

(January 28, 1929)

## The Existing Rights of Canada and the United States

BY MR. BERNARD K. SANDWELL, F.R.S.C.

PRESIDENT DALY:—Gentlemen, it is a great pleasure to welcome to this club today Mr. Bernard K. Sandwell. Although he was born in England and although he has lived for some years in Montreal, yet by virtue of his education at Upper Canada College and the University of Toronto I think he is entitled to be described as an old Torontoian. Mr. Sandwell seems to have an amazing wealth and variety of interests in human affairs and whether we are benefiting by his fine sense of literary criticism and appreciation or whether we are enjoying him as the author of those typical humorous sketches of his or whether we meet him in the role of economist or historian, he is always most interesting and most stimulating. Alluding to the subject which he has chosen for us today I think I am safe in saying Mr. Sandwell has no immediate intention of digging a canal in the St. Lawrence himself nor is he personally interested in the plans of those who have, so I think we may expect the observations which he cares to address to us as coming from one whose views are unbiased by any personal prejudices.

MR. SANDWELL:—President and gentlemen, It is, I think, some six years since I last had the privilege of addressing this club and on that occasion I was, as I usually am, merely trying to provide a little amusement for a gathering of half-tired business men because a business man is completely tired in the evening and he is naturally half-tired at lunch. With him I have the profoundest sympathy because I have been a member of a Canadian

Club myself for many years and know how urgently the members of Canadian Clubs need a little amusement. I trust I was reasonably successful in amusing you on that occasion. I don't know whether that fact has anything to do with the excellent size and intellectual capacity of the audience I see before me on this occasion, but I am inclined to think that the importance and very topical character, in view of the despatches in today's morning paper, of the subject I propose to talk about is more probably the explanation of your attendance.

Probably the chief impression you still retain of my address six years ago, because I cannot hope any of the ideas have remained with you, is that of the extreme fluency of my utterance. On that point also I shall probably disappoint you today. I am hampered, sir, today by two things: first the seriousness of my subject about which it is difficult to jest, and second the change in the constitutional position and constitutional rights of public speakers in the city of Toronto which has occurred since I was last in your midst, and I may add since I accepted the invitation to address this audience. I spent eight years of my life, the best eight years, in the city of Toronto acquiring fluency and skill in the speaking of Greek, Latin, French and other foreign languages—pardon me, Greek and Latin and other foreign languages and French—partly at the hands of some of the distinguished gentlemen whom I now have gathered around me and who are doubtless here to see to what extent I can justify their teaching, but I must not stray into any of these bypaths, but confine myself strictly in the limits of the English language and, as I have had the habit of adorning my discourses with Greek and Latin just to show I was properly educated, I am therefore very considerably handicapped and I have to ask you, Mr. President, if I wander into Greek or Latin or even American or any other foreign language, I have to ask that you will pull my coat-tails in order that I may not unconsciously emit something seditious. And that is all the humor you will get this morning.

This is a serious subject and an extremely topical and immediate one. I gather from despatches in this morning's paper from United States points that negotiations are in

sight, getting near the final stage, getting down to business between the United States and Canada concerning the joint improvement of the St. Lawrence waterways. In that matter we have certain things to sell, certain things to buy. I have been much impressed lately by the extraordinary power of human persuasiveness in the matter of selling things. I have come in contact extensively lately with the genus of human beings known as bond sellers and the things they can do by sheer power of persuasion have amazed me. I have one young friend who recently graduated into the profession of bond selling from a much lowlier business. He was the measurer for one of the leading tailors of the City of Montreal and there had happened recently in Montreal the death of a wealthy Montrealer whose habits of personal habiliment were notoriously slack and unworthy of his financial status and very distressing to his family. And as soon as he died his family decided he should be properly clothed for once in his life—no, for once in his career—before he was finally put away and they telephoned to the leading tailor and my young friend who subsequently graduated into the bond selling business for reasons very adequate, you will admit, was sent and he took a look at the corpse and measured the corpse and started talking to the family and the result was, he went away with the order for the very best suit that that tailor could turn out, with two pairs of trousers.

When you have something to sell, gentlemen, it is wonderful what you can do if you will really have faith in it and know its value; and in the same way when you have something to buy you can sometimes persuade the seller to cut down greatly on the price by beating down his pride in what he has to dispose of. This St. Lawrence improvement matter, for which I am neither advocate nor opponent, I regard very much like the precession of the equinoxes and other natural phenomena. I regard it as one of the things against which it is useless to argue because it will come eventually. The engineers have become excited about it, and when the engineers get excited about it they generally manage to do it, and to get us to provide the money. But I do want to make sure that we get what is coming to us in any negotiations concerning

the terms, and from now on I become very historical. I want to discuss briefly and with a few quotations derived from authoritative sources, the nature of the existing rights of ourselves and the United States in that particular portion of the St. Lawrence which lies wholly within the Dominion of Canada and which is the key to the whole proposition of a navigation highway from the interior of the continent to the sea. And apart from the power aspect, about which I have nothing to say, this is one important aspect of the undertaking that it constitutes a navigation highway from the very interior, from the whole watershed of the Great Lakes out to the Atlantic and the uttermost parts of the earth, and we own the key to it, the portion between the open ocean and the inland part of the system.

What are these rights? There has been very little discussion of this in the very protracted and varied discussions which have gone on about every other aspect. The discussion has been conducted largely by engineers. They are not very concerned about international law. The points I am about to raise have not been referred to, but they are points that need our attention now because negotiations are close at hand. It is as well to wake up and consider the situation before the actual hour of closing negotiations arrives. What is the nature of these rights in the navigation of the St. Lawrence river and St. Lawrence waterway, which is a slightly different matter because it includes canals alongside the St. Lawrence? What is the nature of these rights in the St. Lawrence, from the point where New York on the boundary leaves the river down to Montreal, where the river becomes legally an arm of the sea and open to anybody?

In the beginning of 1871 the United States had no rights whatever in that river except such rights as might exist under general international law. They had no special treaty rights. They had for some forty or fifty years been pressing for the recognition of the natural rights, for the use of any river flowing out from their territory through somebody else's territory but they never succeeded and they never recognized it in anybody else's river. I

would quote Charles C. Hyde, International Law, Boston, 1922:

"From the practice of the United States as indicated by the foregoing Treaties (Britain 1783, Spain 1795, Britain 1794, Britain 1854, Britain 1871, Britain 1909, Britain 1846, Mexico 1848, Mexico 1853) with respect to rivers in part traversing or bounding its own territory, the following conclusions are to be drawn:

First, no right of navigation is known to have been exercised in foreign territory or permitted in American territory except by virtue of a treaty.

Second, no treaty has declared it to be a principle of international law that international navigable rivers are generally open to navigation by vessels of foreign riparian or non-riparian States.

Thirdly, notwithstanding the principles advocated by its statesmen, the United States, as the upstream sovereign, on at least one occasion accepted a treaty the terms of which afford some basis for the contention that the right of navigation secured thereby was conferred as a grant by the sovereign downstream; and on another occasion substantial concessions were yielded for the privilege of access to the sea.

Fourthly, in two cases where the upper stream was wholly within the territory of a single State, no permission was accorded the inhabitants of the territory downstream to navigate the upper waters.

Fifthly, in a treaty of the twentieth century concerning the Canadian boundary waters, the broad rights of navigation reciprocally agreed upon for the benefit of the riparian States were subjected to the operation of local regulations of either country not at variance with the compact.

The nature of the general international rights as they stood at that time and as they stand practically today is set forth by another American authority, P. M. Ogilvie, "International Waterways," New York, 1920, page 156, describing the principles laid down by the Congress of Vienna which have not been substantially modified since.

"Such freedom of navigation," says Ogilvie, "exists by virtue of the voluntary modification by the riverain states of the fullest enjoyment of their jurisdictional rights," and "as a necessary preliminary, therefore, of the interests and security of the riverain states must be vouchsafed by the execution of treaties or other appropriate instruments, sanctioned by all foreign states which seek to engage in such inland transportation."

In other words no waterway however international, to whatever extent it may traverse the country of different states, involves the principle of natural and absolute right on the part of any state to use it in the territory of any

other state. It does give to any such state a moral right to claim execution of a treaty by which the right of navigation will be accorded on reasonable terms, but those terms must be arrived at by negotiation and the interests of the riparian state must be safeguarded by reasonable regulations and precautions. Such is the extent of any general rights that the United States may be held to enjoy under international law regardless of the fact of any existing principles. Such is the nature of the general international rights that the United States may be held to enjoy in Canadian waters. They amount to a right to call for the execution of a treaty by which we should accord to them on reasonable terms and in exchange for reasonable guarantees and equivalents the navigation under our regulations on the national portion of the river.

Such was the nature of the situation in 1871 when the Alabama claims necessitated a very general settlement of outstanding difficulties between Great Britain and the United States and the settlement was negotiated under a good deal of pressure by the United States because the condition of public opinion there then was such that a war between the republic and Great Britain was very far from being impossible, so far as the United States was concerned, and the governments were extremely anxious to avoid any such dénouement. In the negotiation of the Washington Treaty of 1871 one of the negotiators was Sir John Macdonald, not acting as plenipotentiary of Canada but acting as a plenipotentiary of the British Crown. The treaty grants the United States certain rights.

Section 26:—"The navigation of the River St. Lawrence, ascending and descending from the 45th parallel where it ceases to form the boundary, shall forever remain free and open for the purpose of commerce to the citizens of the United States subject to any laws and regulations of Great Britain not inconsistent with such privilege of free navigation."

In return for that the United States granted us corresponding privileges in the Rivers Yukon, Porcupine and Stikine. By the way note that word *forever*.

Section 27:—"The Government of Her Britannic Majesty engages to urge on the Government of the Dom-

union of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence and other canals in the Dominion on terms of equality with the inhabitants of the Dominion," and correspondingly the Government of the United States undertook to urge on the various state governments to give us the use of the state canals.

Now I want to read you a brief extract from the letters of Sir John Macdonald describing the trouble that he had to bring about those two clauses in the treaty, the reasons that he had for drafting them in that way and the effect which he hoped they would have, and was confident they would have, in preserving Canada's control of her own artificial canals between the International part of the river and the port of Montreal. I read from the second volume of Pope's memoirs: "Had I not been present," he writes to Sir Charles Tupper, "the article about the St. Lawrence would have been settled in a manner altogether disadvantageous to us." The negotiations were very controversial and you may recollect that Macdonald found himself rather elbowed out by the British Commissioners because he merely represented Canada.

And it is amazing in reading this to see how the question of fisheries occupied the entire attention and interest of everybody and how the question of navigation did not seem to concern anybody in particular excepting the American negotiators who were anxious to please the centres of population of the Western States. It is really extraordinary how history repeats itself.

"Had I not been present the article about the St. Lawrence would have been settled in a manner disadvantageous to us. The United States Commissioners pressed most persistently from the beginning for the free navigation of the river and canal. They returned again and again to it and used the argument which has an effect on my colleagues that without such grant the Western Senators would never vote for the Alabama settlement. I protested most loudly against the concession. . . . I argued that England had finally refused the right in 1828—and the fact that the Americans had no right to it was recognized by the Reciprocity

Treaty—and now it was too late for them to urge it, and we were not getting anything for it. . . .

"The trouble was, however, how to prevent the argument being raised, and as Mr. Fish was specially anxious that some hope should be held out in the treaty of getting the use of the canals, in order to please the Western Senators, I suggested that both objects might be accomplished by putting in an article similar to that in the Reciprocity Treaty regarding the State canals." \*

And that article was inserted in the terms I have cited by which the only obligation undertaken by anybody was that the British Government undertook to urge us to open our canals and the United States on the other side undertook to urge the individual states to open their canals to us. This article shows expressly that the canals are not a portion of the St. Lawrence but are within the sole control of Canada. That is not an obviously reasonable interpretation of the language of the treaty, as I think any reasonable man would have to interpret it, but is a record of the opinion held of it and the arguments of a man who on our behalf participated in the negotiations. In 1909 we executed a new treaty with the United States, or Great Britain did on our behalf, known as the Boundary Waters Treaty, which is also sometimes referred to by those who maintain the United States already possesses everything it could possibly want in the Canadian part of the St. Lawrence. Just one brief quotation.

The Boundary Waters Treaty, as its title indicates, deals with boundary waters. The St. Lawrence River, between the New York State Boundary, Lake St. Francis and Montreal, is not a boundary water. The treaty contains a definition of boundary water. It is the preliminary article. "For the purpose of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways or the portions thereof along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms and inlets thereof, but not including tributary waters which in their natural channels would flow into such waterways—" not, therefore, includ-

\* Pope's Memoirs of Sir John Macdonald, Vol. II, pp. 128-9.

ing Lake Michigan, a very important point for the United States—"or waters flowing from such lakes, rivers or waterways or the waters of rivers flowing across the boundary."—not including therefore that portion of the St. Lawrence which flows from the international part of the river down through purely Canadian territory to Montreal and ocean navigation.

The Boundary treaty, therefore, has no effect whatever except on boundary waters and establishes no rights in regard to that portion of the St. Lawrence between the United States boundaries and the port of Montreal. Anyhow the Boundary Water Treaty is terminable upon one year's notice. It also includes a clause that the navigation shall forever remain free and open. I don't know just what happens when a treaty terminable on one year's notice says something shall continue free and open forever. That is one of those mysteries but I am inclined to admit it would be a strong moral claim on both of us to continue to hold our boundary waters open for the navigation of the other. And the question is not important, because any system of international law recognizes the same thing. We cannot refuse to make another treaty with the United States upon any reasonable terms exchanging the right to navigate in what are genuinely international boundary waters, but that treaty doesn't apply to the purely Canadian portion of the channel below the American boundary.

Any treaty right therefore to the use of the Canadian portion of the river between Lake St. Francis and Montreal, to the use of any canals not lying within the present banks of the river but lying alongside a river in purely Canadian territory, is a new right. Any treaty right which we may grant to the United States on that point is a new right of the most tremendous importance and of the most tremendous value.

One reason, I think, that this navigation question is not so much discussed as the power question, is because you can express the value of horse power in dollars and cents. Who can tell you how many dollars and cents a perpetual right of navigation from Chicago to the sea, from Toronto or from Rochester to the sea is worth?

Nobody. But it looks pretty illimitable. It looks pretty vast.

Our National Advisory Committee made a report on this subject for the benefit of the Dominion, but unfortunately they have failed to give any lead to the Canadian public as to what they consider to be the nature of the existing rights. The National Advisory Committee says in its main report:

"We have considered whether the proposed waterway should be regulated and governed by treaties already in existence, or whether a new treaty should be negotiated, but feel that that is a matter which the Government would probably prefer to decide for itself. Therefore we make no recommendation in that respect other than to express the conviction that in the event of a new treaty being negotiated the United States should not be given any greater rights than obtain in existing treaties." And my Montreal friends append a supplementary report of their own repeating the same thing.

"This treaty as regards navigation features of this project should extend no greater or further rights than are now assured to the United States under existing treaties."

I am not certain whether it is possible to organize a joint international project without granting to the United States some additional rights to these which I have sketched to you, those very limited, even practically illusory rights, of sailing up the St. Lawrence through the rapids as long as they can get a skilful enough guide; that is the limit of their present rights. I am not sure whether it is possible for the two to join together for the development of an international waterway without adding to those rights. But I want to impress as strongly as I can on this audience and on that great body of Canadian opinion that any such right that we do grant is a right of enormous importance and enormous value to which the United States has no counter part to offer us in regard to navigation. They don't possess any key section of the river. No section of the whole waterway is national to them. They have nothing of that kind to offer us. In 1871 Canada was granted rights on the Yukon, Porcupine and Stikine. I

want to suggest that they are not an adequate consideration for any perpetual or even limited, conditional and safeguarded franchise for American navigation in the lower St. Lawrence. I want to suggest that we have something to sell, and that in selling it we want to be pretty sure we are getting its value.

If I had time I should like to say something about the difficulty of selling things to the United States by way of treaties.

(From the audience, "Go on, go on.")

It is very kind of you but I know the pressure of business on the ordinary man. I feel sure the stock market is going up again today. But you know what the difficulties are. You know the Dominion of Canada possesses in its constitution a clause giving it absolute right to institute any legislation that may be necessary for the good of Canada. In all other respects the civil power of Canada is divided between the provinces and the Dominion so carefully that it has taken about one hundred expensive lawsuits to decide where one begins and the other ends. You know also that the United States has no such civil powers, that any treaty obligations that it undertakes which violate the rights of a state have no binding force, that in consequence we have to be very sure that anything the United States undertakes to give us is something that it can deliver constitutionally without our having to go into the United States Supreme Court and sue for it. I hear people complaining we are being deprived of our treaty rights at Chicago. We haven't any at Chicago. The only right we have in Chicago is the right to go into the United States Supreme Court on the same footing as the state of New York or another state and sue Chicago or the state of Illinois for damages or to secure the prohibition of the diversion. Because the United States is not in a position to grant us anything more, and for that reason the United States is a very difficult country to make a bargain with on this kind of subject.

I have gone beyond the limit of my time. If I started on another subject it would take another half hour to discuss it. I thank you for the very kind reception you have given me.