

THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 48 O. S. } { 39 N. S. }	OCTOBER, 1900.	No. 10.
-----------------------------------	----------------	---------

THE OLD TREATY AND THE NEW.

A waterway to unite the Atlantic and Pacific Oceans comes within those agencies to "abridge distances," which Macaulay said, "barring the alphabet and the printing press had done most to further the progress of humanity." The war with Spain and its resultants have emphasized the importance, if not the necessity, of this waterway to the United States, and caused a strong popular demand for its speedy construction.

For good or evil the United States have become a maritime nation. The possession of Hawaii and the Philippines has precipitated the country into the struggle of the Powers of the Pacific. Gathering Hawaii into the federal fold launched the United States into the Pacific arena; the acquisition of the Philippines committed the country to an international policy "at the gateways of the day."

An Isthmian canal, therefore, is sharply challenging solution. It may be accepted as one of the certainties, and by no means remote, of the future. It would remove, as it were, a whole continent out of the way of ships steaming to the Southern Pacific Ocean. Triumphs of this kind over

the obstacles which nature interposes to the intercourse of mankind may be regarded as a victory of peace greater than which in the present day can bring renown to us from war.

The question that blocks immediate action is: By whom and under what conditions shall it be constructed? Before answering this, it would seem that the Clayton-Bulwer treaty must be dealt with. But regardless of party division, and by an almost unanimous vote, the House of Representatives has passed a bill that is manifestly intended to be an abrogation of the Clayton-Bulwer treaty, and a disapproval of the Hay-Pauncefote treaty now pending before the Senate. The friends of the latter treaty, having negotiated to establish a *modus vivendi* between the United States and Great Britain as to the provisions of the Clayton-Bulwer treaty, were driven by the action of the House of Representatives to secure an extension of time for its ratification to seven months beyond the date fixed in the protocol. This will cover the session of Congress beginning in December, when it is expected the Senate will take some definite action. A recurrence to certain historic facts may be of some value.

Long previous to the war between the United States and Mexico, England in a treaty of peace with Spain obtained permission to cut logwood and mahogany in the Balize Settlement, dividing Nicaragua and Honduras from the Mexican state of Yucatan, and which at that time belonged to Spain. Taking advantage of this privilege England founded a settlement at the Balize, enlarging and extending from time to time its boundaries, and assuming rights of soil and dominion. About the same time she also claimed to have made a treaty with a small tribe of Indians, called the Mosquitos, upon the coast of Central America, and to have guaranteed to them the protection of the British Government. This Mosquito country was within the chartered limits of Nicaragua.

This was the status of affairs when the Mexican war was brought to a close. It was understood that Great Britain had used her powers of diplomacy to defeat any treaty of peace by which the United States would acquire any Mexican territory. On the day that it became known at Vera Cruz that a treaty of peace had been signed, by which Cali-

fornia and New Mexico were transferred to the United States, the British fleet set sail from Vera Cruz and proceeded directly to the mouth of the San Juan River, in Central America, and took possession of the town of San Juan at the mouth of the river, changed its name to Greytown, and established British authority there, in the name of the Mosquito King, to be exercised by the British consul; in fact converted it into a British dependency. The United States promptly protested against this act, as showing hostile motives toward the United States, and having for its object to close up the only channel through which they could establish and maintain communication between the Atlantic States and the newly-acquired possessions on the Pacific.

The controversy growing out of this seizure of that transit route led to the Clayton-Bulwer treaty. However, it should be stated, that during the last years of Mr. Polk's administration he had appointed Elijah Hise, of Kentucky, Minister to the Central American States; and Judge Hise in June, 1849, without having directions to do so, negotiated a treaty on behalf of the United States with Nicaragua, known as the Hise-Selva treaty, by which the United States were invested with "exclusive right and privilege" to construct a ship canal or railway through the territory of Nicaragua, including the river San Juan, between the Atlantic and Pacific Oceans. This treaty contained a number of provisions, such as stipulations for the construction of forts and military works upon the banks of the San Juan for the protection of the proposed passage, and to exclude the vessels of any Power with which either of the contracting parties (United States and Nicaragua) might be at war.

This treaty did not reach the United States until after the inauguration of General Taylor as President, and the appointment of Mr. Clayton as Secretary of State. Mr. Clayton refused to accept the treaty, and in his objections laid special stress upon the article under which the United States guaranteed to Nicaragua forever the whole of her territory, and promised to become a party to every defensive war in which that state might thereafter be engaged for the protection of her territory. In lieu of the Hise-Selva treaty, Mr. Clayton proposed to Sir Henry Bulwer, the British

Minister at Washington, that the British Government should unite with the United States in proposing another treaty to Nicaragua, by which no exclusive advantage should be conferred on any party.

The Clayton-Bulwer treaty was the result of the movement made by Mr. Clayton, and must have met with very general approval, for its ratification by the Senate was resisted by only eight negative votes. This treaty bears date April 19, 1850. The preamble states that the two countries are "desirous of consolidating the relations of amity which so happily subsist between them, by setting forth their views and intentions with reference to any means of communication by ship canal which may be constructed between the Atlantic and Pacific Oceans by the way of the river San Juan de Nicaragua, and either or both of the lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean."

By the first article it is agreed that neither contracting party shall ever obtain for itself any exclusive control over any ship canal, nor erect or maintain fortifications in its vicinity, or "occupy, fortify or colonize Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or assume or exercise dominion over the same; nor will either take advantage of any intimacy, or use any alliance, connection or influence that either may possess, with any state or government through whose territory said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other."

By the fifth article both Powers engage to protect the canal from interruption, seizure, or unjust confiscation, and to guarantee its neutrality, conditionally upon the management of the canal not making any unfair discrimination in favor of one or the other of the contracting parties.

By the eighth article—in order "to establish a general principle"—the provisions of the treaty are extended to any practicable canal or railway across any part of the Isthmus, and therefore covered both Tehuantepec and Panama.

This treaty has produced, perhaps, more discussion and has been the occasion of more ill-feeling than any other treaty we have with a foreign government. Between 1850, the year of its ratification, and 1860 it opened up a host of questions between the contracting parties; and a mass of diplomatic correspondence was exchanged in reference to Great Britain not carrying out the requirements of the treaty, in retaining control over certain Central American territory, Great Britain contending that the treaty was wholly prospective, the prohibitions applying only to future acquisitions, and that she could maintain all her then possessions.

The United States, while conceding that the language admitted of a double construction, insisted that in view of their having no territory in Central America and Great Britain having a great deal, it was unjust and unfair to expect the United States to be put at such a disadvantage as the claim of Great Britain involved. The attitude of the United States was so firmly maintained and vigorously pressed that Great Britain finally yielded all such territorial claims; and in 1860 President Buchanan made the statement that there had been an amicable adjustment, Great Britain having by treaty with Honduras and Nicaragua relinquished the Mosquito protectorate, and given up to Honduras the Bay Islands. Congress expressed no dissent to the President's declaration that "the dangerous questions arising from the Clayton-Bulwer treaty have been amicably settled." The President's message in 1860 committed the United States to a formal acknowledgment that this treaty was an obligatory convention, and that it had been fairly and satisfactorily executed by Great Britain.

Since 1860 this treaty has been in some way recognized by our government in each of the succeeding administrations as a subsisting compact. In 1872 Secretary Fish, being advised of contemplated aggressions by Great Britain on Guatemala, instructed our Minister at London to protest and demand that the Clayton-Bulwer treaty should be observed, and every Central American state must be let alone. In 1880 the treaty was invoked by Secretary Evarts against an alleged attempt of Great Britain to acquire the Bay Islands.

Secretary Blaine criticised the treaty and said it ought to be revised, but he recognized that it was in existence and in force when he expressed the hope that Great Britain would "concede certain modifications," the rest of the treaty "to remain in full force." Secretary Olney in 1895 recognized it in a dispatch to Mr. Bayard, then United States Minister at London, saying: "We are indebted to the Monroe doctrine for the provisions of the Clayton-Bulwer treaty, which both neutralized any interoceanic canal across Central America and expressly excluded Great Britain from occupying or exercising any dominion over any part of Central America." In his message of December, 1885, President Cleveland declared: "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, and must not become a point of invitation for hostilities or a prize for warlike ambition.

. . . The lapse of years has abundantly confirmed the wisdom and foresight of those earlier administrations which, long before the conditions of maritime intercourse were changed and enlarged by the progress of the age, proclaimed the vital need of interoceanic transit across the American isthmus, and consecrated it in advance to the common use of mankind by positive declarations and through the formal obligation of treaties." And this treaty has been recognized by Secretary Hay; it is true that the Hay-Pauncefote amendatory treaty has not been confirmed, but its submission is a direct acknowledgment that the Clayton-Bulwer treaty is in force. Secretary Frelinghuysen is the only Secretary of State who ever made an argument to show that the treaty was void, or rather "voidable." No responsible official in this country has ever claimed that it is actually void; a few merely claiming that it should be amended, or at worst, is voidable. Our government, whenever its infraction has been threatened, has always treated it as full of life, and not having fallen into "innocuous desuetude" from old age. Four different times we have held England to the stipulation that she would assume no control over territory in Central America, and twice we have turned a deaf ear to the in-

formation "that Her Majesty's government would not decline the consideration of a proposal for the abrogation of the treaty by mutual consent." The Clayton-Bulwer treaty was made at our solicitation. It was not obtained by foul means, or by false statements, or to do an unlawful act. There had been ample time for consideration of all the facts, opinions and theories. It was negotiated after mature deliberation, the result of mutual self-abnegation and friendly co-operation to compass an end distinctly utilitarian and humanitarian. It was a convention environed with happy auspices and good intentions, and in pursuance of a long established and often-proclaimed policy. It is a good thing still to regard it as in force. It is of decided value, an instrument made to our hands. It is a bulwark of defence, a contract to be enforced, not surrendered. The only possible reason we could have to do away with it is because we seek to do things we there renounce; in short, to assume the aggressive ourselves, to prefer belligerent to neutral rights, and to launch forth into the troubled sea of foreign politics. Secretary Blaine, though criticising the engagements of the treaty as "imperfectly comprehended and contradictorily interpreted," was constrained to admit: "I am more than ever struck with the elastic character of the Clayton-Bulwer treaty and the admirable purpose it has served as an ultimate recourse on the part of either government to check apprehended designs in Central America on the part of the other."

It provides not only for the extension to Central America of our own historical policy, called the Monroe doctrine, but also for the free use of the canal by all nations. Throughout the entire history of this country's attitude toward a Central American canal, one common feature runs through all the treaties; and that is, whatever canal is built shall be neutralized; that is, exempted in some way from all the operations of war. The idea of neutrality and common use of the canal by all nations was entertained long before the Clayton-Bulwer treaty. It was proclaimed in a resolution passed by the Senate in 1835 and again by a resolution of the House of Representatives in 1839; both looking to the practicability of a canal across the Isthmus, and "to secure by suitable treaty stipulations the free and equal right of

navigating such canal by all nations." Therefore the neutrality provision of the Clayton-Bulwer treaty was no novel idea, but an old idea accepted and concurred in as good, expedient and wise. When the question was raised of the use of the Suez Canal by Great Britain in time of war, she intimated that the neutrality of such an avenue of commerce in time of war could best be maintained by the Power that could assemble the strongest fleet at either end of it. So in our late Spanish war Spain's war vessels were allowed to pass through it, and our own might have gone if they had chosen to do so.

It seems to be the opinion of the best international lawyers of both countries that the Clayton-Bulwer treaty is in full force and effect, and that it cannot be legally got rid of except by mutual consent. If the Hay-Pauncefote treaty, now before the Senate, fails of ratification, any legislation for the building of an Isthmian canal must rest upon an abrogation of the Clayton-Bulwer treaty, whether so declared *eo nomine* or not. The United States cannot take exclusive control of an interoceanic canal in Nicaragua, unless we reach a convention with Great Britain to that effect, or trample under foot the Clayton-Bulwer treaty. The restriction as to the exclusive control of the canal imposed in this treaty, Great Britain agrees in the Hay-Pauncefote treaty, shall continue to bind her, while the United States is released from it. The value of this concession should be estimated as a great consideration for anything we may yield, if we, indeed, yield anything by the proposed modification. The House of Representatives has practically said in the Hepburn bill, No! to the ratification of this amendatory treaty. There must be no adherence to the neutralization of the canal. The whole question must be regarded as strictly and solely as an American question, to be dealt with and decided by the American government. The canal must be built, owned, controlled absolutely by the United States, without suggestion, interference or limitation on the part of any other government on earth. If the old treaty stands in the way, our rank as a "great power," the glorious result of the Spanish war, entitles us to look with contempt upon such a trifling obstacle. A canal American-for-the-Americans with exclusive control

and the right to fortify we want and will have, regardless of any compact to the contrary; for "we've got the ships, we've got the men, we've got the money too."

Is this a good way to end a treaty between two powerful and friendly nations, unless trouble is expressly expected? "A treaty is a compact or agreement entered into by sovereign states for the purpose of increasing, modifying or defining their mutual duties and obligations." A treaty is not at an end because it becomes onerous or burdensome to one of the parties. No mere inequality of advantage can invalidate it. The modern treaty does not contain the *clausula rebus sic stantibus* by which it might be construed as abrogated when material circumstances on which it rested changed. It is a contract between two nations; no one party can annul it at his will. If no stipulated period be designated and no right to terminate upon due notice retained, then it may be terminated only by the mutual agreement of the signatory parties. At a conference of the Signatory Powers to the Treaty of Paris, to consider an apprehended attempt by Russia to overthrow it, the following declaration was put forward: "It is an essential principle of the law of nations that no Power can liberate itself from the engagement of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement." There are certain well-known causes that writers on international law recognize as *per se* abrogating a treaty; when either of the contracting parties loses its existence as an independent state, or where the internal constitution of either is so changed as to render the treaty inapplicable, or in case of war between the contracting parties.

When a treaty is violated by one party, the other can demand redress or can still require its observance. The Supreme Court in the case of *Whitney v. Robertson*, 124 U. S. 194, said: "A treaty is primarily a contract between two or more independent nations and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other." Of course any nation that is strong enough can abrogate a treaty, but a wanton abrogation is a just cause of war; and it rests with the physical power of the na-

tion whether or not the abrogation will be good in point of fact.

By the constitution of the United States a treaty is placed on the same footing and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land; supreme over the constitution and laws of the particular states, and, like a subsequent law of the United States, over pre-existing laws of the same. It is within the power of Congress to pass subsequent laws qualifying, altering, or wholly annulling a treaty. For as Congress possesses the sole right of declaring war, and as the arbitrary alteration or abrogation of a treaty tends to produce it, this power may be regarded as an incident to that of declaring war. The exercise of such a right may be rendered necessary to the public welfare and safety, by measures of the party with whom the treaty was made, contrary to its spirit, or in open violation of its letter; and on such grounds alone can this right be reconciled either with the provisions of the constitution or with the principles of public law. The inviolability of a treaty, even when not especially guaranteed, is the first law of nations. Obligations created by a treaty are of the most sacred character; they are even more solemn and sacred than the obligations of private contracts, on account of the greater interests involved, of the deliberateness with which the obligations are assumed, of the permanence and generality of the obligations, and of "each nation's calling, under God, to be a teacher of right to all within and without its borders."

The public faith of a nation pledged in a treaty has its sanction and basis in that system of morals which underlies our civilization and our institutions. To wantonly disregard or violate such a pledge is utterly subversive of all international morality, utterly destructive of all the moral force by which alone the welfare of nations in their mutual intercourse can be secured.

There being no municipal tribunal before which international good faith may be enforced, the relations and mutual pretensions of nations, in consequence of the growth of international trade and the collision of international interests, are being constantly subjected to a more and more trying

ordeal. Diplomats, publicists and statesmen bear testimony to the urgent necessity of the substitution of reason for force, the efficacy of law in its ethical character over violent expedients, as the only permanent and safe factors in the adjustment of the contingent circumstances which arise and disturb the community of nations.

Boyd Winchester.

Louisville, Ky.