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COMPACTS AND AGREEMENTS BETWEEN STATES AND BETWEEN STATES AND A FOREIGN POWER

HERBERT H. NAUJOKS*

I. INTRODUCTION

During the past three decades, the use of the interstate compact, as authorized by the United States Constitution,1 has come into prominence as an effective device for the settling of differences between states or regions, and as a means of interstate cooperation in the disputed areas of conservation of natural resources and governmental activities.2 The Compact Clause is brief and provides in part that "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . ."

Today, there are, among others, two outstanding controversies which could be resolved permanently and effectively through the use of the interstate compact.

One of these controversies which has at one time or another involved fourteen states bordering on the Great Lakes and the Mis-

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1 United States Constitution, Art. I, Sec. 10, provides in Clause 1: "No state shall enter into any treaty, alliance or confederation. . . ." Clause 3 provides: "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . ."

2 For selected material on the history, development and scope of the Compact, see: Frankfurter and Landis The Compact Clause of the Constitution, 34 Yale L. J. 685 (1925); Zimmerman and Wendell, The Interstate Compact Since 1925 (1951); The Book of States, 1943-44 ed. pp. 51-71; 1948-49 ed. pp. 27-52; 1950-51 ed. pp. 26-31; 1952-53 ed. pp. 20-44; Report of the New York Committee on Interstate Cooperation, LEG. Doc. No. 55, 1952; Interstate Compacts, a compilation of articles from various sources, 1946 Colorado Water Resources Board; Dodd, Interstate Compacts 70 U.S. L. Rev. 557 (1936) and Interstate Compacts; Recent Developments, 73 U.S. L. Rev. 75 (1939); Bruce, The Compacts and Agreements of States with one another and with Foreign Powers, 2 Minn. L. Rev. 500 (1918); Clark, Interstate Compact and Social Legislation, 50 Pol. Sci. Q. 502 (1935) and 51 Pol. Sci. Q. 36 (1936); Donovan, State Compacts as a Method of Settling Problems Common to Several States, 80 U. of Penn. L. Rev. 5 (1931); Carman, Sovereign Rights and Relations in the Control and Use of American Waters, 3 So. Calif. L. Rev. 84, 156, 266 (1929 and 1930); Notes: Interstate Compacts as a Means of settling Disputes Between States, 35 Harv. L. Rev. 322 (1922); The Power of States to Make Compacts, 31 Yale L. J. 635 (1922); A Reconsideration of the Nature of Interstate Compacts, 35 Col. L. Rev. 76 (1935).
Mississippi River has been the subject of litigation in the federal courts and in the United States Supreme Court for more than fifty years. This controversy likewise has been the subject of congressional attention for more than fifty years, and has been under scrutiny by various public officials and many administrative bodies, including two Presidents of the United States, various Secretaries of War, the Federal Power Commission, the War Production Board during World War II, and others.

In this particular controversy, the differences between the states arose over the alleged right of the Sanitary District of Chicago and the State of Illinois to abstract and permanently withdraw for sewage disposal and power purposes, huge quantities of water from the Great Lakes-St. Lawrence system into the Mississippi watershed by way of the Chicago Sanitary and Ship Canal and the Illinois Waterway, to the detriment and damage of the peoples of the Great Lakes states. The states of New York, Pennsylvania, Ohio, Michigan, Wisconsin and Minnesota, as well as the port cities bordering on the Great Lakes, have from the beginning consistently opposed and vigorously challenged such alleged right as claimed by the Chicago Sanitary District and the State of Illinois. The United States Supreme Court, under a decree entered April 21, 1930, has limited the diversion of water from the Great Lakes-St. Lawrence water system through the Chicago Drainage Canal to 1500 cubic feet per second, plus domestic pumpage.

The other problem, which has been the subject of heated debate in the Congress of the United States for more than two decades, is the proposal to construct, jointly with Canada, the so-called St. Lawrence Seaway and Power Project.

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3 Missouri v. Illinois, 180 U.S. 208 (1900); s.c. 200 U.S. 496 (1906); Sanitary District of Chicago v. United States, 266 U.S. 405 (1925); Wisconsin et al v. Illinois et al., 278 U.S. 367 (1929); s.c. 281 U.S. 179 and 696 (1930); 287 U.S. 578 (1932); 289 U.S. 395, 710 (1933); 309 U.S. 559, 636 (1940); 313 U.S. 547 (1941); 340 U.S. 858 (1950).
5 281 U.S. 696 (1930). Domestic pumpage averages about 1700 cubic feet per second.
6 For selected readings on the history, details and present status of the St. Lawrence Seaway and Power Project see: Lincoln, Battle of the St. Lawrence, Fortune, Dec. 1950; Report of a Subcommittee to the Committee on Foreign Relations on S.J. 104, a Joint Resolution approving the agreement between the United States and Canada relating to the St. Lawrence Seaway and Power Project, 79th Congress, 2d session, 1946; Longmire, Showdown on the St. Lawrence, Colliers Nov. 3, 1945; Gladfelter, Flying Bombs Add Argument for Seaway to Open Midwest, Milwaukee Journal, Jan. 14, 1945; Danielian, The Chips are down on the St. Lawrence Seaway, Great Lakes Outlook (published by Great Lakes Harbors Association, City Hall, Milwaukee, Wis.) January, 1952; Naujoks, The St. Lawrence Seaway, Political Aspects, Great Lakes Outlook, April, 1952; THE ST. LAWRENCE SURVEY, PARTS I-VII, (U.S. Dep't Comm. 1941); St. Lawrence Survey, Message from the President of the United States, SEN. DOC. No. 110, 73rd Cong., 2d Sess., 1934.
The St. Lawrence Seaway, consisting of a series of lakes and connecting channels linked with the Atlantic Ocean by way of the St. Lawrence River, is more than 90 per cent developed for navigation. The aim of the St. Lawrence Seaway and Power Project is to remove all obstructions to deep water navigation, and at the same time to provide power facilities which will develop more than one million horsepower of hydro-electric energy. The chief aim of the seaway project is to provide a navigable waterway for large ocean-going vessels from the Great Lakes to the Atlantic Ocean. This involves principally the construction of a 27-foot channel in the so-called International Rapids section of the St. Lawrence River to replace the present 14-foot channel which Canada has long maintained on its side of the river. This channel will continue in operation as a Canadian enterprise even after the deepwater channel is created. Some additional work must also be completed in the connecting channels of the Great Lakes, as well as in many lake ports to provide the required navigable depth of 27 feet for the entire Great Lakes-St. Lawrence system.

The construction of the seaway would be on a self-liquidating basis thru the levy of tolls or charges on cargoes and passenger traffic using the new deepwater navigation facilities to be provided. Under one of the latest proposals, a commission would be set up with a fund of $10,000,000, with power to borrow up to $500,000,000 to pay for the United States' share of the cost of this project. The power project contemplates the construction and installation of power facilities in the International Rapids section of the St. Lawrence River for development of hydro-electric power to be divided equally between the United States and Canada. The cost of these power facilities would also be self-liquidating and be paid for over a period of forty years.

The majority of the people living in the Great Lakes states favor the St. Lawrence Seaway and Power Project, while the Atlantic and Gulf port cities, the eastern railroads, some private power utilities, and some coal operators oppose this project because they believe it constitutes a threat to their pocketbooks. Late in September 1951, President Truman and Premier St. Laurent of Canada, discussed the St. Lawrence Seaway and Power Project, and in December 1951 legislation to authorize the construction of the St. Lawrence Seaway Project was unanimously passed by both houses of the Canadian Parliament. Provision was made in the Act to permit the United States to participate in this project if Congressional approval was obtained in the 1952 session of Congress, otherwise Canada planned to "go it alone." Canada is dead serious in its determination to construct, as soon as possible, the St. Lawrence Seaway and Power Project. However,
Canada undoubtedly would still permit United States' participation by the interested Great Lakes states through the medium of an interstate compact with approval of Congress. In June 1952, the United States Senate defeated a proposal to approve the Canadian-United States St. Lawrence Agreement of March 19, 1941 by a vote of 43 to 40.

A study of the use of interstate compacts over the past 175 years indicates that this method of action has been extremely effective in settling differences based on regional economic, social or physical conditions in America. In order to achieve a permanent, lasting and satisfactory solution for the two mentioned perennial problems, as well as for others, it would seem that a re-examination and study by all parties concerned should be made of the interstate compact, its origin, history and past uses, its legality and applicability to the problem of the control of lake levels, the uses of the waters of the Great Lakes, diversions from and into the Great Lakes, and the like, to the end that an earnest and sincere effort be made to employ it in the settlement of the many troublesome problems involving the Great Lakes region and the adjoining states.

II. History and Construction of the Compact Clause of the Constitution

A. History of the Compact Clause

The compact section of the United States Constitution has its roots deep in American colonial history. It is a part of the story of colonial boundary disputes. Almost all of the colonial charters were vague and had to be applied to strange and poorly surveyed lands. The resulting disputes were settled by two peaceful methods. One was negotiation between contending colonies—usually carried on through joint commissions. Usually the Crown approved all such agreements. If negotiations failed or in lieu of a direct settlement, the second method was followed, namely an appeal to the Crown. This was followed by a reference of the controversy to a Royal Commission. From a decision of the Commission an appeal lay to the Privy Council. These two forms of adjustment were common practice for a hundred years preceding the American Revolution. An appeal in a boundary dispute between New York and New Jersey appears in the records of the Privy Council as late as 1773.7

The American Revolution found many of these disputes still unsettled. It was a logical step to carry over the old idea of settling these disputes by compacts as had been done in the past.

7 5 Acts of Privy Council, Col. Ser. 45.
The Articles of Confederation included a provision which would permit the adjustment of boundary and other disputes. Article VI of the Articles of Confederation prohibited a state, without the consent of Congress, from entering into an agreement, alliance or treaty with any king, prince or state. The Articles then provided that no two or more states shall enter into any alliance between them without the consent of Congress.

The language of Article VI of the Articles of Confederation is interesting and reads as follows:

"ARTICLE VI. No state without the consent of the United States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, prince or state . . . .

"No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue."

In *Rhode Island v. Massachusetts,* the United States Supreme Court pointed out that "at the adoption of the Constitution there were existing controversies between 11 states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the colonies."

Historically, the consent of Congress to validate an agreement between states can be traced to the consent of the Crown to agreements among colonies. The colonial records disclose that during the colonial period, at least nine different boundary disputes were settled by agreement, namely:

Connecticut and New Netherlands Boundary Agreement (1656)
Rhode Island and Connecticut Boundary Agreement (1663)
New York and Connecticut Boundary Agreement (1664)
New York and Connecticut Boundary Agreement (1683)
Connecticut and Rhode Island Boundary Agreement (1703)
Massachusetts and Rhode Island Boundary Agreements (1710) and (1719)
New York and Connecticut Boundary Agreement (1725)
North Carolina and South Carolina Boundary Agreement (1735)
New York and Massachusetts Boundary Agreement (1773)

During the era of the Articles of Confederation, the following compacts were entered into under the Articles of Confederation, namely:

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Pennsylvania and Virginia Boundary Agreement (1780)
Pennsylvania and New Jersey Agreements (1793) and (1786)
Virginia and Maryland Agreement (1785)
South Carolina and Georgia Agreement (1788)

Since the adoption of the Federal Constitution in 1789, compacts with the consent of Congress have been resorted to often in the settlement of problems arising between the states, and have been applied in many fields of legislation, including the following:

(1) Boundaries and cessions of territory.\(^{10}\)
(2) Control and improvement of navigation, fishing and water rights and uses.\(^{11}\)
(3) Penal jurisdiction.\(^{12}\)
(4) Uniformity of legislation.\(^{13}\)
(5) Interstate accounting.\(^{14}\)
(6) Conservation of natural resources.\(^{15}\)
(7) Utility regulation.\(^{16}\)
(8) Taxation.\(^{17}\) Relating to jurisdiction to tax, the exchange of tax data, and agreements as to mutual tax exemptions, and the like.
(9) Civil defense and military aid.\(^{18}\) An interstate civil defense compact was drafted in 1950 by ten northeastern states and the Federal Civil Defense Administration. New York, New Jersey and Pennsylvania entered into a military aid compact in 1951, subject to approval by Congress.

(10) Educational and Institutional Compacts.\(^{19}\)

\(^{11}\) State ex rel Dyer v. Sims, 58 S.E. 2d 766 (W. Va. 1950) rev'd. in 341 U.S. 22 (1951); New York Port Authority Agreement of 1921; Colorado River Compact of 1921; LaPlata River Compact of 1923; Columbia River Compact of 1923; Atlantic States Marine Fisheries Compact, 1950; New England Water Pollution Compact, 61 STAT. 682 (1947); Canadian River Compact of 1951; Yellow River Compact of 1951; Ohio River Valley Sanitation Compact of 1940.
\(^{12}\) Crime Compact of 1934—Interstate supervision of parolees and probationers; also agreement as to jurisdiction over crimes committed on Lake Michigan.
\(^{13}\) National Conference of Commissioners on Uniform State Laws, organized in 1892. See Book of States, p. 18 (1952-53).
\(^{14}\) Virginia v. West Virginia, 220 U.S. 1 (1911) and same parties in 246 U.S. 565 (1918)—settlement and enforcement of financial obligations.
\(^{15}\) Interstate Oil Compact of 1934; Ohio River Valley Sanitation Compact of 1940 which became effective in 1948, 54 STAT. 752 (1940). New England States Anti-Pollution Agreement of 1947—Interstate Sanitation Compact, 49 STAT. 932 (1935).
\(^{16}\) National Association of Public Utilities Commissioners.
\(^{17}\) Kansas-Missouri Mutual Tax Exemption Agreement of 1922; Kansas City v. Fairfax Drainage District, 34 F. 2d 357 (1929); Dixie Wholesale Grocery v. Martin, 278 Ky. 705, 129 S.W. 2d 181 (1939).
\(^{18}\) See THE BOOK OF STATES, Interstate Compacts, pp. 2-24 (1952-1953).
\(^{19}\) See Note on Regional Education, A New Use of Interstate Compact, 34 Va. L. Rev. 64 (1948); Southeastern Regional Educational Compact of 1949 as to this kind of cooperation.
B. Construction

(1) Art. I, Sec. 10, Cl. 3; U. S. Constitution does not prohibit all agreements between states.

The provision of the United States Constitution relating to interstate compacts or agreements is, in its terms, broad enough to prohibit every interstate compact or agreement made without the consent of Congress. Article I, Section 10, Clause 3 of the United States Constitution as we have noted hereinbefore, provides:

"No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . ."

The words "agreement" and "compact" are not defined in the Constitution. Both words were in use before the adoption of our Constitution in 1789 but the precise meaning was not too clear. On occasion, the words "agreement" and "compact" were used as synonyms but at other times one word was given a different shade of meaning from the other. However, it would seem that under the ordinary rules of constitutional construction, the above provision is to be confined to those objects and purposes for which the provision was framed. As so construed, Article I, Section 10, Clause 3 of the Constitution does not apply to every possible agreement or compact between the states, but only to such as might tend to alter the political powers of the states affected, and thus encroach upon or interfere with the supremacy of the United States.20

(2) Some interstate agreements may be effected without Congressional consent.

Agreements between states which are incapable of altering the political power of the states affected may be made by the states without the consent of Congress. As was pointed out in State v. Joslin21 "some contracts or business arrangements between states may be effected without congressional assent." For example, the administrative agreement does not require Congressional consent because it is not a compact. The administrative agreement is usually an informal (though sometimes formal) arrangement between the administrative officers or departments of several states, or between one or more states and the United States. In the past such administrative agreements have been used by states to provide uniform practices relating to the use of and regulations relating to highways, and in the field of education, and the regulation of the business of insurance. Other interstate agreements which do not require Congressional consent include arrangements which are approved by the state legislatures.

21 116 Kan. 615, 227 Pac. 543 (1924). See also cases cited in footnote 20, supra.
(3) States may enter into any kind of compact under the U. S. Constitution but cannot thereby surrender sovereign rights of the people.

Except as limited by the Constitution, the several states may enter into any compact, agreement or other arrangement as they choose, provided, the states cannot limit or surrender by such compact or agreement, the sovereign rights of the people. Such compacts, entered into with the consent of Congress, relating to various fields of inter-state cooperation, have been upheld as against numerous constitutional objections, both Federal and state.\(^22\)

In *City of New York v. Willcox*,\(^23\) it was held that the Port of New York Authority,\(^24\) providing for a joint commission of New Jersey and New York authorities for management of the port of New York, etc., is not invalid as creating an unauthorized quasi-political subdivision of the United States, in violation of the United States Constitution.

In the recent case of *State ex rel Dyer v. Sims*,\(^25\) the court, speaking through Mr. Justice Frankfurter, in sustaining the Compact in question, held that the West Virginia Act ratifying into law the Ohio River Valley Sanitation Compact\(^26\) entered into by eight states to control pollution in the Ohio River system is not invalid, either (1) on the ground that the compact delegates police power of West Virginia to other states or to the Federal Government, or (2) on the ground that the compact binds future legislatures to make appropriations for continued activities of the Sanitation Commission and thus violates the West Virginia Constitution limiting purposes for which the state may contract debt.

In *State v. Joslin*\(^27\) it was held that an agreement between the states of Kansas and Missouri ratified by Congress, whereby such states mutually agreed that the water plants located in Kansas City, Kansas, and Kansas City, Missouri, located within their respective territories, should be exempt from taxation, is valid notwithstanding objection on the ground that the subject is not one concerning which the states may enter into an agreement with each other with the consent of Congress.


\(^23\) 115 Misc. 351, 89 N.Y.S. 724 (1921).

\(^24\) New York Laws 1921, c. 154.

\(^25\) 341 U.S. 22 (1951).

\(^26\) 54 Stat. 752 (1940); 33 U.S.C.A. § 567a (1950).

\(^27\) 116 Kan. 615, 227 Pac. 543 (1924); See also, State v. Cunningham 102 Miss. 237, 59 So. 76 (1912).
However, there are limits upon the right of a state to contract with another, even with the consent of Congress.\(^{28}\)

(4) An interstate compact may not be amended, modified, altered or changed in any way, without the consent of all the parties to the agreement.

As in the case of ordinary private agreements, an interstate compact between two or more states or between a state and a foreign power, cannot be amended, modified, altered or changed in any way without the consent of all the parties to the compact. Neither may the terms of the compact be renounced by one of the parties thereto in a unilateral action, in the absence of a provision in the compact for renunciation of the compact by one of the parties thereto. A recent decision of the United States Supreme Court touching on these questions is found in the case of *West Virginia ex rel Dyer v. Sims, State Auditor.*\(^{29}\)

(5) State's assent to interstate compact does not require technical terms.

An Act of each of the legislatures of the states parties to an interstate agreement is needed to create a valid agreement between the states. In making such a contract, no technical terms need be used. It is sufficient to employ terms which would be sufficient ordinarily to give rise to a contract between the state and an individual. The Courts will construe the compact or agreement, as in the case of ordinary private contracts, so as to carry out the intention of the contracting states,\(^{30}\) with due regard to the fact that sovereign states are parties to the agreement.

(6) The Consent of Congress to an interstate compact may be informal and may be given after as well as before the making of the agreement.

Before a compact can attain full legal stature, it must have received Congressional approval. This fact permits Congress to distinguish between a compact and a treaty. Ordinarily, a court would construe as a compact a proposal which had received Congressional approval. It is possible that under unusual circumstances, a court might construe a proposal as a treaty. However, to date this has never occurred.

The consent of Congress, which may be either general or specific, is sometimes given by resolution, and on other occasions by formal


\(^{29}\) 341 U.S. 22 (1951); also see Chesapeake etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. 1 (Md. 1832).

enactments. In either event, such approval is subject to Presidential veto, since under Article I, Section 7, Clause 3 of the Constitution, "every order, resolution or vote to which the concurrence of the Senate and the House of Representativest may be necessary" is limited by the veto power. It is significant that no compact has ever been vetoed. Congressional consent may be absolute, or it may be limited in some manner.

The consent of Congress to an agreement between states may be given either before or after the making of an interstate compact. Such assent of Congress need not be formal or technical in character or language, but it is sufficient if Congress has expressed its assent to an interstate compact by some positive act in relation to the agreement or by the adoption or approval of the proceedings taken under any such agreement or by sanction of the objects of the compact.

In the leading case of *Chesapeake Canal Co. v. Baltimore etc. R. Co.* it was said: "There is no particular form in which the assent of Congress is required to be given, and it is not material in which form it is given, provided it is done."

In *Virginia v. Tennessee* the court said: "The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied."

In *State ex rel Baird v. Joslin*, in upholding an agreement between two states, the Kansas Court stated:

"The consent of Congress was given by ratification after the two states had acted, but that is not a good ground of objection. The Constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law and of right reason. The only question in cases which involve that point is: Has Congress by some positive act in relation to such agreement, signified the consent of that body to its validity' (Green v. Biddle, 21 U.S. 1, 85)"

The Kansas Supreme Court further pointed out that—

"The Federal Constitution (Art. I, Sec. 10, Par. 3) by forbidding states to enter into any agreement or compact with each other without the consent of Congress, recognizes their power to do so with that consent. (Poole v. Fleeger, 36 U.S. 185, 209). Moreover, some contracts or business arrangements between states may be effected without Congressional

32 4 Gill & J. 1, 136 (Md. 1832).
33 148 U.S. 503, 521 (1893).
34 116 Kan. 615, 227 Pac. 543 (1924).
consent. (Virginia v. Tennessee, 148 U.S. 503, 518). 'The terms, "compacts" and "agreements", as used in this section, cover all stipulations affecting the conduct or claims of states, whether verbal or written, formal or informal, positive or implied, with each other'. (Annotated Constitution, published by authority of the U.S. Senate, p. 365) not forbidden by the Constitution, for even with the consent of Congress, the states may not disobey its injunctions—may not, for instance, do any of the things prohibited by the first paragraph of the section cited (In re Rahrer, 140 U.S. 545, 560), such as entering into a treaty, alliance or confederation. It has been said that the clause 'compacts and agreements' as distinguished from 'treaty, alliance or confederation' may 'very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other.' (Quoted from Story's Commentaries on the Constitution (Sec. 1403) in Virginia v. Tennessee, 148 U.S. 503, 519)"

Where consent is given in advance by Congress it is often provided that such consent is given subject to the submission of completed compacts for approval by Congress. Consent will be valid even though given after the passage of a number of years. In fact, before 1921, virtually every compact was fully negotiated and formulated before Congressional consent was sought or obtained. A new technique appearing in recent years is a Blanket Consent Act enacted by Congress, sometimes even before any negotiations have been entered into between the states.

Whether silence could be construed to operate as consent is still a moot question. One writer argues that:35

"The consent of Congress may assume the form of any action signifying acquiescence in the terms of the compact. Its silence, however, may not properly be construed as assent."

Some authorities have, however, indicated a contrary view.

A more complicated question, and one upon which authorities are divided, is whether or not all agreements between the states are subject to the Compact Clause of the Constitution and hence require congressional consent to be effective, or whether some agreements are of such a nature as to avoid the Compact Clause requirement of congressional consent. The proponents of the view that congressional consent is not required for all valid agreements entered into between states rely for the most part upon statements found in the leading decision of Virginia v. Tennessee,36 and in cases which cite that deci-

35 35 Col. L. R. 76 (1936).
sion, such as *McHenry County et al. v. Brady et al.*\(^{37}\) Writers who take the opposite view and who insist that the validity of all compacts and agreements is dependent upon the assent of Congress, find support for this view in the case of *Holmes v. Jennison,*\(^{38}\) where Mr. Chief Justice Taney declared that all compacts and agreements between states or between a state and a foreign power to be valid must be consented to by Congress.

One writer, in support of this view, argues that:\(^{39}\)

"An 'agreement or compact' must be a transaction between states: neither mere similarity of conduct arising from common motives, nor acquiescences of one state in the acts of another will constitute an 'agreement' in the absence of an interstate promise or grant. While the compact clause applies in terms to all consensual transactions between states, the view has been advanced that agreements lacking political implications are valid even in the absence of Congressional consent. Judicial authority for this position consists, however, of the repetition of an erroneous dictum in *Virginia v. Tennessee,* and a group of cases in state courts which either involve no interstate transactions or are concerned with no state promise or grant. Adherence to the doctrine would require that the conventional distinction between compacts and prohibited treaties, based upon the presence or absence of political consequences, be abandoned. Whatever the practical advantages of upholding certain agreements in the absence of consent, the theory is inconsistent with the apparent purpose of the compact clause; the submission of every interstate agreement to Congressional scrutiny in order to determine whether the extent and nature of its political implications are such that it is objectionable as a 'treaty'."

The view expressed above finds support in the conclusions of a writer whose discussion on this subject is found in an issue of the *Yale Law Journal.*\(^{40}\)

As we have indicated hereinbefore some interstate agreements may be effected without Congressional consent, nevertheless a word of caution is warranted. Because almost any compact of importance is bound to affect the power balance between the states and the Federal Government and hence could be considered political in nature, the states contemplating the making of a compact would be wise to include a provision for Congressional consent. A compact on the subject of the regulation of the levels of the Great Lakes and diversions therefrom, or on the subject of the St. Lawrence Seaway and Power Project, would certainly require Congressional consent.

\(^{37}\) 37 N.D. 59, 163 N.W. 540 (1917).

\(^{38}\) 14 Pet. 540 (U.S. 1840).

\(^{39}\) 35 Col. L. Rev. 76 (1936).

\(^{40}\) 31 Yale L. J. 635 (1922).
III. Distinction Between Compacts and Treaties

The definition of a "treaty" under the United States Constitution is still a relatively unsettled matter of law. In distinguishing a treaty from a compact, under the Constitution, the problem seems political rather than legal. Inasmuch as a compact requires the consent of Congress before it can become effective, the decision is said to be left to Congress to determine in each instance whether the proposal is a treaty or a compact by withholding or granting its consent. Generally the United States Supreme Court has upheld each compact, assented to by Congress, which has come before the high court for review.

As Mr. Justice Brandeis, in considering the nature of a compact, well said in the case of Hinderlider v. LaPlata River & Cherry Creek Ditch:41

"The compact—the legislative means—adapts to our Union of Sovereign States, the age-old treaty-making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in State of Rhode Island v. (Commonwealth of) Massachusetts, 12 Pet. 657, 723-725, 9 L.Ed. 1233."

One writer, in considering the distinction between a treaty and a compact, makes the following observation:42

"The distinction which the framers of the Constitution intended to draw between agreements unconditionally prohibited and those permitted with the consent of Congress is not apparent from the language of the Constitution itself. Nor is aid to be derived from literature contemporary with the Constitutional Convention. There was little or no discussion of these two clauses while the Constitution was in making, and the question has never been judicially determined. Story maintained that the terms 'treaty, alliance, and confederation' applied to treaties of a political character, such as 'treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction or external political dependence, or general commercial privileges'. The terms 'agreement' and 'compact' referred, in his opinion, to 'private rights of sovereignty; such as questions of boundary; interests in land situated in the territory of each other; and other

41 304 U.S. 92, 104 (1938).
42 31 Yale L. J. 635 (1922).
internal regulations for the mutual comfort and convenience of states bordering on each other.'"

Another author notes the reasons behind the distinction made between treaties and compacts in Article I, Section 10 of the United States Constitution, as follows.43

"A distinction may be drawn between the requirements of subdivision 3 of Section 10 and the prohibition contained in subdivision 1 of the same section. . . . In order to establish the sovereignty of the Union for purposes of international relations, it was essential that the states should not enter into any alliance or confederation and that treaties should be entered into only by the Federal Government. A treaty between states would in itself be destructive of national sovereignty. A compact or agreement, however, would not necessarily be destructive of national sovereignty although it might involve issues affecting the entire nation. So it is that, while Congress cannot authorize the state to enter into any treaty, alliance or confederation, agreements between the states may be made, and to protect the national interests it is provided that the consent of Congress must be obtained."

The words "compact and agreement" in Article I, Section 10, Clause 3 of the United States Constitution, it is generally agreed, are used synonymously. In Virginia v. Tennessee44 the Court, through Mr. Justice Field, said:

"Compacts or agreements—and we do not perceive any difference in the meaning except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct of the claims of the parties."

Regardless of the manner in which interstate compacts or agreements are negotiated, entered into and signed on behalf of the signatory states, it is clear that a true compact is not a treaty. If the agreement between the states is a treaty in fact, it could not then be a compact and hence would not be permissible under Article I, Section 10, Clause 1, of the Constitution. A compact, since it does not effect the political balance between the states and the Federal Government, is in essence nothing more than a glorified contract between two or more states or between a state and a foreign power. Accordingly, a compact should be and is generally interpreted in accordance with the rules pertaining to private contracts or agreements. The fact is, however, because of the high character of the parties to the compact (be-

43 Donovan, State Compact As a Method of Settling Problems Common to Several States, 80 U. of Penn. L. Rev. 5 (1931).
44 148 U.S. 503, 520 (1894).
ing quasi-sovereign states), the thinking of the courts in considering compacts is influenced to some extent. This is always the case when states are party litigants in the courts. Thus, the courts will generally follow the interpretation placed upon the particular agreement by the action of Congress in giving its consent to a compact. If the Congress labels the agreement as a compact and hence non-political in character, the courts will generally accept this interpretation as final.

IV. VALIDITY OF COMPACTS WITH A FOREIGN POWER

In most cases to date, the signatory powers to interstate compacts are quasi-sovereign states of the Union. This is the usual situation as an examination of the interstate compacts entered into to date will disclose. However, under the Constitution, there is nothing to prevent a foreign power, such as Canada, from also participating as a signatory party under a compact. In a case where the foreign power has a significant interest in the subject matter of the agreement, it would be not only desirable but necessary for the foreign power to be a party thereto. This would be true in a matter involving international waters, such as a compact between the adjoining Great Lakes states involving the regulation of the levels of such lakes and their connecting waters. Canada would most certainly be interested because its port cities and commerce would be directly affected by any man made regulation of the levels of the Great Lakes. The same would be true in the matter of the St. Lawrence Seaway and Power Project which project would involve in part international waters.

Some individuals have raised the question whether a compact between one or more states and a foreign power would be constitutional. A reading of Article I, Section 10, Clause 3, of the Constitution would seem to dispel any such doubt. This Section states:

"No state shall, without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power."

The above section clearly authorizes a compact with a foreign power. Logic likewise would dictate the view that under the Constitution a compact between one or more states and a foreign power is permissible and is on the same level as an ordinary compact between two states. One writer, who also takes this view, points out that:

"The constitution makes no distinction between interstate agreements and agreements between the states and foreign governments, and hence any agreement or compact, not a treaty, alliance or confederation, would be valid, provided it is approved by congress."

45 31 Yale L. J. 635 (1922).
The present trend toward the use of the compact to obtain cooperation between states and a foreign power is shown by the recent developments in the St. Lawrence Seaway and Power Project.

Former Senator Moody of Michigan, late in the 1952 session of Congress, introduced a bill in the United States Senate, which if enacted into law, would have authorized the states bordering on the Great Lakes by interstate compact to construct jointly with Canada a deep-water channel connecting the Great Lakes and the Atlantic Ocean via the St. Lawrence River. There can be no question but that Senator Moody had a legal opinion to the effect that a compact with Canada would be authorized under the Compact Clause of the Constitution. On January 3, 1953, Representative Dingell of Michigan introduced a joint resolution "To authorize a compact or agreement between the States of Maine, New Hampshire, Vermont, New York, Pennsylvania, Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota, and certain other States, and the Dominion of Canada, with respect to the St. Lawrence seaway."

While there is no United States Supreme Court decision directly sustaining a compact with a foreign power, since this point has never been directly involved in litigation, there are several decisions of the courts which suggest that in a proper case a compact with a foreign power would be sustained. In the case of Holmes v. Jennison, which involved the legality of the proposed extradition of a fugitive from Vermont to Canada, the United States Supreme Court did suggest that a compact with Canada on this subject might be legal. Mr. Chief Justice Taney, in referring to the possible use of a compact, said:

"If such an arrangement is deemed desirable, the foresight of the framers of the constitution has provided the way for doing it, without interfering with the powers of foreign intercourse committed to the general government or endangering the peace of the Union. Under the . . . Constitution, any state with the consent of Congress, may enter into such an agreement with the Canadian authorities. The agreement would in that event be made under the supervision of the United States. . . ."

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46 Senator Wiley of Wisconsin and Representative Dondero of Michigan introduced in the Senate and the House of Representatives similar bills to provide for United States participation with Canada in the St. Lawrence seaway and power project. These bills were introduced in January 1953. On January 23, 1953, the Great Lakes Harbors Association, after vote of its officers and members of the executive committee, endorsed the St. Lawrence project and specifically the principle of the Wiley and Dondero bills. The association is made up of representatives of municipalities, with the exception of Chicago, bordering on the Great Lakes. See Chicago Daily Tribune, Saturday, January 24, 1953.

47 14 Pet. 538 (U.S. 1840).

48 14 Pet. 538, 578 (U.S. 1840).
In another interesting decision, the North Dakota Supreme Court sustained the action of a North Dakota Board of Drainage Commissioners which had built a drain extending fourteen miles into Canada even though a portion of the drain was vested in a Canadian municipality and no Congressional consent had been sought or obtained. The court ruled that the agreement in question was not a prohibited treaty but was a valid compact even though it lacked Congressional approval, since the compact was one which involved no national interest and hence did not need the consent of Congress.

It is clear that if the question concerning the legality of a compact with a foreign power ever is raised in the courts the ruling will be that such a compact is permissible under the Constitution.

V. Procedure in Negotiating an Interstate Compact

A. In General

The first step in the formulation of any interstate compact is to secure the active interest of the various states involved in controversy or who seek cooperation. After the states concerned become actively interested, each will normally appoint compact commissioners. Ordinarily this will be done pursuant to legislative direction, but this may be carried out by executive act alone. Another plan could have the legislature create a commission to study first the feasibility and desirability of entering into a specific compact. If commissioners are appointed, they will meet with the commissioners of the other states for the purpose of negotiating the proposed compact. The personnel for these commissions, or the chief adviser for such commissions, are most profitably drawn from those who are experts in the field.

After the joint compact commissioners have negotiated the compact, the next step normally is ratification of such agreement by each of the state legislatures concerned. However, it is also possible for the legislatures to have previously provided that the signing by the commissioners shall bind the state. The latter procedure speeds up the final adoption of the compact. The signatory states may consummate a compact by any legislative act manifesting an intent to enter into the transaction and no specific wording or phraseology is required in the enabling act.

A compact may provide that it shall take effect upon a certain date, upon ratification by a stipulated number of states, upon ratification by all of the states, or in some similar manner depending upon the nature and substance of the compact. Ratification by the legislature, whether by statute, joint resolution, statutory offer by one state to another, or parallel legislation incorporating an agreement previously drafted by

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49 McHenry County v. Brady, 37 N.D. 59, 163 N.W. 540 (1917).
the representatives party to the compact, is a legislative act and hence subject to veto by the governor. The compact may include a provision that the agreement may be terminated by mutual consent of the participating states.

B. Reciprocal Legislation

An alternative method of entering into a compact is through reciprocal legislation. One prominent writer on the subject of interstate compacts has the following to say concerning the reciprocal legislation method of entering into compacts:50

"The making of a compact by the method of reciprocal legislation consists of the enactment of a statute which is in effect an offer by one state, and an acceptance evidenced by enactment of the same statute by one or more other states. The typical statute usually provides for exchange of formal ratification by the enacting states. To make it a valid compact within the meaning of the Constitution, there must, of course, be consent on the part of Congress."

In a note by J. P. Chamberlain,51 the author reaches the conclusion that legislation through compact arrived at by negotiation rather than by reciprocal legislation is apt to be more satisfactory where the issues are important or complex. This conclusion is obviously correct. The use of reciprocal legislation should be limited to an interstate compact between a few states and on matters that do not involve important or complex problems.

Since reciprocal legislation as a method for entering into a compact is of limited value and not ordinarily used, this method must be distinguished from the more usual uses of such legislation.

VI. ENFORCEMENT OF COMPACTS

It is well settled that an interstate compact is binding upon all of the signatory states and that one signatory state may not renounce its obligations thereunder by unilateral action. Once a compact has been entered into, has received Congressional assent, such a compact has a legal existence and is binding upon all the parties. The signatory states have a right to expect that each and every member thereto will carry out in good faith all of the duties and obligations imposed thereunder. If the compact provides, as many compacts now do, for some method whereby one member state may terminate its participation in the agreement then such method must be strictly followed. In the absence of such provision for renunciation, the agreement remains binding on all signatory states. However, some persons argue that while theoretically a state may not repudiate an existing agreement.

50 Dodd, Interstate Compacts, 70 U.S. L. Rev. 557 (1936).
51 9 A. B. A. J. 207 (1923).
as a practical matter, there is little than can be done if a state renounces a compact.\textsuperscript{52}

The writer does not subscribe to this view. A compact is binding upon all signatory states and if one state renounces the agreement, in the absence of provisions for renunciation, the remaining states may bring suit in the United States Supreme Court to enforce the compact.\textsuperscript{53} While the Compact Clause of the Constitution does not have any provisions for enforcement of compacts, other sections of the Constitution confer upon the United States Supreme Court original jurisdiction to enter... its be... states of the Union.\textsuperscript{54} When the Supreme Court enters a decree in an action between states the Court has the power to enforce its mandate. Thus, the Court could compel a recalcitrant state to fulfill its obligations under a compact. While there is no direct decision on this point, the Supreme Court has indicated that it has the means to enforce its mandate if this should be required.\textsuperscript{55}

Actions between states have been fairly numerous. Nevertheless,}

\textsuperscript{52} In Clark, Interstate Compacts and Social Legislation, 51 Pol. Sci. Q. 36 (1936), the writer suggests that, "In the absence of provisions for renunciation, theory has it that a state may not repudiate an existing compact any more than it may enact legislation controverting its terms. But, as a matter of practical fact, states have on occasion resorted to the last extremity of absolute repudiation and... there is little that can be done about it." The writer of the foregoing article also suggests that if a state decides that a compact violates the state constitution that this in effect abrogates the compact without the consent of the other state. Cf. West Virginia ex rel Dyer v. Sims, State Auditor, 341 U.S. 22 (1951).

\textsuperscript{53} Virginia v. West Virginia, 246 U.S. 565 (1918); Virginia v. Tennessee, 148 U.S. 163 (1918); West Virginia ex rel Dyer v. Sims, State Auditor, 341 U.S. 22 (1951); Kentucky v. Indiana, 281 U.S. 163 (1930); Delaware River Joint Toll Bridge Comm. v. Colburn, 310 U.S. 419 (1940).

\textsuperscript{54} U. S. Const. Art. III, §2, provides in part:

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ... Controversies between two or more States:—between a State and citizens of another State;...

In all cases... in which a State shall be a party, the Supreme Court shall have original jurisdiction, both as to Law and Fact, with such exceptions, and under such regulations as the Congress shall make."


\textsuperscript{55} Virginia v. West Virginia, 246 U.S. 565 (1918); Virginia v. Tennessee, 148 U.S. 503 (1893).

In Wisconsin et al v. Illinois, et al., 281 U.S. 179, 197 (1933), the United States Supreme Court, in an opinion written by Mr. Justice Holmes showed its determination to enforce its mandates and decrees by the court's answer to the argument of the State of Illinois, that the Illinois constitution stood in the way of carrying out the court's order with respect to obtaining sufficient money through taxation for constructing the sewage disposal plants for the Chicago Sanitary District required under the Court's orders. The court pointed out it was already decided "... the defendants are doing a wrong to the complainant, and that they must stop it. They must find a way out of their peril. We have only to consider what is possible if the state of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not
such actions have always been touchy matters. Ordinarily, suits between states are filed only after all negotiations have failed in an attempt to resolve the differences between the states. States have frequently resorted to suits in the United States Supreme Court to vindicate their rights and to compel performance of obligations under agreements with other states. In *Virginia v. West Virginia*, the Supreme Court reaffirmed its power to enforce its mandate in a suit brought by one state against another. In the case of *Kentucky v. Indiana*, the Supreme Court was not obliged to rule on the question of compelling enforcement of the obligations assumed by one state under an interstate compact. Since it was not absolutely necessary so to do, the Court joined the states involved in assuming that the state of Indiana would perform its obligations under the compact. In this case, as in every other case, the states have adhered to the Court's ruling. Should the occasion require it is clear that the Supreme Court will coerce a recalcitrant state to perform its obligations under a compact.

**VII. History and Present Status of Chicago Water Diversion Controversy**

A brief review of the history and present status of the fight over diversion of waters from Lake Michigan at Chicago is necessary to understand fully the reasons why the writer believes that the compact method could solve this problem.

The so-called Chicago diversion controversy arose out of the circumstances that between the years 1892 and 1900, the City of Chicago and its suburbs carried out a plan of disposing of the sewage of the Chicago metropolitan area by cutting a canal across the low continental divide which lies about ten miles west of Lake Michigan, and discharging the sewage of that area into the Mississippi watershed by way of the Des Plaines and Illinois Rivers. However, the inception of the Chicago Drainage Canal plan of sewage disposal and protection of water supply really dates back to early Chicago.

Congress in 1822 authorized the State of Illinois to survey and mark through the public lands of the United States, a route for a canal connecting the Illinois River with Lake Michigan, and setting aside ninety feet of land on either side of the proposed canal in aid of such scheme. A further grant of land was made in the year 1827. In 1836 yet to have fully awakened. *It can base no defenses upon difficulties that it has itself created. If its constitution stands in the way of prompt action, it must amend it or yield to an authority that is paramount to the state.* (Emphasis ours)

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56 246 U.S. 565 (1918).
57 281 U.S. 163 (1930).
58 For a detailed discussion of the history, legal problems and present status of the Chicago water diversion problem, see 30 Marq. L. Rev. 149, 228 (1946-7); and 31 Marq. L. Rev. 28 (1947).
the State of Illinois enacted legislation providing for the construction of the canal, which was to be known as the Illinois & Michigan Canal. It was finally completed in 1848, a part of it substantially on the route of the present Chicago Drainage Canal. The Illinois & Michigan Canal crossed the continental divide between the Chicago and Des Plaines Rivers at a level of eight feet above the lake, and then continued on to LaSalle, Illinois, where it entered the Illinois River. It had been planned to provide a depth for this canal sufficient to take waters from Lake Michigan by gravity, but this was not accomplished, and it became necessary to supply the summit of the canal with waters from the Chicago River by means of pumps and dams.

At first only a small amount of water was pumped into the canal, but this proved insufficient for needs of navigation and sanitation, and the water was not carried into the Mississippi watershed but continued to discharge into the Chicago River. Lake Michigan was the sole source of water supply for the City of Chicago, and the sewage deposited in the river, in times of flood, washed into the lake and contaminated the city's water supply. By the year 1865 the Chicago River had become so offensive from receiving the sewage of the rapidly growing city that the authorities agreed to pump more water into the canal from the Chicago River. By 1871 the canal was enlarged, and in 1872 the summit level was lowered with the hope that this would result in a permanent flow of water from Lake Michigan through the south branch of the Chicago River in an amount sufficient to keep that stream clear and unpolluted. This did not work, and the canal again became badly contaminated. The continuance of this nuisance along the canal resulted in arousing public interest for a better system of sewage disposal and a better water supply.

The result was that many investigations were undertaken and numerous reports filed. In 1887 the Drainage and Water Supply Commission was organized which recommended that the most economical method of sewage disposal was by the discharge of the sewage into the Des Plaines River through a canal across the continental divide. In 1889 the Illinois Legislature authorized the creation of the Sanitary District, and pursuant to such authority the Sanitary District of Chicago was organized. Between the years 1892 and January 17, 1900, the Chicago Drainage Canal was constructed. Under the legislative act, a continuous flow of 20,000 cubic feet of water per second for each 100,000 of population within the Sanitary District was made mandatory. Since the opening of the Chicago Drainage Canal in 1900, the flow of the Chicago River has been reversed, and it now flows away from Lake Michigan, carrying with it waters from Lake Michigan into the Des Plaines and Illinois Rivers.
The opening of the canal in 1900 resulted in a suit by the State of Missouri against the State of Illinois to enjoin the threatened pollution of the waters of the Mississippi River. An injunction was denied by the United States Supreme Court because it was not satisfied that the claims of the State of Missouri that the pollution of the waters of the Mississippi at St. Louis was caused by the introduction of untreated sewage into the Chicago Drainage Canal. The court pointed out that untreated sewage was also placed into the Mississippi River above St. Louis by Missouri cities.

Meanwhile the Great Lakes states and the port cities became alarmed over the abstraction of the waters of the Great Lakes through the Chicago Drainage Canal. They contended that it resulted in a lowering of the levels of the Great Lakes of from 6 to 8 inches for each 10,000 cubic feet per second of diversion. The Federal Government likewise became disturbed because the Sanitary District of Chicago was violating the permit issued by the Secretary of War allowing a diversion of 4,167 cubic feet per second. In 1908 the Federal Government filed a suit in the Federal District Court at Chicago to enjoin the Sanitary District from increasing the flow of waters from Lake Michigan through the Chicago Drainage Canal over and above the amount of 4,167 cubic feet per second authorized by the permit of the Secretary of War. In 1913 the Federal Government filed another suit against the Sanitary District of Chicago to enjoin the diversion of more than 4,167 cubic feet per second from Lake Michigan. These two suits were consolidated and heard as one by the Federal Court, and in 1920 an oral opinion was given in favor of the United States and against the Sanitary District of Chicago. No decree, however, was entered and further arguments were heard and in 1923 the court directed judgment for the relief demanded by the United States. In January 1925 the United States Supreme Court affirmed the decree of the lower court "without prejudice to any permit that may be issued by the Secretary of War according to law." 60

In 1925 the Secretary of War granted a permit authorizing a diversion of waters from Lake Michigan by the Sanitary District of Chicago not to exceed 8,500 cubic feet per second upon certain conditions. This was a temporary permit only and was to expire on December 31, 1929 if not previously revoked.

In 1922 the State of Wisconsin brought an original action in the United States Supreme Court against the Sanitary District of Chicago and the State of Illinois seeking an injunction against the abstraction of the waters of the Great Lakes through the Chicago Drainage Canal.

59 180 U.S. 208, 241 (1901).
60 Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925).
In 1925 and 1926 amended bills were filed and the States of Minnesota, Ohio, Michigan, New York and Pennsylvania joined the State of Wisconsin. The Great Lakes states contended the permit issued by the Secretary of War was ultra vires and void and constituted no authority for the abstraction of the waters of the Great Lakes through the Chicago Drainage Canal. Charles Evans Hughes was appointed Special Master, and after full hearings his report was filed in November 1927, in which he made the finding that a lowering of the levels of the Great Lakes approximately six inches was caused by the abstraction of 8,500 cubic feet per second of water from Lake Michigan through the Chicago Drainage Canal and that this resulted in substantial injuries and damages to navigation and commercial interests of the complaining Great Lakes states, which damages were accentuated in times of low lake levels resulting from natural causes.61 (The difference between extreme high levels and extreme lows is in excess of six feet, and these extremes occur at approximately 23 year intervals, with lesser intermediate fluctuations).

The United States Supreme Court in January 1929 sustained the findings of the Special Master and held that as a matter of law the permit of the Secretary of War was null and void, and that the Great Lakes states were entitled to a decree which would be “effective in bringing that violation (of the rights of the Great Lakes states) and the unwarranted part of the diversion to an end.”62 The court, however, decided to allow additional time to the Sanitary District and the State of Illinois in which to construct the needed sewage disposal plants and facilities for the disposition of the sewage of the Sanitary District. The matter was again referred to Charles Evans Hughes as Special Master, and he filed his report in December 1929 in which he recommended that the Sanitary District and the State of Illinois be given until December 31, 1938 to reduce the diversion to 1,500 cubic feet per second plus domestic pumpage. The Supreme Court affirmed these findings and entered a decree on April 21, 1930.63

In October 1932, the States of Wisconsin, Minnesota, Ohio and Michigan applied to the United States Supreme Court for the appointment of a special officer to execute the decree of April 21, 1930. The four states complained of the delay in the construction and completion of the works and facilities embraced in the program of the Sanitary District of Chicago for the disposal of the sewage of that area. The court enlarged the decree to provide that the State of Illinois be required to take all necessary steps to cause and secure the comple-

tion of adequate sewage disposal plants and sewers to the end that the
diversion of waters of Lake Michigan be reduced at the times fixed in
the decree.\textsuperscript{64}

In 1937, Congressman Parsons of Illinois introduced a bill to au-
thorize an increase in the diversion of waters from Lake Michigan
through the Chicago Drainage Canal to 5,000 cubic feet per second
plus domestic pumpage. This bill was vigorously opposed by the Great
Lakes states, certain port cities, and groups residing along the lower
Illinois River. This bill never enacted into law.

In 1940 the State of Illinois applied for a modification of the
decree entered by the Supreme Court on April 21, 1930 so as to per-
mit a temporary increase in diversion to 5,000 cubic feet per second
plus domestic pumpage.\textsuperscript{65} A Special Master was appointed to inquire
whether the partially treated or untreated sewage deposited in the
Illinois Waterway (formerly known as the Chicago Drainage Canal)
constituted a menace to the health of the inhabitants of certain com-
munities located on the Waterway and on the Des Plaines and Illinois
Rivers. After extensive hearings the Special Master reported that
no menace to health existed. The United States Supreme Court
affirmed this finding.\textsuperscript{66}

Thereafter bills were introduced in each session of Congress which,
if enacted into law, would purport to grant authority to increase the
diversion of water from Lake Michigan over and above the amount
fixed by the decree of April 21, 1930. No such bill was ever enacted
into law. In addition to these legislative attempts, the Sanitary Dis-
trict of Chicago and the State of Illinois, and groups residing in the
Chicago area have sought to obtain increased diversion of water from
Lake Michigan by applications made to the President of the United
States, to the War Department, to the Federal Power Commission,
and to the War Production Board. All of these petitions and applica-
tions were vigorously opposed by the Great Lakes states, the port
cities, the Great Lakes Harbors Association and by groups residing
along the lower Illinois River.\textsuperscript{67}

In 1952 bills were introduced to permit the abstraction of large
quantities of water from the Great Lakes through the Chicago Drain-
age Canal on the theory that this would result in lowered lake levels
and thus mitigate damages being caused to shore property by the then
current high lake levels. No such bill was adopted by the 1952 Con-

\textsuperscript{64} Wis. et al v. Illinois et al., 289 U.S. 398, 710 (1933).
\textsuperscript{65} Wis. et al v. Illinois et al., 309 U.S. 569 (1940).
\textsuperscript{66} Wis. et al v. Illinois et al., 313 U.S. 547 (1941).
\textsuperscript{67} See Printed Hearings before the Committee on Public Works, H.R., 82d Con-
gress, 2d session, May 27-28, June 4-5, 1952, No. 82-18. Illinois Waterway—
Diversion of Water from Lake Michigan.
gress. The fight for increased diversion continues with the introduction of similar bills in the 1953 session of Congress. The proponents of a large diversion of waters from Lake Michigan through the Chicago Drainage Canal have constantly and regularly applied pressure in Washington to obtain some color of authority to increase the diversion of water from Lake Michigan at Chicago.

VIII. HISTORY AND PRESENT STATUS OF THE ST. LAWRENCE SEAWAY AND POWER PROJECT

In the controversy regarding the construction of the St. Lawrence Seaway and Power Project, we find that as early as the year 1895 the governments of the United States and Canada appointed a Deep Waterways Commission to investigate the feasibility of a deep water route connecting the Atlantic Ocean with the Great Lakes via the St. Lawrence River. In 1897 this commission reported that the St. Lawrence River route was feasible and recommended that further detailed surveys be made.⁶⁸

In 1902 Congress requested the President to invite Great Britain to join in the formation of an international waterway commission to be composed of three members each from Canada and the United States. This commission was established as the International Joint Waterways Commission in December 1903. Its principal contribution was to pave the way for the so-called Boundary Waters Treaty of 1909. Under the Boundary Waters Treaty of 1909 an International Joint Commission was established to review proposals for the construction of obstructions in and diversions of boundary waters, giving preference to uses of such waters for: domestic and sanitary purposes; for navigation and servicing of canals; and for power and irrigating purposes.

In 1914 the United States government addressed a note to the British Ambassador inquiring as to the views of the Canadian government with regard to the advisability and feasibility of a joint undertaking for the construction of a deep waterway via the St. Lawrence River for ocean-going vessels. No further action was taken due to the beginning of World War I.

Meanwhile, the opening of the Panama Canal on August 14, 1914 seriously weakened the competitive position of the Middle West and brought the East and West Coasts closer together. This led to demands for early construction of the St. Lawrence Seaway to give products from the Great Lakes area lower freight costs to the markets of the world. The increased demand for electric power in Canada and in

⁶⁸See The Great Lakes Outlook, April 1952—The St. Lawrence Seaway—Political Aspects, by Naujoks, H.H.
the Northeastern part of the United States sparked a movement to utilize the tremendous potential electric power on the St. Lawrence River. The increase in foreign trade also influenced the Seaway movement. All of these developments created a widespread demand for the improvement of the St. Lawrence River to permit ocean-going vessels to enter the Great Lakes ports.

As a result of these demands for the construction of the Seaway, many organizations and commissions were created to assist in promoting the Great Lakes-St. Lawrence Seaway. The Great Lakes-St. Lawrence Tidewater Association; the Great Lakes Harbors Association, many state deep waterway commissions were all formed after World War I. Comprehensive surveys of the St. Lawrence Seaway project were undertaken and by the year 1932 there were 21 states associated with the Great Lakes-St. Lawrence Tidewater Association. On the Canadian side, interest in the St. Lawrence Seaway movement was also active and aggressive. The Canadian Deep Waterways and Power Association was formed and held many meetings. Many studies were undertaken and in January 1927 the United States Department of Commerce issued a report on the seaway, recommending a 27-foot channel. In 1928 the Canadian Advisory Committee made its report on the seaway. This report was the basis of a note from Canada to the United States January 31, 1928. Meetings on this subject were held throughout the United States and in Canada, and the question was fully debated. Negotiations were carried on in 1930 and 1931 until a treaty was signed July 18, 1932 between representatives of the United States and Canada.

This treaty provided for a 27-foot channel for navigation, and for the construction of power facilities on the St. Lawrence River. Hearings on the treaty were held in the United States Senate in 1932 and 1933. The principal support for the treaty came from states bordering on the Great Lakes and from states west of the Mississippi River. They argued that the cheaper transportation provided by the seaway would greatly aid the export trade of this area. They argued also that the seaway would greatly cheapen the cost of imports into this area of raw materials as well as consumer goods. It would restore, they said, without harming the railroads or existing facilities, the Middle West to a position of economic parity with the states benefitted by the Panama Canal. Many farm organizations supported the treaty.

The opposition to the treaty came principally from these sources: The North Atlantic port cities; the railroad interests; the coal interests and the lake carriers and the canal interests. Opponents of the treaty argued that the cost of transportation would be excessive; that there would be insufficient traffic upon the seaway to warrant any
large expenditure, and that there would be no appreciable reduction in transportation rates, but that harm would be done existing facilities. On the matter of costs it was argued that they were unreliable and should be revised. On the matter of traffic it was asserted that the coal and iron movements were principally between lake ports and that wheat was a declining export commodity. It was stated also that railroad labor would be displaced and that the American ports would suffer in favor of Montreal. It was argued, further, that there was no market for the potential power and that if such power were sold it would reduce consumption of coal by 40 million tons a year. Opposition also came from the ports of Buffalo and New Orleans, the New York Barge Canal, a number of private shippers and the eastern railroads.69

In March 1934 the United States Senate voted on the proposal to ratify the treaty and the vote was 46 ayes, 42 nays, 3 paired and 5 not voting. Since a two-thirds affirmative vote was needed, the treaty failed of ratification.

The failure to approve the treaty didn't end the matter. Negotiations carried on between the United States and Canada and many conferences were held to arouse new interest in the St. Lawrence Seaway and Power Project. In May 1938 the United States submitted to Canada a draft of a new treaty on this subject. In January 1940 meetings between representatives of the United States and Canada were held in Ottawa. In October 1940 negotiations were renewed, and on March 19, 1941 the Canadian-American Agreement to Develop the Great Lakes-St. Lawrence Basin was signed in Ottawa, Canada. This agreement provides for the construction of a shipway with 27-foot locks which would be sufficient to admit ninety per cent of ocean shipping from the Atlantic Ocean to the Great Lakes. It further provides for installation of power facilities on the St. Lawrence River for the development of hydro-electric power. In the 1941 session of Congress, resolutions were introduced to grant approval to the Canadian-American St. Lawrence Agreement of March 19, 1941. The resolution was never approved because of Pearl Harbor and the necessity of conserving materials for the war effort. In 1943, and again in 1944 and 1945 bills were introduced in the House and in the Senate to authorize the St. Lawrence Seaway, but they failed of passage. In the 80th and 81st Congresses, other bills were introduced on the St. Lawrence Seaway and Power Project, but none of these bills were ever approved. In June 1952, the Senate of the 82nd Congress

voted on the St. Lawrence Seaway and Power Project, and the proposed measure was defeated by a vote of 43 to 40.

At the present session of Congress (the 83d) the St. Lawrence Seaway and Power Project will again be brought up for consideration, and it would seem that another bitter fight will be made against authorization of this project, and a stalemate may again result, although the prospects for success seem brighter than ever before.

CONCLUSION

After more than a century of experience, the interstate compact has finally emerged as a very versatile and desirable instrument in the settlement of controversies between states, and as a means of securing cooperation among states. An examination of the compacts made during the past few decades discloses that a variety of important matters have been satisfactorily dealt with through the medium of the compact. This fact emphasizes the present-day recognition being accorded the usefulness of the compact in resolving differences between the states. Often where litigation or compulsion exercised through legislation fails as a permanent settlement of interstate differences, the compact could afford a satisfactory and permanent settlement.

The perennial Chicago Diversion controversy is one problem that could be settled permanently by means of an interstate compact. This controversy is still very much alive after fifty years of dispute. Newspaper dispatches reveal that another attempt will be made at this session of Congress to obtain authorization for increased diversion of water from Lake Michigan through the Chicago Sanitary and Ship Canal. The President of the Board of Trustees of the Sanitary District of Chicago, Anthony A. Olis, asserted that a bill for increased diversion would be introduced and that such measure faces a brighter outlook than in the year 1952.

The Great Lakes states have a proprietary interest in the waters of the Great Lakes. Likewise the Dominion of Canada has an interest in such waters because certain of the Great Lakes constitute a portion of the international boundary between the United States and Canada. It would seem, therefore, that the only way in which any satisfactory settlement can be reached, not only with regard to diversion, but also with reference to stabilization of the levels of the Great Lakes by means of regulatory works, is through the medium of an interstate compact. As the history of this controversy shows, litigation has failed, attempted legislation has failed, and appeals to the

executive branch of the government have failed. It is obvious then, that the only solution is by agreement between the parties concerned.

Likewise, from the discussion on the St. Lawrence Seaway project it is clear that the only way an early completion of the St. Lawrence Seaway and Power Project can be assured is through the medium of an interstate compact whereby the interested Great Lakes states, together with the Dominion of Canada, and with the approval of Congress, would plan, construct and share the cost of such program. It would seem that this method would overcome the opposition of many of the southern, western and southwestern states which in the past have opposed the construction of the St. Lawrence Seaway on the general theory that it is of no interest to them and they should not be forced to pay any part of the cost of such an improvement.

In view of the growing recognition of the value of interstate compacts, the only sensible approach now would seem to be that the interested states should make every effort to achieve a settlement of these two disputes through the medium of interstate compacts.