# PANAMA CANAL

## TOLLS AND TREATIES

GEORGE A. TALLEY

THE "ANCON" AT CULEBRA CUT, THE FIRST SHIP PASSING THROUGH THE CANAL AT THE OPENING AUGUST 15, 1914

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# THE PANAMA CANAL

## An Elucidation of Its Governmental Features as Prescribed by Treaties; a Discussion of Toll Exemption and the Repeal Bill of 1914; and Other Pertinent Chapters

By

GEORGE A. TALLEY

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Connecting Two Oceans—
Humanity Forging the Link

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REVISED EDITION

This is a special work and distinguishable from other books on the Panama Canal

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## THE LEGAL NAME.

The Suez Canal received its name from the Isthmus; why not the Panama Canal take its name from an Isthmus? The first company to begin work at Panama was the "Universal Interoceanic Panama Canal Co.," by abbreviation called "The Panama Canal Co.," and both de Lesseps and Bunau-Varilla used the term the Panama Canal. In the strenuous Congressional debate in 1902, over Nicaragua and Panama, some used the expressions the "Nicaragua route" and the "Panama route," but others frequently spoke of "The Panama Canal"; still Congress continued to place the head-line "Isthmian Canal" over all canal laws, and created the "Isthmian Canal Commission" to build the canal. A national law was passed August 24, 1912, declaring that the canal "shall hereafter be known and designated as the Panama Canal." The name has thus become common property and is made a part of the Congressional Documents; and all may freely use in speech and in print, the legal and geographical name of this national waterway.

## ERRATA.

On page 46, Cristobol should be "Cristobal."

" 88, Everts should be "Evarts."

" 113, 8 Cranch should be "7 Cranch."

" 218, statesman in the 11th line from the bottom should be "statesmen."

" VII, of index, 106 in 8th lines from top should be "109."

" VII, of index, 107 in 9th line from top should be "106."

# CONTENTS

# INTRODUCTION.

Since there is a reason for most human action, there is supposed to be a reason for this, another book on Panama and its world-renowned waterway.

Our country has gone through one of its epoch-making political struggles over the question of fixing the tolls for the use of the canal. The crucial question was: shall any ships be exempt from paying tolls? So far as we are now able to judge, this question has been answered by Congress and the country, decidedly, in the negative.

Our present purpose is to save and record some of the main reasons urged for and against the proposition, not only in Congress, but by the unofficial citizens during the contest. The action of Congress is supposed to be in the interest of the great body of the American people; hence the right of the citizen to aid by advice in directing that action. What is stated and printed in this publication, on any controversial question relating to treaties (except citations from public documents) is not set forth as representing the view of the nation or of any of its officials, but as the individual opinion of a private citizen; and is entirely for home use and is addressed only to our own citizens.

In the arguments before Congress with respect to the rates for the service of the Panama Canal, it became necessary to discuss every possible question in the whole field of legal, moral and economic right, whether contained in treaties, or inhering in the laws, customs

or constitution of the nation. The economic problem was one of vast consequence and was to a large degree local; still it extended to things external as well as internal.

While the canal is in our limits and jurisdiction, still its economic features are materially controlled by treaties, compacts and arrangements with other nations, as was demonstrated in the controversy just concluded. That once the discussion opened, there was no resting place until every nook of legal right had been searched and exposed to public view; hence the debate ran to the limit, and stopped because there was nothing beyond.

After all webs were brushed aside there was but one question: Some Americans wanted to favor ships as against the railroads regardless of the expense to be cast upon the nation. Others favored neither ships nor railroads, but believed that all the tolls would be most urgently required to maintain, improve and guard the canal, and that generosity, under the conditions, would be most impolitic.

As this situation was unique in our canal experience, it was impossible for prior writers on Panama to record or discuss such questions. As history, these matters are decidedly new.

In this work we shall only incidentally touch on the physical features, and mechanism of the canal, for the reason that this field has been fully explored and discussed by experts in that line. Our chief aim is to treat of the governmental phases, the national and international treaties and compacts, and how our operation of the canal is affected thereby.

The toll-exemption argument brought out prominently for discussion the subjects of national sovereignty, of neutralization, of fortification of the canal,

of treaty rights; hence special chapters are devoted to a full, general discussion of these subjects.

It was thought to be beneficial to give a short history of the Suez Canal; a comparing of notes, with the canal at Panama.

Under the national law as lately amended, there is no longer to be discrimination in tolls in favor of any customer using the canal; still, how long might it be before adverse political sentiment would again install toll exemption in favor of coastwise or other shipping industries? It is entirely proper, even now, to keep fresh the theories and principles upon which the repeal act was founded. A valid argument today may still be a convincing argument tomorrow upon the same subject matter, brought forward for discussion. Foundation principles are not so easily overthrown, nor do they quickly lose their virtue and vitality.

How fortunate, in this time of world-wide war, that we have adjusted the canal toll question, and stand before the nations on the high pedestal of honor, fairness and impartial justice. We have shown that we are in our international dealings above all sordid and petty selfishness; that our mission is to be an aid to civilization, rather than a ponderous burden thereon; and that our purpose in life is to build up and not destroy. How quickly in time of disaster and war, radicalism gives way to rational conservatism. A wise conservatism should be indicative of a normal state of mind; radicalism is abnormal. See the catastrophe in Belgium: war waged against a neutral nation, the result of a violation of a sacred treaty of neutrality. About two years ago General Von Bernhardi of the German army, in a military book, as stated in the public press, prophesied that a war between Germany and France was probable and that Germany might invade

France through Belgium. Speaking of neutrality treaties, he boldly asserted that neutrality was only a "paper bulwark." He no doubt meant that it could be violated with impunity by a nation able to justify her act in successful battle. This only shows that nations should be slow in making treaties and then not artfully ignore them.

In this present work we have no self-interest to serve, having no relations with ships or railroads. Our views are based on the facts surrounding the acquisition of the canal lands and the pledges of history. The lines have been marked and we should, as near as possible, walk by them.

This publication has its source-springs back in 1912, when toll exemption was first brought before the country; and when the proposal was lately made in Congress to repeal the act, we received favors from the public press by their printing a number of letters which we contributed in the interest of the repeal bill. We recognize our obligations to the *Public Ledger* and *The Press* of Philadelphia, and the *Every Evening* and the *Morning News* of Wilmington, Del.

In preparing this work we were aided by the loan of books (by the score) by the Wilmington Public Library, and by data furnished by the working force of the library. A very important service was rendered by Senators Lodge, Root, McCumber and O'Gorman in their sending documents from Washington; and we acknowledge the kindness shown by the Department of State at Washington in furnishing documents and other essential information.

We have thought it to be of great value to print herein full excerpts from the speeches of Senators Root and O'Gorman in the late discussion in the Senate;

these make clear the questions at issue between the contending forces in Congress.

It is the hope that what is herein preserved and presented may be useful, not only for the present, but in coming years when similar problems may disturb and vex our country. If our statements appear in any way partisan, it is not from prejudice and impulse, but from the very logic and reason resulting from past events, and from right and justice emanating from all our compacts and the surrounding circumstances.

GEO. A. TALLEY.

Linwood Station, Pa., Aug. 1914.

# PANAMA CANAL.

## CHAPTER I.

### SPAIN AND THE ISTHMUS.

The intrepid and inspired Columbus in 1492 sailed west from Palos on the uncharted and unknown sea hoping to reach China or some intervening land; he failed in reaching China, but discovered America. He landed on the island of Guanahani which he believed to be part of India, and later visited the adjacent West Indian Islands and finally settled on Hispaniola (Haiti). And on January 4, 1493, he set out on his return to Spain to report his discovery and to receive his country's plaudits.

In September, 1493, he again sailed to America with a number of ships and 1500 men and made other settlements among the various islands, and again returned to Spain (in 1496) taking 225 Spaniards, 30 natives and vast treasurers with him. There were the usual jealousies against the successful discoverer and great opposition was encountered in raising supplies for another expedition, which retarded him for a year.

In 1498 he made his third voyage to the new colony. The mistake he made was in taking with him many men charged with crime. These he found to be a trouble and a detriment. It was on this voyage that he discovered Trinidad and at last reached the shore of Continental America: the first mainland seen by Columbus was on the shore of Venezuela.

His enemies having carried their unjust calumnies to such an extent Ferdinand ordered Columbus placed

in irons and carried to Spain where he arrived late in the fall of 1500, but he was almost instantly given his liberty and rewarded with still greater honors and dignity. It is said that Columbus retained his fetters as long as he lived and ordered that they be placed with his body in his coffin.

Feeling that his great work was not yet accomplished he sailed on his fourth voyage in 1502. He arrived off St. Domingo but was refused the right to land. Later he sailed on to Darien and this was perhaps his first view of the historic isthmus separating the two great oceans. Columbus here failed to find the fabled "secret strait" which was supposed to furnish a passage to the Pacific and the way to China. Columbus never saw the Pacific, and in 1504 broken in health and spirit he returned to Spain to spend two years in sickness, suffering and despondency and finally to die at Valladolid, May 20, 1506. Like other great heroes he was to suffer the misfortune of having others reap the harvest where he had so courageously and successfully sown. Thus the cruelty of fate often decrees that men of heroic and immortal accomplishments must suffer martyrdom and death and be consigned to the tomb in order to gain their just rewards.

It is most fitting that in writing of one of the "wonders of the world" (yet without a number) we should pause to pay tribute to that intelligent and daring genius who first led the white man into the territory in which lies the great American isthmus; and whose name was properly given to the state and nation that until but recently included the famous Panama Canal zone. Although some believe that Rodrigo Bastidas touched the Panama coast before Columbus; yet this is in grave doubt; but it is recorded that in 1503 Columbus actually visited the famous Chagres river which has fur-

nished a large portion of the bed of the Panama canal. The finding of the Chagres river in 1503 was almost as important as the opening of the famous canal in 1914. Both were momentous, each according to its day and time. While lauding our American enterprise and prowess for the wonderful accomplishment let us not forget the incomparable navigator who sailed this river four hundred years before.

Some of the men of history and contemporaries of Columbus were Bastidas, Balboa, Cortez and the cruel Pizzaro. In a few years Spain was in control of nearly all the territory now known as Latin-America. But it was not until 1513 that the white man crossed the isthmus and discovered the Pacific, then called the South Sea. Balboa, taking 190 Europeans and many natives began his march from the North to the South Sea, and it took him from September 6 to September 29 to make the trip. When he reached the top of the mountains he first received a full view of the eastern shore of the greatest ocean. He made a second trip to the Pacific in 1516 and constructed the necessary ships and sailed up and down the shore of the Pacific in pursuit of gold, silver and pearls but he was induced to return to the north side of the isthmus by Pedrarius (or Devila) and was treacherously tried, condemned and beheaded. It was Magellan, not Balboa, that named the Pacific Ocean. It is to be remarked that Balboa traversed the isthmus from coast to coast nearly one hundred years before the settlement at Jamestown.

It seems that the natives had told and often repeated the story of the "secret strait," and since no search could locate it, many supposed that it formerly existed and perhaps was obliterated by some convulsion of nature.

Cortez, in 1523, not being able to find the lost strait

considered the idea of making such a waterway. Spain many times had visions of a canal across the isthmus, but never succeeded in getting beyond the investigation stage. Some went so far as to look upon the enterprise with superstitious awe, and considered that as the Creator had separated the two oceans disaster would result from making an artificial connection. Spain with her Cortez and Pizzaro did not have pluck for such a Herculean task.

Nations in colonizing America have kept mostly to their home lines of latitude. Columbus left Palos on the 37° of Latitude, and as he supposed, sailed due west, and which should have landed him in the mouth of Chesapeake Bay. But fate or accident veered him towards the south and he first saw land on the 25° of latitude. And in his immediate discoveries thereafter he moved farther south and centered at last on the isthmus of Panama on the 9° of latitude. He was seeking a farther ocean and perhaps the stories of the natives directed him to the isthmus as the only way of reaching the South Sea. Looking back from the present, it seems as if destiny rather than design steered the first permanent settlers on this continent almost directly to Panama. Here ships met the barrier and it has taken four centuries to overcome it and still the barrier is only partially removed since mechanical devices are yet necessary to complete the transit. It is upstairs at one end and down stairs at the other. It is a wonderful achievement and French initiative followed by American force, energy and finance, has wrought it.

Those who desire to go deeply into ancient Spanish theorizing on building a canal across the isthmus can find satisfaction in consulting Willis F. Johnson's comprehensive work on the Panama canal.

## CHAPTER II.

## MODERN REALITIES.

During the 16th century Spain enjoyed almost a complete monopoly of American colonization. There were at that time only four important naval and maritime powers—Spain, England, France and Holland. At the close of this century these nations were all struggling for conquest—on this side of the Atlantic. England secured islands in the Caribbean Sea and on continental America made settlements at Jamestown and at Plymouth. The French secured Canada, and the Dutch settled at New York and on the Delaware. The French, Dutch and English afterward divided Guiana. During this time attention was centered on a canal to the Pacific either at Panama, Nicaragua or Tehauntepec; but no one was, in the early days, able to accomplish the work. The canal was wanted but physical and mechanical ability was lacking; still, negotiating and treaty-making went on respecting a wholly imaginary canal.

But the dawning of the nineteenth century brought definite ideas about the making of a strait connecting the two oceans. Alexander von Humboldt came to America in 1799 and remained in Mexico and the Isthmian district until 1804, and freely speculated about a canal to the Pacific. He believed this would "immortalize a nation occupied with the true interests of humanity." He examined nine different routes and believed a canal entirely feasible, but seems also to have been living in dreamland when he suggested a canal by way of the Mississippi and Missouri rivers, connecting

with the Columbia; and when he would build through Mexico by the Rio Grande del Norte into the Gulf of California; and even when he suggested the Tehauntepec route. His idea about the height of the mountain ranges on the isthmus seemed to have been distorted and amusing. Nothing definite came from his canal work, it was all ideal.

It can serve no useful purpose here to tabulate all proposed canals across the isthmus, from Humboldt down to the making of our treaty with New Granada. By this time the canal enterprises were all centered in three nations—France, England and the United States; all others seem to have withdrawn from the field. Our nation having secured the whole Northwest territory by the Louisiana purchase in 1803, began to take interest in the Pacific coast traffic, and in 1846 made a treaty with New Granada for rights of transit across the isthmus. This treaty was based on the guarantee of the United States to New Granada of the "perfect neutrality" of the isthmus with the view that free transit from one sea to the other might not be interrupted; and there was a like guarantee of "the rights of sovereignty and property which New Granada has and possesses over the said territory."

New Granada guaranteed to the United States that the right of way or transit across the isthmus upon any modes of communication that now exist or that may be hereafter constructed shall be open and free to the government and citizens of the United States and for the transportation of any article of produce, etc.; that no other tolls or charges be levied upon the citizens of our nation, thus passing "over any road or canal that may be made by New Granada or by the authority of the same, than is under like circumstances levied upon the Granadian citizens." This, perhaps, was the first *neu-*

*tralization* of ways and transit across the isthmus.

It seems that general sovereignty was not only retained by New Granada but that the United States guaranteed to maintain that "sovereignty" and all "property," and also the "neutrality" of the isthmus transit—and this meant freedom and perfect equality. We must have received a small share of *sovereignty* or what right had we to interfere on the lands of another?

Under this treaty we secured the right to use any mode of transit lawfully installed across the isthmus under the authority of New Granada; but we find no authority for America to construct and own any road, railroad or canal, although there was expressly given the right of "protection." This treaty was to continue for twenty years and thereafter until notice by either party was given for its abrogation. It was not abrogated and it passed over to Panama after she became a state.

## CHAPTER III.

### CLAYTON-BULWER TREATY.

The first railroad in America to be operated with a locomotive was laid in South Carolina about 1826. The traffic across Panama so demanding, a company of Americans with American capital in 1855 put in operation the Panama railroad. The canal stage had not yet been reached, although our nation in 1849 had entered into a treaty with Nicaragua to build a canal by the Nicaragua route. This treaty could not be made effective without conflict with England, because she claimed interest in the Mosquito coast and this was in the line of the proposed canal. It became absolutely necessary for America to agree with England; so John M. Clayton, then Secretary of State, signed with England the Clayton-Bulwer treaty in 1850.

It is quite popular these days to censure our nation for making the treaty; but John M. Clayton was not accustomed to do frivolous acts in government. He had a situation to meet and without doubt secured all that was possible under the conditions then existing. America was not so great as it is today, and was seeking rights outside of its own territory; there was no way to obtain these isthmian rights except by war or by contract. The canal was too large a task for us then, without our also going to war to secure the bare franchise. No doubt the Clayton treaty was the sum total of the favors then obtainable; at least we have the right now to so believe. If Nicaragua did not have absolute sovereignty, how could she grant us a complete legal franchise? It thus appears, in 1850, that our nation began to seriously at-

tempt to conquer the isthmus by the way of a canal. But what were the difficulties created by this treaty? And what were the difficulties and prospects of building the Nicaragua canal if the treaty had given us a full and free hand without any restriction whatever?

The treaty provided for a ship canal to the Pacific by way of the San Juan river. Article I declared that neither nation "would ever obtain or maintain for itself any exclusive control over the said ship canal;" and that neither would build "any fortification commanding the same;" and would not exercise any dominion over any part of Central America; and that neither will use any alliance, connection or influence with any state through whose territory the canal may pass for the purpose of acquiring directly or indirectly for the citizens or subjects of the one any advantages through the canal "which shall not be offered on the same terms to the citizens and subjects of the other." There is nothing abstruse about this!

Article 2 provides that the vessels traversing the canal shall, in case of war between these parties, "be exempt from blockade or capture by either belligerent;" and this privilege was to extend from the ends of the canal as may hereafter be found expedient to establish. This section has no significance, for war itself would supersede this article.

Article 3 provides that when any parties began the building of any such canal the two nations would jointly protect the work so begun until its completion.

Article 5 says that both parties engage that when the canal is completed they will protect it from seizure or confiscation and they will guarantee the "neutrality" thereof, so that it may forever be kept open and free and the money invested be secure. The right to withdraw from the "protection" obligation is reserved to

either party, if there is any discrimination, but notice must be given before such withdrawal.

Article 8, the vital and now the most *notorious* part of the treaty, states that the parties having not only desired in entering into this convention to accomplish "a particular object," but also "to establish a general principle," by treaty stipulation they agreed to extend their protection to any other communication by canal or railway across the isthmus which is now proposed whether at "Tehauntepec or Panama." In granting, however, their joint protection it is always understood that the parties, constructing or owning the said canal or railroad, shall impose no other charges or conditions of traffic than the said governments shall approve as just and equitable; and that the same canals or railroads being open to the citizens and subjects of the United States and Great Britain on *equal terms* shall also be open on like terms to the subjects of any other state willing to grant the same protection.

There does not seem to be much obscurity in the terms of this treaty, but difficulty began almost at the beginning in construing it. The principal difficulty arose over the question: whether the condition that neither party was to exercise any sovereignty or control over any part of Central America was retroactive or only prospective? Great Britain claimed that it related to subsequent acquisitions of colonial rights, while our nation claimed that England should at once abandon all rights that she then claimed in Nicaragua. This contention went on until our terrible civil war of 1861 began. We then had other questions engaging us. England in the contentious stage seemed more anxious than we for the abrogation of the treaty. It was plain that America did not have the funds for the canal at that time; that England would not furnish the capital; and

that England not being anxious to yield all colonial control in Central America, would as soon abandon the treaty. In the early days America was determined not to give up the treaty, but to hold England to the contract. We cared not for colonies, but did care to keep England from isthmian ownership, and this was the corner stone of the original compact.

It is quite evident in looking backward that we had an inordinate desire to have a canal, but had not the courage or ability to attempt so great a task. We, like all predecessors on the isthmus, could plan, survey and speculate, and yet baffle at doing the work. It was an immense task, and, by many strong men, deemed wholly impossible. Up to the time of our civil war we had neither the money nor the necessary machinery for completing such a work. Even the Panama canal has taken enormous and almost fabulous sums of money and the combined labors of both France and the United States. One failed and the other coming on the scene fresh and vigorous has by a desperate struggle finally gained the canal. What would have been the result from 1850 to 1880 had our nation undertaken to build the Nicaragua canal? It could have resulted in nothing but failure! But the Clayton treaty was a sufficient bone of contention during one half a century to keep American and English diplomats "in business" while matters were brewing to bring about funds and appliances to construct a canal somewhere on the isthmus. Instead of America losing by the treaty she gained all—she kept England from extensive colonizing in Central America. The Clayton treaty gave us far greater use than abuse. It was not given up by us until the proper time came, and this happened in 1901.

While we were urging England to observe the treaty she was as vigorously calling for arbitration

which we in every instance declined. These diplomatic sparrings for advantageous position in the Central American problem is all, most clearly, shown in official letters of the following Secretaries of State: Marcy in 1853, Buchanan in 1854, Cass in 1858, Seward in 1866, Fish in 1872, Evarts in 1880, Blaine in 1881, Frelinghuysen in 1882, 1883 and 1884. These are to be found at length in Wharton's International Law, vol. 2, at page 184.

If the treaty was even violated by England, or conditions had so changed that there was no further consideration for it, still this could only be a reason why it should be changed or abrogated. It does not seem that America was ever willing to take its chance and abrogate the treaty entirely. Both nations seem to have found consolation and benefit in it, and would not absolutely abandon it. It was not a failure in the beginning, for it was secured by America's very keen and broad lawyer and statesman—John M. Clayton. Very few of that day were his equal. The fact that we held fast to the treaty for 50 years is proof of this statesman's ability. Why continue to battle over this old treaty since we surely got our whole desire in 1901 by the Hay-Pauncefote treaty? If we did not; why not?

A canal was really begun by Americans at Nicaragua under a charter granted by Congress in 1889. The Maritime Canal Company was organized with Hiram Hitchcock of New York, president; the total capital was $250,000,000. Work was begun at Greytown, June 8, 1890, but the stringency of 1893 caused the failure of the construction company. And the work still remaining in abeyance the franchise from Nicaragua expired in 1899. Thus the Nicaragua canal so far as actual construction work is concerned came to its end. But the battle went on in Congress most vig-

orously between Panama and Nicaragua with Senator Morgan as the persistent, inveterate champion of the Nicaragua route. Bunau-Varilla and the French advocates of Panama most ingeniously and successfully gained the victory for Panama. This whole contest is clearly and graphically described in Bunau-Varilla's great book on Panama, bearing the date of 1913. This work is comprehensive and a storehouse of canal history.

## CHAPTER IV.

## GENERAL GRANT AND THE CANAL.

Ulysses S. Grant was the most successful of American generals, hence the *greatest* American general; for in war nothing counts but success; the struggle from "start to finish" is always for victory.

What had General Grant to do with Panama? In 1852 he sailed from New York with his regiment for California and marched across Panama almost on the line of the present canal. Some of the troops being attacked by cholera they were left behind in charge of Lieutenant Grant. He thus had the opportunity to fully realize the possibilities of an isthmian canal. He was not brought into prominent official relations with the nation until the Civil War of 1861.

His great generalship brought him to the Presidency in 1868, and again in 1872. While President in 1869 he gave attention to the subject of a canal "by America under American control." He held that no European government should hold such a work; and he appointed an Inter-oceanic Canal Commission, composed of army and navy officials. This commission directed four different surveys to be made: First, at Atrato on the Isthmus of Darian; second, at the Isthmus of Tehauntepec; third, at Nicaragua; fourth, at Panama from the mouth of Chagres river to Panama City. This route was recommended by the surveying party for a lock canal but not for a sea-level canal, on account of the floods in the Chagres river.

The Canal Commission went on gathering data until 1876 when it reported to President Grant in favor of

the Nicaragua route by way of the San Juan river. This was at that time deemed conclusive, but there was the Clayton-Bulwer treaty barring the way. It could not be wholly an American canal while that treaty was binding. Grant's Secretary of State, Fish, at once took up the question with England for a modification of the treaty; this was a difficult and slow task and Grant's administration closed with no definite results.

General Grant was not here able to gain a civil victory whatever he might have done had he undertaken the work by the arbitrament of war. An American canal on American soil under American control was a patriotic and noble sentiment, but two things were indispensable requisites: we must be able to build the canal; and we must secure full ownership (no qualifications) and full sovereignty over the territory. Had we then the territory no doubt General Grant would have undertaken the conquest of the isthmus.

We as a nation never had the full opportunity of building any canal until 1903, when we received grants, franchises, national indorsements and treaties to this effect; and by virtue of them and American engineering skill and courage, and a plethoric national treasury we have reached the goal, gained the victory and commerce now floats from the Pacific to the Atlantic, not on a "fabled strait," but on a real tangible interoceanic canal.

General Grant's views are clearly and forcibly expressed in his able article in the North American Review, February, 1881.

## CHAPTER V.

## HAY-PAUNCEFOTE TREATY.

After the close of the late war with Spain our country saw more strongly the necessity of a connection between the two oceans. There was a prevailing feeling in favor of the Nicaragua route but Congress did not seem willing to decide the question. In fact it had not yet definitely secured any right of way.

Again negotiation was taken up with England to modify the Clayton treaty. This finally ended in the Hay-Pauncefote treaty, ratified December 16, 1901. The old treaty was superseded and all our rights were to be regulated by the clear meaning of the words and provisions of the new compact. If a provision of the old treaty, or any principle thereof, was adopted by the new treaty, of course it is binding on the respective parties because it is a part and parcel of the contract. If any vital part of a contract can be disregarded all could be disregarded and there would be no contract.

Only one provision of the old treaty is in any way mentioned as preserved. The Preamble of the new treaty says, that the two nations "being desirous to facilitate the construction of a ship canal * * * by whatever route may be considered expedient, to remove any objection which may arise out of the Clayton-Bulwer treaty to the construction of such canal under the auspices of the United States, without impairing the general principle of neutralization established by Article 8 of that convention" have for this purpose appointed plenipotentiaries, etc.

Article 1, says that the prior treaty is superseded

by the present treaty. Article 2, provides that the canal may be constructed under the auspices of the United States directly at its own cost or by loan or gift to others; and "that subject to the present treaty" our nation shall enjoy "all the rights incident to such construction as well as the exclusive right of providing for the regulation and management of the canal."

This section gave our nation the privilege to buy the right of way and own it, and itself build and own the canal. It also gave full rights to govern, protect and police the great waterway.

Article 3, relates to the "neutralization" of the canal under the rules (so far as applicable) for the operation of the Suez Canal. Section 1 of this article says that "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 subjects and citizens in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable."

Section 2, provides that the canal shall not be blockaded nor shall any act of war or hostility be committed within it.

Section 3, says that war vessels shall not revictual nor take on stores while in transit.

Section 4, prohibits belligerents from embarking troops or taking on warlike material in the canal except from accident in the transit.

Section 5, provides that Article 3 shall apply to waters within 3 marine miles of either end of the canal. And that vessels of belligerents shall not remain in such waters more than twenty-four hours at any one time except in distress.

Section 6, makes all establishments, buildings and

works used in the operation of the canal a part thereof; and they shall enjoy in time of war, immunity from attack by belligerents and from acts calculated to impair the use of the canal.

Article 4 is one of the important features of the compact. It says that "no change of territorial sovereignty or of international relations of the country or countries traversed by the canal shall affect the general principle of 'neutralization' or the obligations under the present treaty."

This article could be held to operate in two ways in favor of England. First, if America bought the territory and secured the canal sovereignty, still this change of circumstance should not deprive England of her right to equal treatment. Second, if we, owning the canal and lands, should conclude to sell to another, still England should have her right of like fair and equal treatment at the hands of the purchaser. This article refers to any "change of territorial sovereignty," in the lands traversed by the canal and does not specify but includes every possible change of title. We did not require the protection of this article and it must have been wholly for the advantage of the other contracting party.

This is a remarkably short treaty and did its work effectively. It gave us freedom from a joint arrangement under which neither England nor America could own a canal across the isthmus. Nor could either colonize or own any Central American state.

The new treaty gave us full liberty as a nation to buy or own any territory for canal purposes singly and alone. It also gave England full license, if she chose, to secure rights and build a canal for herself. There is no prohibition against England, except the Monroe doctrine.

Many are now able to criticise the Hay-Pauncefote

treaty for what they term its impracticability. But we must remember that Theodore Roosevelt, John Hay, Ambassador Choate and the United States Senate affirmed it, and it, no doubt, was deemed all-sufficient in word and letter, until the toll exemption bill was brought forward and enacted when the canal was nearing completion.

The treaty was the work of statesmen and seems to have been the only thing desired in the ante-canal era. But it is something else to-day; a new treaty is called for. But who would have prescience sufficient to draft it?

There is one vital question under this treaty, and it has been debated probably more than any previous question, saving only the omnipresent tariff contention. The treaty requires that vessels of "all nations" shall have equality of rights and that there shall be no discrimination against the "subjects and citizens" of any nation. There ought to be no trouble in knowing what the words "all nations" comprise.

Article 8 of the Clayton-Bulwer treaty states: that the parties not only desire in entering into this convention to accomplish "a particular object," but also to establish "a general principle" they agree to extend their protection by treaty stipulation to any other railroad or canal across the isthmus either at Tehauntepec or Panama.

The words, "to establish a general principle," have a very important significance both in the preamble and body of the new treaty. The preamble says that the United States may build the canal without "impairing the general principle of neutralization established by Article 8" of the superseded treaty. It would appear that the "general principle" in the old treaty was "neutralization" and that both meant equal terms to the con-

tracting parties and particularly naming them. It is claimed by England and by many in this country that "neutralization" was carried forward from the old to the new treaty; and that this meant equality of tolls between England and America as well as between all other users of the canal; and many claim that we agreed, if England gave up her claim under the old treaty, that America would treat the English subjects on the same terms with her own citizens.

It must be noted that the Hay-Pauncefote treaty is made by no nations only America and Great Britain. It should be binding on both equally if that was the intention. If we built the canal almost entirely for ourselves we must find the right in some other proceeding, for it does not clearly so appear in that treaty. All civilized nations are interested in the precedents formed by interpretations given internationally to treaties. They become rules governing future actions. Home politics should never be allowed to extend so far as to injuriously affect our international relations. Every leading nation should be anxious to observe its compacts without being advised about it. Only in a clear case should they persistently contend. Many lawyers have argued correctly that Article 8 of the old treaty was only an agreement to make a treaty in the future. But what of this? The Hay-Pauncefote treaty was made as and for a full compliance with the promise. The rights are now determined by the new treaty aided by anything of the old that is expressly saved in the new.

There has been a great struggle in Congress over the six rules brought into the Hay treaty from the Suez Canal regulations.

Article 3 says that the canal shall be free to all nations observing these rules. From this the attempt is made to scrutinize deeply to see who might be excluded

or included in the words "all nations." All who obey the rules are included, and all who disobey are excluded.

It may be said that our nation is not disobeying, and that the rules are not applicable to us. All have the right to use on equal terms until the rules are violated by some nation, then it will be compelled to pay the penalty. Why did the United States adopt the rules in advance if they were put in at her instance alone? If England has no interest in them why can we not change them at pleasure? Did both England and America draft them into the treaty?

In these days, laws prohibit almost everything; but everybody does not violate all of them. Some nations might come under the condemnation of one or more of these "Suez rules," and so might the United States perhaps. All nations that observe them may use the canal on equal terms. On equal terms with what standard? Perhaps with a standard fixed by the operator. Would the United States be compelled to give free tolls to her citizens whether she desired it or not? We are now going by "precise rules," and it would not do to have too many different rates. There is only one rate prescribed by the rules.

These rules relate almost entirely to belligerents; but nations are not always in war. This being so, all nations, including the United States, would not be under the rules only when at war, and this, with some nations, might never arise. We gain but little by attempting to prove what countries are included in the words "all nations" by resorting to any abstruse reasoning about the "six rules." The nations observing the rules get through; those breaking them are excluded. When a vessel comes to the canal there is a presumption of innocence until proven guilty. If there were no war, all

would be innocent and ought to be able to pass at the one specified rate.

It has been said that the preamble is no part of the treaty and may be disregarded. This would be impossible in this particular case because *no canal* is specified in the articles of the treaty, and we are bound to refer to the preamble to define the canal or the treaty might be wholly void. The preamble says: The construction of a ship canal to connect the Atlantic and Pacific Oceans by whatever route may be deemed expedient.

The preamble is no part of a statute but it is often an all important part of a contract or treaty. It is an admission of a vital fact relating to the contract or treaty, and acts as an evidentiary estoppel and is regarded as admitted truth. Little vs. Watson 32 Maine 214.

By securing the new treaty America was delighted and immediately set about to negotiate for a canal strip and franchise; for no land was yet purchased. The struggle in New York, Paris, Colombia and Nicaragua went on at times almost violently. The question had to be threshed out before a final award was given. Circumstances so directed that the inchoate French canal along the Chagres was adopted. Americans took the place of Frenchmen and the work went on most systematically and courageously to full completion.

Note: England and America made the treaty, and it provides that all nations "observing the rules" shall have equal tolls. Whatever rate—high or low—that America sets for her private citizens, must be the rate for all other nations who keep the rules. The lowest rate becomes the standard.

## CHAPTER VI.

## FRANCE AND THE ISTHMUS.

As far back as 1836, a French Company secured a concession to establish roads and a canal across Panama; and Louis Philippe sent his chief engineer, Napoleon Garella, to survey a canal route; he selected Limon Bay as the Atlantic entrance. This grant was allowed to lapse.

Bonaparte Wyse much later acquired a grant from Colombia for a canal by the Atrato river. This did not appeal to the late French builders so Wyse hastened to Bogota, and on May 18, 1878, permission was granted him to build "anywhere across the isthmus."

De Lesseps having opened the Suez Canal in 1869 under a blaze of glory, France believed that he was the man for the occasion and could easily solve the Panama problem; so what was termed an International Congress of Engineers was called at Paris in 1879 to pass on plans and schemes for building a canal. Only a fraction of the delegates were engineers. The Congress was presided over by de Lesseps himself and was largely under his control. It rejected all proposals except two; a lock canal at Nicaragua and a sea-level canal at Panama.

Godin de Lepinay, a member of the Congress expressed the idea which has been followed since by the American government; erect a dam across the Chagres river near its mouth on the Atlantic side and another across the Rio Grande on the Pacific side. Then let the water from the rivers rise behind these dams to the height of 80 feet above sea level. Then cut a channel

through the Culebra hill sufficient to cause the water to stand between the dams at all points deep enough to float the desired ships. This plan was not even thought worthy of discussion by the Congress.

The French wanted a sea-level canal and even gave some thought of tunnelling the mountain. This was inconceivable to many people and justly so. On October 20, 1879 the Universal Inter-oceanic Canal Company was organized at Paris by de Lesseps. Bunau-Varilla says that de Lesseps was not an engineer and did not like engineers. He had no trouble in getting the amount of stock subscribed, mostly in small lots and many subscribers being women. The original subscriptions amounted to $120,000,000, with 102,000 stockholders. Work was begun February 1, 1880, and within two years an army of workmen were engaged from ocean to ocean. Glowing reports were circulated in France and de Lesseps who remained in France was worshipped as a hero.

The question is often asked, how could the French people build the canal in the face of the Monroe Doctrine and against the wish of the United States? They had a private grant from Colombia, the sovereign; and France, the nation, had no jurisdiction over the enterprise; hence it was not colonizing or controlling territory in America against the Monroe Doctrine. If the French people had succeeded in completing the canal it would, to a limited extent, come under the control of the United States by virtue of the grants to us under the New Granada treaty of 1846. The de Lesseps grant being subsequent to 1846 was taken subject to our right and control, under our treaty unless we expressly waived our control in favor of the French grant. It never got to this critical stage for the reason that the French Company did not complete the canal; and we,

purchasing their rights for $40,000,000 merged their claim into ours and all questions were thus happily eliminated.

The French had performed an enormous amount of excavation which fell to us by the purchase, so we were a long way on the road with the task when we began our part of the work. New plans however had to be made, new machinery secured and greatest of all, sanitation had to be installed and, generally, order to be brought forth out of chaos. Government engineering has now practically completed a canal, but who can say that it has been economically done? Or vice versa? $400,000,000 is a tremendous sum; but the American people wanted the canal; they wanted to own and control it. It is no time now to regret the outlay; but the nation should take all proper economic steps to regain it.

The Clayton-Bulwer treaty required England and America to protect any canal across the Isthmus, *built by any persons*. This made it lawful for de Lesseps to take rights from Colombia and build the canal, and so long as England was in harmony with de Lesseps, she had the right to call upon us to help protect the canal. Our hands were tied; but de Lesseps would have had to operate the canal under the protection of England and America. The Clayton-Bulwer treaty and our treaty of 1846 would have governed, otherwise war might have resulted.

The French Company got into financial difficulty in 1888. A receiver was appointed in 1889. He had new plans drawn to complete the work. These called definitely for a permanent lock canal without provision for deepening to sea level. The report was submitted in 1890. These plans seem to have been criticised by

Bunau-Varilla as impossible under the financial situation.

The populous in France became divided and many savagely attacked de Lesseps and the whole undertaking. Bunau-Varilla says that "there was then but one crime, and that was to have served the Panama enterprise. There was but one virtue; and that was to have helped to destroy it." The canal trouble was then taken up by parliament, and for seven years it was a seething political caldron. In 1894 the affairs came into the hands of the New Panama Canal Company, which attempted to complete the work, but in 1898 they made an offer to sell the rights and interests to the United States. Matters were in such a precarious state that it was impossible to rehabilitate the enterprise. There was now only one hope; sell to the United States and destroy the Nicaragua scheme. At last this was the consummation.

The plan of the French was to build a much smaller canal than has been constructed by the Americans. While one was a makeshift, the other is a full sized operating machine. The French idea was to make the locks 65 feet wide and 590 feet long; and the Culebra cut was to be 72 feet wide. The American plan is: locks 110 feet wide and 1,000 feet long; with the Culebra cut 300 feet wide while the sea-level ends are 500 feet wide. This is stated in Bunau-Varilla's work on Panama, page 112. In the early stages of the French undertaking Bunau-Varilla at the age of 26 years had charge of all the canal work from Colon to Panama.

## CHAPTER VII.

## SECURING THE ROUTE.

After securing the treaty in 1901, the crucial struggle then began. We now had the right to build a canal anywhere across the isthmus so far as England was concerned. Nicaragua was in the ascendency, yet to many engineers this seemed almost an impossibility. There were the San Juan river and the Nicaragua lake to be traversed and deepened; and, then there was the very high ridge between the lake and the Pacific. It would be a difficult and expensive undertaking. The route through the lake was more than 70 miles long; twenty-eight miles of this would need to be dredged and this would only be a narrow canal in a vast inland sea, which in time of storm would be as boisterous as the ocean. How would a ship be kept in a narrow channel in such a state of weather. The heavy seas would also cause the channel to fill from the sides and constant dredging would be required. But the greatest of all difficulties according to Bunau-Varilla would have been the ridges both east and west. The greatest cut at Nicaragua would be the depth of 297 feet; and by this route eight locks would be required. Another great detriment at Nicaragua was the sharpness of the curves which would have made it dangerous navigation for ships of extreme length.

The French Company having virtually reached the end of its courage and finances, America was offered the opportunity to buy the incomplete Panama canal, rights and works. Before this could be done a treaty must be made with and a charter secured from Colom-

bia. This passed to the stage where the Hay-Herran treaty was signed by which America was to pay $10,000,000 to Colombia. But this unfortunately failed of ratification by the Colombian Congress.

The whole matter now came to a standstill; for Colombia held the key to the situation. Bunau-Varilla representing the French Company was compelled to act promptly and with decision. Panama as a state must not lose the canal; it seceded, established a temporary government and Colombia sent troops to coerce her rebels. If Panama and Colombia had engaged in war, America would have been compelled to protect the railroad. Peace *had* to be maintained and this meant liberty to the new Republic. This was the legal theory, at least of a most important and critical situation. Bunau-Varilla in his late book on Panama discloses the whole story with all of its thrilling episodes and diplomatic adventures.

On Nov. 4, 1903, Bunau-Varilla was appointed minister from Panama, (a nation *de facto*), and on Nov. 13 was received as such minister by President Roosevelt. In his address Varilla spoke in part as follows: In consecrating its (Panama's) right to exist, Mr. President, you put an end to what appears to be interminable controversy as to the rival waterways, and you definitely inaugurate the era of the achievement of the Panama Canal. * * * The highway from Europe to Asia, following the pathway of the sun is now to be realized. * * * The pathway sought has hitherto remained in the land of dreams. Today, Mr. President, in response to your summons, it becomes a reality. (House documents 58 Cong. 1 session, page 17.)

On Nov. 18 a treaty with Panama was duly signed. Panama pledged ratification on Dec. 2, 1903; America

did not ratify until Feb. 23, 1904, with 66 senators in favor and 14 against it.*

The Republic of Panama was recognized by America Nov. 13, 1903; by France Nov. 16; by China Nov. 26; by Austria-Hungary Nov. 27; by Germany Nov. 30; by Denmark Dec. 3; by Russia Dec. 6; by Sweden and Norway Dec. 7; by Nicaragua Dec. 15; by Peru Dec. 19; by Cuba Dec. 23; by Great Britain Dec. 24; by Italy Dec. 24; by Japan Dec. 28; by Costa Rico Dec. 28; by Switzerland Dec. 28; by Belgium Dec. 9; and later substantially all of the other civilized nations joined in welcoming the new Republic into the family of nations; which increased the grand total to 25 powers.

The new ambassador has said that in less than two months after Panama's Declaration of Independence, the Republic was recognized by all of the powers of the earth, great and small, with a few insignificant exceptions. And what was the purpose of this speedy, phenomenal, universal, harmonious world action? It could have meant nothing else than that the world demanded the connecting of the two oceans, and that the demand should be imperatively granted.

Panama's first minister was a full-born Frenchman, and had no interest in Panama except his relation to the French Canal Company. All he desired was to make sure of a tight and binding treaty. This part he worked out to a complete conclusion, and no one takes greater pleasure in America's success than he. His firm belief, however, is that the lock canal must gradually be brought to a sea-level strait. This could probably be done by removal of the top-load from the mountain on each side of the Culebra cut and thus avoid "slides" arising from deepening of the cut. There should be little difficulty in excavating sufficiently

* See Cong. Record, Feb. 23, 1904.

to eliminate the higher lock. Every lock removed is one step nearer the open strait.

According to report the Nicaragua route would be 183 miles long, while the Panama Canal is 50 miles long. It would have taken three times as long to pass through a Nicaragua Canal as at Panama, for travel can only be safely taken through the canal in the daytime.

We have selected the route at Panama and built the canal and no benefit can come from discussing discarded plans. Our hands are now full and other routes can have but little attractions for us; only perhaps we might use our foresight to protect our present monopoly by securing the privilege of any other available route.

## TEN YEARS AFTER.

The preceding statement shows the situation not in 1914, but in 1904, and it is now a part of the world's recorded history. But conditions have changed, somewhat, and we now have an interest in the canal property to the extent of $400,000,000. Our nation has tried amicably to adjust all questions with Colombia and a treaty has been signed which was ratified at Bogota, June 9, 1914, and is now pending before our Senate for ratification.

Under the Constitution the President and the Senate hold all the treaty-making authority, and there is no appeal from their decision, the nation and the people are bound. Most treaties are negotiated in secret and are ratified by the Senate in secret session, and may thus become "the supreme law of the land" without any advice from the electorate.

The citizen has his constitutional protection in the requirement, that a treaty must be ratified by a two-

thirds vote of the Senate. Every presumption is that the President and two-thirds of an able and conservative body like our Senate will make no treaty against the interest of the nation. And the adjustment with Colombia we can safely leave in the hands of the treaty-making authorities.

We cannot fail to recognize that we have had ten years advance time in which to build the canal and now have it in operation. These ten years of advance time have been of vast money value to us.

And it should be the hope and desire of all citizens, that whatever treaty is ratified by the Senate may be the panacea which shall heal, adjust and harmonize all!

## CHAPTER VIII.

## THE PANAMA TREATY OR CANAL CHARTER.

Panama revolted on November 3, 1903, and on the 18th of the same month Secretary Hay and Bunau-Varilla signed the Hay-Bunau-Varilla treaty which was ratified on February 23, 1904. The United States at that time secured the grant of lands and the franchise to build and operate a canal across Panama from ocean to ocean, in accordance with the provisions of the treaty mentioned above. This is a most important treaty, a long contract of twenty-six articles—a broad charter, a grant of many and varied franchises. While it is comprehensive in favor of our country there are some reservations in favor of Panama. It is evident that it is not a full and clear warranty deed for it is not usual to engraft the twenty-six articles of a treaty in such a deed.

America was satisfied at that time with the grant, for it was much broader than the proposed treaty with Colombia. It will be unnecessary to give more than the main features of the charter here.

The first and very important obligation on America is that we guarantee the independence of Panama; and this without qualification or limit as to time. Perhaps we would be obliged to do this even outside of the treaty.

Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for canal purposes of the width of ten miles—five miles on each side of the center line of the canal, excepting such parts as fall within Panama

City and Colon. There was granted in perpetuity the use and control of any other lands and waters outside the zone for the construction, operation and sanitation of the canal, or any auxiliary canal or works necessary to the enterprise. There were also granted islands within the zone and certain islands in the bay of Panama.

Panama granted to the United States all rights, power and authority within the zone and within the limits of the auxiliary lands and waters described in Article 2 of the treaty, which the United States would possess and exercise if it were sovereign of the territory within which the lands are located to the entire exclusion of Panama of any such sovereign rights and authority.

Panama grants to the United States as subsidiary to the prior grants, the right to use the rivers, lakes and other waters for navigation and for water power for the operation and protection of the canal.

The United States is granted in perpetuity a monopoly for any system of communication by canal or railroad across the isthmus. This is *most important.* It is also provided that private land titles shall be preserved and if taken by the United States for purposes of the canal the damages for the same shall be appraised by a commission appointed by both of the parties to the treaty. The decision of the commission shall be final.

The United States was granted the right to take property in Colon and Panama for sanitation and for water and sewerage purposes. If the property could not be purchased then our nation was authorized to take it by right of eminent domain.

That all water and sewerage works are to be operated for fifty years and at the expiration of said fifty

years such works are to revert to the cities of Colon and Panama respectively.

The Republic of Panama agrees that the cities of Colon and Panama shall comply in perpetuity with the sanitary ordinances made by the United States, and in case of their failure the United States is granted the right to enforce the same. And there is granted to the United States the right to maintain order in the cities and adjoining territory, if Panama is not able to maintain such order.

Panama further grants to the United States all rights that she may be entitled to in the property of the new Panama Canal Company, and the Panama Railroad Company as a result of the transfer of sovereignty from Colombia to Panama.

It is also agreed that the ports of entrance of the canal and the waters thereof and the towns of Panama and Colon shall be free for all time from custom tolls, tonnage and other dues or charges or taxes upon any vessel using the canal or belonging to the United States and used about the canal, except tolls for use of the canal; and except charges imposed by Panama upon goods destined for consumption by the rest of Panama and upon vessels that do not cross the canal. Panama agrees that she will not impose any tax on the canal, railroad, works and vessels employed in the service of the canal. And there shall not be imposed any contributions upon the officers and employes in the service of the canal and railroad.

The United States agrees not to charge for dispatches over any telegraph or telephone company against officials of Panama, more than is charged against its own officials.

A restraining provision is: that the canal and entrances thereto shall be *neutral in perpetuity* and shall

be operated on the terms provided for by Section 1, Article 3, of, and in conformity with, the treaty entered into by the United States and Great Britain on November 18, 1901. This is a regulation in the most vital part of the grant.

The main object of the charter was to permit us to construct and operate a public canal, but it is nowhere directly stated that tolls could be charged for the use of the canal. It was left to be implied from ownership. We could not operate the works as a public charity, for the world, but would be obliged to exact compensatory tolls.

Panama is to have the right to transport over the canal its vessels, troops and munitions of war without paying charges of any kind; also over the railway for the transport of persons in the service of the new Republic. This is evidently a part of the consideration for the grants of the treaty. For by Article 14 the United States was to pay $10,000,000 to Panama and a sum of $250,000 annually so long as the canal continued; and it is provided in said Article that the stated sums were to be in addition to all other benefits coming to Panama under the convention. Free transportation was "one of the benefits coming to Panama." Did not Panama hereby pay these tolls in advance?

Panama also further granted to America all rights to future earnings under the concessions to Lucien N. B. Wyse, now held by the new Panama Canal Company; and all pecuniary rights accruing thereunder as well in the canal as in the railroad. And it was declared that said rights and property were to be free from any present or reversionary interest in Panama, and that the title of the United States upon the completion of the prospective purchase from the Panama Canal Company shall be absolute so far as concerns

Panama, saving always "the rights of the Republic specifically secured under this treaty."

Our country was given explicit power to employ armed force for the protection of the canal and the ships which use the same; and also to establish fortifications for these purposes. And for further protection the Republic of Panama was to sell or release to the United States necessary lands for naval or coaling stations on the Pacific coast and on the Caribbean coast.

These are the main points of the canal charter grant, and, like all similar documents, it is not so clear but what disputes may arise as to the proper meaning of some of the provisions. In less than one year after the ratification of this treaty Panama filed a protest against the actions of our country under it. Mr. Taft then Secretary of War, visited Panama and conceded largely what was demanded. The dispute mostly grew out of the action of our country in collecting certain custom duties near Panama and Colon. Panama claimed that the treaty gave to it this right and not to America. This was conceded to Panama. Long and involved treaties are liable at any time to bring on contention and diplomatic controversy.

The Panama treaty is strong in our favor because Bunau-Varilla signed for Panama and he wanted it liberal enough to cause the United States to go on and buy the existing rights of the French Company. Still his work was subject to revision when the home government sat in judgment on its ratification. It was ratified at Panama, December 2, 1903.

We are safely in charge of the canal under this most valuable treaty and no doubt we shall observe it in word and spirit.

## CHAPTER IX.

## BUYING THE FRENCH RIGHTS.

The French Company desiring to realize something out of an unprofitable unfinished enterprise were most anxious to unload the burden upon some individuals or nation who were able to complete the canal. After their effort and failure those desiring to invest in isthmian projects were decidedly scarce. The whole list of purchasers was represented by unit; it was one—and this was the United States. The French company had either to go forward and finish the canal or forfeit all or make haste and sell to the one customer.

No wonder Bunau-Varilla was so wrought up over Panama's secession and the making of the Panama treaty. It was the last and only chance and the situation necessarily brought on desperation.

The American Canal Commission had negotiations with the French company many months prior to the Panama Revolution and told the new Panama canal people that they could not recommend a purchase for more than $40,000,000. This brought from Paris January 4, 1902, a definite offer to sell all for the above named sum. The commission then changed its report in favor of Panama and the purchase of the French rights and property.

In June, 1902, Congress passed what is known as the Spooner act, by which the President was authorized to acquire for and on behalf of the United States at a cost of $40,000,000 all of the property and franchises of the New Panama Canal Company, on the isthmus of Panama, and all maps, plans, records on the isthmus

and in Paris, including not less than 68,863 shares of the stock of the Panama railroad, owned by or held for the use of the canal company, provided that a satisfactory title could be obtained for all of such property. The President was authorized to secure from Colombia exclusive and perpetual control of a strip of land not less than six miles wide and extending from the Caribbean Sea to the Pacific Ocean and the right to the waters thereon generally for canal purposes.

That when the President has secured the right of way from Colombia and a satisfactory title to the French property and rights, he is to pay to the New Panama Canal Company for this property the sum of $40,000,000, and to Colombia such sums as he has agreed to with her. He is then to excavate a ship canal using as far as possible the unfinished French work. The canal to be a lock canal, if deemed advisable.

If he failed in getting the rights at Panama then he was to secure property at Nicaragua, if possible, and build the canal there.

He succeeded in buying the French rights and the Panama route was adopted. The complications at Paris consumed a vast amount of time and the conveyance of the French rights could not be had until May 4, 1904. At this date the French stockholders received the purchase money; and now with the incomplete canal in our hands and with the grant and charter from Panama, the Americans were able to proceed with the great enterprise.

Some preliminary work was done by the canal commissioners immediately after May 9, 1904; and on June 1, 1904, John F. Wallace of Chicago was appointed chief engineer of the canal project. He took hold of the work with vigor, but difficulties arising which never have been fully understood by the public, Mr. Wallace on

June 28, 1905, resigned his position. His place was filled at once by John F. Stevens, who held his position until 1907. Then Colonel Goethals of the army was placed in charge and the work has gone on to practical completion, in a most orderly and successful manner.

The slides in the deep Culebra Cut have delayed the opening of the canal, but they may not have been a real detriment, because the displaced material can be removed more cheaply by dredging and conveyance away by water than by removing it in the dry form by train. Sooner or later this mountain top will need to be removed and by removing it now it will be done for all time.

A dispatch from Panama to the American papers announced that on May 11, 1914, the canal was opened and the Pennsylvania (5,000 tons) of the Pacific Mail ship line passed through in charge of a tug from Panama to Colon, to load with sugar for New York.

General use of the canal for commercial purposes was not inaugurated until August 15, 1914. On this date the large Government-owned freight ship, the Ancon, left Cristobol, on the Atlantic side, and passed through the canal to the Pacific, and was followed by other ships in waiting, and the canal was officially opened to the commercial traffic of the world.

The following officials were on board: Colonel Goethals, U. S. A., Governor of the Canal Zone; President Porras of Panama; Capt. Hugh Rodman, superintendent of transportation; and Captain Sukeforth, commander of the Ancon. The peace flag of the American Peace Society fluttered at the masthead on this special occasion.

Vessels drawing 30 feet of water can now use the canal; even the great American dreadnoughts can pass through with safety, although work is still going on to

deepen the cut through Culebra. The Ancon passed through the three locks at Gatun and was raised 85 feet from sea-level to Gatun lake, in seventy minutes. Most of the present canal traffic is by American ships from Honolulu and San Francisco.

Our nation now has the long-coveted canal in operation and the dream and idealism of centuries has at last become a tangible fact, a golden reality.

## CHAPTER X.

## TOLL EXEMPTION ACT.

On August 24, 1912, a law was passed and approved, providing for regulating the operation of the Panama Canal when completed and ready for use. It reads in part as follows: * * * *

"Sec. 5. That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the government of the United States for the use of the Panama Canal: Provided, that no tolls when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President by proclamation. No tolls shall be levied upon vessels engaged in the coastwise trade of the United States. That section 4132 of the revised statutes is hereby amended to read as follows:

"Sec. 4132. Vessels built within the United States and belonging wholly to citizens thereof and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States and seagoing vessels, whether steam or sail, which have been certified by the steamboat inspection service as safe to carry dry and perishable cargo, not more than five years old at the time they apply for registry, wherever built, which are to engage only in trade with foreign countries or with the Philippine Islands and the islands of Guam and Tutilia being wholly owned by citizens of the United States or corporations organized and chartered under the laws of the United States or of any state thereof, the president

and managing directors of which shall be citizens of the United States and no others may be registered as directed in this title. Foreign built vessels registered pursuant to this act shall not engage in the coastwise trade: Provided, that a foreign-built yacht, pleasure boat or vessel not used or intended to be used for trade admitted to American registry pursuant to this section shall not be exempt from the collection of ad valorem duty provided in section thirty-seven of the act approved August fifth, nineteen hundred and nine, entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes.' That all materials of foreign production which may be necessary for the construction or repair of vessels built in the United States and all such materials necessary for the building or repair of their machinery and all articles necessary for their outfit and equipment may be imported into the United States free of duty under such regulations as the Secretary of the Treasury may prescribe: *Provided, further,* That such vessels so admitted under the provisions of this section may contract with the Postmaster General under the act of March third, eighteen hundred and ninety-one, entitled 'An act to provide for ocean mail service between the United States and foreign ports, and to promote commerce,' so long as such vessels shall in all respects comply with the provisions and requirements of said act."

"Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be

lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November 18, 1903. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of one dollar and twenty-five cents per net registered ton as nearly as the same may be determined, nor be less than the equivalent of seventy-five cents per net registered ton. The toll for each passenger shall not be more than one dollar and fifty cents. The President is authorized to make and from time to time to amend regulations governing the operation of the Panama Canal, and the passage and control of vessels through the same or any part thereof, including the locks and approaches thereto, and all rules and regulations affecting pilots and pilotage in the canal or the approaches thereto through the adjacent waters.

"Such regulations shall provide for prompt adjustment by agreement and immediate payment of claims for damages which may arise from injury to vessels, cargo, or passengers from the passing of vessels through the locks under the control of those operating them under such rules and regulations. In case of disagreement suit may be brought in the district court of the Canal Zone against the governor of the Panama Canal. The hearing and disposition of such cases shall be expedited and the judgment shall be immediately paid out of any moneys appropriated or allotted for canal operation.

"The President shall provide a method for the determination and adjustment of all claims arising out of personal injuries to employees thereafter occurring while directly engaged in actual work in connection with the construction, maintenance, operation, or sanitation of the canal or of the Panama Railroad, or of any auxiliary canals, locks or other works necessary and convenient for the construction, maintenance, operation, or sanitation of the canal, whether such injuries result in death or not, and prescribe a schedule of compensation therefor, and may revise and modify such method and schedule at any time; and such claims, to the extent they shall be allowed on such adjustment, if allowed at all, shall be paid out of the moneys hereafter appropriated for that purpose or out of the funds of the Panama Railroad Company, if said company was responsible for said injury, as the case may require. And after such method and schedule shall be provided by the President, the provisions of the act entitled "An act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," approved May thirtieth, nineteen hundred and eight, and of the act entitled "An act relating to injured employees on the Isthmian Canal," approved February twenty-fourth, nineteen hundred and nine, shall not apply to personal injuries thereafter received and claims for which are subject to determination and adjustment as provided in this section.

* * * *

"Sec. 11. That section five of the act to regulate commerce approved February fourth, 1887, as heretofore amended, is hereby amended by adding thereto a new paragraph at the end thereof as follows: From and after the 1st day of July, 1914, it shall be unlawful

for any railroad company or other common carrier subject to the act to regulate commerce to own, lease, operate, control, or have any interest whatever (by stock ownership or otherwise, either directly, indirectly, through any holding company or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic, or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

"Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said commission shall be final.

* * * *

"No vessel permitted to engage in the coastwise or

foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned chartered, operated or controlled by any person or company which is doing business in violation of the provisions of the act of Congress, approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" or the provisions of sections 73 to 77, both inclusive, of an act approved August 27, 1894, entitled "An act to reduce taxation, to provide revenue for the government and for other purposes," or the provisions of any other act of Congress amending or supplementing the said act of July 2, 1890, commonly known as the Sherman Anti-trust Act, and amendments thereto, or said sections of the act of August 27, 1894. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ships are parties. Suit may be brought by any shipper or by the Attorney General of the United States." * * * *

Approved August 24, 1912.

## CHAPTER XI.

## REPEAL OF THE EXEMPTION ACT.

While the toll exemption law of 1912 was before Congress and before its passage, England began to question its legitimacy, when compared with the limitations of the Hay-Pauncefote treaty. She in a friendly way made inquiries which might be considered a protest.

The discussion continued until Mr. Taft's office expired and was unfinished when President Wilson assumed office. No other nation so far as the public know, except England has filed a protest against the exemption. But it was announced that several of the prominent nations of Europe would not, nationally, take part in the Panama Exposition to be held at San Francisco.

Many people interpreted this to be the result of the passage of the act to exempt our coastwise trade from tolls. The European nations took a very important part in recognizing the independence of Panama and thereby, in their unanimity, Panama became a nation *de jure.*

No nation at this day and age can live to and for itself. We are in the "Brotherhood of Nations" and are a very important part of the world's civilization. We are obliged to agree and harmonize with the world's highest code of honor; and should in the words of Jefferson have "a decent regard to the opinions of mankind."

President Wilson meeting trouble in diplomatic adjustment of some international questions, which he did

not disclose, and in order to place such matters in a more favorable situation for our nation, he on March 5, 1914 appeared before Congress and delivered an address asking for the repeal of the toll exemption act, which had become a law under President Taft's administration.

ADDRESS OF PRESIDENT WILSON TO CONGRESS, MARCH 5, 1914.

"Mr. Speaker, Mr. President, gentlemen of Congress I have come to you upon an errand which can be very briefly performed, but I beg that you will not measure its importance by the number of sentences in which I state it. No communication I have addressed to the Congress carried with it graver or more far-reaching implications as to the interest of the country, and I come now to speak upon a matter with regard to which I am charged in a peculiar degree by the constitution itself with personal responsibility.

"I have come to ask you for the repeal of that provision of the Panama Canal Act of August 24, 1912, which exempts vessels engaged in the coastwise trade of the United States from payment of tolls, and to urge upon you the justice, the wisdom, and the policy of such a repeal with the utmost earnestness of which I am capable.

"In my own judgment, very fully considered and maturely formed, that exemption constitutes a mistaken economic policy from every point of view, and is, moreover, in plain contravention of the treaty with Great Britain concerning the Canal concluded on November 18, 1901. But I have not come to urge upon you my personal views. I have come to state to you a fact and a situation. Whatever may be our own difference of opinion concerning this much debated meas-

ure, its meaning is not debated outside the United States. Everywhere else the language of the treaty is given but one interpretation, and that interpretation precludes the exemption I am asking you to repeal. We consented to the treaty; its language we accepted, if we did not originate; and we are too big, too powerful, too self-respecting a nation to interpret with too strained or refined a reading the words of our promises just because we have power enough to give us leave to read them as we please. The large thing to do is the only thing that we can afford to do, a voluntary withdrawal from a position everywhere questioned and misunderstood. We ought to reverse our action without raising the question whether we were right or wrong, and so once more deserve our reputation for generosity and for the redemption of every obligation without quibble or hesitation.

"I ask this of you in support of the foreign policy of the administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequence if you do not grant it to me in ungrudging measure."

In pursuance of the President's request the Sims bill was introduced in the House on March 9, 1914; this was a bill simply to repeal the toll exemption part of the law of 1912. The bill was passed by the House on March 31 following by a vote of 247 in favor and 162 against repeal. This vote is taken from the newspapers of April 1, 1914. The bill then reached the Senate on April 1, and was reported out of committee on April 30, without any recommendation. On June 10, what is known as the Simmons-Norris amendment was adopted by the Senate by a vote of 50 to 24; and on June 11, the bill and amendment was passed by a vote of 50 to 35.

Some of the arguments in the House were political rather than legal. Still the repeal went through the House with a bound!

When the bill was presented to the Senate, a different field was opened up. The Senate was supposed to have been closely divided on the repeal question. This alone made it a critical matter and it brought out an entirely different kind of argument and oratory. The Senate is a deliberative body and contains some of the very able lawyers of the country. Impulsive oratory there, could not stand before the close reasoning and analytic dissection made by the clear and cold legal intellect. The discussion covered almost every conceivable legal question that ingenuity could suggest to maintain the respective sides of the controversy. Patriotism to country was brought forward on both sides to influence the decision. The one who favored toll exemption stood on patriotism as a reason to oppose the foreign view of the construction of the treaty; those who opposed exemption came back with the plea that it was the highest patriotism to ones country to induce the nation to observe with honor its duties and obligations under international compacts, so on the face of things all were patriots, and were willing to argue to the fullest extent in the service of their country. It is not believed that any acted through sympathy for England as against their own nation. Some, perhaps, held a firm opinion of our country's duty voluntarily assumed to secure the canal and were seeking to have this performed and there was no sympathy for England or subservience to any foreign power. Party politics made a strong appeal but the wiser policy gained the decision.

All admitted that the canal belonged to America, was obtained with American money and was under

American control, but when it came to offering the service and use of the canal to the general travelling public another question was interjected and it was vital. Many very able men believed that a canal to be owned by America, to be locked up by America, would be altogether out of harmony with the purchase and the enormous outlay. They believed that the canal was intended for use, *for general use* and that there should be no favoritism even if there had been no binding treaty conditions. Some even believed that toll exemption would be an imposition on our government after it having spent such an enormous sum of money and with untold millions yet to be expended in the near future.

The main arguments in favor of maintaining the exemption were:

1. By the repeal we are bowing down to England.
2. The exemption is necessary in order to control the railroad rates.

As to the first, it is impossible to think that any substantial citizen would purposely decide to favor England as against his own country except his country was clearly in the wrong. It is the belief that in a short time this argument will be forgotten and no one will be found willing even to suggest it. It cannot possibly be true.

As to the second argument: There can be no need of toll exemption to regulate the railroads for the reason that the Interstate Commission and 48 State Utility Commissions have the railroads entirely in leash and under perfect subjection; hence water competition is most absolutely not needed for any such purpose. The canal commercially is needed as a time-saver and as a means of transporting heavy goods, cheaply.

There were many other auxiliary arguments made

why coastwise ships should be exempted and our nation should do as she pleased about the home rates. One argument was strongly urged and it was this: We have *sovereignty* over the canal and are beyond control as regards the operation thereof. Legal conclusion cannot always be founded on the claim of sovereignty. Sovereignty cannot overthrow a clear legal compact based on a proper consideration. The question in such cases is not what the sovereign power is, but what did the sovereign promise *to do and perform?*

Our nation had sovereignty enough to legally make the treaties and the amount thereof can in no way increase or reduce the obligation. The ill-spent time on the sovereignty argument was in every sense a futility. We believe that if a nation by binding compact pledges itself to another nation, it to that extent places itself under control of that sovereign.

It may be an effective argument, when discussing rights between a subject and his nation, to make use of the high-sounding word *sovereignty;* but it cannot be more than "sounding brass" when arguing with another sovereign nation. One sovereignty may have power to *neutralize* the sovereignty of another by the mere force of favorable circumstances. One nation may grant transit through its territory to another in full sovereignty, or it may charge the grant with any condition or limitation at pleasure. The compact in its *entirety* determines the degree and measure of the sovereignty.

Another suggested argument was: That the canal is domestic territory and our trade through it would be interstate traffic; hence, why should a foreign nation have any control over it? The canal is not wholly domestic, but it is in many ways conceded to be *international.* How could we have so much diplomatic negotia-

tion and contention about a purely domestic canal? A domestic waterway would be private so long as it was not dedicated to the world's use, thereafter it would be international.

Another argument urged most faithfully was: That giving our coastwise ships free passage through the canal would build up a lagging industry and would aid business in general and give the consumer lower prices. The operation would be this: The nation would donate tolls to aid a "class of business;" the money donated would come from the national treasury; so the aid would be national cash. If donated tolls were a thing essential to national prosperity why not go further and donate money to aid in building ships and operating them. If the nation is to be a public benefactor as regards the coastwise trade, where shall the benefactions begin and end? Who will be able to determine the question? Shall it be a subsidy of half tolls, all tolls, or a direct subsidy of one-half the cost of ships and tackle? Why any economist could so precisely figure it out that the amount of tolls should be the precise amount that the government should donate to the coastwise trade is a mystery "past finding out." It must have been on the theory that here was the opportunity and a convenient time to secure what was possible. It was evidently not founded on any system of mathematical calculation. It was simply "we want it and expediency ought to grant it to us."

Another captivating suggestion was: Millions of dollars are annually spent in dredging rivers and no tolls are charged for their use; then why not exempt our ships from canal tolls? In order for the argument to be effective the rivers and the Panama Canal should be parallel cases. There is no analogy except that ships sail through both.

Sailing through water does not always create a correct analogy. Some waters are private, others are public. Some are national, others international. Some channels are gated while others are thrown open and dedicated to the world's commerce. It is general for Congress to dredge only public streams although it was once charged that large sums were politically spent in dredging navigable streams in mountain districts.

The greater part of the expenditure for present dredging is in opening great tidal channels from 35 to 40 feet deep. This is not required for coastwise trade but for foreign ships; and these do not compete with the railroads. These river highways are dedicated freely to the use of all without favor or distinction and in entire harmony with the practice of other nations over their national rivers. What would the world think if we permitted our ships to sail our rivers free, and at the same time charged tolls to foreign ships? There would surely be retaliation and perhaps a "boycott."

But our rivers are wholly under the jurisdiction of the United States and have been since the Revolution. They are owned by the States but navigation is controlled by the nation. If we dig a new canal within our States we are not compelled to go into interminable international negotiations and treaty-making to secure the right. It is domestic entirely until we openly and irrevocably dedicate it to the world's use.

Should our nation purchase and own the Delaware Canal, and bar it against all ships except domestic vessels, the world could have no complaint, even if we freed our ships from toll. As to foreigners this would be a private canal. We could dredge or not dredge; charge or not charge. But the Welland, the Sault, the Suez and the Panama Canal are not of this private character; they are dedicated, public and treaty-regulated canals.

The first two are free to all by treaty; while the last two are toll canals by treaty and diplomacy.

Similar rules cannot legally, logically or sensibly govern dissimilar institutions. The Panama Canal is in no way similar to the national rivers. They are different in origin and control; hence are in no way similar in legal status.

Mr. C. E. Dobson of Pensacola, Fla., giving testimony before the Senate Committee, April, 1914, made a clear and entirely original distinction between the rivers and the Panama Canal. It was this: The rivers lead from the ocean to some domestic port or terminus; while the Panama Canal is not a terminus but a link connecting the countries of the world with one another. The canal was not built to give traffic from New York or London to Panama city; nor yet for traffic from San Francisco to Colon; but its whole purpose was to connect the two great oceans, and thus, was to be not a river but in principle a part of the oceans; and was built with the definite purpose of being a toll canal.

The objections were mostly what may be termed obstructive arguments; arguments thrown across the pathway to prevent the moving forward of the forces of science, logic, justice and correct legal interpretation. The stronger arguments prevailed and the exemption was repealed.

The *Philadelphia Ledger* of June 14, 1914, in its editorial, speaking of the "repeal act," most graphically and correctly says, "the objectors were argued out of court."

The passage of the repeal cannot be claimed a victory either for the Democrats, the Republicans or the Progressives; nor yet even by England. But it was the victory of the whole body of our people for the credit, and benefit of the American Nation.

## CHAPTER XII.

## THE SENATE COMMITTEE.

The Interoceanic Canal Committee of the Senate comprised the following:

James A. O'Gorman, N. Y.
Chairman.

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| Thornton, La. | Brandegee, Conn. |
| Chilton, W. Va. | Borah, Idaho. |
| Shields, Tenn. | Crawford, S. Dak. |
| Walsh, Mon. | Bristow, Kan. |
| Thomas, Col. | Perkins, Cal. |
| Owen, Okl. | Page, Vt. |
| Simmons, N. Car. | |

The Committee began the tolls repeal hearing April 7, 1914 and continued the taking of testimony until April 27. The report of the testimony and the documents introduced constitute a volume of 1022 closely printed pages. Witnesses appeared both by subpoena and voluntarily. Every one having any plea to make, on either side, was given an opportunity of being heard, and was treated with respect and courtesy.

It was a remarkable hearing; men from every part of the nation appeared and gave earnest testimony in support of their side of the controversy. These witnesses consisted of, senators, ex-senators, lawyers, college professors, doctors, ship-owners, merchants, chamber of commerce men, economists, statisticians and diplomats.

Some of these made extended oral statements and were cross-examined fully by the committee; others sent long printed arguments; all phases of the canal

question were critically examined and no interests were neglected. The committee sought all possible light on questions of law, of treaty interpretation, of international practice and custom and of the history of the proposed canals across the isthmus; evidence was heard respecting proceedings in the Senate when the two Hay-Pauncefote treaties were before it for ratification; there were also produced all letters and documents relating to the negotiations between England and America leading up to the signing of the treaties.

Witnesses naturally differed according to their personal and financial interests; and sometimes political considerations influenced their opinions. Still the committee acted most judicially and intently listened to all. When they came to weigh the testimony they were as far apart as the witnesses had been. Not being able to agree they submitted the evidence to the Senate without any recommendation.

The case may have been hastened through the House, but the Senate—both in the committee and before the full body, acted with the utmost care and deliberation. The arguments in the open Senate were comprehensive and upon the highest plane. All argued to their complete satisfaction. Every one felt the responsibility resting upon him and voted as duty dictated. The exemption law was repealed with a reservation that the nation waived no right, that it held under the treaties which it had entered into with England and Panama.

The case was so thoroughly considered from all view points that there is no reason why the conclusion reached should not be lasting and a final adjustment of the tolls question, unless other and new complications should arise. It should be considered by all parties as a final and irreversible judgment.

## THE TOLL REPEAL BILL AS SENATE PASSED IT.

Be it enacted, by the Senate and House of Representatives of the United States of America, in Congress assembled, that the second sentence in Section 5 of the act entitled "An act to provide for the opening, maintenance, protection and operation of the Panama Canal, and the sanitation and government of the canal zone," approved August 24, 1912, which reads as follows:—

"No tolls shall be levied upon vessels engaged in the coastwise trade of the United States," be and the same is hereby repealed.

Sec. 2. That the third sentence of the third paragraph of said section of said Act be so amended as to read as follows: "When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three:" Provided, That the passage of this act shall not be construed or held as a waiver or relinquishment of any right the United States may have under the treaty with Great Britain ratified the 21st of February, 1902, or the treaty with the Republic of Panama, ratified February 26, 1904, or otherwise to discriminate in favor of its vessels by exempting the vessels of the United States or its citizens from the payment of tolls for passage through said canal, or as in any way waiving, impairing or affecting any right of the United States under said treaties, or otherwise, with respect to the sovereignty over or the ownership, control and

management of said canal and the regulation of the conditions or charges of traffic through the same.

The bill as amended passed the Senate June 11, by a vote of 50 to 35. It was taken to the House at once, and there it was moved to further amend it by declaring that the United States had the right to exempt its vessels from tolls and that it had sovereignty over the canal zone. This was defeated by a vote of 174 to 108. The bill as amended by the Senate was then finally passed by a vote of 216 for and 71 against it. The bill was signed and approved by the President on Monday, June 15, 1914, and is now the law of the land. All vessels will henceforth pay tolls without any discrimination and on terms of entire equality.

## CHAPTER XIII.

### TREATY-RIGHTS.

In the rude and barbaric ages nations had little intercourse and treaties were not so general or necessary as in modern times. Civilization and commerce have brought nations into close relationship and daily association. It would be impossible to conduct international business, at this day, without definite and specific compacts, known as treaties.

Parties entering into treaties are not always coequal states. A superior nation may enter into treaty with a subject or dependant nation. As for instance: our treaties with the Indian tribes. These tribes are under the protection of the United States and are termed subordinate and dependent nations. See Wharton's International Law Vol. 2, p. 532.

Many weaker states come under the subjection of stronger powers, and a treaty in form is not entered into between them. The superior nation often grants to the inferior, concessions in the nature of a charter or constitution, which has all the binding force of a treaty. It is a treaty or contract in the form of a grant made by the superior and accepted by the inferior. Such a grant is probably more permanent and enduring than the ordinary treaty.

A treaty between independent states is a contract precisely as an agreement between individuals. A state is a corporation—a body corporate and politic, and can enter into any lawful contract with another corporate nation. These compacts may cover almost every property, business, social, commercial or govern-

mental transaction; yet there is no judicial forum in which these obligations and duties may be enforced between co-equal contracting nations.

Violations of these treaties can be satisfied by diplomacy, by arbitration or by war. The courts of one nation have no jurisdiction beyond its own territory and sovereignty. There is no known judicial proceedure to enforce a specific performance of a treaty. The compelling reason for a nation's observance of its compacts will be found in honor or in fear of applied physical force.

In every nation there is official authority to bind by a lawful treaty; and all treaties should be executed under and by this legal authority; yet it will not be permitted, that a nation may renounce a treaty on a mere technicality growing out of its informal execution. Treaties are more in the form of gentlemen's agreements and based upon national honor; still they should be made with the customary solemnity and formality.

Under our constitution the treaty power is vested in the President, when his act is ratified by a two-thirds vote of the Senate; and when so made, a treaty becomes the "supreme law of the land." It is even more than this; it is binding on our nation outside of our territory; it is internationally binding.

If our courts should hold a treaty not binding and not "the supreme law of the land," this decision might be entirely ignored by the other contracting nation; the latter might construe the treaty for itself, and demand its performance. That is: a decision of our court on a question under a treaty, would be accepted by another nation only as an *argument* and would be convincing only so far as it might be founded on reason and logic. The case of Olsen vs. Smith 195 U. S. Rep. has been cited by the toll exemption advocates as if it put an end

to all further debate on the question of discrimination under the Hay-Pauncefote treaty. This case merely decided that under the treaty with England (1815) coastwise ships might not be required to pay pilotage under a state law when foreign ships would be required to pay such charges. The court held that there was no discrimination because the business was entirely different and the pilot law need not apply to our coastwise ships and to foreign ships on terms of entire equality.

This case is not conclusive for the following reasons:

1. The decision of our Supreme Court is not binding on England even when construing the treaty of 1815. It is a national court and not international. The American nation created this court and gave it,its power and authority. Before a court can conclude two nations by its judgment it must be created by both or they should jointly submit their controversy to it for decision. So long as there is no international court nations must adjust treaty disputes by the *political* departments of government.

2. The decision although binding between Olsen and Smith and rendered by a most able court it is not necessarily binding on others. If the "pilot's charges" were included in the "duties and charges" which were to be equal between domestic and foreign ships by the treaty, then if any ships were freed the treaty might be violated. If they were not and pilotage was only a charge for services rendered not as a "port charge," but as a charge in transit before arriving at port, then the decision might have justification; but it was not placed on this ground. Again, if pilotage was compulsory why not on all vessels? It might be that the sailing officers of coastwise ships were men expert in local navigation and really *pilots in fact.* But the

court's decision was not placed on this basis. The decision in no way can have any relation to the Panama case.

3. The court may have been influenced by some "classification" theory which is now running to such an extent that our nation may become a government of class citizenship instead of being what the founders really made it a government "acting on the individual" —a constitutional democracy, a republic. Through odious class distinctions our country is day by day being unconsciously led away from its former freedom towards bondage—class bondage.

4. Pilot charges are fees due to individuals for personal work and are not government charges in the sense of tolls for carrying vessels through the canal by the United States—through a canal founded on an enormous outlay and on intricate international compacts; there is no analogy!

5. Port charges whether pilotage or otherwise are clearly domestic rates for entering a national port; the canal is not a *port facility* but it is a highway between two oceans and not connected with any port in particular. Instead of being connected with a port, it is of and for the world. It is unique and governed by its own peculiar situation. So the case of *Olsen v. Smith* as an argument in the Panama case may be brushed aside as another irrelevant argument and inapplicable.

It may be well to call attention to the case of *Guy v Baltimore* 100 U. S. Rep. 442 as an offset to *Olsen v. Smith.* The city of Baltimore passed an ordinance to require all vessels landing goods at the public city wharves to pay a certain wharfage rate provided that no wharfage should be paid on the produce of Maryland landed at such wharves. Here was a clear discrimina-

tion. It is profitable to listen to what the court says about such an ordinance. It spoke in substance as follows:

The wharf at which the appellant landed was long ago "dedicated to the public use." The public who may use it embraces all engaged in trade and commerce upon the public waters of the United States. Such vessels may traverse these waters without let or hindrance from local authority.

It is claimed that the state empowered one of its political agencies to burden commerce with exactions for wharfage which it does not place on the products of the state. The city could no more do this than it could discriminate against traffic of other states in the use of the public streets and highways. Baltimore, if it pleases, may allow the use of its wharves without charges; or it may under state law charge equal fees on all users, provided the charges do not exceed a fair remuneration for the use.

It cannot employ such property "held for public use" to hinder or obstruct commerce in favor of its own state. Such wharfage cannot be considered as compensation for the use of property; it is an expedient to do indirectly what cannot be done by direct tax.

"Cities owning wharves upon public navigable streams, and quasi-public corporations transporting the products of the country cannot discriminate to impede traffic. In exercise of the police power a state may exclude traffic in articles fairly considered to be dangerous to the health, the lives and the property of the people."

These were the expressed views of the same court that decided *Olsen vs. Smith;* and there are principles announced which are in a way applicable to the Panama controversy.

In Ware vs. Hylton 3 Dallas (before the Supreme Court in 1796) the question arose under the treaty of peace with England as to what debts were reserved in favor of English merchants, (owing by Americans) under the treaty language "that creditors on either side shall meet with no impediment" in the recovery of all bona fide debts, &c.? The question was: what debts came under the general language "all bona fide debts?" The court justly held, that "no line could be drawn between creditors, unless found in the treaty. * * * * The indefinite sweeping terms made use of by the parties * * * exclude the idea of any class of cases having been intended to be excepted." Vattel says: that "it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear terms when the sense is manifest and leads to nothing absurd there can be no reason to refuse the sense which this treaty naturally presents." He further says "to go elsewhere in search of conjecture, to restrain it would be to elude it. Let the brightest light shine on all the parts, let it be expressed in terms most clear and determinate; all of this shall be of no use if we search for foreign reasons, to maintain what cannot be found in the sense it naturally presents."

The court further states, that rights under the treaty must be "mutual." If Americans can collect their debts against Englishmen the rule must operate *vice versa.* That the rule in such cases "should work both ways." This case thoroughly demonstrates the correct rule for construing mutual treaty compacts, and cannot be made clearer by any subsequent adjudications. Mutual contracts must be mutually and reciprocally binding and so construed, otherwise gross wrong and injustice would be the result.

In Meigs vs. McClung 9 Cranch, Chief Justice Mar-

shall says: "The treaty is the contract of both parties; each having lands. The words are the words of both parties."

The court in Green vs. Biddle 8 Wheaton says, in construing a treaty, "that where the words of a law *treaty* or contract have a plain and obvious meaning, all construction in hostility with such meaning is excluded. This is a maxim of law and a dictate of common sense."

One able lawyer in the canal controversy held that if a nation attempted to part with its jurisdictional or property rights by treaty grant, every presumption would be against the intent of the state to so part with the same. The reply to this would be that if a state, for a consideration paid, makes a grant to a sovereign state "the grant will be taken most strongly against the grantor." If a state attempts to grant any sovereign right or jurisdiction to one of its own citizens or subjects the grant is usually held to be void, because a ruling nation cannot place itself under the governmental power of the subject. The sovereign must remain sovereign over the citizen. But the rule and universal practice among nations is that a grant may be made of any right by one sovereign to another, and the usual mode of transfer is by treaty.

The granting nation is bound most strongly by the words of the treaty because it was within its power to limit the grant and not mislead the grantee to its injury. Of course the first rule is, to strive to define the treaty by a fair construction of the words used; if doubt arises all doubts shall be construed in favor of the grantee. The grantor will not be permitted to abridge or narrow the terms of his contract.

This is clearly demonstrated in Hauenstein vs. Lynham 100 U. S. Rep. In this case the United States had

made a treaty with Switzerland giving to Swiss aliens in this country the right to own land and in case of their decease intestate that the foreign heirs might have the lands converted into money under state laws here, and take away the funds as their own property. The "time" in which this might be done was not settled in the treaty, but was to be governed by the laws of the state in which the land lay. A prior treaty had fixed the time limit to three years, but this was changed in the new treaty which was under consideration. The land was in Virginia and this state had fixed no time limit by which an alien could sell and export the proceeds. It was claimed that as no limit was fixed that the sale could not be made at all, and that the treaty was wholly inoperative and a nullity. The court held that "the terms of the limitation imply clearly that *some time*, and not that *none*, was to be allowed." And further said: "When a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. Shanks v. Dupont 3 Peters 242. Such is the settled rule in this court."

Another cardinal rule of construction of treaties is: that if the words are ambiguous their meaning is to be determined from the surrounding circumstances; and even parol evidence may be used to demonstrate the meaning and intention of the nations thus signing the compact.

Justice Miller held in *Head Money Cases* 112 U. .S Rep. that: "a treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party

chooses to seek redress, which in the end may be enforced by actual war. With all of this the judicial courts have nothing to do * * * * But a treaty may contain provisions which confer rights upon citizens of one nation residing in the territory of the other which partake of the nature of municipal law * * * an illustration of this character is found in treaties which regulate the mutual rights of citizens * * * in regard to rights of property by descent or inheritance when the individuals concerned are aliens."

He further held, that a treaty is a law of the land just the same as a statute is; and when such rights are to be enforced in court, reference is made to the treaty the same as to a statute. The constitution gives it no superiority over an act of Congress. A treaty is made by the President and Senate. Statutes are made by the President, Senate and House of Representatives. Justice Miller makes a closing statement on this line, as follows: "In short we are of opinion that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal."

The learned judge loses sight of one very important party to a treaty. A treaty must be made by the President, the Senate and the *other contracting nation.* The latter can have no part in enacting a law of Congress. How can such a statute have any binding force on the nation not privy to it? A treaty is a mutual compact; a statute is wholly unilateral. It would be a strange proceeding, when a contract made by and between two nations could be revoked or abrogated by the legislative body of one. A subsequent act of Congress might revoke a treaty but it would not bind the other contract-

ing nation. It is not always a wholesome doctrine to teach, that a treaty can be overthrown by a subsequent act of Congress. This could not be done without our nation assuming the full responsibility for the act. The better doctrine to inculcate would be that if a nation makes a proper treaty it should observe it, rather than attempt to find a way to renounce it by a subsequent legislative act.

Congress has the right to declare war, and some time this might be the result of a Congressional revocation of a treaty. Since the treaty-making power is vested in a proper department, it would be better to rest it there and not turn it over to Congress, except under the necessities of war.

There is nothing clearer in international polity than this: that war between contracting nations suspends or abrogates all treaty and contract relations between them. It is impossible to be at peace with your enemy in war. Certain acts of humanity are authorized by the law of nations and a nation at war may pledge its faith to this extent. Society &c., vs. New Haven 8 Wheaton.

A treaty may in many cases cease to operate after an entire change of circumstances; but this rule could not be universal. A continuing treaty relating to the building and operating of a public utility could not be ignored by some trivial change in conditions. If a treaty provided for a certain charge for services, this would not fail because the utility company saw fit to change the title of its right of way from a leasehold to a fee. A railroad company does not change its legal rates when it changes its holdings from a condemned to a fee title.

Here would be an example of a change of circumstances that would render a treaty void: If a nation agreed to protect a weaker nation for a consideration

and became unable to give protection the treaty would be avoided by this change of circumstance. A change of circumstance is not *a rule* that always revokes a treaty; but the most that can be said is that some changes in circumstances may abrogate a treaty.

It has been argued that the Hay-Pauncefote treaty is annulled because we secured title to the canal zone after the making of the treaty. But two nations were bound by that treaty—England and America. England did not abrogate it because we became owner of the canal lands. And America did not and cannot because in the very grant, that some now claim was a ground for revoking the treaty, we, the only one claiming that the treaty has ceased to operate through a "change of circumstance," in Article 18 of the Panama treaty, expressly recognized and ratified the very Hay-Pauncefote treaty. We expressly agreed to operate the canal under the terms of the Hay-Pauncefote treaty.

It is a very lame argument, even to suggest, that a treaty is not binding on us because we have most positively and solemnly reaffirmed it in a subsequent compact. How can the grant from Panama revoke the treaty when we in this grant declare that we *will* observe it?

A nation may in one treaty be grantee and in another it may be grantor; and in diplomacy it must be consistent. If it contends for a restricted grant as against the grantee in one case it cannot claim that a grantee's rights are to be enlarged in another instance. A nation will not be permitted to play "fast and loose" in matters of diplomacy, for international rules must be certain, invariable and consistent.

We are grantor in the English treaty and grantee under Panama. Shall we construe both in favor of the grantor?

But here is where all parties seem to get astray; they construe a treaty governing a public utility, by the rules which control ordinary commercial relations between nations. These are based on reciprocal dealings between the contracting nations. We did not build the Panama Canal because other nations build canals; and our treaties say nothing about reciprocation with any other canal or with other rates of charge. Transportation is not governed by tariff rules or rules governing barter and trade.

ECONOMIC VIEWS.

The labor and expense of taking coastwise and foreign ships through the canal are equal; the same for American or English ships. The kind of ship does not affect the labor or service, or the compensation. When a ship arrives at the canal, or a wagon at a toll gate, it is not a question where it hails from; the charge should be based on the service rendered not upon who is the customer.

A railroad company fixes its rate per head and not upon the color or occupation of the passenger, or the nationality of the patron. It is not usual to meddle with transit rates in a commercial treaty; if so, it is in a separate proviso. A treaty might require equal treatment, but if it expressly required discrimination or unequal treatment it would be a wonder!

The canal is not a class enterprise; its purpose is to pick up a ship in one ocean and launch it into the other. Would it not be strange to donate this service to one customer and not to another?

Many publicists hold that the equality, prescribed by the treaties, means equality in the conditions of treatment of all ships, being served by the canal, without regard to flag, origin or destination. The

words *origin* and *destination* illustrate the case most clearly. The work performed, the services rendered by the canal should conclusively determine the amount of tolls in every case. In feudal days discriminations were favored, but under modern theories of correct government discriminations are odious.

The thirteen colonies gained their territory and sovereignty by combat and the treaty of 1783. Florida, Louisiana, and the Panama lands and rights were acquired by treaties. The canal property now represents the sum of $400,000,000. These are not the kind of treaties that are revoked by a mere breach of conditions or by "change of circumstances" since the making of the treaty. Large vested and continuing interests in land are not to be taken from a nation only with its consent or by battle. Even forfeitures between individuals are not favored in the law. It is sheer folly to assert that a nation can be divested of its territory by mere legal construction of the terms of a treaty; still the holding nation should in honor observe and keep its promises. A nation does not have unlimited sovereignty, while subject to binding charges and servitudes, for the obligations may be enforced by and through the world's *vis major*.

Whatever may be gained, by treaty or by war, may be lost by the same process.

## CHAPTER XIV.

## THE SPOONER LAW.

The Spooner Law was approved June 28, 1902, after we had come to realize that we could secure the French rights in Panama for $40,000,000. The President was authorized to buy these rights, also to secure the needed lands by a purchase from the Republic of Colombia. He attempted to buy from the latter but wholly failed. The opportunity came to purchase the same lands and right of way from Panama, claiming to be the successor to Colombia.

Technically the statute required the purchase from Colombia and not from Panama; but the President and in fact the country demanded the Panama canal and it should be secured, if at all, legally possible. The President made a treaty with Panama and purchased the canal zone from her, because of Colombia's continued refusal to make the grant. The President justified his course (which was not literally within the words of the Spooner act) by claiming that he was locating the canal on the line required by the law, and on the line of the French unfinished canal. The French rights located the canal and it could be nowhere else under that law. The only question was as to the technical name of the grantor; it was to be Colombia. The President moved around this by saying as Panama had seceded from Colombia he could not buy from the latter but, if buy at all, it must be from the successor.

There was a stronger ground than this; and it was the real course, in fact, that was pursued. The treaty-making power of our nation—the President and Senate

—did make a treaty with Panama by which the right to the canal zone was secured. The statute directed the President to buy the route from Colombia. But he did what he had the constitutional right to do independent of the statute—buy it by treaty from Panama if she owned it. Congress could not deprive him of his right of making the treaty, but might in any such case refuse to furnish the funds.

The canal right was contracted for by treaty and all was constitutional up to this point. The only question was, did the President have the authority to use $10,000,000 to pay to Panama when the order was to pay it to Colombia? All of the law-making body, except the House, consented to the purchase from Panama, by making the treaty. If money unlawfully was used to buy lawful property for the nation under great necessity and all was afterward abundantly recognized by Congress the whole deal so far as our national affairs are concerned has been affirmed and ratified. It has become, in a domestic sense, a closed incident and now only of historic interest. See Wilson vs. Shaw 204 U. S. Rep.

The important question now before us is, are we bound legally and morally to use the canal for the purposes for which it was acquired, and are we bound to abide by all of the provisions of the two treaties There ought to be but one answer to this question.

## AN IMPORTANT DECISION.

The late case of Wilson v. Shaw before the United States Supreme Court, in 1906, being brought to test the right of the United States to build the canal and also to question the title acquired from Panama, is a case of momentous importance, and could not be omitted from a book giving a view to date of the canal controversy.

The land having been purchased and the canal work having proceeded to a large extent, the court did not care to go to the extreme length of enjoining the political department from performing a work of such magnitude.

Hence only the main points raised by the plaintiff were given any consideration by the court. It evidently had no sympathy with the attempt to enjoin this work.

The court did not feel called upon even to decide whether we have sovereignty over the canal or not. It did decide that the nation had title under the treaty with Panama but did not say what limitations if any the property was subjected to by the treaty. It said nothing about how the canal was to be operated or whether the operator was a common carrier or not, or on what terms or conditions it was to be operated.

The court rarely goes beyond what is essential to the decision of the case in hand, but leaves all other questions to be decided when the occasion may so require. The decision is most important so far as it extends; hence we print the most interesting parts of it, below.

### THE OPINION.

Justice Brewer rendering the decision said:

If the bill was only to restrain the Secretary of the Treasury from paying the specific sums named therein, to wit: $40,000,000 to the Panama Canal Company and $10,000,000 to the Republic of Panama it would be sufficient to note the fact of which we may take judicial notice that those payments have been made and that whether they were rightfully made or not is so far as this suit is concerned, a moot question. * * *

But the bill goes further and seeks to restrain the Secretary from paying out money for the construction

of the canal, from borrowing money for the purpose and issuing bonds of the United States therefor. In other words the plaintiff invokes the aid of the courts to stop the government of the United States from carrying into execution its declared purpose of constructing the Panama canal. The magnitude of the plaintiff's demand is somewhat startling. * * *

To tell the story of all that was done in respect to the construction of this canal prior to the active intervention of the United States, would take volumes. It is enough to say that the efforts of de Lesseps failed. Since then Panama has seceded from the Republic of Colombia and established a new republic which has been recognized by other nations. This new republic has by treaty granted to the United States rights, territorial and otherwise. Acts of Congress have been passed providing for the constructing of a canal, and in many ways the executive and legislative departments of the government have committed the United States to this work, and it is now progressing. For the courts to interfere and at the instance of a citizen, who does not disclose the amount of his interest, stay the work of construction by stopping the payment of money from the treasury of the United States therefor, would be an exercise of judicial power which, to say the least, is novel and extraordinary. * * *

He contends that whatever title the government has was not acquired as provided in the act of June 28, 1902, by treaty with the Republic of Colombia. A short but sufficient answer is that subsequent ratification is equivalent to original authority. The title to what may be called the Isthmian or Canal Zone, which at the date of the act was in the Republic of Colombia, passed by an act of secession to the newly formed Republic of Panama. The latter was recognized as a nation by the

President. A treaty with it, ceding the canal zone was duly ratified. 33 stat. 2234. Congress has passed several acts based upon this title of the United States, among them one to provide a temporary government. 33 stat. 429. * * *

It is too late in the history of the United States to question the right of acquiring territory by treaty. Other objections are made to the validity of the right and title obtained from Panama by the treaty; but we find nothing in them deserving of special notice.

Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the canal zone is no part of the territory of the United States, and that, therefore, the government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, "grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal." By Article 3 Panama "grants to the United States all the rights, powers and authority within the zone mentioned and described in Article 2 of this agreement * * * which the United States would possess and exercise 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."

Other provisions of the treaty add to the grants named in these two articles further guarantees of exclusive rights of the United States in the construction and maintenance of this canal. It is hypercritical to contend that the title of the United States is imperfect,

and that the territory described does not belong to this nation, because of the omission of some of the technical terms used in ordinary conveyance of real estate.

Further, it is said that the boundaries of the zone are not described in the treaty; but the description is sufficient for identification, and it has been practically identified by the concurrent action of the two nations alone interested in the matter. The fact that there may possibly be in the future some dispute as to the exact boundary on either side is immaterial. Such disputes not infrequently attend conveyances of real estate or cessions of territory. Alaska was ceded to us forty years ago, but the boundary between it and the English possession east was not settled until within the last two or three years. Yet no one ever doubted the title of this republic to Alaska.

Again plaintiff contends that the government has no power to engage anywhere in the work of constructing a railroad or canal. The decisions of this court are adverse to this contention. In California v. Pacific R. R. Co. 127 U. S. 39, it was said:

It cannot at the present day be doubted that Congress under the power to regulate commerce among the several States, as well as to provide for postal accommodation and military exigencies had authority to pass these laws. The power to construct or to authorize individuals or corporations to construct national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. * * * *

*A fortiori,* Congress would have like power within the territories and outside of state lines, for there the

legislative power of Congress is limited only by the provisions of the Constitution, and cannot conflict with the reserved power of the states. Plaintiff, recognizing the force of these decisions seeks to obviate it by saying that the expressions were *obiter dicta*, but plainly they were not. They announce distinctly the opinion of this court on the questions presented, and would have to be overruled if a different doctrine were now announced. * * *

## CHAPTER XV.

## HISTORIC PLEDGES.

America has been discussing the question of canals and ways of transit across the historic isthmus for more than three-quarters of a century; and we quote the following, from public documents and history.

Henry Clay declared as early as 1826: "that if a canal be opened across the isthmus for sea vessels * * * its benefits should be extended to all parts of the globe upon payment of a just compensation or reasonable tolls."

In 1835 a senate resolution spoke with reference to an isthmian canal and among other things used the words "free and equal right to all."

To the same effect was a house resolution in 1839.

Mr. Root in his speech in the Senate, May, 1914, cites Rives as saying to Palmerston: That the United States would not if they could obtain "any exclusive right or privilege in a great waterway which naturally belongs to all mankind." This was said in 1849 and related to the pending Clayton treaty.

In 1846 we made a treaty with New Granada by which she bound herself that the transit across the isthmus shall be free to the government and citizens of the United States and no other tolls shall be levied upon her citizens passing over any road or canal made by New Granada or under her authority than is laid on the Granadian citizens.

Then in 1850 the Clayton-Bulwer treaty was made with England and the two nations agreed that if any canal is built from the Atlantic to the Pacific that

neither will seek any advantage in navigation through the canal which shall not be offered on the same terms to the citizens or subjects of the other.

Secretary Cass in 1858 had discussion with England about the Clayton treaty and wrote as follows: "While the declared object of that convention had reference to a ship canal by the way of San Juan * * * yet it avowed none the less plainly a general principle in reference to all practicable communications across the isthmus * * * The principle was that the inter-oceanic routes should remain under the sovereignty of the states through which they ran and be neutral and free to all nations alike. * * * So far as the United States and Great Britain are concerned these stipulations were expressed in unmistakable terms. * * *

"What the United States wants in Central America next to the happiness of its people, is the security and neutrality of the interoceanic routes, which lead through it." A few days later in 1858 he stated: "The general policy of the United States concerning Central America is familiar to you, we desire to see the isthmian routes opened and free to the commerce and intercourse of the world."

There was a shade of change in our statements, under Grant's administration and that of Hayes. We then began to talk of an American canal for Americans; and that our interests would not allow a canal to be under the control of any foreign power. About this time the French people were negotiating for a route for a canal. Mr. Everts, secretary, made one statement in 1880 worthy of close consideration: He said all the treaties in the world fail to be a safeguard in a time of great conflict. What he forsaw was the fact that treaties are for peace; and "do as you can" is the rule for war.

President Hayes, however, said: that a canal under American control, he was "quite sure will be found not only compatible with, but promotive of, the widest and most permanent advantage to commerce and civilization."

Mr. Cleveland coming into office found a treaty signed with Nicaragua, which was pending before the Senate for ratification. He withdrew it; the main reason being that he did not favor buying distant territory and entering into unlimited engagements to defend the territory of the state where such interests lie. In his message of 1885 he gave his view as follows: "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, to be removed from the chance of domination by any single power nor become a point of invitation for hostilities or a prize for warlike ambition. * * * *

"These suggestions may serve to emphasize what I have already said on the score of the necessity of a neutralization of any interoceanic transit; and this can only be accomplished by making the uses of the route open to all nations and subject to the ambitions and warlike necessities of none."

Lincoln and Seward had also ideas about a canal. Seward in 1861 spoke thus: That the United States does not demand anything of Nicaragua only that it so conduct its affairs as to permit and favor the opening of an interoceanic navigation which shall be profitable to Nicaragua and "equally open to the United States and to all other nations. * * * Seeking only such facilities for our commerce as Nicaragua can afford profitably to herself, and yield, at the same time to other commercial nations."

Mr. Blaine in 1881 comes boldly into the negotia-

tions for the modification of the Clayton treaty. He finds it a handicap to our country, and insists that our interest in a canal far exceeds that of any other nation; that we should have a free hand in both peace and war in control over the canal, that the canal in time of war should not be used to throw a hostile fleet against either of our coasts. In this he was to the full limit, representing the welfare of his country; but with it all he could not forget the time worn pledge of American equality and neutrality.

He emphasized strongly and reiterated what others had promised most solemnly: "This government entertains no design in connection with this project, for its own advantage, which is not also for the equal or greater advantage of the country to be directly and immediately affected. 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 tolls and obligations for the use of the canal shall apply with absolute impartiality to the merchant marine of every nation on the globe." He most correctly draws the line on the use of the canal for any wrongful or evil purpose. It is emphatically for "peaceful purposes."

Mr. Blaine far exceeded all, in his declaration about the equality of user, when he not only promises it, but would by "public proclamation declare it." And what shall we think of his power of definition, when he says that the tolls shall apply impartially to "every nation on the globe."

The lamented McKinley also gave expression to the general sentiment that an isthmian canal to be built or controlled by Americans should be open to all nations; for on December 7, 1898, Secretary Hay wrote to Henry

White, charge d' affaires at London: "The President hopes he may take it for granted that the British government not only have no wish to prevent the accomplishment of this great work but that they feel a lively interest in it and appreciate the fact that the benefits of its successful achievement will be to the advantage not only of England and America but of all commercial nations." In this the President and Mr. Hay jointly spoke.

The Bard Senate amendment offered to the first Hay-Pauncefote treaty was in the following language: Article III. "The United States reserves the right in the regulation and management of the canal to discriminate in respect of the charges of traffic in favor of vessels of its citizens engaged in the coastwise trade." This was defeated in the Senate by a vote of 43 against and 27 in favor.

In 1900 the foreign relations committee of the Senate, of which the extremely able Senator Davis was chairman, made a report amazingly explicit in its declaration regarding this Hay-Pauncefote treaty and our Altruistic purpose and motive in building any canal across the isthmus. The following extracts from that report are taken from the printed report of the proceedings before the Senate Committee on Interoceanic Canals of 1914:

"That the United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication, and their sincere wish, if it should be found practical, was to see it dedicated to the common use of all nations on the most liberal terms and a footing of perfect equality for all.

"That the United States would not, if they could, obtain any exclusive right or privilege in a great highway which naturally belongs to all mankind.

"That while they aim at no exclusive privilege for themselves, they could never consent to see so important a communication fall under the exclusive control of any other great commercial power. * * *

"In the origin of our claim to the right of way for our people and our produce, armies, mails and other property through the canal, we offer to dedicate the canal to the equal use of mankind. * * * *

"No American statesman speaking with official authority or responsibility has ever intimated that the United States would attempt to control this canal for the exclusive benefit of our government or people. They have all with one accord declared that the canal was to be neutral ground in time of war and always open on terms of impartial equity to the ships and commerce of the world. * * * *

"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.

"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 the canal as property, is worth more than its cost, we are not called on to divide the profits with other nations. If it is worth less, and we are compelled by national necessity to build the canal, we have no right to call on other nations to make up the loss to us. * * * *

"The Suez canal makes no discrimination in its tolls in favor of its stockholders, and, taking its profits or the half of them as our basis of calculation, we will never find it necessary to differentiate our rates of toll in favor of our own people in order to secure a very great profit on the investment. * * * *

"The Suez canal is in the same situation, and none of the European powers would have it otherwise, because it is to the interest of all nations that war shall not exist in or near the canal, and it is made a national crime for any nation to violate the neutral ground. No nation is willing to incur universal hostility by violating the sanctity of waters in which all have equal right.

"But the canal is not dedicated to war but to peace, and whatever shall better secure just and honorable peace is a triumph."

Mr. Blaine's clear and positive declaration of 1881 fortified by the incontrovertible doctrine in the Davis report, set the pace for Theodore Roosevelt and John Hay in 1903 in the negotiations for the Bunau-Varilla treaty made on the behalf of Panama.

The President in his message December 7, 1903, spoke thus: "Panama has done her part. All that remains is for the Americn Congress to do its part and forthwith this republic will enter upon the execution of a project colossal in its size and well nigh incalculable possibilities for the good of this country and the nations of mankind."

And January 4, 1904, the President sent a special message to Congress and went even to far greater length in asserting our unselfish motives in building the proposed canal, from which we quote:

"I confidently maintain that the recognition of the Republic of Panama was an act justified by the interests of collective civilization. If ever a government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded in the interest of mankind, the United States holds that position with regard to the interoceanic canal. Since our purpose to build the canal was definitely announced there have come from all

quarters assurances of approval and encouragement * * and to general assurances were added specific acts and declarations. In order that no obstacles might stand in our way Great Britain renounced important rights under the Clayton--Bulwer treaty and agreed to its abrogation, receiving in return nothing but our honorable pledge to build the canal and protect it as an open highway. It was in view of this pledge and of the proposed enactment by the Congress of the United States of legislation to give it immediate effect, that the second Pan-American Conference at the City of Mexico on January 22, 1902, adopted the following resolution: 'The republics assembled at the international conference of Mexico applaud the purpose of the United States government to construct an interoceanic canal and acknowledge that this work will not only be worthy of the greatness of the American people, but also in the highest sense a work of civilization, and to the greatest degree beneficial to the development of commerce between the American States and the other countries of the world.'

* * * *

"The powers have one after another followed our lead in recognizing Panama as an independent state. Our action in recognizing the new republic has been followed by like recognition on the part of France, Germany, Denmark, Russia, Sweden and Norway, Nicaragua, Peru, China, Cuba, Great Britain, Italy, Costa Rica, Japan and Austria-Hungary."

"There have been many revolutionary movements for the dismemberment of countries which were evil, tried by any standard. * * * * The people of Cuba have been immeasurably benefited by our interference in their behalf, and our own gain has been great. So will it be with Panama. The people of the isthmus and as I firmly believe of the adjacent parts of

Central and South America will be greatly benefited by the building of the canal and the guarantee of peace and order along its line; and hand in hand with the benefit to them will go the benefit to us and to mankind."

We have one more source of information of what John Hay's opinion was, about equal rights of all nations in the use of the canal; it has not been brought out before in our American arguments. Bunau-Varilla and Secretary Hay held private conferences about the contents of the treaty with Panama; only one of the parties is now living. By referring to the Varilla book on Panama at pages 373 and 376 will be found a full statement of what Secretary Hay said about the purpose of the United States in building the canal and the reason why Section 18 was put into the treaty with Panama and why the Hay-Pauncefote treaty was engrafted into and made a binding part of the same treaty. The Varilla statement seems to confirm just what Mr. Hay had always said about the neutrality and equality of use of the canal by all customers.

Our country joined in the English treaty of 1901 and the Panama treaty of 1903 and whether these pledges were in substance carried into the treaties or not we should show our good faith to the world and voluntarily respect them.

Note: President Grant contended for an "American canal," still, in 1870, he authorized Gen'l Hurlbut, at Bogota, to sign a treaty for "equal tolls to all nations," and sent the same to the Senate for ratification. President Johnson (1869) sent a similar treaty to the Senate to be ratified. American officials, by urging "American control," meant merely the "political" control. Economically they all demanded "toll equality."

## CHAPTER XVI.

### ABSTRUSE PHRASE "ALL NATIONS."

From the *Morning News*, Wilmington, Del., April 29, 1914.

To the Editor: Many Americans in the Panama controversy are willing to stand on the epigram that, "It cannot be reasonably argued that in fixing the terms for customers that our nation looked upon itself as one of the customers." This may be a convincing statement, but it is not conclusive.

It is not a question of what Congress thought when laying the tolls, but what England and America both thought and had a right to think when the treaty was made. America was extremely anxious for the treaty and in it agreed that there should be "entire" equality as to all nations. If "customers" is substituted for nations it would read "equal to all customers." Every user of the canal ought to be a "customer" and not a "mendicant." It sounds better. Again, the word customer should not be determined by nationality alone—customer means user. Even if the nation could prefer itself, still one individual, or even a class, is not the whole nation.

We lose ground by standing on the epigrammatic statement. We get back in the end to the old question, did we include our own people by the words "all nations"? As only two nations were contracting, the words must of necessity include both of these parties. The "other" nations were oblivious to the compact.

If "all nations" included England why did it not

also include America? Can it be that a mutual contract is not "mutually" binding? These words literally defined mean "all in the family of nations," or that the outside nations not contracting were entirely excluded for want of privity in the agreement; then the treaty would apply only to the contracting parties.

And again, equality to all nations means equality as "to all people of all nations." And this is where we arrive in the final analysis. The question is thus clear, that the canal was for all the people of the earth and America as a corporate body was to be the instrument to build and operate the canal for all on grounds of entire equality. Of course Americans are part of the world's people.

Ownership alone does not confer all the benefits of user upon the owner; other ships must have the right to use. A public utility is for the public use, and the operator, when it has made a compact for equality of use cannot prefer its own citizens. The real question is, was not the title secured from Panama specifically described as for canal purposes? If we did not get the lands for "canal purpose" why are we in Panama at all? And further, what has the Hay-Pauncefote treaty to do with anything but a public canal? We made our canal treaties wholly to secure a canal—and it was an international franchise grafted on to interests in lands. This franchise and landed interest was subject to all charges mentioned in the treaties with England and Panama. Equality requires the collection of tolls on all where there is power to collect. Our nation has power to collect against any ships that use the canal.

The equality mentioned in the English treaty is in words expressly backed up by the Bunau-Varilla treaty which grants the right from Panama. We there af-

firmed the English treaty of 1901 and made it a part of the canal grant.

The Hay treaty should be construed in connection with the Clayton treaty which is superseded. The latter expressly required equality between England and America because no others were connected with it (unless they joined in protecting the canal) then they were all to become equal. The new treaty was for the benefit of the world and the comprehensive expression "all nations" was adopted. If there is no "ambiguity" in the treaty then England is right. If there is ambiguity it is a latent ambiguity and parol evidence may be used to prove what the parties really intended. This evidence is all in favor of full equality to all users. A liberal construction must include America in the clause "all nations."

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GEORGE A. TALLEY.

## CHAPTER XVII.

## FORTIFICATION AND WAR.

From *Morning News*, Wilmington, May 16, 1914.

Mr. Editor: Some Americans have difficulty in knowing what our status would be if we were at war with a foreign power.

If any power was at war with America that per se would be war against all the forces, power, property and sovereignty of the United States. A hostile ship would not be allowed within cannon shot of the canal, much less be permitted to enter it. A state of war during the continuance thereof operates to abrogate all prior treaties and contract rights between the belligerents. War creates no "gentleman's agreement," it is war simply with all its dire and terrible consequences.

The canal having been built by the United States for the public (or as trustee for the world) its relation to it is of a dual character. It has a property interest in the canal and appurtenances, and operates a public utility for all law-abiding people of the world. Its duty as owner and as trustee is vigorously to maintain and protect the great improvement both on account of its own money invested and for the benefit of the world's shipping industry.

It would be a terrible disaster to all nations to have this enterprise damaged or destroyed. The right to construct being granted us, the right to maintain and protect is necessarily implied. The right to enter the canal and pass through involves a question of civil contract and the payment of money as tolls. How can warring nations enter into civil business relations with each

other? Can the rules of any treaty or even of international law compel a belligerent to sell war material or commissary stores to its enemy? Such a thing would be altogether absurd. A nation would be guilty of offence against itself, if it passed the opponent's warships through the canal and thus gave comfort and aid to its enemy. Such a proceeding would be wholly impossible. And no treaty could legally provide for such a requirement. A duel is fought on a chosen field, but war is fought wherever destiny appoints. The treaties with England and Panama merely permit "vessels of war of all nations to use the canal." The term vessels of war here could not mean hostile ships really "engaged in war" against the canal.

The treaty provision is (and this we could do without treaty) that our nation may "maintain such military police as may be necessary to protect the canal against lawlessness and disorder." And further: that in time of war the canal shall "enjoy complete immunity from attacks and injury." Here is granted full right to maintain and protect the works and all property. Our nation could be neutral between any other nations engaged in war, but there could be no neutrality between nations at war. Therefore neutrality could only apply to the operating nation when it was at peace; if it was engaged in war the other hostile nation could not be neutral and could not use the canal.

But some may say how could we use the canal if at war? On this clear legal and logical ground; that the use of the canal by us would be for the protection of the sovereignty and perpetuity of the nation, hence the protection and perpetuity of the canal itself.

While we are at peace, neutrality requires us to use all nations alike. We are at peace with them and may freely enter into civil contract to carry their war ves-

sels through the canal. But when we go to war we cannot be neutral to our antagonist, and there is no known way to compel it until international power is asserted to this end. Neutrality means peace, not war!

A battleship of a friendly nation is not to be distinguished from a merchant ship so far as our relations with them extend; but a ship of war, hostile to the canal would be a moving fortification and a danger to the canal, to our nation and to the world's interest. The canal could only be used for a legal purpose, war against the canal would in every way be illegal and criminal. The very law of necessity and the right of self-protection demand the exclusion of all hostile ships.

GEORGE A. TALLEY.

## CHAPTER XVIII.

## NEUTRALIZATION.

The words neutrality and neutralization have become of momentous importance in the Panama canal controversy. Heretofore neutrality, as applied to nations was generally supposed to relate only to a state of war, and meant that a non-combatant should not aid either belligerent nor allow its property to be used for such purpose. For instance: Belgium was made neutral ground between France and Germany. Hostile armies cannot wage war within the territory or waters belonging to a neutral. Neutrality means "attend strictly to your own business and do not intermeddle."

But the Clayton-Bulwer and the Hay-Pauncefote treaties have given an extended meaning to the term neutralization. These apply the word to both peace and war. Many of our ablest diplomats, and those of other countries, construe the word to mean that the users of the canal, individually, should stand on the same footing, no matter what nation or port they hailed from. By using the word neutrality in its full literal sense, and by applying it to both war and peace, there should be little difficulty in finding the meaning, when used in national treaties. It would be thus: All nations are battling for trade, and when they approach a neutral waterway they should find it neutral in fact, not aiding or favoring one above another. Hence neutrality means equality of rights and privileges. When we stop to consider, this has been the common acceptance among English speaking people; for often when persons are engaged in any contest or controversy, a bystander, if

appealed to, will reply: "I have nothing to say; I am neutral."

John M. Clayton, Delaware's renowned statesman and lawyer, and compeer with Daniel Webster; and John Hay, one of the world's most famous diplomats, used the word *neutralization,* both accurately and scientifically.

There can be one neutrality between nations in commercial warfare and another kind when nations are engaged in mortal conflict. The canal must be neutral in both cases. If we, being owner and operator, are engaged in war, ships hostile to us would not be allowed to enter the canal. But the canal being under our jurisdiction and in a sense our property we could pass our warships through, both for the protection of the canal and our nation in general. To the extent of our ownership in the canal, it is a part and parcel of the nation. To protect this part we must protect the whole.

How could the canal be neutral if we were engaged in war? How could our property be neutral when our guns and army were hostile? How could we observe any treaty about canal property when desolating, hysterical war is engaged in pillage, burning, the annihilation of property and the wholesale destruction of human life?

The word *neuter* is Latin in origin; that is, *ne* not and *uter* either; not either, for one side or the other, in any controversy, contest or dispute, whether it be business, commerce, war or otherwise. A neutral will not aid or favor the one or the other; he will accord like treatment to all.

Neutrality is generally inactive. And nationally, is created through neutralization—by the act of neutralizing; it is created by acts or contracts of nations. Lands and territory are neutral and passive—remain

in a quiet state; while a railroad, a canal, or a ship is in action and should be neutral in its activity, if it is by any legal requirement, so restricted and charged.

A canal is constructed for service—is bound to be active, and should be neutral to all ships—to all whom it is under obligation to serve. A public, operated canal should serve all equally in time of peace, whatever may be the rule in time of war.

At last the touchstone has been found, that will give a full definition to the ominous phrase "all nations," and this is the word neutralization.

## CHAPTER XIX

## NATIONAL SOVEREIGNTY.

(The following article is taken in substance from the *Every Evening*, Wilmington, Del.)

It was said by a distinguished lawyer, recently, before the Senate committee investigating toll exemption, that sovereignty was absolute and when vested could not be limited or modified. This raises a very momentous question, both in national and international polity. It would seem to be illogical on its face, for if sovereignty can be held by grant, it can of necessity be acquired by grant, and will be absolute or limited according to the literal terms of the compact.

We must start with the postulate that sovereignty originally was vested in the people—the inhabitants of a territory; and that they either by compact or by acquiescence placed sovereignty in some personal control: that is in an absolute monarch, or in a constitutionally elective body; or it might remain in the people's hands and be exercised directly from time to time as in a pure democracy or complete socialism. Sovereignty simply means rule, government, police power and control. Now if all control is with the people why can they not dispose of sovereignty in their own way? In the beginning of a State, they can; but after the formation, the State must follow the terms and requirements of its constitutional charter.

But a Constitution is only for those who made it—the particular State. It can have no extra-territorial operation except by contract or through conquest.

Hence sovereignty remains in its own jurisdiction unimpaired and paramount until those controlling it, by treaty, consent to abandon all or any part thereof; or until they have been subjugated in battle. The people having the right to purchase sovereignty have the right by contract to sell, restrain or limit it.

The very construction of our government proves our contention to perfect exactness. The states and their people made a compact with the nation that it should have sovereignty in a certain specified field; and in all others the states reserved their sovereignty. Then we have national and state sovereignties, and once upon a time had squatter sovereignty. Under our peculiar system the states rarely exercise all of their powers; there is a sort of conjoint operation of partial and separate government; while the unused sovereignty lies dormant in the people.

All of our vast territory came to us by treaty grant in full sovereignty, unless limited by express conditions and modifications. *Green vs. Biddle,* 8 Wheaton 1. Every nation of necessity has the power to grant (totally or partially) its sovereignty; but this must be done in due legal form. Sometimes it may be under "force and arms," other times by treaty conformable to international law.

By the Clayton-Bulwer treaty, England and America contracted to assume joint sovereignty over the anticipated canal. In some matters we have assumed joint authority under the Bunau-Varilla treaty; and all of the canal authority that we hold, Panama granted to us by treaty, and our rights are measured by the grant in its *entirety.*

While every good citizen or subject should uphold his nation's sovereignty to the full limit, yet it would be folly to set up an imaginary, fictitious, impossible

sovereignty and worship it as a fetich. Sovereignty is just what contracting nations between themselves make it, and if a nation by treaty pares or whittles away its sovereignty it of necessity only retains the remainder. Nine nations assumed jurisdiction over the Suez Canal; and the civilized powers limit the sovereignty of the Sultan of Turkey. England holds suzerainty over Egypt, South Africa, and the great American nation, Canada. Can we liberate the Philippines, without parting with our sovereignty? Who will now hold extreme sovereignty over Ireland?

When we talk about "unchangeable sovereignty," do we think of a power called "the family of nations" and what paramount power it holds? This supreme authority permits a nation to work out its destiny, so long as its actions are not detrimental to the peace and order of the world; otherwise they will control and direct the nation, and "state sovereignty" will give it no protection.

Another eminent lawyer has said that "the presumption is against the state's intention to part with or abridge its jurisdictional or property right." This depends on circumstances. If the state grants a franchise to a subject, the grant will not be extended beyond the clear meaning, because the state being sovereign will decide the doubt in its own favor. But nations do not stand in this relation to each other; they are co-equal sovereigns; and in such case the grant is construed most strongly against the grantor, as held in *Hauenstein* vs. *Lynham,* 100 U. S. Report and *Green* vs. *Biddle,* 8 Wheaton.

One more illustration we shall give to show that sovereignty can be transferred or partitioned. Selkirk was monarch on his lonely island. If John Smith had later been washed ashore, would anyone hold that Sel-

kirk could not have drawn a line across his domain and have given sovereignty over one-half to Smith and have retained for himself the remainder?

GEORGE A. TALLEY.

Linwood, Pa., May 28, 1914.

It may be profitable to extend this discussion and cite authority proving the position assumed. Sovereignty originated under absolute monarchy. The dictum of Louis XIV that, "I am the state" aptly illustrates the old idea of sovereignty. It would have been *lese majeste* then to have asserted that sovereignty was in the people or that it could be limited; in the Dark Ages there could be no partial sovereign. By claiming that sovereignty is indivisable we found our ideas on the dead past of feudalism and absolutism.

Republicanism recognizes that the people rule through representation; that sovereignty is apportioned. When we divide authority we concede that sovereignty may be limited and severed.

Sovereignty of course includes all of the powers and agencies of government and must exist somewhere in the aggregate; but sovereignty does not always imply power internal; it may be largely exerted from without. Originally it may have been local to the state, but part of the sovereignty may by contract or by force be transferred to an outside nation. Full sovereignty is then the sum of all the atoms or units into which it has, by circumstances, been divided. Changing conditions may separate it or re-unite it; it may in theory be full and complete, but, under Divine and under all human authority, sovereignty rests, where? This is the question.

Every one, although a sovereign, renounces a part of his sovereignty when he joins in forming a state; on this theory a nation may be partly sovereign amid the "Family of Nations." It is impossible for a nation to have absolute sovereignty while subject even in part to other authority.

Prior to the drafting of the Constitution sovereignty was vested separately in 13 states; delegates from which drafted and signed a formal constitution. This was by Congress submitted to conventions of the separate states for ratification. It was duly ratified and the people of those states were welded into a nation under the title "The United States." State lines were retained and were essential, for the nation could only be identified by the boundaries of the states.

Extensive sovereignty was vested in the nation and the remainder was retained by the states and the people. It was impossible to confer sovereignty on the nation except by consent of the people and the states. It was through state mechanism that the constitution was ratified; it was by state conventions, perhaps representing their people. The accepted view is that, we have sovereignty in the states and nation, and by construction the ultimate unused power is in the people.

The first eleven amendments are limitations upon national powers. The later amendments appear to be an expansion of national sovereignty. The effect of all amendments is either to modify, increase or diminish sovereignty. To change sovereignty by amendment of the constitution it requires affirmative action of the nation through Congress and the approval of the states. Amendments are then founded on the consent and positive acts of all parties; and thereby sovereignty is either conferred, limited or surrendered. Sovereignty can then be modified and limited by and through na-

tional and state political processes—by the direct affirmative action of both.

The cases of *Chisholm* vs. *Georgia* 2 Dallas *Penhallow* vs. *Doane* 3 Dallas, and *Texas* vs. *White* 7 Wallace comprise a remarkably able treatise on Sovereignty. Sovereignty was nowhere mentioned in the Constitution, but was studiously avoided. In the Chisholm case two of the judges said, that, by consenting to the Constitution, the States *limited* their sovereignty.

Chief Justice Chase, in *Lane* vs. *Oregon* and *Texas* vs. *White* 7 Wallace, said that the people of the United States constitute one government and without the States in union there could be no such political body as the United States.

Since the Creator must exist before the creature, the States antedated the nation. They were separate colonies at the date of the Revolution like Canada and Australia are today. Oppression against one drove all to a common defense, yet each held fast to its own proper sovereignty. Gradually they united for protection and this ended in confederation. By confederating, the States reduced, only to a meagre degree, their sovereignty.

Perhaps one of the most scientific discussions of sovereignty is found in Bluntschli's (German) work on the *Theory of the State,* Oxford edition, 1892. He says: "The state is the embodiment and personification of the national power. This power, considered in its highest dignity and greatest force is called sovereignty." Lexicographers state that the word "sovereignty" is of French origin, and means: the exercise of extreme power; dominion. The theory of sovereign power was developed under French feudalism and monarchy. It

was the *ne plus ultra* in government; the monarch held ultimate authority. This was the continental idea up to the 17th century; but the pendulum swung back, and representative government now gives no recognition to the idea that all power is vested in one single official. Distribution of power is now the *desideratum.*

Bluntschli clearly recognizes that at this stage of the world's civilization, a state is not a law unto itself; but is affected with international restraint; and subject to this, it is controlled by its own citizens through its contitutional charter. The state can no more, than the citizen, escape restraint and subjection. There is no universal system of government, ruling nations under all conditions and circumstances. Every free state adopt its system and puts it into operation, until outside superior power interferes and restrains. War often determines the sovereign rule of a state.

Senator Spooner in his masterly speech in the Senate in 1904 on the ratification of the Panama treaty, showed by copious citations from text writers, that one nation could hold a *servitude* in lands of another. This is unquestionable; but will not burdensome servitudes so held really operate as a limitation of sovereignty? How can a nation hold complete sovereignty if another holds a right of way or other encumbering servitudes over its territory? Under such conditions the *servient* state cannot be full master over its own lands and people. No one can be free while under the bonds of servitude!

If the sovereignty of a state is in the people, the question arises, who are the people? Not the citizenship, in mass, nor yet a majority. It has most forcibly been said, that when the people take sovereignty into their own hands revolution or anarchy must follow. Masses act from impulse; there is no deliberation, cool

discussion nor any application of the wholesome principle of the "check and balance." Where everybody seeks to rule, nobody can govern!

Sovereignty is a dangerous instrument when impulsively exercised either by a monarch or on the other hand by the whole body of the people, each one claiming a share of sovereign power. The safest form of government is where the ruling power is neither in one head nor in a combination of all citizens, but distributed among representative officials under constitutional regulation.

Some scientists assume sovereignty to be in the mass of the people; others in the state officials; others in one ruling head—the king or emperor. In the United States ultimate sovereignty is in the people, not singly, but as a body, with a portion of it delegated under our constitutional system to the states and the nation.

Sovereignty represents the whole power of the nation, and why can it not restrict, restrain or even abandon its power? Why may it not decline or refuse to exercise its full power? Or why may it not by compact or treaty place itself partially or wholly under the protection of another state?

Why may not a state accept additional territory, subject to any reasonable conditions or limitations of government or authority over it, which is reserved or specified in the compact or grant? No nation is above all law, contract or moral obligation. It would be a powerful nation that could ignore and defy the whole family of nations.

Even Bluntschli declares that: "If a state were responsible for the exercise of its sovereignty to another nation, its sovereignty would thereby be limited." This is the sum and substance of the whole contention, "in

a nut-shell." It is axiomatic and needs no demonstration.

The American people have lived so long under a divided and complex sovereignty that they have become experts in the doctrine of division and limitation of sovereignty. Under our system the jurisdiction, respectively, of the states and nation determine the sovereignty of each. They each have a limited jurisdiction, hence limited sovereignty. The jurisdiction being subject to change by constitutional amendment, sovereignty is not stable, but always subject to enlargement or to contraction according to existing constitutional conditions.

Works on international law show that nations limit their sovereignty by sending and receiving ambassadors and ministers plenipotentiary; by permitting armed ships of foreign nations in domestic waters; by giving permission to foreign armies to cross their territory; by accepting protection or suzerainty from another nation; by permitting outside nations to dictate matters of internal policy; and by treaties of alliance. In fact any joint undertaking between states, which is founded on binding compact would be a limitation on sovereignty, and, no doubt, the same result follows from permitting foreign nations to buy and hold buildings for ambassadorial purposes in another state or nation.

Our national Supreme Court has recognized this doctrine in numerous cases. In Schooner Exchange v. McFadden 8 Cranch, Chief Justice Marshall gives a most interesting and instructive discussion of the rights of foreign ministers, ships of war, and the passage of foreign armies in domestic territory; and how these may affect sovereignty.

In McCulloch v. Maryland 4 Wheaton, Marshall says: "That the sovereignty of the state extends to

everything which exists by its own authority or is introduced by its permission." He seems to limit *sovereignty* to the exact *power* of the state. He holds that a state can tax only what is in its *power* and cannot tax things within the power of the nation.

Again he holds that the creation of a corporation appertains to sovereignty, and asks: "But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America the powers of sovereignty are *divided* between the government of the Union and those of the states. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." This *McCulloch* case is one of the famous cases of American history; it has always been accepted as a great landmark in juridical matters and has never been disputed. Can sovereignty be *divided* when the great Marshall says that it *was divided* by the American Constitution?

When Kentucky parted from Virginia and became a separate state, there was a compact between them, by which certain lands held under Virginia grants were still to be governed by Virginia law, notwithstanding, their location in Kentucky. The latter sought to disregard the compact on the ground that as the lands were within Kentucky's sovereignty, this must be paramount and absolute, and must govern and control the title. The Federal Court in *Green v. Biddle*, 8 Wheaton, held that Kentucky's sovereignty was expressly limited by the compact of separation and that it took, precisely, what was granted by the parent state, Virginia; that it took a limited sovereignty.

By closely reading the testimony given before the Senate Committee of 1914, considering toll exemption, it drops out, that the doctrine of the absolutism of sov-

ereignty was based on the theory of John Austin, the writer on government, during the first quarter of the 19th century. Austin assumed the theory of sovereignty, that the King in Parliament had all power, and which was of Divine origin—that this power was in no way limited or circumscribed. It was the same absolute power claimed by Louis XIV and by George III, put into different form and reasserted. Austin should have recognized, that England lost America, through the asserted absolutism of the King over the colonies across the sea.

Herbert Spencer says that Austin was brought up to military life, and applied the dictatorial rules of the army to civil government. Every one should recognize, that military rule is founded largely on necessity, while civil government should be based on contract and some kind of constitutional theory.

The English people are so imbued with the idea that parliament has absolute sovereignty, that they have become really sensitive on the question. Yet no nation has more colonies operating under systems, more or less, freed from the sovereignty of King and Parliament, than has England. The Austin theory was academic and not in accord with English practice.

Nothing can be clearer than this: If England confers on a Dublin parliament, power over Ireland, which has been heretofore vested in the London parliament, to that extent, the latter has parted with the sovereignty which will be exercised by the former. It is mathematically true, that, what London gives away to Dublin, she will cease to hold and own. Two different parliaments, acting in the same realm, cannot both be supreme. Each may be sovereign as to its own legal powers, but both cannot be sovereign as to the same right and power.

Herbert Spencer's theory is a modification of the extreme doctrine of Austin. The Spencer view is in entire harmony with our Supreme Court, as laid down by McLean, J. in *License Cases* 5 Howard. It reads: "The powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties."

Absolute sovereignty claimed by some of our states, brought on the Civil War; and it was decided by *wager of battle,* that state sovereignty had in 1787, been limited by the national constitution. It is futile to attempt to argue away the correctness of an axiom.

If a nation could exist at the North Pole, or other inaccessible region, it would have the fullest and most complete sovereignty; there would be no others to molest or control it.

As individuals, in society, lose part of their liberty, so do nations through association limit their sovereignty. A state's sovereignty is measured by its powers, its jurisdiction, and it true *legal rights.*

## CHAPTER XX

## EXEMPTION AND POLITICAL PLATFORMS.

Since toll exemption had its origin in the intense feeling against railroads, and in the desire to aid shipping and the ship building industry, it became a most fertile field for political crops.

The exemption bill was appoved August 24, 1912, and the presidential election was not held until the November following. The National Conventions were held that year, one in June, one in July and the other in August. What would a National Convention be without its long drawn charges (against all supposed political offenses and offenders) and called the platform?

The Republican Convention adopted a platform on June the 22nd, but for some inscrutable reason escaped the catastrophe by making no declaration about toll exemption. Senator Root was chairman and his wisdom may have directed the course, or perhaps this *political* issue as a platform plank had not yet been created.

The Democratic Convention at Baltimore created the invention, which fate compelled its votaries in Congress in 1914 utterly to abandon and destroy. The party received its reward for inserting an extraneous, impolitic plank into the platform. The exemption plank adopted, July 2, 1912, read as follows:

"We favor the exemption from tolls of American ships engaged in coastwise trade passing through the Panama Canal. We also

favor legislation forbidding the use of the Panama Canal by ships owned or controlled by railroad carriers engaged in transportation competitive with the canal."

The Progressive Party at Chicago, August 7, 1912, discussed the toll question in this extended manner:

The Panama Canal, built and paid for by the American people must be used primarily for their benefit. We demand that the canal shall be so operated as to break the transportation monopoly now held and misused by the transcontinental railroads by maintaining sea competition with them; that ships directly or indirectly owned or controlled by American railroad corporations shall not be permitted to use the canal, and that American ships engaged in coastwise trade shall pay no tolls.

These planks were adopted one in July the other in August, and were intended to control the officials elected in November, 1912, and installed in office still later. The exemption bill passed the House May 23, 1912, by an overwhelming majority. On June 11, 1912, the Senate committee reported the House bill with the toll exemption provision, and certain amendments. This bill was most thoroughly discussed and was passed with amendments by the Senate on Aug. 9, 1912, by a vote of 3 to 1. How utterly futile to bring this toll exemption matter into the platforms of 1912!

Under the canal treaties this was a non-partisan, an international question, and not a matter for political exploitation. In America, through custom almost everything is gathered into a National platform, and particularly, personal, local, national, and most unfortunately international concerns. So it was thought in 1912, that a platform would be weak and defective indeed without a toll exemption plank, although it was evident that the law must pass Congress within the space of a few days at most.

As no political party could expect to carry forward

an important national election without more than a score of issues, what difference did it make in 1912, so that there were an abundance of issues, whether they were live or extinct issues? It did make a difference in 1914, to the party who invented the toll plank in 1912, for many in Congress voted to sustain the platform pledge, while many others cast the platform to the winds, and voted to repeal the exemption law which an impolitic platform had supported.

The mystery is, how any could be held by the binding pledge of the platform, when it was throughout the country declared, that a treaty would be revoked and held of no force, through "a change of circumstances" after the signing thereof. Why did not our Congressmen apply the treaty doctrine to the platform, and at once free themselves from the entanglements, by claiming that they were absolved through the "change of circumstances" since the national conventions? But some will loyally follow a platform because of a supposed pledge.

A political platform is neither "law nor gospel," far from it; it is made for the occasion and might be out of date the day after it was declared. Suppose a platform declared for peace with any named nation, and we were attacked immediately, by this same nation; of what binding force, this platform, in such an emergency? Suppose a platform declared for free trade and before the sitting of Congress, universal bankruptcy should fall upon the country and a tariff law would be the only salvation; should we adhere to the platform or disregard it to save the country?

This question must always be met and solved: When should a party platform be thrown aside and when observed? Political expediency makes the platform, but circumstances must absolutely determine

when it may be cast aside as unbinding and impracticable. While honor requires the observance of preelection pledges, still what shall be done when these conflict with the obligations of office?

To avoid the dilemma, platform pledges should be few and far between. Which should prevail, duty to a faction, or duty to the state?

## CHAPTER XXI.

## A BRITISH STATEMENT.

In a former chapter we stated that it was impossible to think that any citizen had taken a course in the repeal of toll exemption in favor of England in preference to his own country.

On June 29, 1914, a statement was made by Sir Edward Grey in the House of Commons which has an important bearing on this subject. It was but justice to Americans that the statement was made and given such world-wide publicity. We print the following from the news columns of the *Philadelphia Public Ledger* of June 30, 1914, by express permission:

London, June 29.—The repeal of the act exempting coastwise shipping from payment of tolls for passage through the Panama Canal was the subject of a portion of a speech by Sir Edward Grey, the British Foreign Secretary, in the House of Commons today. Sir Edward was replying after a general debate on the appropriations for the Foreign Office, and he paid high compliments to President Wilson and the motives underlying his action.

The Foreign Secretary remarked that while a settlement had been reached it had not been entirely free from misrepresentation which might have in it the seed of future mischief. He added:

"It is due to the President of the United States and to ourselves that I should, so far as possible, clear away that misrepresentation. It was stated in some quarters that the settlement was the result of bargaining or diplomatic pressure. Since President Wilson came into office no correspondence has passed, and it ought to be realized in the United States that any line President Wilson has taken was not because it was our line, but his own.

"President Wilson's attitude was not the result of any diplomatic communication since he has come into power, and it must have been the result of papers already published to all the world.

"It has not been done to please us or in the interests of good relations, but I believe from a much greater motive—the feeling that a Government which is to use its influence among the nations to make relations better must never when the occasion arises flinch or quail from interpreting treaty rights in a strictly fair spirit."

Without doubt many Americans were opposed to the exemption of any ships that accepted the services of the canal, and when England objected to the act of 1912, they gave a thorough investigation to the subject and were convinced that exemption was economically and politically wrong; hence the strong contest to have the act repealed.

The English people made their own arguments, while the Americans, likewise, made their arguments at home among themselves. There was no concert of action with any foreign nation, and if any arguments were in harmony with outside arguments it was merely incidental, from the facts and circumstances surrounding the controversy. The opponents of the repeal should have been content with an attack against the *arguments*, and their overthrow if possible.

Since our system of government has cast upon the citizens a large part of the political and governmental power, they, in any national controversy, take part in the discussion, as they are expresssly authorized by the terms of the constitution.

The canal arguments, internationally, took place between the diplomatic officials of the two nations. The home discussion was a family—a domestic affair. The repeal of the exemption act belonged wholly to Congress and the American people.

It seems strange that some disputants could clearly see that "the canal was built with American money, and the land was bought with American money," yet were unwilling to allow some of those whose property would be charged with a part of this debt, to determine by what economic system this most expensive enterprise should be operated.

The American people have the right to establish, in the first place, the rates for the use of the canal.

They have a right to be heard, by any legitimate course of reasoning, on the question of rates or the exemption from tolls. The ultimate decision, as to whether there can be discrimination in rates would be regulated by a construction of the treaties. But the legal rights under the treaties are so interwoven with the economic question of rates, that it would be impossible to determine the economic problem without reference to all phases of the controversy. They are all necessarily brought into the debate, and are a necessary part thereof.

Toll exemption has already been made a matter of partisan politics and may again be brought forward as platform material and become a live subject for political exposition around the hustings. And when discussion begins, whether before Congress or in a political canvass, there is no place for debate to end, until the whole field has been explored and investigated. This must be the rule in all nations where the power is vested in the voting multitude.

Let us go back in our reverie to Monticello, and rehearse the words of the immortal Jefferson, written to President Monroe October 23, 1823. Speaking of what is since known as the "Monroe doctrine," he said: "One nation, most of all, could disturb us in this pursuit; she now offers to lead, aid and accompany us in it." He discloses this to be Great Britain, and continuing, says: "With her, then, we should most sedulously cherish a cordial friendship, and nothing could tend more to knit our affections than to be fighting once more side by side in the same cause."

Could it be, truthfully said, that on account of the above sentiment, that Jefferson was in any way allied with England against his own country?

Such a conception would be incredible and wholly impossible!

## CHAPTER XXII.

### REASONS FOR BUILDING THE CANAL.

Many statesmen claim that we built the canal, solely, for our own people and such incidental use as we choose to accord to other nations; that we have all control, full ownership, absolute sovereignty; and we need ask nothing from any other power as to our canal policy.

We presume that our motives in building the canal were:

1. For honor and glory.
2. A determination, that no foreign nation should have prime control, and that we might secure ourselves from being discriminated against by any other operator.
3. To afford our traffic, both domestic and foreign, a short route from ocean to ocean, without a distant trip around Cape Horn.
4. For the profits that might in the course of time come from the operation of such a utility.
5. To move our warships, quickly, from coast to coast, in time of necessity or war.
6. For the often repeated benevolent purpose of benefiting civilization and the advancement of the whole world.

If there were other reasons we are not able to conjecture them. In the beginning, nothing was ever suggested about what the tolls should be or that any ships should be exempt, except in the Panama treaty certain free tolls were given as a part of the purchase money; and might be considered as tolls paid in advance.

The momentous problems were: Where to build,

how to build, and how to secure the lands? And finally is it possible to build and operate a canal? The French had failed; can we succeed?

Now, if one of the prime reasons was to furnish a short cut for our ships, from ocean to ocean, is it not enough to furnish the "short cut" without making it a clear donation?

If it were only the original cost of the canal, for which we are obligated, there might be a plea asking for favors in the nature of a subsidy. But we are only at the beginning of the expense of the canal. Operating expenses will be enormous, and new plans will ever be brought to the forefront for adoption and installation. No one can approximate what changes are in the immediate future. No one has a right to expect that all the nation's future finances can be expended in Panama, and that any ships of traffic can be allowed to navigate the canal without cost or tolls. We are now only at the threshold; the end is a very long way in the distance, with unconjectured millions of expenditure to be placed on top of the $400,000,000.

It is too soon for generosity; it will be better policy to see what the balance sheet will show. There is a national economic question to be solved of far greater moment than the international treaty questions. If we do not receive income from our own ships, then we are dependent wholly on foreign customers for funds to recoup our annual outlay. Can we expect their patronage, by notifying them, that we built the canal, and own it, and will do as we please with it?

Necessity might still drive some foreign ships to use the canal, almost against their desire; but is it not far better to court their good will and patronage, precisely as would every successful man of business?

The whole trouble with a nation operating a public

utility is, that it is liable to be affected with politics the same as toll exemption has affected the Panama Canal. Politics, at least in America, is not based on economy, but on what is best in a political sense; what is the self-interest or the vagaries of any class of voters.

If a private corporation owned the canal, there would not be even a suggestion of toll exemption. Even in the post-office department all users pay the same rate, except officials who have the franking privilege, as a part of their salary.

Since all questions connected with the finances of the canal are yet an unsolved problem, let those who believe in "ship subsidy," if they have the political power, enact a law making the donation a definite sum, and pay the same out of a specific, known and ascertained fund.

Let us for a moment follow the theory, that America built the canal for herself:

Then England signed the Hay-Pauncefote treaty with this end in view, and Panama went to revolution and to the edge of war to give America a canal for Americans. We are not sure that foreign nations, more than ourselves, are so overflowing with benevolence and altruism.

## CHAPTER XXIII.

### MECHANISM—OPERATION—FINANCE.

For the sake of variety we may take a little relaxation from the discussion of the heavy problems of treaty construction, neutralization, national sovereignty, and consider in a chapter, some of the physical and economic questions connected with the canal.

When the French people began the building of the Panama Canal they had in mind a channel at sea-level—an open strait like the Suez Canal. After years of work they foresaw the difficulties and changed the plan to one with locks.

When the Americans began work they "made the dirt fly" but with no definite type of canal in view; they simply began to cut down the mountain and make a channel for *a canal.*

The contest went on between the advocates of the two kinds of canal until 1906, when the President sent a message to Congress in favor of a lock canal. It was debated in Congress thoroughly, and an act was passed providing for locks, which was approved June 29, 1906.

It has been stated that Engineer Wallace favored the open canal, while Mr. Stevens and Colonel Goethals believed in the lock system.

There has been a most visionary idea among acting engineers as to what a sea-level canal would have cost. The first French estimate was $140,000,000. In 1906 the American estimate was $247,000,000. Later the amount had so increased, through the Culebra difficulties, that in 1909 it was supposed that the cost might run to $560,000,000. As the

digging continued and the difficulties developed, some estimated that this type of canal might cost a billion dollars; and yet it is a question whether a sea-level canal be at all possible. Engineering skill is unable, at this day, to foretell what might happen in the Culebra Cut, if an attempt were made to dredge a free, open channel from ocean to ocean.

The French Company had prognostications of the *slides* at Culebra while their work was in progress. The distance through the mountain is nine miles, and no one can know where and when a *slide* may happen and the exact area which may be so involved. It has been stated that one slide which has taken place may cover an area of 75 acres.

As the bottom of the channel at Culebra is now about 45 feet above sea-level, it will require the deepening of the channel (for these nine miles) to the additional depth of 85 feet, to afford passage for large ships from ocean to ocean, without locks; and the additional depth of nearly 45 feet from Gatun dam to the foot of the mountain. It is impossible now to know, whether this great depth through the mountain could be excavated with safety or not. The flood-waters of the Chagres would also have to be carried off by a separate outlet.

By experience, the present plan is a success, so long as the Gatun dam and locks serve their intended purpose. The sea-level plan is in the realm of doubt and uncertainty. In the distant ages, if funds are abundant, the top of the mountain on both sides of the canal might be removed and the needed depth in the channel be secured.

With the large amount already invested and almost all depending on foreign patronage, is the American nation willing to double or treble the present investment? This problem belongs to the future, and to the

favorable turn of the wheel of fortune. The nation has gained one of its main purposes; it can at least, by the present plan, take its warships through from one ocean to the other in any emergency.

### THE DAMS.

One of the most important features of the present plan is the Gatun dam, and the immense lake behind it. This body of water is said to cover an area of 164 square miles. We should remember that the canal runs substantially a north and south direction; the isthmus at this point extending from east to west rather than from north to south; hence the Spaniards called the Pacific the "South Sea."

With these points of the compass in view, the Gatun lake extends very largely to the west of the canal and far up into the mountains; the extreme width being 20 miles, The lake then must extend almost 10 miles beyond the canal zone. The length of the lake from Gatun to the foot of the mountain is about 23 miles; at this last point the lake is but 500 feet wide, simply the width of the canal. The average width for 16 miles from Gatun is 1,000 feet, so vessels for this distance will be steaming through a wide channel with full navigation facilities.

The dam at the south end of Culebra, at Pedro Miguel, is only such as is required to stop the spilling of the canal water into the Pacific. Here one set of locks is placed. At the further distance, to the south, of one and one-half miles is the Miraflores dam and two sets of locks. This dam creates a lake one and one-half miles long, and mostly supplied with water from the small river Cocoli and the Rio Grande, and this operates the two sets of locks at Miraflores.

The Gatun dam was the one uncertain engineering

feat of the enterprise. Some very able engineers doubted whether the substratum would support the dam, with 85 feet depth of water behind it; for bed-rock was 200 feet below the surface. Fortunately a high hill was located near the center of the line of the dam. The dam extends from high land on one side of the Chagres river to high lands on the opposite side, being of a total length of 7500 feet; this central hill becoming a part of the dam. The artificial barrier is at the base, almost one-half a mile wide; and is 105 feet high, above sea-level, extending about 20 feet above the water-level; is 100 feet wide at the top, and from 388 to 400 feet wide at the water-level, according to height of the water.

The spill-way was placed not in the artificial part of the dam, but was cut through the central hill. The floor of the spill-way is 10 feet above sea-level and 285 feet wide. There is a concrete dam across the spill-way 69 feet high; on top of this is a system of iron gates to be opened to let off the surplus water. When the water in the lake is at normal height, it is claimed that the spill-way is capable of discharging 140,000 cubic feet of water in a second. This water is not to be lost, for it will operate a power plant to furnish electrical power for canal uses. The spill-way at Miraflores will be operated in a similar manner.

### THE CANAL.

The canal begins in the Atlantic near Colon, in Limon Bay and extends at sea-level 7 miles to Gatun locks; and for this distance is 41 feet deep and 500 feet wide. It then, from the locks, extends southward through Gatun lake 23 miles to the foot of the mountain; then 9 miles through Culebra Cut to Pedro Miguel; through this cut, the bottom width is 300 feet. It

then passes on through Miraflores Lake, 1½ miles, to the last two sets of locks. Here the sea-level canal begins and extends 8 miles (500 feet wide) into the Pacific. The canal is thus about 50 miles long, from end to end. A large part of the material for the erection of the Gatun dam was taken from the Culebra Cut.

### CONSTRUCTION AND COST.

The total excavations for the canal and auxiliary works amount to the grand total of 260,370,028 cubic yards of earth and rock. Included in this is about 30,000,000 cubic yards dug by the French, useful to the Americans, because the same was dug in the line of the present canal. There were dug by the French Company about 48,000,000 cubic yards, which were of no use to us because they were not within the canal boundaries.

The cost of the canal, to date, will aggregate the vast sum of $400,000,000. In this is included $50,000,000, purchase money, to the French Company and to Panama, for the unfinished canal and the right of way.

It has taken an army of men to carry forward this work; in 1914 there were employed on the canal 23,113 men; and on the railroad and canal combined the total of 26,277 men. Americans were mostly paid in gold, and the foreigners were paid in Panama silver, from choice.

The French work, in the "cut" was much narrower than the American channel, and at the crest was dug to a depth of 161 feet; as the extreme height of the mountain, above sea-level, was 400 to 500 feet, the Americans had to excavate on an average of 100 feet below the work of the French Company; and on the widened strips they were required to cut down from

the top of the ridge the full depth of the virgin soil. These figures can only give the approximate depth of the cut at Culebra, because the mountain for the whole 9 miles is not of uniform height.

The bends at Culebra almost equal the number of miles in length in the cut; at these curves it was required that the channel be widened to keep large ships from striking the shore while rounding the curves. The time required for a vessel to pass through the canal will be from 10 to 12 hours. Navigation, for safety, will be mostly in the daytime; but if necessity requires night transit, the canal from Gatun to the Culebra Cut has been furnished with lighthouses. It might be taking too much risk to pass through the locks and Culebra after dark, at least, by ships of large dimensions.

## THE LOCKS.

There are three sets of twin locks at Gatun, one set at Pedro Miguel, and two sets at Miraflores; that is 12 locks in all. The height of each lock is practically one-third of the lift from sea-level to lake-level, or one-third of 85 feet. There are two locks on each level, so as to give transit to a vessel going up and one going down at the same time; also to give passage in case one lock should become disabled.

These locks are made 110 feet wide and 1,000 feet long to accommodate the largest known ships. They are fitted also with shut-off appliances or safety gates, to be used to stop the flow in case of accident to the regular lock gates.

The locks are filled through large tunnels built in the lock-sides, with laterals opening underneath the lock-floors. And the vessels will be towed through the

locks by a specially adapted canal engine so as to avoid any damage to the locks by the passing ship.

A ship in passing up the canal is towed into the first lock at sea-level; the water is turned into the lock and in fifteen minutes the ship is raised 28½ feet to the second lock; here the process is repeated and the ship rises to the third lock; then it is raised in this lock 28½ feet to the level of the lake; it then steams into the lake, being just one and one-half hours going through the three locks. It passes on to the south locks and goes through them in one hour and a half. It then takes three hours for passage through all the six locks; this will leave from 7 to 9 hours to pass through the other parts of the canal, about 47 to 48 miles, or about 7 miles an hour. This of course is on the theory that everything works out without mishap and according to rule.

The lock walls are of concrete; the outside walls at Gatun are 50 feet thick, the center 60 feet thick. The side walls are, by plan, so reduced as to be 8 feet wide on top. The total bottom width of the twin locks is about 380 feet. The three sets of locks at Gatun make a concrete mass nearly 80 feet high, 380 feet wide and 3,000 feet long, less the lock spaces, tunnels, &c.

The canal is far from being a straight line across the isthmus; it makes many angles and yet does not coincide with the bed of the Chagres river. It is stated that the river crosses the canal many times between Gatun and where the Chagres enters the canal zone. It is evident that the canal does not entirely follow the line of the river.

The *slides* are more numerous than the most of us have been advised. Even where the sides are of rock, *slides* may happen; the Panama rock is brittle and

when dry is easily fractured, and has little more sustaining power than clay. Both sides of the "cut" are subject to slides, and science cannot determine in advance where or when they may occur. It is a natural phenomenon, and beyond the ken of science.

They are without doubt caused by some peculiar weight pressure, and the remedy should come through the removal of the load.

Note:—A late book on the canal is by Bakenhus, Knapp and Johnson, 1915. Mr. Bakenhus writes upon the engineering features of the canal. From this it appears that Gatun Spillway is cut through the central hill and has a rock bottom. On this is built the concrete dam, arc-shaped, with the convex side towards the lake. The crest is 69 feet above sea-level, on this are 14 iron gates, 19 feet high, each about 45 feet wide. The gates will hold the water in the lake to the height of 88 feet above sea-level.

The length of the canal is given from shore to shore as 41.5 miles, and from deep water in Limon Bay to deep water in Panama Bay the length is 50.4 miles. Government engineers with access to the records speak with correctness; we may rely on their statements.

## CHAPTER XXIV.

## CONGRESSIONAL ORATORY.

The question of the construction of the two treaties, respecting the Panama Canal, were in some phases before Congress for discussion at divers times in 1912, 1913 and in 1914 up to the date of the passage of the act repealing toll exemption.

The arguments made, in favor of exemption, during 1912 and 1913 were largely collected by Joseph R. Knowland of California and printed as a public document under the title "Symposium of views protesting against a surrender of American rights" in the tolls controversy; and which comprises 134 pages. This was the fortified position, behind which, the toll-exemption advocates sought to find protection. The arguments in the "Symposium" were perhaps the popular view in our country in 1912-13.

In 1914 another vista was opened up to our vision. Legal reasoning began to assert itself and many believed that toll exemption had been inconsiderately written into the "canal law." The repeal act was in 1914 brought before Congress with a purpose to determine the very right of the matter—morally, legally, nationally and internationally.

The adverse argument in the House was wholly ineffective against the vast majority of the votes ready to be cast in favor of the repeal of the exemption law. But in the Senate the closeness of the vote gave a great impetus to the arguments for and against the repeal act. Able arguments were made in the Senate by Root, McCumber, Lodge, Cummins, Poindexter, O'Gorman,

Lewis, Borah, Works, Martine, Bristow and many others. Party politics was almost entirely neutralized and rendered inert; it lost most of its cohesive power.

A remarkable feature connected with the Senate proceedings was, that the leader on each side of the controversy came from the State of New York; that Mr. Root, a Republican, was vigorously supporting the repeal of toll exemption; and that Mr. O'Gorman, a Democrat, was energetically opposing the measure. Here is the most convincing proof that the tolls question was not a matter of partisanship and should not have been made such. It was a question deeper and more vital than that; it had reference to world matters and could not be entirely local or domestic. It was wisely decided, disregarding party expediency, and there it rests to-day, as a most correct declaration of national policy.

The speeches made by these two leaders were exhaustive, and comprehended all that was possible to be said on the respective sides of the question. They were serious, thoughtful, and no doubt founded on conviction. But as there was a controversy, out of necessity, both could not be on the *winning side.*

These speeches were printed by the government as Public Documents, and we print below, extracts from each.

SPEECH OF HON. JAMES A. O'GORMAN.

Mr. O'GORMAN. A bill is now pending before us to repeal the coastwise exemption, but the advocates of the bill do not seem to be in accord as to the reasons why Congress should reverse itself. Some of those who support the repeal are opposed to the exemption on economic grounds; others recognize its economic advantages but believe that the Panama Canal act violates

the Hay-Pauncefote treaty. Others approve the existing law, and while insisting that it does not contravene the provisions of the Hay-Pauncefote treaty, nevertheless favor the repeal because the Executive has requested that this action be taken.

The question is an important one and its wise solution will tax the intelligence and patriotism, perhaps the courage and independence, of every Senator. Our action on the pending measure may mark an epoch in the history of the Republic; its influence may be felt by our posterity. Whether we shall deserve their censure or gratitude will depend upon the manner in which we shall meet the responsibility which now confronts us. If we perform our duty as become Senators of the United States and vote according to our judgment and convictions, I believe that no Senator now or hereafter will have to reproach himself with having abandoned his country when her honor and security called for his defense.

The bill comes from the committee without recommendation, a motion to report it favorably having been defeated by a vote of 5 to 9.

Mr. President, I intend to consider briefly the legal, economic, and political aspects of this question. In my judgment, the British claim has neither law nor justice to sustain it. I hope to be able to establish: First, that the exemption of the coastwise vessels constitutes a wise, economic policy, and is not affected by the Hay-Pauncefote treaty; second, that if coastwise vessels fall within the terms of the treaty, the exemption does not constitute a violation thereof; third, that the canal has been constructed on territory over which the United States exercises the power of sovereignty, while the canal contemplated by the treaty was to be built on alien

soil and, therefore, the Hay-Pauncefote treaty is wholly inapplicable.

I shall not at this time attempt to trace the history of the numerous efforts made from time to time during the past century to construct an interoceanic canal. It will be remembered that in 1903 the Republic of Panama ceded to the United States in perpetuity a tract of territory 10 miles wide extending for 40 miles from the Atlantic to the Pacific Ocean. The Supreme Court of the United States, in Wilson against Shaw (204 U. S., 33), decided that the sovereignty of the United States over this tract, known as the Canal Zone, is the same as over any other part of the United States, and that was the specific concession made by the British Government in its second note of protest. It is part of our country. It is territory of the United States and constitutes part of our coast line. Unaided and alone, the United States built the canal through this zone and thus connected the two oceans. In the prosecution of this vast undertaking the United States has expended over $400,000,000. Its construction by American enterprise on American soil at the expense of the American people is the greatest engineering achievement of this or any other age. Unselfishly we offer its advantages to all the nations of the world. It is estimated that it will cost the United States not less than $5,000,000 annually for the maintenance and operation of the canal, and upward of $10,000,000 annually for its military defense, which, together with $12,000,000 annual interest upon the original investment, will make an annual charge of $27,000,000.

In our legislation two years ago Congress provided that the tolls should not exceed $1.25 per ton, with lower rates for ships in ballast, and it has been estimated that for some years 10,000,000 tons will annually pass

through the canal at an average of $1 a ton, or $10,000,000 annually. The canal will not, therefore, be self-sustaining, and the United States, the owner of the canal, will for a long period be required to suffer an annual loss of upward of $17,000,000, which will be borne alone by the taxpayers of this country. In limiting the toll rate at $1.25 per ton, and in fixing the specific rate at $1.20 under the presidential proclamation, pursuant to the statute, Congress was required to meet the competition of the Suez Canal, now controlled by Great Britain, the toll rates for that canal at the present time being $1.20 per ton. It was not possible, therefore, to fix a toll rate on a basis of securing a reasonable return upon the cost of construction and maintenance.

In the legislation referred to Congress did not discriminate between American and foreign vessels engaged in over-seas trade. American vessels engaged in foreign trade are required to pay the same tolls that are paid by foreign vessels. Congress, however, did provide that American coastwise vessels shall be exempt from the payment of tolls.

The right to make this exemption has been challenged by the British Government, and the claim has been made that the exemption constitutes a violation of the Hay-Pauncefote treaty. There will be a subsequent reference to the details of this treaty. For the present it is sufficient to state that it is urged on behalf of Great Britain that under its terms vessels of all nations, including American "vessels of commerce and of war," are to be treated alike with respect to toll charges.

* * *

The canal referred to in the first Hay-Pauncefote treaty was the same canal described in the Clayton-Bulwer treaty, namely, a canal to be constructed at Nicaragua.

Senators, this is important in reference to the plea which we have heard so frequently that Great Britain gave up some valuable right. She never had a right in Panama until it was conferred upon her by the second Hay-Pauncefote treaty. The restraint exercised by Great Britain was enlarged in the second Hay-Pauncefote treaty by extending the treaty to any canal "by whatever route may be considered expedient." This modification was made so as to embrace Panama, and the concession cannot be defended as a wise one, inasmuch as the right of the United States to construct a canal at that point without the consent of Great Britain was not affected by the Clayton-Bulwer treaty. This diplomatic blunder can be explained only upon the theory that our negotiators did not know that Panama was not part of Central America in 1850, although the records of the State Department would have disclosed that fact, and the same information might have been ascertained in any encyclopedia.

The new treaty contains a further provision found in article 4 that the general principle of neutralization or the obligation of the contracting parties shall not be affected by any change of territorial sovereignty of the country traversed by the canal. The meaning of this provision is that the rights of the parties shall not be affected by a change in the sovereignty which may occur after the canal is constructed. It can have no application to a condition such as prevails here where the canal was constructed on territory of the United States, even though acquired after the execution of the treaty. If sovereignty had been acquired by the United States after the construction of the canal then this provision would be applicable.

Subdivision 1 of article 3 is the provision of the treaty which is the basis of the controversy and under

which the supporters of the British contention claim that the expression "all nations observing these rules" embraces the United States, overlooking the obvious distinction between the nation that makes, establishes and promulgates the rule and the nations that observe the rule.

In other words, it is said that Great Britain and other nations have the same rights to the use of the canal that the United States has. If that be so, what compensation does the United States derive from the investment of $400,000,000 and for the $17,000,000 annual deficit in the operation of the canal? The United States must have some rights not enjoyed by other nations, because it is declared that the United States shall have all the rights incident to the construction as well as the exclusive right of regulation and management. What can these rights be if they are not rights of ownership and control, subject only to the permission of other nations to make use of the canal on such terms as the United States may impose?

What discrimination is there among the nations so using the canal by permission of the United States if all are treated alike? If you accept the British view, what are the rights we possess incident to the construction?

What is our status? Do we own the canal, or are we only an international caretaker, with no special privilege except to foot the bills and to maintain a sufficient military force to defend the canal and preserve its neutrality? Did we engage in this great undertaking primarily for the United States, and incidentally for the rest of the world, or primarily for the world, without any particular advantage to the United States? Is our only reward the glory of the achievement? In all the history of recorded time did any nation ever act so improvidently as we have acted, according to the

views of the British advocates? If we entered into a contract such as is claimed by Great Britain, where were the men whose duty it was to protect the rights of the American people? * * *

There are six rules, and, as I have said, if one applies to the United States all apply. Again the language: "So that there shall be no discrimination against any nation;" if we accept the British interpretation and hold the United States to be one of the "all nations," then we have the absurd situation of prohibiting our country from making charges that will discriminate against herself.

Note the words, "the nations observing these rules shall use the canal on terms of entire equality." How can an owner be on terms of entire equality with the mere grantee of a privilege? Where a foreign country fails to observe the rules, its ship will not be permitted to use the canal. Will it be claimed that the United States will be denied the use of the canal if it fails to observe the rules which it establishes?

Who would prohibit the United States from using the canal if it neglected to observe any of these rules? Who could prohibit the ships of the United States from using the canal? Was it ever contemplated by the negotiators that such a contingency could arise? The other nations, however, for whom the United States makes these rules, do stand on an entire equality, and it is to them that the term "all nations" refers. * * *

I now invite your attention to my third proposition that treaties do not apply to changed conditions, and that therefore the Panama Canal is not burdened by the provisions of the Hay-Pauncefote treaty. It will be observed that the Hay-Pauncefote treaty was adopted in 1901, that it was the expectation of both nations that the canal would be built on foreign soil, and that for the

protection of the canal it was distinctly stipulated that the rights of the parties would not be affected by any subsequent change of sovereignty of the territory over which the canal was constructed, that is, change of sovereignty after its construction.

At that time, as well as for 50 years before, the contemplated route was through the Republic of Nicaragua. Two years after the adoption of this treaty, we entered into a treaty with the Republic of Panama whereby it conferred upon the United States in perpetuity all the rights of sovereignty possessed by the Republic of Panama over this stretch of land of 40 miles form ocean to ocean. The doctrine is well established in international law that all treaty engagements are necessarily subject to the general understanding that they shall cease to be obligatory as soon as the conditions upon which they were executed are essentially altered.

(Here Senator O'Gorman cited from two text books—one by Hall, a recognized British authority on international law, the other by Oppenheimer, professor of international law at Cambridge University—to sustain the propositions: that neither party to a treaty can make its binding effect depend on other conditions than those contemplated when the treaty was made; and that all governments of the family of nations agree that treaties are concluded under the tacit conditions *rebus sic stantibus*; and that vital changes of circumstances after the making of a treaty relieve the parties from its further performance.)

ECONOMIC PHASES.

Mr. President, I now desire to make a few observations regarding the economic phases of this legislation.

For more than 30 years the transcontinental railroads of the country used their powerful influence and resorted to every device to prevent the construction of an isthmian canal.

I do not believe that there is a Senator in this body who will have the temerity to deny the accuracy of that statement, that for 30 years the transcontinental railroads interposed every conceivable obstacle to the construction of a canal connecting the two oceans. Railroads dread water competition because that means cheaper railroad rates. No railroad ever secured control of a competing water line on this continent without destroying competition. Now that the canal is built, the same malign influence is endeavoring to minimize its service to the public.

It was recently reported by a committee of the House of Representatives that 92 per cent of the vessels engaged in coastwise trade are controlled by the railroads of the country, or shipping consolidations which are operated in defiance of the antitrust laws of the land. If these ships, backed by the power of railroads, were allowed to use the canal there would be an end to competition in transportation because, as Mr. Wilson said in his speech on August 15, 1912, "Railroads will not compete with themselves."

Judge Prouty, and Mr. Lane, now Secretary of the Interior, who were for many years members of the Interstate Commerce Commission, appeared as witnesses before the Interoceanic Canals Committee two years ago and gave it as their judgment, based on their knowledge and experience, that the only effective way to secure competition and prevent the railroads from making the canal a corporate asset was to exclude all railroad-controlled vessels.

By the act which the pending bill seeks to amend

Congress not only prohibited railroad-controlled vessels from using the canal when in competition with the railroads, but conferred jurisdiction upon the Interstate Commerce Commission to compel railroads in all parts of the country to dispose of their interests in their competing water transportation lines.

It may be argued that proper competition could be secured by a reasonable regulation of rates by the Interstate Commerce Commission, but the regulation of rates can only serve to correct abuses after they develop and oppress the public, while the exclusion of railroad vessels from the canal is an absolute preventive of the abuse.

Moreover, it gives encouragement to independent shipbuilders to construct vessels to engage in the canal trade and thus develop an important American industry. * * *

PARTY PLEDGES.

Those who seek to justify the betrayal of party pledges must invent an excuse or openly confess that the declaration of principles adopted at the Baltimore convention was a mere sham to be used only for the purpose of deceiving the American electorate and not for the purpose of being redeemed honestly. When before did the Democratic Party violate party pledges? When did it repudiate a solemn covenant with the American people?

Unusual care was taken at the Baltimore convention to adopt a platform which could be scrupulously respected by the party and its candidates. To avoid the possibility of the candidates repudiating the platform, or any part of it, the platform, at the suggestion of the leader of the party, although carefully considered and unanimously approved by the committee on resolutions

days before, was not presented to the convention and adopted by that body until after the candidates had been selected. It is within the memory of the members of the committee that we pursued this course on the advice of the then leader of our party, who declared that he did not want any contest or issue between the candidates and the platform. * * *

Mr. President, it is useless to pretend that we are dealing with an economic question. The request to repeal was not based upon that ground. Disguise it as you will, the controversy rests upon international grounds. It has been charged that Congress and President Taft are guilty of a breach of faith. As a nation we are charged with breaking our word. Enact the repeal and you confess an act of deliberate national dishonor, because the act of 1912 was passed and President Taft approved it after the protest of Great Britain. If we were wrong in 1912 we should confess our shame and make restitution, but that we were right is established by the great weight of legal authority, and the judgment of the Nation. And believing we were right the confession implied in the proposed repeal would expose us to the shame and reproach of the world. The canal was built for military and commercial purposes, and if we now surrender our sovereignty over its waters we may not be able to sustain our military rights in the future without a struggle. And the day may not be far distant when our necessities will compel us to declare to the world that our control of our own canal cannot be challenged by any power.

No Senator questions the patriotism and high purposes of the President, but if legislation is to be made dependent upon his will alone, no one can predict the mischief to which such a precedent will expose this Government in future years. The welfare of one hundred

millions of freemen cannot be dependent upon the judgment of one man. For the making of the laws of the Nation Congress is responsible, and this responsibility cannot be evaded. The fathers of the Republic wisely placed a limitation on the power of the Executive, and these limitations cannot be disregarded without doing violence to the Constitution which we have all solemnly sworn to uphold. * * *

SPEECH OF HON. ELIHU ROOT.

Mr. ROOT. Mr. President, some time ago I taxed the patience of the Senate by rather extended remarks upon the duty of the United States in regard to tolls upon the Panama Canal; and what I have to say now upon that subject is rather in the way of reply to arguments which have been made, views which have been expressed, and opinions which have been made manifest by various Senators in the course of the long debate which has intervened.

I wish, before proceeding, to express my very great satisfaction with the character of the debate in this Chamber upon this subject. The excitement and fervor of a false patriotism, the insolence and rancor which ill befit the consideration of a serious international subject by a great people, but which have been injected into the popular discussion of this question in some quarters, have found but little response among the members of the Senate of the United States. The question which is before us has been debated with a sense of responsibility and dignity. Senators have argued the question as lawyers and legislators upon its merits. I address myself to a reply to some of the arguments which have been made with a sense of serene satisfaction in dealing with a question which rests in the minds of my col-

leagues upon considerations of right reason and just regard for national obligations and national rights.

Let me try, sir, to state the question; and to state the question I must state the situation as it is presented. The bill which is before the Senate proposes to repeal certain clauses of the Panama Canal act passed August 24, 1912. The act was designed to provide for the opening, maintenance, protection, and operation of the canal, and it conferred authority upon the President in respect of establishing tolls for the use of the canal and imposed certain limitations upon him. Section 5 of the act authorized the President to prescribe and from time to time change the tolls; it provided "that no tolls, when prescribed as above, shall be changed" without six month's notice; it provided that no tolls shall be levied upon vessels engaged in the coastwise trade of the United States. * * * * *

The President has issued a proclamation imposing tolls of $1.20 per net registered ton upon vessels loaded, a smaller amount upon vessels in ballast, and no tolls upon vessels engaged in American coastwise trade. A question has been raised by Great Britain as to the conformity of that action with a treaty made between the United States and Great Britain in 1901, known as the Hay-Pauncefote treaty. It is claimed that that treaty requires that there shall be no discrimination between the tolls imposed upon foreign vessels and the tolls imposed upon vessels owned by citizens of the United States.

The first thing which we naturally do when such a question is presented is to inquire: What is our title? What are the rights that we have?

Until very recently the Isthmus of Panama was not the property of the United States, and we had no rights there except certain rights derived from an old

treaty with New Granada, made in 1846, by which New Granada gave to the United States certain privileges in any lines of communication which might be constructed, either railroad or canal, but gave the United States no right to construct a canal and no property rights whatever.

How did we get the canal upon which we are proposing to exact tolls? It was under a treaty made with the Republic of Panama, sometimes called the Hay-Bunau-Varilla treaty. It was signed at Washington on the 18th of November, 1903. Under that treaty with Panama, the owner of the Isthmus, by article 2—

> granted to the United States in perpetuity the use, occupation, and control of a zone of land and land under water, for the construction, maintenance, operation, sanitation, and protection of said canal, of the width of 10 miles—

And so forth.

By article 3 it granted to the United States all the rights, power, and authority which the United States would possess and exercise if it were the sovereign of the territory, to the exclusion of Panama.

In article 18 it provided that—

> The canal, when constructed, and the entrances thereto, shall be neutral in perpetuity and shall be opened 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 18, 1901.

That treaty with Panama is the basis of our rights. That treaty lies at the foundation of any question that can be raised as to what we do with the canal which we are constructing, because it is by that treaty, and by that treaty alone, that we get our title. By that treaty the grant of property and jurisdiction upon which we have proceeded, upon which we hold the canal, is subject to the provision that the canal, when constructed, and the entrances thereto, shall be neutral in perpetuity,

and shall be opened upon the terms provided for by the treaty between the United States and Great Britain of November 18, 1901.

So the treaty with Great Britain which is referred to here is carried into our title as a limitation upon it.

Let us turn to the treaty with Great Britain which is referred to by Panama in this grant. That treaty was signed at Washington November 18, 1901. It recites that a convention was considered expedient by the United States and Great Britain—

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 of April, 1850, commonly called the Clayton-Bulwer treaty * * * without impairing the "general principle" of neutralization established in article 8 of that convention.

It proceeds to say:

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.

It then proceeds with article 3:

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 28th 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.

Rule 1, which I have just read, is the section 1 of article 3 of the treaty with Great Britain which is specified in the eighteenth article of our grant of title from Panama as being especially and peculiarly and signally incumbent upon us to observe. "The canal," says the

treaty with Panama, "when constructed, and the entrances thereto, shall be neutral in perpetuity and shall be opened upon the terms provided for by section 1 of article 3" of the treaty with Great Britain.

I have now read section 1 of article 3. There follows, then, in article 3, a series of provisions relating specifically to the kind of neutrality which shall be imposed. They are in substance these:

First. There shall be no blockade of the canal or act of war in it or in its terminal waters.

Second. There shall be no delay in transit in time of war by a belligerent.

Third. No troops or supplies in time of war shall be landed or taken on by vessels in the canal.

Fourth. Belligerent ships shall remain but 24 hours in the terminal waters.

Fifth. A war vessel of one belligerent shall not leave the canal within 24 hours after the vessel of another belligerent has left.

All of those are covered by the general provision of the article in the treaty with Panama in these words:

> And in conformity with all the stipulations of the treaty entered into by the Governments of the United States and Great Britain

Under these provisions, first, of the Panama Treaty, and, second, of the treaty with Great Britain, which is incorporated into the grant of title to us, one question, and one question only, is raised. That is, What is the measure of the tolls that we are at liberty to charge a ship belonging to a British or German or French citizen passing through the canal?

It is quite natural to say that this is a question of the exemption of our ships. It is not a question of the exemption of our ships. No one doubts our right to pass our ships through the canal free, or for any tolls that we choose to impose and that they are able and

willing to pay. The question is whether we are bound to take our treatment of the ships belonging to American citizens as the measure of the treatment that we accord to ships belonging to the citizens of other countries.

We have the canal at the Sault, through which pass a greater tonnage and a greater traffic than we can anticipate for the Panama Canal for generations. We charge no tolls to American vessels—that is to say, vessels owned by American citizens—passing through the canal at the Sault, and by treaty we grant to the citizens of Great Britain and Canada the same treatment we accord to our own citizens and their vessels. We have agreed that the measure that we mete to our own citizens shall be the measure we mete to the citizens of Canada. There is no question there about our rights with our own, and there is no question here about our rights with our own.

Nor, Mr. President, is there any question here about the absolute and complete control of the canal by the United States. There is no question, there can be no question, about it. Political control, military control, administrative control, all are ours. The only question is, What standard are we bound to apply in making a charge to the citizens of another country for the use of the canal for passing the ships through? The treaty itself is quite clear. * * *

We occupy a variety of relations to that business. We are the practical sovereign of the territory, and we have all the rights of sovereignty in respect to the territory. We are the owner of the canal just as a canal company would be the owner if it had constructed it under a charter, just as the Panama Railroad Co. owns the Panama Railroad. We will be the owner of many ships that pass through the canal. We owe protection

to many citizens of the United States who will own ships that pass through the canal.

Those four different relations of the United States to this busines stand each by itself, and the rights and obligations of each may be clearly ascertained and stated. Sometimes a dual quality will effect an extinguishment of rights and obligations, as, for instance, if the United States as the owner of a ship sends its ship through a canal and is also the owner of the canal, the obligation as owner of the ship to the owner of the canal will be offset; but for any clear conception of what the rights and obligations are, we must consider each character in which the United States stands by itself.

It would be impossible to state more distinctly the precise relation that we have in regard to the control of the canal than Mr. Choate stated it in his letter of October 2, 1901, to Mr. Hay, when the treaty was agreed upon. He said:

> I am sure that in this whole matter, since the receipt by him of your new draft, Lord Lansdowne has been most considerate and more than generous He has shown an earnest desire to bring to an amicable settlement, honorable alike to both parties, this long and important controversy between the two nations. In substance, he abrogates the Clayton-Bulwer treaty, gives us an American canal—ours to build as and where we like, to own, control, and govern—on the sole condition of its being always neutral and free for the passage of the ships of all nations on equal terms, except that if we get into a war with any nation we can shut its ships out and take care of ourselves.

Nor is there any question here about ships owned by the United States. There is much confusion in discussing this subject arising from the use of the term "ships of the United States" or "American ships." The Senator from Mississippi [Mr. WILLIAMS] called attention to that the other day very pointedly. There are ships owned by the United States. When the United States acquires the other character of owner of the canal, of course there can be no question about tolls on

those ships, but ships owned by citizens of the United States are quite a different thing. Citizens of the United States are not the United States. They are separate and distinct entities. We tax them, we regulate them, we fine them, we impose charges upon them. If they acquire property from the United States, they pay for it, and if the United States acquires property from them, it pays for it. They are entirely separate and distinct individuals from the United States. The question here is about charges that shall be made by the United States to two different classes of separate and distinct individuals, both classes being the owners of ships, one class being citizens of the United States and the other class being citizens of some other country.

The words of this Hay-Pauncefote treaty, Mr. President, are framed to cover both a canal company and the United States. Observe that article 2 of the Hay-Pauncefote treaty says:

> 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—

And so forth.

Now, there is a variety of contingencies to which the words of this treaty are addressed, and you must construe the words as they would apply to a canal company in which the Government of the United States had become a stockholder, as it is of the Panama Railroad Co. to-day, or the bonds of which the United States has guaranteed, as it guaranteed the bonds of the Pacific railroad companies. The fact that the United States has stepped in and itself taken the character of a canal company makes no difference whatever in the meaning and force and interpretation and application of these

words. The treaty remains the same, the meaning of it the same. The acquisition of additional and different rights by the United States may arise merely to modify the effect of the application of the treaty.

Nor, Mr. President, is there any question here about the right of the United States to subsidize its own ships. That is as clear and as unquestionable as its right to appropriate money to put up a public building in the city of Washington. It does not rest upon our assertion, for Sir Edward Grey, the secretary of state for foreign affairs of Great Britain, in his memorandum handed to our Secretary of State on the 9th of December, 1912, says, commenting upon President Taft's memorandum accompanying the signature to the bill—

> The President argues upon the assumption that it is the intention of His Majesty's Government to place upon the Hay-Pauncefote treaty an interpretation which would prevent the United States from granting subsidies to their own shipping passing through the canal, and which would place them at a disadvantage as compared with other nations. This is not the case. His Majesty's Government regard equality of all nations as the fundamental principle underlying the treaty of 1901 in the same way that it was the basis of the Suez Canal convention of 1888, and they do not seek to deprive the United States of any liberty which is open either to themselves or to any other nation; nor do they find either in the letter or in the spirit of the Hay-Pauncefote treaty any surrender by either of the contracting powers of the right to encourage its shipping or its commerce by such subsidies as it may deem expedient.

I take the line to be at the point where title to the money vests in the United States. If the construction which I feel forced to give to this treaty is a sound one, we are not at liberty to produce the result of a subsidy to American ships by relieving them of tolls which we impose upon other ships. We are not at liberty to produce the effect of a subsidy in that way; but the instant that the money paid for tolls becomes the property of the United States, becomes a part of the general fund of the United States, the United States has absolute and uncontrollable authority in the disposition of

that money. All lawyers are familiar with the distinction between accomplishing an unlawful object in a lawful way and accomplishing a lawful object in an unlawful way. To subsidize American ships is lawful. However we may differ about the policy, we have the power; we have the right; but if the construction I give to this treaty is the correct one, we have excluded ourselves by solemn covenant from accomplishing that lawful result in this particular way; and if it be true that we have excluded ourselves from doing it in this particular way, it is no answer to say the same result could be accomplished in another way. In my view it is no concern of ours why Great Britain chooses to insist upon our keeping the covenant and not to produce the effect of a subsidy in that particular way. If this construction of the treaty is right, she has a right to say, "You shall not do that thing in that way"; and if we made the covenant, it is none of our affairs why she chooses to say it.

Now, upon what conflict of reasons rests the decision of the question whether we are bound to regulate the tolls upon foreign shipping by the tolls on American shipping? The underlying question has been stated quite frequently as being whether the words "all nations" in rule 1 of article 3 include the United States or not. Rule 1 reads:

> The canal shall be free and open to the vessels of commerce, and war of all nations observing these rules on terms of entire equality.

I say that very often the subject has been discussed upon the assumption that the answer to the practical question raised depends upon whether the term "all nations" includes the United States or not. That does not get quite to the foundation upon which the reasoning should rest. The fundamental question is, What

kind of equality did the makers of this treaty intend? Says the treaty:

> The canal shall be free and open to all vessels of commerce and war of all nations observing these rules on terms of entire equality.

When a French or a German ship sails into that canal and has imposed upon it a toll, and says, "this toll is unequal because the vessel that passed here immediately before me was allowed to go with a lower rate of toll," can that be said, if the vessel before was an American ship—

Mr. WILLIAMS. The ship of an American citizen.

Mr. ROOT. The ship of an American citizen; or can it be said only if it was the ship of some foreign power? What is the "entire equality" contemplated by rule 1 of article 3 of this treaty? Is it entire so that it assures equality in comparison with all ships engaged in the same trade similarly situated, the same kind of trade, or is it partial, so as to be equality in comparison only with certain ships engaged in the same kind of trade and not applying to other ships engaged in the same kind of trade, to wit, not applying to ships which are owned by American citizens The rule proceeds:

> 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.

Is the kind of equality that is assured such that there will be no discrimination or that there will be no discrimination except against the ships of other nations and in favor of ships belonging to American citizens?

Now, let us examine the question in the light of the circumstances which surrounded the making of this treaty and the conditions under which it was made. Treaties cannot be usefully interpreted with the microscope and the dissecting knife as if they were criminal indictments. Treaties are steps in the life and the

development of great nations. Public policies enter into them; public policies certified by public documents and authentic expressions of public officers. Long contests between the representatives of nations enter into the choice and arrangement of the words of a treaty. If you would be sure of what a treaty means, if there be any doubt, if there are two interpretations suggested, learn out of what conflicting public policies the words of the treaty had their birth; what arguments were made for one side or the other, what concessions were yielded in the making of a treaty. Always, with rare exceptions, the birth and development of every important clause may be traced by the authentic records of the negotiators and of the countries which are reconciling their differences. So it is the universal rule in all diplomatic correspondence regarding international rights, in all courts of arbitration, that far more weight is given to records of negotiations, to the expressions of the negotiators, to the history of the provisions than is customary in regard to private contracts or criminal indictments. * * *

We know now that the negotiators of this treaty, the men who made it, all understood that the larger equality was intended by its terms. Of course, what the negotiator of a treaty says cannot be effective to overthrow a treaty; but I think we must all start, in considering this question, with the assumption that the words are capable of two constructions. I think no one can deny that, in view of the differences of opinion which have been expressed here regarding their meaning. So here are words capable of two constructions, a broad construction and a narrow construction, but the fact that all the makers of the treaty intended that the words they used should have the larger effect is certainly very persuasive toward the conclusion that those

words should receive the larger effect. Not only the American negotiators but the British negotiators as well so understood it. Whenever we seek to impose upon these words a narrower construction for our own interests than the makers of the treaty understood them to have, we should remember the fundamental rule of morals that a promisor is bound to keep a promise in the sense in which he had reason to believe the promisee understood it was made. * * *

(After reciting what our diplomats said while negotiating the English treaty, as to its meaning Mr. Root proceeded as follows:)

Who were these men? Certainly, anyone who finds in this treaty now a meaning different from that which they thought their words carried should consider many times the steps by which he reaches his conclusion.

Mr. Choate, the head of the American bar, clear, able, with penetrating intelligence, with vast experience in the use of words and the construction of treaties, of statutes, of contracts, unquestionable in the virile strength and loyalty of his Americanism. When he thought that the words he used had a particular meaning, we may well think twice before we say that they have not that meaning.

Henry White, one of the few diplomats trained from their youth up in the American service.

John Hay, the pride of our generation in American diplomacy. John Hay, that sensitive soul that could produce the American types of the Pike County ballads, and the charm, the felicity of whose phrases makes them jewels in the history of American literature. John Hay, who received the spirit, the motive, the characteristics of his Americanism as the young secretary and the confidential and intimate friend of Lincoln.

Theodore Roosevelt, with his swift, incisive mind and his high courage.

All these—the charge d'affaires who opened the negotiations with Lord Salisbury, the ambassador who carried on the negotiations, the Secretary of State who supervised and authorized the negotiations, the President who authorized, as one of the first acts of his Presidency, the signature to the treaty and laid it before the Senate—all these understood that they were making a treaty with the largest equality, and with no trifling, narrow, "favored nation" provisions. * * *

Now, Mr. President, the common law of England and America, the public policy especially of America at the very time this treaty was being negotiated, enforced with unsparing rigor the duty of equal charges and equal service by all public utilities to all the public which they were to serve, and in the face of this long series of public declarations by the Government of the United States committing itself to that relation, the relation of the builder and operator of a public utility for all the world, the makers of this treaty could not honorably have used words with any other meaning than the meaning of the large equality which they say they meant these words should have.

There is another reason. The kind of equality which the negotiators intended—that is, an equality in which the treatment of American citizens is made the standard for the treatment of foreign citizens—had during all the history of the Isthmian Canal efforts been the standard sought for in negotiations and treaties. That kind of equality was the standard adopted by the public policy of the United States for all similar enterprises. It was customary; it was uniform; it was natural for negotiators of a treaty relating to a canal. * * *

It was not merely the immemorial policy of the United States and Great Britain regarding all canals;

it was not merely the general public policy of the United States and Great Britain regarding all ports and waters, but it was the policy of the United States regarding trade the world over, and the champion and protagonist of that policy was John Hay. At the very time that he was negotiating the Hay-Pauncefote treaty he was appealing to the justice of all the nations of the world for the "open door" in China; he was appealing to them in the interest of the world's commerce, in the interest of civilization to accord in all their possessions in China, what? Favored-nation treatment? Oh, no; the same treatment that they accorded to their own citizens. Let me ask you to attend for a moment to things that John Hay wrote regarding this great design, the accomplishment of which will ever stand in the history of diplomacy as one of the proudest contributions of America to the progress of civilization. On September 6, 1899, he wrote to Mr. Choate in London:

> The Government of Her Brittanic Majesty has declared that its policy and its very traditions precluded it from using any privileges which might be granted it in China as a weapon for excluding commercial rivals, and that freedom of trade for Great Britain in that Empire meant freedom of trade for all the world alike. While conceding by formal agreements, first with Germany and then with Russia, the possession of "spheres of influence or interest" in China, in which they are to enjoy special rights and privileges, more especially in respect of railroads and mining enterprises, Her Brittanic Majesty's Government has therefore sought to maintain at the same time what is called the "open-door policy" to insure to the commerce of the world in China equality of treatment within said "spheres" for commerce and navigation.

He wrote to Ambassador White in Germany September 6, the same date:

> Earnestly desirous to remove any cause of irritation and to insure at the same time to the commerce of all nations in China the undoubted benefits which should accrue from a formal recognition by the various powers claiming "spheres of interest" that they shall enjoy perfect equality of treatment for their commerce and navigation within such "spheres." * * *

So he wrote all of the great nations of the world an appeal for equal treatment, an appeal for a specific stipulation to secure the equal treatment that no higher charges should be imposed upon the citizens of any other country in the ports and waters possessed by those great powers in China or for freight or passage over the railroads built and controlled by them than were imposed upon their own citizens. To that appeal all the great powers of the world responded in affirmance; and on the 20th of March, 1900, Mr. Hay was able to issue his circular of instructions to all the ambassadors and ministers of the United States announcing the universal assent of the world to that great principle of equality —equality measured by the rights of the citizens of the nation granting it in all the Empire of China; yet we are asked to believe that John Hay denied, abjured, repudiated that policy of civilization in regard to the Panama Canal at the very moment that, through the same agents, he was enforcing the policy upon the same countries; and that he did it without knowing it, as the Senator from Mississippi [Mr. WILLIAMS] suggests.

* * * * * *

After referring to instances where our nation had asked for and secured arbitration with England, Senator Root continued as follows:

Oh, arbitration when we want it, yes; but when another country wants it, "Never, never furl the American flag at the behest of a foreign nation."

Mr. President, the subject that I am now discussing raises sharply the question how the American people want their affairs to be conducted. They have a multitude of relations with other countries. They are doing a business of over four thousand million dollars with other countries. They are traveling all over the world in hundreds of thousands. They are receiving

in this country hundreds of thousands of the citizens of other countries. Vast interests of property and of liberty and of life are regulated by the great body of treaties and conventions that we have with other countries. We think ourselves, and rightly think ourselves, leaders in civilization. We are for the amelioration of manners and of conduct which tends to substitute kindly feelings and considerate treatment for the rule of hatred, of strife, and of war.

Do the American people wish their representatives to treat all the other nations that are in conventional relations with us; that are brought in contact with us by travel, by trade, by all the multitudinous intercourse of modern life, upon the theory that any question of right by them is an insult, that any according of a right to them by us is a surrender? Do they want us to conduct our foreign affairs on the principle of the thoughtless youth who flings up his hat and shouts for the flag or as just and considerate men transact their own business with each other, as neighbors in a town treat each other, as business men treat their customers and the persons from whom they buy? Do they want us to be ugly and revengeful and insolent and brutal and boasting, or do they want us to be dignified and calm and considerate and reasonable in our relations with foreign countries?

I say that the argument that we are called upon to "surrender at the behest of Great Britain" raises the question which I have just described, and which I will not stop to answer, for there can be but one answer and that finds itself in the immediate response of every Senator.

But, Mr. President, why are we here discussing repeal? Great Britain asked for arbitration. Why are we here discussing repeal? * * *

We are here now supporting this repeal bill because, in the judgment of the old and wise and experienced Senators best qualified to judge, it was impossible and is impossible to get a vote of two-thirds of the Senate to send the question to arbitration.

There were other evidences, but I will not detain you to give them. I could read from the records of the Committee on Interoceanic Canals matter to sustain the same conclusion. A majority of 32 of the members of the Senate would be necessary to send this case to arbitration. We are for this repeal first and chiefly because we cannot arbitrate it, and to refuse to arbitrate it would be discredit and dishonor for our country.

Right or wrong, whatever rules or whatever exceptions may justify it, if we decide this in our favor and refuse to arbitrate we are discredited, we are dishonored, we have repudiated our principles.

Now, let any man who votes against this repeal take to himself the responsibility of leading his country into that position. I for one shall not. If every constituent I have were looking with hope for lower freight rates, I would not. If my convictions were so blinded that I saw only the lurid light of red flame when a railroad is mentioned, I would not lead my country into such a position. If I had away back in my childhood learned a tradition of hatred against any other country, I would not lead my own country into such a position as that. I will vote for this repeal because it is the surest and, I believe, the only way to save our country from that most discreditable result.

Mr. President, there is one argument which I have omitted to notice against this repeal. It is the argument that Great Britain alone has protested; that no other country has protested or remonstrated. That is true, so far as I know; but let me call your attention to

something that happened in the course of the negotiations. You remember that the Clayton-Bulwer treaty provided for all other countries coming in and agreeing to share in protection. You remember that the first Hay-Pauncefote treaty provided that all other countries should be asked to adhere; that is to say, to become parties to the treaty. The Senate struck it out, and in the negotiation of the second Hay-Pauncefote treaty it was omitted. You remember that Lord Lansdowne wished to have inserted in the treaty a provision limiting the benefits of freedom and equality of the canal to those nations which should agree to observe these rules, and Mr. Hay objected to having the agreement. Here is what Mr. Choate said about it. He is giving an account of an interview with Lord Lansdowne. He says:

> Secondly, I told him that I thought his amendment of the first clause of the third article, insisting upon bringing in other nations as parties to the agreement after the Senate had struck out of the Hay-Pauncefote treaty the article inviting them to come in, would seem counter to the very strong conviction in the Senate, sustained, as I believe, by an equally strong and general popular conviction, that we ought not to accord to other nations any contract rights whatever in the canal which we were to build and own; that none of them, though invited, ever came in or offered to come in under the Clayton-Bulwer treaty; that at present they had no rights; that they must be content to rely on our national honor to keep the canal open to them, as declared in this treaty with Great Britain.

Mr. Hay reports to the Senate:

> This was represented to His Majesty's Government, and it was also insisted on the part of the United States that there was a strong national feeling among the peoples of the United States against giving to foreign powers a contract right to intervene.
>
> * * * * * *
>
> That they must rely upon the good faith of the United States in its declaration to Great Britain in the treaty that it adopts the rules and principles of neutralization therein set forth, and that it was not quite correct to speak of the nations other than the United States as being bound by the rules of neutralization set forth in the treaty.

No contract rights are given to these other powers. Our Senate will not permit it; our people will not per-

mit it. France, Germany, Austria-Hungary, Italy, Russia, and all the rest are to have no contract right, but they are to rely on the honor of the United States. They are to have only the good faith of the United States that we will observe the declarations of the treaty. They have made no representation or protest. Oh no; they cannot. They have no contract rights. They have nothing but our honor; nothing but the good faith of America.

Mr. WILLIAMS. Which can be carried out by no one except ourselves.

Mr. ROOT. Yes. Mr. President, who is the guardian of a nation's honor but her own sons? Do we commit its keeping to England? Oh, no; not to England nor to any other power on earth do we commit the duty of remonstrance against our breach of honor. Our conscience must be our monitor. America must make the demand upon America that her honor and her good faith be kept without stain.

It is no petty question with England about tolls. This is a question whether the United States, put on its honor with the world, is going to make good the public declarations that reach back beyond our lives, whether the honor and good faith of the United States is as good as its bond, whether acute and subtle reasoning is to be applied to the terms of a treaty with England to destroy the just expectations of the world upon more than half a century of American professions, upon which we give no contract right, and there is no security but honor and good faith.

Sir, in the weak and inadequate arguments and appeals that I have made upon this subject I speak not for England. I do not present England's case. I do not care about her case. But I knew something about this treaty. I knew what John Hay thought. I sat next him

in the Cabinet of President McKinley while it was negotiated, and of President Roosevelt when it was signed. I was called in with Senator Spooner to help in the framing of the Panama treaty which makes obedience to this Hay-Pauncefote treaty a part of the stipulations under which we get our title. I negotiated the treaty with Colombia for the settlement and the removal of the cloud upon the title to the Isthmus of Panama and carried on the negotiations with England under which she gave her assent to the privileges that were given to Colombia in that treaty. I have had to have a full conception of what this treaty meant for now nearly 13 years. I know what Mr. Hay felt and what he thought, and, Mr. President, I speak for all the forebears that went before me in America and for all that shall come after me, for the honor and credit of our country, and for that alone. If we do not guard it, who shall?

A settlement? We are told that the speech I made in January, 1913, prevented a settlement. If I could believe that, I would tell it to my children, that they might rejoice after I am gone at that one service rendered to their country. Settle? Compromise? Compromise the honorable obligations of our country? Never. If Great Britain should be so false to the duty she assumed in imposing upon us stipulations as a condition of our having the right to build the canal, if she should be so false to the duty toward mankind which she assumed then, as to commute the obligations that we took upon us for any advantage to herself, I would not consent to give one copper farthing to have her withdraw her demand.

We are right or we are wrong. If the rule of equality which we have prescribed for all the world is infringed by this statute, no negotiations with Great Britain can relieve us of our obligations to arbitrate or

withdraw the statute, our obligations to the rest of the world to arbitrate or withdraw the statute, our obligations to ourselves, to our own consciences, our own sense of right and honor.

There is even more than the higher interests of an ordinary nation involved in this question.

It is now some 80 years since De Tocqueville, in his great book Democracy in America, which presented to the world so just and favoring an estimate of our country, wrote these words:

> It is therefore very difficult to ascertain at present what degree of sagacity the American democracy will display in the conduct of the foreign policy of the country, and upon this point its adversaries, as well as its advocates, must suspend their judgment. As for myself. I have no hesitation in avowing my conviction that it is most especially in the conduct of foreign relations that democratic governments appear to me to be decidedly inferior to governments carried on upon different principles.

Mr. President, I have not believed that to be true. I do not believe it to be true. I could not believe it and not despair of the future of our civilization, for more and more the control of all foreign as well as domestic affairs is coming into the hands of democracy. More and more the judgment of the great body of the people determines the actions of Secretaries of State and ministers of foreign affairs and foreign ambassadors and ministers. If democracy is incompetent to deal with foreign affairs more and more, the world will return to the chaos of international strife and war.

Our country has taught the world the most valuable lesson of modern history, if not of all history, that a democracy is competent to maintain within its own territory peace and order with justice. Our democracy has set at naught all the dismal forebodings of its enemies and compelled an unwilling assent from the Governments of the world to its entire competency to rule itself. I have believed and I do believe that the power

of a developing democracy is competent to the maintenance of international peace and justice, to substitute kindly consideration, the mutual courtesy and forgiveness of international brotherhood for the hatred and strife of monarchical and dynastic rule.

Our democracy has assumed a great duty and asserts a mighty power. I have hoped that all diplomacy would be made better, purer, nobler, placed on a higher plane because America was a democracy. I believe it has been; I believe that during all our history the right-thinking, the peace-loving, the justice-loving people of America have sweetened and ennobled and elevated the intercourse of nations with each other; and I believe that now is a great opportunity for another step forward in that beneficent and noble purpose for civilization that goes far beyond and rises far above the mere question of tolls or a mere question with England. It is the conduct of our Nation in conformity with the highest principles of ethics and the highest dictates of that religion which aims to make the men of all the races of the earth brothers in the end.

Mr. President, the noble American who negotiated this treaty as Secretary of State did his share in his time toward accomplishing the beneficent work of ennobling diplomacy and the relations of states. He did it with purest patriotism and the most unswerving devotion to the interests of his own country; and I cannot but feel that in preventing our country from repudiating the obligation into which he entered to make possible the great work of the canal we are rendering a service to his memory that must be grateful to his friends. I recall something that he said that is worth remembering when we are dealing with his work and thinking of the spirit in which he wrought. I ask you to listen to it:

There are many crosses and trials in the life of one who is endeavoring to serve the Commonwealth, but there are also two permanent sources of comfort. One is the support and sympathy of honest and reasonable people. The other is the conviction dwelling forever, like a well of living water, in the hearts of all of us who have faith in the country, that all we do, in the fear of God and the love of the land, will somehow be overruled to the public good; and that even our errors and failures cannot greatly check the irresistible onward march of this mighty Republic, the consummate evolution of countless ages, called by divine voices to a destiny grander and brighter than we can conceive, and moving always, consciously or unconsciously, along lines of beneficent achievement whose constant aims and ultimate ends are peace and righteousness.

I invoke for the consideration of this obligation of honor and good faith, which he assumed in our behalf and in the name of our country, that nobility and largeness of spirit which he exhibited and illustrated in his life. [Applause in the galleries.]

## CHAPTER XXV.

## THE SUEZ CANAL.

Why bring the Suez Canal into a book treating of the Panama Canal? These two great waterways are the famous international canals of the world's accomplishment; and when repeal of toll exemption was brought prominently before our country, many citizens at once asked: Why can't our nation fix tolls as she pleases, just as do the owners of the Suez Canal?

It then is most proper, as a matter of general information, to treat in a brief way of the Suez Canal, as to its organization, owners and mode of operation. M. de Lesseps held friendly relations with the Khedive of Egypt and proposed to organize a company and undertake to construct a canal from the Mediterranean to the Red Sea under favorable grants and franchises. The Khedive consented to the proposition and the first concession was signed, provisionally, in November, 1854; a complete specification of the grant was drawn up at Cairo, March 25, 1855, by two engineers, Linant and Mougel Bey. M. de Lesseps appealed to the best engineers in Europe to ascertain if the work was possible. This international Commission met at Paris, October, 1855, and passed on to Alexandria where they arrived in November.

The Commission made scientific investigation of the route of the proposed canal and borings to find out about the substratum; the required depth was bored with ease. A favorable report was made and sent to the Khedive; and de Lesseps at once began to advertise the project with a view to the organization

of the Maritime Suez Canal Co. This was done at Paris in 1858, the capital being £8,000,000 divided into 400,000 shares, each being for £20. The Khedive, Said Pasha, took 177,642 shares.

The provisional concession of 1854 was confirmed by the Khedive in 1856 and in the confirmation more definitely was set forth the scope of the enterprise and the powers and obligations relating to the same. The confirmation convention, ratifying the Khedive's acts, was not entered into between the Sultan and the canal company until March 19, 1866, when the Sultan's Firman was issued. A very large part of the canal work had then been performed, for the canal was begun in 1860 and it was completed so as to be operative in 1869. The number of shares do not remain stationary at 400,000 shares, for in 1910 there were in circulation 379,421 shares, 20,579 shares having been redeemed. On December 31, 1911, there were in circulation 378,231 shares of stock. In 1875 Great Britain purchased the shares held by the Khedive, but this did not give England control of the company; the French people held the majority of stock; but England secured her control over the canal by securing political power over Egypt.

The company paid dividends of 4.7 per cent for the first 5 years; these gradually increased until 1911 when they amounted to 33 per cent. The investment is so profitable that the shares are rarely offered for sale; they at times have sold at 1,000 per cent premium.

Great Britain as a nation holds nearly one-half of the stock; and these large profits are not secured by allowing any vessels to escape paying tolls. The owners are not donating tolls to coastwise trade, but are operating the canal strictly for profits, and it is evident that they are abundantly successful.

The total excavation up to the time of opening the canal to traffic amounted to 80,000,000 cubic yards, mostly sand. At first the canal was merely a ditch, being 25 feet deep and 72 feet in width at the bottom; at the ground level the width ranged from 200 to 300 feet, and the deepest cut was 80 feet.

And for 43 years work has been going on to increase both the depth and width. In 1915 it is expected that the channel will be 36 feet deep, and the bottom width 134 feet. The deepest vessel to date, to pass through had a draft of 28 feet. The present plan will give passage to vessels with a draft of 31 to 32 feet. Vessels have increased in size in keeping with the yearly increase in the size of the canal. In 1870 the average net tonnage was 898 tons per ship; this had increased by 1911 to 3,688 tons per ship.

While the canal was small it required 49 hours for a passage through; the total length being 87 nautical miles (104 miles); by deepening and the removal of curves the time of transit has been reduced to 17 hours in 1911 for vessels furnished with searchlights; without these, ships cannot travel by night. On account of the wind currents in the eastern seas sailing vessel rarely use the canal, but make the trip around South Africa.

The total expenditure in construction up to 1912 has been the sum of $127,000,000; not one-third of the cost of the canal at Panama, although work on the former has been going on for 43 years. Suez was an easy task compared with Panama, which de Lesseps clearly recognized.

When the canal was opened in 1869 most of the trade east was conducted by sailing ships, which made the traffic through the canal exceedingly light for the first few years. From 1870 to 1911 the net tonnage in-

creased from 436,000 to 18,324,000 tons; and the passenger increase was from 26,000 to 275,000. The business is rapidly increasing on account of expansion of trade between Europe and America and the far east. In 1906 the number of soldiers going through from Russia to war against Japan increased this line of business; that year the passenger traffic numbered 352,000.

Statisticians show that Panama cannot compete with Suez for trade in India, the Red Sea, East Africa or the Persian Gulf. It is said that 5 per cent of the trade between Europe and Japan and 10 per cent between Europe and Australia may use the Panama route. And that rates of toll cannot change this; it is not a question of competition.

Great Britain had in 1910 practically sixty-two per cent of the total traffic through the Suez Canal. Ships owned by America using the canal were so small in number as to be scarcely worthy of mention.

SUEZ CHARTER OR CONCESSION.

Article 14 of the concession (January 5, 1856) for the Suez Canal reads thus: "We hereby solemnly declare for ourselves and for our successors under reserve of ratification by his Imperial Majesty the Sultan, the great maritime canal from Suez to Pelusium and ports belonging to it henceforth and forever open as neutral passages to any merchant vessel crossing from sea to sea, without any distinction, exclusion or preference, whatever, for persons or nationalities, against the payment of dues and execution of regulations established by the said Universal Company, grantee for the working of the said canal and its dependencies."

Article 17 provides:

"To indemnify the company for the expenses of construction, maintenance and working devolving upon them by these presents, we authorize the company

henceforth and during the whole term of their lease, as determined by clauses 1 and 3 of the preceding article, to establish and levy for the passage through the canals and ports thereunto appertaining, navigation, pilotage, towage, tracking, or berthing, dues according to tariffs which they shall be at liberty to modify at all times upon the following express conditions:

First. That these dues be collected without exception or favor from all ships under like conditions.

Second. That the tariffs be published three months before they come into force, in the capitals and principal commercial ports of all nations whom they may concern.

Third. That for the special navigation due, the maximum toll shall not exceed 10 francs per ton of capacity on vessels, and per head of passengers."

It is thus explicitly provided that there shall be the same rate of toll for all traffic, under like conditions, and the same rate for passengers.

There is no opportunity for discrimination as to ships or people. This concession, prescribing equality, was made 58 years ago; is it not generally supposed that we have been "progressing" since 1856? By adopting toll exemption we would be operating a great public utility, in a less enlightened mode, than did Egypt and Turkey 58 years ago. It will be well for Americans to take the opportunity and study well these Egyptian concessions and the Suez system.

The rates of toll on this canal were at the beginning extremely high on account of the lightness of traffic; being in 1874 per net ton $2.51. They have been gradually reduced and are now fixed at $1.20 per ton.

The Suez Canal is operated by a private company, for the express purpose of securing the profits. In recent years it has turned out to be an institution whose substratum seems to be a veritable gold mine.

We are largely indebted for the above facts to Mr. Emory R. Johnson's reliable book of canal statistics, compiled by authority of, and printed by, the United States government, bearing date 1912; also to Arthur Silva White's most excellent English book, *Expansion of Egypt*, 1889; and to Congressional documents.

## SUEZ CANAL CONVENTION.

SIGNED AT CONSTANTINOPLE OCTOBER 29, 1888.

RATIFIED DECEMBER 22, 1888.

### ARTICLE 1.

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. Consequently, the high contracting parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace. The canal shall never be subject to the exercise of the right of blockade.

### ARTICLE 2.

The high contracting parties recognizing that the fresh water canal is indispensable to the Maritime Canal, take note of the engagements of his Highness the Khedive towards the Universal Suez Canal Company as regards the Fresh Water Canal; which engagements are stipulated in a convention bearing date the 18th March, 1863, containing an *expose* and four articles. * * *

ARTICLE 3.

The high contracting parties likewise undertake to respect the plant, establishments, buildings and works of the Maritime Canal and of the Fresh Water Canal.

ARTICLE 4.

The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article 1 of the present treaty, the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal, shall be committed in the canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the Belligerent Powers.

Vessels of war of belligerents shall not revictual or take in stores in the canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force and without any other intermission than that resulting from the necessities of the service. * * *

(It is provided that vessels shall depart in 24 hours from the ports Suez and Said, &c.)

ARTICLE 5.

In time of war belligerent Powers shall not disembark nor embark within the canal and its ports of access either troops, munitions, or materials of war. But in case of an accidental hindrance in the canal, men may be embarked or disembarked at the ports of access

by detachments not exceeding 1,000 men with a corresponding amount of war material.

ARTICLE 6.

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

ARTICLE 7.

The powers shall not keep any vessel of war in the waters of the canal (including Lake Timsah and the Bitter Lakes). Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of which shall not exceed two for each power. This right shall not be exercised by belligerents.

ARTICLE 8.

(This article provides that the agents in Egypt of the signing powers of this treaty shall be charged to watch over the operation of the canal and have power of correcting abuses, &c. It is hereby omitted. )

ARTICLE 9.

The Egyptian Government shall within the limits of its powers resulting from the Firmans and under the conditions provided for in the present treaty, take the necessary measures for insuring the execution of the said treaty. In case the Egyptian Government should not have sufficient means at its disposal, it shall call upon the imperial Ottoman Government, which shall take the necessary measures to respond to such appeal; shall give notice thereof to the signatory powers of the Declaration of London of the 17th March, 1885; and shall, if necessary, concert with them on the subject. The provision of Article 4, 5, 7 and 8 shall not interfere with the measures which shall be taken in virtue of the present article.

ARTICLE 10.

* * * It is likewise understood that the provisions of the four articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea.

ARTICLE 11.

The measures which shall be taken in the cases provided for by Articles 9 and 10 of the present treaty shall not interfere with the free use of the canal. In the same cases the erection of permanent fortifications contrary to the provisions of Article 8 is prohibited.

ARTICLE 12.

The high contracting parties, by application of the principle of equality as regards the free use of the canal, a principle which forms one of the bases of the present treaty, agree that none of them shall endeavor to obtain with respect to the canal territorial or commercial advantages or privileges in any international arrangements which may be concluded. Moreover the rights of Turkey as the territorial power are reserved.

ARTICLE 13.

With the exception of the obligation expressly provided by the clauses of the present treaty, the sovereign rights of his Imperial Majesty the Sultan, and the rights and immunities of his Highness the Khedive, resulting from the Firmans, are in no way affected.

ARTICLE 14.

The high contracting parties agree that the engagements resulting from the present treaty shall not

be limited by the duration of the acts of concession of the Universal Suez Canal Company.

ARTICLE 15.

The stipulations of the present treaty shall not interfere with the sanitary measures in force in Egypt.

ARTICLE 16.

The high contracting parties undertake to bring the present treaty to the knowledge of the States which have not signed it, inviting them to accede to it.

ARTICLE 17.

The present treaty shall be ratified and the ratifications shall be exchanged at Constantinople within the space of one month, or sooner if possible. In faith of which the respective plenipotentiaries have signed the present treaty and have affixed to it the seal of their arms.

Done at Constantinople the 29th day of the month of October in the year 1888.

Signed by the representatives respectively of Great Britain, Germany, Austria-Hungary, Spain, France, Italy, Netherlands, Russia, and the Ottoman Empire.*

This treaty is given in both French and English in Senate Doc. Mis. 56 Cong. 1st sess. 1899, Vol. 10. Doc. 151; and in English in Senate Rep. 56 Cong. 2nd sess. 1900, Vol. 1, Doc. 1339; and in House Doc. 62 Cong. 2nd sess. 1912, Doc. 680; and in White's Expansion of Egypt pg. 339.

## CHAPTER XXVI.

## CONSTITUTIONAL EQUALITY.

The tolls question has been tried by almost all known legal tests, excepting the one arising under the Constitution. This question could only be raised by American citizens, and not by a foreign power. What is this constitutional question?

The United States has built the canal at a large expenditure of public money. When the nation or a state builds a highway or a public utility or any other public improvement with public tax funds it cannot discriminate between its citizens, permitting some the free use thereof, and placing tolls and rates upon others. This would be opposed to the principles of the American constitutional system; opposed to a free republican government.

It is not the old question of regulating interstate traffic carried on by private industries; but it is a question of the government, with public funds of which it is trustee, itself, carrying on business, whether interstate or otherwise.

For instance, take the streets of Washington. The government could not deny one law-abiding private citizen the use thereof, while other citizens were allowed full liberty therein. The same rule would hold as to the public parks, the Congressional Library, and even as to the Capitol itself. Every public enterprise carried on at public expense must be public in fact and not in theory alone; it must be public in the sense of affording like treatment to all citizens.

A court is a public institution and all must find

justice therein at one uniform rate. All must find equal protection under the police laws of the country; equal protection from the army and navy; equal protection in his property rights and in liberty itself. There can be no discrimination in the use of the United States mail, except as to officials, and they are a part of the governmental institution. There is one fundamental principle that must pervade all proper national action, and that is: that this is a government for *all the people* and not a government for a selected *portion* or class of citizens. Class distinctions seem to be running to excess under political encouragement and by the apparent approval of a large part of the citizens.

Class laws are passed and enforced which very able publicists believe to be out of harmony with the American system as ordained by the founders. Every one should realize that an act illegal at the hand of a single citizen would be equally illegal if done by any class of the people. A favor to a class should not be permitted, if denied to an individual or to another class of citizens. This is declared to be a land of freedom. How can this be if some are given liberty and others are bound under unjust restraint and discrimination? How can there be any clear and evident class distinctions under a constitution the offspring of 1776 and based on liberty and equality, and which were still more strongly guaranteed by the amendments gained by the great civil combat of 1861? There can be no assured *liberty* where class favoritism and distinctions are fostered and encouraged by the political opinion of the citizens.

This is not a government for John Doe and Richard Roe, but for all of the American people! The Pilgrim fathers before leaving the Mayflower signed a compact pledging their faith to establish a body politic

and thereby to enact *"such just and equal laws"* as shall be for the general good of the colony.

And in the famous Declaration of American Independence it is asserted that "we hold these truths to be self-evident, that all men are created equal." Jefferson's thoughts seemed to dwell on creating a nation whose very corner-stone was equality. The whole absorbing idea in the building of the great republic was that men should be *equal,* and governed by laws conferring equality of privilege, equality of opportunity and equality of rights in all the public benefits growing out of national exertions and operations. The colonists had lived under a different system and yearned for liberty and political equality.

The first words of our Constitution are: We the people of the United States in order to form a more perfect union, establish justice * * * promote the general welfare and secure the *blessings of liberty* to ourselves and our posterity do ordain and establish this Constitution. Can we suppose that the whole body of the people made a constitution to grant the privileges and benefits of government, in any instance, to only a part of the people?

The whole tenor of the Constitution with the amendments, is in favor of equality of rights and privileges.

We note the following provisions:

1. The Congress shall have power to lay and collect taxes, to pay the debts and provide for the "common defense and genral welfare of the United States."
2. To establish *uniform* rules of naturalization and *uniform* laws on bankruptcy.
3. No bills of *attainder* shall be passed.
4. No capitation or direct tax shall be laid only in proportion to the census or enumeration.
5. No *preference* shall be given by any regulation of commerce or revenue to the ports of one state over those of another.
6. No title of *nobility* shall be granted by the United States.

7. The citizens of each state shall be entitled to *all privileges and immunities* of citizens in the several states.

8. Congress shall make no law for the establishment of religion, or abridge the freedom of speech or the press.

9. No person shall be deprived of life, liberty or property without due process of law.

10. *All persons* born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States. No state shall by law *abridge the privileges and immunities* of the citizens of the United States; nor deny to any person the *equal protection of the laws.*

11. The right to vote shall not be denied by the *United States* or by any state on account of race, color or previous condition of servitude.

These selected provisions show most conclusively the theory upon which the Constitution was adopted. It breathes, throughout, the spirit of *equality* and *liberty.* Liberty may in many ways be restrained for the good of the whole body politic; but equality, in a governmental sense, cannot be impaired without doing violence to the public welfare.

Suppose that toll exemption were now in force, as to the Panama Canal, and that the owner of an American ship engaged in foreign trade paid large taxes to the nation; and suppose the owner of a coastwise ship was so lacking in thrift as to pay only nominal taxes; could the nation legally or morally levy tolls against the former, and discharge the latter from all tolls and charges? What kind of a free government could justify such a proceeding? This would most surely be a robbing of Peter to pay Paul.

We are not making proper use of our perception, if we do not see the tendency of the departments of our state and national governments to run to class extremities. Even the wholesome anti-trust laws, passed for the purpose of enforcing *equality* of opportunity in business, must be amended so as to further intrench class exemptions and privileges. Such policies are not only most illogical but they are in a manner op-

Note: The Federal Sup. Court on Nov. 1, 1915, decided that the Alien Labor Law of Arizona was an unjust class law and violated the *equality* provisions of the Constitution. This case supports the reasoning in the above chapter.

pressive. Conspiracy is conspiracy; theft is theft, whether the actor be rich or poor, great or small, a favorite at court or *persona non grata.*

In many affairs of state no one expects favoritism, all by intuition recognize equality of rights; but it is in the deviation from this correct rule that wrong and injustice begin. The continuous violation of the rule of equality and the creating of class distinctions must ultimately sap the foundations of any Republican government.

Public taxes should only be laid for public purposes. If our canal was built with public tax funds the use should not be donated to any special class, because to this extent it would be applied to private uses. Then we should have public taxes raised and appropriated to private uses, contrary to all constitutional theory and principles.

In Providence Bank v. Billings, 4 Peters, the Supreme Court laid down this wholesome doctrine: "The power of legislation, and consequently of taxation, operates on all persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all *for the benefit of all.*"

The government built the canal either with *tax funds* or with funds *already in the treasury.* If the former, then the canal was built for *all without* favor. If the latter, then the treasury funds belong to *all* the people, and when changed into canal property the people all still hold a common right therein and the services of the canal cannot be donated to one and not to all the owners. Equality in ownership demands equality of use and benefit.

In the case of the State v. Milwaukee Gas Co., 29 Wisconsin Rep. the court said: that the state can no

more tax the community, to set one class of men up in business than another; can no more subsidize one occupation than another; can no more make donations to the men who build railroads than it can make them to men who build stores and manufacturies. The above statement of the court is most thoroughly sound and legal. We have stated the constitutional rule to be, that the nation cannot build a canal with tax money and then discriminate between taxpayers in the services of the canal. Now this is finally a question for the national Supreme Court to decide, and should they decide that the nation has the right to make discrimination in rates, still, there would be a moral, just and political reason why there should be no favoritism shown in the rates between the citizens. Unquestionably the government is a trustee for the taxpayers, to build and operate the canal, and it cannot violate its trust and donate the use of the canal to one American and deny the same free use to another citizen. This is outside of any constitutional or economic question, and it is one that must be governed by the well-known rules and principles of equity. A trustee cannot give away the trust estate, but should deal fairly, and with the strictest impartiality to all.

As heretofore stated the Colonists sought a home on these shores to gain liberty denied them in England. They had been bound down by caste and class divisions at home, and the first thing when landing here they declared for equal and just laws. This sentiment had so grown at the time of the revolution, and of the formation of the nation, that equality was so wrought into the citizens as to become bone of their bone and flesh of their flesh.

It was declared in the great declaration of 1776 and ordained in the Constitution; and in the early days

of our Supreme Court it was most scrupulously enforced and maintained. Would the founders now be able to recognize their handiwork? The original structure has expanded but in its operations the great principles of equality have become shrunken rather than expanded. Commissions rule almost everything, as deputies of legislative bodies. And the attempt is continuously made to place all labor under the power of unionism.

If we were to cast out of our legislative halls all *class bills* but little would remain. The political cry goes up against "special privileges" and the first thing done by the proclaimers is to introduce measures to institute special privileges in favor of themselves and their friends. Once, equality was sounded from the housetop; what chance of political success at this day, would a candidate have if he announced that he was a staunch advocate of equality. Of course he would have none; he must *pledge himself* to inequality and class favoritism.

The people in classes seem to be seeking through the power of legislation, some kind of special protection at the hands of the state or nation. It is becoming customary; it is becoming a part of the very life of the citizenship; it is looked upon almost as a religious duty. Scanning from 1776 forward to the present, it seems that the desire for class legislation has *progressed* to such an extent that if continued it must lead on, ultimately, to chronic political disease and to disaster.

Everyone should share both the burdens and benefits of government. A part of the people cannot appropriate all the benefits without instituting class privilege. Public sympathy naturally takes sides with the weak and unfortunate, and millions upon millions of money are devoted to charity. Charity is founded on humanity, and not to create class distinction.

Rather than state our own theories too profusely, we extract a few concepts from eminent writers and oracles on government, which are as follows:

1. A free state establishes no religion, abolishes all benefits and privileges to the clergy, and governs all citizens by authority of general and equal laws.

2. Equality of rights and privileges is the purpose and aim of the law.

3. The constitutional state requires that all government and law shall proceed from a uniform representation of the people. The people by ballot confer the right to govern by one law for the whole country and people.

4. Every one should submit equally to the states authority; there is but one common citizenship, one common freedom.

5. The state should act rationally, justly and from high moral principles, and not from passion or impulse. Its law comes through legislation and must bind all equally without regard to condition, station or power.

Try toll exemption by these salutary principles, and what foundation has it to stand upon? How could any national funds be used to construct a public utility, and then its services be dedicated to a selected class of the people?

"Taxes are laid upon all for the benefit of all;" and constitutional America is a government of the people, by the people, *for the people.* National property, as distinguished from private property, belongs to the people, and its use is for all the people. Then how can any American ship be denied the use of the canal? And how

can there be distinction and favoritism in the use and benefit from "common property?"

Most appropriate is the great constitutional maxim —the foundation stone of liberty and equality: "That those who make the laws are to govern by promulgated, established laws not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough."

And equally pertinent is the poetical epigram:

"Remember, man, the Universal Cause
Acts not by partial, but by general laws."

Men under government may be physically, mentally and morally unequal. The state has performed its duty when it gives equality of opportunity and privileges; it has not the power to re-create the units of society and thereby establish a personal equilibrium. Governmental equality, equality of legal rights should be granted by the state; but the conferring of social equality and equality of faculty and ability depends on a higher power and is entirely beyond the sphere and functions of the commonwealth.

Ask of thy mother earth, why oaks are made
Taller or stronger than the weeds they shade?
Or ask of yonder argent fields above,
Why Jove's satellites are less than Jove?

POPE.

Note: In *Magoun vs. Savings Bank* (the Inheritance Tax), decided by the U. S. Sup. Court in April, 1898, the court admitted that the statute in controversy was a *class law*, yet upheld it as being a *reasonable* classification. This case is the base upon which such class laws as the Income Tax, the labor amendment to the Sherman law, wages and hours of labor laws, etc., find support. In Cooley's Const. Lim. (pages 487 to 498) a vast number of cases are discussed which were brought into court through class legislation.

## CHAPTER XXVII.

## THE PEACE SOCIETIES.

There are three very strong societies working for peace, arbitration and the observance of our treaty compacts: the American Peace Society, Washington, D. C., the Carnegie Peace Endowment, New York City, and the World Peace Foundation, Boston, Mass. The peace organizations were critisized by Congressmen on the opposite side for their course in the tolls controversy, and their actions taken for world peace and disarmament. These associations are composed of men of mental and financial strength and are a power in any cause by them espoused.

The finances are in a powerful way aided by the Carnegie endowment of $10,000,000 for the advancement of peace. This produces the annual revenue of $500,000. The American Peace Society gets the yearly sum of $31,000 to distribute among the auxiliary societies. But the World Peace Foundation depends on its own resources. The trustees of the Carnegie Endowment, given in the Senate Interoceanic Committee's report, 1914, are:

Trustees: President, Elihu Root; vice president, Joseph H. Choate; secretary, James Brown Scott; treasurer, Charlemange Tower. Robert S. Brookings, Thomas Burke, Nicholas Murray Butler, John L. Cadwalader, since deceased; Cleveland H. Dodge, Charles W. Eliot, Arthur William Foster, John W. Foster, Austen G. Fox, Robert A. Franks, William M. Howard, Samuel Mather, Andrew J. Montague, Henry S. Pritchett, George W. Perkins, Jacob G. Schmidlapp, James L. Slayden, Oscar S. Straus, Charles L. Taylor, Andrew

D. White, John Sharp Williams, Robert S. Woodward, Luke E. Wright.

The following are the trustees and directors of the World Peace Foundation as given in the Report of the Trustees issued in 1914:

Trustees: George A. Plimpton, president; A. Lawrence Lowell, William H. P. Faunce, Joseph Swain, Samuel T. Dutton, Sarah Louise Arnold, Edward Cummings, Samuel W. McCall, Samuel J. Elder, George W. Anderson, George H. Blakeslee, Albert E. Pillsbury.

Directors: Edwin D. Mead, chief director; David Starr Jordan, James A. Macdonald, Hamilton Holt, Charles R. Brown, William I. Hull, George W. Nasmyth, Charles H. Levermore, secretary; Albert G. Bryant, Denys P. Myers.

Treasurer: Arthur W. Allen, 40 Mt. Vernon Street, Boston.

From the aforesaid Senate Committee's Report we are able to give the following officers of the American Peace Society: Senator Theodore Burton of Ohio, president; Dr. Benjamin F. Trueblood, secretary; Mr. Arthur D. Call, executive director and joint secretary.

Since peace and harmony among nations depend largely on the observance of treaties the peace societies very obviously were brought into the controversy over the Panama tolls. Their position was: that the English treaty should be observed by us without any favor or distinction if its import was clear that there should be no discrimination; and that if the treaty was at all doubtful the question should be arbitrated. They believed that the violation of a treaty would cause serious complications and lead to disturbance in international harmony.

Peaceful men could not think of national action, which might induce or encourage hostility or war. War is barbarism and should be relegated to the dark past;

and disputes between nations should be settled, not by wager of battle, but like private controversies by civil proceeding or by arbitration. Some very prominent members of the peace societies favored the repeal bill. Without the aid of these able men it is doubtful if the bill would have been enacted. More than 700,000 copies of Senator Root's speech delivered in the Senate in 1913 were circulated.

Such work could not be consummated without the expenditure of money. This was liberally donated and was the cause of violent censure by those opposing. If the cause were just, the money was morally spent in this crusade of education for the world's uplift. Having faith in their propaganda, why should these associates not go forward with force and energy? It would be difficult for an advocate of peace to be *over-zealous* in the work. So far as is known, these associations are doing a noble work and should not be subjected to condemnation. What more noble and altruistic than the promulgation of the doctrine of peace and harmony?

These societies are largely voluntary associations. The great financial institution is the Carnegie Endowment. The work of these heroes is not so much political as educational. They operate through the schools, colleges and churches. They teach the young idea how not to shoot at their brothers of the human family.

Peace is a matter of education, of culture, of morality, of religion, of civilization, and is the foundation of Christianity. Then why should not money be expended copiously and the best of man's ability be given in aid of this most righteous cause?

War is *diabolical* and in no way justifiable except in case of attack and in self defense. So long as the evil of war infests the world nations must protect themselves against violence and destruction. There is yet

no means of protection against a ravaging nation only by being armed for the emergency. Every one has the right to protect himself against an armed highwayman or bandit.

Civilization has placed the ban on bull-fights, prize-fights and the duel; but these are *minims* of evil compared with the flood of crime perpetrated on the field of carnage. How inconsistent to prevent, by law, cruelty to animals and to children and punish simple assault without battery, and at the same time go to war, with most deadly appliances, and destroy life by thousands and whole cities, schools, hospitals and churches. Nations properly use heroic measures to drive out plague and pestilence, yet will engage in combat for the express purpose of a much greater destruction of human life.

It is far easier to be drawn into war than to get free from its entanglements. Peace is the normal state, war is abnormal; peace is conservation war is destruction. The end and result of war is to attain peace; that is, nations carry on war and excruciating carnage to complete exhaustion, to gain peace. Why not secure this end by some rational process and forever abolish war? Nations should restrain themselves by some educational process or peace propaganda from committing the grossest wrongs by wholesale. It will be impossible to obtain disarmament among nations by the action of one nation alone; there must be a concert of action brought about through harmonious agreement.

The United States is pre-eminently a peaceable, industrial and non-aggressive nation, and in no way cultivates or fosters the spirit of war; still if the conservative, thoughtful portion of our citizens believe, at any time, that we are on the edge of a hostile military volcano, which at an unforseen moment is liable to envelop us, it is our right and duty to prepare for the dire

calamity and do ALL that is necessary for our security and safety. Life, family, home and property must be held sacred above all else, even above peace itself! But we should not be led into mortal conflict without justification, nor through the *furor* of the "hue and cry." We should stand firm for peace and yield to war when it becomes the only practical alternative. Peace or war, however, is not always a matter of a nation's choice.

Rulers are sometimes so inflamed with militarism that they seek to justify, on high moral grounds, their illegal and vicious attacks; it has even been customary from the birth of history for nations to loudly proclaim that God is with them in war and supports their side in the struggle. They may delude themselves, for it is beyond the power of man to clearly perceive and interpret the designs of Providence. There is a wide expanse, often, between a fostered belief, and positive, assured knowledge. It is impossible for the Supreme Power to favor both sides in battle. In most cases, perhaps, it is on the side of neither.

The champions of peace in their effort to limit world armament and to abolish war, and in their work for the observance of our treaty obligations have been guided by conservatism, logic, intelligence and wisdom.

"Oh, peace! thou source and soul of social life;
Beneath whose calm, inspiring influence
Science his view enlarges, Art refines
And swelling Commerce opens all her ports;
Blest be the man divine who gives us thee."

## CHAPTER XXVIII.

## INTERNATIONAL EMINENT DOMAIN.

In the course of events it frequently happens that necessity demands that the great body of outside nations shall have a way of transit through and over the lands and territorial waters of an obstructing nation. The right is founded on the principle that a nation holds sovereignty over a particular portion of the earth only so long as it uses the same in the interest of the world's progress and betterment. When it acts in hostility to the plain dictates of civilization and humanity the family of nations will interfere and compel proper civility and neighborly intercourse.

The family of nations is the forum of the world and its decree must be obeyed by the offending nation. The red man of America, the barbarian of Africa and the cannibal of the Oceanic Isles were brought under subjection through this civilizing principle. Perhaps not by a formal decision by the world powers, but by and with their implicit consent and approval.

Even nations now claiming to be civilized have to be brought under subjection and tutelage by combined international powers. International law compels nations to observe their proper duties to other members of the national family; and International Eminent Domain is a high power that must at times be exerted to enforce international duties and obligations.

Eleven years ago we prepared an article on this subject which was printed in the Wilmington, Del.,

*Morning News* on January 30, 1904, and reprinted in the Chicago *Legal News* February 6th, of the same year, which article was in substance as follows:—

* * * *

All intelligent nations now know that the earth's surface comprises two extensive continents, separated by two vast oceans, thousands of miles in width. Retrospect teaches us how short a period of time this fact has been known; and, also, how rapidly we are advancing in knowledge and civilization.

The land surface of the earth is now largely occupied, in severalty, by many governmental nations and tribes, while the great seas remain the common domain of all. This occupancy of the lands and these joint rights in the seas originated from natural impulse and instinct rather than from express written compact. It is perhaps an economy of nature that the world's territorial government should for most purposes be by units, rather than by one centralized comprehensive entirety.

In the remote past such a concentrated government would have been an impossibility; for even at the dawn of the Christian era the ruling nations or tribes had little knowledge of, or commerce with those living in different and remote parts of the world. In those times of limited travel and trade very little was known of what is now termed international law. It was not then needed. Neither can we expect to find international law in the age of hieroglyphics. Christianity, civilization and the printing press are the progenitors of the jus inter gentes.

This law, like all other human law, is not stable, but is ever changing from age to age with the circumstances that wield the destiny of nations. That which

makes it can unmake it at pleasure. Its keeping must always remain in the hands of the ruling nations; and it is binding just so far as there is power to enforce it.

NATIONAL RELATIONSHIP.

Nations are becoming more closely connected as education and invention develop. The ocean cables, the wireless telegraph and the rapid steaming leviathans of the twentieth century bring the people of the world into daily contact and communication. We cannot, if we would, seclude ourselves in the desert nor in the mountain wilderness. We are drawn willingly or unwillingly into the world's struggles, commerce and warfares. This situation is not peculiar to the United States alone, but likewise affects all nations in the ruling class.

During this transition from the lower to the higher civilization our national rights, needs and duties are ever increasing. The Esquimau of the frozen North has but little need of railroads and ship canals. The planter on a small tropical isle may need ships and canals but not the railroad. Yet the active, hustling nations of the temperate zone engaged in all branches of the world's traffic and, often by necessity in its wars, needs and should have all privileges, rights and benefits in the seas and lands of the world that a wise and universal policy may demand.

In legal theory an independent nation owns not only its sovereignty but its territory; still, whatever it does own is subject to conquest in a just cause by a stronger power or a combination of powers. A nation, also in theory, controls its subjects; yet combined international power may control both the nation and its subjects. A magna charta, a constitution, or a state code is of no avail against an overpowering hostile army. Following the Norman conquest British land

titles were divested; the landlord became vassal, sovereignty was overthrown and a new regime was erected upon the fearful wreck. Modern international law has revoked this Norman rule, and conquest now overthrows sovereignty only, and leaves the private land titles vested in the prior owner. In 1825 Chief Justice Marshall decided that the African slave trade was legal by the law of nations; but before the elapse of twenty-five years the powers of the world decreed this trade to be illegal and the slave dealer was driven from the high seas.

Theorists may not approve of this doctrine of forcible national action, but if in any given case universal policy approves the act, it passes into the realm of res adjudicata and becomes final. This is the court of last resort; there is no higher appeal so far as worldly power extends. Thus the world powers rule the world, and this becomes more emphatic day by day. The people of the world constitute these powers—and who shall reverse what the people have decided?

All writers on international law lay down the rule that nations are equal in their sovereignty and that no one can (without consent) invade the domain of another. But these authors show, before reaching their closing pages, that there are numerous exceptions to the rule and that in many instances sovereignty may justly be invaded. These exceptions make the rule a limited one, and thus wholly destroy its universality. When the gate is opened to let in one exception it will be difficult to close it against a host of others following in the same line and with credentials fully as strong. By conceding that the sovereignty of a nation may in certain cases be invaded by another nation we do not admit the doctrine that "might makes right," because this adage is neither universally true nor universally false; for might makes

right when it is right, and only the right should prevail.

The deduction from these premises is that the property and sovereignty of a nation, if needed for a high international purpose, may be invaded, and, to that extent, may be appropriated under the doctrine of international eminent domain subject to the payment of a just compensation, if the right to compensation has not been forfeited. The cases in which this rule may be enforced are not enumerated in any tabulated list, but each case is determined by its own circumstances.

PRECEDENTS.

Are there precedents for the doctrine that an international way can be built through the domain of a nation without her consent? A perfect parallel may be difficult to find, but analogy is so close that it may be said that history furnishes ample precedent.

The Suez canal became a necessity and was made, perhaps, by agreement of the parties in interest; but if consent had been refused and the civilized powers had determined that the canal was needed the refusal of consent would not have prevented its construction. The straits of the Dardanelles and the Bosphorus lie wholly within the empire of Turkey, still they were compelled by the treaty of five nations to be kept open to the merchant shipping of the world. The rivers Danube, Scheldt and Rhine in Europe, and the St. Lawrence and the Yukon in North America, and the Amazon and the La Plata in South America furnish instances where the ocean end of the river belonged to one sovereignty, and the source end to another. Treaties (more or less voluntary) have made these rivers free to the world's commerce. If this had not been accomplished by express compact the shut-in nations would, by conquest or in-

ternational eminent domain, have opened the way as soon as they had acquired sufficient international aid.

The Mississippi was at one time a source of trouble between the United States and Spain. Our country asserted her right to the free navigation of this river throughout its length. Spain, then owning Louisiana, denied our right. The later purchase of Louisiana by the United States from France settled the question for all future time.

Perhaps the strongest illustration of the right to traverse the domain of a foreign nation for general navigation purposes is the case of the Danish inland seas and passage. If Denmark could lawfully have prevented the invasion of these waters for the purpose of navigation a very important and extensive part of northeastern Europe would have been shut in from the Atlantic. This was the cause of much international dispute during the period from 1319 up to 1857. In the early stages Denmark was arbitrary; but as time passed and nations became more enlightened, and commerce spread over the world the great nations made a more positive demand for freer rights of transit, when, at last through great pressure a liberal grant was made which, though apparently voluntary, was more or less a matter of subdued compulsion.

How long would England and Morocco be permitted to close the straits of Gibraltar against general navigation? What would follow if Russia and the United States should interdict passage through Behring Straits? Universal policy would administer the needed relief and open the channels to general traffic.

It may be said that these specified waterways can be kept open because they are natural existing channels; but that the making of a new passage through a nation is a different question. The proposed way

would be obstructed by the virgin soil. The existing channels mentioned were obstructed by the prohibitory edict of the holding nation. To acquire the right of navigation in either case, the obstruction would need to be removed. It might in many cases be less difficult to cut a new canal than to force a passage through the waters of a strong and powerful nation against its consent. The governing principle in both of these cases being identical the legal right must of necessity be the same. The question to be decided in all such cases will be, is the desired channel or way an international necessity and do the world's powers demand it?

## INTERNATIONAL EMINENT DOMAIN.

Can the right of eminent domain apply to an international right of way? Is there a right of international eminent domain? A state may take the property or franchise of a subject and apply the same to a higher and more beneficial use, on the theory that the needs of the nation demand it. The doctrine of eminent domain did not spring into being by force of any written law, but it is inherent in government itself, and is subject to the dictates of any supreme power whether national or international. If it is essential to the sovereignty of a single state, with much stronger reason is it essential to the world's higher sovereignty. Can it be that the needs of a single state are of a higher order and more imperative than those of the whole world of which it is but a part?

These questions then must be adjusted along legal and equitable lines. The binding power of law is in the penalty. The penalty is but a dead letter if there is no appointed power to execute it. It requires sovereign

power both to enact and enforce the law of nations. Law proceeds from sovereignty. National law proceeds from national sovereignty. Divine law proceeds from divine sovereignty. Then why not international law proceed from international sovereignty?

The right of eminent domain is an attribute of sovereignty. Then international sovereignty must have its own attribute of the right of eminent domain. This higher international right exists in fact, in precedent, and is supported by incontrovertible logical conclusion.

National sovereignty is in no sense eternal or unchangeable. Nations then hold their territory subject to such betterments as the policy of the world may emphatically demand. * * * *

GEO. A. TALLEY.

Also, on February 28, 1904, we had printed in the Philadelphia *Public Ledger* a letter which, in part, reads as follows:

To the Editor of the Public Ledger.

* * * * * *

"Titles to land are conferred neither upon nations nor individuals for obstructive or base uses. They hold their lands subject to the world's necessities upon being paid the proper compensation.

Every legal mind recognizes that there is a right of way of necessity in favor of the land owner who is shut in from the common highway by an intervening farm, in fact every road, street, canal or railroad has been laid out, solely, on the ground of necessity. This is the foundation of the state's right of *eminent domain.* If man has a private way of necessity, and the nation has a public way of necessity, then why have not the combined nations an international public way of necessity? No nation by virtue of its sovereignty can

deny to the people of the world the natural right of transit through its domain when it is urgently demanded.

It is rare that nations so far forget their duty to mankind as to deny these rights of transit overland or by way of rivers and inland seas and passages. * * *

That which is justified by the supreme right of *eminent domain* cannot be wrong. Individual nations are in many cases subject to law laid down by the great body of civilized nations. These international rules are the offspring of humanity, necessity and the civilizing influence of Christianity. They are rights of the highest order.

It would be a marvellous doctrine that a state could exercise the right of *eminent domain* and then deny the same right to its overlord—the combined international powers. The sovereignty that enacts and enforces international law, has within it the right of *eminent domain* and the wisdom to determine when necessity demands its enforcement."

* * * *

Some one may suggest, that even if land in any instance is taken by "international eminent domain" there should be a formal proceeding to that end. This is not at all necessary, for under absolute government court proceedings are not at all essential, but the sovereign power simply takes what is needed, either with or without paying compensation.

But civilized international powers would act upon the plane of honor and justice and would pay the proper condemnation money. There being no established international court, there could be no judicial proceedings. But the right of eminent domain does not depend upon

such process unless some constitutional system so requires.

It may also be said, that no nation is secure, if its sovereignty can be invaded without let or hindrance. But herein lies the security: This high power could not be set in motion at the dictation of one or even a few nations. The public demand would have to be so urgent, that the world powers were practically a unit in the demand.

The Bernhardi doctrine under which Germany, without legal grounds invaded Belgium, had no relation, whatever, to the principles of International Eminent Domain, because the world powers did not ordain it. Belgium's invasion was not by the authority of twenty-five world powers, but with the approval of the invader's single ally. There is a difference between eminent domain proceedings and war.

This chapter is wholly academic, and at this date can only be a statement of an abstract principal of governmental science; yet in the evolution of the world's history it may at any time become of vital practical importance.

The civilized world is more and more becoming a confederation of nations, with its watchmen upon the walls, scanning over mountain, plain and ocean noting who are violating international duty and propriety. When this combination is substantially in accord in any decision, the offender must yield obedience to the decree. But when the family of nations is, itself, almost wholly engaged in mortal combat there will be no authority left either to make or enforce a decree.

There can be no "concert of the world-powers" in the midst of a world-wide war!

## CHAPTER XXIX.

## GLEANINGS.

Through accidental fire in the printing office and the distractions of the world-wide war, this work has been delayed; yet this has not been wholly disadvantageous for it has been possible to make corrections and a deeper research into that storehouse of history and international law known as "Congressional Documents". The war alone sheds new light on some problems discussed in earlier pages.

In House Miscellaneous Document, 46 Congress, third session, 1880-81, important testimony is preserved on several canal questions, which was given before the House committee, by these prominent men: Admiral Ammen, Lieut. Collins, F. W. Kelley, Commander Lull, A. G. Menocal, J. Lawrence Smith, Capt. Jas. B. Eads, Ferdinand de Lesseps, and ex-Secy. Richard W. Thompson.

Another important record is Senate Document, 57 Cong. first session, Vol. 19, 1901-02, containing 1,200 pages. This hearing was to determine whether the Spooner Law, providing for the purchase of the French rights and the completion of the Panama Canal should be enacted.

But the most comprehensive and prolific history of the Canal, and the rights connected therewith, will be found in Sen. Doc. 59 Cong. 2nd Session, 4 Vols. containing 3,207 pages. This hearing decided that the Canal should be a lock canal, and that the dam should be at Gatun instead of at Bohio.

This was a most remarkable hearing, on account of the feeling at times, shown between some of the interrogators and certain witnesses. At such times it was a combat of intellect against intellect, with the thrust and counter-thrust; yet as a whole it is a wonderful revelation of important canal data.

The witnesses were men of very noted ability. They were: Secretary Taft, Chief Engineer John F. Stevens, Ex-Chief Engineer John F. Wallace, Poultney Bigelow, Maj. Hugh J. Gallagher, E. S. Benson, R. V. Schwerin, Gov. Chas. E. Magoon, Theodore P. Shonts, David W. Ross, Wm. Nelson Cromwell, Jacob E. Markel, Linden W. Bates, Wm. Barcley Parsons, Alfred Noble, Frederic P. Stearns, Col. E. H. Ernst, Gen. Peter C. Hains, Gen. Henry L. Abbott, Gen. Geo. W. Davis, Wm. H. Burr, Edward A. Drake, Alfred Anderson, Robert Lesley and Richard L. Walker.

The testimony of some witnesses covers from 200 to 300 printed pages each. Extended testimony was given by Mr. Cromwell, attorney for the French Company and by Sec'y Taft.

The most notable thing in the whole hearing was the contest between Senator Morgan, the questioner, and Mr. Cromwell the lawyer-witness. After days of strenuous examination, the witness came out at the conclusion apparently vigorous and unconquered. His testimony was replete with valuable information; and to the end he declined to disclose private matters between himself and his client, the French company. He was exceedingly clear and accurate in his legal views, and knew *when* and *how* to speak, and when to decline.

Mr. Wallace under a careful examination disclosed his reasons for resigning, in 1905, his position as chief Engineer of the canal.

Mr. Taft's evidence, as Secretary of War, covered

a vast field, was highly instructive and of incalculable benefit to the committee.

A witness whose testimony was convincing and forceful was Mr. Stevens, Chief Engineer. Among the other witnesses were some of the most noted Engineers of the nation.

The Committee had the benefit of the findings of the Consulting Board and of the Canal Commission of 1906, yet the formal reports had not been filed. The Consulting Board (majority) favored the sea-level plan; but the minority and the Canal Commission both favored a lock canal with the "Great Dam" at Gatun.

On June 27, 1906 the House, finally, passed the Senate bill in form as follows:

"Be it enacted, etc., That a lock canal be constructed across the Isthmus of Panama connecting the waters of the Atlantic and Pacific oceans, of the general type proposed by the minority of the Board of Consulting Engineers, created by order of the President, dated January 24, 1905, in pursuance of an act entitled 'An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans. Approved June 28, 1902.'"

This bill was engrossed June 28, and approved by the President, June 29, and under it the Great Dam was built at Gatun; though the French Company and many American Engineers had at a prior date, selected Bohio as the dam site. The final choice was the wise one, both on account of the water supply and the vast area of free navigation afforded from Gatun to the mountains; both sites required locks to the height of 85 feet.

The safety of the canal, now hangs on this phenomenal Gatun dam and its locks; the slides at Culebra can be controlled by dredging, expensive though it be.

### WYSE AND DE LESSEPS.

Lieut. Wyse, whose mother was a Boneparte, secured his concession in 1878, and with de Lesseps at

once took steps to build a canal at Panama, selecting this route, as de Lesseps says, relying wholly on prior surveys made by American Engineers. The Wyse concession reserved full sovereignty to Colombia. The charter grant required that there should be equality among all users of the canal, and forbade the transfer of the rights to a foreign power. De Lesseps and his associates became incorporated under the general law of France. This definite purpose of a foreign people to build a canal at Panama brought the question in 1880, vividly, before the United States.

Our nation had spent millions of dollars in surveys with the view of building a Canal under American control. President Hayes, Secretary Evarts and Congress began a search to ascertain our rights in the emergency. The whole civil government became aroused. If checkmated at Panama the only place for us was at Nicaragua. Two canals across the American barrier would be a surfeit; commercially, one would destroy the other. The practical question today is: will the traffic make one canal profitable?

Our interest in the canal project received a stimulus at three different epochs. The Civil War brought General Grant to the presidency and with him an inspiration for a canal.

Wyse and De Lesseps about 1880 began active work at Panama, this again aroused the American inspiration for the canal. It was evident that foreign influence might outstrip us and gain a monopoly of this enterprise.

Then came the war with Spain and at its close we again became inspired, even enthused, and must have a canal, because the *Oregon* sailed around the Horn and helped to save the flag at Santiago.

On Page 45 *ante*, it is said that on May 4, 1904,

the canal was conveyed to the United States and the French stockholders received their money. It now appears that our nation did not deem it wise to send in one shipment, $40,000,000 in gold from this country; so it was on May 4, deposited in Morgan's bank, New York, the money to be transmitted to Paris in installments. It did not all reach Paris until 60 days after May 4, 1904.

## MONROE DOCTRINE.

In 1880 our nation was face to face with a delicate situation: was the grant to Wyse in violation of our treaty of 1846 with New Granada, and if the French operated a canal under this grant, would we control it under that treaty? Would a canal operated by citizens of France under a French charter, violate the Monroe Doctrine? Would not any canal built at Panama by Europeans be liable to bring our nation into trouble and conflict? These serious problems were viewed by Statesmen from different angles.

They also had divergent views on the location for the Canal; some through interest or prejudice seemed to be glued to Nicaragua; others from conviction favored Panama; others favored Panama, not because it was the better way, but for the very purpose of eliminating the French competition. The Panama advocates found the French failure a direct American benefit. It made the opportunity for an exclusive canal in our hands, and fortunately this is now a demonstrated fact. So long as we do justice to all and charge a uniform rate, no one will care to build a competing canal at Nicaragua.

But did the French project violate the Monroe Doctrine? This doctrine meant that no foreign nation

would be allowed to colonize in America and thereby overthrow Republican institutions, and render our Supremacy less secure. But Statesmen in Congress contended after deep consideration, that it was more important to prevent a foreign power from owning an isthmian canal than to prevent colonizing; that the canal's control could be far more dangerous to the United States, because it could be used as a direct military agency against us, by shutting out our fleet and passing a hostile navy through to attack our coasts. Hence Congress would not consent that the canal should be under foreign control, and made it plain that America should own it. We could make no protest, if individuals built a canal, acting solely under the sovereignty of Colombia. De Lesseps positively asserted before a Congressional Committee in 1881, that the French Corporation was a private enterprise and he was perfectly willing to have American stockholders and the headquarters at New York or Washington.

The United States continued to survey at Nicaragua and at Panama and to negotiate with the French Corporation. The situation remained unadjusted through the terms of Hayes, Garfield, Arthur, Cleveland, Harrison and McKinley; and under Roosevelt the whole matter was settled by the French Company offering to sell to the United States for $40,000,000.

They first offered to sell for $109,000,000. This was deemed exorbitant and the Canal Commission reported Nov. 16, 1901, that in view of the terms, they were of opinion that the most practicable and feasible route for a canal to be under the control and ownership of the United States was the Nicaragua route.

The struggle continued over the routes, until Congress was about to direct by the "Hepburn" House bill, that the Canal should be at Nicaragua. This bill on

Jan. 9, 1902, passed the House and was introduced in the Senate and referred to the Committee.

On Jan. 18, 1902, the Canal Commission filed a new report stating that the French Company had offered to sell for $40,000,000; and that as conditions now exist, they were of opinion that "the most practicable and feasible route" for an isthmian canal to be "under the control, management and ownership of the United States" is that known as the Panama route. The opinion was unanimous.

The Commission testified before the Senate Committee, that they in 1901 favored the Panama route, but the price then asked by the French Company prevented their so reporting. By the purchase of the Panama rights happily the Monroe Doctrine ceased to be a disturbing factor. It was conceded by Wyse and de Lesseps that their concession from Colombia was subject to our treaty of 1846.

### INVENTORY OF PROPERTY PURCHASED.

The following is an abridgement of the property taken over from the French Company.

1st. 56 tracts of land, 30,000 acres; also Wyse's rights in 625,000 acres not yet delimited.

2nd. 2431 buildings, offices, shops, etc. and the main office headquarters in Panama with the furniture.

3rd. All the plant, tugs, launches, dredges, locomotives, cars, cranes, pumps, excavators, etc.; surveying instruments, office supplies, surgical outfits, and thousands of items of other supplies.

4th. Excavations in the main canal, and in the diversions, of the total of 39,586,332 cu. yds.

5th. 68,863 shares of the 70,000 shares of the Panama R. R. stock, subject to mortgages. The company owned cash $438,569; and 3 ships, the *Alianca, Advance* and *Finance* each of 2,000 tons; also charters of steamers running from New York to Colon and from Panama to San Francisco; also half of the Islands, Naos, Culebra, Perico, and Flamenco in Panama Bay; the R. R. Co. owned nearly the whole of the town of Colon, the houses being built under lease.

6th. Maps, drawings and records at Paris worth $2,000,000.

The Commission valued all at $40,000,000.

## NICARAGUA VS. PANAMA.

The Canal Commission concluded that any canal at Panama or Nicaragua must be with locks; also that the water supply at either site was ample; that on account of the harbors, on the Panama route and the railroad service, the canal there could be put into operation more speedily than at Nicaragua; that the operating expense would be much less at Panama; that the Panama Canal was 134.6 miles shorter, with less number of locks, and far less curvature; and that the time of passage at Panama was 12 hours, as against 33 at Nicaragua. It was claimed that a sea-level canal, could, in time, be made at Panama, but at Nicaragua this would be forever impossible on account of Lake Nicaragua, being 110 feet above sea-level.

Earthquakes and volcanoes figured against Nicaragua; but against this argument was raised the cry that the revolutionary disposition of the people at Panama would endanger the Canal. The final contest

was fought out in the Senate in 1902. Bunau-Varilla secured an invincible champion when Senator Hanna came over to the Panama side. While Senator Morgan was plausible, and dealt in rhetoric and ancient history, his arguments did not convince like the strong, business-sense arguments, and clear, terse philosophy of Senator Hanna. The $40,000,000 offer and a partly built canal, caught the business men of the nation. The Spooner bill was substituted for the Hepburn bill, and after a stormy contest the Spooner Law was passed by the Senate, and later accepted by the House and was approved by the President, June 28, 1902. Under this law all the rights at Panama were secured and we now have in operation the channel connecting the two oceans—one of the world's most remarkable accomplishments. There is now a single canal—an American Canal—controlled by America, and to be operated for the civilized world on terms of equality.

On July 16, 1915, the three American dreadnoughts, the *Missouri, Ohio* and *Wisconsin* passed through the Panama Canal from Colon to Balboa in the space of 9 hours. They moved in single file about one-fourth of a mile apart, and were in command of Rear Admiral Wm. F. Fullam. These were the first large battleships to navigate the canal; a small fleet of American submarines passed through in February, 1915. It is stated that the 3 battleships paid tolls to the amount of $45,000. It is now demonstrated that the nation has attained one of the main purposes in constructing the canal—pass its fleet through this waterway and thus protect either coast in case of an emergency.

### ULTIMATE SOVEREIGNTY.

In 1904 Panama raised a serious question—that

of "Titular Sovereignty." She claimed that this remained in her even considering the broad language of Article 3, of the Hay-Varilla treaty. Panama claimed the right to a part of the postal receipts, and to certain custom dues collected near the canal zone, and other rights. These matters were taken up diplomatically and on Aug. 11, 1904, Mr. Obaldia, Minister for Panama, addressed a letter to Sec'y Hay making a strong legal argument, that Panama did not by the treaty divest herself of all Sovereignty in the Zone; if this had been true he said that one or two articles would have been sufficient and the other qualifying articles would not have been necessary.

Mr. Hay on Oct. 24, 1904 answered, at length, with a strong plea, that the treaty was a grant of territory and not a mere concession or privilege; and that full sovereignty was conferred and that it "could not be divided."

The issue being directly joined, President Roosevelt in Oct. 1904 asked Sec'y Taft to proceed to Panama and try to secure an adjustment; saying in his letter, that however far a just construction of the treaty would enable us to go . . * . . * . . * . . * . . in asserting the equivalent of sovereignty over the Canal strip, the rights that we intend to exercise shall be with proper regard for the people of Panama.

At the end of November Mr. Taft arrived in Panama and about Dec. 3, 1904, made with Panama an arrangement called a *modus vivendi*, a temporary compact by which the nations could "live together" until a definite provision could be made. So far as we are informed the two nations still are operating under it. Mr. Taft in reporting to the President, Jan. 12, 1905, expressed his view of the technical question of "Titular Sovereignty." He believed that we had

sovereignty to hold and operate the canal, and that so long as we had full police and judicial control there was "no use quarreling over what was dear to those people, but of no value whatever to us."

A treaty, if fairly doubtful, should be construed in favor of the grantee; hence all real doubt must be decided against Panama; still we should be bound to the true meaning of the treaty as a whole.

A mortgage, in the premise, conveys the absolute fee title; yet it is by subsequent provisions made only a conditional title. In all legal documents an antecedent positive provision may be modified by a subsequent condition. Treaties necessarily fall under these rules; still there can be no question but what the United States has all the sovereignty necessary for controlling and operating the canal, and may do everything in the Zone to make the canal efficient. We went there to build and operate a canal, and the treaty must be liberally construed to that end.

In the Senate investigation (1906) some Senators concluded that we own the Canal Zone precisely as we do the Peninsula of Florida or Porto Rico. Some of the witnesses were not willing to go to this extent. They seemed to think, if for any reason we were unable to operate the canal and it was permanently suspended, that the rights, perhaps might revert to Panama.

Little can be gained by following up these highly technical problems. We are operating, by virtue of Panama's granted consent, a canal for all mankind and we ought not to be bound by a too narrow construction.

## WAR PROBLEMS.

We learn from experience. The European war

brings to our vision many problems that may attend the operation of the Panama Canal in case of an American war. The canal would invite attack and perhaps would be the first territory to feel the shock of battle. It is isolated and is the slender tie binding our two coast lines. It is now observed that even treaties do not restrain a desperate nation in time of war.

The two canals, Suez and Panama, must be protected by military power rather than by neutrality treaties. Take the situation of the Suez Canal today: It would be instantly destroyed if certain belligerent armies could reach it, although solemn treaties pledge its protection.

It is a highway for the world, yet no neutral nation feels any obligation to police or defend it. Have neutrals no duty or responsibility there? Why have they not? They look to the Allied Powers to guard it, and nations at peace hold aloof as if it were none of their affair. The Panama Canal would be subject to the same hazard under similar circumstances.

These great international channels while primarily under the protection of their owners should, in case of *disability* of the owners, come under the temporary guardianship of the world powers, to prevent their destruction. International law should preserve them, for they are more than *national rivers,* they are connecting links of the oceans, and being for the world's use, the world should stand sponsor for their safety.

It is now plain, that airships could destroy the locks of a canal in a single night raid; and perhaps a small submarine could find its way into a canal and torpedo the lock gates.

This war has brought forward the question of the right to declare a "war zone" in the high seas adjacent

to an enemy's coast. If a war zone can be lawfully declared, then the seas at both ends of the canal could be made a zone of war and all ships going to the canal would be subject to destruction with all on board. International law grows from precedent and usage. If in 1915, the world concedes the legal right to establish a war zone, it would be cited as authority in a later war in which our nation might be engaged.

A war zone around our canal would stifle traffic there, for merchant ships would not seek transit under threat of certain destruction.

A declaration of war between nations makes as between their war forces the whole world a zone of war. They may battle in their own domain or by permission on neutral land, or on the high sea, but they cannot designate any part of the sea, as a delimited zone of war.

The declaring of a war zone cannot change the sacred rules of international law. No belligerent can war against neutral ships, or against merchant ships of the enemy, in the common domain. The rights of non-combatants are commensurate with the sea itself, subject however, to the well-known right of "search and seizure." But this must be done with due regard for human life, whether those on board be neutral or enemy non-combatants. War, by custom, may be waged on the high sea and non-combatants must keep out of range of "shot and shell." But after the battle the whole sea becomes common property. The taking of an enemy's merchant ships and the "search and seizure" of neutral ships relate wholly to property rights and do not permit the taking of the life of non-combatants. In war the taking of human life to be legal, must be on the actual field of battle. There can be no war zone as to non-combatants; their common

rights in the sea are inherent, and were not granted by the belligerents, hence cannot be taken away by their authority. No single nation can have *absolute sovereignty* over the public domain.

The loss of the *Titanic* with her human cargo was from natural causes; it was from accident and not from design. The *Lusitania* a peaceful ship with nearly 2,000 unfortunates on board (many being women and children) was on May 7, 1915, sunk by an enemy's submarine because she entered a *supposed* war zone of the sea. This ship had a mixed cargo of passengers of both neutral and enemy non-combatants, who were on legal and peaceful errands and it is now almost universally conceded by the world that they should have had the protection of international law. This appalling episode should cause the ruling powers to order and decree that the use of submarines as instruments of civilized warfare, shall for the future be absolutely forbidden.

## OWNERSHIP AND DUTY.

But a few days ago we were asked: who owns the Panama Canal? The reply was that the view of our greatest statesman is, that the United States owns and has *political* control of the Canal, but under treaty and years of pledges she should operate it without discrimination, to all comers. This is precisely what Grant, Hayes, Blaine, Evarts and others meant, when saying that America must own the isthmian waterway. Most of them have at some time, declared that a canal should be for all on equal terms.

In 1880 the House Foreign Relations Committee had before it, the question of the canal and the Monroe Doctrine; this was brought about by the French pro-

ject. The Committee's resolution provided, "that should a canal be constructed across the isthmus this government will insist that it shall not be under the control of any European government; that it shall be free to the commerce of the world upon equal terms." Representative Crapo testified before the committee, that if the Clayton Treaty were abrogated England could not complain, if her trade could use the canal on "equal terms with our own."

In 1902 when the question was whether we should buy the French rights or build at Nicaragua, Senator Hanna (who turned the day for Panama) on June 5, 1902 declared: "I want to discuss this question from the standpoint of loyalty to my country." By constructing the canal "we owe an equal responsibility to every nation. * * I do not understand that this is any selfish project or that we are even considering the rate per cent. as a reward for our venture." And Senator Pettus on the same occasion said, the people will own and control the canal and "it is their desire to have all the world participate equally with the citizens of the United States in the use of the canal."

On June 11, 1902, Senator Fairbanks said, that by the Hay-Pauncefote treaty the United States may operate the canal and "she asks no aid of any power—and is ready to carry the enterprise to its consummation, and hold it perpetually for the commerce of the world upon terms of absolute equality."

Senator Spooner at the same session, in advocating his bill expressed himself thus:

"The unfinished canal lies there a menace to the safety of the United States. I have thought it might be completed, and that the day might come when our *Oregon* would go around the Horn again and an

enemy's *Oregon* might go through this short canal." And again: "It is a project of the whole country * * for all time and it is not to be belittled Mr. President, or it should not be, by action governed by mere sentiment, by prejudice or by assumed local interest."

A most dramatic incident occurred when Representative Mann on January 7, 1902, with patriotic eloquence declared: "We have benefited greatly by the work and trials of other nations and peoples. Today we will give to all nations and to all peoples without preference and without discrimination a reminder of our prosperity and our generosity, which will stand like the pyramids of Egypt—a lasting memorial to our labor—and which unlike the pyramids will be of constant use and benefit to progressive mankind. (Applause.) * * *

Have we not the right, then, to contemplate with satisfaction, the proposition we are now making, that our country at its own expense and out of its own treasury, without contribution or aid from other peoples or nations, takes this mighty step forward, in the march of civilization, not for itself, not for our advantage, not to benefit ourselves, not to gain a preference over our neighbors, but in the interest of the whole world for the good of all people? We pay the expense; they share equally the results. No sublimer conception of a great enterprise was ever entertained by man, or by spirit. * * * * The heart of the American people grows greater when it undertakes work like this. It beats in rhythm with the progress which is yet to come when it approves a project like this." (Applause)*

The speaker's sentiments were ratified by the generous applause of the body of the House, at

*See, Cong. Record 1902, Appendix pg. 3.

the close of every paragraph. It was not a simple pledge but it was a pledge with a *double guaranty.*

It has been said that the late Secretary Hay, on being asked, if the United States was included in the words "all nations" used in the Hay-Pauncefote treaty, emphatically replied: "what else could all nations mean but *all nations*!"

Why does Europe concede to us the right to own and control the Panama Canal? Is it for our betterment alone? Or do they expect us to deal out *even-handed justice,* to all seeking the service of the canal?

From a broad outlook and from a most thoughtful consideration of the work in hand, we now say, without sentimentality and in all reverence, that, since the Star of Fortune has led us to Panama, and by its kindly light we have been able to forge the link that now connects the two great oceans, let us look with pride at the immortal accomplishment, without boasting or arrogance, and not forget our obligations to England for the Hay-Pauncefote treaty; to Panama for cutting the Gordian knot which seemed to bind us to defeat; to the French heroes who first began the canal's construction; to the twenty-four world powers, whose generous approval, at a critical moment, assured to us the Panama route; to those officials outside and inside of Congress whose vision and courage through one of the world's most historic struggles, held fast to the route designed by creation for the canal; and to the Engineers and stalwart champions who planned, wrought, dredged, blasted and constructed under a tropical sun, in the midst of pestilence, against obstacles almost insurmountable; and, while remembering all this, and that it is through the beneficence of Destiny we are permitted to own this great work, we should recognize

our debt to the world, our years of sacred pledges, and in justice and honor grant to all peaceful ships the use of this short and safe waterway FOREVER, without discrimination, partiality or exclusion; and thereby gain the esteem, friendship and plaudits of *all nations*, down the courses of Time—through the cycles of Ages!

# PANAMA TOLLS

President Taft on Nov. 13, 1912, established by proclamation the rates for the use of the Panama Canal in pursuance of the statute passed August 24, 1912, as follows:

1. On merchant vessels carrying passengers or cargo one dollar and twenty cents per net vessel ton—each one hundred cubic feet—of actual earning capacity.

2. On vessels in ballast without passengers or cargo forty per cent. less than the rate of tolls for vessels with passengers or cargo.

3. Upon naval vessels, other than transports, colliers, hospital ships and supply ships, fifty cents per displacement ton.

4. Upon army and navy transports, colliers, hospital ships, and supply ships, one dollar and twenty cents per net ton, the vessels to be measured by the same rules as are employed in determining the net tonnage of merchant vessels.

It was also prescribed that the Secretary of War should prepare and fix such rules for the measurement of vessels and such regulations as are necessary to carry the proclamation into effect.

On April 16, 1914, President Wilson issued an Executive Order, which provided:

1. That payment of tolls for the use of the Panama Canal and for fuel and other material and supplies sold and for repairs, harbor pilotage, towage, furnished by the canal to vessels, shall be made to the Collector of the Canal at Balboa or Cristobal, except that deposits for tolls may be made with the Treasurer or an Assistant Treasurer of the United States to the official credit of the Collector of the Canal.

A vessel may enter Gatun Lake from either end without passing through the locks at the other end and may return to the point of entry without payment of additional tolls.

2. All payments shall be made in lawful money of the U. S., but drafts may be accepted as provided in Section 5.

3. Payment of tolls shall be made before the vessel is allowed to enter any lock of the canal; all bills for materials, towage or other legal bills shall be paid before the vessel is given clearance at the port of departure.

4. A certificate may be issued to the officer in charge of the locks and if desired to the master of the vessel, by the Canal Auditor, that the vessel is entitled to pass through.

5. Unless, in the opinion of the Canal Governor, payment in cash to the Collector is necessary for canal purposes, drafts on banks in the U. S. under supervision of the Comptroller of the Currency, may be accepted for conversion into cash, for paying tolls and for other services and goods, provided the drafts are secured by high-grade bonds in accordance with further provisions of this Section 5.

6. Provision is made that steamship companies or agencies may make deposits to the credit of the Canal Collector with the Treasurer or Assistant Treasurer of the U. S. to be applied in payment of tolls. (Full directions are given how this shall be done.)

7. Provides for refund of excess of deposit when not used, etc.

8. The Governor of the canal may prescribe such additional regulations as may be necessary and proper.

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## THE SHIP RAILWAY.

Wm. F. Channing was perhaps the first in this country to suggest the idea of transporting large ships overland on a railroad track. He drew plans for such an enterprise as early as 1859, and on March 29, 1865, secured a patent for the invention from the United States, and assigned the same to Horace H. Day, who contemplated the carrying of vessels around Niagara Falls. Diagrams are shown in House Miscellaneous Doc., 46 Cong., 3d session 1880-1, page 78.

The House Ship Canal Committee, had before it in 1880, not only the question of canals, but also the problem of a ship railway at Tehauntepec. Capt. Eads and others had asked for a charter and money assistance from the nation. Among the witnesses advocating the ship railway were: Dr. Wm. F. Channing, N. Y.; J. W. Goodwin, Pa., and Capt. James B. Eads. The latter introduced letters from eminent engineers indorsing the proposal; ship-builders generally condemned the idea; and if the purpose was to transport overland large vessels, the proposal was held to be chimerical. Capt. Eads asked a modified charter from Congress in 1887. This passed the Senate Feby. 17, 1887, and on Feby. 23, was laid before the House, read twice and referred to the Commerce Committee. We have not been able to find that it was ever reported out of committee. Capt. Eads died March 8, 1887, and the whole project terminated.

While the plan might be a success for the transport of shallops (an improvement upon the Indian portage) still no vessel-owner would trust a ship of large dimensions, and weighed down with a full cargo, to the hazard of such an operation. Ships are intended for the sea, yet out of necessity they must be constructed and repaired on land; but when the necessity ceases, their land migrations should also cease.

# HAY-PAUNCEFOTE TREATY OF 1901.

The United States of America and 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, 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:

The President of the United States, John Hay, Secretary of State of the United States of America;

And 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, the Right Honourable Lord Pauncefote, G. C. B., G. C. M. G., His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States;

Who, having communicated to each other their full powers, which were found to be in due and proper form, have agreed upon the following Articles:

ARTICLE I.

The high contracting parties agree that the present treaty shall supersede the afore-mentioned convention of the 19th April, 1850.

ARTICLE 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.

ARTICLE 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 28th 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 in the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within 3 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.

ARTICLE IV.

It is agreed that no change of territorial sovereignty or of 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.

ARTICLE V.

The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by his Britannic Majesty; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

In faith whereof the respective plenipotentiaries have signed this treaty and thereunto affixed their seals.

Done in duplicate at Washington, the 18th day of November, in the year of our Lord one thousand nine hundred and one.

JOHN HAY. [Seal.]
PAUNCEFOTE. [Seal.]

# TREATY WITH PANAMA—HAY-BUNAU-VARILLA.

The United States of America and the Republic of Panama being desirous to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific oceans, and the Congress of the United States of America having passed an act approved June 28, 1902, in furtherance of that object, by which the President of the United States is authorized to acquire within a reasonable time the control of the necessary territory of the Republic of Colombia, and the sovereignty of such territory being actually vested in the Republic of Panama, the high contracting parties have resolved for that purpose to conclude a convention and have accordingly appointed as their plenipotentiaries,—

The President of the United States of America, John Hay, Secretary of State, and

The Government of the Republic of Panama, Philippe Bunau-Varilla, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Panama, thereunto specially empowered by said government, who after communicating with each other their respective full powers, found to be in good and due form, have agreed upon and concluded the following articles:

ARTICLE I.

The United States guarantees and will maintain the independence of the Republic of Panama.

ARTICLE II.

The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. The Republic of Panama further grants to the United States in perpetuity the use, occupation and control of any other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal or of any auxiliary canals or

other works necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said enterprise.

The Republic of Panama further grants in like manner to the United States in perpetuity all islands within the limits of the zone above described and in addition thereto the group of small islands in the Bay of Panama, named Perico, Naos, Culebra and Flamenco.

ARTICLE III.

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise 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.

ARTICLE IV.

As rights subsidiary to the above grants the Republic of Panama grants in perpetuity to the United States the right to use the rivers, streams, lakes and other bodies of water within its limits for navigation, the supply of water or water-power or other purposes, so far as the use of said rivers, streams, lakes and bodies of water and the waters thereof may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal.

ARTICLE V.

The Republic of Panama grants to the United States in perpetuity a monopoly for the construction, maintenance and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific Ocean.

ARTICLE VI.

The grants herein contained shall in no manner invalidate the titles or rights of private land holders or owners of private property in the said zone or in or to any of the lands or waters granted to the United States by the provisions of any Article of this treaty, nor shall they interfere with the rights of way over the public roads passing through the said zone or over any of the said lands or waters unless said rights of way or private rights shall conflict with rights herein granted to the United States in which case the rights of the United States shall be superior. All damages caused to the owners of private lands or private property of any kind by reason of the grants contained in this treaty or by reason of the operation of the United States, its agents or employes or by reason of the construction, maintenance, operation, sanitation and protection of the said Canal or of the works of sanitation and protection herein provided for, shall be appraised and settled by a joint Commission appointed by the Governments of the United States and of the Republic of Panama, whose decisions as to such damages shall be final and whose awards as to such damages shall be paid solely by the

United States. No part of the work on said Canal or the Panama Railroad or on any auxiliary works relating thereto and authorized by the terms of this treaty shall be prevented, delayed or impeded by or pending such proceedings to ascertain such damages. The appraisal of said private lands and private property and the assessment of damages to them shall be based upon their value before the date of this convention.

ARTICLE VII.

The Republic of Panama grants to the United States within the limits of the cities of Panama and Colon and their adjacent harbors and within the territory adjacent thereto the right to acquire by purchase or by the exercise of the right of eminent domain, any lands, buildings, water rights or other properties necessary and convenient for the construction, maintenance, operation and protection of the Canal and of any works of sanitation, such as the collection and disposition of sewage and the distribution of water in the said cities of Panama and Colon, which, in the discretion of the United States may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal and railroad. All such works of sanitation, collection and disposition of sewage and distribution of water in the cities of Panama and Colon shall be made at the expense of the United States, and the Government of the United States, its agents or nominees shall be authorized to impose and collect water rates and sewerage rates which shall be sufficient to provide for the payment of interest and the amortization of the principal of the cost of said works within a period of fifty years and upon the expiration of said term of fifty years the system of sewers and water works shall revert to and become the properties of the cities of Panama and Colon respectively, and the use of the water shall be free to the inhabitants of Panama and Colon, except to the extent that water rates may be necessary for the operation and maintenance of said system of sewers and water.

The Republic of Panama agrees that the cities of Panama and Colon shall comply in perpetuity with the sanitary ordinances whether of a preventive or curative character prescribed by the United States and in case the Government of Panama is unable or fails in its duty to enforce this compliance by the cities of Panama and Colon with the sanitary ordinances of the United States the Republic of Panama grants to the United States the right and authority to enforce the same.

The same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon and the territories and harbors adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.

ARTICLE VIII.

The Republic of Panama grants to the United States all rights which it now has or hereafter may acquire to the property of the New Panama Canal Company and the Panama Railroad Company as a result of the transfer of sovereignty from the Republic of Colombia

to the Republic of Panama over the Isthmus of Panama and authorizes the New Panama Canal Company to sell and transfer to the United States its rights, privileges, properties and concessions as well as the Panama Railroad and all the shares or part of the shares of that company; but the public lands situated outside of the zone described in Article II of this treaty now included in the concessions to both said enterprises and not required in the construction or operation of the Canal shall revert to the Republic of Panama except any property now owned by or in the possession of said companies within Panama or Colon or the ports or terminals thereof.

ARTICLE IX.

The United States agrees that the ports at either entrance of the Canal and the waters thereof and the Republic of Panama agrees that the towns of Panama and Colon shall be free for all time so that there shall not be imposed or collected custom house tolls, tonnage, anchorage, lighthouse, wharf, pilot, or quarantine dues or any other charges or taxes of any kind upon any vessel using or passing through the Canal or belonging to or employed by the United States, directly or indirectly, in connection with the construction, maintenance, operation, sanitation and protection of the main Canal, or auxiliary works, or upon the cargo, officers, crew, or passengers of any such vessels, except such tolls and charges as may be imposed by the United States for the use of the Canal and other works, and except tolls and charges imposed by the Republic of Panama upon merchandise destined to be introduced for the consumption of the rest of the Republic of Panama, and upon vessels touching at the ports of Colon and Panama and which do not cross the Canal.

The Government of the Republic of Panama shall have the right to establish in such ports and in the towns of Panama and Colon such houses and guards as it may deem necessary to collect duties on importations destined to other portions of Panama and to prevent contraband trade. The United States shall have the right to make use of the towns and harbors of Panama and Colon as places of anchorage, and for making repairs, for loading, unloading, depositing, or transshipping cargoes either in transit or destined for the service of the Canal and for other works pertaining to the Canal.

ARTICLE X.

The Republic of Panama agrees that there shall not be imposed any taxes, national, municipal, departmental, or of any other class upon the Canal, the railways and auxiliary works, tugs and other vessels employed in the service of the Canal, store houses, work shops, offices, quarters for laborers, factories of all kinds, warehouses, wharves, machinery and other works, property, and effects appertaining to the Canal or railroad and auxiliary works, or their officers or employees, situated within the cities of Panama and Colon, and that there shall not be imposed contributions or charges of a personal character of any kind upon officers, employees, laborers, and other individuals in the service of the Canal and railroad and auxiliary works.

ARTICLE XI.

The United States agrees that the official dispatches of the Government of the Republic of Panama shall be transmitted over any telegraph and telephone lines established for canal purposes and used for public and private business at rates not higher than those required from officials in the service of the United States.

ARTICLE XII.

The Government of the Republic of Panama shall permit the immigration and free access to the lands and workshops of the Canal and its auxiliary works of all employees and workmen of whatever nationality under contract to work upon or seeking employment upon or in any wise connected with the said Canal and its auxiliary works, with their respective families and all such persons shall be free and exempt from the military service of the Republic of Panama.

ARTICLE XIII.

The United States may import at any time into the said zone and auxiliary lands, free of custom duties, imposts, taxes, or other charges, and without any restrictions, any and all vessels, dredges, engines, cars, machinery, tools, explosives, materials, supplies, and other articles necessary and convenient in the construction, maintenance, operation, sanitation and protection of the Canal and auxiliary works, and all provisions, medicines, clothing, supplies and other things necessary and convenient for the officers, employees, workmen and laborers in the service and employ of the United States and for their families. If any such articles are disposed of for use outside of the zone and auxiliary lands granted to the United States and within the territory of the Republic, they shall be subject to the same import or other duties as like articles imported under the laws of the Republic of Panama.

ARTICLE XIV.

As the price or compensation for the rights, powers and privileges granted in this convention by the Republic of Panama to the United States, the Government of the United States agrees to pay to the Republic of Panama the sum of ten million dollars ($10,000,000) in gold coin of the United States on the exchange of the ratification of this convention and also an annual payment during the life of this convention of two hundred and fifty thousand dollars ($250,000) in like gold coin, beginning nine years after the date aforesaid.

The provisions of this Article shall be in addition to all other benefits assured to the Republic of Panama under this convention.

But no delay or difference of opinion under this Article or any other provisions of this treaty shall affect or interrupt the full operation and effect of this convention in all other respects.

ARTICLE XV.

The joint commission referred to in Article VI shall be established as follows:

The President of the United States shall nominate two persons and the President of the Republic of Panama shall nominate two persons and they shall proceed to a decision; but in case of disagreement of the Commission (by reason of their being equally divided in conclusion) an umpire shall be appointed by the two Governments who shall render the decision. In the event of the death, absence, or incapacity of a Commissioner or Umpire, or of his omitting, declining or ceasing to act his place shall be filled by the appointment of another person in the manner above indicated. All decisions by a majority of the Commission or by the umpire shall be final.

ARTICLE XVI.

The two Governments shall make adequate provision by future agreement for the pursuit, capture, imprisonment, detention and delivery within said zone and auxiliary lands to the authorities of the Republic of Panama of persons charged with the commitment of crimes, felonies or misdemeanors without said zone and for the pursuit, capture, imprisonment, detention and delivery without said zone to the authorities of the United States of persons charged with the commitment of crimes, felonies, and misdemeanors within said zone and auxiliary lands.

ARTICLE XVII.

The Republic of Panama grants to the United States the use of all the ports of the Republic open to commerce as places of refuge for any vessels employed in the Canal enterprise, and for all vessels passing or bound to pass through the Canal which may be in distress and be driven to seek refuge in said ports. Such vessels shall be exempt from anchorage and tonnage dues on the part of the Republic of Panama.

ARTICLE XVIII.

The Canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section 1 of Article three 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 18, 1901.

ARTICLE XIX.

The Government of the Republic of Panama shall have the right to transport over the Canal its vessels and its troops and munitions of war in such vessels at all times without paying charges of any kind. The exemption is to be extended to the auxiliary railway for the transportation of persons in the service of the Republic of Panama, or of the police force charged with the preservation of public order outside of said zone, as well as to their baggage, munitions of war and supplies.

ARTICLE XX.

If by virtue of any existing treaty in relation to the territory of the Isthmus of Panama, whereof the obligations shall descend or be assumed by the Republic of Panama, there may be any privilege or

concession in favor of the Government or the citizens and subjects of a third power relative to an interoceanic means of communication which in any of its terms may be incompatible with the terms of the present convention, the Republic of Panama agrees to cancel or modify such treaty in due form, for which purpose it shall give to the said third power the requisite notification within the term of four months from the date of the present convention, and in case the existing treaty contains no clause permitting its modifications or annulment, the Republic of Panama agrees to procure its modification or annulment in such form that there shall not exist any conflict with the stipulations of the present convention.

ARTICLE XXI.

The rights and privileges granted by the Republic of Panama to the United States in the preceding Articles are understood to be free of all anterior debts, liens, trusts, or liabilities, or concessions or privileges to other Governments, corporations, syndicates or individuals, and consequently, if there should arise any claims on account of the present concessions and privileges or otherwise, the claimants shall resort to the Government of the Republic of Panama and not to the United States for any indemnity or compromise which may be required.

ARTICLE XXII.

The Republic of Panama renounces and grants to the United States the participation to which it might be entitled in the future earnings of the Canal under Article XV of the concessionary contract with Lucien N. B. Wyse now owned by the New Panama Canal Company and any and all other rights or claims of a pecuniary nature arising under or relating to said concession, or arising under or relating to the concessions to the Panama Railroad Company or any extension or modification thereof; and it likewise renounces, confirms and grants to the United States, now and hereafter, all the rights and property reserved in the said concessions which otherwise would belong to Panama at or before the expiration of the terms of ninety-nine years of the concessions granted to or held by the above mentioned party and companies, and all right, title and interest which it now has or may hereafter have, in and to the lands, canal, works, property and rights held by the said companies under said concessions or otherwise, and acquired or to be acquired by the United States from or through the New Panama Canal Company, including any property and rights which might or may in the future either by lapse of time, forfeiture or otherwise, revert to the Republic of Panama under any contracts or concessions, with said Wyse, the Universal Panama Canal Company, the Panama Railroad Company and the New Panama Canal Company.

The aforesaid rights and property shall be and are free and released from any present or reversionary interest or claims of Panama and the title of the United States thereto upon consummation of the contemplated purchase by the United States from the New Panama Canal Company, shall be absolute, so far as concerns

the Republic of Panama, excepting always the rights of the Republic specifically secured under this treaty.

ARTICLE XXIII.

If it should become necessary at any time to employ armed forces for the safety or protection of the Canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.

ARTICLE XXIV.

No change either in the Government or in the laws and treaties of the Republic of Panama shall, without the consent of the United States, affect any right of the United States under the present convention, or under any treaty stipulation between the two countries that now exists or may hereafter exist touching the subject matter of this convention.

If the Republic of Panama shall hereafter enter as a constituent into any other Government or into any union or confederation of states, so as to merge her sovereignty or independence in such Government, union or confederation, the rights of the Unitd States under this convention shall not be in any respect lessened or impaired.

ARTICLE XXV.

For the better performance of the engagements of this convention and to the end of the efficient protection of the Canal and the preservation of its neutrality, the Government of the Republic of Panama will sell or lease to the United States lands adequate and necessary for naval or coaling stations on the Pacific coast and on the western Caribbean coast of the Republic at certain points to be agreed upon with the President of the United States.

ARTICLE XXVI.

This convention when signed by the Plenipotentiaries of the Contracting Parties shall be ratified by the respective Governments and the ratifications shall be exchanged at Washington at the earliest date possible.

In faith whereof the respective Plenipotentiaries have signed the present convention in duplicate and have hereunto affixed their respective seals.

Done at the City of Washington the 18th day of November, in the year of our Lord nineteen hundred and three.

JOHN HAY [Seal]
P. BUNAU-VARILLA [Seal]


ISTHMIAN CANAL COMMISSION
MAP SHOWING
ISTHMUS WITH COMPLETED CANAL
SCALE
Miles
Kilometres
CARIBBEAN SEA
PACIFIC OCEAN
GULF OF PANAMA
BAY OF PANAMA
Pt. Cocal
San Buenaventura Is.
Buenaventura Cove
Portobello
Saximo Mt.
Cerro Bruja
Naranjos I.
Muerto I.
Saragossa
Rio Grande
Rio Diablo
Rio Peluca
Rio Pequeni
Rio Boquerón
Pt. Hale Remo
Margarita
Pt. Caño Principal
B. de las Minas
Pt. Toro
BREAKWATER
COLON
Bay of Manzanillo
CRISTOBAL
LIMON BAY
Naranjitos
Empilonado
Sta. Rita Mt.
Marajal
Mt. Hope
Pt. Tortuguilla
Fort Lorenzo (Ruins)
Chagres
Taramillos
Rio Gatun
Rio Ancha
Rio Culebra
Rio Chagres
Mindi
N. Gatun
GATUN LOCKS AND DAM
GATUN
Pt. Diego
Rio Piña
Montelirio
Rio Agua Sucia
Que. Patos
Las Campanas
San Juan
Tranquilla
El Vigia
Lion Hill
Lagarto
Rio Lagarto
Bohio
Frijoles
Alhajuela
Casa Larga
Juan Mina
Pihiva
Palo Grande
Escobal
Area of Gatun Lake at Elev. +85 Ft., 163.38 Sq. Mi.
Arroyo
Cana
Cruces
Gamboa Bridge
Bas Obispo
Camp Elliot
CONTINENTAL DIVIDE
Cerro Grande (1000 Ft.)
Gold Hill
Empire
Culebra
Cucaracha
Old Panama (Ruins)
PEDRO MIGUEL LOCKS
MIRAFLORES LOCKS
Corozal
Pt. Paitilla
Panama Harbor
PANAMA
Arraijan
BALBOA
Perico I.
Flamenco I.
San Jose Rock
Pal o Seco
(Leper Col.)
Culebra I.
I. Changarmi
Pt. Bruja
Venado I.
Cocovi I.
Cerro de Cabra
Chorrera
Tortola I.
Pt. Vacamonte
Melones I.
Taboga I.
Taboguilla I.
Morol
I.C.C. Sanitarium
80° 00' LONGITUDE WEST FROM GREENWICH


ISTHMIAN CANAL COMMISSION
MAP SHOWING
ISTHMUS WITH COMPLETED CANAL
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CANAL ZONE
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PANAMA
BAY OF

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