The second article deals with waters (whether rivers or lakes) traversing the territories of two or more states. In summary form, the course of the stream may not be changed by structures of any kind without the consent of the state through which the stream flows; any alteration of the stream or its pollution by refuse from factories, etc., is forbidden; and quantities of water cannot be withdrawn which will seriously change the essential character of the stream or interfere with its use lower down the stream. It is further stated in this article that a right of navigation recognized by international law can not be violated by usage of any kind.

The next article deals with the upper courses of the stream, by providing that the water may not be dammed up or forced back in such a way as to overflow the region above the constructions or works erected on the stream.

The last article recommends the appointment of joint commissions to pass upon or to express an opinion upon new structures or modification of existing structures which will affect the flow through the territory of the other state.

From this brief survey of the Madrid session, it is evident that the Institute is steadily fulfilling the hopes of its founders by enlarging the bounds of international law by each of its sessions.

THE EXTRADITION TREATIES BETWEEN THE UNITED STATES AND FRANCE AND THE UNITED STATES AND SALVADOR

Since going to press with the July number of the JOURNAL, President Taft has proclaimed two treaties of extradition, one with France,[1] the other with Salvador.[2]

The former replaces that concluded between the United States and France, November 9, 1843, together with the additional articles thereto of February 24, 1845, by which robbery and burglary were added to the list of extraditable crimes, and of February 10, 1858, by which counterfeiting and embezzlement by private persons were added. The need for a new agreement on the subject between the two governments is clear when it is considered that the old treaty with France, including the additional articles, comprised only ten specifications of crime for which extradition could be granted, whereas most of our extradition

[1] Printed in SUPPLEMENT to this number of the JOURNAL, p. 243.
[2] *Id.*, p. 300.

conventions enumerate many more, as, for instances, the present treaty with Great Britain enumerates about thirty, that with Spain more than twenty, and that with Japan about twenty.

This consideration led the American Government in 1890 to instruct the then American Minister at Paris, Mr. Whitelaw Reid, to propose to the Government of France the negotiation of a new extradition treaty upon the basis of a draft transmitted to him. The ensuing negotiations at Paris resulted in the signature of a convention on March 25, 1892. Upon transmission thereof to the United States Senate with a view to its advice and consent to its ratification, that body amended the convention, which in its amended form failed to secure ratification on the part of the Government of France. It was not until June 27 of the current year that the high contracting parties succeeded in exchanging ratifications of the convention, which had been signed anew as modified by the Senate in 1892 and had again been amended by the Senate of the United States. This last amendment, however, obtained acceptance by the Government of France and the treaty has been promulgated in both countries.

A comparison of the new treaty with the old reveals the following as the most important modifications and additions:

To the list of extraditable offenses are added fraud by a bailee, etc., larceny, obtaining money by false pretenses, perjury, child stealing, kidnapping, obstruction of railroads endangering human life, piracy, mutiny, crimes and offenses against the laws for the suppression of slavery and slave trading, and receiving stolen money. New articles relate to the procuring of a mandate, the nonsurrender of citizens, immunity from punishment for other crimes than the one for which the extradition is granted, the statute of limitations, priority of trial for offenses in the country of refuge, concurrent requisitions by third countries, articles seized in the possession of the accused, the proceeds of the crime charged, and procedure for colonies. The former articles respecting prohibition of trial for political offenses and respecting the expenses of extradition are amplified as in recent treaties.

The new treaty with Salvador is a resumption of conventional relations between the United States and that country in the matter of extradition, the former treaty, which was concluded May 23, 1870, havhaving been denounced on notice given by Salvador, October 9, 1894, to take effect March 2, 1904. That convention was nearly as brief as the old French convention, specifying as extraditable crimes only piracy

and mutiny on board a ship in addition to those included in the French agreement. It contained, however, a provision guarding against trial on another charge than the one of extradition, one for trial in the country of refuge for an offense there committed before extradition, and one excluding extradition of citizens. The benefits of that treaty seem to have been merely of a preventive character, for, according to Prof. John Bassett Moore's Report on Extradition (1890), there does not appear to have been a single requisition made by either government up to that date upon the other, although the convention had been in effect sixteen years. In 1894, however, the Government of Salvador made an application for extradition of several Salvadorean refugees, among whom were General Antonio Ezeta and other military officers of the government of Carlos Ezeta, which had just been overthrown. The extradition proceedings in California resulted in the discharge by the federal magistrate, Judge Morrow, of all of the accused but one Cienfuegos, and it was shortly after this decision that the Salvadorean Government gave the conventional notice under Article VIII which in due course brought about the lapse of the treaty. It may be remarked that the Department of State subsequently declined to surrender Cienfuegos on the ground that the charge on which he was committed was not embraced in the requisition for his extradition, the warrant for the preliminary hearing, or the warrant of arrest.

The new treaty follows closely the language of the convention between Spain and the United States proclaimed May 21, 1908. Among the variations, which are in general of minor importance, the Salvadorean treaty includes in its list of extraditable offenses, mayhem, and receiving stolen property knowing it to be stolen, and contains an article on transit.

As compared with the old treaty the new one presents about the same advance that the new treaty with France presents over the former convention with that country, notwithstanding the fact that as above observed the first treaty with Salvador contained a number of provisions not found in the early treaty with France. This may be in part accounted for by the difference of some eighteen years in the inception of the negotiations with the two countries, those with France having begun about 1890, whereas the Salvadorean negotiations were apparently initiated subsequently to the recent convention with Spain, upon which it appears to be modeled. At any rate in the treaty with Salvador we find provisions lacking in the French treaty.

Among the features of the treaty with Salvador which do not appear in the French treaty is the exception from the definition of a political offense for which fugitives are not extraditable of the act of murder committed or attempted against the life of the sovereign or head of a foreign state or against the life of any member of his family. This provision, although it appears in agreements concluded by the Government of the United States as a rule only in the extradition treaties of the present century, is by no means an innovation even in the earliest of these, for the conventions with Luxemburg (1883) and Russia (1887) contain like clauses, though the Russian provision is not so broadly inclusive.

The Salvadorean treaty also contains an article permitting the conveyance through the territories of either country of any person, not being a citizen of the country to be passed through, extradited by a third Power to either of them, for any of the crimes specified in the treaty. This would seem to be a feature which should be desirable in treaties with all countries whose territory might be convenient for transit. The loophole afforded by the absence of such provisions from some of our treaties has been recently commented upon in a letter published in *The Outlook* of September ninth last.

Two articles in each of the treaties under comment, that in reference to trial for an offense other than the one for which extradition has been granted, and that in respect to prescription of prosecution, are of interest as being substantially different in the two treaties. The treaty with France contains as its Article VII the following:

> No person surrendered by either of the high contracting parties to the other shall be triable or tried to be punished for any crime or offence committed prior to his extradition, other than the offence for which he was delivered up, nor shall such person be arrested or detained on civil process for a cause accrued before extradition, unless he has been at liberty for one month after having been tried, to leave the country, or, in case of conviction, for one month after having suffered his punishment or having been pardoned.

This appears in substance in most of the American treaties. On the other hand, the subject in the Salvadorean treaty is dealt with as follows:

> Art. IV. No person shall be tried or punished for any crime or offence other than that for which he was surrendered without the consent of the government which surrendered him, which may, if it think proper, require the production of one of the documents mentioned in Article XI of this treaty.

What is meant by the "documents mentioned in Article XI" is not clear from the text of Article XI, for the latter article seems to contain no explicit mention of such documents as would meet the case Article XI follows the wording of Article XI of the treaty with Spain except as to its last paragraph, and it would seem that had the last paragraph of the Spanish Article XI also been incorporated in the Salvadorean treaty, the "documents mentioned in Article XI" would be readily referable to the customary authenticated copies of the sentence or warrant of arrest, etc. That such are the documents in contemplation would seem to be the fact from an examination of other treaties containing the same feature, as for example the Mexican treaty (Articles XIII and VIII).

The articles respecting limitation of trial by prescription are, in the French treaty:

> Article VIII. Extradition shall not be granted, in pursuance of the provisions of this convention, if the person claimed has been tried for the same act in the country to which the requisition is addressed, or if legal proceedings or the enforcement of the penalty for the act committed by the person claimed have become barred by limitation, according to the laws of the country to which the requisition is addressed.

and in the treaty with Salvador:

> Article V. A fugitive criminal shall not be surrendered under the provisions hereof, when, from lapse of time or other lawful cause, according to the laws of the place within the jurisdiction of which the crime was committed, the criminal is exempt from prosecution or punishment for the offence for which the surrender is asked.

It will be observed that the provision of prescription in the French treaty refers to the law of the requested country, while in the Salvadorean treaty it refers to the law of the requesting country. Among the treaties of the United States there are only two others, those with Spain and the Dominican Republic, that read like the Salvadorean treaty, while some twenty are similar in this respect to the French treaty. The convention with Switzerland (1900) regards the law of prescription both of the requested and the requesting state, and stands alone among treaties of the United States in this respect. Great Britian has concluded treaties with Argentine Republic, Bolivia, Chile, Cuba, Panama, and Peru which in their provision regarding prescription refer both to the law of the requesting state and that of the requested state, but the rest of her treaties refer only to the prescriptive law

of the requested state. It may be queried whether an appeal to the law of the requesting state would not better be permitted only as a defense at the trial in the requesting state, and not at the hearing in the country of refuge, in view both of the difficulty of applying a foreign law of prescription with its exceptions to a statement of facts necessarily often incomplete, and of the nature of an extradition hearing as merely a preliminary examination.

It may be worthy of consideration, now that the nations of the world are for the most part bound together by bipartite arrangements in the matter of bringing fugitives to justice, whether, with the growing intimacy between peoples and increasing opportunities of flight from country to country, the effective advantages of simplicity and uniformity will not lead to the making of an international agreement to which all nations may adhere.