MINORITY OPINIONS

IN THE MATTER OF THE APPLICATION OF RAINY RIVER IMPROVEMENT COMPANY FOR APPROVAL OF PLANS FOR DAM AT KETTLE FALLS

Filed under Article III of the Treaty between the United States and Great Britain, May 5, 1910.

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AT WASHINGTON AND OTTAWA

OTTAWA
1913
INTERNATIONAL JOINT COMMISSION

UNITED STATES
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L. White Busbey, Secretary.

CANADA
TH. CHASE CASGRAIN, Chairman.
HENRY A. POWELL.
CHARLES A. MAGRATH.
Lawrence J. Burpee, Secretary.
BEFORE
The International Joint Commission

IN RE
Application for Approval of the
Kettle Falls Dam

DISSENTING OPINIONS OF
H. A. POWELL and C. A. MAGRATH
Commissioners

Mr. Powell:

The application in this case was for the approval by the International Joint Commission of a contemplated dam at Kettle Falls. The Falls are situate on the Kettle River at its entrance into Rainy Lake. Kettle River is a boundary water between the Province of Ontario and the State of Minnesota.

The application was made, with the assent of the United States, by the Rainy River Improvement Company. The dam across the River has been authorized by the United States, and the necessary approval by the Department of the United States Government charged with the duty of looking after obstructions in navigable waters has been secured. A dam across the river has also, it is claimed been authorized by the Parliament of Canada, but on conditions that have not yet been fulfilled. The charters were granted to different companies which, however, are acting in unison. The application came up for consideration at a session of the Commission held at Ottawa in the month of October last, when the Commission of its own motion raised two objections to considering it:

1. The Commission has no jurisdiction in the matter, as the dam, the approval of which is sought, commences at the United States shore, and extends across the river to the opposite bank.

2. The United States Congress and the Parliament of Canada, have passed concurrent legislation authorizing the erection of the dam, and consequently there is no dispute to adjust.

A third objection was urged before the Commission to the consideration of the application at the present time, viz: both the United States and the Canadian Governments have referred to the Commission for investigation and report the
question of the level and use of the Lake of the Woods and its tributary waters; and the question of a dam at Kettle Falls is involved in this larger question.

The first objection is based on Article III, and the first paragraph of Article VIII, of the Treaty which read as follows:

ARTICLE III.

"It is agreed that, in addition to the uses, obstructions and diversions herefore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

"The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation; provided that such works are wholly on its own side of the line, and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

ARTICLE VIII.

"This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose."

The first two objections were set down for argument before the Commission at Washington in November, 1912, when they were ably argued by the different counsel engaged.

I will discuss these objections in the order above stated.

The arguments against the jurisdiction of the Commission, so far as the first objection is concerned, were based upon the following words of section III: "obstructions on either side of the line affecting the natural level or flow of boundary waters on the other side of the line," and it was contended that these words do not include structures which extend beyond the boundary line or across the whole boundary waters, and affect the flow on both sides of the line. This contention, I must confess, I cannot appreciate.

The Commission has jurisdiction over all obstructions on each side of the boundary line at Kettle Falls which affect the flow or level of water on the other side. It is unnecessary to define the word "obstruction," but it may consist of, among
other things, a sand bank formed by the water; a vessel which has been abandoned; a structure accidently in the river or designedly placed there; and a part of the bank or a part of the vessel, or a part of the structure may and the remaining portion may not be an obstruction. If the question were asked: "Is there anything on the United States side in the contemplated dam which would affect the flow or level of the waters on the Canadian side," there could only be one answer.—"Yes, the whole of the work on the United States side will do so." If the further question were asked: "Is there anything in the contemplated structure on the Canadian side which would similarly affect the waters on the United States side," there could only be one answer to this question also.—"Yes, all that portion of the work which lies in Canadian waters will do so." That each portion is organically or structurally connected with the other, and plays its part in disturbing the whole width of the river cannot alter this plain fact, that it is an obstruction on one side which affects the level or flow of the waters on the other. Not only is each portion an obstruction in fact, it is also an obstruction in law, and the courts of the country in which it is situate can abate it as such. Each portion of the dam is therefore an obstruction within the meaning of Article III, an obstruction on one side which affects the level or flow of the water on the other side of the boundary line. The dam by reason of its two portions producing these analogous or reciprocal results must be looked upon as coming within the very words of the treaty. By Article VIII of the Treaty above quoted "all cases involving obstructions so affecting the flow or level of the River are within the jurisdiction of this Commission and it is the duty of the Commission to "pass upon" them. Unless there is something in the context of the Treaty which is inconsistent with this construction or unless it would lead to manifest absurdity, it must prevail.

After a most careful analysis of the Treaty, and the fullest consideration of the results which would flow from the adoption of this construction, I have failed to detect any inconsistency or absurdity. I would rest my judgment, so far as this objection is concerned, on this statement of the case; but, inasmuch as the views of some of my colleagues differ from those I have expressed, and the adoption of these views would greatly restrict the judicial powers of the commission and its usefulness, I will discuss briefly the argument adduced by Counsel in support of the first objection and the results which would flow from the construction of Article III for which they contended. This construction involves reading into the Article as a qualifier of the word "obstructions" the words "which have no physical or structural connection with the obstructions on the other side of the boundary line." It was argued that we must look at Article III in the light of the
principle or policy” of the Treaty and that the Article when so viewed does not apply to a work situate on both sides of a boundary water. This principle or policy must be gathered from the Treaty itself, a task which is very difficult since a treaty is ordinarily a mosaic of compromises founded not on principle but on expediency. The eminent jurists who framed the Treaty did not formulate what they regarded as the best conceivable arrangement, but what they felt was the best arrangement acceptable to all parties. The most careful scrutiny however will not reveal any principle or policy which would prevent the Treaty applying to such a work. On the contrary the principle or policy of the Treaty gathered from the Treaty itself, is simply an intention to devolve upon the Commission among other questions touching obstructions just such questions as are involved in this application.

Another contention was that the Commission should construe the Treaty in view of the legal situation with regard to boundary waters which existed at the time the Treaty was entered into.

There were or could be, in the legal situation as it then was (as there are or can be in the present legal situation), two classes of obstructions on each side of the boundary line which affected the flow or level of the waters on the other side—first, entire structures; second, portions of structures the remainders of which lay on the other side of the line. Before the Treaty both classes when situate within the territory of the same country had national and international features in respect to all of which they stood precisely on the same footing, both in the eyes of international law and the law of that country and were alike in respect to the procedure for their abatement and for their legalization. It is a necessary corollary to this proposition that the obstructions constituted by the remaining portions of the structures and the obstructions of the first class situate on the other side of the line, were also precisely similarly circumstance in these respects.

To be more specific—at the time the Treaty was entered into a work situate entirely on the Canadian side and an obstruction on the same side which formed a portion of a work extending into United States waters were subject to the same laws, common and statutory, of Canada, and were subject to the same principles of international law. Under the laws of Canada the courts and proper legislative powers could abate the obstructions and the international law applying to each obstruction was to be worked out by the slow and unsatisfactory expedient of diplomatic negotiation.

The same statement is true vice versa with respect to an obstruction entirely situate on the United States side, and that portion of the structure mentioned which was situate on the United States side. The Treaty deals with the interna-
tional phases of obstructions—hence the use of the words in Article III: “obstructions on one side of the boundary line which affect the level or flow on the other side of the boundary line.” This language is a very succinct and exact method of describing the obstructions which at the time of the adoption of the Treaty were of international significance.

The Treaty substituted the Commission for the diplomatic machinery which was previously required to supplement and even vary the action of the courts and legislatures of the different countries. Its provisions making the substitution and conferring jurisdiction upon the Commission will be found upon careful examination to be most skilfully drawn, and admirably designed to make the substitution with as little disturbance as possible of the principles of law and international jurisprudence which previously applied to boundary waters.

On the other hand the construction of Article III, contended for by counsel opposing the application creates a distinction in the case of the second class of obstructions above mentioned, which was anomalous, entirely unnecessary and had been previously unknown. In fact the construction is inconsistent with the results which the practical application of the Treaty unquestionably works out. This will appear from the following case.

Were an application made for the approval of a work (a wing dam, for instance), at the Falls stretching from the United States bank to the boundary line, there could be no question as to the jurisdiction of the Commission to grant approval.

If after its construction approval was asked for another work (another wing dam for instance) on the Canadian side commencing at the shore and abutting on the outer end of the first wing dam, but having no structural connection or community of interest therewith, the granting of such approval would undoubtedly be within the power of the Commission.

Assuming that approval of the second wing dam has been granted and the wing dam constructed, and that the owner of the one wing dam has purchased the other wing dam, and used the two as contributory to a common purpose, then we would have what is practically one dam stretching from shore to shore. The only difference between this and the dam, the approval of which is now sought, is there would be a seam in the former that would be absent in the latter, through which there might be a possible leakage or run of water. There is nothing in the Treaty express or implied, preventing one person making application for both wing dams. He might also consolidate the two applications into
one as this would be a mere matter of procedure. On this consolidated application, the Commission would have the power to grant approval of both wing dams. The approval of the United States portion could be granted on the ground that it was an obstruction which disturbed Canadian waters, and the Canadian portion could be approved on the ground that it disturbed United States waters. The situation would be analogous to that of an ejectment or trespass suit in which the locus in quo, though completely covered by one building, consists of two pieces of land, the titles to which are derived from two different sources. We have therefore in this supposed case practically the case before us. What is for all practical purposes one continuous dam across the river is approved of in two sections on the one application.

The few supposititious cases following, taken from a number which suggest themselves, will further illustrate the absurdity which would result from the acceptance of the construction which the first objection calls for:

1. A vessel sinks in boundary waters, is abandoned, and lies on the bottom across the boundary line. If the objection is well founded the Commission has no jurisdiction over the whole or any portion of the vessel, as the vessel is an obstruction situated in and affecting the flow on both sides of the boundary line.

2. Two wing dams, such as I have supposed, are built in a boundary stream. They extend to and meet in the centre but have no organic connection or community of object or purpose. There is necessarily a seam between the two. We unquestionably have jurisdiction over each dam. Why should we not have jurisdiction over the work if the piers were structurally or organically connected? The only difference is that in the one case there might be a leak or flow of water through the dam which would not exist in the other. Surely it could not be seriously contended that it would be necessary to invoke the sovereign powers of Great Britain and the United States to stop the leak.

3. A bridge of solid crib work is built across a boundary river. Such a structure, if the objection is good, is not within our jurisdiction, but if a waterway however narrow, is cut through it on the boundary line the remaining portions are thereby brought within the jurisdiction of the Commission.

4. A pier which permits the passage of water on either side and interferes with the level and flow on both sides, is erected on the dividing line of a boundary river. If the objection is well taken, we would not have jurisdiction, but if the pier should be displaced so that it became contiguous to the boundary line, but wholly on one side of it, it would require our approval.
5. An embankment is constructed from the Canadian side to the boundary line of the river, but no farther; it is certainly within our jurisdiction. But if the owner desires to place himself outside of our jurisdiction, he needs only, if such objection is well taken, extend his work an appreciable distance on the other side of the boundary line, and his purpose is accomplished.

The argumentum ad absurdum might be pushed even further. The language of Article III. of the Treaty with respect to obstructions is "on either side of the line," and the language with respect to disturbances of level and flow is "on the other side of the line."

If the words "on either side of the line" when applied to obstructions exclude an obstruction which is part of a structure extending to the other side of the line, why should the words "on the other side of the line" when applied to a disturbance of the level or flow of the water not be confined to cases where the disturbance is exclusively on the other side of the line? There is no conceivable reason why the limitation of the words should not be made in the case of disturbances or effects, if it is made in the case of the obstructions or causes. As a matter of fact, obstructions on one side affecting the level or flow on the other side of a stream unavoidably affect the level or flow on the same side of the stream, and if this limitation is made, the result would be that the Commission would have no jurisdiction at all in respect to obstructions of the level or flow of streams.

So multitudinous are the absurd results which would flow from this construction were it adopted, that the Treaty, which is a wise and statesmanlike contrivance admirably designed to afford a simple, inexpensive and expeditious means of adjusting disputes which might engender dangerous ill-feeling between the two countries, would become, to use the quotation made by Lord Denman in the celebrated O'Connell case, "a mockery, a delusion and a snare."

It was also argued before the Commission that we have no jurisdiction since the applicant had not obtained authority from Canada to build the dam across the river, or even in Canadian waters. The answer to this argument is three-fold. In the first place, this objection, if valid, would only extend to that portion of the dam situated in Canadian waters, and not affect our jurisdiction so far as the portion in the United States waters is concerned. It was suggested that to authorize only half or some other fractional portion of the dam would be an act of folly never contemplated by the Treaty. If it be conceded that such an authorization would be an act of folly, it can not reasonably be argued that this "folly" in the applicant's case would deprive the Commission of the juris-
dictation to adjudicate upon it, however certain it might be that we would decide against the application. In the second place, the authority of Canada is not (as will appear by reference to Article III.) a condition precedent to jurisdiction; it is only a requirement to be observed before the work is completely legalized, and could be obtained either before or after the giving of our approval. Prudent applicants in ordinary cases would obtain such authority before applying to the Commission, and the Commission might require that such authority be first obtained. The Commission might also follow the course frequently pursued by Courts of Equity in analogous cases and make its approval conditional on the applicant's receiving such authority. However much the absence of such authority should influence the Commission in refusing to exercise its power it cannot denude the Commission of its jurisdiction. In the third place it is scarcely open to those opposing the application to say that Canada has not authorized the work when they are putting forward as a separate contention the claim that Canada has authorized the work and that the authorization goes to the extent of a "special agreement."

It was also argued before the Commission that inasmuch as the proposed dam stretches across the whole Kettle River, the United States and Canada respectively would, even in giving authority under Article III for the construction of the portions of such work situate in their respective territories, necessarily assent to and give authority for the construction of the work as a whole; that all international questions respecting it would be settled by the giving of such authority by each; and that the dam would not be within the jurisdiction of the Commission. There is a subtle fallacy lurking in this contention which comes to the front when Article III. is construed in connection with Article XIII.

Taking these sections together, the situation with respect to the authority necessary to erect obstructions in boundary waters may be stated in three propositions:

1. By the second paragraph of Article III either country has absolute authority to erect wholly in the waters on its own side of the boundary certain structures connected with commerce and navigation, provided they do not affect the flow or level of the waters on the other side of the boundary line.

2. By the first paragraph of Article III either contracting party has authority to permit any obstruction whatever to be erected in the waters on its own side of the boundary line which so affects the waters on the other side of the boundary line; but such authority is not absolute; it is conditional on the approval by the Commission of the obstruction.
3. By Article XIII and the first paragraph of Article III the High Contracting Parties have power to take any obstruction falling within No. 2 out of the jurisdiction of the Commission, and have absolute authority by a "special agreement" between them to legalize the obstruction, but this "special agreement" must be either a "direct agreement" or a "mutual arrangement" as provided in Article XIII.

It would be a difficult task to define the expression, "by authority of the United States or of the Dominion of Canada" used in Article III. Fortunately it is unnecessary to do so, for this much is clear,—the "authority" spoken of in that Article is not the authority which takes an obstruction out of the jurisdiction of the Commission. This last, is the "special agreement" referred to in Article XIII, and is derived either from a "direct agreement" between the High Contracting Parties, or from a "mutual arrangement" between them, expressed by legislation as provided in that Article.

So careful is the treaty in safeguarding the jurisdiction of the Commission that unless and until the requirements of a "special agreement" are observed in any "authority" purporting to be given by Canada and the United States, individually or jointly, that "authority" must be taken as given subject to the approval of the Commission. Such "authority" is tantamount to the authority which would be given by either country or both countries by saying—"we are perfectly willing that the proposed work should be done and we authorize it to be done, provided the Commission, which has been constituted for the very purpose of considering such matters, approves of its construction." The High Contracting Parties however, have not finally abdicated their powers, and if they think investigation by the Commission is not necessary, or for any other reason they see fit to take a matter out of the jurisdiction of the Commission and themselves give authority to construct the work they can do so; but this authority must, by Articles III and XIII be given in and evidenced by a "special agreement," and a "special agreement" only, such as therein provided.

No person who appeared before the Commission had the temerity to argue that there was any "direct agreement" between the High Contracting Parties. Reliance was placed upon the existence of a "mutual arrangement." As this "mutual arrangement" must necessarily be discussed in treating of the second objection, I will pass on to the consideration of that objection.

Objection No. 2 rest upon Articles III and XIII of the Treaty, upon a Statute of Canada, and a Statute of the United States.
Article XIII. of the Treaty reads as follows:

"In all cases where special agreements between the High Contracting Parties hereto are referred to in the foregoing articles, such agreements are understood and intended to include not only direct agreements between the High Contracting Parties, but also any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion."

The Dominion Statute is as follows:

"Whereas the Ontario and Minnesota Power Company, Limited, has by its petition represented that it was incorporated by Letters Patent under the Great Seal of the Province of Ontario dated the thirteenth day of January, one thousand nine hundred and five, under "The Ontario Companies Act," being Chapter 12 of the Revised Statutes of Ontario, 1897; and whereas the said Company has prayed that it be enacted as hereinafter set forth, and it is expedient to grant the prayer of the said petition: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The Company may construct, develop, acquire, own, use and operate the water power now or hereafter existing on the Rainy River, in the Province of Ontario, and construct, develop, operate and maintain works, canals, raceways, water-course, dams, piers, booms, dykes, sluices, conduits and buildings, in connection with the said power, including any increase of the said power on Rainy River by storage or other works on waters tributary to Rainy Lake which the Company now has or may hereafter have power to construct: Provided that no work authorized by this section shall be commenced until the plans thereof have first been submitted to and approved of by the Governor in Council."

It will be noticed that the Statute says nothing whatever about a dam at Kettle Falls. The main purpose of the act is to develop the power at Fort Frances, forty-five miles distant from Kettle Falls, and the power conferred, if any, to erect a storage dam at Kettle Falls, is only incidental to the other. The authority to build a dam can only be gathered by inference and by reference to the Letters Patent issued and the leases and agreements entered into with the Company by the Province of Ontario. It is questionable whether the Statute gives any power to erect a dam at Kettle Falls, but, assuming it does do so, the power is subject to the conditions and agreements contained in the Letters Patent and agreements.

The Act of Congress relative to the matter was passed in 1911, and authorized a dam over the outlet of Lake Namakan at Kettle Falls.

It is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Rainy River Improvement Company, a corporation organized under the laws of the State of Minnesota, its successors and assigns, be, and they are hereby authorized to construct, maintain, and operate a dam across the outlet of Lake Namakan at Kettle Falls, in Saint Louis County, Minnesota, at a place suitable to the interests of navigation, in accordance with the provisions of
the Act approved June twenty-third, nineteen hundred and ten, entitled
"An Act to regulate the construction of dams across navigable waters;"
approved June twenty-first, nineteen hundred and six."

"Sec. 2. That the right to alter, amend, or repeal this Act is hereby
expressly reserved."

It was contended by counsel opposing the application
that these two statutes constitute "a special agreement" under
Article XIII of the Treaty, and that the Commission conse-
quently has no jurisdiction to entertain the application.

Article XIII may be looked upon as having been insert-
ed to make clear the limitation of the authority given the
Commission by Article III. The words "direct agreement" are
most important. In regard to the rights of navigation
possessed by the people and in regard to the rights of the
riparian proprietors, the executive government of either
country does not, except as an extraordinary Treaty Making
Power, possess, in the absence of proper statutory authoriz-
ation, the slightest power to alienate or impair them. The
"direct agreement" must be regarded as being made in purs-
ance of this extraordinary Treaty Making Power.

The agreement, if any exists, must as I have said be a
"mutual agreement" to be spelled out of the legislation of
the United States Congress and the Dominion Parliament.
Questions very difficult to answer suggest themselves in re-
spect to this "legislation"—does the Treaty mean legislation
only which Congress or Parliament has the power to pass?
Both legislative bodies can legislate respecting navigation,
but have they the power to authorize, for purposes other than
those of navigation, obstructions which by changing the
course or height or velocity of the stream injure the rights
of riparian proprietors in their respective countries?

In view of the fact that legislative power both in Can-
da and in the United States is divided between the Federal
legislature on the one hand and the provincial or state legis-
latures on the other, can the Treaty Making Power, or "a
direct agreement" in pursuance of the Treaty, confer upon
the federal legislatures the right for international purposes
to do things which they, for other purposes, under their
respective constitutions, could not do? These questions have
not yet arisen in Canada; but they have been the subject of
judicial consideration in the United States—The supreme
authority of a treaty has been provided for by Article VI of
the U.S. Constitution, and by Section 132 of the Canadian
Constitution.

Without hazarding any opinion on these questions I will
assume for the purpose of argument that these legislative
bodies can authorize unconditionally the construction of the
dam in question, and inquire whether or not they have actually done so. Congress has by statute authorized construction of the work and the department of the United States Government which is charged with the oversight of obstructions in rivers has approved of the plans. The authorization by that country of a dam is therefore complete. The Dominion Parliament has authorized its construction by statute embodying the condition that the plan should first be approved by the Governor in Council. The plans have not been approved; the condition has not been fulfilled. It is impossible to say that if the Governor in Council does approve of the plans referred in the Canadian Statute that these plans will be the same plans or that the dam approved of will be on the same site as the plans and dam the United States has approved.

It was suggested during the argument that the selection of plans, sites and builders is a “mere matter of administration,” and that the essential element is the authorization by both countries of the damming of the river. While it may be conceded that the selection or authorization of particular people to build the dam may be such a matter, I am far from admitting that the plans and site are such. Involved in the plans are the height of the dam and facilities for navigation through it. These and the site are elements which may be most essential from the standpoint of obstructions, and with regard to them, both countries should, so to speak, have their minds together. Let it be granted, both countries have authorized some dam to be built, but does not this authority fall within Number 2 of the above propositions, and is it not subject to the approval of the Commission? The dam crosses the whole river and the dominant features in the situation are the interference with navigation, the extent of the over-flow of the riparian lands above and of the withdrawal of the water from the riparian lands below. Of all the obstructions with which the two countries may deal, such cases as the present stand out clearly as cases in respect to which investigation and approval should be given by the Commission.

But if it be assumed that the height, site, builders and construction of a dam are “mere matters of administration,” is not the fact that the Statutes of Canada and of the United States are not agreed in respect to them, most important in coming to a conclusion as to whether or not there is a “mutual arrangement” expressed by “concurrent or reciprocal legislation?” It is a difficult matter of construction to determine whether the “concurrent and reciprocal legislation” so called must not be legislation which implements a preceding agreement or understanding between the powers.

If a preceding agreement is necessary there is no “mutual arrangement” as there was no preceding agreement.
If a preceding agreement is not necessary, we must look to the statutes alone for the "mutual arrangement."

Comparing these statutes and conceding the doubtful claim that the Canadian statute authorizes a dam at Kettle Falls, what do we find? The Canadian statute simply authorizes a dam which the Ontario and Minnesota Power Company had, or might thereafter have, power to construct. The only power to construct appears to be by virtue of Letters Patent issued by the Province of Ontario incorporating this Company, and an agreement between the Government of Ontario and Edward Wellington Backus, by which Mr. Backus and his associates can construct a storage dam at or near Kettle Falls, subject to such regulations and conditions as may be imposed by the Lieutenant Governor-in-Council, and may raise the water above the dam to a point not higher than high water mark. The United States authorizes the Rainy River Improvement Company to build a dam across the river at Kettle Falls at a point suitable to the interests of navigation. The plans for the first mentioned dam shall first be submitted to and approved of by the Governor-in-Council of Canada, the second mentioned dam shall be in accordance with the provisions of an Act of Congress approved on the 23rd day of June, 1910. The Canadian Act has eight sections, subjecting among other things the Ontario and Minnesota Power Company to the control of the Board of Railway Commissioners in Canada and the practice and provisions of the Canadian Railway Act of 1903. The Act of Congress reserves to Congress the right to alter, amend or repeal its statute. The Canadian Act is silent on this point, but the Canadian Parliament has the same right without any reservation.

There is not a single point touched upon in either act with respect to which the statutes agree. There is not even a solitary provision in either act which suggests that either country contemplates legislation on the part of the other, with reference to a dam. All that can be said is each country acting independently of the other has through its legislature authorized, or purported to authorize, a dam. The result is that they have really authorized two dams.

The United States has sanctioned the making of the application under which this Commission has acted. Such a course is absolutely inconsistent with any belief on that country's part that there is a "special agreement" or "mutual arrangement" in existence. Mr. Thompson, as counsel for Canada, argued before the Commission that there was no "mutual arrangement." The fact that the governments of the two powers are of the same opinion as to the absence of a "mutual arrangement," cannot give this Commission jurisdiction, if, in fact, there was such a "mutual arrangement." but the action of the two governments has some significance
in regard to the question as to whether or not there was a “mutual arrangement.” To my mind, it is one of the grossest of absurdities to claim that the legislation comes up to the requirements of Article XIII of the Treaty. There is not in it even a suggestion of a “mutual arrangement.”

To state my conclusions briefly,—the jurisdiction of the Commission in respect to an obstruction in boundary waters depends solely upon this fact: Whether or not it is an obstruction on the one side which affects the level and flow of the waters on the other side of the boundary line. The objects for which it has been constructed; the purposes which it serves; the authority under which it is created, whether private, municipal, provincial, state, national or international, unless such authority is derived from “special agreement” between the two countries; its structural character, whether earth, wood or masonry; its extent, whether it is part of a work which merely reaches beyond the boundary line or across the whole water—are important facts, it is true, but facts that can weigh only with the Commission in the exercise of its jurisdiction, and have no bearing whatever, on the question, whether such jurisdiction actually exists.

This jurisdiction exists by virtue of Articles III, and VIII, and the only authorities which could take the dam out of this jurisdiction have not done so. They have only given an authority which falls under proposition Number 2 above stated and is subject to our approval of the proposed work.

It is almost unnecessary to add that in my opinion the Commission has power to grant the approval asked for in the application.

Even if the members of the Commission have grave doubts as to its jurisdiction over this dam, it would be better to assume jurisdiction. By pursuing such a course no possible injury could be done to anyone. If on the other hand the Commission has jurisdiction, a great deal of harm might be done by refusing to exercise it. In cases of this kind it is better to act on the old maxim, hasty judicis est jurisdictioe ampliare.

While I am of the opinion, above expressed, I think the third objection is well taken. The proposed dam at the Kettle River Falls cannot be looked upon separately from the question regarding the level and use of the water of the Lake of the Woods and its tributaries, which has been referred to this Commission jointly by the United States and Canada. Further consideration of this application should be postponed until the larger question is investigated and reported upon by the Commission.

Dated this 17th day of April, 1913.
MR. MAGRATH:

I concur with Mr. Powell in his conclusions, my reasons being that the portion of every international dam which obstructs flow on one side of the boundary must raise the water level on the other, over and above the height caused by the portion of the structure on such other side if standing alone. That is, if the entire structure consisted of two sections, suspended in the air and one was let down into the stream, fitting across that portion of the stream in one country, that obstruction would at once cause new water elevations across the stream.

Then if the other section was dropped into place, thereby making a continuous structure from shore to shore, the existing water levels would at once be forced to a still higher elevation. Therefore a dam extending across an international stream can be said to be an obstruction which "on either side of the line" affects "the natural level or flow" on the other, and consequently under Article III of the Treaty, the International Joint Commission has jurisdiction, provided it is not being built under a "special agreement between the parties hereto"—the High Contracting Parties—as determined in said Article III.

For the interpretation of "special agreements" it is necessary to go to Article XIII, wherein it is stated: "Such agreements are understood and intended to include not only direct agreements between the High Contracting Parties, but also any mutual arrangement between the United States and the Dominion of Canada, expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of Canada," which while not presuming to legally define, I will call identical legislation.

Now when two nations come together and make a direct agreement it is known as a Treaty. Whether that holds good in every case is a matter of indifference as there will never be any difficulty in distinguishing a direct agreement as between the High Contracting Parties—Great Britain and the United States.

But if A and B, citizens of the United States and Canada mutually arrange to join in the construction of say a dam across the boundary for industrial purposes, and admitting they then obtain identical legislation from Congress and Parliament, are we to understand that in consequence of that legislation the mutual arrangement of the two individuals immediately becomes a "mutual arrangement between the United States and the Dominion of Canada," constituting it nothing short of a "special agreement" between Great Britain and the United States, as called for in Article III of the Treaty?
I find it impossible to accept that view. Such legislative authority by Congress and Parliament in favour of A and B bears on the face of it a mutual arrangement but only between the two individuals. There is a vast difference between this supposed case and the recent proposed trade arrangement between Canada and the United States, known as the Reciprocity agreement. That was a "mutual arrangement between the United States and the Dominion of Canada" which was to be made effective and "expressed by concurrent or reciprocal legislation upon the part of Congress and the Parliament of Canada."

Every structure intended to extend from one country into another must arise out of a mutual arrangement between the parties on both sides of the boundary, who for reasons of their own wish to erect it, and the legislative authority from Congress and Parliament will presumably express that agreement and make clear the parties between whom it exists. If these authorities moreover show an arrangement made by the two Governments, then the Commission has no jurisdiction.

In short the Commission is without jurisdiction if (a) Great Britain and the United States, the treaty-making powers, make a direct agreement; or (b) Canada and the United States, who are unable to enter into a treaty, come to a mutual arrangement, which to be made effective must be moulded into legislation, which the parties to the arrangement demanded should be concurrent or reciprocal, and which the circumstances would naturally require to be identical.

It cannot be argued, and in fact is not urged, that the proposed obstruction has been "heretofore permitted" within the meaning of Article XIII of the Treaty, and it seems impossible to understand how it can be regarded under the same article as being "hereafter provided for by special agreement between the parties hereto," which interpreted by Article XIII means hereafter provided for by "mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion," especially when the legislative authority from Parliament was obtained in 1906, four years before the Treaty came into force, while that from Congress was secured after the Treaty came into force. In my opinion the present case then does not fall within either of the above categories.

Assuming that identical legislation by Congress and Parliament relieves the Commission of its jurisdiction, is it not a fact that laws enacted by a legislative body frequently are not absolutely identical with the bills as presented to that body? If that is so, is it unreasonable to suggest that while two identical bills may be presented to two different legisla-
tunes, there is still greater possibility of want of harmony in the finished products as acts of those legislatures? Does not the duty therefore devolve upon the Commission at least seeing that the authority of Congress and Parliament is identical. In the matter of the application under consideration, that has not been done as the application from the Canadian side has not yet reached the Commission, though the Commission has knowledge of the fact that the applicants have been moving to that end.

If the Commission is to take the position that it has no jurisdiction substantially because there is legislative authority from both Congress and Parliament, that attitude it appears to me would if applied to the case of a proposed obstruction on one side of the boundary only, affecting "the natural level or flow" on the other—where the Commission admits its jurisdiction, and for which there must be legal authority from either Congress or Parliament, preclude the riparian owners and state or provincial authorities on that side of the boundary, with undoubted rights in the waters affected, from appealing or otherwise being heard by the Commission when dealing with the matter. Such a course would hardly lead towards the attainment of the best results in at least one object of the Treaty as expressed in its preamble, namely the prevention of "disputes regarding boundary waters."

The Treaty was entered into for a purpose—namely to facilitate the management, in the interests of the two countries of a great asset, common to both,—the boundary waters, and which can only be accomplished by the two Governments through the agency of some such tribunal as the Commission. Therefore I can hardly conceive that it was the intention of those Governments to withhold from the Commission a large proportion of the questions—obstructions crossing the boundary—that may likely arise along those international waters.

Under "The Rules of Procedure of the International Joint Commission," Rule 6 provides, that "private persons" seeking the approval of the Commission for the use, obstruction or diversion of boundary waters, "Shall first make written application to the Government within whose jurisdiction the privilege desired is to be exercised, to grant such privilege, and upon such Government or the proper Department thereof transmitting such application to the Commission, with the request that it take appropriate action thereon, the same shall be filed and proceeded with by the Commission, in the same manner as an application on behalf of one or other of the Governments."

In the case of a structure extending across the boundary, there must of necessity be an application on each side thereof, and if those applications come forward to the Commission
from the two Governments "for appropriate action," it appears to me open to very grave doubt indeed if the Commission could under such circumstances refuse consideration by denying its jurisdiction.

That seems to be the situation in this application of the Rainy River Improvement Company. It was submitted to the Commission by the State Department at Washington "for appropriate action," and Mr. Thompson representing the Attorney-General of Canada practically admitted the jurisdiction of the Commission in his statement to it dated 13th November, 1912, wherein he asked that the application be delayed and added that the Government of Canada had not yet approved of the plans of the applicants. Further, when dealing with the question at the meeting of the Commission at Washington a few days later, Mr. Thompson strongly argued that the Commission had jurisdiction in this case. In short, no application can reach the Commission under its rules except through its principals—the United States and Canada—and the submission to the Commission of applications by them might fairly be regarded as a denial by them of any mutual arrangement between them even though the legislative authority of the applicants by Congress and Parliament is identical in every respect.

I am therefore unable to see anything in this case to cast doubt upon the jurisdiction of the Commission, and in reaching that conclusion I do so with full deference and respect to the opinions of my colleagues who hold a different view.

Dated this 17th day of April, 1913.