THE REPEAL OF THE PROVISION OF THE PANAMA CANAL ACT EXEMPTING AMERICAN COASTWISE VESSELS FROM THE PAYMENT OF TOLLS

When the Act "to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," the short title for which is "The Panama Canal Act," was passed by the Congress of the United States and approved by the President on August 24, 1912, an editorial appeared in the October number of the Journal for that year commenting upon the passage of the Act through Congress, and especially upon the provision that exempted American vessels engaged in the coastwise trade from the payment of tolls. Since that time this provision of the Act has been the subject of international controversy between the United States and Great Britain and an issue debated at great length and with much earnestness in the internal politics of the United States.

It is not necessary for our readers that we restate the positions of the two governments or recount the elaborate and at times heated arguments which have been elsewhere advanced on both sides of the question as to whether the provision referred to was in contravention of the Hay-Pauncefote Treaty. The substance of the first protest of Great Britain, dated July 8, 1912, which was filed with the Department of State while the Act was pending in Congress, and the text of the memorandum of President Taft which accompanied his signature of the Act by way of answer to the British protest, are contained in the editorial referred to.[1] The formal protest of Great Britain dated November 14, 1912, and handed to Secretary of State Knox by the British Ambassador on December 9, 1912, the answer of the United States, dated January 17, 1913, and the reply of Great Britain of February 27, 1913, are printed in full in the Supplement for 1913, pages 46, 208 and 100, respectively. The subject was put on the program of the Seventh Annual Meeting of the Society, held in Washington in April, 1913, and the printed Proceedings of that meeting contain the discussions in full on both sides of the question and upon all the points involved in the dispute.

The diplomatic correspondence had lagged for a little over a year when President Wilson, on March 5, 1914, took a decisive step toward ending the international problem which he had found unsolved upon his assumption of office a year previous. On this date he appeared before

[1] The text of the British note is printed in the Supplement for 1913, page 46.

Congress and made an address in which he expressed his personal opinion that discrimination in favor of American ships was prohibited by the treaty. But without urging this, his personal view, upon Congress, he earnestly requested for other reasons the repeal of the objectionable clause. The President's address is so very brief and concise that it is printed textually, as follows:

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

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

In my own judgment, very fully considered and maturely formed, that exemption constitutes a mistaken economic policy from every point of view, and is, moreover, in plain contravention of the treaty with Great Britain concerning the canal concluded on November 18, 1901. But I have not come to urge upon you my personal views. I have come to state to you a fact and a situation. Whatever may be our own difference of opinion concerning this much-debated measure, its meaning is not debated outside the United States. Everywhere else the language of the treaty is given but one interpretation, and that interpretation precludes the exemption I am asking you to repeal. We consented to the treaty; its language we accepted, if we did not originate; and we are too big, too powerful, too self-respecting a Nation to interpret with too strained or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please. The large thing to do is the only thing that we can afford to do, a voluntary withdrawal from a position everywhere questioned and misunderstood. We ought to reverse our action without raising the question whether we were right or wrong, and so once more deserve our reputation for generosity and for the redemption of every obligation without quibble or hesitation.

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

A bill to carry out the President's request was immediately introduced in the House of Representatives and promptly passed. In the Senate, however, it met a formidable and determined opposition, and was not passed until June 11th, after three months of debate, and then only with an amendment aimed to reserve any rights which the United States may

have under the treaty to discriminate in favor of its own vessels. The amendment was accepted by the House of Representatives on the following day and on June 15, 1914, the Act received the approval of the President of the United States and became a law. As finally passed, the Act, commonly known as the Repeal Bill, consists of only two sections, which read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second sentence in section five of the Act entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," approved August twenty-fourth, nineteen hundred and twelve, which reads as follows: "No tolls shall be levied upon vessels engaged in the coastwise trade of the United States," be, and the same is hereby, repealed.

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

The proviso inserted in the repeal bill in the Senate by way of amendment seems to be of doubtful effect. A reading of the President's message of March 5, 1914 plainly shows that he urged the repeal as an act of grace and generosity and that he had no desire or intention to raise the question as to whether the exemption was or was not a violation of the terms of the Hay-Pauncefote Treaty. Neither did he place his request upon the ground that it was made because of the insistence by Great Britain upon her interpretation of the treaty, for he distinctly stated that the action should be taken as a voluntary withdrawal by the United States from its position. If other evidence of the correctness of this statement of the President's attitude be needed in addition to his own statement of it in his address of March 5th, attention is called to a state-

ment reported to have been made in the House of Commons on June 29, 1914 by Sir Edward Grey, the British Foreign Secretary. In referring to an allegation that the action of President Wilson was the result of a diplomatic bargain with Great Britain, Sir Edward Grey is reported to have stated:

> It is due to the President of the United States and to ourselves that I should so far as possible clear away that misrepresentation. It was stated in some quarters that the settlement was the result of bargaining or diplomatic pressure. Since President Wilson came into office no correspondence has passed and it ought to be realized in the United States that any line President Wilson has taken was not because it was our line, but his own. President Wilson's attitude was not the result of any diplomatic communication since he has come into power, and it must have been the result of papers already published to all the world. It has not been done to please us or in the interests of good relations, but I believe from a much greater motive—the feeling that a government which is to use its influence among the nations to make relations better must never, when the occasion arises, flinch or quail from interpreting treaty rights in a strictly fair spirit.

A simple repeal of the exemption clause in the terms first enacted by the House of Representatives, in response to a request such as was made by the President, could not properly be interpreted as a waiver or relinquishment of any rights which the United States may have under the Hay-Pauncefote Treaty. Neither could the mere fact of the failure of the United States to exempt its vessels from the payment of tolls be regarded as a waiver or relinquishment of any such right to exempt. It will be recalled that the Panama Canal Act as originally reported to the House of Representatives in 1912 made no provision for the exemption of American vessels, and, as pointed out in these columns at that time, the House Committee in reporting the bill so drawn made a distinct declaration that the wording of the bill was not based upon nor did it refer to any interpretation or construction of the treaty. The Committee used the following forcible language:

> While many members of our committee believe that by the terms of our treaties with Great Britain we are prevented from allowing preferential or free tolls to ships of American registry, either coastwise or foreign, the majority of the committee voting for uniform tolls authorize and request the statement—positive, plain, and unequivocal—that no language of this section was chosen or used for the purpose of foreclosing discussion and differing opinions on that question. They authorize the express affirmation that this provision is adopted for present use, disclaiming all intention to declare in this section any construction of the language of the treaty or to establish any precedent or permanent legislative policy or to bind any future Congress should it be deemed expedient or adjudged competent to adopt a different basis.

The insertion of the proviso seems to have been made primarily as a political expedient for obtaining the support of those Senators who did not believe that the law as adopted in 1912 was a violation of the treaty but who opposed the exemption on the ground that it was an unsound economic policy of the government. The adoption of this amendment serves to indicate the substantial doubt in the minds of a great many, if not a probable majority, of the Senators that the exemption of American coastwise vessels from the payment of tolls may not properly be granted by the United States without running counter to the letter and spirit of the treaty. The approval of this amendment by the President after he had asked for repeal without raising the question of treaty interpretation, shows the narrow margin on which he had to rely in getting the bill through the Senate.

The adoption of the proviso seems also to serve notice that the question has been only temporarily postponed and that it may be raised again should another Congress see fit to pursue the policy pursued by the Congress in 1912 of using the Canal as a means of aiding the American merchant marine. Such a contingency will no doubt depend in large measure upon the amount of revenue which the Canal actually produces and the size of the annual bills for maintaining and operating it. Should there be any considerable deficit it is not likely that any future Congress will vote to increase the deficit by relieving the American vessels of their share of the burden. On the other hand, should there be a surplus the question of relieving American vessels from the payment of tolls in this waterway as in all other waterways of the United States may again be raised.

There can be no doubt that the best solution of the question would have been its arbitration at the present time, just as there can be no doubt that if the question is raised again it will have to be submitted to arbitration. It is a purely legal question, involving the interpretation of a treaty, a class of questions universally recognized as being proper subjects for international arbitration and mentioned especially in all arbitration agreements, including the general arbitration treaty of 1908 between the United States and Great Britain, recently renewed for another period of five years.

Arbitration at the present time would have been entirely satisfactory to Great Britain. Her last diplomatic communication on the subject was practically limited to a request for arbitration. Arbitration was also desired by a majority in the Congress of the United States, but in

order to bring about an arbitration in the United States a treaty negotiated by and with the consent of the Senate is necessary, and a majority of the Senate is not sufficient to consent to a treaty. The assent of two-thirds of the Senators is necessary before a treaty may be ratified by the President of the United States, and it was evident, not only before the repeal was requested by the President, but also after it was practically assured that the bill would be passed, that the consent of two-thirds of the Senators could not be obtained to submit the tolls question to arbitration.

THE EIGHTH ANNUAL MEETING OF THE SOCIETY

The Eighth Annual Meeting of the American Society of International Law was held, according to previous announcement, in Washington at the New Willard Hotel from April 22 to April 25, 1914. The general subject selected by the committee for consideration at the meeting was the Monroe Doctrine. The committee also placed upon the program the subject of the teaching of international law in American institutions of learning, as explained in an editorial comment of the Journal for January last. The codification of international law, which had been included in the program as a third subject for consideration, in anticipation of a report from the Committee on Codification, was not taken up at the meeting because the Committee found it impracticable to render a report at the present time and requested that the committee be continued which request was granted by the Society.

It was considered desirable and convenient to treat the two general subjects to be considered by the meeting separately by dividing the sessions between them and the program was arranged accordingly.

In pursuance of this plan the meeting was opened on Wednesday evening, April 22, 1914, at eight o'clock, by the Honorable Elihu Root, President of the Society, who took as the subject for his presidential address "The Real Monroe Doctrine." He was followed by Mr. Charles Francis Adams, of Boston, who described the origin of the doctrine. The subject was resumed at the session beginning at 2:30 o'clock on the afternoon of Thursday, April 23rd, by a consideration of the statements, interpretations and applications of the Monroe Doctrine and of more or less allied doctrines during three different periods of its history. The period from 1823–1845 was covered by Mr. William R. Manning, Adjunct Professor of Spanish American History in the University of