The Canal Tolls and American Shipping

Lewis Nixon
THE CANAL TOLLS AND
AMERICAN SHIPPING
THE CANAL TOLLS
AND
AMERICAN SHIPPING

BY
LEWIS NIXON

NEW YORK
McBRIIDE, NAST & COMPANY
1914
FOREWORD

It is proposed in this book to submit to an impartial examination the different interpretations of the meaning of the Hay-Pauncefote Treaty. Lest the writer's long association with American shipping interests may seem to militate against a detachment from personal bias in this discussion, he deems it wise to add that he is no longer engaged in shipbuilding, nor has he any interest direct or indirect in any vessel engaged in the foreign or coasting trade of the United States.

Finding many arguments advanced upon ideas gathered from hasty consideration which had not taken in both sides of the question, it was decided to try to put within these brief limits a general analysis of the Treaty's provisions, to review both sides of the controversy and to give furthermore all the state papers that show the development of the Treaty.

If the reading of this book adds to the general information of the ordinary reader without time for exhaustive study and enables him to criticise with confidence the many addresses and papers on the subject I shall feel that it has served the purpose of its inspiration.
Foreword

There seems to be an impression that the contention respecting the right of the United States to remit toll charges on its own vessels is an academic question, and that such contention is simply a battle of wits. As a fact it is the most serious determination that has been asked of our people for half a century.

Our foreign trade is in the hands of our commercial rivals and if the Panama Canal policy is not determined aright it will remain there with ever strengthening control.

Some of our people upon hearsay, others upon blind acceptance of the opinions of others, owing to the fact that treaties were not available, have developed a state of mind in which an insistence upon secure, moral and legal rights is viewed as a breach of treaty faith.

Lewis Nixon.

New York,
7 April, 1914.
## CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary Steps</td>
<td>1</td>
</tr>
<tr>
<td>The Clayton-Bulwer Convention</td>
<td>11</td>
</tr>
<tr>
<td>Neutrality and Equal Treatment and the Suez Rules</td>
<td>24</td>
</tr>
<tr>
<td>The Negotiation of the Hay-Pauncefote Treaty</td>
<td>45</td>
</tr>
<tr>
<td>Insincerities</td>
<td>70</td>
</tr>
<tr>
<td>The Speech of Senator Elihu Root</td>
<td>76</td>
</tr>
<tr>
<td>The British Protest</td>
<td>88</td>
</tr>
<tr>
<td>Regulation of Commerce</td>
<td>92</td>
</tr>
</tbody>
</table>

### APPENDICES

| The Clayton-Bulwer Convention | 101 |
| The Hay-Pauncefote Treaty | 106 |
| The Hay-Bunau-Varilla Treaty | 109 |
| The Suez Canal Convention | 122 |
| Negotiation of the Hay-Pauncefote Treaty (Correspondence) | 127 |
| First British Protest | 173 |
| Second British Protest | 175 |
| Reply of Secretary of State Knox | 188 |
| President Taft's Memorandum to Accompany the Panama Canal Act | 197 |
| Speech of Senator Elihu Root | 206 |
| Platform Declarations | 238 |
| Treaty of 1846 | 239 |
| President Wilson's Message | 241 |
| Panama Canal Act | 242 |
THE CANAL TOLLS AND AMERICAN SHIPPING
CHAPTER I
PRELIMINARY STEPS

Even Columbus hoped to discover a strait between the North and South American Continents. The question of cutting through the Isthmus we find referred to many times from 1502 to recent years.

In 1826 Secretary of State, Henry Clay, wrote to Messrs. Anderson and Sergeant, United States delegates to the Panama Congress, advising the consideration by that Congress of the matter of a canal.

In 1835 the Senate adopted a resolution requesting the President to consider the expediency of opening negotiations with the governments of other nations, especially with those of Central America and New Grenada, with a view to safeguarding individuals or companies that might undertake to build a canal across the Isthmus. In 1839 the House of Representatives took action along similar lines in response to a memorial from New York merchants.
On February 10, 1847, President Polk transmitted with message to the Senate for ratification "A general treaty of peace, amity, navigation and commerce between the United States and the Republic of New Grenada," concluded at Bogotá, December 12, 1846. Under this treaty of 1846, the citizens, vessels and merchandise of the United States were to have reciprocal treatment with those of New Grenada in passage across any part of Panama, besides being relieved from any import duties on goods in transit. This in return for the positive and efficacious guarantee of the neutrality of the Isthmus—as well as the rights of sovereignty and property over it.

The Panama Railway completed in 1855 was an outcome of this treaty.

The American and Atlantic Ship Canal Company executed a contract with the Government of Nicaragua August 27, 1849.

Mr. Squier, United States Chargé d’affaires, concluded a treaty ceding Tigre Island in the Gulf of Fonseca to the United States. On October 16, 1849, the British Diplomatic representative to Guatemala, Mr. Chatfield, with an armed force took possession of Tigre Island. Possession at that time would have meant war with Great Britain. We were in the midst of the bitter discussions leading up to our Civil War and had we gone to war with Great Britain very probably the Civil War would have been precipitated with the Southern States as possible allies of Great
Britain. The conversion of English lumber camps on the eastern coast of Nicaragua and Honduras into what was practically British territory, through virtue of occupation in anticipation of the building of a canal, was considered by American statesmen of the period as equivalent to a virtual abandonment of the Monroe Doctrine.

In 1848, England seized and occupied Greytown till 1860 under the mask of aiding the Mosquito Indians, even crowning an Indian King as a "cousin" and "great and good friend" of European sovereigns. The salary of the king was £1000 a year till he died in 1864. Just so long as England considered it necessary she maintained the protectorate over the Mosquito Reservation, getting the Austrian Emperor to bolster up her claims in 1880, and it was not till 1894 that the Mosquito Coast was turned over to Nicaragua and until work under Menocal on the Nicaragua Canal, which was carried on in 1891 and 1892, was abandoned.

So our Government was driven to execute a treaty which violated the intent of the Monroe Doctrine. Just as one of the results of the Russo-Turkish War was to give England control of Cyprus, with the right to occupy territory near the Canal in British interests, and in Central America, though agreeing not to fortify or settle, (in Article I of the Clayton-Bulwer Treaty) we find her holding fast to the Mosquito Coast until 1894 and to Belize to the present day. While
Great Britain engaged by treaty to vacate the coast she violated this treaty in letter and spirit. President Pierce, in a message in 1856, said:

It is with surprise and regret that the United States learned that a military expedition under the authority of the British Government had landed at San Juan del Norte, in the State of Nicaragua, and taken forcible possession of that port, the necessary terminus of any canal across the Isthmus within the territories of Nicaragua. It did not diminish to us the unwelcomeness of this act on the part of Great Britain to find that she assumed to justify it on the ground of an alleged protectorship of a small and obscure band of uncivilized Indians whose proper name had even been lost to history, who did not constitute a State capable of territorial sovereignty either in fact or in right, and all political interests in whom and in the territory they occupied Great Britain had previously renounced by successive treaties with Spain when Spain was sovereign to the country and subsequently with independent Spanish America.

The following proclamation is another violation of treaty rights.

Office of the Colonial Secretary.
Belire, July 17, 1852.

This is to give notice that Her Most Gracious Majesty the Queen has been pleased to constitute and make the Island of Roatan, Bonacca, Utilla, Barbarat, Helene and Morat to be a Colony to be known and designated as the Colony of the Bay Islands.

Augustus Frederick Gare,
Acting Colonial Secretary.
Roatan was one of the "islands adjacent" to the American Continent that had been restored by Great Britain to Spain under treaties of 1783 and 1786.

Mr. Marcy, Secretary of State, informed the United States Minister to Great Britain, July 26, 1856, as to the view taken by the United States saying:

Great Britain had not at the time of the Convention of April 19, 1850, any rightful possessions in Central America, save only the usufructuary settlement at Beline, if that really be in Central America, and at the same time if she had any she was bound by the express tenor and true construction of the convention, to evacuate the same and thus to stand on precisely the same footing in that respect as the United States.

The Dallas Clarendon Treaty of 1854, stating explicitly that the protectorate over the Mosquito Indians and continued possession of the Bay Islands would be terminated, was refused by Great Britain.

At any rate it is known that there was much misunderstanding preceding 1850 and alarm over acts of British aggression. Mr. Lawrence, our Minister in London, making but little progress owing to the evasive policy of Great Britain, Mr. Clayton, Secretary of State, signed a convention in Washington directly with Sir Henry Bulwer. This treaty was ratified July 5, 1850, and is known as the Clayton-Bulwer Convention. While Great
Britain made sure of land near to and commanding the entrance of any Nicaraguan Canal, there can be no question but the English statesmen of the day fully appreciated the strength of the New Grenada Treaty of 1846.

The wording of the eighth article of the Clayton-Bulwer Convention, the extension by treaty stipulation of protection, was to secure certain like terms of treatment over other routes. So from 1850 to 1901 we find every form of diplomatic strategy exerted to extend such treaty stipulations and so enjoy equal terms with the United States.

The Treaty of 1846 gave reciprocal rights to the United States and before the provisions of the Clayton-Bulwer Convention could be extended to the Isthmus of Panama very material modifications must have been made in the Treaty of 1846 and this could not be done without the consent of New Grenada.

In fact the Treaty of 1846 with New Grenada stood in the way of the equal treatment guaranteed in the superseded Clayton-Bulwer Treaty, as it extended certain privileges in Panama to the United States by virtue of our giving reciprocal conditions of treatment in Panama itself. It is an accepted principle in international law that favored nation treaties do not preclude the extending of a special privilege to another nation provided a reciprocal privilege is secured in return. Thus the United States negotiated a commercial treaty with the Sandwich Islands in 1876, pro-
viding for certain reciprocal trade concessions. The British Government made the following comment thereon:

As the advantages conceded to the United States by the Sandwich Islands are expressly stated to be given in consideration of and as an equivalent for certain reciprocal concessions on the part of the United States, Great Britain cannot, as a matter of right, claim the same advantages for her trade under the strict letter of the Treaty of 1851.

Evidently Senator Root's conclusions are that the Monroe Doctrine was in no sense binding upon Great Britain, and that her seizure of lands, in direct opposition to that doctrine, gave her a "coign of vantage which she herself had for the benefit of her great North American Empire for the control of the Canal across the Isthmus."

England promised nothing in the Clayton-Bulwer Treaty that she was not barred from holding by the Monroe Doctrine, and she gave up nothing, even after promising, and the coign of advantage thus embraced includes a claim over Panama, in the opinion of Senator Root. For when asked whether the Treaty of 1846 did not influence the possible extension of the Clayton-Bulwer Convention to Panama, he took a position which seems contrary to the provisions and precedents of public law and in direct repudiation of the clearly expressed attitude of successive administrations of the United States, Mr. Root says:
The whole Isthmus was impressed by the same obligations which were impressed upon the Nicaragua route, and whatever rights we had under our Treaty of 1846 with New Grenada were thenceforth bound to exercise, with due regard and subordination to the provisions of the Clayton-Bulwer Treaty.

Every precedent and practice of international law seems in conflict with such a stand.

Dr. Oppenheim says:

Such obligation as is inconsistent with obligations from treaties previously concluded by one State with another cannot be the object of a treaty with a third State.

In case the arbitration so vigorously urged by Senator Root should find for Great Britain, should we refuse to accept such finding in order to keep our faith under the Panama Treaty or abrogate the Panama Treaty in order to submit to the finding?

At all events Great Britain's adroit efforts to obtain a contract right by extending the treaty stipulations contemplated in Article VIII of the Clayton-Bulwer Convention can be noted from 1850 on.

Thus in 1857 Mr. Cass in a letter to Lord Napier in response to a request for a joint agreement said:

It would be inconsistent with the established policy of this country to enter into a joint alliance with other powers as proposed in your lordship's note.
Preliminary Steps

Mr. Evarts in 1880 refused to consent to any agreement with any foreign power to participate in the special rights already enjoyed by us in Panama.

Mr. Blaine in 1881 said in a message to Mr. Lowell:

In the judgment of the President this guarantee (of neutrality on the Isthmus) does not require reënforcement or accession or assent from any other power.

In President Arthur's message of December 6, 1881, we find that he said that the prior guarantee of neutrality of the Isthmus of Panama was indispensable and that the interjection of any foreign guarantee might be regarded as a superfluous and unfriendly act. He even went so far as to say that Great Britain might claim a share in such guarantee through some wording of the Clayton-Bulwer Convention and recommended the abrogation of any clause that might possibly be so construed.

Mr. Blaine refused to agree to an arbitration of the boundary between Costa Rica and Panama by a European sovereign saying that any question affecting the territorial limits of Panama was of direct practical concern to the United States. Mr. Bayard accepted the findings later but required that the scope and effect should be defined without impairment of any rights of the third parties, not sharing in the arbitration.

Mr. Gresham in 1893 made clear the position of
Canal Tolls and American Shipping

the United States that our approval of an arbitrated boundary in no way made the United States a party to the litigation.

Mr. Bayard in 1886 spoke of the "serious concern the United States could but feel were a European power to resort to force against a sister republic of this hemisphere as to the sovereign and uninterrupted use of a part of whose territory we are the guarantees under the solemn faith of a treaty."

We, during all this time, acted quickly to put down disorder or revolution, interfering with the use of the railway across the Isthmus.

Thus Mr. Gresham cabled in 1895:

If for any reason Colombia fails to keep transit open and free, as that Government is bound by Treaty of 1846 to do, United States are authorized by same treaty to afford protection.

While many such cases can be cited they all simply tend to the same end.

We have shown:

1. That under the Treaty of 1846 the United States enjoyed certain special reciprocal rights with New Grenada over the Isthmus of Panama.
2. That there was a full realization of the danger of permitting any European power to enter into the enjoyment of similar privileges by any form of treaty stipulation permitting a participation in our contract rights.
CHAPTER II

THE CLAYTON-BULWER CONVENTION

The Convention signed April 19, 1850, is given in full in the Appendix to this volume.

The Convention was considered to be hurtful to the spirit of the Monroe Doctrine.

Secretary of State Olney, in 1896, said:

In short the true operation and effect of the Clayton-Bulwer Treaty is that, as respects all water and land interoceanic communication across the Isthmus, the United States has expressly bound itself so far to waive the Monroe Doctrine as to admit Great Britain to a joint protectorate.

The Convention as stated in the preamble was "for facilitating and protecting the construction of a ship canal and for other purposes." It was primarily to cover the building of a particular canal starting with the river San Juan de Nicaragua on the Atlantic side.

Article I debars either the United States or Great Britain from acquiring or holding 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.

Even our English friends will admit this Article
Canal Tolls and American Shipping

superseded as we have acquired rights on the Isthmus that cannot be enjoyed in common with Great Britain in addition to rights already ours under the Treaty of 1846.

Besides in the Hay-Pauncefote Treaty England has assumed no obligation in connection with the use of the Canal.

Article II says that even in the event of war between the two nations their vessels using the Canal shall be exempt from blockade, detention or capture by either belligerent. While our right to use the Panama Canal as an addition to our war power is conceded by Great Britain, the concession is a guarded one and an admission by us that neutrality is the same as equal treatment, would result in a challenge of the right of the United States to have such power.

Article III provides for a joint protection of the parties constructing the Canal, together with their property.

Article IV pledges Great Britain and the United States to use their influence with States having or claiming jurisdiction over the territory through which the Canal passes, to facilitate the construction and to secure free ports at each end.

Article V is of great importance, for in this article Great Britain and the United States engage to jointly protect the Canal and guarantee its neutrality. Both parties, however, reserve the right to withdraw their protection or guarantee upon six months' notice provided the persons or
company undertaking or managing the Canal make discriminations against one or in favor of one over the other.

It will be noted that management clearly covered the regulation of commerce by tolls and otherwise. The penalty arising from discrimination caused simply the withdrawal of protection by the one discriminated against, the neutrality being secured by joint protection or by the protection of one in case that one secured special treatment not accorded to the other.

So we find the neutrality of this particular Canal provided for in Articles II and V.

Article VI provides for inviting the coöperation of other nations by their entering into treaty stipulations with the two principals.

Article VII has to do with the joint treatment of those who supply the money and do the work on the Canal with an expressed preference for the first reliable contractor that no time may be lost.

Now let us see what Article VIII says:

The Governments of the United States and Great Britain having not only desired, in entering into this Convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection by treaty stipulations to any other practical communication, whether by canal or railway, across the Isthmus which connects North and South America; especially to the inter-oceanic communications should the same be practicable, whether by cable or railway which are now proposed to be established by the way of Tehuantepec or Panama.
In granting, however, their joint protection to any such canals or railways, as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on even terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

Senator Root has several times hearkened back to Article VIII of the Clayton-Bulwer Convention for an argument to support his contention that we must treat the vessels of war and commerce of Great Britain upon terms of equality with our own vessels under all circumstances.

The entire Clayton-Bulwer Convention speaks of equal treatment owing to the fact that equal obligations were undertaken in affording protection and in guaranteeing neutrality.

By Articles II and V of the Clayton-Bulwer Convention the two Governments provided jointly for the building of a particular canal, its protection and its neutrality, the latter being secured by joint protection. But in Article VIII we find two conditions covered separately in the two paragraphs of the article.

The first paragraph establishes as a general principle, to apply to all available routes, the par-
ticular object accomplished by joint protection in earlier articles of the Treaty, this object being the neutralization secured in Articles II and V by joint protection.

The second paragraph provides that if the two countries do extend their contract joint protection by treaty stipulation to other routes, such routes shall be open to the two countries on equal terms and on like terms to other countries willing to join in the protection.

An important fact in this connection already noted is that either party could withdraw the protection by which neutrality and protection was secured by giving six months' notice, in case such equality of treatment was not secured.

As provided by the Clayton-Bulwer Convention, the Canal specified to run through Nicaragua was to be neutralized by the two nations jointly; they were to join in the burdens; they were to join in the protection; and they were to join hand in hand in controlling the Canal and in seeing that all nations did have exactly the same treatment by the Company building this canal through a territory alien to each of them.

This partnership control you will see has been definitely and permanently ended by the last treaty, and this termination, we see from the pourparlers, proves beyond question that Great Britain understood this and acted in complete accord with such understanding.

Equality of treatment under Article VIII was
the return for a joint assumption of burden and responsibility, yet the British contention is that since a certain privilege was obtained through joining in protection this privilege must continue even though Great Britain is relieved from this expensive and burdensome responsibility. That is, in absence of explicit yielding to Great Britain, our rights are to be limited or destroyed by implication. But happily the wording of the Hay-Pauncefote Treaty is clear upon this point. Is it "equal treatment" or "neutrality" that is carried over from Article VIII? The preamble to the Articles of the Treaty says: "the objections that may arise from the Clayton-Bulwer Convention to the construction of the Canal are to be removed without impairing the general principle of 'neutralization established in Article VIII.' We supersede the Treaty in every other respect."

The preamble to rule I of Article III of the Hay-Pauncefote Treaty says that the United States adopts as the basis of neutralization certain rules substantially as embodied in the Suez Canal Treaty. And further light is thrown upon the meaning by the fact that in modifying the Suez rules only such parts as provided for neutralization were retained and all references to equal treatment thrown out. We shall examine these rules further on.

But Great Britain, and some American supporters of her protest, says that so long as she is
not permitted to join in protection that neutrality secured by our protection becomes the same as equal treatment secured by joint protection. It shows the demoralization of the public mind on this question when such preposterous conclusions are taken seriously. I should be the last one to decry British diplomatic capacity, nor do I find anything wrong in their diplomats making the best case possible for their Government. They certainly act upon Madame de Staël’s saying that: “The patriotism of nations ought to be selfish.” It has long been a favorite expedient of British diplomatist to lay claims long in advance through pourparlers. So the ingenious attempts up to the last minute to retain a partnership or contract participation in the Hay-Pauncefote Treaty were to be expected.

The Treaty of Ghent, which some of those not knowing of its provisions are anxious to celebrate, signed fifteen days before the Battle of New Orleans, provided for the restoration of all territory, places and possessions taken by either nation from the other during the war, with certain unimportant exceptions.

But the minutes of the Conference at Ghent kept by Albert Gallatin represent the English Commissioners as declaring in exact words through Mr. Goulburn:

We do not admit Bonaparte’s construction of the law of nations. We cannot accept it in relation to any subject matter before us.
While the American Commissioners did appreciate the meaning, it became known afterwards that the British Ministry did not intend the Treaty of Ghent to apply to the Louisiana Purchase at all. From 1803 to 1815, Pitt, the Duke of Portland, Grenville, Perceval, Lord Liverpool and Castlereagh, denied the right of Napoleon to sell the territory to us.

The words used by Mr. Goulburn were meant to lay the foundation for a claim on the Louisiana Purchase entirely external to the provisions of the Treaty of Ghent. And if Pakenham had not been defeated we should have been deprived of this territory and should have had no canal. Of course no one considers extraneous matter as pertinent except those who cannot gain their ends through the plain terms of a contract.

When the Treaty of 1824 between the United States and Russia was about to be exchanged the Russian Minister informed Secretary of State Adams that he was instructed by his Government to file an explanatory note at the time of the exchange of ratifications, stating the views of his Government as to the meaning and effect of certain articles of the Treaty. Mr. Adams informed him that such a note could have no effect whatever on the Treaty unless it was sent to the Senate with the Treaty and received its approval.

We had a similar prior filing by Sir Henry Bulwer of a statement that the British Government did not understand the engagements of the Clay-
The Clayton-Bulwer Convention to apply to British settlements at Honduras or its dependencies.

Fortunately, though, in the case of the Hay-Pauncefote Treaty the negotiations support all the American contentions as the letters exchanged clear up all points in dispute, and clearly restrict the sphere of operation of the rules to a field in which they affect all persons and vessels alike.

I have already referred to the different paragraphs of Article VIII, but Mr. Hay is so freely quoted in what he might say were he alive that I wish to advance the evidence of his written ideas at the time of the negotiations. In the memorandum prepared by him we find in referring to Article IV of the Hay-Pauncefote Treaty: "It is thought to do entire justice to the reasonable demands of Great Britain in preserving the general principle of neutralization and at the same time to relieve the United States of the vague, indefinite, and embarrassing obligations imposed by the eighth article of the Clayton-Bulwer Convention."

And yet, while plainly done away with by Mr. Hay, who in good faith preserves the general principle of neutrality, we find Senator Root in his Senate Speech endeavoring to revive these same vague, indefinite and embarrassing obligations of Article VIII.

The Suez Canal had been neutralized in 1888 by certain rules and under the first Hay-Pauncefote Treaty certain rules were adopted to secure the
free navigation of the Canal that were in many respects like those of the Suez and it was said these rules were to preserve and maintain the general principle of neutralization of Article VIII of the Clayton-Bulwer Convention, not the latter part of Article VIII as Sir Edward Grey labors to prove by a process of elimination, which eliminates the general principle of neutrality altogether and substitutes for it equal rights.

No one can deny that neutrality was secured by joint protection in the Clayton-Bulwer pact, just as was equal treatment. We were willing to carry on the neutrality of the Canal and it is definitely pledged and the rules by which we shall permit its neutral use are clearly set forth in rules given in Article III the protection being given by us alone.

Surely if we had been desirous of giving equal treatment as well it would have been so stated. It is certainly not implied but on the contrary is definitely refused as we shall see when we trace the origin of the rules.

Do not assume for an instant that we could not have built a canal without Great Britain’s permission. This all too general assumption confesses a loyal subserviency abhorrent to Americans—at least to the far greater part of them. The Clayton-Bulwer Convention had been violated by Great Britain, but we were not goaded to abrogate it even though justified.

Sir Edward Grey says that if we had built the
The Clayton-Bulwer Convention

Canal under the Clayton-Bulwer Treaty we must have given English vessels equal treatment with our own, and then conveniently forgets that the Hay-Pauncefote Treaty superseded the Clayton-Bulwer Convention. But we are not building under the Clayton-Bulwer bargain.

President Pierce in a message of 1856 said:

It was with surprise and regret that the United States learned that a military expedition under the authority of the British Government had landed at San Juan del Norte in the State of Nicaragua and taken forcible possession of that port, the necessary terminus of any canal or railway across the Isthmus within the territories of Nicaragua.

It did not diminish to us the unwelcomeness of this act on the part of Great Britain to find that she assumed to justify it on the ground of an alleged protectorship of a small and obscure band of uncivilized Indians, whose proper name had even been lost to history, who did not constitute a state capable of territorial sovereignty either in fact or in right, and all political interest in whom and in the territory they occupied Great Britain had previously renounced by successive treaties with Spain when Spain was sovereign to the country and subsequently with independent Spanish America.

The Fifty-first Congress took up this subject very fully.

The Committee on Foreign Relations of the Senate presented to the Fifty-first Congress a report containing a review of the history of the Clayton-Bulwer Treaty and it reported to the
Senate its conclusion that it had become obsolete and that

The United States is at present under no obligation, measured either by the terms of the Convention, the principles of public law or good morals, to refrain from promoting in any way it may deem best for its own interests the construction of this Canal, without regard to anything contained in the Convention of 1850.

To this report are appended the names of every member of the Committee among them two who have held the office of Secretary of State, Messrs. Evarts and Sherman.

The United States Government had to obtain the necessary powers from Congress to build the Canal, and it could not ask Congress to use the money of the United States in a project controlled in any way by a foreign nation.

Abrogation would however have left both parties freedom of action in Central America, if we abandoned the Monroe Doctrine. The Monroe Doctrine already barred Great Britain from doing what she agreed not to do in the Clayton-Bulwer Treaty and the first Hay-Pauncefoote Treaty was considered, as was the Clayton-Bulwer Treaty, in violation of the Monroe Doctrine and as unduly limiting the power of the United States and was denounced by the Democratic Party in its Denver Platform. The Clayton-Bulwer Treaty was really a convention covering an uncertain contingency as to time and place, leav-
ing to joint action the preparation of rules of management and control.

The Clayton-Bulwer Convention is superseded. We have traced the bearings of facts up to the time of such abrogation.

It is plain to be seen that if the joint protection by which neutrality and equal treatment could be secured in this convention should be extended by treaty stipulation that grounds for claiming equal participation would be laid. Since 1850 we had been resisting adroit efforts to obtain such joint contract extension.

Yet with a persistency and statecraft to be admired we find the first treaty submitted in the Hay-Pauncefote negotiations embodying a surrender of this principle on our part and as fast as beaten on one demand another was presented.

Happily for us the influence of a firm and consistent traditional policy exerted for over fifty years prevented such surrender.
CHAPTER III

NEUTRALITY AND EQUAL TREATMENT AND THE SUEZ RULES

We find that by the preamble to the Hay-Paunce-fote Treaty its object is

To remove any objection which may arise out of the Convention of 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the United States, without impairing the general principle of neutralization, established in Article VIII of that Convention.

The American people very clearly were determined that a participation by other nations in a canal built by us would not be permitted. Some of our statesmen strongly recommended the abrogation of the Clayton-Bulwer Convention and we had ample reasons for doing so, the Treaty having been violated in letter and spirit. This would doubtless have given rise to bad feeling as firm assertion of American rights for some reason seems unpopular with a part of our people. Unquestionably the new treaty was executed to "save the face" of Great Britain for otherwise it must have been abrogated.

So in order not to impair the general principle
of neutralization we adopt certain rules in Article III of the Hay-Pauncefote Treaty as a basis for such neutralization.

It is stated that these rules are substantially as embodied in the Convention of Constantinople, for the free navigation of the Suez Canal. Much light will be thrown upon the controversy over the meaning of the Treaty by an examination of this convention which is given in the Appendix. For what is omitted is just as important as what is retained in clearing up the intention of the rules.

The British contention is that under the rules as appearing in the Hay-Pauncefote Treaty, they are entitled to equal treatment because in a former treaty equal treatment was secured by joint protection and joint protection being done away with equal treatment must result. The wording of the protest given in full in the Appendix is so ingenuous that it must be given:

It certainly was not the intention of His Majesty's Government that any responsibility for the protection of the Canal should attach to them in the future. Neutralization must, therefore, refer to the system of equal rights.

In other words a certain privilege gained through joining in protection must remain although we relieve Great Britain from this expensive and burdensome responsibility.

Senator Root says that the Panama Canal is to be made "neutral upon the same terms as were specified in the Clayton-Bulwer agreement."
Edward Grey by a strange coincidence makes the same misstatement in his protest.

Read the Hay-Pauncefote Treaty. It abrogates the Clayton-Bulwer Convention, preserving only the general principle of neutrality, and this neutrality is to be secured by elaborate and stated rules based upon rules adopted thirty-eight years after the Clayton-Bulwer Treaty, and even these Suez rules of 1888 were radically changed that the United States might fortify the Canal and might have and enjoy all the rights incident to construction, as well as the exclusive right of providing for the regulation and management of the Canal.

England in 1882 seized Egypt and when secure in possession in 1888, in compliance with Great Britain’s proposition for a national conference of the Powers, a treaty of seventeen articles was drawn up between the following: Great Britain, Austro-Hungary, France, Germany, Holland, Italy, Spain, Russia and Turkey, we find Great Britain became a party, with the reservation that the terms of such treaty should not be brought into operation in so far as they would not be compatible with the transitory and exceptional condition in which Egypt was put for the time being in consequence of her occupation by British forces, and in so far as they might fetter the liberty of action of the British Government during such occupation (See Martens, 2d ser. Page 557).

Not only has there been a desire to keep alive the abrogated Clayton-Bulwer Treaty, but since
the Treaty of Constantinople was drawn upon in shaping the rules of neutrality there is an attempt to read into rules adopted by us in Article III for securing neutrality the various obligations of the Suez rules whether found in our rules or not. In revising the rules in order to adapt them to the intentions of the negotiators every feature not applying to the neutrality which they engaged to offer was stricken out.

Thus from Article I was taken out: "The Canal shall always be open in time of peace as in time of war regardless of flag." The rules do not guarantee at all time and for all powers the free use of the Canal, nor forbid the keeping of men of war in or near the Canal, nor provide that the Canal must remain open in time of war. In fact the changes made from the Suez Canal rules clearly put the United States in a class apart in all such respects.

Since the rules as adopted are designed to embody the conditions under which we agree to uphold the neutrality of the Canal, let us seek the definitions of neutrality as given in Dr. Oppenheim's International Law. He says:

Neutralities may be defined as the attitude of impartiality toward belligerents, adopted by third states and recognized by belligerents, such attitude creating rights and duties between the impartial states and the belligerents.

No one but ourselves is permitted to maintain
28 Canal Tolls and American Shipping

the neutrality of the Canal; we do not agree to be neutral toward an enemy, hence we hold the Canal neutral as to other powers. Again quoting from Dr. Oppenheim:

Since neutrality is an attitude of impartiality it excludes such assistance and succor to one of the belligerents as is detrimental to the other, and further such injuries to one as benefit to the other.

Reading Rule 1 of Article III covers such contingencies of impartial treatment in that we treat the vessels of commerce and of war of all nations alike not simply as regards charges and conditions of traffic but in all other ways in which we might aid or succor one or injure the other.

How closely we follow in our rules the Oppenheim doctrines is shown by again quoting him:

Neutrals must prevent belligerents from making use of their neutral territory and of their resources for military and naval purposes during the war.

A hurried résumé of the rules shows that vessels of war of a belligerent must not embark or disembark troops, munitions of war, or warlike materials, that the Canal must never be blockaded, that vessels of war of a belligerent shall not remain within three miles of either end, and that a vessel of war of a belligerent shall not depart within 24 hours from the departure of a vessel of war.

In fact it will be found that every contingency connected with belligerent operations is covered
Neutrality and Equal Treatment

by our rules but that having adopted such rules to preserve the neutrality of the Canal they are not capable of being construed nor stretched to cover conditions having to do with *ordinary commerce unaffected by belligerent operations.*

We have the support of Dr. Oppenheim in this; following him further in defining and explaining neutrality we find:

Neutrality is a condition during a condition of war only.

Rights and duties deriving from neutrality do not exist before the outbreak of war.

Hence in applying rules to conserve the neutrality of the Canal such rules if directly applying to accepted understanding of neutral obligations could not be extended to cover the ordinary conditions and far more extended existence of peaceful commerce except by specific provisions or by implication from the fact that no articles in the treaty granted further powers.

Now, Lord Lansdowne did attempt to make these rules apply to ordinary commerce when he suggested August 3d, 1901, an amendment that the neutrality rules should "govern all inter-oceanic communications across the Isthmus."

This will be referred to later as it shows clearly a request for the adaptation of the rules to the peaceful commerce using the Canal and the studied refusal of the United States to grant such request.
The action of the Senate is very enlightening upon this point as it struck out the expression "in time of war as in time of peace," but retained the linking together of vessels of war and peace, so that rules applying to one must apply to the other.

But the changes from the rule prove even more. There is an idea prevalent that the rules for neutrality are not applicable in their entirety to neutral obligations, and that Rule 1 is inconsistent unless applied to peaceful commerce. Let us examine them as briefly as possible.

The intention is to make sure that we shall not play favorites in time of war by extending any special privileges or treatment to one belligerent as against another, either by hindering or delaying his vessels of war or by interfering with his vessels of commerce. Hostile operations might be hampered, even by unjust or inequitable charges exacted in such a way that under particular circumstances such charges might bear more heavily on one belligerent than another. So we agree not to discriminate as between nations in respect of the conditions or charges of traffic or otherwise—not simply tolls but any rules affecting passage through the Canal in the interest of one belligerent as against another. In fact the British interpretation would prevent us at any time favoring even vessels belonging to our Government in the way of docking facilities, coaling arrangements, use of repair shops, signal stations,
Neutrality and Equal Treatment

anchorage grounds, wharf and watering facilities, or otherwise.

But say the English partisans, Great Britain will not insist upon this. If we admit her right to insist, as we do, when we strip from Article III its bearing upon the neutral operation of the Canal, she can object and doubtless would. Each time an insurmountable objection which invalidates her claims is brought we find partisans eager to waive it.

The equality of treatment covered in the rules is equality of treatment of belligerents meted out under the rules we have adopted to secure the neutralization of the Canal. We can only be neutral as between others; we cannot be neutral in case we are ourselves a belligerent.

While this was admitted by Lord Lansdowne we find Sir Edward Grey, realizing that such prior admission was damaging to their case, endeavoring to extend us certain special rights for our man-of-war on the score that we now have sovereign rights in the Canal Zone. This is a dangerous concession, for if we are in a class apart with our man-of-war we are, of course, in a class apart with our merchant vessels, and changes, in vital respects, brought about by changed relations of principals, render the entire treaty voidable.

Since Dr. Oppenheim states in his recent booklet that we have no such rights, a quotation from Sir Edward Grey's protest will be of interest. The protest says:

The protest says: