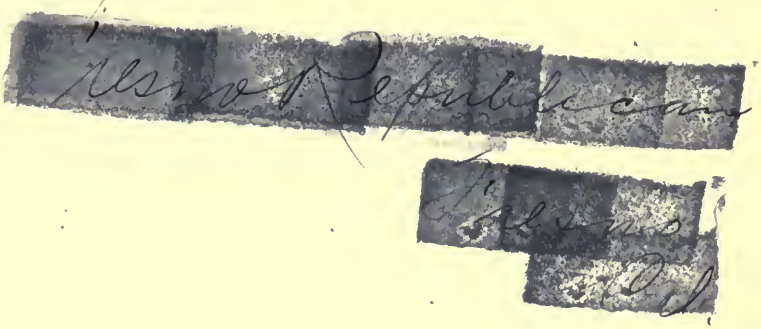

56TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { DOCUMENT No. 551.

A DIGEST

OF

INTERNATIONAL LAW

AS EMBODIED IN

DIPLOMATIC DISCUSSIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS,

AND ESPECIALLY IN

DOCUMENTS, PUBLISHED AND UNPUBLISHED, ISSUED BY PRESIDENTS AND SECRETARIES OF STATE OF THE UNITED STATES, THE OPINIONS OF THE ATTORNEYS-GENERAL, AND THE DECISIONS OF COURTS, FEDERAL AND STATE.

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CHAPTER XVI.

CONSULS.

I. *CLASSES AND TITLES.*

§ 696.

"The word 'consul' is ordinarily used, in a specific sense, to denote a particular grade in the consular service; but it is sometimes used also, in a generic sense, to embrace all consular officers.—15 C. Cls. R. 74."

Consular Regulations of the United States (1896), § 14, p. 6.

See The American Consular Service, by Eli T. Sheppard, formerly U. S. consul in China, and late international law adviser to the Government of Japan. The University Press, Berkeley, Cal., 1901; reprinted from the University [of California] Chronicle, IV. 6.

"The term 'consular officer' includes consuls-general, consuls, commercial agents, deputy consuls, vice-consuls, vice-commercial agents, and consular agents, and none others."

Consular Regulations of the United States (1896), § 2, p. 3, citing Rev. Stats., sec. 1674.

"Consuls-general, consuls, and commercial agents are full, principal, and permanent consular officers, as distinguished from subordinates and substitutes.—R. S., sec. 1674. Vice-consuls or vice-commercial agents, when in charge, are acting consuls or commercial agents for the time being, and are principal consular officers.—33 Fed. Rep. 167."

Consular Regulations of the United States (1896), § 3, p. 3.

Although consuls have diplomatic functions in the Barbary States, their letters of credence have been in conformity with their commissions, which, until recently, in every instance described them as consuls merely. No consul with such a title was warranted in officially assuming also the title of "agent."

Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Vidal, consul at Tripoli, No. 30, July 10, 1873, MS. Inst. Barbary Powers, XV. 558.

The American consular representative at Cairo, Egypt, has by statute the title of "Diplomatic Agent and Consul-General."

". . . 'Vice-consular officers,' or 'substitute consular officers,' includes vice-consuls general, vice-consuls, and vice-commercial agents. 'Subordinate consular officers' includes deputy consuls-general, deputy consuls, and consular agents.—R. S., sec. 1674."

Consular Regulations of the United States (1896), § 4, p. 4.

Commercial agents are by the laws of the United States (Revised Statutes, sec. 1674) full, principal, and permanent consular officers. They differ from the latter only in rank or grade. The title of the

office, as representing a distinct grade in the consular service, is peculiar to the service of the United States.

Commercial agents in the United States service are to be distinguished from certain officers, described in international law by the same title, who are not usually regarded as entitled to the full rank and privileges of a consular officer. The exigencies of the public service have necessitated the appointment by the United States from time to time of commercial agents of this character, and the right to appoint them is at all times reserved; but such appointments have usually been made to countries whose governments have not yet been recognized by the United States and to which it was desired to send a confidential agent whose recognition need not be asked from the local government. Prior to the act of August 1, 1856, which reorganized the consular service, and raised commercial agents to the consular rank, the officers appointed by the United States with the title of commercial agent were usually those of limited powers.

Consular Regulations of the United States (1896), secs. 15, 16, pp. 6–7. By the act of April 5, 1906, for the reorganization of the consular service, "the grade of commerical agent is abolished."

An example of the appointment of a commercial agent of the second class above referred to may be seen in the following instruction:

"The Department has learned with regret that the Grand Duke of Tuscany has established a rule not to recognize the consuls of any nation at the city of Florence.

"To obviate in some degree the inconvenience of this decision, as well as to enable you, so far as you may be able, to extend aid to citizens of the United States in Tuscany requiring your assistance, and to perform such other official acts as your position may render necessary, I transmit herewith the certificate of your appointment as commercial agent.

"The duties of a commercial agent are similar to those of a consul, and the same instructions are given to each, yet he does not, like the latter, bear a commission from the government: this is given only under the seal of the United States. He is a mere Executive agent sent abroad for the promotion and advantage of American commercial interests, selected by the Department, corresponding with, instructed, and controlled by the Department, and bearing an authority from the President under the seal of the Department. His recognition by the local authorities where he resides, altho' always important as affording facilities in the performance of his duties, is not necessary to it. In some instances these agencies are conferred upon persons who are directed to keep the trust confided to them secret, and these appointments do not necessarily carry with them a recognition on the part of this Government of the existing authority at the places to which they are made.

"It will not probably be deemed expedient for you to request from the government of Tuscany a recognition of your appointment." (Mr. Everett, Sec. of State, to Mr. Lance, consul at Florence, Jan. 26, 1853, 14 MS. Desp. to Consuls, 473.)

While the Austro-Hungarian government declines to issue exequaturs to "commercial agents" of the United States, such agents not being specifically mentioned in the treaty of 1870, yet it will recognize such an official as a "commercial (consular) agent," and will issue orders permitting him to carry out his consular functions.

For. Rel. 1903, 14–16.

Vice-consuls and vice-commercial agents are consular officers who shall be substituted temporarily to fill the place of consuls-general, consuls, or commercial agents, when they shall be temporarily absent or relieved from duty. They have, accordingly, no functions or powers when the principal officer is present at his post, but their functions are coextensive with his when he is absent from his district and in all cases where they are lawfully in charge of the office.

Consular Regulations of the United States (1896), § 17, p. 7, citing Revised Statutes, sec. 1674; 33 Fed. Rep. 167.

"Deputy consuls are consular officers subordinate to their principals, exercising the powers and performing the duties within the limits of their consulates at the same ports or places where their principals are located. They may perform their functions when the principal is absent from his district, as well as when he is at his post; but they are not authorized, in the former case, to assume the responsible charge of the office, that being the duty of the vice-consul. R. S., sec. 1674."

Consular Regulations of the United States (1896), § 18, p. 8.

"The substitute and subordinate officers of consuls-general are by statute simply designated as vice-consuls and deputy consuls. It is customary, however, and the practice is indirectly recognized in the statutes, to designate such officers as vice-consuls-general and deputy consuls-general. Their powers and duties are the same as specified for vice and deputy consuls in the two preceding paragraphs. R. S., secs. 1674, 4130."

Consular Regulations of the United States (1896), § 19, p. 8.

The law does not specifically provide for the appointment of a "deputy consul-general," but the word "general" is used to show that the deputy is attached to a consul-general. Legally, it is mere surplusage, and does not alter the deputy's functions, "which are those of a deputy consul."

Mr. Wharton, Assist. Sec. of State, to Mr. Kissam, March 7, 1891, 181 MS. Dom. Let. 168; Mr. Uhl, Assist. Sec. of State, to Mr. Miller, Nov. 26, 1895, 206 MS. Dom. Let. 206.

"Consular agents are consular officers subordinate to their principals, exercising the powers and performing the duties within the limits of their consular agencies, but at ports or places different from those at which their principals are located. R. S., sec. 1674. Their functions are not, in all respects, as extensive as those of the principal officer. Though they act at places different from the seat of the principal office and their duties are in substance the same toward persons desiring consular services, they act only as the representative of the principal, and are subject and subordinate to him. They are not authorized to correspond with the Department of State, unless through the principal or under exceptional circumstances; they make no returns or reports directly to the Department, and they are not permitted to render accounts or make any drafts for expenditures on the Departments of the Government, unless under express instructions."

Consular Regulations of the United States (1896), § 20, p. 8.

"The President is authorized to appoint consular clerks, not exceeding thirteen in number at any one time, who shall be citizens of the United States and over 18 years of age at the time of their appointment. They can not be removed from office except for cause, stated in writing, which shall be submitted to Congress at the session first following such removal. They may be assigned, from time to time, to such consulates and with such duties as the Secretary of State may direct. When so assigned, they are subordinate to the principal consular officer at the post. They will perform such clerical or other duties of the consulate as he may designate, and carefully observe and obey his instructions in all respects.—R. S. secs. 1704, 1705. (Paragraphs 511, 512.)"

Consular Regulations of the United States (1896), § 23, p. 9.
Consular clerks will be appointed only after satisfactory examination. (Consular Regulations § 24, p. 10.)

As stated above, by the act of April 5, 1906, for the reorganization of the consular service, "the grade of commercial agent is abolished."

By the same act, provision is made for the appointment of "five inspectors of consulates, to be designated and commissioned as consuls-general at large." They are to be appointed by the President, with the advice and consent of the Senate, from the members of the consular force, and are each to receive a salary of $5,000 and expenses of travel and subsistence. Their business is to inspect consular offices, under the direction of the Secretary of State. Each consular office is to be inspected at least once in two years. Moreover, whenever the President "has reason to believe that the business of a consulate or a consulate-general is not being properly conducted and that

it is necessary for the public interest, he may authorize any consul-general at large to suspend the consul or consul-general, and administer the office in his stead for a period not exceeding ninety days." And the consul-general at large in question may also "suspend any vice or deputy consular officer or clerk in said office during the period aforesaid."

Act of April 5, 1906, sections 3 and 4. This act takes effect on June 30, 1906.

II. *APPOINTMENT.*

§ 697.

Consuls-general and consuls are appointed by the President, by and with the advice and consent of the Senate. (Const., Art. II., sec. 2.)

Commercial agents were appointed directly by the President.

Consular Regulations of the United States (1896), § 31, p. 12.

The reform of the consular service, as organized under the act of 1856, has been recommended in various messages of the President, as well as in reports of committees of Congress. The provisions of the act of April 5, 1906, entitled "An act to provide for the reorganization of the consular service of the United States," are given at their appropriate places in this chapter.

By an executive order of Sept. 20, 1895, provision was made for the examination of applicants for certain consular positions, with a view to test their competency and fitness.

President Cleveland, annual messages, Dec. 6, 1886, Dec. 3, 1888, and Dec. 7, 1896; President Roosevelt, annual message, Dec. 3, 1901; report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, xc.; report of Mr. Lodge, Com. on For. Rel., May 3, 1900, Senate Report 1202, 56 Cong. 1 sess.; reports of Mr. Adams, Com. on For. Aff., March 8 and May 21, 1900, House Report 562, 56 Cong. 1 sess., parts 1 and 2.

As to the consular service in China, with information in regard to the consular establishments of other powers as well as of the United States, see despatch of Mr. John Russell Young, min. to China, No. 561, Nov. 28, 1884, MS. Desp. from China.

An appropriation by Congress for the salary of a consul at a particular place, where there has previously been only a consular agency, is sufficient authority for the appointment by the President of a consul there.

Sampson *v.* United States, 30 Ct. Cl. 365.

"Vice-consuls-general, deputy consuls-general, vice-consuls, deputy consuls, vice-commercial agents, and consular agents are appointed

by the Secretary of State, usually upon the nomination of the principal consular officer. The privilege of making such nominations must not be construed to limit the authority of the Secretary of State to appoint these officers without such previous nomination by the principal officer. The statutory power in this respect is reserved, and it will be exercised in all cases in which the interests of the service or other public reasons may be deemed to require it.—R. S., sec. 1695; 15 C. Cls. R. 64."

Consular Regulations of the United States (1896), § 39, p. 15.

As to other conditions, see id. § 40 et seq.

Formerly consular agents were appointed by the consuls, and were not considered as being, in a strict sense, consular officers of the United States. "Consuls of the United States," said Mr. Forsyth, "have no right to appoint vice-consuls, and the consular agents which they are authorized to constitute . . . are not regarded as officers of the government or as entitled to any privileges or immunities from the governments within whose territories they may exist." (Mr. Forsyth, Sec. of State, to Mr. Morelli, June 20, 1837, MS. Notes to Italy, VI. 28. See same to same, Nov. 16, 1836, id. 29.)

"A consular agent, as you are aware, is not, strictly speaking, a United States officer, being merely the agent of the consul from whom he receives his appointment, though, pursuant to a regulation here long established, the consuls must report the names of the agents whom they appoint to this Department for approval. This government does not ask the foreign government within whose territory they reside to receive and recognize them as its officers or agents. They are not entitled to a consular flag, and may not use any insignia of office contrary to the laws of the country where they are.

"It was Mr. Webster's opinion that 'the consuls of the United States have no authority to appoint *vice-consuls*, they being expressly instructed to appoint *consular agents* at such places within their consular jurisdiction as they may deem necessary;' and also that a 'consular agent stands in the same relation that any citizen would hold under similar circumstances, and it is as a citizen of the United States only that he can be considered, and not as an officer acting under the authority of the United States.'" (Mr. Hunter, Assist. Sec. of State, to Mr. Everett, May 28, 1855, 44 MS. Dom. Let. 89.)

In 1856 the appointment of these agents was, by statute (R. S. § 1695), transferred to the President, and they were thenceforth included in the denomination of "consular officers." (R. S. § 1674.) Consular agents are still held, however, by the courts to be agents of their supervising consuls (Gould *v.* Staples, 9 Fed. Rep. 159), and are said to be not technically officers of the United States by First Comptroller Lawrence. (4 Lawrence, First Compt. Decisions, 88.) But recognition of them is now uniformly requested. (Consular Regulations, § 42.)

Under the act of 18th August, 1856 (11 Stat. 56; Rev. Stat. § 1738), which provides that "no consular officer shall exercise diplomatic

functions . . . in any case, unless expressly authorized by the President so to do," a retiring minister can not install a consul in charge of the legation, nor can the consul receive the pay provided by law for a chargé d'affaires.

Otterbourg *v.* United States, 5 Ct. Cls. 430.

Under Revised Statutes, secs. 1695, 1703, authorizing the President to provide for the appointment of vice-consuls, vice-commercial agents, etc., and to fix their compensation, and under the Consular Regulations of 1888, secs. 36, 87, it is proper to appoint a vice-consul-general when the consul-general is sick and unable to discharge his duties, and a vice-consul previously appointed has not qualified but is absent from the country.

United States *v.* Eaton, 169 U. S. 331, 18 S. Ct. 374.

Under Consular Regulations of 1888, sec. 87, authorizing "the diplomatic representative" to appoint a vice-consul in case of emergency, the minister of the United States in Siam, who is also consul-general, may, on becoming ill so as to be disqualified from discharging his duties, appoint a vice-consul-general, and the fact that he is unable to perform the duties of the office of minister resident does not deprive him of the power in that capacity to make an emergency appointment.

United States *v.* Eaton, 169 U. S. 331, 18 S. Ct. 374.

In case of emergency or in the absence of the consular agent on leave, the principal consular officer may designate, with the approval of the Department of State, a suitable person to perform the duties under the title of consular agent.

Consular Regulations of the United States (1896), § 21, p. 9.
See, also, Mr. Porter, Act. Sec. of State, to Tevfik Pasha, Turkish min., Oct. 4, 1886, MS. Notes to Turkey, I. 465.

By the act of April 5, 1906, for the reorganization of the consular service, consuls-general are divided into seven classes, according to salary, and consuls into nine classes. And it is further provided that "the offices of vice-consuls-general, deputy consuls-general, vice-consuls, and deputy consuls shall be filled by appointment as heretofore, except that whenever, in his judgment the good of the service requires it, consuls may be designated by the President without thereby changing their classification to act for a period not to exceed one year as vice-consuls-generals, deputy consuls-general, vice-consuls, and deputy consuls; and when so acting they shall not be deemed to have vacated their offices as consuls." It is also provided

that "consular agents may be appointed, when necessary, as heretofore;" and that "the grade of commercial agent is abolished."

Act of April 5, 1906, sections 2 and 3.

As to inspectors of consulates, see supra, § 696.

The act provides that the provisions of law relating to the official bonds of consuls-general, and the provisions of sections 1734, 1735, and 1736, R. S., shall apply to the inspectors of consulates or consuls-general at large.

Mr. Hay, Secretary of State, sent to Governor Foster, of Louisiana, July 27, 1899, the following telegram: "In view of the absence of the Italian consul from his post at New Orleans, the Italian Government has provisionally appointed Marquis Camillo Romano, second secretary of the embassy, to be gerant of the consulate. He has been recognized in that capacity by direction of the President. I have the honor to advise you thereof, and at the request of the Italian chargé to ask that Signor Romano be accorded due recognition and all possible consideration by the authorities of Louisiana."

For. Rel. 1899, 444, 445.

Question of citizenship.

"If Congress should think proper to appoint consuls, we are humbly of opinion, that the choice will fall most justly, as well as naturally, on Americans, who are, in our opinion, better qualified for this business than any others; and the reputation of such an office, together with a moderate commission on the business they may transact, and the advantages to be derived from trade, will be a sufficient inducement to undertake it, and a sufficient reward for discharging the duties of it."

Messrs. Franklin, Lee, and Adams, to the President of Congress, July 20, 1778, 7 John Adams's Works, 20. See, also, id. 209.

In the consular and diplomatic appropriation act approved February 25, 1885, there is the following clause:

"For consular officers not citizens of the United States, six thousand dollars." (23 Stat. 330.)

This item is also found in the consular and diplomatic act of July 1, 1886 (24 Stat. 115), and subsequent acts. It is intended to cover salaries of vice-consuls who are not United States citizens. In August, 1886, it was said that there was not a single alien appointed to a salaried consulate, though there were several cases of such appointments at small feed consulates and commercial agencies.

The objections to the appointment of merchants as consuls are noticed in 6 Hunt's Merch. Mag. 301; 10 id. 447; 12 id. 211; 16 De Bow's Rev. 12.

The objections to the appointment of aliens as consuls are stated with much force in 12 Hunt's Mag. 211.

"With respect to your inquiries on the subject of consuls, vice-consuls, and agents, you will observe that the system of the United States is different from that of other nations. We appoint only na-

tive citizens consuls. Where a port is important enough to merit a consular appointment, if there is a deserving native there, he is named consul; if none, we name a merchant of the place vice-consul, notifying him that whenever a citizen settles there he will be named consul, and that during his residence the functions of the vice-consul will cease, but revive again on his departure; in the meantime the vice-consul of one port and its vicinities has no dependence on the consul of another; each acts independently in his department, which extends to all places within the same allegiance nearer to him than to any other consul or vice-consul. Each may appoint agents within their department who are to correspond with themselves."

Mr. Jefferson, Sec. of State, to Mr. Johnson, consul, Aug. 29, 1791, MS. Inst. U. States Ministers, I. 86.

"It has been the general and almost invariable rule of this government to appoint in preference a native American citizen to every consular office abroad; when a person bearing that character, suitably qualified for the office, was also desirous of obtaining it."

Mr. Adams, Sec. of State, to Mr. Hill, consul at Rio de Janeiro, April 30, 1819, 2 MS. Desp. to Consuls, 159.

"From the nature, variety, and importance of consular duties, and their bearing on the commercial interests of nations, consuls ought always to be citizens of the country which they represent. Accordingly Vattel (Book 2, cap. 2, sec. 34) declares that 'the functions of a consul require, in the first place, that he should be not a subject of the state where he resides, as, in this case, he would be obliged in all things to conform to its orders, and thus not be at liberty to acquit himself of the duties of his office.' Chitty, in his Commercial Law (vol. 1, page 48), adopts the same principle. It is true he proceeds to say: 'But, contrary to this principal, it is not unusual to appoint a native of the foreign state to be the consul there, as in Portugal, Spain, and Italy, where there is a scarcity of British subjects, and in which it has been customary for the consul-general to appoint natives of such countries to act as their deputies at inferior ports.' He adds, however, 'but this, it has been observed, is an unwarrantable and impolitic practice.'

"The President, at an early period of his administration, had this subject under consideration, and determined to appoint no consuls who were not American citizens, and, indeed, several consuls have been removed because they did not possess this qualification."

Mr. Buchanan, Sec. of State, to Mr. Donelson, Dec. 16, 1846, MS. Inst. Prussia, XIV. 104.

"As a general rule it is preferable that United States citizens only should be appointed to all consular offices. When, however, none can

be found to serve at a particular place, aliens may be selected, giving the preference to citizens or subjects of other nationalities than that of the country where the officer is to serve.

"When, however, no such person can be found, a subject of the country may be appointed if not contrary to law or treaty. If any other country has a consular officer in Tripoli who is a Turkish subject the United States may claim the same privilege under their treaty. In the case of a consular agent, however, it would be advisable previously to name to the local authorities the person proposed to be appointed, if they should not object."

Mr. Hunter, Second Asst. Sec. of State, to Mr. Vidal, Aug. 11, 1873, MS. Inst. Barb. Powers, XV. 561.

"The experience of the government has demonstrated the inconvenience and often serious embarrassment resulting from the appointment of naturalized citizens to consulates within the country of their nativity, while with regard to appointments in other countries they stand on the same footing as all other citizens."

Mr. Fish, Sec. of State, to Mr. Glover, Apr. 7, 1876, 112 MS. Dom. Let. 586.

As to the impolicy of appointing naturalized citizens as consuls to the country of their origin, see Schuyler's Am. Diplomacy, 79.

By section 21 of the act of Aug. 18, 1856, diplomatic officers and principal consular officers were required to be citizens of the United States. (11 Stat. 60.) By the act of Feb. 28, 1867, payment of compensation to principal consular officers who were not citizens was forbidden. (14 Stat. 412; 12 Op. At. Gen. 124.) The act of June 11, 1874, provided for the payment of salaries to certain consular officers not citizens. (18 Stat. 66.) The Revised Statutes, which became law June 20, 1874, do not contain that part of the act of 1867 prohibiting payment to consuls not citizens (see § 1690), and § 1744 incorporates only that part of sec. 21 of the act of 1856 which requires diplomatic officers to be citizens. It therefore does not seem to be contrary to law to commission as a consul one who is not a citizen of the United States. (R. S. §§ 5595, 5596.) Nevertheless, it is the general practice to commission only citizens; but there are occasions when by reason of inadequate salary or the lack of any at all it is not possible to appoint citizens. It often happens that an alien is appointed vice-consul, or consular agent, though even in these cases preference is invariably given to citizens where one can be found for the post.

Mr. Adee, Act. Sec. of State, to Mr. Winchester, Aug. 13, 1895, 204 MS. Dom. Let. 82.

"No person who is not an American citizen shall be appointed hereafter in any consulate-general or consulate to any clerical position the salary of which is one thousand dollars a year or more."

Act of April 5, 1906, section 5.

With reference to objections suggested by the Chinese government to the appointment by the United States as consuls at treaty ports of persons engaged in trade, Mr. Seward observed that it was obvious that it would be preferable in many cases to have consuls who should receive adequate salaries from the Government; but that the extended condition of modern commerce rendered it impossible for any government exclusively to adhere to that system; that, consequently, every maritime power employed merchants as consuls, and that the practice was often sanctioned by treaties and was recognized by the law of nations.

Mr. Seward, Sec. of State, to Mr. Burlingame, min. to China, No. 25, Feb. 4, 1863, Dip. Cor. 1863, II. 848.

See, also, same to same, No. 30, March 3, 1863, id. 850.

For dispatches of Mr. Burlingame, to which these instructions were in reply, see id. 829, 842.

For views substantially the same as those expressed by Mr. Seward, see Mr. Upshur, Sec. of State, to Mr. Huntington, U. S. S., Jan. 20, 1844, 33 MS. Dom. Let. 462. See, also, infra, § 710.

III. *EXEQUATUR.*

1. Nature and Effect.

§ 698.

The question of the right of a consular officer, principal or subordinate, to exercise consular privileges at a particular place depends upon the scope of his exequatur.

Mr. Fish, Sec. of State, to Mr. Stevens, June 23, 1873, MS. Inst. Paraguay, I. 163; Mr. Porter, Act. Sec. of State, to Mr. Cox, min. to Turkey, No. 4, Aug. 10, 1885, MS. Inst. Turkey, IV. 256.

See, as to consular exequaturs, Hall, Int. Law, 5th ed., 318.

It appearing by a publication in a newspaper in Venezuela, over the signature of the Venezuelan consul and vice-consul at New York, that they claimed to be sole agents in that city for emigration to Venezuela, the matter was called to the attention of the Venezuelan minister at Washington, with the statement that, as the exercise of the functions of emigration agents was not sanctioned by the exequaturs of the officers in question, it was preferred that they should abstain from acting in that capacity.

Mr. Fish, Sec. of State, to Señor Dalla Costa, Aug. 22, 1874, MS. Notes to Venezuela, I. 154.

"Consuls are indeed received by the government from acknowledged sovereign powers with whom they have no treaty. But the exequatur for a consul-general can obviously not be granted without recognizing the authority from whom his appointment proceeds as sovereign. 'The consul,' says Vattel (book 2, chap. 2, § 34), 'is not a public minister; *but as he is charged with a commission from his sovereign*, and received in that quality by them where he resides, he should enjoy, to a certain extent, the protection of the law of nations.'"

Mr. Adams, Sec. of State, to the President, Jan. 28, 1819, MS. Report Book.

The act of soliciting and receiving from the government of a certain country an exequatur for a consular officer at a particular place, is not a conclusive recognition of such country's sovereignty over the place in question. The request for an exequatur concerns merely the performance of certain duties by a United States officer toward the vessels and citizens of the United States, with the permission of the authority in actual possession, and can not be assumed to imply the expression of any opinion as to the right of possession or to operate in confirmation of a claim of right. Such was the position of the United States in obtaining exequaturs from Nicaragua for a consul at Corn Island; from the Hovas government for a consul at Madagascar, and from Great Britain for a consul at Belize.

Mr. Rives, Act. Sec. of State, to Mr. Hall, min. to Central America, No. 638, Nov. 12, 1888, MS. Inst. Cent. Am. XIX. 173.

"A commercial agent is a consular officer appointed by the Secretary of State to reside at ports where for political reasons it may not be expedient formally to recognize the authority of the government claiming jurisdiction, or where that government may not think proper to recognize a consul. The former consideration probably led to the original appointment of a commercial agent at Belize. Though those reasons for continuing that title to the consular officer there may not now have the same force which may at first have been assigned to them, they may be supposed to be still operative to a degree which may make it inexpedient to change the title, at least for the present." (Mr. Fish, Sec. of State, to Mr. Frye, M. C., Jan. 7, 1876, 111 MS. Dom. Let. 320.)

A commission was issued to Mr. Priest at San Juan del Sur, Nicaragua, as United States consul. He hoisted his consular flag, but, owing to a personal objection, the Nicaraguan authorities withheld his exequatur. While matters were in this situation his house was entered by a military force and he was arrested and imprisoned. Held, that as he had not been recognized as consul the trespass could not be complained of as an international offense against a public functionary. It was added that the propriety of having his

consular flag hoisted, before he had received his exequatur, might be questioned.

Mr. Marcy, Sec. of State, to Mr. Wheeler, min. to Nicaragua, May 11, 1855, MS. Inst. Am. States, XV. 236.

The insertion of conditions in an exequatur is unusual, and when applied to United States consuls abroad will be excepted to by the United States.

Mr. Fish, Sec. of State, to Mr. Sickles, Apr. 16, 1870, MS. Inst. Spain, XVI. 98.

Although it was "believed not to have been customary" to request formal authority for vice-consuls, consular agents, or even commercial agents, to exercise their functions, yet, as the Mexican government seemed to expect that its sanction of the exercise by such officers of their authority there would be requested, it was stated that copies of their commissions would be forwarded to the legation of the United States at Mexico in order that such sanction might be applied for.

Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Foster, min. to Mexico, No. 24, Aug. 30, 1873, MS. Inst. Mexico, XIX. 22.

As it has been deemed inexpedient to issue exequaturs in the form of an official paper signed by the President and bearing the great seal of the United States, except to consular officers bearing a regular commission signed by the chief executive of the appointing state and bearing its great seal, it has been deemed proper to issue a less formal exequatur, in the form of a certificate of recognition signed by the Secretary of State and bearing the seal of the Department of State, to subordinate officers appointed by foreign consuls-general or consuls in the United States under their own signature and seal of office. This course is understood to be in accordance with the practice touching subordinate consular officers of the United States in foreign countries.

Mr. Evarts, Sec. of State, to Mr. Sherman, Sec. of Treas., Dec. 12, 1879, 131 MS. Dom. Let. 13.

As to the difficulties encountered in securing the recognition of the United States consul at Galatz and the United States commercial agent at Bucharest, Roumania, see Mr. Evarts, Sec. of State, to Mr. Kasson, No. 122, July 30, 1879, MS. Inst. Austria-Hungary, III. 48.

As to the recognition of the vice and deputy consul-general at Cairo, Egypt, see Mr. Sherman, Sec. of State, to Mr. Terrell, No. 1448, May 18, 1897, MS. Inst. Turkey, VII. 107.

As to the refusal of Turkey to grant exequaturs to United States consuls at Erzerum and Harpoot, see Mr. Day, Sec. of State, to Mr. Straus, min. to Turkey, Sept. 13, 1898, MS. Inst. Turkey, VII. 274.

"After more than two years from the appointment of a consul of this country to Erzerum, he has received his exequatur." (President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, lxxxiii.)

The mutessarif of Samsoun, Turkey, refused to recognize Mr. Arzoglou, a Turkish subject, as United States consular agent at that place, or to allow him to display the American flag. (For. Rel. 1893, 623.)

Exequaturs do not issue to consular agents or vice-consuls. "Orders of this government to the Federal officers of the district where the appointee's functions are exercised are deemed sufficient recognition."

Mr. Evarts, Sec. of State, to Mr. Shishkin, Russian min., Nov. 14, 1879, MS. Notes to Russian Leg. VII. 290.

"Your explanations concerning the functions of pro-consuls seem to show that it is not customary to submit their commissions or to ask for their recognition. Unless Her Majesty's government should be pleased to adopt a different course in this regard hereafter, the pro-consuls you mention will continue to be omitted from the list of regularly recognized consular officers."

Mr. Blaine, Sec. of State, to Sir Edward Thornton, British min., May 27, 1881, MS. Notes to Great Britain, XVIII. 519.

2. Conditions of Issuance.

§ 699.

September 8, 1793, the British minister requested an exequatur for the British consul for North Carolina, South Carolina, and Georgia, on the strength of a copy of the consul's commission. Mr. Jefferson replied that it appeared to be "so material in law" that the grant of the exequatur should be "founded on an inspection of the original" commission, that the President had granted permission to the consul to exercise his functions provisionally, without the formality of an exequatur, till there should have been "full time to produce the original of his commission to be exhibited to the President."

Mr. Jefferson, Sec. of State, to the minister plenipo. of Great Britain, Sept. 10, 1793, 5 MS. Dom. Let. 265.

For the various forms of exequaturs issued by the United States, see a memorandum on "Consular Exequaturs," June 8, 1864, 36 MS. Desp. to Consuls, 513.

"Before an exequatur can be granted by the President, recognizing a consul or vice-consul of any nation as entitled to exercise his official functions in this country, evidence should be laid before him that such officer is duly appointed, which could only be done, consistently with the views just expressed, by producing a commission, either directly from his government or else from the authorized agent; in which latter case it should be accompanied by the instru-

ment investing such agent with the necessary authority. This power of appointment is frequently conferred upon consuls-general, with or without limitation or modification, but is not necessarily or uniformly attached to their office."

Mr. McLane, Sec. of State, to Mr. Lederer, Austrian consul-general, Feb. 28, 1834, MS. Notes to For. Legs. V. 168.

See, to the same effect, Mr. Marcy, Sec. of State, to Mr. Horner, Dec. 29, 1853, MS. Notes to Arg. Rep. XI. 35; Mr. Fish, Sec. of State, to Mr. Garcia, Jan. 23, 1872, id. 100.

"In all cases of application for an exequatur for or in behalf of a foreign consul, a commission emanating either from the head of his government or from a functionary known to possess the power of appointing consular officers, should be submitted to the President and recorded in the Department of State." Meanwhile, provisional permission for the exercise of consular functions may be given, and information of the fact duly furnished to the collector of customs at the proper port.

Mr. Forsyth, Sec. of State, to Baron de Mareschal, Austrian min., March 21, 1839, MS. Notes to German States, VI. 51.

"I have the honor to acknowledge the receipt of your note of the 9th instant, informing me that your government has authorized its legation here to confer diplomas of appointment, in a certain prescribed form to consuls and vice-consuls, the object of which is to enable such officers to act provisionally, which commissions are to serve in lieu of the imperial commissions granted to such officers when definitively appointed. The President has accordingly directed me to transmit to you his act recognizing Mr. Daniel J. Dasmond as provisional vice-consul of Austria, for Philadelphia, with which I have the honor to return the diploma which accompanied your note." (Mr. Webster, Sec. of State, to Mr. Hülsemann, Austrian chargé d'affaires, Aug. 18, 1842, MS. Notes to German States, VI. 73.)

As to the power of Russian consuls "missi," under the Russian consular regulations, to appoint subordinate officers, see Mr. Evarts, Sec. of State, to Mr. Shishkin, Russian min., Nov. 14 and 29, 1879, MS. Notes to Russ. Leg. VII. 290, 292. Mr. Evarts, in the note of Nov. 19, refers to the similar powers of Italian and Portuguese consuls.

Consular agents are appointed by consuls as deputies at places within their respective consular districts. They correspond with and make returns to the consuls by whom they are appointed; and, although it is in some cases expressly provided by treaty that they shall be permitted to reside in the ports for which they are designated, "exequaturs for that purpose are never applied for or expected . . . There is no instance in which this government has granted an exequatur to any officer below the grade of vice-consul."

Mr. Forsyth, Sec. of State, to His Highness Prince Metternich, Dec. 26, 1834, MS. Notes to German States, VI. 3.

See, to the same effect, Mr. Forsyth, Sec. of State, to Sir C. R. Vaughan, British min., April 24, 1835, MS. Notes to Brit. Leg. VI. 14.

See, also, Mr. Forsyth, Sec. of State, to Baron Lederer, Austrian consul-general, Feb. 3, 1838, id. 38, stating that, while an exequatur could not be issued to a person appointed by Baron Lederer to act as "agent" at New York in his absence on leave, yet, if he would appoint him as "acting consul-general, or consul," an exequatur would be issued to him in that capacity, it satisfactorily appearing that power for the purpose was expressly attributed to Baron Lederer by his official instructions.

"With a view to avoid obvious uncertainties and inconveniences, it is deemed indispensable that this Department should be promptly apprised of any appointment of consular officers of foreign powers in the United States, whether such appointments be occasioned by the death, illness, or absence of a consul or vice-consul, duly recognized by exequatur of the President, or whether the person appointed be a vice-consul or consular agent, expected to exercise functions in that character subordinate to a consul.

"Information whether the person appointed is a citizen of the United States, or a subject of the government who may appoint him, is also desirable."

Mr. Seward, Sec. of State, to Mr. Stuart, British chargé, circular, June 25, 1862, MS. Notes to Gr. Br. IX. 208. This circular was prompted by the circumstance that persons had in some instances been placed in charge of consulates at ports in the Southern States, without notification to the Department of State. See Mr. Seward, Sec. of State, to Lord Lyons, British min., June 4, 1862, MS. Notes to Gr. Br. IX. 196.

Where provisional notification is given of the appointment of a consular officer pending formal presentation of his commission and application for an exequatur, no exequatur or certificate of recognition issues, but the Secretary of the Treasury is requested to cause the officers of his Department to give temporary recognition to the acts of the appointee. After the lapse of a reasonable time, if no further action is taken confirmatory of the appointment, it is dropped from the record.

Mr. Blaine, Sec. of State, to Sir Edward Thornton, British min., May 27, 1881, MS. Notes to Great Britain, XVIII. 519.

It formerly was the usage of none of the European governments to grant exequaturs to consuls residing in their colonies. Nevertheless, consuls were in some cases duly commissioned and sent to such places, on the supposition that, being unobstructed by the local authorities in the exercise of their consular functions, their services might be of use to their countrymen resorting thither; and the law, which recognized commercial agents of the United States in foreign ports, was considered as applying to such American consuls in the colonies as were not regularly acknowledged, and as conferring on

them the same official character and rights as were enjoyed by those agents.

Mr. Adams, Sec. of State, to Mr. Pitman, Nov. 8, 1821, 19 MS. Dom. Let. 184. See, also, Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, No. 31, Aug. 5, 1862, MS. Inst. Colombia, XVI. 42.

But the government might decline to receive a commercial agent "without offence." (J. Q. Adams's Memoirs, IV. 88.)

As to the refusal of Spain to receive a United States consul at Ponape, Caroline Islands, see For. Rel. 1892, 488.

As to the refusal of Germany to recognize foreign consular officers at Jaluit, Marshall Islands, see Mr. Bayard, Sec. of State, to Mr. Coleman, chargé, No. 381, Nov. 19, 1888, MS. Inst. Germany, XVIII. 166.

The practice in the United States, on notification of the appointment by a foreign consul-general of a vice-consul, or a consular agent, is for the President to require a formal certificate of appointment by the government represented by such vice-consul or agent, though it will be sufficient if it appear that the appointment was made by the consul-general in conformity with the laws of his country.

Mr. Evarts, Sec. of State, to Mr. Shishkin, Nov. 14, 1879, MS. Notes to Russia, VII. 290.

No person holding an office under the United States will be recognized as a consular officer of a foreign state.

Mr. Frelinghuysen, Sec. of State, to Mr. de Bille, March 5, March 23, April 25, 1883, and Mr. John Davis, Act. Sec. of State, to Mr. de Bille, May 17, 1883, MS. Notes to Denmark, VII. 136, 138, 146, 149.

See the Constitution of the United States, Art I., sec. 9, clause 8.

On the appointment by the United States of a consul-general, consul, or commercial agent, his commission is retained at the Department of State till he has taken the prescribed oath of office and his bond has been filed and approved. His commission is then sent to the proper diplomatic representative of the United States with instructions to apply for an exequatur. The consul may, however, when so directed, proceed to his post and enter on the discharge of his duties on receiving permission from the proper local authorities to act in his official capacity till his exequatur arrives. If there is no United States legation in the country to which he is sent, the commission of a principal consular officer is sent to him directly with instructions to transmit it, on arriving at his post, to the proper department of government and request an exequatur.

It is customary to transmit to the diplomatic representative the certificates of appointment of all subordinate consular officers of the United States, except those of consular clerks, interpreters, and marshals, for the purpose of obtaining recognition from the government of the country or permission from the local authorities to act.

It is the practice, in the colonies or dependencies of a country, to instruct the consul-general or other principal consular officer of the United States to apply to the proper colonial authorities for permission for a newly appointed consular officer to act provisionally, pending the result of the request for an exequatur.

Consular Regulations of the United States (1896), §§ 48–54.

3. Refusal or Revocation.

§ 700.

Revocation of exequatur.

If a consul be guilty of illegal or improper conduct, he is liable to have his exequator revoked, and, if his conduct is criminal, to be punished according to the laws; or he may be sent out of the country, at the option of the offended government.

Coppell *v.* Hall, 7 Wall. 542; Butler, At. Gen., 1835, 2 Op. 725.

The exequatur of Mr. Duplaine, French vice-consul at Boston, was revoked, in October, 1793, for the reason that he had, "with an armed force, opposed the course of the laws of the land . . . and rescued out of the hands of an officer of justice a vessel which he had arrested" by judicial process.

Mr. Jefferson, Sec. of State, to Mr. Duplaine, Oct. 3, 1793, Am. State Papers, For. Rel. I. 178.

President Washington's order revoking Duplaine's exequatur, with the subsequent correspondence, is given in Am. State Papers, For. Rel. I. 181 et seq.

Under Jay's treaty each government had the right of dismissing consuls for such reasons as it should itself think proper. But this did not preclude a dismissal based on special reasons of policy to be specially assigned. (1 J. Q. Adams's Memoirs, 157.)

"The President of the United States requests the Secretary of State to give directions for preparing letters to the consul-general and all the other consuls and vice-consuls of the French Republic throughout the United States, revoking their exequaturs, and a proclamation announcing such revocation to the public; the proclamation to be published, and the letters expedited, as soon as the law shall be passed declaring the treaties and convention no longer obligatory."

President Adams to Mr. Pickering, Sec. of State, July 7, 1798, 8 John Adams's Works, 576.

By a proclamation issued Jan. 4, 1850, President Taylor announced that he had revoked the exequatur granted to Señor Carlos de España, bearing date Oct. 29, 1846, and recognizing him as Spanish consul at New Orleans. (Richardson's Messages, V. 50.)

The Portuguese consul-general at New York having declined to appear as a witness in the prosecution of certain persons charged with fitting out vessels in the United States for engaging in the African slave trade, the Department of State complained to the Portuguese minister at Washington. It seems that the consul-general based his refusal upon a claim that he was privileged from giving testimony. The Department of State took the view that he was not so privileged; but maintained that, even if he was, his use of his privilege for the purpose of obstructing the administration of justice and of shielding from punishment persons charged with an infamous crime would render his continuance in the office of consul inexpedient and the revocation of his exequatur proper. Such conduct on the part of a consul of the United States would, said the Department, "most certainly insure his removal as soon as it was made known to the President."

Mr. Marcy, Sec. of State, to Commander Figanière, Portuguese chargé d'affaires, Feb. 19, 1855, MS. Notes to Portugal, VI. 143. See, also, same to same, March 27, 1855, id. 145.

The Spanish consul at New York having insisted upon "unlawful, unnecessary and unfriendly conditions for his certificate of bills of health for vessels clearing for New Orleans and Havana," and the Spanish government having taken no measures to correct the inconvenience, Mr. Seward stated that if the consul should persist in his course he should deem it to be his duty "to advise the President of the United States to withdraw his exequatur." (Mr. Seward, Sec of State, to Señor Goni, Dec. 16, 1868, MS. Notes to Spanish Leg. VIII. 234.)

Case of Mr. Bunch.

In August, 1861, a Mr. Mure, of Charleston, South Carolina, was arrested at New York when about to embark for England, and was sent to Fort Lafayette on a charge of being a bearer of despatches from the Confederate authorities at Richmond. Among other things in his possession, there was found a sealed bag for the British foreign office bearing labels signed and sealed by Mr. Robert Bunch, British consul at Charleston, and among the letters found on Mr. Mure's person was one in which it was stated that "Mr. B," meaning Mr. Bunch, had communicated to the writer "on oath of secrecy," that the "first step" toward recognition of the Confederacy by Great Britain had been taken, in that he, Mr. Bunch, and the French consul at Charleston, had sent a gentleman to Richmond to ask President Davis to adhere to the Declaration of Paris. August 17, 1861, Mr. Seward instructed Mr. Adams to submit this paper to the British government and ask that Mr. Bunch be removed and that another person be appointed to fill his place who would not pervert his functions to aid hostilities against the United States. Mr. Adams presented the matter to Earl Russell on the 3rd of September. Earl

Russell on the 9th of September replied that, in pursuance of an agreement between the British and French governments, Mr. Bunch was instructed to communicate to the Confederate authorities the desire of those governments that the 2nd, 3rd, and 4th articles of the Declaration of Paris should be observed by the Confederate States in the prosecution of hostilities, the commerce of Great Britain and France being deeply interested in the maintenance of those articles; that Mr. Bunch, in what he had done in that matter, had acted in obedience to his instructions; and that the British government could not accept as a reason for removing him a statement, in a letter from someone not named, that the "first step" toward the recognition of the Confederacy by Great Britain had been taken. Mr. Seward, writing on October 23, 1861, said that, so far as Mr. Bunch's proceedings were covered by the British government's avowal of responsibility, the matter was to be settled directly between the two governments; but that the United States could not admit that Mr. Bunch, while exercising consular privileges with the consent of the United States, could carry on communication with insurgents in arms against the Federal government; that the United States must revoke Mr. Bunch's exequatur, since he had not only been a bearer of communications between the insurgents and a foreign government, in violation of the laws of the United States, but had also abused the confidence of the two governments by reporting that the first step had been taken toward the recognition by Great Britain of the sovereignty of the Confederate States, and also because his conduct had all along "been that, not of a friend to this government, or even of a neutral, but of a partisan of faction and disunion." The exequatur of Mr. Bunch had, added Mr. Seward, been withdrawn because his services as a consul were "not agreeable to this government," and the consular privileges taken from him would be allowed to any successor against whom no grave "personal objections" should exist. Mr. Seward, in saying that Mr. Bunch had violated a law of the United States, alluded to the so-called Logan Act of 1798, which forbids any person, not specially appointed or duly authorized by the President, whether a "citizen or denizen," from counselling or aiding in any political correspondence with the government of any foreign state with an intent to influence the measures of such government in relation to disputes with the United States or to defeat the measures of the latter. Earl Russell, in a note to Mr. Adams of November 26, 1861, intimated an opinion that the act in question was inapplicable to the case of Mr. Bunch, and also denied the charge that Mr. Bunch had acted as a partisan of faction and disunion; but he did not dispute the President's naked right to withdraw Mr. Bunch's exequatur.

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 64, Aug. 17, 1861, Dip. Cor. 1861, 117; Mr. Adams to Earl Russell, Sept. 3, 1861,

id. 136; Earl Russell to Mr. Adams, Sept. 9, 1861, id. 140; Mr. Seward to Mr. Adams, No. 109, Oct. 23, 1861, id. 148; Earl Russell to Mr. Adams, Nov. 26, 1861, Dip. Cor. 1862, 7.

"Mr. Bunch continued to reside at Charleston." (Bernard, The Neutrality of Great Britain during the American Civil War, 186.) This statement by Bernard, of course, refers to the fact that Charleston continued, for a long while after the revocation of Mr. Bunch's exequatur, to be in the possession of the Confederate government.

It is a curious circumstance that in 1875 Mr. Bunch, being then British minister resident at Bogotá, acted as arbitrator in a case between the United States and Colombia. (Moore, Int. Arbitrations, II. 1427, et seq.)

As to the revocation of the exequaturs of various British consuls in 1856, for implication in the violation of the neutrality laws of the United States, see Crampton's case, supra, § 640.

Case of Mr. Rogers.

Mr. Seward, in an instruction to Mr. Kilpatrick, Chile, dated Feb. 19, 1866, informed him of the revocation on the 12th inst. of the exequator granted to Don Estaban Rogers on October 14, 1863, as Chilean consul ad interim at New York. Mr. Kilpatrick was instructed, in communicating the fact to the Chilean minister for foreign affairs, "to say that this measure was adopted for causes satisfactory to this government, and in defence of the dignity and honor of the United States," and to "add, at the same time, that should the Chilean government see fit to appoint a successor to Mr. Rogers, if entirely unobjectionable, the usual exequatur will be granted to him."

On February 15 Mr. Asta Buruaga, the Chilean minister at Washington, who had seen a notice of the revocation of the exequatur in the press, complained that he had not been advised either of the action taken or of the reasons for it, and intimated that it was inspired by false representations of Spanish agents as to the consul's violation of the neutrality laws.

Mr. Seward replied, February 16, that the action was taken "for causes satisfactory to this government, and in defense of the dignity and honor of the United States," and that Gen. Kilpatrick had been instructed to say to the Chilean government "that a new consul, if entirely unobjectionable, will be received by this government."

Mr. Asta Buruaga subsequently left at the Department of State, April 26, 1866, a communication on the subject, dated the 2nd of that month, from the Chilean minister of foreign affairs. In this communication Mr. Covarrubias said that Mr. Seward's "laconic explanation," which was called forth by the minister's "timely and just observations," did not disclose the reason for the revocation of the exequatur. When, in 1859, Chile "was compelled, for good and powerful reasons, to cancel the exequatur of Mr. Trevitt, consul of the United States at Valparaiso," she addressed without delay to

the United States minister explanations which were "spontaneous, clear, circumstantial, full, and satisfactory." She therefore looked with "double surprise and regret" upon the present case, in which she had "a right to expect at least that the international principle of reciprocity would have been consulted."

Mr. Seward, May 29, replied, in a note to Mr. Asta Buruaga, that the President was not convinced that an error had been committed in the withdrawal of the exequator or in the manner in which it was done. The consul's exequator was summarily revoked "under full conviction on the part of this government that the complaints of his violation of the neutrality laws were sustained by presumptive proof, and that to allow him to continue to exercise consular functions while pursuing such unlawful practices would involve a necessity for explanations between the government of Chile and that of the United States, which could in no case improve the friendship existing between them, and might, perhaps, result in producing a rupture of relations which would be prejudicial to both, and to the cause of all the American republics." It was, however, "an occasion of much regret" that a commercial agent of Chile "should have proved himself unworthy of the confidence reposed in him by the friendly government of the United States."

Dip. Cor. 1866, II. 375, 419, 420, 425, 428.

"By receiving consular representatives from a foreign country the United States come under no obligation of law or courtesy to allow the persons so received to retain and exercise consular functions, when, for any reason, those persons become unacceptable to this government, nor does this government come, under those circumstances, under an obligation to submit its proceedings, in revoking an exequatur, to revision by the government of a friendly nation whose commission the consul bore when the exequatur was revoked."

Mr. Seward, Sec. of State, to Baron de Wetterstedt, April 23, 1866, MS. Notes to Sweden, VI. 174.

Janssen's case.

In 1866 Mr. Janssen, who was consul of Oldenburg at New York, was summoned to be examined as a witness in a suit pending in the supreme court of the State against himself and certain other persons, as members of a commercial partnership. By Article IX. of the treaty between the United States and Hanover of 1846, to which Oldenburg had adhered, it was expressly provided that if consuls should carry on trade they should be "subjected to the same laws and usages to which private individuals of their nation are subjected in the same place;" nor did the treaty exempt consuls from being summoned to testify. When sued, Mr. Janssen caused an appearance to be entered for himself, and made no

objection to the jurisdiction of the court, either on general grounds or on the ground that he was entitled to be proceeded against only in the Federal courts. When he was summoned to testify, however, his counsel disclosed to the court the fact of his consular character. The court then suggested that the proper course under the circumstances would be to dismiss the plaintiff's action on the ground that it should have been brought in the Federal courts, and such a motion was made and the action was dismissed. On December 26, 1866, President Johnson issued a proclamation revoking Mr. Janssen's exequatur on the ground of his "having refused to appear in the supreme court of the State of New York to answer in a suit there pending against himself and others on the plea that he is a consular officer of Oldenburg, thus seeking to use his official position to defeat the ends of justice." On the strength of the various decisions to the effect that the consul's privilege from suit in the State courts was official and could not be waived by him, an application was made by counsel for Mr. Janssen for the withdrawal of the proclamation. This question was referred to Mr. E. Peshine Smith, examiner of claims of the Department of State, who advised that the proclamation be not recalled. Mr. Smith said that the words "refused to appear to answer," in the proclamation, were descriptive of the refusal to appear as a witness as well as of a refusal to appear as a party; that, if Mr. Janssen had chosen to decline to appear as a party in a State court, no offense could have been taken; that the real offense imputed to him was his refusal to appear and answer as a witness; that it was in the proceedings in relation to his summons as a witness that his consular position was disclosed, and that it was really in consequence of this that the proceeding was dismissed. Mr. Smith further said: "This government instructs its consular officers, even where, as in France, there is a treaty stipulation, that they shall not be compelled to appear as witnesses before the courts; that it is nevertheless their duty, on invitation, to appear and give their testimony unless necessarily prevented; that they have no right on account of their official position, or disinclination, or personal inconveniences, to refuse compliance with such invitation, and that a refusal without good cause therefor will be regarded as an act of disrespect toward the government within whose jurisdiction the consul resides, and as a sufficient reason for his removal. (Consular Manual, sections 639 and 641.) The United States expect from the consular officers of foreign powers the same respect for the courts, and the same readiness to contribute their testimony when invoked in the administration of justice, which we enjoin upon our own officers. Especially is this expected from consuls engaged in commerce, as was Mr. Janssen. The fact that Mr. Janssen was himself a defendant in the action in no way diminished his obligation to appear as a witness. On the contrary, his voluntary

appearance as a party, when he might have declined to appear, might well be regarded as a formal intimation of his willingness to do what anyone else would be bound to do in similar circumstances, and what he would not be permitted to refuse in a suit against any other person. I think, therefore, the revocation of Mr. Janssen's exequatur was rightful and ought not to be annulled."

Report of Mr. Seward, Sec. of State, to the President, March 28, 1867, accompanying the message of President Johnson to the Senate of March 28, 1867, S. Ex. Doc. No. 1, special session of the Senate, 6, 36, 38.

That a consul of Hanover engaged in trade at San Francisco is not entitled to exemption from testifying in a San Francisco court, see Mr. Seward, Sec. of State, to Judge Hoffman, July 22, 1862, 57 MS. Dom. Let. 509.

Usher's case.

The Paraguayan government canceled its recognition of Mr. Usher, consular agent of the United States at Asuncion, on the ground that he had taken part in political differences in the country, and had used his abode or place of business at Villa Rica as an asylum for persons hostile to the government, and had hoisted the flag of the United States over the building as an emblem of his authority. The Department of State said that if Mr. Usher was guilty of the things charged, the action of the Paraguayan government could not be complained of; but that he denied the truth of the charges. The Department of state, however, did not undertake to determine this question of fact, but based its decision on other grounds. It appeared that Mr. Usher was appointed as consular agent at Asuncion and was so recognized by the Paraguayan government. His right, therefore, to display the flag of the United States, if such a right existed, was limited to Asuncion, and did not accompany him to other parts of Paraguay. By assuming to exercise it at the remote point of Villa Rica, especially in the state of affairs then existing, he plainly went beyond the bounds of his authority, and his action in "exercising an important political attribute of that character" there was not justified, and the United States could not "find fault with the Paraguayan government at its correcting his mistake by canceling his recognition as consular agent at Asuncion."

Mr. Fish, Sec. of State, to Mr. Stevens, June 23, 1873, MS. Inst. Paraguay, I. 163.

The exequatur of the Pontifical consul at New York appointed prior to 1871 will not be canceled on the sole ground of the absorption of the Pope's temporal power in that of Italy.

Mr. Fish, Sec. of State, to Baron Blanc, July 18, 1876, MS. Notes to Italy, VII. 306.

The action of a foreign consul, in assuming to decide the question of the guilt or innocence of one of his countrymen who was charged with being a fugitive from justice, and in extorting from him the alleged proceeds of his criminality by groundless threats of criminal prosecutions, is a ground for invoking the consul's exequatur.

Mr. Frelinghuysen, Sec. of State, to Mr. de Bille, Danish min., April 2 and April 14, 1883, MS. Notes to Denmark, VII. 141, 143.

Braida's case.

"I have to acknowledge the receipt of your dispatch dated May 28 last, in which you recite a conversation had by you on the 21st of May with the President of Nicaragua relative to the restoration of Mr. Sigmund C. Braida to his office as consul of the United States at San Juan del Norte, in the conduct of which he was suspended some weeks ago in consequence of the withdrawal of his exequatur by the Nicaraguan government.

"The President informed you that he had temporarily restored Mr. Braida's exequatur; but you replied that at the time of Mr. Braida's 'removal from office' you had 'appointed' Dr. Henry De Soto consul in his stead, that the Nicaraguan government had recognized Dr. De Soto as such consul, and that Mr. Braida could not be restored to the office without first procuring Dr. De Soto's resignation, which step you did not regard as advisable until and unless Mr. Braida's permanent restoration should be assented to.

"The withdrawal of Mr. Braida's exequatur did not operate as a removal from office, but only as a suspension of his authority to perform the duties thereof. No vacancy was thereby created which required filling by the appointment of another person; and, furthermore, a minister has no authority to appoint a consul. The President of the United States alone is authorized to appoint a consul, and then by and with the advice and consent of the Senate. Your authority extended only to the temporary installation of an unofficial person to preserve the consular archives and to perform such duties as in the emergency he might lawfully undertake without authorization according to law. Your action in designating Dr. De Soto to act in Mr. Braida's stead, and in obtaining local permission for him so to act, was in legal effect nothing more than appointment of a custodian of the consulate and archives during the suspension of the regularly appointed officer. The restoration of Mr. Braida's exequatur, therefore, whether temporary or permanent, would operate as a rehabilitation of his suspended authority to perform consular functions and qualify him to supersede Mr. De Soto in the custody of the office, without the formality of a resignation or other express determination of Mr. De Soto's connection therewith.

"You are therefore instructed to assent to the President's offer to restore Mr. Braida's exequatur, and to permit him to resume charge of the office."

Mr. Uhl, Acting Sec. of State, to Mr. Baker, min. to Nicaragua, June 14, 1894, For. Rel. 1894, 479.

Señor Madriz, Nicaraguan minister of foreign affairs, admitted to Mr. Baker that Señor Lacayo, the Nicaraguan commissioner to the Mosquito Reserve, had inconsiderately recommended the withdrawal of Mr. Braida's exequatur, on suspicion that he had used his influence to prevent the abdication of the Mosquito Government. (For. Rel. 1894, App. I. 288.)

See, also, For. Rel. 1894, App. I. 298, 300 et seq.

As to the withdrawal and restoration of the exequatur of Mr. Bingham, British consul at San Juan del Norte, see id. 297.

July 29, 1897, the minister of foreign affairs of Guatemala informed the legation of the United States that the President of the Republic had on the preceding day ordered the withdrawal of the exequatur of Mr. Florentin Souza, United States consular agent at Champerico. The legation, being entirely without previous advices on the subject, asked to be acquainted with the reason for the government's action, but stated that another person would be placed in charge of the consular agency for the present. Mr. Souza disclaimed any knowledge as to the cause of the government's action. The course of the legation was approved; but with reference to its request for the reasons for the withdrawal of the exequatur, the Department of State said: "You were not strictly in your right in making this request. As a general rule of international intercourse, a government can withdraw a consular exequatur without assigning any reason. If it voluntarily assigns cause for removal, it invites discussion of the sufficiency thereof, and defensive evidence can be offered with a request for reconsideration. If it offers no reasons, it can not be compelled to give them. Your inquiry, therefore, should be treated as a request for information rather than as a demand for proof of good cause, and it is hoped the Guatemalan government will so construe it."

Mr. Sherman, Sec. of State, to Mr. Pringle, chargé, Aug. 18, 1897, For. Rel. 1897, 338.

A request having been made that the government of the United States revoke the exequatur of the Italian consul-general at New York, because of his refusal to certify to the official character of a notary public, the Department of State said: "In view of the fact that it has been held by the Attorney-General of the United States that an American consul is not required to certify to the official character and acts of a foreign notary public, the Department is

unable to comply with your request to have the Italian consul-general removed for refusing to 'legalize' your signature."

Mr. Hill, Assist. Sec. of State, to Mr. Canale, July 19, 1899, 238 MS. Dom. Let. 536.

Refusal of exequatur.

"Refusals to grant the exequatur are not uncommon. An English consul was refused by Russia, in the Caucasus, because it was alleged that he was hostile to the Russian government, and had expressed strong opinions about Russian movements in Asia. In our own history, without going further back, a consul recently appointed to Beirut was rejected by Turkey, because he was a clergyman and might be too much connected with the missionaries; another was rejected by Austria on account of his political opinions, he having previously been an Austrian subject."

Schuyler's Am. Diplomacy, 96.

The action of the Spanish government in refusing exequaturs to consuls is final.

Mr. Forsyth, Sec. of State, to Mr. Eaton, Oct. 12, 1839, MS. Inst. Spain, XIV. 99.

See, as to the refusal or revocation of exequaturs, Hall, Int. Law, 5th ed. 319–320.

"The right of the Nicaraguan government to refuse an exequatur to Mr. Priest [who had been appointed United States consul at San Juan del Sur] can not be denied. If, as is intimated, the only cause assigned for their hesitation was the publication of a private letter of that gentleman which was deemed objectionable, he may regret this as a misfortune, but, if he shall not ultimately receive the exequatur, we could not consider it as an injury of which it would be advisable to complain."

Mr. Marcy, Sec. of State, to Mr. Wheeler, min. to Nicaragua, May 11, 1855, MS. Inst Am. States, XV. 236.

The publication of articles written by a consul derogatory to the government by which he is recognized, though he requested that the articles be not published over his signature, justifies a demand for his recall. "His complaint lies against the paper for having sacrificed him; not against that government for having exercised its right in view of the publications in question." (Mr. Hay, Sec. of State, to Mr. Hawley, U. S. S., Aug. 3, 1900, 246 MS. Dom. Let. 676.)

"The exercise of the undoubted right of withholding an exequatur is . . . an extreme one. In this country it is rarely resorted to."

Mr. Blaine, Sec. of State, to Mr. Morgan, May 31, 1881, MS. Inst. Mex. XX. 267.

See, also, same to same, June 29, 1881, id. 318.

The refusal of an exequatur by a foreign government, when not involving an invasion of the prerogatives of the United States under the law of nations, will not be excepted to.

Mr. Bayard, Sec. of State, to Mr. Cox, Apr. 29, 1886, MS. Inst. Turkey, IV. 430.

See same to same, Mar. 24, 1886, id. 420.

The Brazilian government in 1894 declined to issue an exequatur to Reuben Cleary, as deputy consul-general of the United States at Rio de Janeiro, on the ground that the granting of the exequatur would import that the office of deputy consul-general was entitled to the prerogatives, privileges, and immunities of that of consul-general, to which it was merely auxiliary. At the same time the Brazilian government informally recognized Mr. Cleary's power to act. The Department of State replied that as the Brazilian government had recognized the appointment of Mr. Cleary as deputy consul-general, a formal exequatur was not necessary. It seems that the legation had been instructed merely to ask for Mr. Cleary's recognition in his official capacity.

Mr. Gresham, Sec. of State, to Mr. Thompson, min. to Brazil, Sept. 27, 1894, For. Rel. 1894, 83–85.

Conviction of a person by a United States military commission at Manila of publishing seditious newspaper articles in violation of the Articles of War will preclude the recognition of such person as the consular agent of a foreign power at that place.

Mr. Adee, Second Assist. Sec. of State, to Mr. Sickles, Dec. 26, 1899, MS. Inst. Spain, XXII. 658.

IV. *DISMISSAL OR RECALL.*

§ 701.

For cognate cases, see the preceding section.

The stipulation in a consular convention that consuls shall be received on both sides "could not mean to supersede reasonable objections to particular persons who might at the moment be obnoxious to the nation to which he was sent, or whose conduct might render him so at any time after. In fact, every foreign agent depends on the double will of the two governments, of that which sends him and of that which is to permit the exercise of his functions within their territory; and when either of these wills is refused or withdrawn, his authority to act within that territory becomes incomplete."

Mr. Jefferson, Sec. of State, to the minister plenipo. of France, Dec. 9, 1793, 5 MS. Dom. Let. 390; 4 Jefferson's Works, 90.

The executive directory of the French Republic alleged that Mr. Parish, United States consul at Hamburg, gave passports to Englishmen under the title of Anglo-Americans, for the purpose of introducing into the French territory emissaries of the British court, and on this ground asked that he might be recalled. The government of the United States discredited the charge, but the President, being desirous "of maintaining a course of action as impartial as his principles," and having for some time had it in contemplation to appoint an American citizen as consul at Hamburg, caused the French government to be informed that a change would be made as soon as a proper person could be found to succeed Mr. Parish, who was not a citizen of the United States. (Mr. Pickering, Sec. of State, to Mr. Adet, June 2, 1796, 9 MS. Dom. Let. 145.)

As to the case of the acting Chinese consul at Manila, in 1898, see Mr. Hay, Sec. of State, to Sec. of War, Dec. 29, 1898, 233 MS. Dom. Let. 476.

The participation, by a consul of the United States in China, in the opium trade, after notice forbidding such participation, is ground for his dismissal.

Mr. Legaré, Sec. of State, to Mr. Cushing, June 12, 1843, MS. Inst. China, I. 19.

The President, after commissioning a consul to whom the government to which the consul is sent objects, "will not revoke the commission unless he should be satisfied that the reasons for not receiving him were well founded and of a character to justify [that] government in refusing an exequatur."

Mr. Marcy, Sec. of State, to Mr. Daniel, Nov. 7, 1853, MS. Inst. Italy, I. 76.

As to refusal of exequatur on grounds personal to consul, see Mr. Seward, Sec. of State, to Mr. Kirk, Apr. 27, 1864, MS. Inst. Argentine Rep. XV. 193.

It appearing that the Spanish consul at New York was in the habit of viséing passports which had already been used abroad, or which had been issued more than a year previously, after he was informed that the laws and regulations of the United States required passports to be renewed at or before the expiration of a year, for which renewal a tax of five dollars was collected, the Department of State, observing that a consul who persisted in such conduct after being requested to discontinue it manifested an unfriendly feeling and forfeited his claim to be recognized in an official capacity, asked that the consul in question be recalled and another sent in his place.

Mr. Fish, Sec. of State, to Señor Lopez Roberts, Spanish min., April 29, 1870, MS. Notes to Spanish Leg. VIII. 384.

Vidal's case.

"In August last an outrage was committed and the terms of our treaty with Tripoli violated by an insult to our consul [Mr. Vidal] stationed at the port of Tripoli. As is the custom and right and duty of this government, prompt measures were taken for the protection of the consul and the maintenance of the honor and dignity of this government, and also to secure reparation and satisfaction for this insult. These measures were effectual and it is a source of satisfaction that an ample apology with the assurances against a recurrence of a similar indignity which was demanded by the United States, was accorded by the Tripolitan authorities. It is with much satisfaction that the President learns that the Porte promptly interposed the authority which it may exercise in Tripoli to the effect that reparation should be made; but this fact does not appear in the correspondence between the United States consul and the governor of Tripoli."

Mr. Fish, Sec. of State, to Mr. Maynard, min. to Turkey, Oct. 8, 1875, MS. Inst. Turkey, III. 140.

"I have the honor to acknowledge the receipt of your note of the 5th ultimo, referring to your previous notes of the 9th and 30th of December last, in which, by direction of the Ottoman government, you request the recall of Mr. Vidal, United States consul at Tripoli, on account of the course pursued by him on the occasion of the controversy between him and the governor-general in August last.

"You also state that 'on a recent occasion the consul of the United States at that place threatened, in a communication sent by him to the authorities, again to send for vessels of war by means of which he proposes to enforce inadmissible demands.' Mr. Vidal gives no intimation of such intention in any of his despatches to this Department. In the absence of any report from him on this matter this government can not undertake to express an opinion or make any decision in regard thereto. It is a cause of regret that Mr. Vidal, who is esteemed by this government as a valuable officer, has unfortunately lost the confidence of the authorities of the government where he has for several years been discharging his functions. The President is ever mindful of the sensibilities of those to whom he accredits public functionaries, and even though he may think that those agents of this government have lost the confidence of the Government to whom they are accredited, through misapprehension of the motives which have directed their conduct, he appreciates the duty of considering the wishes of a friendly power not to have retained a representative who has ceased to enjoy their kindly sentiments. In view, therefore, of the request of the Ottoman authorities for the recall of Mr. Vidal, and in consequence of the earnest desire of the United States to preserve and strengthen the cordial

and intimate relations which have so long existed between this government and the Porte, it has been determined to comply with the request, and this will be done as soon as his successor can be selected."

Mr. Fish, Sec. of State, to Aristarchi Bey, May 3, 1876, MS. Notes to Turkey, I. 151.

"This Department regrets the misunderstanding which took place last year, between Mr. Vidal, the consul of the United States at Tripoli, and the authorities there. The occasion of that misunderstanding was sudden and unexpected in its origin. The first information received in regard to it came by cable, and was necessarily meagre. The inference from it was, however, that the consul and his family were in danger from some popular tumult. The information received led to the visit there of the United States men-of-war to which you refer. It was not until months afterwards that written reports in regard to the affair reached this Department. It was then only that a proper opinion could be formed upon the subject. The Ottoman government ultimately thought proper to object to the course of Mr. Vidal on the occasion, and requested his recall. The request has been complied with. A successor to him has been appointed, and it is hoped that, through his agency, the good understanding with the proper authorities may be restored and preserved."

Mr. Fish, Sec. of State, to Aristarchi Bey, Sept. 18, 1876, MS. Notes to Turkey, I. 170. See, also, Nov. 16, 1876, id. 178.

See, also, Mr. Fish to Aristarchi Bey, June 10, 1876, MS. Notes to Turkey, I. 162.

V. *PRIVILEGES AND IMMUNITIES.*

1. Under International Law and Treaty.

§ 702.

"Consuls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties, and whatever special privileges may be conferred upon them by the local laws and usages, or by international compact, they are not entitled, by the general law of nations, to the peculiar immunities of ambassadors."

Wheaton's Int. Law, Dana's ed., § 249, p. 324.

See, also, Bradford, At. Gen., 1794, 1 Op. 41; Berrien, At. Gen., 1830, 2 Op. 378; Butler, At. Gen., 1835, 2 Op. 725; Cushing, At. Gen., 1854, 7 Op. 18; Gittings *v.* Crawford, Taney's Decis. 1.

"In the early Middle Ages, and before the establishment of more or less permanent legations, consuls appear to have enjoyed the right of exterritoriality, and the privileges and immunities now accorded to diplomatic representatives. In non-Christian and semi-civilized

countries these privileges have, to a large degree, been preserved to them, and they have the sanction of both treaty and usage. Upon the establishment of legations, however, the exemptions and immunities granted to consuls came to be regarded as a limitation of the territorial rights of the sovereign, and they have in the process of time been restricted to such as are necessarily incident to the consular office, or have been provided for by treaty, or are supported by long-established custom or the particular laws of the place. A consular officer in civilized countries now has, under public law, no acknowledged representative or diplomatic character as regards the country to which he is accredited. He has, however, a certain representative character as affecting the commercial interests of the country from which he receives his appointment; and there may be circumstances, as, for example, in the absence of a diplomatic representative, which, apart from usage, make it proper for him to address the local government upon subjects which relate to the duties and rights of his office, and which are usually dealt with through a legation."

Consular Regulations of the United States (1896), § 71, p. 27.

"Although consuls have no right to claim the privileges and immunities of diplomatic representatives, they are under the special protection of international law, and are regarded as the officers both of the state which appoints and the state which receives them. The extent of their authority is derived from their commissions and their exequaturs. It is believed that the granting of the latter instrument, without express restrictions, confers upon a consul all rights and privileges necessary to the performance of the duties of the consular office. Generally, a consul may claim for himself and his office not only such rights and privileges as have been conceded by treaty, but also such as have the sanction of custom and local laws, and have been enjoyed by his predecessors or by consuls of other nations, unless a formal notice has been given that they will not be extended to him."

Consular Regulations of the United States (1896), § 72, p. 27.

"The law of nations does not of itself extend to consuls at all. They are not of the diplomatic class of characters to which alone that law extends of right. Convention indeed may give it to them, and sometimes has done so; but in that case the convention can be produced. . . . Independently of [a special] law, consuls are to be considered as distinguished foreigners, dignified by a commission from their sovereign, and specially recommended by him to the respect of the nation with whom they reside. They are subject to the laws of the land indeed precisely as other foreigners are, a convention where there is one making a part of the laws of the land; but

if, at any time, their conduct should render it necessary to assert the authority of the laws over them, the rigor of those laws should be tempered by our respect for their sovereign, as far as the case will admit. This moderate and respectful treatment towards foreign consuls it is my duty to recommend, and press on our citizens, because I ask it for their good, towards our own consuls, from the people with whom they reside."

Mr. Jefferson, Sec. for For. Aff., to Mr. Newton, Sept. 8, 1791, 4 MS. Am. Let. 283.

"Consuls are not diplomatic characters, and have no immunities whatever against the laws of the land;" and hence they can be prosecuted for breach of neutrality laws.

Mr. Jefferson, Sec. of State, to Mr. Gore, Sept, 2, 1793, 23 MS. Dom. Let. 244.

See, to the same effect, circular of Mr. Van Buren, Sec. of State, May 5, 1830, 23 MS. Dom. Let. 339.

"Consuls are undoubtedly entitled to great respect as bearing the commissions of their sovereign; but their duties are of a commercial nature and their public character subaltern; neither their persons nor their domiciles have heretofore beeen protected as have those of ambassadors and other public ministers. Instances are not wanting in which some of them have been brought within the jurisdiction of our courts. It is not known that it has ever yet laid the foundation of any charge of a breach of privilege, or infringement of public law, on the part of any of the governments of Europe, whose commissions these consuls may respectively have borne."

Mr. Monroe, Sec. of State, to Mr. Harris, chargé d'affaires at St. Petersburg, July 31, 1816, MS. Inst. U. States Ministers, VIII. 89.

A foreign consul is liable to be punished to the same extent as other foreign residents for a criminal violation of the local law of the country in which he resides.

Mr. Clayton, Sec. of State, to Mr. Calderon de la Barca, Spanish min., Aug. 28, 1849, MS. Notes to Spain, VI. 187.

In 1879 an officer of the Mexican Government exacted a forced loan from various persons, including Macmanus and Sons, an American firm, of which Mr. Scott, the American consul at Chihuahua, was a member. The consular office, it appears, was used as a place of deposit for the funds of American citizens engaged in business in Chihuahua; and, when payment was demanded, Mr. Scott closed the doors. An officer later appeared with an additional force, when Mr. Scott, concluding that further resistance was useless, opened the

door, and the officer obtained the sum required. Even supposing, said Mr. Evarts, that the consul had been engaged in no other business than that of an official character, there was nothing in the treaty of 1831 which guaranteed to his place of business freedom from search. There was a distinct guarantee of the archives and papers of the consulate, but it was not alleged that these were disturbed. By a stipulation in the treaty the parties had agreed to enter into a special convention for defining the powers and immunities of consuls, but all attempts in that direction had proved abortive, so that no exemption of the offices of consuls from being entered by the authorities of the country could be claimed as a right, especially where a consular officer was a member of a mercantile firm and his place of business was the same as that of the firm.

Mr. Evarts, Sec. of State, to Mr. Foster, min. to Mexico, No. 725, Feb. 20, 1880, For. Rel. 1880, 734.

A consul may claim exemption from service on juries and in the militia.

Consular Regulations of the United States (1896), § 73, p. 28.
With reference to this and certain other privileges, it is said to be probable that "all these privileges could not be claimed for subordinate officers, especially for those who are citizens or subjects of the foreign state." (Ibid.)

Citizens of the United States who hold foreign consulates in the United States are not exempt from jury duty or service in the militia by the law of nations.

Cushing, At. Gen., 1856, 8 Op. 169.
Adopted in Lawrence's Wheaton (1863), 430.

During the war between the United States and Spain the Department of State, replying to an inquiry as to the status of Mr. José Costa, a Spanish subject, who held a commission and exequatur as consul for Uruguay at San Francisco, California, said: "The international rule, followed by this government, is that a foreign consul, being a citizen or subject of a state other than that which appoints him, is in all respects to be treated as such citizen or subject, and only as enjoying the official immunities or privileges stipulated for his consular office. Your inquiry as to Mr. Costa being required to register . . . is not clearly understood. No general requirement of registry of Spaniards within the territory of the United States has been made, but, if such formality should be required, Mr. Costa would unquestionably have to conform thereto."

Mr. Moore, Assist. Sec. of State, to Mr. Murguiondo, May 12, 1898, MS Notes to For. Consuls, IV. 414.

A "consul is not entitled, by virtue of his office, to be considered a diplomatic agent of his sovereign in the absence of an accredited minister, or chargé d'affaires of his country, and consequently can not justly claim the privileges usually accorded to diplomatic functionaries."

Mr. Forsyth, Sec. of State, to Mr. Hagerdorn, Bavarian consul at Philadelphia, Sept. 7, 1839, 30 MS. Dom. Let. 329.

Where a consul, by being appointed chargé d'affaires, acquires diplomatic privileges, he becomes so invested as chargé d'affaires, not as consul.

Cushing, At. Gen., 1855, 7 Op. 342.

The minister of the Netherlands, in announcing his departure on leave, stated that the business of the legation had, as in previous instances, been entrusted to the Dutch consul-general at New York; but that, as the consul-general was returning from Europe and might not arrive for several days, any communication from the legation "would be signed, for the minister," by the person provisionally in charge of the consulate-general. As the consul-general had not, on previous occasions of a similar kind, been recognized by the Department of State in a diplomatic capacity, but had been corresponded with as consul-general of the Netherlands, it was thought proper to say to the person provisionally in charge of the consulate, when he signed, "for the minister, the chargé d'affaires, a. i.," that it was assumed that the title of chargé d'affaires was employed with reference to his "ad interim direction of the affairs of the consulate."

Mr. Adee, Act. Sec. of State, to Mr. Bennebrock Gravenhorst, Sept. 24, 1898, MS. Notes to For. Consuls, IV. 424.

See supra, § 664.

A trading consul, in all that concerns his trade, is liable in the same way as a native merchant. The character of consul does not give any protection to that of merchant when they are united in the same person.

Coppell *v.* Hall, 7 Wall. 542.

"The privileges of a consul who engages in business in the country of his official residence are, under international law, more restricted, especially if he is a subject or citizen of the foreign state. If his exequatur has been granted without limitations, he may claim the privileges and exemptions that are necessary to the performance of the duties of his office; but in all that concerns his personal status or his status as a merchant it is doubtful whether he can claim any

rights or privileges not conceded to other subjects or citizens of the state. He should, however, claim the same privileges and immunities that are granted to other merchant consuls in the same country."

Consular Regulations of the United States (1896), § 74, p. 29.

By conventions with Belgium, Germany, Independent State of the Congo, Italy, Netherlands, Roumania, and Servia, consuls are exempt from arrest except for crime. By treaty with Turkey they are entitled to suitable distinction and necessary aid and protection. In Muscat they enjoyed the inviolability of a diplomatic officer. In Austria-Hungary and France a consul is to enjoy personal immunities; but in France, if he is a citizen of the country or owns property there, or is engaged in commerce, he can claim only the immunities granted to other citizens of the country who own property or to merchants. In Austria-Hungary and Roumania, if engaged in business, he can be detained only for commercial debts.

Consular Regulations of the United States (1896), § 81, p. 31.

In 1876 the dwelling of Mr. Bamberger, United States vice-consul at Genoa, was entered, and property there levied upon in satisfaction of a judgment against him. Mr. Spencer, the consul, was at the time at his post. By Article VI. of the consular convention between the United States and Italy of 1868, "consular offices and dwellings" were to be "at all times inviolable," and the local authorities were "not, under any pretext," to "invade them," nor to "examine or seize the papers there deposited." Although there was some difference between the English and Italian texts of the article, which might give rise to a question whether the immunity stipulated for consuls was to be enjoyed by a vice-consul when the latter was not charged with the consular functions, it was thought that the last sentence of Article VIII., which authorized the appointment of "vice-consuls and consular agents" and stipulated that they should enjoy, with certain specified exceptions, the privileges secured by the convention to "consular officers," was quite explicit and granted the immunity claimed.

Mr. Fish, Sec. of State, to Mr. Marsh, min. to Italy, No. 554, Dec. 6, 1876, MS. Inst. Italy, II. 6.

2. In Eastern Countries.

§ 703.

"In non-Christian countries the rights of exterritoriality have been largely preserved, and have generally been confirmed by treaties to consular officers. To a great degree they enjoy the immunities of

diplomatic representatives, together with certain prerogatives of jurisdiction, the right of worship, and, to some extent, the right of asylum. These immunities extend to exemption from both the civil and criminal jurisdiction of the country to which they are sent, and protect their households and the effects covered by the consular residence. Their personal property is exempt from taxation, though it may be otherwise with real estate or movables not connected with the consulate. Generally, they are exempt from all personal impositions that arise from the character or quality of a subject or citizen of the country."

Consular Regulations of the United States (1896), § 75, p. 29.

Such extraterritoriality as consuls enjoy in the Mohammedan states, for example, is due to the fact that these states are not admitted to a full community of international law with the nations of Christendom, and not to the consular office. The institution of consuls originated in the mere fact of differences in law and religion, at that period of modern Europe in which it was customary for distinct nationalities, coexisting under the same general political head, and even in the same city, to maintain each a distinct municipal government. Such municipal colonies, organized by the Latin Christians, and especially by those of the Italian Republics in the Levant, were administered, each by its *consuls*, or proper municipal magistrates, whose commercial relation to the business of their countrymen was a mere incident of their general municipal authority. The authorization of a consul to communicate directly with the government near which he resides does not endow him with the diplomatic privileges of a minister.

Cushing, At. Gen., 1855, 7 Op. 342.

"Your dispatch No. 61, of the 16th ultimo, relative to the question of precedence which has arisen among the representatives of foreign powers of Tangier, has been received. In reply I have to state that every nation may consult its own pleasure in regard to the grade of its diplomatic or other representative in a foreign country. That grade must be presumed to be measured by its sense of the importance of its relations with the power to which the representative may be accredited.

"Consuls have diplomatic functions in the Barbary States. The United States consul is accredited to the Emperor of Morocco. His predecessors were accredited in the same way, and the consuls at Tripoli, Tunis, and in Egypt are respectively accredited to the heads of the governments of those countries."

Mr. Seward, Sec. of State, to Mr. McMath, consul at Tangier, Dec. 30, 1868, Dip. Cor. 1868, II. 172.

In extreme cases, where the privileges of a consulate are invaded, the flag of the United States may be struck by the consul, and all friendly intercourse with the authorities of the residence suspended.

Mr. Webster, Sec. of State, to Mr. McCauley, April 20, 1852, MS. Inst. Barbary Powers, XIV. 132.

"According to the terms of the treaties confirmed by those of the exequaturs, granted by the Beys of Tunis to the consular officers in Tunis, the honors, privileges, and prerogatives they had a right to were the following: Right to put a flagstaff and flag on the consular house; right to have one or more janissaries appointed by the Bey; to be exempted from civil or criminal jurisdiction; to be exempted from custom-house duties upon personal effects for the consul and family; to have the right of refuge or inviolability of the consular house and official documents; right to the clause of the most favored nation; exemption from taxes upon the consular house. These privileges have lasted for centuries."

Mr. Chapelié, vice-consul at Tunis, to Mr. Uhl, Assist. Sec. of State, Feb. 12, 1895, For. Rel. 1895, I. 415.

With reference to the action taken by the consular body at Tunis, in regard to their having been invited collectively, through their dean, instead of individually, to attend a garden party given by the French resident, in his dual capacity as minister of the Bey, the Department of State said that, as the incident did not suggest any discrimination against the United States representative, there seemed to be no serious ground of complaint on the part of this government. (Mr. Adee, Act. Sec. of State, to Mr. Chapelié, No. 471, July 11, 1895, MS. Inst. France, XXIII. 129.)

In December, 1899, the consul at Smyrna sent his cavass to Magnesia, a place 30 miles distant, to recover certain merchandise which belonged to A. S. Avedikian, third dragoman of the consulate, and which had been sequestered by order of a Turkish court, without notice to the consul, in a building leased by Avedikian. The cavass proceeded to Magnesia, broke the judicial seals on the building, and entered into possession. Two days later some Turkish soldiers, acting under orders of the governor, entered the house and arrested him, took from him his arms, and sent him in custody to Smyrna, where after four hours' further detention he was released.

The United States legation at Constantinople protested against the arrest of the cavass and demanded the return of his arms, which was done. In reporting the incident, Mr. Griscom, chargé, said:

"In regard to the arrest of the cavass, I would beg to point out that the injury to the government of the United States is serious. The cavasses are privileged persons, free from arrest under the Turkish law, whose function is to insure the safety of the persons

and property of the official representatives of foreign powers in the Turkish Empire. If they may be arbitrarily arrested and imprisoned, their value ceases."

In a later report he said:

"In regard to the arrest of the cavass, I have had the honor already to submit to the Department the question of a demand for reparation. Although the prestige of our consulate at Smyrna has suffered and the cavass has been severely humiliated, yet I can not but feel that the offense received by the United States government is offset by the arbitrary action of the consul in breaking the seal of a Turkish court without first exhausting all diplomatic and administrative intervention. There is little doubt but that the incident could have been avoided had the consul referred the question to this legation at any time during the fifteen days that elapsed between the illegal placing of the sequester, December 10, and the breaking of the seals of the court, December 25. I would therefore respectfully suggest that the incident be dropped without further demands upon the Porte."

For. Rel. 1900, 924, 932.

3. Protection Due to Consular Officers.

§ 704.

"As in war the bearers of flags of truce are sacred, or else wars would be interminable, so in peace ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station."

President Fillmore, annual message, Dec. 2, 1851, Richardson's Messages, V. 118.

See, to the same effect, Mr. Webster, Sec. of State, to Señor Calderon de la Barca, Spanish min., Nov. 13, 1851, 6 Webster's Works, 507.

As a consul is not a public minister, a riot before his house by a tumultuous assembly, requiring him to give up certain persons supposed to be resident with him, is not an offense within that section of the act of April 30, 1790, which prescribes the punishment for any infraction of "the law of nations, by offering violence to the person of an ambasardor or other public minister." (Bradford, At. Gen., 1794, 1 Op. 41.)

Insults by a foreign government to a consul, or encroachments by it on his rights, will justify a demand that in addition to other redress "the flag of the United States shall be honored with a salute."

Mr. Seward, Sec. of State, to Mr. Harvey, Nov. 29, 1861, MS. Inst. Portugal, XIV. 221.

The search of the person of a foreign consul, his imprisonment, and the carrying off of his archives by the general in command of the United States Army in a captured city is a violation of the law of nations, for which the government of the United States considers itself bound to apologize and to give all other suitable redress.

Mr. Seward, Sec. of State, to Mr. Van Limburg, June 5, 1862; same to same, Aug. 20, 1862; Sept. 4, 1862: MS. Notes to Netherlands, VI. 195, 207, 214.

Dalton's Case.

With reference to the case of Mr. Dalton, a citizen of the United States, and United States consul at Ciudad Bolivar, Venezuela, who was reported to have been arrested and for three days imprisoned by order of President Guzman Blanco, the Department of State said: "Mr. Dalton belongs to a class of consuls authorized to transact business. If he does, he is for all purposes of such business subject to the same treatment as any other American resident engaged in trade in Venezuela. He is manifestly subject to no less favorable treatment, although he may have no specific personal exemptions or privileges by reason of his office. But if he, a consul, has been subjected to treatment to which no American citizen under the treaty can be, that is, to imprisonment in virtue of an executive order without trial or opportunity for legal defense, then the fact of his being known as the representative of a friendly power might be deemed to aggravate the injury committed."

Mr. Frelinghuysen, Sec. of State, to Mr. Baker, min. to Venezuela, May 12, 1884, For. Rel. 1884, 585.

It afterwards appeared that Mr. Dalton, being ill at the time, was not arrested, but that his son was taken and imprisoned, apparently as a "substitute." A question was raised as to the American citizenship of Dalton, jr. (Id. 586–597.)

German Consul at Cincinnati.

Complaint having been made by the German government that the German imperial consul at Cincinnati, Ohio, was interfered with in the discharge of his duties by a certain person who used misleading advertisements and displayed the German flag before his office so as to create the impression that he was a German consul and thereby obtain money from misguided German subjects, the matter was referred to the Attorney-General of the United States, who expressed the opinion that the case did not come within the provisions of section 4062, Revised Statutes, and that it would be necessary to resort to the local law for a remedy. The matter was then brought to the attention of the governor of Ohio, with a reference to the consular convention between the United States and the German Empire of December 11, 1871, which provides that consular officers "shall not in any event

be interfered with in the exercise of their official functions, further than is indispensable for the administration of the laws of the country." The difficulty appears to have been amicably arranged by the local authorities, the person against whom the complaint was made having disclaimed any intention to create erroneous impressions and having abstained from the further use of the signs in question.

Mr. Bayard, Sec. of State, to Gov. Foraker, May 18, 1887, 164 MS. Dom. Let. 197; same to same, June 27, 1887, id. 492; Mr. Bayard, Sec. of State, to Baron von Zedtwitz, Oct. 1, 1887, MS. Notes to Germany, X. 524.

Riot at Mollendo.

March 25, 1893, a mob at Mollendo, Peru, excited by anti-Masonic feeling, attacked the Masonic hall, at which a funeral was at the time being held, and, after driving out the participants, sacked and burned the building. In the attack on the hall, the office of Mr. Meier, the acting consul-general of the United States, which was near by, incidentally suffered, and Mr. Meier himself was wounded in the leg with a bullet. It was stated that there was a squad of police present, but that it looked on without interfering with the acts of the mob. The minister of the United States at Lima, in response to his telegraphic report of the occurrence, was, on April 6, 1893, instructed to protest against the lack of protection to the consul on the part of the authorities, and, in the event of the circumstances being found to be as he had reported, to ask that reparation be made for the injury inflicted on the person and property of Mr. Meier; that regret be expressed, and that the offenders be promptly prosecuted. Before this instruction was received the Peruvian government, acting upon a presentation of the circumstances by the American minister, had voluntarily expressed its regret, promised reparation, and stated that measures had been taken to punish the guilty. The apparent inaction or connivance of the local police was explained on the ground that the smallness of their number rendered them powerless to contend against the crowd; but the subprefect was suspended from his duties and submitted to trial in order that the question of his conduct and responsibility might be properly determined. In view of this voluntary action of the Peruvian government a formal protest was not presented. In June, 1893, the case was finally settled by Peru's paying the sum of 2,000 soles, in full discharge of all claims of Mr. Meier for damages resulting from injuries to his person and his property.

Mr. Gresham, Sec. of State, to Mr. Hicks, min. to Peru, tel. April 6, 1893, For. Rel. 1893, 510.

See, also, For Rel. 1893, 511–514, 515–524.

Case of British "proconsul."

In 1895 the British Government demanded an indemnity for the alleged arbitrary arrest and expulsion by Nicaragua of certain British subjects from the Mosquito Reserve. Among the persons so arrested and expelled was Mr. Hatch, British "proconsul," or acting vice-consul, at Bluefields. In regard to Mr. Hatch the British Government said: "Although Mr. Hatch was not strictly speaking an officer in Her Majesty's consular service, it might have been expected that the Nicaraguan authorities in the reserve, who carried on a correspondence with him and made use of his services in a consular capacity whenever and so long as it suited their convenience to do so, would, as a matter of ordinary courtesy, have communicated with Her Majesty's Government before resorting to so extreme a measure as the arrest of that gentleman."

Lord Kimberley, For. Sec., to Dr. Barrios, Nicaraguan min. at London, Feb. 26, 1895, For. Rel. 1895, II. 1025. Compliance with the demand for indemnity in its entirety, in respect of all the British subjects involved, was compelled by reprisals. (Id. 1029–1034.)

Spanish consul at Jacksonville.

In 1896 the Spanish minister at Washington represented that Cubans and their associates at Jacksonville, Florida, were meditating an attack on the Spanish consul, and that attacks had actually been made upon confidential agents employed by the legation and acting under orders of the consul. These representations were brought to the attention of the governor of Florida, with the expression of the conviction that the authorities of the State would take all proper and lawful steps to "protect the consular representatives of a friendly nation and the agents employed by him in the furtherance of the legitimate purposes of his mission."

Mr. Olney, Sec. of State, to gov. of Florida, Oct. 6, 1896, 213 MS. Dom. Let. 113.

See, to the same effect, Mr. Olney, Sec. of State, to the gov. of Georgia, Oct. 6, 1896, 213 MS. Dom. Let. 116.

See, also, Mr. Moore, Act. Sec. of State, to the At. Gen., July 21, 1890, 178 MS. Dom. Let. 399.

Upon a report that the consul of the United States at Ciudad Bolivar, Venezuela, had been attacked and wounded, and that American interests generally were in jeopardy, a man-of-war was ordered to proceed to La Guayra without delay. (Mr. Adee, Act. Sec. of State, to Mr. Scruggs, min. to Venezuela, tel., Aug. 29, 1892, For. Rel. 1892, 618.)

Kellett's case.

An alleged assault committed upon the United States vice-consul-general, Mr. E. V. Kellett, at Chiengmai, Siam, November, 1896, was arbitrated by Mr. Barrett, United States minister at Bangkok, and Mr. Pierre Orts, assistant legal adviser to the Siamese government. It appeared that a difli-

culty occurred between the vice-consul-general and Siamese soldiers acting as police in regard to the arrest of a clerk of the vice-consul-general. It was found that the soldier police transcended their orders and acted improperly, although their conduct was to a certain extent excused by the excitement resulting from the unusual and imprudent steps taken by the vice-consul-general in the matter. It was agreed that the officer in command of the soldier police should be reprimanded and reduced in rank and suspended without pay for a year, besides not being allowed to return to Chiengmai within five years; that a punishment somewhat similar should be visited on the officer next in command and on three ordinary soldiers; that the Siamese government should express its regret, and that a copy of the decision should be officially published. It seems that some of the "recommendations" of the arbitrators were not carried into effect, and nearly two years afterwards it was recommended by the United States legation that the case should be permitted to rest where it was. The Department of State, although under the impression that the award of the arbitrators had long since been carried into effect, concurred in this recommendation.

For. Rel. 1899, 674–675.

Cases in Venezuela.

"The several statements found in the correspondence . . . have been read with surprise and regret, because of the apparent indifference of the local authorities at La Guayra, in view of the action of the Federal government of Venezuela, based upon your representations, to afford Mr. Goldschmidt that measure of personal protection which is his due. It is difficult to comprehend how such acts as those complained of are permitted. The threatening of the life of a peaceable citizen, and that man a consular representative of a friendly power, can not be treated with indifference or lightly pushed aside, and the government of the United States will hold that of Venezuela to a strict accountability for any harm or insult that may be wantonly inflicted on Mr. Goldschmidt.

"You may say as much to the minister for foreign affairs, adding that the conduct of the local authorities in this case has been most disappointing, and that the treatment of a consular officer in the manner disclosed by Mr. Goldschmidt in his complaint is not calculated to inspire that respect for law and order or that regard for the individual rights or personal liberties of peaceable, law-abiding citizens which they have a right to demand, and which the government of the United States thinks justly and properly due to one of its citizens who is, at the same time, the official representative accredited to Venezuela.

"It may be true that Mr. Goldschmidt was not entirely blameless or sufficiently patient under the circumstances, but even so, this fact

can not alter the circumstance that his personal liberties and rights are clearly recognized under international law, and that any complaint that they are abridged or of insult offered should be treated on its merit. This is all that is asked, and is all that the government of the United States expects or demands."

Mr. Hay, Sec. of State, to Mr. Loomis, min. to Venezuela, June 7, 1900, For. Rel. 1900, 952.

As stated by Mr. Goldschmidt, he was returning with his wife, on the evening of May 4, 1900, to his residence in La Guayra, when the street, which was very narrow, was blocked by four young men, as he thought, intentionally. He made his way by, when one of them accosted him and loudly charged him with having pushed a boy. After a brief verbal altercation, Mr. Goldschmidt started to brush his interlocutor aside, when the latter made a motion toward his hips as if to draw a revolver. Mr. Goldschmidt then dealt him a blow with his cane and walked on, supposing the incident to be closed. Two days later, however, an elder brother of the interlocutor, whose name was Golding, published a letter, addressed to the prefect of the district, denouncing the act of Mr. Goldschmidt as "cowardly and unjust," declaring his intention to carry the matter "to the farthest limit," and demanding the execution of justice. On the 9th of May Mr. Goldschmidt, while walking with his wife and two children, was stopped by the elder Golding, who drew a revolver and threatened to shoot him, but was seized by a bystander. Mr. Goldschmidt immediately laid the affair before the prefect of police and afterward before the jefe civil, both of whom promised to have Golding arrested and sent away, but, as this apparently was not done, he reported it to the legation at Caracas. On the representations of Mr. Loomis, United States minister, President Castro instructed the civil and military commander at La Guayra to "carry out the regulations of the police code in case of a repetition of the act," and to investigate what had already been done. Mr. Loomis, however, asked that the authorities be instructed "to take immediate steps to prevent a repetition of the attack upon Mr. Goldschmidt," if this had not already been done. In reply, he was advised that, according to official reports from La Guayra, there was a personal quarrel between Mr. Goldschmidt and Golding, with fault on both sides; that Golding had "suffered a six days' arrest, double the regular police punishment," and had been released in order that he might work on a neighboring plantation; and that the consul had been advised as to what would be necessary to institute a prosecution against him. Mr. Goldschmidt denied the accuracy of this version, declaring that he had had no "personal quarrel" with the elder Golding, nor had ever met him till assailed by him with the revolver. "I think," said Mr. Loomis, in reporting the case to his government, "under a strict interpretation of the penal code, all has been done by the authorities that may be done, unless the consul desires to enter upon a regular prosecution. What seems hard and inconsistent to the consul, doubtless, is that for an alleged political offense men are imprisoned indefinitely here, while one who threatens his life, in the presence of his family, suffers no more than six days of detention. The consul also insists that the 'would-be' assailant was not in prison six days." (For. Rel. 1900, 944–951.)

It should be observed that Mr. Loomis had previously reported the two following incidents:

Mr. Goldschmidt, Jan. 1, 1900, was walking with his wife to his residence when a soldier policeman, standing near, fired his carbine, wounding Mrs. Goldschmidt, though not seriously. Next day Mr. Goldschmidt called on the jefe civil, who though he expressed no regrets stated that the soldier was in prison, pending an investigation as to whether the firing was intentional or accidental, and would be punished accordingly.

On the evening of Jan. 18, 1900, Mr. Goldschmidt when returning to his home with his wife was stopped, in front of the house of the prefect of police, by a soldier or policeman, who stated that he had orders to search all persons for arms. Mr. Goldschmidt protested his official character, but the officer tore open his coat and searched him. The jefe civil, to whom Mr. Goldschmidt complained by telephone that "these annoyances were getting rather too frequent," replied that it was "barbaridad," and that the offender should be punished; and next morning the "comisario mayor" called at Mr. Goldschmidt's house and made a renewed expression of the jefe civil's regrets and promise of punishment. During the afternoon Mr. Goldschmidt saw the policeman in the street, "carrying a gun, as usual, evidently on duty." (For. Rel. 1900, 943–944.)

On the night of Oct. 22, 1900, the legation of the United States at Caracas received a telegram from Mr. Baiz, a Danish subject, but United States consular agent at Barcelona, Venezuela, stating that he was in prison "incomunicado" by order from Caracas, and that he knew nothing of the cause of his arrest. The next morning Mr. Russell, secretary of the legation, on inquiring at the foreign office, was informed that Mr. Baiz had been arrested by mistake, and had been released with due apologies. Mr. Baiz, however, stated that he was released without any explanation; and a telegram of inquiry sent to him by Mr. Russell on the 24th of October was not received by him.

Mr. Loomis, United States minister at Caracas, was, on Jan. 16, 1901, instructed to present the case to the foreign office, and to call attention to the interception of the telegram. His instructions also said: "This is not the first occasion upon which Mr. Baiz has been subjected to the arbitrary action of the Venezuelan local military leaders. Although he is not a citizen of the United States, this government will protect him, while acting as its consular representative, against the arbitrary interference of Venezuelan officials. You will insist that adequate explanations and apologies be made to the consular agent, and that proper measures be taken to prevent the recurrence of such acts."[a]

Mr. Loomis, on Jan. 30, 1901, presented the matter in conformity with his instructions, and in so doing stated that, as he was informed,

[a] Mr. Hay, Sec. of State, to Mr. Loomis, min. to Venezuela, Jan 16, 1901, For. Rel. 1901, 534.

a telegraphic order was received by the authorities at Barcelona from the minister of the interior for the arrest of a person named Baiz, who was at a certain time treasurer of the State; and that the authorities, although they knew that Mr. Baiz, the consular agent, was a peaceful merchant, who had never had any connection with the government, arrested him and held him in confinement till the next morning, when they released him with the remark that his arrest and imprisonment were "a mistake." [a]

Mr. Blanco, minister of foreign affairs, replied, Feb. 16, 1901, that reports on the incident had been requested, but that Mr. Baiz ought to be satisfied with the excuses or explanations already made; and that, as a consular agent was subject to the civil jurisdiction in what related to his person and property, he could "look for no other action to be taken in his case than would be taken in similar cases with respect to any person whatever entitled to the guaranty and protection given by the laws of the country." [b]

Subsequently, however, Gen. Rodriguez, provisional president of the State of Barcelona, addressed a letter to Mr. Baiz, on April 16, 1901, as follows: "Mr. Consul: I am pleased to tell you that your arrest some months ago, and which I regret exceedingly, was due to a mistake, as I personally had the honor to tell you at the time, and as there is nothing that can lessen the esteem in which Mr. Baiz is held by the authorities, the government takes especial pains to maintain the most cordial relations with the consulate out of regard for the person in charge, and also for the fact that he is the consular agent of the United States, a nation always friendly to Venezuela." [c]

Mr. Baiz replied in a similar vein, and the incident of the arrest and imprisonment was treated as terminated; but a further inquiry was made as to the interception of Mr. Russell's official telegram.[d] This was explained to have been due to the interruption of the service first by storms and then by the earthquake of October 29; and the explanation was accepted as satisfactory.[e]

Case in Santo Domingo.

In January, 1904, the German consul at Santo Domingo City requested the American legation, in the absence of a German naval vessel, to request the commander of the U. S. S. *Columbia* to furnish a guard to conduct to the city the German vice-consul who, with his family,

[a] Mr. Loomis, U. S. min., to Mr. Blanco, min. of for. aff., Jan. 30, 1901, For. Rel. 1901, 535.

[b] Mr. Blanco, min. of for. aff., to Mr. Loomis, min. to Venezuela, Feb. 16, 1901, For. Rel. 1901, 536. It appeared that Mr. Baiz had been required to pay various forced loans to the local authorities. (Ibid.)

[c] For. Rel. 1901, 538.

[d] Mr. Hill, Acting Sec. of State, to Mr. Russell, chargé at Caracas, May 4, 1901, For. Rel. 1901, 539.

[e] Mr. Hay, Sec. of State, to Mr. Russell, chargé at Caracas, July 12, 1901, For. Rel. 1901, 541.

resided about two miles away, and who was ordered to remove into the city within forty-eight hours or to suffer the consequences, his situation at the time being precarious because of a civil conflict which was going on. The legation communicated the request to the commander of the *Columbia*, who at once sent forty marines to the legation, but before they proceeded on their errand the American diplomatic representative personally advised the Dominican government of what was proposed to be done. The Dominican officials expressed their concurrence, as the government was powerless to render the aid itself, and orders were given to the commandants of the several forts that there should be no firing while the guard was outside the walls. When the marines left the city, they were accompanied by the American diplomatic representative and the German consul, and they kept in sight of the *Columbia*, whose guns were trained to render assistance if needed; and they were able to remove the vice-consul with his family to the city, together with a certain amount of portable property, without accident.

For. Rel. 1904, 267.

4. Protection of Archives and Dwellings.

§ 705.

Not only may a consul claim inviolability for the archives and official property of his office and their exemption from seizure or examination, but he is protected from the billeting of soldiers in the consular residence.

Consular Regulations of the United States (1896), §73, p. 28.

By various treaties, inviolability of the consular office and dwelling is expressly secured. This does not imply that a consular dwelling may be used as an asylum.

Inviolability is also in many instances expressly pledged to the archives and papers of consulates.

Consular Regulations of the United States (1896), §§ 79, 80, p. 31.

April 9, 1849, the dwelling of Mr. Weems, United States consul at Antigua, Guatemala, was forcibly entered by a body of armed men, apparently engaged in an insurrection, and pillaged of money and other property valued at upwards of $3,000. His consular office and the archives of the consulate were in the same house, where his family also resided. The persons who committed the pillage were pursued by an armed force under the command of the President of Guatemala in person, and the property was recaptured. It was not, however, returned to the owner, but seems to have been appropriated as booty

by the troops making the capture. On this state of facts the United States maintained that Mr. Weems had a clear and indisputable claim against the government of Guatemala for remuneration. That a government was bound to afford ample protection to the official representatives of other governments within its limits, was, said the Department of State, at the very foundation of international intercourse and was universally acquiesced in. The government of Guatemala sought to deny responsibility on the ground that it had made every effort to prevent the perpetration of the outrage and to punish those who committed it. The government of the United States did not deny that such efforts had been made, but affirmed that the liability of Guatemala for any failure to give protection to the official representative of the United States did not depend upon "the ability of the government to prevent the infliction of the wrong complained of, or on the sincerity and good faith in which its efforts to that end were made."

Mr. Hunter, Act. Sec. of State, to Mr. Molina, Aug. 6, 1852, MS. Notes to Central America, I. 33.

"2. The local authorities have an abstract right to forbid the employment of a foreign naval force to protect the houses of consuls, even in emergencies such as those to which you refer. That employment may, however, be justifiable under circumstances similar to those which are reported at Cape Haytien.

"3. Strictly speaking, the consular flag can only be properly displayed over the residence of the consul himself. If, however, he should think proper to fly it elsewhere, with a view to protect the property of his countrymen, or property in which they may be interested, he must do this at the risk of having that emblem disregarded by the foreign authorities. This Department can not authorize or direct any such use of the flag of the United States, but will not censure it unless the act should formally be complained of by the foreign government."

Mr. Hunter, Acting Sec. of State, to Mr. Peck, Oct. 4, 1865, MS. Inst. Hayti, I. 62.

After considering the results of an investigation of an alleged insult to the American flag, the burning in June, 1880, of a building in which a United States consular agent in Chile had his office, the conclusion was reached that there was "no proof or probability that insult was intended, with a knowledge that the flag was that of the United States. If, as is supposed," continued the Department of State, "the firing of the building was in conformity with the war policy of Chile, and even if the Chilean officer, under whose direction that took place, was aware that the flag was that of the United States,

the removal of the flag before the burning may be regarded as less offensive than if it had been allowed to be consumed. Whatever might have been the disposition of this government under other circumstances, it makes no claim on Chile for the value of the building, as it is understood that it was not American property."

Mr. Blaine, Sec. of State, to Mr. Martinez, June 29, 1881, MS. Notes to Chile, VI. 279.

Early in January, 1887, the vice-consul of the United States at Santos, Brazil, complained to the chief of police that a group of men and boys had thrown stones at the consulate, breaking some of the windows and injuring the consular coat of arms. On investigation it appeared that the stoning was not directed at the consular office, but at the quarters of a merchant on the floor below it in the same house, who was violating a local ordinance forbidding the keeping open of shops on Sunday. Some of the persons concerned in the disorder were punished, and an explanation of the occurrence was duly communicated by the chief of police to the vice-consul. The United States considered the matter to have been satisfactorily disposed of.

For. Rel. 1887, 53.

In September, 1888, the Peruvian authorities took possession of the building at Mollendo in which the consular agency of the United States was situated. The incident was terminated by negotiations between Mr. Buck, the American minister at Lima, and Mr. Alzamora, Peruvian minister of foreign relations. Mr. Alzamora stated that, as the consular agent, MacCord, had a consular office at Arequipa and resided there, the authorities assumed that the consular agency at Mollendo had disappeared, and under that impression seized the house in which it had been kept. The house was restored to the owner, and orders were given to the effect that, as the agency was definitely ascertained to be in Mollendo, it would be recognized as being there, but that no consular agency would be recognized at Arequipa. In view of this explanation and disclaimer of intention to offend Mr. Buck stated that he considered the incident as closed.

Mr. Buck, min. to Peru, to Mr. Bayard, Sec. of State, No. 460, Jan. 22, 1889, MS. Desp. Peru; Mr. Bayard to Mr. Buck, Feb. 18, 1889, MS. Inst. Peru, XVII. 372.

The consular agent of the United States at Laguna de Terminos, Mexico, having denied the power of the consul at Merida to suspend him and refused to surrender the office, and the local authorities being unable to act in aid of the consul in ousting him without special permission from the Federal government (art. 31, Mexican Consular Law), the legation of the United States at Mexico was

instructed to lay the facts before the Mexican foreign office, request the withdrawal of the consular agent's certificate, and the aid of the Mexican government in enabling the consul to obtain possession of the archives and property of the United States at the consular agency.

Mr. Blaine, Sec. of State, to Mr. Whitehouse, chargé, Nov. 13, 1889, MS. Inst. Mexico, XXII. 484.

Myers's Case.

In July, 1890, the consulate of the United States at San Salvador was violated by the forces of the provisional government and the flag torn down. The property and archives of the United States and the personal property of Mr. Myers, the consul, were destroyed and carried away, and Mr. Myers himself subjected to great personal indignities and hardships.

With reference to these things Mr. Blaine, Nov. 20, 1891, declared that the incident was of a very grave and serious character, inconsistent with the friendly relations of the two countries and in direct violation of Art. XXXV. of the treaty of 1870. The government of the United States could not, said Mr. Blaine, with self-respect have accepted less reparation than Mr. Mizner, the American minister, had at the time proposed. This was (1) that the flag should be hoisted in broad daylight by a uniformed commissioned officer of the provisional forces; (2) that, as the flag was hoisted, a military salute should be paid to it; (3) that the consul should be placed in possession of his office, his property, and the archives, and should be allowed fully to resume his rights and prerogatives, including free communication with the United States and their minister; (4) that the minister of foreign affairs of the provisional government should write to the American minister a letter of regret and apology, and (5) that a satisfactory indemnity should be paid for damage done to the property of the United States and the private property of the consul. The first two conditions were complied with, and also the third so far as the property and archives survived; and it was afterwards reported that the secretary-general of Salvador had agreed to comply with the remaining conditions, but this was not done. The government property destroyed in the consulate was valued at $137.25 and the property of the consul at $2,035.40; total, $2,172.65. This amount the Salvadorean government was expected promptly to reimburse. Mr. Myers estimated his personal injuries and sufferings at $15,000; but whether he was entitled to this amount the United States would, said Mr. Blaine, leave to further mutual consideration.

The Salvadorean government agreed that a satisfactory payment should be made for the damage done to the property of the United States and the private property of the consul, but took the ground that the damages should be sued for before the Salvadorean courts.

Mr. Blaine, in an instruction of April 6, 1892, said that it was unnecessary to discuss what the proper course would be if, during the occurrence in question, the property of an ordinary resident alien had been destroyed. But Mr. Myers was consul of the United States; he had no business and no interests in Salvador separate from his consular business and interests. His property which was destroyed was properly and necessarily in the American consulate, which, by the terms of the treaty, was declared to be inviolable. The incident was never in any of its phases a matter within the jurisdiction of the courts of Salvador, nor could the United States, said Mr. Blaine, consent to submit the agreement which it had made with the government of Salvador to any tribunal other than one of their joint making. It was thought that the determination of the matter ought to be arrived at without difficulty by the Salvadorean minister of foreign affairs and the minister of the United States; and if they should prefer each to appoint a person to examine and report on the question this would be considered a mere matter of detail. As to the question of reparation for the personal injuries to Mr. Myers, although it was not covered by the agreement, it was, upon general principles, regarded, said Mr. Blaine, as one to be determined solely by the agreement of the two governments.

Salvador afterwards settled the claim directly, by paying $2,500 in gold, as "compensation in full" for the loss of the property of the United States and of that of the consul, and for the "personal sufferings" of the consul.

For. Rel. 1892, 21, 24, 30–37, 49–51; For. Rel. 1893, 176, 179, 181, 182, 184. See, also, For. Rel. 1890, 64, 73, 75, 101.

By Art. 31 of the treaty with Peru, of Aug. 31, 1887, it was provided that "the archives and papers" of consulates should be "inviolably respected," and that "no person, magistrate, or other public authority" should, "under any pretext, interfere with or seize them." On a report that the local authorities at Piura, Peru, had, in executing a judicial process against the furniture of the "consular agent" of the United States there, broken open the desk in his office, scattered the archives about the room, and carried away several parcels of official papers, some of which were afterwards returned by unknown persons, the legation of the United States at Lima was instructed to ask for a disavowal of the acts of the local authorities, for their reprimand, and for a guarantee that such an incident should not recur.

Mr. Sherman, Sec. of State, to Mr. Neill, No. 250, June 26, 1897, MS. Inst. Peru, XVIII. 37.

On the evening of April 15, 1898—a week before the outbreak of war between the United States and Spain—a mob attacked and

demolished the American consulate at Malaga, and removed the United States coat of arms, hanging the Spanish colors in its place. The minister of the United States at Madrid immediately on being advised of the incident asked the Spanish government to protect all United States consulates and consular officers throughout Spain. The civil governor of Malaga, acting under instructions from Madrid, restored the coat of arms and expressed his regrets and those of his government for the attack. The Spanish government, in an official note, expressed its regret for the excesses of the mob, and stated that instructions had been given for the protection of the persons and property of United States consular representatives.

For. Rel. 1898, 1079–1085.

Tourgée's case.

The convention of February 23, 1853, between the United States and France, relative to consular privileges, besides granting to consular officers the privileges usually accorded to their offices, "such as personal immunity, except in case of crime," etc., contains the following special provisions:

"They may place on the outer door of their offices, or of their dwelling houses, the arms of their nation . . . ; and they shall be allowed to hoist the flag of their country thereon." (Art. II.)

"The consular offices and dwellings shall be inviolable. The local authorities shall not invade them under any pretext. In no case shall they examine or seize the papers there deposited." (Art. III.)

In the winter of 1898–99, Mr. Tourgée, United States consul at Bordeaux, took a furnished house at Arcachon, 30 miles from Bordeaux, but within his consular district, in order to undergo there a course of medical treatment. The routine work of the consulate continued to be done in the office at Bordeaux, but he conducted his consular correspondence and wrote his despatches in the house at Arcachon, which consequently contained various official papers. In April, 1899, owing to a dispute as to reservations in the lease, Mr. Tourgée withheld the second installment of rent. The landlord then obtained from a civil tribunal a writ authorizing the seizure in the house of any movable goods belonging to the tenant. When the bailiff appeared with the writ, Mr. Tourgée refused to permit it to be executed, raising the American flag and protesting his privilege. The bailiff, however, with the assistance of a commissary of police, entered the house, but, finding the personal effects of the tenant insufficient to pay the rent, did not seize them.

The United States took the view that these proceedings constituted a violation of the treaty, holding that Article III. guaranteed the inviolability of any dwelling in which the consular officer might for the time being have his habitation within his consular district. The United States, it was said, required the consul to keep offices at

Bordeaux, but not necessarily his dwelling; and attention was called to the fact that he performed official work in the house at Arcachon.

The French government, on the other hand, held that the treaty accorded inviolability to the consular dwelling only, because it might sometimes be difficult to distinguish the office from the residence; that the designation in the exequatur of the seat of the consulate determined the place of official residence, the mention of the wider area of jurisdiction referring only to the right to perform consular acts; and that, as consuls do not enjoy the exemptions of public ministers, the privilege of the treaty should not be extended beyond the offices and residences of the consuls at their several official posts.

The United States, while maintaining that this view was not consistent with the letter or the intent of the treaty, intimated that it would be adopted, should occasion arise, as a reciprocal construction thereof.

For. Rel. 1900, 429–431, 432–435, 450–452, 455, 456.

Cases at Port au Prince.

March 30, 1899, Dr. J. B. Terres, vice-consul-general of the United States at Port au Prince, Hayti, complained to Mr. Powell, United States minister, that on the afternoon of the preceding day, when he arrived at his residence, he found on the premises 15 or 20 Haytian soldiers. They withdrew before he could reach the gate, but one of his domestics told him that they had come with an order to arrest two men who were in his employ. The next morning, in coming from his bath, he found two Haytian generals sitting on the gallery of his house. On his inquiring their mission, they stated that they had an order from the minister of the interior to arrest two Spaniards (Cubans) who were in his employ. He answered that he did not admit any right to invade his premises with an armed force under any pretext whatever, and that if any information was desired from him he should be written to officially. On the strength of these incidents, he protested to Mr. Powell against the action of the Haytian government, and requested him to take steps to prevent a like occurrence.

In a note written to Mr. Lafontant, minister of foreign relations, March 30, 1899, Mr. Powell declared that an entrance upon "the premises of accredited officers of the United States, located in this Republic, is a grave infraction of international law, a recurrence of which will be very apt to lead to serious complications," and that "all Cubans resident in this Republic are under the protection of the United States while in the peaceful performance of their work, and are not to be molested." Mr. Powell requested Mr. Lafontant to inform his colleague, the minister of the interior, that the Haytian government "has no right to enter upon the premises of United

States consular officers with either its military or its constabulary force." [a]

Mr. Lafontant, while stating that he had immediately communicated with the department of the interior, assured Mr. Powell that it could not have been the intention of his colleague "to give orders that may be of the nature to cause a violation of international laws and the violation of the dwelling of an accredited agent of the United States;" and that he took note of the fact that Cubans residing in the Republic were under the protection of the United States.

Mr. Lafontant subsequently wrote to Mr. Powell assuring him that the minister of the interior, in ordering, on the request of the diplomatic representative of the Dominican Republic, the arrest of a Dominican who was in the service of Dr. Terres with a view to expelling him, "had in no wise the intention to violate the dwelling of an accredited agent of the United States, nor to commit any infraction of the international laws." Mr. Lafontant called attention to the fact that in consequence of the protest of Dr. Terres the order was not executed, and declared that it would be painful to his government if Mr. Powell "could believe for a single instant that a minister of the Republic could have given an order of a nature to disturb the good relations that unite the two Republics and to which my government attaches such price." [b]

In reply Mr. Powell expressed his satisfaction, at the same time stating "that the two Dominicans referred to are not and have never been in the employ of our vice-consul-general, Dr. J. B. Terres." [c]

The Department of State, on receiving a report of the case, said: "It appears . . . that the parties were merely employed 'in the tobacco plantation' belonging to Dr. Terres, and that the Haitian military authorities did not enter the legation or consular premises, but merely went to Dr. Terres's residence. Even this is explained to have been the result of a blunder on the part of subordinate officials. In view of these facts, the Department is of opinion that you had no authority whatever in the premises, either to grant or to refuse the surrender of the parties, or to approve their arrest."

Mr. Hay, Sec. of State, to Mr. Powell, min. to Hayti, April 25, 1899. For. Rel. 1899, 377.

October 28, 1899, the Haytian minister of foreign affairs addressed a note to the United States legation at Port au Prince stating that the minister of the interior had just announced that he was about to make domiciliary searches in the square in which resided Mr. Battiste, deputy consul of the United States, and that it was possible that his dwelling might be penetrated. It was further stated

[a] For. Rel. 1899, 375.
[b] For. Rel. 1899, 376.
[c] For. Rel. 1899, 377.

that the notice was given with a view to avoid misunderstanding, and that the police would be accompanied by a justice of the peace. Immediately afterwards, and before a response could be made by the legation, Mr. Battiste's residence was surrounded and entered by the police, who represented that they were searching for a thief. It appeared that the chief of police entered the dwelling, revolver in hand, to the terror of the inhabitants. Subsequently the legation complained to the minister of foreign affairs of the action of the police, observing that Mr. Battiste would have given any information in regard to his private residence that the Government might have desired. The minister of foreign affairs replied: "I hasten to express the regret that the unusual precautions taken by my department to facilitate the execution of that police measure did not produce the desired result. I will add that my regrets are the more intense and the more sincere, that Mr. Battiste has always merited the consideration of the Government."

On receiving full reports of the case, the Department of State said:

"The search seems to have been immediately accomplished without awaiting the result of the formal application made to the legation for its sanction.

"The application so made is somewhat vague, but in the light of Mr. Battiste's report to Mr. Terres it appears that the entire square was being searched for an escaped thief who was supposed to have taken refuge there.

"As the immunities attaching to the office of deputy consul do not include so-called asylum for persons charged with violating the law, no objection could be seen to effecting the proposed search after notification, and with the sanction and, if necessary, the full assistance of the officers of the legation. It seems clear, however, that the proceedings were not conducted with suitable consideration for Mr. Battiste's official position, his yard fence having been broken down and his premises alarmingly invaded by an armed force.

"The protest made by Mr. Terres is approved as proper and timely. The reply from Mr. St. Victor is evasive and unsatisfactory, being confined to an expression of regret that the exceptional precautions taken by his department to facilitate the execution of the proposed police measure had not produced the expected result.

"You will impress upon Mr. St. Victor the obvious circumstance that no time was allowed to the legation to respond in the desired sense, inasmuch as the search appears to have been already in progress when the agents of the legation hastened to Mr. Battiste's house for the purpose of aiding the local authorities in the orderly execution of the proposed search, and you will express the hope that you may not at any time hereafter be called upon to make renewed complaint respecting any such offensive disregard of the consideration

and official amenities due to the representative agents of the United States at Port au Prince, or, indeed, anywhere else within Haitian jurisdiction.

"As it would appear from Mr. Terres's statements that Mr. Battiste's fence has been broken down, you should insist, if it has not already been done, that any injury done to the property of this officer of the United States shall be made good."

Mr. Hay, Sec. of State, to Mr. Powell, min. to Hayti, Nov. 27, 1899; For. Rel. 1899, 407.

Case at Cienfuegos.

On the morning of February 1, 1904, the United States consul at Cienfuegos found the door of his office "besmeared and the coat-of-arms literally covered with mud." He reported the facts to the police. The acting mayor ordered an immediate investigation, and, in company with other civil authorities, called at the consulate to express regrets. The minister of the United States at Havana brought the matter to the attention of the government, which expressed its "most energetic disapproval" of the occurrence, and intimated that the author of the offense should not remain unpunished. The government of the United States, "in view of the apologies made and the precautions taken to prevent a repetition of the insult," declared that the incident might be regarded as closed.

For. Rel. 1904, 236–238.

5. Display of National Arms and Flag.

§ 706.

A consul may place the arms of his government over his door. Permission to display the national flag is not a matter of right, though it is usually accorded and is often provided for by treaty.

The right to place the national arms and the name of the consulate on the offices is given by treaties with Austria-Hungary, Italy, and the Netherlands (and colonies); on their offices and dwellings, by treaty with Belgium and Germany; the right to place their national flag on their dwellings, except where there is a legation, by treaties with Austria-Hungary, Belgium, Germany, Roumania, and Servia; the right to place the arms, name, and flag on their offices or dwellings, by treaties with France and Salvador; and the right to place the name and flag on their dwellings, by treaty with Colombia. The treaty with the Independent State of the Congo confers the right to raise the flag on the consular office.

Consular Regulations of the United States (1896), §§ 70, 73, 86, pp. 26, 28, 33.

As to the display of the national arms, §§ 70 and 73 do not seem to be entirely consistent.

"The raising of the consular flag in Mexico . . . is a matter subject to municipal law, unless a privilege in respect to it should have been granted by treaty. We have no other privilege than that of equality with other nations, which will always be insisted on. It appears, however, that the authorities at the City of Mexico have overlooked a strict observance of the law, by allowing consuls to display their flags on holidays of their respective nations. This, it seems to me, is as much as may be needed. If, however, they should at any time think proper to withdraw this indulgence, it is clear that we can not insist upon its continuance as a matter of right."

Mr. Fish, Sec. of State, to Mr. Foster, Feb. 16, 1874, For. Rel. 1874, 730.

The right of consular agents of Austria to hoist their national flag in places where their sovereign has no legation is established by the fourth article of the consular convention of July 11, 1870, between Austria and the United States, and this right can not be impaired by any municipal ordinance prohibiting the exhibition of flags.

Mr. Freylinhuysen, Sec. of State, to Gov. Pattison, of Penna., Aug. 27, 1884, 152 MS. Dom. Let. 304.

Consuls, in erecting flag poles, may be required to conform to municipal regulations designed to keep the streets free from projecting signs and other fixtures.

Mr. Cridler, Third Assist. Sec. of State, to Mr. Halstead, No. 74, Feb. 3, 1900, 171 MS. Inst. Consuls, 2.

6. Ceremonial.

§ 707.

"Consuls have no claim, under international law, to any foreign ceremonial, and no right of precedence except among themselves, and in their relation to the military and naval officers of their own country. This precedence, as to officers of the same grade in the consular body of the place, depends upon the date of the respective exequaturs."

Consular Regulations of the United States (1896), § 76, p. 29.
See, as to the relations of consuls to naval officers of the United States, id. §§ 109–113, 440–442.

With reference to the action of Commander Truxton, U. S. S. *Jamestown*, in sending an armed party and forcibly placing the American flag on the United States consulate at Honolulu at half-mast, on the occasion of the death of the Dowager Queen Kalama, Mr. Fish said: "The conduct of the consul on that occasion in not taking notice of a patent and notorious fact was wrong. The Navy

Department has censured the conduct of Commander Truxton, which was an inexcusable indignity to the consul, and a violation of the rules and regulations of the service, which you ought to have denounced and rebuked. You were remiss in not protesting against it, if you could not have prevented it."

Mr. Fish, Sec. of State, to Mr. Pierce, min. to Hawaii, No. 27, Oct. 21, 1870, MS. Inst. Hawaii, II. 203.

Although the captains of United States army transports have no official standing, being merely masters of ships employed by the War Department, the Department of State recommended that the War Department adopt with regard to them, as a wise and prudent provision, Art. 169 of the Naval Regulations of 1896, which requires that "diplomatic and consular officers in charge of legations or consulates shall be notified of the arrival of the ship in port."

Mr. Cridler, Third Assist. Sec. of State, to Sec. of War, April 26, 1900, 244 MS. Dom. Let. 526.

The Secretary of the Navy "thinks it inadvisable to indicate any correspondence of rank between consular officers and naval or military officers; for, while the honors prescribed for consular officers of different grades are explicitly stated in the Navy Regulations, the Navy Department is unacquainted with any explicit determination of the correspondence of rank between consular officers and officers of the Navy or Army."

Mr. Hay, Sec. of State, to Gov. Allen (Porto Rico), May 23, 1900, 245 MS. Dom. Let. 230.

This letter also discusses the naval courtesies to be paid to the governor of Porto Rico.

As consular officers have under international law no claim to any foreign ceremonial and right of precedence except among themselves and in their relations with the military and naval officers of their own country, there would "seem to be no necessity" for the governor of Porto Rico "to call in person upon all consular officers." Nor could it be said to be "appropriate" for him to do so; at most the only question that could properly be suggested would be whether it "was not deemed *unfitting* or *inappropriate*" for him to make such a call.

Mr. Hay, Sec. of State, to Gov. Allen (Porto Rico), May 23, 1900, 245 MS. Dom. Let. 230.

As to the relations of the agents of the Independent State of the Congo with foreign consuls, see For. Rel. 1887, 26.

7. Uniform.

§ 708.

"Diplomatic officers are forbidden by statute to wear any uniform or official costume not previously authorized by Congress. Consular officers are not authorized by law to wear any uniform, and the prohibition imposed by statute on diplomatic officers is hereby extended to consular officers. It is provided, however, that all officers who served during the rebellion as volunteers in the Army of the United States and have been honorably mustered out of the volunteer service shall be entitled to bear the official title and upon occasions of ceremony to wear the uniform of the highest grade they held, by brevet or other commissions, in the volunteer service. They may also, on like occasions, wear the distinctive army badge of the corps or division in which they served. These provisions are held to apply to consular officers whose service and discharge from the Volunteer Army bring them under its terms. R. S. secs. 1226, 1688."

Consular Regulations of the United States (1896), § 452, p. 178.

It was ruled that this precluded a consul who was an officer in the National Guard from wearing the uniform of his rank; and it was stating that the placing of his military title on his official card would be considered objectionable. (Mr. Cridler, Third Assist. Sec. of State, to Mr. Olmstead, December 9, 1897, 223 Dom. Let. 279.)

8. Presents.

§ 709.

Under Article I, section 9, of the Constitution of the United States, "no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." This applies to consuls and diplomatic agents.

See supra, § 651.

9. Engaging in Business.

§ 710.

No consular officer whose salary exceeds $1,000 a year is allowed to engage in business, and the President may extend this prohibition to a consular officer whose salary does not exceed that amount, and may require him to give a bond not to violate the prohibition.

It is unadvisable that interpreters, marshals of consular courts, and consular clerks, receiving a salary, should be allowed the privilege of trading, although exceptions may be made for good cause.

Consular Regulations of the United States (1896), § 37, p. 14, citing Rev. Stat. §§ 1699, 1700; and also 18 Stat. 486, to the effect that the consuls at Fayal and Auckland are exempted from the prohibition as to trading. See supra, § 697.

For a report as to consular officers engaged in business in violation of law, see H. Ex. Doc. 90, 35 Cong. 2 sess.

The United States sustained the right of consuls engaged in trade to take part in the deliberations of the consular body at Chefoo, China. (For. Rel. 1903, 82, 84.)

"Sections sixteen hundred and ninety-nine and seventeen hundred of the Revised Statutes of the United States are hereby amended to read as follows:

"'SEC. 1699. No consul-general, consul, or consular agent receiving a salary of more than $1,000 a year shall, while he holds his office, be interested in or transact any business as a merchant, factor, broker, or other trader, or as a clerk or other agent for any such person to, from, or within the port, place, or limits of his jurisdiction, directly or indirectly, either in his own name or in the name or through the agency of any other person; nor shall he practice as a lawyer for compensation or be interested in the fees or compensation of any lawyer; and he shall in his official bond stipulate as a condition thereof not to violate this prohibition.

"'SEC. 1700. All consular officers whose respective salaries exceed $1,000 a year shall be subject to the prohibition against transacting business, practicing as a lawyer, or being interested in the fees or compensation of any lawyer contained in the preceding section. And the President may extend the prohibition to any consul-general, consul, or consular agent whose salary does not exceed one thousand dollars a year or who may be compensated by fees, and to any vice or deputy consular officer or consular agent, and may require such officer to give a bond not to violate the prohibition.'"

Act of April 5, 1906, section 6.

VI. *AMENABILITY TO LOCAL JURISDICTION.*

1. CIVIL PROCESS.

§ 711.

Consular privilege can not protect a consul as to mercantile matters engaged in by him independent of his official business.

1 Kent, 44; 2 Phill. (3d ed.), 335; Arnold *v.* Ins. Co. 1 Johns. 363; Indian Chief, 3 C. Rob. (Adm.) 25, 29.

It was held that Barclay, an American consul residing abroad, who had entered into partnership with another person, was not privileged from foreign attachment.

Caldwell *v.* Barclay et al. (Court of Common Pleas, Philadelphia, 1788), 1 Dallas, 305.

In a suit brought against a consul-general of France, for transactions of a public nature, in which he acted as the commercial agent of his country, the President has no constitutional right to interfere, but must leave the matter to the tribunals of justice.

Lee, At. Gen. 1797, 1 Op. 77.

A consul can not be held personally liable on a contract which he enters into on account of his government, the credit being given to that government.

Jones *v.* Le Tombe (1798), 3 Dallas, 384.

In February, 1860, Mr. Colvin, United States consul at Demerara, filed there a petition in insolvency, and Mr. Daly, administrator-general of the colony, was appointed his trustee. By the local law Mr. Daly thus became entitled to all of Mr. Colvin's assets for the benefit of the latter's creditors. In the first instance, however, Mr. Colvin declined to include in his schedule of assets his claim against the United States for salary. The court ordered him to pay over to Mr. Daly his salary and fees up to March 31, 1860, and to place on his schedule his claim for salary from that date up to the time of his ceasing to act, which was July 1, 1860. On Dec. 18, 1860, Mr. Colvin obtained, on his own petition, a final order of discharge from all liabilities previously incurred and placed on his schedule. Subsequently Mr. Colvin asked the Treasury to pay to himself his salary from March 31 to July, 1860, notwithstanding its inclusion in the schedule of assets on the insolvency proceedings. The Department of State, when consulted, replied that as a general rule British consuls in the United States and American consuls in Great Britain and her colonies "are not regarded as public ministers and do not enjoy the privilege of exterritoriality" (Phillimore, Int. Law, vol. 2, p. 260; Wheaton's Elements, 304; Consular Regulations, 13, 236, 279); that, as a result, consuls, whether engaged in trade or not, were subject to all the local remedies as between creditor and debtor, including bankruptcy process in invitum, and a fortiori voluntary; and that in such proceedings he was "subject to the local jurisdiction and to all its lawful decrees appertaining to the debts and credits of the bankrupt, including the forced surrender of choses in action."

Mr. F. W. Seward, Assist. Sec. of State, to the Fifth Auditor of the Treasury, March 23, 1861, 53 MS. Dom. Let. 507.

"Such are the principles applicable to the case," said Mr. Seward; but a final decision of the particular case was reserved, pending a further presentation of the facts.

As a consul neither in Germany nor in the United States enjoys any privilege which puts him upon a different footing in regard to his private debts from the citizens or subjects of the country in which he exercises his functions, his creditors in such country can not expect to have debts dues from him collected by means of a diplomatic appeal to his government, and such an appeal is considered irregular.

Mr. Fish, Sec. of State, to Mr. Von Schlozer, Dec. 11, 1874, MS. Notes to German Leg. IX. 77.

In September, 1893, William L. Dunham, consular agent of the United States at Haida, Austria, left his post owing a number of debts. One of his creditors brought suit and obtained an order that certain articles, which Dunham had left behind, should be turned over to him. Dunham's successor refused, however, to deliver up the articles, which, although they were in the consular office, appeared to be Dunham's personal property. The Austrian government protested against this refusal, maintaining that by the principles of international law and the consular convention between the two countries of July 11, 1870, no such privilege was conceded; and that, while Article V. of the convention granted immunity to the archives and papers against search and seizure, this did not extend to other objects in the office of the consul. It seems that Dunham's successor, in refusing to permit the seizure of the articles in question, acted under orders from his superiors to hold them as government property, in order to cover a prior claim of the United States against Dunham for government funds illegally retained by him. The claim of the United States, however, was otherwise disposed of, and instructions were given to consider the articles thenceforth as the personal property of Dunham, and as subject to seizure to satisfy any claim against him.

For. Rel. 1894, 27–30.

The Department of State "is not in a position to declare" that under Article II. of the consular convention with Austria-Hungary of July 11, 1870, or under the most-favored-nation clause of Article XV. thereof, or under the general principles of international law, an Austrian consular officer is exempt from civil suit for indebtedness. In the case of Fromant *v.* Duclos, 30 Fed. Rep., 385, in which the defendant was Austrian vice-consul-general at New York, the question of official immunity was not even raised, the question being whether the United States district court had jurisdiction of the suit.

Mr. Adee, Second Assist. Sec. of State, to Messrs, Hensel, Bruckmann & Lorbacher, Oct. 29, 1897, 222 MS. Dom. Let. 81.

See, to the same effect, as to Haytian consuls, Mr. Gresham, Sec. of State, to Mr. Voorhees, Nov. 16, 1893, 194 MS. Dom. Let. 288.

In July, 1899, the minister of the United States at Quito represented to the Ecuadorean government that a subcommissary of police at Guayaquil had issued a summons to the United States consul-general to answer in a suit for debt; that the summons was served by an officer who entered the consulate-general without permission, and that, when the consul-general's secretary appeared in response to the summons before the subcommissary, the latter used insulting language toward the consul-general. The minister therefore requested that the subcommissary be punished for his insult to the consul-general, and the officer who served the summons for violating the sanctity of the consulate-general. In a subsequent conversation the Ecuadorian minister of foreign relations maintained that there was no cause for complaint on the part of the United States; that, while it was an offense for the officer to enter the consulate to serve a summons on the consul-general, the offense was no greater than if he had entered any private residence in the city for such a purpose; that he was liable to punishment, but only by the local law, as in other cases, and that the subcommissary of police, in using insulting language about the consul-general, was guilty of no other or greater offense than if he had so spoken of one of his fellow-citizens. With reference to this discussion, the Department of State instructed the United States minister that if the consular officers of any foreign country enjoyed by treaty with Ecuador immunity from service of judicial process in such cases, a similar immunity might be asked by the United States "as a friendly courtesy," although there was no treaty between the two countries on the subject; but that, "unless the offensive action of the Ecuadorean official while serving the summons is made punishable by some law of Ecuador especially applying to offenses against foreign consular officers, he would appear to be subject only to the general law applicable to offenses against private individuals." It was added that the United States had a special law making it a penal offense to assault or offer violence to the person of a public minister, in violation of the law of nations, but that there was no such law applying to consular officers.

Mr. Hay, Sec. of State, to Mr. Sampson, min. to Ecuador, Oct. 5, 1899, For. Rel. 1899, 262.

The consul-general subsequently reported that he was aware that he was not exempt from civil process, but that he had objected to the false and insulting remarks made about him by the police magistrate in open court, and to the invasion of the consulate, and even his bedroom, by the officer serving the process, and that President Alfaro

had, on a recent visit to Guayaquil, censured the subcommissary of police and expressed regret for the occurrence, and that the subcommissary had since been succeeded in his office by another person. (For. Rel. 1899, 262–263.)

2. Criminal Process.

§ 712.

Case of Genoese consul.

The Genoese consul at Philadelphia was indicted in 1793 for a misdemeanor for sending anonymous and threatening letters to Mr. Hammond, the British minister, and other persons, with a view to extort money. Defendant's counsel moved to quash the indictment on the ground that the Supreme Court of the United States had exclusive cognizance of the case, under section 2 of Article III. of the Constitution. The judges, Wilson and Peters, Judge Iredell dissenting, rejected the motion to quash on the ground that the original jurisdiction of the Supreme Court was not exclusive. It is stated in a note of the reporter that the defendant was tried at the April session of the circuit court, 1794, before Jay, Chief Justice, and Peters, J. At the trial counsel for the defendant contended (1) that the matter charged was not a crime at common law, and was not made criminal by any statute of the United States; (2) that a criminal proceeding ought not to be maintained against a person possessing the official character of the defendant. The court held that the offense was indictable and that defendant was not privileged from prosecution. The jury found him guilty; but he was afterwards pardoned on condition (as it was said) that he surrender his commission and exequatur.

United States *v.* Ravara (1793, U. S. circuit court, Phila. Dist.), 2 Dallas, 297.

Cited in Valarino *v.* Thompson (1853), 7 N. Y. 576, 579.

Kosloff's case.

November 24, 1815, Mr. Kosloff, Russian consul-general at Philadelphia, was arrested on the charge of having ravished a girl of twelve years, who was a servant in his family. He was brought before a justice of the peace, who was not legally empowered to take bail in cases of that class, and, on a prima facie case being shown, was committed to jail to await trial. He remained in prison till the afternoon of November 25, when he was brought on habeaus corpus before Chief Justice Tilghman, who admitted him to bail and appointed Monday, the 27th of November, for a hearing. The hearing took place before Chief Justice Tilghman, at chambers. The prosecutrix and two other witnesses were examined. The Chief Justice declared it to be his opinion that the evidence was not such as could secure a convic-

tion of rape; but, as there was a positive oath to the fact, he bound over Mr. Kosloff on bail of $500 to the next session of the court of oyer and terminer, which was to meet in January, 1816, and also bound over the witnesses to appear and testify. Mr. Kosloff and the father of the girl were also, respectively, bound over to keep the peace and be of good behavior. An indictment was found at the January session of the court; but on motion of the defense it was dismissed by Chief Justice Tilghman, Judge Breckinridge sitting with him, on the ground that, as the defendant was a consul, cognizance of any offense charged against him belonged exclusively to the Federal courts. The judicial proceedings then ceased. Rape not being then a crime by Federal statute, the Attorney-General of the United States gave an opinion that the Federal courts could not take cognization of the offense.

While the proceedings were pending, on December 23, 1815, Mr. Monroe brought them to the attention of Mr. Harris, chargé d'affaires of the United States at St. Petersburg, who was instructed that consuls could claim no exemption from the local jurisdiction on account of crimes, but that the rights of the accused would be duly observed. It appeared, besides, that Mr. Ingersoll, United States district attorney at Philadelphia, was instructed to act in Mr. Kosloff's behalf. On March 20, 1816, however, Mr. Harris reported that Count Nesselrode had declared that Mr. Kosloff had been arrested under the most aggravating circumstances, that the incident had wounded the honor of Russia, and that he had it in charge to request Mr. Harris not to appear at court till reparation was granted. It seems that the proceedings had been represented both by Mr. Kosloff and by Mr. Daschkoff, the Russian diplomatic representative at Washington, as being without foundation, and in disregard of what was due to the former's official station. Mr. Daschkoff indeed, besides urging a trial on the merits, maintained that Mr. Kosloff was, as consul-general, exempt from the local jurisdiction, and went so far, when the United States declined to grant reparation, as to declare his mission at an end. The views of Mr. Daschkoff as to Mr. Kosloff's official immunities appear not to have been shared by the Russian government; and full explanations were made by the government of the United States to show that the proceedings had not only been strictly in accordance with law, but that the United States had itself taken measures to assure to Mr. Kosloff all the rights he could claim.

Mr. Ingersoll, United States district attorney at Philadelphia, to Mr. Monroe, Nov. 25, 1815, MS. Misc. Let.; same to same, Nov. 28, 1815, id.; Mr. Monroe, Sec. of State, to Mr. Harris, chargé d'affaires at St. Petersburg, Dec. 23, 1815, MS. Inst. U. States Ministers, VIII. 17; Mr. Ingersoll to Mr. Monroe, Jan. 27, 1816, MS. Misc. Let.; same to same,

Feb. 28, 1816, id.; same to same, March 17, 1816, id.; Mr. Harris to Mr. Monroe, March 20, 1816, MS. Desp. Russia; Mr. Ingersoll to Mr. Monroe, April 18, 1816, MS. Misc. Let.; Mr. Monroe to Mr. Ingersoll, July 1, 1816, 16 MS. Dom. Let. 310; Mr. Ingersoll to Mr. Monroe, July 5, 1816, MS. Misc. Let.; Mr. Monroe to Mr. Harris, July 31, 1816, MS. Inst. U. States Ministers, VIII. 89; Mr. Monroe to Count Nesselrode, Sept. 12, 1816, MS. Notes to For. Legs. II. 172; Mr. Monroe to Mr. Harris, Sept. 30, 1816, MS. Inst. U. States Ministers, VIII. 104; Mr. Monroe to Mr. Daschkoff, Oct. 3, 1816, MS. Notes to For. Legs. II. 177; Mr. Monroe to Mr. Pinkney, Nov. 12, 1816, MS. Inst. U. States Ministers, VIII. 117; Mr. Monroe to Messrs. Adams and Gallatin, Nov. 12, 1816, id. 127; Mr. Monroe to Mr. Alexander H. Everett, Nov. 14, 1816, id. 130; Mr. Monroe to Count Nesselrode, Oct. 23, 1816, MS. Notes to For. Legs. II. 180.

It appears that, prior to the receipt by the Russian Government of the final explanations of the United States, Mr. Daschkoff informed Mr. Monroe that he had "terminated his mission to the United States by the order of his sovereign," on account of this case, which was regarded as the more remarkable since "the government of Russia had admitted that a consul deserves no protection in such a case from the law of nations." (Mr. Daschkoff, Russian min., to Mr. Monroe, Sec. of State, Oct. 31, 1816, MS. Notes from Russia; Mr. Monroe, Sec. of State, to Mr. Pinkney, Nov. 12, 1816, MS. Inst. U. States Ministers, VIII. 117.)

In his note to Count Nesselrode of October 23, 1816, Mr. Monroe reviewed the circumstances of the case at length. In this note he states that the first appeal made to the local law was by Mr. Kosloff, who sought protection against the father of the girl, in order to gain security against personal outrage. It was some time after this that the girl made the complaint on which Mr. Kosloff was arrested. After the indictment was quashed in the State courts, Mr. Daschkoff demanded that proceedings to vindicate Mr. Kosloff be taken in the Federal courts. The Attorney-General of the United States, however, advised that the Federal courts had not been invested with jurisdiction of the offense, and that Mr. Kosloff should seek vindication by a proceeding in the State courts against his prosecutors.

For the opinion of Chief Justice Tilghman, dismissing the indictment, see Com. *v.* Kosloff, 5 S. & R. 545.

"Even ministers of the highest grade, in cases of great enormity, are subject to the penalty of the law, according to the law of nations. Consuls can claim no exemption from it."

Mr. Monroe, Sec. of State, to Mr. Harris, chargé d'affaires at St. Petersburg, Dec. 23, 1815, MS. Inst. U. States Ministers, VIII. 17.

This statement related to the foregoing case, but it was afterwards qualified, as seen below.

"How far ambassadors and public ministers themselves are exempted by the law of nations from punishment for crimes of this nature by the laws of the country in which they reside may perhaps with some be doubtful; but this is foreign to the present purpose.

Consuls, it is believed, are not exempt from such punishment. This opinion is supposed to be warranted by the weight of authority in those commentators on public law whose opinions are alike respected in Europe and the United States, and by the general admission and practice of European nations. Consuls are undoubtedly entitled to great respect, as bearing the commissions of their sovereign, but their duties are of a commercial nature, and their public character subaltern; neither their persons nor their domiciles have heretofore been protected, as have those of ambassadors and other public ministers.

"Instances are not wanting in which some of them have been brought within the jurisdiction of our courts. It is not known that it has ever yet laid the foundation of any charge of a breach of privilege or infringement of public law on the part of any of the governments of Europe, whose commissions these consuls may respectively have borne. For a recapitulation of some of these instances, I beg leave to refer you to the report made to me by the attorney of the United States at Philadelphia. I also beg leave to refer you, with the like view, as well as for an elucidation of other topics connected with this dispatch, to the opinion at large of that very respectable magistrate, the chief justice of Pennsylvania, contained in the folio document, and numbered 20. One of the instances set forth in the attorney's report, and known to this Department to be authentic, deserves to be particularly adverted to. It was the case, not of a consul, but of a commissioner of His Britannic Majesty, under the sixth article of the treaty of amity, commerce, and navigation between the United States and Great Britain, made at London in the year 1794.

"A British subject, clothed with a commission from his King, under this article (whereby, as it is conceived, he stood upon a footing certainly not inferior in dignity to a consul), was subjected to a process issuing from a court in Philadelphia, and took his trial before a jury on the charge brought against him. The government of England did not complain of the proceeding."

Mr. Monroe, Sec. of State, to Mr. Harris, July 31, 1816, MS. Inst. U. States Ministers, VIII. 89.

Croxall's case.

In 1834 Mr. Croxall, United States consul at Marseilles, dismissed a domestic from his employ, and, on her refusing to leave the house, forcibly ejected her. She brought proceedings, civil and criminal, against him, alleging that he had severely beaten her and broken her arm. He was arrested and imprisoned thirteen days before trial, no bail being taken. He was acquitted on the criminal charge, but was required to pay 2,000 francs damages and the costs of suit. Dec. 6, 1836, the American minister

at Paris was instructed as follows: "It is believed that under the laws and usages of France favors and exemptions are extended to foreign consuls, and that in conducting his defense Mr. Croxall's proper course [in a proceeding against him for assault] would have been to plead the privileges of his official character. However this may be, the imprisonment of an American consul residing in a foreign court is a serious evil and inconvenience, not only as lessening his influence as an officer of his government, but as calculated to produce, in some cases, injurious effects on the interests of American citizens confided to him, and to reflect dishonor on his country. It is, also, an infraction of the law of nations. Vattel says (vol. 2, chap. 2, § 34) that a sovereign 'by the very act of receiving a consul, tacitly engages to allow him all the liberty and safety necessary in the proper discharge of his functions, without which the admission of the consul would be insignificant and deceptive.' And, again, speaking of consular functions, the same author observes that 'they seem to require that the consul should be independent of the *ordinary criminal justice* of the place where he resides, so as not to be molested or imprisoned, unless he himself violates the laws of nations by some enormous misdemeanor.' Our Constitution recognizes this doctrine by providing that in all cases affecting consuls the Supreme Court alone shall have original jurisdiction."

April 13, 1838, however, Mr. Forsyth wrote that if, as appeared to be the fact, Mr. Croxall "stood upon the same ground as all other foreign consuls whose governments had not entered into conventional stipulations with France to secure to those functionaries certain privileges and immunities, the United States have no special reason to complain of the course of proceeding against him. It nevertheless appeared to the President that the imprisonment of Mr. Croxall while holding his commission from the United States, and his exequatur from the French government, was not called for by the occasion, and that any restraint upon him, rendering impracticable the performance of his consular duties, if consonant to national law, was not consistent with national comity, as exercised in France to other friendly powers. This government was embarrassed by the mixed character of the proceedings versus Mr. Croxall. A criminal and civil action appeared to have been carried on and been tried together, and while he has been acquitted of the crime charged he has yet been compelled to pay damages to the accuser.

"Another difficulty was interposed by Mr. Croxall himself, who made no question of official privilege, but submitted, as if as a matter of course, to arrest and detention by the prosecuting officer. So far as regards the civil action, the United States do not assert the right to interfere, except in case of gross injustice, of which the French

tribunals, the President believes, are incapable. Whether the arrest and detention were on the civil or criminal process is not yet understood. On the whole, the President thinks it proper to leave the subject to your discretion, to be pursued or terminated as you may deem best, with this suggestion, however, that the occasion be taken to establish the understanding that, whenever a consul of either party shall be the subject of criminal prosecution requiring restraint upon him, and thus interfering with his official duties, the government proceeding against him shall give notice to the diplomatic representative of the other party of the charge against the consul, that such arrangements for the performance of the consular duties, pending the investigation, may be made as the honor and interest of his government may require."

Mr. Forsyth, Sec. of State, to Mr. Cass, min. to France, No. 6, Dec. 6, 1836, and No. 19, April 13, 1838, MS. Inst. France, XIV. 220, 239.

That the United States will insist on reparation for any personal injustice inflicted on one of its consuls in a foreign state, see Mr. Forsyth, Sec. of State, to Mr. Hunter, April 14, 1837, MS. Inst. Brazil, XV. 43.

Foreign consuls are subject to criminal process for the violation of the municipal laws. In addition to the ordinary means of redress, the President may, in his discretion, withdraw the exequatur.

Cushing, At. Gen., 1855, 7 Op. 367.

With reference to certain judicial proceedings taken by the British authorities at Hongkong against the United States consul there, on a charge of aiding in the rescue of the master of an American vessel who had been arrested for an alleged assault on a seaman on shipboard, the Department of State said: "Information has been received that the proceedings against you for being concerned in the rescue of Captain Nichols have been abandoned. The ground for the discontinuance of those proceedings is that the usher had not the legal custody of Captain Nichols, because he had not been provided with a written warrant to hold him in custody. Upon examination of the evidence you have furnished to the Department, though conflicting, it does not appear sufficient to sustain the charge against you of having aided in the rescue if Captain Nichols had been legally in custody. Though this course towards you may be regarded as an act of discourtesy, yet, all the circumstances considered, it can hardly be treated as an outrage."

Mr. Marcy, Sec. of State, to Mr. Keenan, consul at Hongkong, April 14, 1856, 21 MS. Desp. to Consuls, 567.

Referring to the arrest of the United States consul-general at Montreal, Canada, on a charge of kidnapping, Mr. Seward said: "This

Department does not consider that, pursuant to public law, a consul-general is entitled to any diplomatic immunity. Freedom from arrest in favor of such officers is sometimes stipulated for by treaty, but there is no such stipulation in any treaty between the United States and Great Britain. On the contrary, the 4th article of the convention of the 3rd of July, 1815, declares that, in case of illegal or improper conduct towards the laws or government of the country to which he is sent, a consul may either be punished according to law, if the laws will reach the case, or sent back, the offended government assigning to the other the reason for the same."

Mr. Seward, Sec. of State, to Mr. Bates, Nov. 21, 1863, 62 MS. Dom. Let. 308.

A United States consul in Brazil, who had been libeled in a news paper, went to the office of the editor with a view to chastise him. A scuffle ensued, and the consul, after an attempt had been made on his life, shot the editor. The consul was then arrested, and bail was refused him. As the shooting seemed to have been unpremeditated and in self-defense, the circumstance that he was not admitted to bail occasioned "some surprise;" but, as every effort seemed to have been made to alleviate the hardship of his detention, it was thought that complaint on that score "might be deemed out of place," there being no reason to believe that the proceedings were not conducted in accordance with law.

Mr. Porter, Act. Sec. of State, to Mr. Osborn, No. 120, June 2, 1885, MS. Inst. Brazil, XVII. 294.

Mr. Hollis, United States consul at Mozambique, having shot and wounded a native African whom he mistook for a burglar, was tried by the Portuguese authorities and sentenced to keep the peace for two years or be imprisoned for six months. The practical result of the sentence would have been to place him at liberty, but for the fact that the prosecuting officer took an appeal, pending the determination of which Mr. Hollis was out on bail. Mr. Hollis thought that he should have been acquitted, and wished the government of the United States to intervene. The government did not feel warranted in doing this, unless there had been "a plain denial of justice." The Department of State requested the Navy Department to allow the U. S. S. *Castine*, then cruising on the southeast African coast, to touch at Mozambique and report upon the case.

Mr Gresham, Sec. of State, to Mr. Lodge, U. S. S., April 23, 1895, 201 MS. Dom. Let. 603.

See, also, Mr. Gresham, Sec. of State, to Mr. Hollis, Nov. 17, 1894, 199 MS. Dom. Let. 432.

February 14, 1897, Moustapha Bey, Turkish minister, wrote to Mr. Olney, Secretary of State, that Mr. J. A. Iasigi, Turkish consul-general at Boston, had telegraphed him that he had been arrested in a civil suit in New York, in pursuance of a warrant received by telegraph from Boston. The minister complained of this arrest as being in violation of Article II. of the treaty of 1830, which, as he contended, guaranteed in principle to the Turkish consuls and officers most-favored-nation treatment. He asked that suitable measures be taken for the release of the consul. February 19 Mr. Olney replied that it seemed to be a sufficient answer to the suggestion contained in the minister's note that information had been received which made it entirely certain that Mr. Iasigi's arrest was not made in a civil suit, but on a criminal charge of embezzlement, with a view to his extradition to Massachusetts to be tried thereon. March 9, 1897, Moustapha Bey wrote that in pursuance of instructions which he had received, Mr. Iasigi had been relieved of his functions as consul-general at Boston and was no longer in any sense an agent of the imperial government.

For. Rel. 1897, 582–583.

3. Jurisdiction of Courts in United States.

§ 713.

The constitutional provision giving the Supreme Court original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls has been construed not to mean exclusive jurisdiction, so as to prevent the vesting of power in any such case in inferior Federal courts.

Mr. Forsyth, Sec. of State, to Mr. Cass, min. to France, No. 19, April 13, 1838, MS. Inst. France, XIV. 239.

Both circuit and district courts of the United States have jurisdiction of suits brought against foreign consuls.

Saint Luke's Hospital *v.* Barclay, 3 Blatch. 259; Graham *v.* Stucken, 4 Blatch. 50; Bixby *v.* Janssen, 6 Blatch. 315; Gittings *v.* Crawford, Taney's Decis. 1.

The President has no authority to interpose in a suit against a consul, though it be of a public nature and concern the consul's government. A consul is not privileged from legal process by the law of nations, nor is the French consul-general by the consular convention between the United States and France, of 1788, though the process against him is limited to Federal courts.

Lee, At. Gen., 1797, 1 Op. 77.

Foreign consuls and vice-consuls are not public ministers within the law of nations or the acts of Congress, but are amenable to the civil jurisdiction of the courts. But they are bound to appear only in the Federal courts, the State courts being excluded by the Constitution and laws.

Wirt, At. Gen., 1820, 1 Op. 406.

The exemption of consuls in the United States from suits in the State courts is not a personal privilege, but a privilege that attaches to their official character; and an omission to plead it is not a waiver of it.

Davis *v.* Packard, 7 Pet. 276; Durand *v.* Halbach, 1 Miles (Phila.), 46.

In 1846 judgment was recovered in the superior court of the city of New York against one Thompson, who was associated as a commission merchant with one Mason, doing business under the firm name of Mason & Thompson. Thompson only was served with process. At the trial he made defense on the merits; but, after judgment was rendered against him, he took out a writ of error on the ground that he was consul of Ecuador, and therefore not subject to the jurisdiction of the State courts. The plaintiff alleged in reply, among other things, (1) that the defendant voluntarily submitted himself to the jurisdiction, and (2) that the suit related to matters in which he and Mason were, as partners in trade, jointly interested. Held, that it belonged to the United States courts, and not to the State courts, to determine to what privileges and immunities a foreign consul was entitled, and that the exemption of the defendant was confirmed by section 9 of the judiciary act of 1789, which gave the United States district courts jurisdiction "exclusively of the courts of the several States of all suits against consuls and vice-consuls," with an exception not affecting the pending case. The judgment of the superior court was therefore reversed, and the reversal was affirmed on appeal.

Valarino *v.* Thompson (1853), 7 N. Y. 576.

As to conflicts of criminal jurisdiction between the United States and State courts, see People *v.* Welch (1894), 141 N. Y. 266; In re Loney (1890), 134 U. S. 372.

While State courts have no jurisdiction of suits against foreign consuls, they may assume jurisdiction of suits begun by consuls. And it seems that, where a foreign consul files a bill in equity in a State court, the court may entertain a crossbill.

Sagory *v.* Wissman, 2 Benedict, 240.

It has been held that a foreign consul may be arrested in the United States circuit court, under the acts of February 28, 1839 (5 Stat. 321),

and January 14, 1841 (5 Stat. 410, Rev. Stat. § 990), and the New York code of procedure, in a suit for money recovered by him in a fiduciary capacity. It was held also that the pendency of a former suit in a State court is no defense to a second suit for the same cause of action in the Federal court, as the State court had no jurisdiction.

McKay *v.* Garcia, 6 Benedict, 556.

With reference to certain legal proceedings against the Italian consul at San Francisco, Mr. Fish said that, if the proceedings were in a court of the State of California, and not in any of the courts of the United States, they were "null and void, for it is entirely settled that it is the privilege of the government of Italy, not merely the personal privilege of the consul, that its consul should be impleaded only in a Federal court." If, therefore, the proceedings were in a State court, the consul should bring his official character to its knowledge by a plea to the jurisdiction, so that the record might contain conclusive evidence of its incompetency and of the nullity of any judgment it might render.

Mr. Fish, Sec. of State, to Count de Colobiano, Dec. 22, 1869, MS. Notes to Italy, VII. 48.

With reference to a complaint concerning legal proceedings against the Italian consul at San Francisco, Mr. Fish, after saying that, if the proceedings were in a State court they were null and void and should be checked by a plea to the jurisdiction setting forth the defendant's official character, observed that, if the proceedings were in a United States court, it was expected that any defense which the consul might present would receive impartial and intelligent consideration, and that complete justice would be done. Mr. Fish added that the Executive had "no capacity to control or influence the deliberations of any court, State or Federal;" that if, after a case had been prosecuted to the court of last resort, it should be made to appear that manifest error had intervened and had not been corrected, it might then become the duty of the Executive government to consider its obligation to repair the wrong; but that meanwhile it was the duty of the consul to avail himself of the means of defense which the laws afforded, "and not contribute by his own negligence to an erroneous decision."

Mr. Fish, Sec. of State, to Count de Colobiano, Dec. 22, 1869, MS. Notes to Italy, VII. 48.

For the enunciation of the same principle with reference to a suit in the United States courts at New Orleans against the acting French consul in respect of moneys which he had, as administrator of a deceased citizen of France, transmitted to his government for proper distribution by it, see Mr. Evarts, Sec. of State, to M. Outrey, French min., May 24, 1879, MS. Notes to French Leg. IX. 300.

An action was brought in the United States circuit court for the southern district of New York to recover damages for an alleged unlawful conversion of certain articles of merchandise. The defendant denied the material allegations of the complaint, and by way of counterclaim asked judgment against the plaintiff for certain sums. The plaintiff filed a replication, and the case was tried by a jury, with the result that a verdict was given in favor of the plaintiff. The defendant then sued out a writ of error on the ground, among other things, that he was consul of Sweden and Norway, and that, according to the Constitution and laws of the United States he should have been impleaded, not in the circuit court, but in the United States district court. By section 711 of the Revised Statutes, following the act of 1789, jurisdiction was vested in the United States courts, exclusively of the State courts, of suits against consuls or vice-consuls. By the act of February 18, 1875, 18 Stat. 318, this part of section 711 was repealed, so that there remained no statutory provision which in terms made the jurisdiction of the courts of the United States exclude that of the State courts in suits against consuls or vice-consuls. But, as the Supreme Court and the district courts were, under the Constitution and the existing legislation of Congress, the only Federal tribunals invested with jurisdiction without reference to the citizenship of the parties of suits against consuls, it was held that the only ground on which the jurisdiction of the circuit court could be supported was that of the alienage of the defendant, and that, as such alienage could not be presumed from the mere fact that he was alleged to be a foreign consul, the record did not present a case which the circuit court had authority to determine.

> Börs *v.* Preston (1884), 111 U. S. 252, citing Grace *v.* Am. Ins. Co., 109 U. S. 278, 283; United States *v.* Ravara, 2 Dall. 297; United States *v.* Ortega, 11 Wheat. 467; Davis *v.* Packard, 7 Pet. 276, 284; St. Luke's Hospital *v.* Barclay, 3 Blatch. 259; Graham *v.* Stucken, 4 id. 50; Gittings *v.* Crawford, Taney's Decis. 1.

A certain person was sued at Atlanta, Ga., for a balance due on furniture. He made no defense until after judgment was rendered against him, when he moved to set the judgment aside on the ground that he was a Belgian subject, residing at Atlanta as consul of the Belgian government, received and recognized as such by the government of the United States, and that he was not subject to suit in the State courts. The motion was overruled, and this decision was affirmed on appeal.

> De Give *v.* Grand Rapids Furniture Co. (1894), 94 Ga. 605, 21 S. E. 582. See, also, Pooley *v.* Luco, 72 Fed. Rep. 561.

In reply to a complaint that the Danish vice-consul at New York had refused to obey a subpœna duces tecum issued by a State court,

Mr. Olney referred to Article X. of the consular convention between the United States and Denmark of April 26, 1826, which declares that the archives of consulates are inviolable and that under no pretext has any magistrate the right to seize or interfere with them, and added: "A State court has no jurisdiction of writs against a foreign consul, such jurisdiction being specifically reserved to the Federal courts, under Article XI. sec. 2, of the Constitution. In this connection you are referred to sections 563, 687, 688, and 711 of the Revised Statutes."

Mr. Olney, Sec. of State, to Messrs. Martin & Weil, Nov. 13, 1896, 213 MS. Dom. Let. 673.

The Turkish consul at Boston, being charged with embezzlement in Massachusetts, was committed to prison in the city of New York by a city magistrate for thirty days to await a requisition from the governor of Massachusetts for his delivery to the agent of that State. He applied for a writ of habeas corpus in order to obtain his release. By the judiciary act of 1789, 1 Stat. 73, it was provided (sec. 13) that the Supreme Court should have "original but not exclusive jurisdiction of all suits" in which a consul or vice-consul should be a party; that the district courts should have, exclusively of the State courts, jurisdiction of all crimes and offenses cognizable by the United States, where the punishment should not exceed six months (sec. 9); that the district courts should also have jurisdiction, exclusively of the State courts, "of all suits against consuls and vice-consuls," with certain exceptions; and that the circuit courts should have exclusive cognizance of all crimes and offenses against the United States, except where otherwise provided, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. Under these provisions it remained the accepted law until 1875 that the Federal courts had exclusive jurisdiction of offenses by foreign consuls.[a] The provisions of the judiciary act were carried into the Revised Statutes of the United States June 22, 1874, without any substantial change, but under a different arrangement. By paragraph 8 of section 711 the jurisdiction of the State courts was excluded in all "suits or proceedings" against consuls. The word "proceedings" was new, while the word "offenses," which was embodied in the exception in section 9 of the judiciary act, was omitted. By the act of February 18, 1875, 18 Stat. 316, paragraph 8 of section 711 was stricken out. The provisions of sections 563 and 629, Revised Statutes, conferring jurisdiction on the Federal courts in all cases against consuls, both of crimes and of suits, were left untouched, as was also paragraph 1 of section 711, conferring on the Federal courts exclusive jurisdiction of "all crimes and of-

[a] United States *v.* Ravara, 2 Dall. 297; Com. *v.* Kosloff, 5 Serg. & R. 545; United States *v.* Ortega, 11 Wheat. 472, 473, note.

fenses cognizable under the authority of the United States." It was contended that by the repeal of paragraph 8 of section 711, which excluded the jurisdiction of State courts in "suits or proceedings" against consuls, the jurisdiction of those courts was opened to the prosecution of crimes and offenses by consuls against State laws, while, on behalf of the petitioner, it was urged that offenses by consuls were still cognizable exclusively by the Federal courts. Without deciding this question, the court held that the objection to the jurisdiction of the State courts did not apply to preliminary proceedings in interstate rendition, or to a commitment by a magistrate not acting as a court.

In re Iasigi (1897), 79 Fed. Rep. 751.

It was also held that the district judge, who had denied the writ of habeas corpus, had no power to admit the prisoner to bail pending an appeal to the Supreme Court from the order denying the writ. (In re Iasigi (1897), 79 Fed. Rep. 755.)

An appeal was taken by the prisoner to the Supreme Court of the United States from the foregoing decision. On the hearing a letter was produced from the Assistant Secretary of State, by which it appeared that, between the date of the issuance of the writ of habeas corpus and that of the order remanding the prisoner into custody, the latter was removed from office by the Turkish government. Held, that the objection to his detention, if such objection was ever tenable, which the court did "not intend in the slightest degree to intimate that it could be," no longer existed at the time of the order, and that the order therefore could not be held to be erroneous.

Iasigi *v.* Van de Carr (1897), 166 U. S. 391, citing, among other cases, Ex parte Hitz, 111 U. S. 766, and Nishimura Ekiu *v.* United States, 142 U. S. 651.

Since the repeal by the act of February 8, 1875, of paragraph 8 of section 711 of the Revised Statutes of the United States, the State courts have concurrent jurisdiction with the Federal courts of civil suits against consuls. Under section 709, Revised Statutes, the judgment of the State courts may be reviewed by the Supreme Court of the United States on writ of error; but this right of review may be waived by the consul, either by defending in the State courts on the merits or by suffering judgment to go against him by default.

Wilcox *v.* Luco (1897), 118 Cal. 639; 50 Pac. Rep. 758.

It was held in this case, on July 16, 1896, that, without regard to the repeal of sec. 9 of the judiciary act of 1789, a State court could not exercise civil jurisdiction over a foreign consul, in view of sec. 2, Art. III., of the Constitution, declaring the judicial power of the United States to extend "to all cases affecting ambassadors, other public ministers, and consuls." (Wilcox *v.* Luco, 45 Pac. Rep. 676, citing Miller *v.* Van Loben Sels, 66 Cal. 341.)

The case was reheard, with the result that, as above shown, the opposite view was finally maintained.

4. THE GIVING OF TESTIMONY.

§ 714.

Exemption from the obligation to appear as a witness is secured absolutely by the convention with France, and, except for defense of persons charged with crime, by treaties with Austria-Hungary, Belgium, Italy, Netherlands, Roumania, Salvador, and Servia. Where the consul can not be required to appear, his testimony may be taken in writing at his dwelling. In claiming his privilege from process, he should offer to give his evidence in the mode prescribed by the particular treaty, and should throw no impediment in the way of proper administration of justice in the country of his official residence.

Consular Regulations of the United States (1896), § 82, p. 32.

Dillon's case.

At the April session, 1854, of the United States district court for the northern district of California, an indictment was found against Señor Del Valle, Mexican consul at San Francisco, under section 2 of the neutrality act of 1818, on a charge of enlisting or hiring certain persons to enlist as soldiers in the service of the Republic of Mexico. Among the witnesses for the defense was M. Dillon, French consul at San Francisco, who was served with a subpœna duces tecum. When the witnesses for the defense were called M. Dillon was not in court. It was found that the subpœna had been returned merely as "served," in the same form as the rest of the summonses. Defendant's counsel then asked for an attachment against the absent witness and stated that, if the court desired, they were prepared to argue their right to the attachment. Judge Ogden Hoffman, before whom the case was pending, stated, according to a contemporary report of the trial, that any argument was unnecessary: that he had reflected upon the subject and was satisfied that an attachment must issue, since the sixth amendment to the Constitution, securing to persons accused the right to have compulsory process for obtaining witnesses in their favor, although it may have been broader than it should have been, must override any claim of immunity from process, even though such claim be made under a treaty. When brought into court under the attachment, M. Dillon presented, through counsel, a protest based upon Articles II. and III. of the consular convention between the United States and France of February 23, 1853. By Article II. it is provided that consuls shall never be compelled to appear as witnesses before the courts, but that, if their testimony is desired, they shall be invited in writing to appear in court and give it, and that, if they are unable to do so, it shall be requested to be given in writing or be taken orally at their dwellings. Article III. provides that the consular offices and dwellings shall be inviolable, that the local authorities shall not under any pretext in-

vade them, nor in any case "examine or seize the papers therein deposited." M. Dillon stated that the paper which he was summoned to bring with him must, if in existence, have formed a part of the archives of his consulate.

The question raised by the protest was then fully argued and Judge Hoffman, changing the view which he had previously taken, held that compulsory process ought to have been refused. In rendering his decision, he stated that it was admitted by counsel for M. Dillon that, if the Constitution secured to the accused the right to process against the consul in order to secure his testimony, he could not be deprived of it by a treaty stipulation. Judge Hoffman held, however, that the sixth amendment was intended only to place the accused in the same position in making his defense as the government occupied in endeavoring to establish his guilt, and that the object of the provision was accomplished if he enjoyed equal rights with the government in compelling the attendance of witnesses. An ambassador, said Judge Hoffman, was not amenable to the laws of the country to which he was sent, and this immunity was recognized and confirmed by sec. 29 of the act of April 30, 1790. In the present case, a consul had by a treaty, which was the supreme law, been placed beyond the reach of the court's process. The cases seemed not to be distinguishable in principle, and as no discrimination was made between the accused and the prosecution, the Constitution was not violated.

In re Dillon, 7 Sawy. 561, 7 Fed. Cas. 710; Report of the Trial of Luis Del Valle, Consul of the Republic of Mexico at the Port of San Francisco, for a Breach of the Neutrality Laws of the United States, in the District Court of the United States for the Northern District of California: San Francisco, 1854.

When the attachment was served on M. Dillon, he hauled down his consular flag; and the case was taken up by the French minister at Washington, as involving a gross disrespect to France. A long and animated controversy between Mr. Marcy, then Secretary of State, and the French government ensued. The fact that an attachment had issued under which M. Dillon was brought into court was regarded by the French government not merely as a contravention of the treaty, but as an offense by international law; and it was argued that the disrespect was not purged by the subsequent discharge of M. Dillon from arrest. It was urged, also, that the fact that the subpœna contained the clause duces tecum involved a violation of the consular archives. Mr. Marcy, in a letter of September 11, 1854, to Mr. Mason, then minister at Paris, discusses these questions at great length. He maintains that the provision in the Federal Constitution giving defendants opportunity to meet witnesses produced against them face

to face, overrides conflicting treaties, unless in cases where such treaties embody exceptions to this right recognized as such when the Constitution was framed. One of these exceptions relates to the case of diplomatic representatives. "As the law of evidence stood when the Constitution went into effect," says Mr. Marcy, "ambassadors and ministers could not be served with compulsory process to appear as witnesses, and the clause in the Constitution referred to did not give to the defendant in criminal prosecutions the right to compel their attendance in court." This privilege, however, Mr. Marcy maintained, did not extend to consuls, and consuls, therefore, could only procure the privilege when given to them by treaty which, in criminal cases, was subject to the limitations of the Constitution of the United States. Mr. Marcy, however, finding that the French government continued to regard the attachment, with the subpœna duces tecum, as an attack on its honor, offered, in a letter to Mr. Mason, dated January 18, 1855, to compromise the matter by a salute to the French flag upon a French man-of-war, stopping at San Francisco. Count de Sartiges, the French minister at Washington, asked in addition that when the consular flag at San Francisco was rehoisted, it should receive a salute. This was declined by Mr. Marcy. In August, 1855, after a long and protracted controversy, the French government agreed to accept as a sufficient satisfaction an expression of regret by the government of the United States, coupled with the provision that "when a French national ship or squadron shall appear in the harbor of San Francisco the United States authorities there, military or naval, will salute the national flag borne by such ship or squadron with a national salute, at an hour to be specified and agreed on with the French naval commanding officer present, and the French ship or squadron whose flag is thus saluted will return the salute gun for gun."

Mr. Marcy, Sec. of State, to Mr. Mason, min. to France, May 30, 1854; June 8, 1854; July 14, 1854; Sept. 11, 1854; Dec. 13, 1854; Jan. 18, 1855; MS. Inst. France, XV. 192, 198, 202, 210, 241, 249.
See, also, President Pierce, annual message, Dec. 4, 1854.

Under Article II. of the consular convention between the United States and France, of February 23, 1853, supra, "it is the duty of a consul, when invited to appear in court to give his testimony, to comply with the request unless *he is unable to do so*. This duty he violates, if he refuses without good and substantial excuse. Neither his official character, his disinclination, nor any slight personal inconvenience constitutes such an excuse. The pressure and importance of official duties requiring immediate performance may prevent his attendance in court, but such can very rarely be the case where the court sits at the place of his residence. It is not claimed that the

court can entertain the question of the competency of his excuse for declining to comply with its invitation; but, where the government of the United States has fair grounds to question the good faith with which the consul avails himself of the provision of the convention which exempts him from compulsory process, it has two modes of redress and it can take either at its option. It can appeal to the consul's government to inquire into the case in this respect, and to deal with him as it shall find his conduct deserves; or it can revoke his *exequatur*."

Mr. Marcy, Sec. of State, to Mr. de Figanière, Portuguese chargé d'affaires, March 27, 1855, MS. Notes to Portugal, VI. 145.

See, also, Mr. Marcy, Sec. of State, to Mr. Mason, min. to France, Jan. 18, 1855, MS. Inst. France, XV. 249.

By the last clause of Article II. here cited, it is provided that in case of death, indisposition, or absence of consular officers, the consular secretaries and consular pupils attached to their offices shall be entitled to discharge ad interim the duties of their respective posts, and shall enjoy, while thus acting, the prerogatives granted to the incumbents. "It is manifest that under the clause just cited, in the absence of the consul, the person acting as such officer would be entitled to the same privileges and rights as the consul, and this is the construction which the Department thinks should be given to it." (Mr. Thomas, Assist. Sec. of State, to Mr. McCoy, March 26, 1856, 45 MS. Dom. Let. 171.)

The contention of Mr. Marcy in the case of M. Dillon, French consul at San Francisco, that the sixth amendment to the Constitution of the United States, which provides that an accused party shall have compulsory process for obtaining witnesses in his favor, should be considered as qualifying the general and absolute terms of the consular convention with France, "was not acquiesced in by the French government, which required their flag, when raised to the mastheads of certain of their men-of-war at San Francisco, to be saluted as a reparation for the alleged indignity to their consul." It is therefore desirable that in any future consular convention no such oversight should be committed.

Mr. Fish, Sec. of State, to Mr. Bassett, Oct. 18, 1872, MS. Inst. Hayti, I. 267.

Case of Mr. Guenther.

Under date of Feb. 16, 1899, Mr. Guenther, consul-general of the United States at Frankfort on the Main, was served with a subpœna from the royal court of that place to appear and give testimony in a pending suit against one Ludwig Bettag. The subpœna contained this clause: "Witnesses who do not appear without sufficient excuse are to be sentenced, according to paragraph 50 of the penal code, to pay the costs occasioned by such nonappearance, also to a fine not to

exceed 300 marks; and if this is not paid, to imprisonment not to exceed six weeks—producing them by arrest is also admissible."

Mr. Guenther, in reply, sent to the court a note, indicating his readiness to testify if properly requested to do so, but protesting against being summoned under threats of fine and imprisonment and eventual arrest.

The Department of State, on receiving the correspondence, instructed the embassy at Berlin (1) that, as no exemption from summons was stipulated for in the consular convention of 1871, it could not be claimed unless it should be found that the consul-general was entitled to it under the most-favored-nation clause, but (2) that, as by Article III. of the convention Mr. Guenther, not being a German subject, enjoyed "personal immunity from arrest or imprisonment, except in the case of crime," the menace of fine, arrest, and imprisonment, not for any crime, not only appeared to be gratuitous and "wanting in the respect due from one friendly government toward the consular officer of another," but, if carried into effect, would constitute a flagrant violation of the treaty. Continuing, the Department of State said:

"Article V. provides that 'the officers and dwellings of consuls missi, who are not citizens of the country of their residence, shall be at all times inviolable. The local authority shall not, except in the case of the pursuit for crime, under any pretext invade them.'

"While Mr. Guenther's office and dwelling are inviolable, he is threatened with arrest and imprisonment outside, or by virtual imprisonment inside, his office and dwelling, if he fails to obey the process, either by arresting him outside of his dwelling and office or inside thereof; or, if it is not sought to arrest him outside, to virtually imprison him within by making it impossible for him to go out without being subject to arrest and imprisonment.

"It appears, moreover, that the summons is addressed to him as consul-general of the United States, and he is, as such officer, required, in answer to question one, attached to the process, to give evidence, 'from papers to be shown,' whether 'Bettag is an American citizen.' The papers referred to are evidently those belonging to the consular archives. This would seem to be violative of Article V., which provides that 'the consular archives shall be at all times inviolable, and under no pretense whatever shall the local authorities be allowed to examine the papers forming part of them.' While the papers are protected from seizure or examination, the thing prohibited is sought to be accomplished by compelling the consul to show them or to disclose their contents."

Mr. Hay, Sec. of State, to Mr. White, amb. to Germany, March 6, 1899, For. Rel. 1899, 302.

In a dispatch of Feb. 28, 1899, Mr. Guenther reported that the royal court, in reply to his protest, had sent him a polite letter requesting him to appear and give his testimony on "Feb. 28, 1899, between the hours of 9 to 12 a. m.," and stating that the summons was made out in the usual form by mistake. Mr. Guenther also said that he had "complied with the request and answered the questions propounded in court, where the officials verbally apologized and said that they had not been aware of the existence of the consular convention of 1871." (For. Rel. 1899, 305.)

The Department of State expressed gratification with "the satisfactory termination of the incident." (For. Rel. 1899, 305.)

The instruction of Mr. Hay to Mr. White, above quoted, enclosed a copy of an instruction of July 31, 1894, to Mr. Mason, then consul-general of the United States at Frankfort on the Main, in relation to a summons sent him in a suit brought by Julius Teufel against Henry Nickel for defamation of character, to testify as to statements made to him by Nickel that Teufel had undervalued certain exported articles. The Department of State then said:

"The information regarding which your testimony is desired was conveyed by Mr. Nickel to you in your capacity of consul-general of the United States, and as such officer you took action and communicated the statements to the Department, thereby making them a part of the records of your consulate.

"It is provided in Article V. of the treaty of 1871 with Germany that the consular archives shall be at all times inviolable; and where communications are from their nature confidential, for the cognizance of the consul's government only, it is clear that consular officers should not be called upon to testify regarding them.

"The Department, therefore, can not authorize you to testify in the case, on the ground that whatever knowledge you may have is official and privileged, because concerning only your relation to your own government.

"It is also very probable that Germany has a treaty with France, or with some other country, giving consular officers the privilege of declining to appear in courts as witnesses. In such event, the position now taken would be fortified by the provisions regarding privileges and immunities granted to the most favored nation contained in Article III. of the treaty of 1871 with Germany.

"From the inclosed letter from the Treasury Department you will see that the Secretary of the Treasury is of the opinion that your appearance as a witness would be detrimental to the interests of this country." (Mr. Rockhill, Third Assistant Sec. of State, to Mr. Mason, U. S. consul, July 31, 1894, For. Rel. 1899, 304.)

Art. III. of the treaty of Dec. 11, 1871, also provides that consular officers "shall not in any event be interfered with in the exercise of their official functions, further than is indispensable for the administration of the laws of the country." For the invocation of this clause in the case of Mr. Merritt, consul at Chemnitz, Saxony, when ordered to appear and give testimony at a time when he had an official engagement elsewhere, see Mr. Blaine, Sec. of State, to Mr. Phelps, No. 178, Dec. 17, 1890, and No. 196, Jan. 29, 1891, MS. Inst. Germany, XVIII. 389, 403.

Consuls, whether missi, salaried, feed, or engaged in business or not, are not as a general rule exempt from judicial process, but they

can not be summoned to give evidence of matters of their consular business, nor to produce to the court any part of the consular archives.

Mr. Hill, Acting Sec. of State, to Mr. Hunter, min. to Guatemala, Jan. 9, 1901, For. Rel. 1900, 705.

Case at Bluefields.

March 27, 1899, Col. Francisco E. Torres, the "delegate of the executive power on the Atlantic coast" of Nicaragua, addressed to Mr. Clancy, consular agent of the United States at Bluefields, certain questions concerning the revolutionary uprising under General Reyes during the preceding month. The uprising had been suppressed, and Col. Torres was conducting a military court of inquiry. The questions addressed to Mr. Clancy related to his action in issuing at the beginning of the outbreak a warning to Americans to observe a strict neutrality, to his attitude and that of the commander of the U. S. S. *Marietta* toward the revolutionary authorities, and to the action of various Americans. Mr. Clancy refused to answer the questions without the permission of his official superiors.[a]

April 7, 1899, Mr. Sorsby, U. S. consul at San Juan del Norte, telegraphed to the Department of State: "Martial law continues. Must Clancy appear before court of inquiry now sitting here and testify regarding Americans in late revolution and political events generally relating thereto? I request that Clancy's refusal to appear be approved."[b]

"The Department has received a cablegram (copy inclosed) from our consul, W. S. Sorsby, asking whether our consular agent, M. J. Clancy, at Bluefields, 'must appear before the court of inquiry now sitting here and testify regarding Americans in the late revolution and political events generally relating thereto,' and asking whether his refusal to do so is approved.

"Article X. of the treaty of 1867 between the United States and Nicaragua provides that 'the diplomatic agents and consuls of the United States in Nicaragua shall enjoy according to the strictest reciprocity whatever privileges, exemptions, and immunities are or may be granted in the Republic of Nicaragua to the diplomatic agents and consuls of the most favored nations.'

"You will determine what immunities, exemptions, and privileges are accorded by Nicaragua by treaty with Spain, Great Britain, or any other nation, to the consuls of such nation; and whatever exemption, privilege, and immunity they are accorded you will claim for Mr. Clancy.

"As a general rule of international law it may be observed that in the absence of treaty stipulation consuls are not, as such and in general, entitled to all immunities which attach to a diplomatic repre-

[a] For. Rel. 1899, 563, 564.

[b] For. Rel. 1899, 568.

sentative. The consular archives are, however, inviolable under all circumstances. They can neither be invaded nor searched, nor seized by the officers of justice or other authority; but the personal books and papers of the consul are not entitled to such immunity. He can not be required to divulge information which came to him in his official capacity, for that is the exclusive property of his government; but as to matters which come within his knowledge or observation in his mere capacity as an individual he is not privileged from testifying as a witness. If a consul should himself participate in the commission of crime or in setting on foot an insurrection, or should observe others doing so, against the government to which he is accredited, he could not be shielded from testifying, according to the forms of the local law, as to the facts thus acquired and within his personal knowledge.

"On the one hand, he is entitled to enjoy all the privileges necessary to enable him to discharge the duties of his office; on the other hand, he is not to refuse to testify, under the circumstances and limitations above stated, simply because the facts to which he is required to testify might be of a political character, or simply because his testimony might have a tendency to implicate American citizens or others in the commission of unlawful acts."

Mr. Hay, Sec. of State, to Mr. Merry, min. to Nicaragua, April 17, 1899, For. Rel. 1899, 566, 567–568.

On the same day Mr. Hay telegraphed to Mr. Sorsby as follows: "Claim all exemptions, privileges, and immunities accorded by Nicaragua by treaty to consuls of any other most favored foreign nation. If none such are accorded by treaty between Nicaragua and other foreign state, Clancy may testify touching facts which came to his knowledge in his merely personal and unofficial capacity, but not as to facts or communications obtained in his capacity as consular agent. If he so testifies, report to the Department copy of questions and answers." (For. Rel. 1899, 568.)

April 30, 1899, Mr. Merry wrote: "The 'court-martial' continues taking evidence daily, with closed doors." (For. Rel. 1899, 575, 576.)

"Respectfully requesting reference to your No. 217, dated April 17, I desire to state that before its receipt I had telegraphed from Managua to Mr. Sorsby, at Bluefields, supporting his decision as to refusal to testify before the Torres court-martial. Three days prior to my departure from Bluefields the dispatch reached me, when the matter had already been dropped by General Torres.

"Although aware that within the limitations explained in your instruction consular officers might be required to testify before the civil courts of the country to which they are accredited, I arrived at the conclusion that such evidence could not be properly given before a court-martial. The English vice-consul, taking the same ground, appeared, and after giving his name and address, refused to testify without the order of his superior, who has supported him. I was also

influenced by the desire to avoid a dangerous precedent. Martial law is often declared in the Spanish-American republics during the time of peace, as at Bluefields, for political purposes. If these military courts are authorized to demand the presence of our consular officers as witnesses there is no limit to the possibility of abuse resulting therefrom, as no restriction will be placed by them upon the information they will ask for, and the privileged consular information will thus be accessible to them. In the case of Mr. Clancy it was doubly dangerous, because, not understanding Spanish, he would have no means of knowing if his evidence was correctly translated. Instances have occurred recently at Bluefields where the hired government translator tried to have recorded what the foreign witness had not stated, but, the witness understanding Spanish, he was promptly corrected and reprimanded by the witness. The matter having been practically closed, and no demand made upon me for consular evidence after my arrival at Bluefields, the precedent is now established that before courts-martial in Central America ministers and consular officers need not testify—a position which I respectfully suggest may be of importance hereafter. Had I received your No. 217, dated April 17, in time, I should, of course, have strictly obeyed the instruction."

Mr. Merry, min. to Nicaragua, to Mr. Hay, Sec. of State, May 9, 1899, For. Rel. 1899, 583.

5. Taxation.

(1) liabilities and exemptions.

§ 715.

With reference to a complaint that the consul of the Elector of Hesse at New York had been enrolled in a military company, and had been fined by a court-martial for nonattendance upon the company's parades, the Department of State said that the case was one that belonged primarily to the courts of law, which had, when resorted to in such cases, always decided, according to the principle laid down in the law of nations, and embodied in treaties, that "all persons recognized in the consular character by the President's exequatur, *who are not citizens of the United States*, are exempted from all public service, and from all taxes, imposts, and contributions except such as they may have to pay on their property, or in consequence of their engaging in commercial pursuits, they remaining in all cases amenable to the laws of the country."

Mr. Forsyth, Sec. of State, to Mr. Faber, Feb. 3, 1840, 30 MS. Dom. Let. 465.

As to Art. V. of the consular convention with New Granada of 1850, see Mr. Cridler, Third Assist. Sec. of State, to Mr. McNally, May 13, 1899, No. 34, 167, MS. Inst. Consuls, 272.

"If Bremen consuls are exempted from taxation in the United States, it is through the courtesy of the authorities of the several States in which these officers are situated, and not from any stipulation in the existing treaty between the United States and Bremen, of which only can this Department take cognizance."

Mr. Appleton, Assist. Sec. of State, to Mr. Diller, consul at Bremen, March 3, 1859, 26 MS. Desp. to Consuls, 508.

See, also, Mr. F. W. Seward, Assist. Sec. of State, to Mr. Doering, vice-consul at Oldenburg, May 29, 1861, 29 MS. Desp. to Consuls, 523.

With reference to a complaint of the Russian minister that the Russian consul-general at New York had been called upon to pay the Federal income tax, Mr. Seward wrote the Secretary of the Treasury that it was desirable that the law on the subject should receive such a construction as to exempt foreign consuls "from any such tax which may not be chargeable upon income derived from property in the United States or from business other than that of an official character." If the law would not admit of such a construction, Mr. Seward suggested that it should be modified, and he added that the Department of State was not aware that the income of any United States consul abroad, derived from official sources, was taxable by the governments of the countries where they resided.

Mr. Seward, Sec. of State, to Mr. Chase, Sept. 23, 1863, 62 MS. Dom. Let. 9.

"Whatever we may say of the right of a government to tax the incomes . . . of persons residing within its borders as consuls from foreign governments, the practice of late years of our own government, and it is believed of the British government, has been not to insist on such a tax. Therefore, whatever may be said on the abstract question of the right of the British government to tax your income, you may with good reason claim exemption from such tax in the present case on the ground of international comity and reciprocal favor." (Mr. Adee, Second Assist. Sec. of State, to Mr. Bonham, consul-general at Calcutta, No. 20, April 5, 1887, 120 MS. Inst. Consuls, 677.)

"The general principle is that a foreign consular officer is subject to no charge in the country of residence, by reason of his official capacity or acts; but that if such officer contracts private interests there, such as engaging in business, acquiring taxable property, and the like, he is subject to the same rules as a private individual. I know of no [United States] internal-revenue tax which could affect the official character, functions, or emoluments of a foreign consul."

Mr. Frelinghuysen, Sec. of State, to Mr. de Struve, Russian min., April 21, 1884, MS. Notes to Russia, VII. 449.

See, as to consular exemptions from taxation, under particular conventions, Consular Regulations of the United States (1896), § 83, p. 32.

By Article III. of the consular convention with Italy of 1878, consular officers, citizens of the state by which they are appointed, are "exempt from all national, state or municipal taxes, imposed upon persons either in the nature of capitation tax or in respect to their property unless such taxes become due on account of the possession of real estate or for interest on capital invested in the state in which they reside. If they are engaged in trade, manufactures or commerce, they shall not enjoy such exemption but shall be obliged to pay the same taxes as are paid by other foreigners under similar circumstances."

By Article X. of the treaty between the United States and Portugal of 1840, each party engages to give to consuls appointed by the other most-favored nation treatment. Hence it was advised that the Portuguese vice-consul at New York, whose residence was in New Jersey, was entitled to exemption in the latter State from (1) a capitation or poll tax, and (2) a tax on his personal property, unless it became due for interest on capital invested in the State of his residence, New Jersey.

Mr. Day, Assist, Sec. of State, to the governor of New Jersey, Jan. 31, 1898, 225 MS. Dom. Let. 89.

With reference to a note of the minister of Austria-Hungary of January 26, 1898, concerning the Austrian income tax law which took effect on the first of the year, and the treaty between the two countries of July 11, 1870, the Department of State said: "The interpretation placed by this Department on the treaty corresponds with that suggested in your note, namely, that where consuls are citizens of the country which has appointed them and are owners of real estate in the country to which they are accredited, they are subject to taxation on their real and personal property, which would include the tax on their houses and on their incomes derived from mortgages on property situated in the country where they exercise their consular functions. So far as this Department is informed, the practice in the various States composing the United States is in harmony with this interpretation of the treaty."

Mr. Sherman, Sec. of State, to Mr. Hengelmüller, Austro-Hungarian min., No. 212, Feb. 2, 1898, MS. Notes to Aust. Leg. IX. 352.

See, as to treaty stipulations, Consular Regulations of the U. S. (1896), § 83, p. 32.

By Article III. of the consular convention between the United States and Germany, of December 11, 1871, it is provided that under no circumstances shall the "official income" of consular officers be subject to any tax.

By the German law relating to insurance against disability and old age, all persons working in a dependent position, on regular wages

that do not exceed a certain amount per annum, are required to insure themselves against certain liabilities, the insurance to be effected by means of stamps pasted on cards, one half the cost of the stamps being paid by the employer and the other half by the employee. The American consuls in Germany submitted themselves to the law, in respect of their German employees, it being for the advantage of the latter. In 1901, however, a question was raised by the United States consul at Breslau in respect of two German subjects employed by him, one as secretary and the other as messenger, the consul claiming that neither he nor they could be obliged to pay the tax. The German authorities, on the other hand, considered it doubtful if the consul was freed by the treaty from the obligation to contribute toward the payment for the stamps, and besides intimated that, if the two employees were to be considered as American officials, they were not entitled to any pension under the law. The foreign office therefore requested the American embassy to use its good offices in the case to the end that the two German subjects in question might not be deprived of advantages which would accrue to them if they were in other employ. It seems that there had always been uncertainties as to the exact meaning of Article III. of the convention of 1871, in so far as it related to consular officers and employees of German nationality, but that the general practice had been to exempt them from taxation. This, however, had not been done in pursuance of any formal decision, and, if the question was made one of principle, it seemed not improbable that the German employees of the American consulates would be held to be liable to local taxation.

The Department of State held that under the provisions of Article III. the consul at Breslau, not being a German subject, was exempt from the payment of the tax in question, but that this exemption could not be claimed for the secretary and messenger of the consulate who were German subjects; and that, as the members of the embassy at Berlin and the United States consular officers generally throughout the German Empire had voluntarily submitted themselves and their employees to the provisions of the insurance law, the consul at Breslau should be advised to follow the same course, as it was to the advantage of his employees. It was observed that he could undoubtedly so arrange that they should bear the payment of the quota of the contribution which he was asked to pay.

Mr. Hill, Act. Sec. of State, to Mr. White, ambass. to Germany, Apr. 30, 1901, For. Rel. 1901, 173, acknowledging despatch No. 1604 of Mr Jackson, chargé, to Mr. Hay, Sec. of State, Apr. 13, 1901, For. Rel. 1901, 172.

(2) Customs Duties.

§ 716.

It is not usual to allow to consuls the right of free entry for goods sent to them for their personal use; though in some countries this privilege is granted as a matter of courtesy.

Mr. Bayard, Sec. of State, to Mr. Cox, Nov. 6, 1885, MS. Inst. Turkey, IV. 305.

Article II. of the treaty between the United States and Austria-Hungary of 1870, in exempting consuls from all direct and personal taxation, refers to all kinds of assessments, forced loans, income and capitation taxes, and other charges levied by the general or local government upon the individual, distinct from property taxes or duties by reason of transactions in which he may engage in the place of his residence. It does not refer to customs duties upon importations collected by the general government, nor to municipal duties on articles of consumption, commonly called *octroi* duties, nor to excise taxes, stamp charges, and the like.

Mr. Bayard, Sec. of State, to Mr. Lee, chargé, No. 16, Nov. 6, 1885, MS. Inst. Aust.-Hungary, III. 371.

Although exemption from stamp taxes on paper used officially by consuls in Mexico is "not expressly conceded by the Mexican consular law," it "is rational to expect it, and it is apparently sanctioned by usage." (Mr. Blaine, Sec. of State, to Mr. Ryan, min. to Mexico, No. 362, Oct. 8, 1890, MS. Inst. Mex. XXII. 641.)

Article III. of the treaty between the United States and the German Empire of 1871 does not exempt consuls from payment of customs duties on importations.

Mr. Rives, Assist. Sec. of State, to Mr. Smith, No. 100, Jan. 3, 1889, 128 MS. Inst. Consuls, 214.

By Article XVII. of the treaty between the United States and Tunis of 1797, each party is "at liberty to establish a consul in the dependencies of the other;" and this consul is entitled to "import for his own use all his provisions and furniture without paying any duty." In 1895 the Tunisan minister of foreign affairs, who was also the French minister resident, notified the vice-consul of the United States that the government of Tunis intended to suppress all privileges, honors, and prerogatives granted to the consuls by treaties, except in the case of salaried officers. As the vice-consul was an unsalaried officer, the United States, March 12, 1895, declared that in conformity with the rule generally observed, which made no discrimination between salaried and unsalaried consular officers of foreign states, it could not acquiesce in any differential treatment of its consular officers abroad "based upon a mere detail of financial relation between this government and its agent, which in no manner

concerns the agent's relation to the government to which he is accredited and from which he receives his exequatur." The French government subsequently stated that the object which the Tunisan government had in view was the withdrawal of the custom-house franchise from consular agents engaged in business. The United States, besides reaffirming its position that neither the treaty nor usage made any distinction between salaried and unsalaried consular officers, replied that it was perfectly compatible with a consular officer's duties as such that he be permitted to engage in trade, and that the practice was generally recognized among nations; that vice-consuls, as a rule, were resident merchants, and even officers of the regular consular career receiving salaries below a stated amount were permitted to engage in business apart from their office and subject to the laws governing trade, and that the United States would insist on similar treatment for its consular agent to that accorded to "consuls de carrière."

Mr. Uhl, Act. Sec. of State, to Mr. Vignaud, chargé at Paris, March 12, 1895, For. Rel. 1895, I. 414; Mr. Olney, Sec. of State, to Mr. Eustis, amb. to France, June 17, 1895, and Dec. 7, 1895, id. 419, 422.

"In no event could a consular uniform, which is the personal property of the individual, be included in the term 'consular supplies,' which are the property of the government. The case is different with flags and coats-of-arms, which belong to the government, and are by the consular officer turned over to his successor."

Mr. Moore, Assist. Sec. of State, to Mr. Cafiero, May 11, 1898, MS. Notes to For. Consuls, IV. 413.

"In explanation of my statement in my aforesaid note [of June 5] to the effect that consular officers are not accorded the privilege of free entry, I have to say that on the arrival of consular officers in this country free entry is allowed of their personal and household effects, as in the case of ordinary passengers; but, under the regulations of the Treasury Department, they have not the right after arrival in this country, as in the case of ambassadors and ministers, to import supplies, &c., free of duty. The fact that Signor Tosti [Italian vice-consul at New York] failed to import his household effects for his permanent establishment here on the occasion of his first arrival in this country in his official capacity of vice-consul, is no bar to the free importation now of such effects, provided they have been used abroad not less than one year, whether immediately preceding his arrival or not."

Mr. Hay, Sec. of State, to Count Vinci, No. 489, June 8, 1899, MS. Notes to Italian Leg. IX. 362.

"Article 476 of the Customs Regulations of the United States provides for the free entry in the United States 'of articles sent by a

foreign government, for its use, to an agent in this country, on application through the Department of State.' Under this article official supplies to foreign consular officers in the United States are admitted free of duty.

"With a view of establishing Article 476 aforesaid upon a reciprocal basis, which would appear to be rightfully demanded, the Secretary of the Treasury desires to ascertain the course pursued in this respect towards United States consular officers by the different nations of the world having consular representatives in this country."

Mr. Hill, Act. Sec. of State, to Dip. officers of the United States, circular, May 29, 1901, MS. Inst. Arg. Rep., XVII. 543.

The following papers may be consulted with regard to the countries mentioned:

Austria-Hungary: Mr. Bayard, Sec. of State, to Mr. Lee, No. 16, Nov. 6, 1885, MS. Inst. Aust.-Hung. III. 371.

Brazil: Mr. Sherman, Sec. of State, to Mr. Conger, No. 12, Aug. 7, 1897, MS. Inst. Brazil, XVIII. 259.

Germany: Mr. Blaine, Sec. of State, to Mr. Everett, chargé, No. 255, Aug. 24, 1881, MS. Inst. Germany, XVII. 112; Mr. Frelinghuysen, Sec. of State, to Mr. Everett, No. 300, Feb. 2, 1882, id. 153; Mr. Rives, Assist. Sec. of State, to Mr. Smith, No. 100, Jan. 3, 1889, 128 MS. Inst. Consuls, 214.

Great Britain: Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, No. 59, July 21, 1885, MS. Inst. Gr. Br. XXVII. 513; Mr. Adee, Second Assist. Sec. of State, to Mr. Bonham, consul-general at Calcutta, No. 20, April 5, 1887, 120 MS. Inst. Consuls, 677.

Italy: Mr. Bayard, Sec. of State, to Mr. Stallo, No. 23, April 3, 1886, MS. Inst. Italy, II. 328; same to same, April 27, 1887, For. Rel. 1887, 633; same to same, Aug. 20, 1887, id. 640; Mr. Olney, Sec. of State, to Mr. MacVeagh, No. 144, Jan. 20, 1896, MS. Inst. Italy, III. 102; Mr. Moore, Assist. Sec. of State, to Mr. Cafiero, May 11, 1898, MS. Notes to For. Consuls, IV. 413; Mr. Hay, Sec. of State, to Count Vinci, No. 489, June 8, 1899, MS. Notes to Ital. Leg. IX. 362

Japan: Treasury Department Circular, No. 184, Oct. 13, 1898.

Mexico: Mr. Bayard, Sec. of State, to Mr. Manning, Sec. of Treas., Sept. 10, 1885, 157 MS. Dom. Let. 106; Mr. Bayard, Sec. of State, to Mr. Morgan, No. 184, May 15, 1886, MS. Inst. Mex. XXI. 491; Mr. Bayard to Mr. Manning, No. 99, May 4, 1887, id. 693; same to same, June 2, 1887, MS. Inst. Mex. XXII. 5; Mr. Hill, Assist. Sec. of State, to Mr. Towle, No. 18, Dec. 27, 1900, 175 MS. Inst. Consuls, 520.

Russia: Mr. Adee, Act. Sec. of State, to Mr. Breckinridge, No. 93, July 6, 1895, MS. Inst. Russia, XVII. 355, acknowledging receipt of Mr. Breckinridge's No. 92, June 15, 1895, which enclosed a note from the Russian foreign office of March 16/28, 1895.

Sweden and Norway: Mr. Bayard, Sec. of State, to Mr. Magee, No. 103, Sept. 14, 1888, MS. Inst. Sweden and Norway, XV. 181; Mr. Sherman, Sec. of State, to Mr. Ferguson, No. 132, April 23, 1897, id. 429.

Turkey: Mr. Bayard, Sec. of State, to Mr. Cox, No. 43, Nov. 6, 1885, MS. Inst. Turkey, IV. 305.

Venezuela: Treasury Dept. Circulars, Nos. 175 and 196, Sept. 26 and Nov. 23, 1898.

VII. *POWERS AND DUTIES.*

1. Scope and Limitations.

§ 717.

The jurisdiction allowed to consuls in civilized countries over disputes between their countrymen is voluntary and in the nature of arbitration, and it relates more especially to matters of trade and commerce.

Consular Regulations of the United States (1896), § 73, p. 28.

"To remove a misconception which seems to have partially taken place, you are advised that no judicial authority belongs to your office, except what may be expressly given by a law of the United States and may be tolerated by the government in whose jurisdiction you reside. On the contrary, all incidents of a nature to call for judicial redress must be submitted to the local authority, if they can not be composed by your recommendatory intervention."

Mr. Madison, Sec. of State, to consuls and commercial agents, circular, July 1, 1805, MS. Desp. to Consuls, I. 248.

It is inadmissible for a consul to take persons from a vessel of his nationality arriving in port and subject them to examination at the consulate on suspicion of their being implicated in a crime committed in his country, even though they be afterwards discharged.

Mr. Frelinghuysen, Sec. of State, to Mr. West, British min., March 3, 1883, MS. Notes to Gt. Br. XIX. 216.

A United States consul in China is required, within the range of his duties, to obey the official order of the minister of the United States in China. If this order is reversed by the Department of State, the reversal is communicated through the minister, until which time the order binds.

Mr. Frelinghuysen, Sec. of State, to Mr. Young, min. to China, Feb. 6, 1884, MS. Inst. China, III. 537.

In certain treaties it is provided that requisitions for surrender of fugitives from justice may be made by consular officers in the absence of diplomatic representatives.

Consular Regulations of the United States (1896), § 92, p. 36.

A consul of the United States has no authority to appoint a curator for an American corporation, which may at the time have in the

country in which he resides no competent official upon whom legal service can be made in case of "legal attacks" upon it.

Mr. Gresham, Sec. of State, to Mr. Baker, No. 123, Feb. 5, 1894, MS. Inst. Central America, XX. 237.

"The viséing of passports, by national consuls in a foreign country, is generally regarded as a domestic function, regulated by the laws and requirements of the consul's country. Several European powers prohibit visés to the passports of certain classes of aliens. Russian consuls, for instance, will not authenticate any paper in behalf of a Jew for use in Russia; and Turkey refuses to legalize the passports of any naturalized person of Armenian birth. There is no way by which this Department can procure a visé in such cases. The Turkish minister uniformly refers all applications for visés to the Ottoman consuls.

"In the supposition that Mr. Minassian emigrated and became naturalized without imperial permission, his only effective remedy would seem to lie in a petition to the Sultan to sanction his change of allegiance and permit him to revisit his native country."

Mr. Uhl, Act. Sec. of State, to Mr. Agnew, May 3, 1895, 202 MS. Dom. Let. 49.

See, to the same effect, Mr. Uhl, Act. Sec. of State, to Mr. Bogigian, April 29, 1895, 201 MS. Dom. Let. 689.

Unless by statute or treaty a foreign consul can exercise no municipal jurisdiction in the United States.

In re Aubrey, 26 Fed. Rep. 848.

A consul, though a public agent, is clothed with authority only for commercial purposes. He has a right to interpose claims for the restitution of property belonging to subjects of his own country, but it is not competent for him, without the special authority of his government, to interpose a claim on account of the violation of the territorial jurisdiction of his country.

The Anne (1818), 3 Wheat. 435, 445; The Lilla, 2 Sprague, 177.

See, also, as to the extent of the powers and privileges of consuls, Viveash *v.* Becker, 3 Maule & Selwyn, 284.

While consuls, when there is no other representation, and when duly recognized, are competent parties to assert or defend the rights of property of their fellow-citizens or subjects in a court of admiralty without special procuration, they can not receive actual restitution of the property in controversy without a special authority. But a vice-consul, duly recognized by our government, is a competent party to assert or defend the rights of property of the individuals of his

nation, in any court having jurisdiction of causes affected by the application of international law—in this case a court of admiralty.

The Bello Corrunes, 6 Wheat. 152.
See, also, The London Packet, 1 Mason, 14.

A consul, in an enemy's country, has no authority by virtue of his office to grant a license or permit which will have the effect of exempting a vessel of the enemy from capture and confiscation.

Rogers *v.* Amado, 1 Newberry's Adm. 400.

A consul of the United States in a neutral country has no authority by virtue of his official station to grant a license or permit to a vessel to exempt it from belligerent capture by the naval forces of his own country for attempting to enter a blockaded port.

The Benito Estenger, 176 U. S. 568, 20 S. Ct. 489.

2. CORRESPONDENCE.

§ 718.

With the exception of correspondence with the Treasury Department concerning accounts, and such other correspondence as law or regulation may require him to have with other departments or officers, the consul is required to conduct no official correspondence with any department of government except through the Department of State. This rule is especially applicable to communications from subordinates of other departments. Such communications should not be answered without first obtaining the Department of State's permission.

Consular Regulations of the United States (1896), § 134, p. 48.
See, also, id. §§ 132, 133.
See Mr. Fish, Sec. of State, to Mr. Boutwell, Sec. of Treas., Jan. 21, 1871, 88 MS. Dom. Let. 69.

In various treaties between the United States and other powers, it is stipulated that consuls shall have the right to correspond with the local authorities in case of any infraction of treaty, and that, if the local authorities fail to give redress and there is no diplomatic representative, they may apply to the government of the country in which they exercise their functions.

Consular Regulations of the United States (1896), § 85, p. 33.

"In the practice of our Government there is no immediate connection or dependence between the persons holding diplomatic and consular appointments in the same country; but, by the usage of all the commercial nations of Europe, such a subordination is considered as of course. In the transaction of their official duties the consuls are

often in necessary correspondence with their ministers, through whom alone they can regularly address the supreme government of the country wherein they reside, and they are always supposed to be under their directions. You will accordingly maintain such correspondence with the consuls of the United States in France as you shall think conducive to the public interest; and in case of any vacancy in their offices, which may require a temporary appointment of a person to perform the duties of the consulate, you are authorized, with the consent of the government to which you are accredited, to make it, giving immediate notice of it to this Department."

Mr. Adams, Sec. of State, to Mr. Brown, min. to France, Dec. 24, 1823, MS. Inst. U. States Ministers, X. 152.

In August, 1861, a Mr. Mure, of Charleston, South Carolina, was arrested in New York when about to embark for England, and was sent to Fort Lafayette on a charge of being a bearer of despatches from the Confederate authorities. Among the things found in his possession there was a sealed bag addressed to the British foreign office with labels signed and sealed by Mr. Bunch, British consul at Charleston. The bag was sent to Washington, where it was delivered to Mr. Seward. Mr. Seward sent it on by special messenger, who was instructed to deliver it to Mr. Adams, American minister at London, who was in turn to deliver it to its address in the condition in which he would receive it. Mr. Seward stated that he had not entertained the idea of breaking the seals, and he instructed Mr. Adams to express regret that circumstances had rendered necessary the arrest and detention of Mr. Mure, as well as the brief interruption of the correspondence of the British consul. Mr. Adams was also directed to say that, if the bag should be found to contain any papers of a treasonable character against the United States, it was hoped that they would be delivered up to him for the use of his government, and that the British consul at Charleston, if shown to be privy to their transmission, should be made to feel the severe displeasure of his government. September 9, 1861, Earl Russell stated that, on opening the bag at the foreign office, there did not appear to be any ground for suspicion that it had been improperly used. Earl Russell added that Her Majesty's government were advised that the suspension of the conveyance by post of letters between British subjects in the Northern and the Southern States was a contravention of the treaty on the subject between the two governments; and that Mr. Bunch had endeavored to palliate the evil by inclosing some private letters in his consular bag. Mr. Seward, writing to Mr. Adams, on October 22, 1861, took exception to Mr. Bunch's "substitution of his consular bag and official seal for the mail bag and mail locks of the United States, and of his own mail carrier for the mail carriers of the

United States," and declared that, although in the particular case the proceeding was practically harmless and was not likely to be repeated, it was "not defensible on any ground of treaty or international law." Mr. Seward added that the interruption of the post, while it worked literally a nonfulfillment of a treaty stipulation, was due to the sudden violence of an insurrection, and that the suppression of correspondence between parties in the insurgent territory with persons in foreign countries was a measure essential to the suppression of the insurrection itself; and that he felt assured that the magnanimity of the British government might be relied on not to complain at one and the same time of a breach by the United States of the international postal treaty under such circumstances, and of the resort by the government to a measure which was indispensable to complete its ability to fulfill it.

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 63, Aug. 17, 1861, Dip. Cor. 1861, 114; Mr. Adams to Earl Russell, Sept. 3, 1861, id. 134; Earl Russell to Mr. Adams, Sept. 9, 1861, id. 139; Mr. Seward to Mr. Adams, No. 108, Oct. 22, 1861, id. 147.

"With reference to the permission given to the foreign representatives to correspond with their consuls in the ports of the insurgent States by means of vessels of war entering their ports, I have to remark that circumstances have come to the knowledge of this Department which render it advisable that this permission shall hereafter be restricted to correspondence of the consuls of those powers only who, by the regulations of their respective governments, are not allowed to engage in commerce. I will consequently thank you to request the commander of any British vessel who may visit the ports adverted to to abstain from carrying letters for consuls who may be engaged in trade."

Mr. F. W. Seward, Act. Sec. of State, to Lord Lyons, British min., Feb. 6, 1862, Dip. Cor. 1862, 253.

In a note to Lord Lyons of October 18, 1861, Mr. Seward stated that "official correspondence of other powers with the agents of those powers in blockaded ports, as well as that of British authorities with their agents, might be sent by British vessels of war." (Dip. Cor. 1861, 174.)

In respect to the censorship of foreign newspapers and periodicals addressed to American consular officers in Russia, the United States will claim privileges equal to those which may be accorded to similar matter intended for the consular officers of other governments.

Mr. Hunter, Act. Sec. of State, to Mr. Hoffman, chargé, No. 73, Oct. 1, 1879, MS. Inst. Russia, XVI. 100; Mr. Evarts, Sec. of State, to Mr. Hoffman, No. 101, April 2, 1880, id. 127; Mr. Evarts to Mr. Foster, min. to Russia, June 4, 1880, id. 138; Mr. Olney, Sec. of State, to Mr. Peirce, chargé, No. 346, Dec. 15, 1896, MS. Inst. Russia, XVII. 524.

"I have read with interest Señor Gallegos' explanation of the manner in which his government regards the facts upon which are based the charge that Mr. Myers [the U. S. consul at San Salvador] was prevented from communicating with the American legation, and that of having refused him a passport to leave the Republic unless upon the condition of withdrawing his exequatur at the same time.

"He says that 'hardly had the capital been recaptured, although the frontier was in part uncovered, when Mr. Meyers, without giving due credit to what had occurred, proposed to forward the telegram of which your excellency inclosed me a copy' and that 'without refusing to Mr. Myers permission to inform the Department of State at Washington of what had occurred, he (the secretary-general) limited himself to simply proposing that the form of his telegram should be modified in the terms known to your excellency.' He concludes, therefore, that Mr. Myers 'was not prevented from communicating with his government in any manner whatever, and although there was exercised a species of censorship in respect to the telegram which he proposed to send to Mr. Blaine on the 2d day of August, 1890, for the excellent reason I have mentioned, still that exceptional measure had a legitimate basis in the abnormal condition of affairs then existing, the Republic being in a state of siege, a situation which suspends the guaranty of the inviolability of correspondence. To this reason might be added still another—that the telegram alluded to may not in strictness be considered as an official act or report exclusively relating to the exercise of consular functions, the only case where officials of that class are to be recognized as independent of the state in whose territory they reside according to the treaties.'

"Whether the act of the Salvadorean government be called prevention of communication or mere censorship, it resulted, in fact, in preventing Mr. Meyers from sending the telegram to his government which he desired to send. It does not relieve the matter that the government of Salvador proposed another and different telegram which it was willing to permit to be sent. It was competent for the Salvadorean government itself to communicate to this government such a report of the facts in question as may have seemed to it proper, but not for it to dictate to an official what he should report. The government does not recognize the pertinency of any principles which may be thought to be applicable to a state of siege or martial law. At the time of the occurrences in question the city of San Salvador was in the undisputed possession of the government forces, and there was nothing in the situation warranting interference with the right of free communication to which Mr. Myers was entitled by treaty and the principles of international law. Neither can this government conceive of any communication between its consul and itself more intimately associated with his official duties than a report that the

consulate and its archives had been destroyed and the performance of his official functions interrupted. Mr. Myers would have been most derelict in his duty if he had not attempted to communicate that fact. Such a communicaton was privileged, and in the opinion of this government especially within the purview of the second section of article 35 of the treaty of 1870, which provides that 'Consuls in all that exclusively concerns the exercise of their functions shall be independent of the state in whose territory they reside.'

"Señor Gallegos, for similar reasons, justifies the course of his government in refusing Mr. Myers a passport to leave the country except upon the condition of the withdrawal of his exequatur. He finds also a further justification therefor in the fact that his 'departure from the country had for its evident object, as your excellency recognizes, to nullify the action taken by the government respecting the telegram which it was proposed to send.'

"Señor Gallegos' explanation strengthens my conviction of the correctness of the language which I used with respect to this phase of the case in my No. 21 of November 20 last, and which I now repeat:

"'Article 32 of the treaty of 1870 is plain with respect to the right of the government of Salvador to withdraw Mr. Myers' exequatur upon reasonable grounds, but to refuse to give him a pass to leave the country except on that condition, while making no objection to his continuing to exercise his consular functions if he would remain, was a species of duress, the gravity of which is increased by the fact that his avowed purpose in temporarily leaving was to communicate with his government. It would seem to have been an attempt to do indirectly what Mr. Myers charges was also done directly, viz, to prevent his communicating with his superiors.'

"This government, therefore, renews its protest, as it is in duty bound to do, against the interference of the government of Salvador, both directly and indirectly, with Mr. Myers' official communications."

Mr. Blaine, Sec. of State, to Mr. Shannon, min. to Cent. Am., April 6, 1892, For. Rel. 1892, 34, 36–37.

For previous correspondence as to the case of Mr. Myers, see For. Rel. 1890, 105, 115, 118; and supra, § 705.

With reference to the action of the Haytian authorities in seizing a letter which was addressed to Mr. Rouzier, consular agent of the United States at Jeremie, and which was sent from Kingston, Jamaica, in the private luggage of a passenger, the Department of State observed that it did not appear, on the facts before it, whether the seized communication was addressed to Mr. Rouzier as consular agent, and added: "The general rule is that immunity of consular correspondence extends only to such communications as may be addressed to an officer in the line of his official business, especially when they are conveyed by private hands outside the mails. A consul's immunities do not extend

to his personal transactions in the country of his residence outside of his official duties and functions. The inviolability of the regular mails is not now in question. Should any letter posted in Hayti, or in a foreign place, and addressed to a consular representative of the United States by his official title, be seized and opened in transit by the local authorities, just cause of complaint and remonstrance would arise. In this instance interference appears to have been rather with the personal luggage of an incoming passenger than with the official correspondence of the consular agency, and this circumstance might prevent remonstrance being pushed as far as might otherwise be due. You may, however, represent to the authorities that a personal letter addressed to the United States consular agent at Jeremie has been so seized in transit, and you may ask an explanation and disavowal of the act and the delivery of the letter to the person to whom it was addressed."

Mr. Uhl, Act. Sec. of State, to Mr. Terres, No. 113, Dip. series, Oct. 23, 1895, MS. Inst. Hayti, III. 463.

In 1896 the Department of State took the ground that the testimony or sworn statement of an American citizen under arrest in Cuba, taken by an American consul for the use of the government of the United States, was in the nature of a privileged communication between the government of the United States and its agent, and that the demand of the Spanish authorities that the consul must in such case furnish a copy of the prisoner's affidavit to the military commander or local magistrate was "distinctly discourteous under international practice."

Mr Rockhill, Assist. Sec. of State, to Mr. Lee, consul gen. at Havana, No. 144, Oct. 24, 1896, 154 MS. Inst. Consuls, 228.

February 17, 1897, Mr. Olney, Secretary of State, cabled to Mr. Taylor, minister to Spain, that the United States consul at Sagua la Grande, Cuba, reported that on the 5th of February the mayor refused to permit him to telegraph in cipher on official business to the consul-general, and subsequently refused to transmit a telegram in Spanish or English to the Department of State reporting the interference with communication with the consul-general. Mr. Olney said: "Such inhibition of official communications of consuls of the United States with their superior or with this Department requires instant correction and rebuke." On the 20th of February Mr. Taylor replied that the minister for foreign affairs had just received a telegram from Cuba stating that the mayor of Sagua la Grande "acted through mistake and that specific instructions [had been] given to prevent such occurrence in future."

For. Rel. 1897, 501–502.

3. Interposition with Local Authorities.

§ 719.

"In countries with which the United States have treaty stipulations providing for assistance from the local authorities, consular officers are instructed that it is undesirable to invoke such interposition unless it is necessary to do so. In cases of arrest and imprisonment, they will see, if possible, that both the place of confinement and the treatment of the prisoners are such as would be regarded in the United States as proper and humane. If a request for assistance is refused, the consular officer should claim all the rights conferred upon him by treaty or convention, and communicate at once with the diplomatic representative in the country, if there be one, and with the Department of State. When such requests are made in accordance with long-established usage, he should, when they are refused, make suitable representations to the proper local authority, and likewise advise the legation and the Department."

Printed Pers. Inst. Dip. Agents, 1885, § 150, p. 32.

Though not entitled to represent his sovereign in a country where the sovereign has an ambassador, a consul is entitled to intervene for all subjects of that power interested.

Robson *v.* The Huntress, 2 Wall. jr. 59.

"It seems to us only reasonable that when any person being a prisoner alleges, with apparent probability, that he is an American citizen, that the acting political authorities in New Granada should allow him to be visited by the consul of the United States, to the end that, the fact of his citizenship being verified, the consul may lend his good offices or bring his case before this government. In such a case it would be proper for you to bring the subject formally to the notice of the authorities, if you had been duly received, and if not then to do it informally while the question of your admission to your position is in abeyance."

Mr. Seward, Sec. of State, to Mr. Burton, min., to Colombia, No. 16, Jan. 29, 1862, MS. Inst. Colombia, XVI. 26.

July 24, 1861, Lord Lyons applied for an order to allow the British consul at Baltimore to visit Thomas C. Fitzpatrick, a British subject, then held as a prisoner at Fort McHenry. On the 26th of July, Mr. Seward transmitted an order from the Secretary of War complying with Lord Lyons's request. (Mr. Seward, Sec. of State, to Lord Lyons, British min., July 26, 1861, MS. Notes to Great Britain, VIII. 470.)

See Mr. Hunter, Second Assist. Sec. of State, to Mr. Wilson, consul at Matamoras, Aug. 15, 1870, 57 MS. Inst. Consuls, 577.

"I have the honor to bring to your notice a remarkable communication by the governor-general of the island of Cuba to the consul-general of the United States under date of the 6th instant. Mr. Williams having, in execution of instructions telegraphed to him, made representations touching the prolonged confinement of certain American citizens without trial and in contravention of existing treaties and engagements between the United States and Spain, Gen. Martinez de Campos replied that consuls are not invested with diplomatic functions and, therefore, can not rightfully present official remonstrance in affairs of government, but may merely address themselves confidentially to the authorities for the purposes of inquiry in order to report to their government; and he adds that the custom of responding to such confidential inquiries can not be continued if the government of the United States should not become convinced of the correctness of his views.

"The position so taken by Gen. Martinez de Campos has naturally occasioned this government much surprise. The right of consuls to intervene with the local authority for the protection of their countrymen from unlawful acts, violative of treaty or of the elementary principles of justice, is so generally admitted as to form an accepted doctrine of international law. More than this, it has been conventionally established by treaties. In the enjoyment of the most favored national right, stipulated in the existing treaty between the United States and Spain, the express provisions of the consular treaty of February 27, 1870, between Spain and Germany are to be invoked. The ninth article thereof provides that consuls-general and other consular officers shall have the right to address the authorities of their district in remonstrance against every infraction of the treaties or conventions existing between the two countries and against any abuse whatsoever of which their countrymen may complain. . . . Such correspondence is not and can not be diplomatic in any sense. Its object is to furnish a ready and convenient method of adjusting the questions at issue on the spot, thereby averting resort to those necessary diplomatic channels which the intercourse of sovereign powers provides. . . .

"I address this note to you in the expectation that the direct relations known to exist between yourself and the superior authority in Cuba will enable you to set the governor-general right upon this important point, and that the necessity may not arise of carrying to Madrid the questions involved."

Mr. Olney, Sec. of State, to Mr. Dupuy de Lôme, Sept. 26, 1895, For. Rel. 1895, II. 1209.

See Mr. Williams, consul-general at Havana, to Mr. Adee, No. 2586, Sept. 11, 1895, For. Rel. 1896, 777.

"Knowing, as I do, the elevated view taken by General Martinez Campos of all questions," his "exertions" that "foreigners may suffer as little as possible," and the fact "that he maintains the best and most cordial relations with the head of the United States consular service in Cuba," "I can assure the government of which your excellency forms a worthy part that, in writing to Mr. Williams in the sense in which he did, it was certainly not with the intention or wish that the United States should address him through me, as is customary between sovereigns, but to the end that, he being, as he knows that he is, a delegated authority, foreign consuls in addressing him officially in the exercise of a right acknowledged by international and conventional law, and which nobody denies, may not go so far as to ask for decisions, request declarations, or demand settlements which His Majesty's government alone is competent to adopt

"I am sure that what the governor-general of the island of Cuba has done was not denying a right, but endeavoring to prevent the abuse of it, which, it is true, has been unintentionally committed for a long time back."

Mr. Dupuy de Lôme, Span. min., to Mr. Olney, Sec. of State, Oct. 1, 1895, For. Rel. 1895, II. 1212.

"I note the . . . statement that, his [the governor-general's] office being merely one of delegated authority, 'foreign consuls, in addressing him officially in the exercise of a right which you state to be acknowledged by international and conventional law, and which nobody denies, may not go so far as to ask for decisions, request declarations, or demand settlements which His Majesty's government alone is competent to adopt.'

"This statement would seem to imply a limitation of the subjects upon which a consular representative may properly correspond with the local Spanish authority in Cuba. But neither is such limitation expressly confirmed by you, nor can it be fairly inferred either from the text of the treaty between Spain and Germany, in which I find the fullest conventional definition of the right, or from precedent and usage. The right of consuls 'to address the authorities of their district in remonstrance against every infraction of the treaties or conventions existing between the two countries and against whatever abuse may be complained of by their countrymen' clearly includes initial representations upon those subjects. It may indeed happen that the precise form of remedy may have to be referred to His Majesty's government and that appropriate redress may be attainable only after diplpomatic negotiations between the two governments.

"But such negotiations are the sequel of the original remonstrance, and are made necessary only when and because the local authorities show themselves lacking either in the will or the power to adequately

deal with the grievance. This is clearly expressed in the concluding paragraph of article 9 of the Spanish-German treaty of February 22, 1870, which specifically authorizes consuls, in the absence of the diplomatic agent of their country, to conduct such further diplomatic discussion with the supreme government, thus clearly distinguishing between the incident in its incipient stage and the incident when it has passed that stage and become a subject of diplomatic treatment.

"The communications of the consul-general to which his excellency the governor-general takes exception have been in each case made under the authority and direction of this Department in the interest of good relations and with the design of avoiding, if possible, that ulterior diplomatic correspondence which would necessarily ensue should any wrong against an American citizen in Cuba remain unredressed after due representation to the local authorities. It is, of course, true, as stated in my note of September 26, that the consul-general can not conduct a diplomatic discussion with the governor-general, since neither that officer nor the consul-general possesses the requisite powers. Nevertheless, though the subject treated of may ultimately become the theme of diplomatic negotiation, that circumstance can not deprive the consul of the clear right nor absolve him from the clear duty of initiating such inquiries and remonstrances as the interests intrusted to his keeping may from time to time require."

Mr. Olney, Sec. of State, to Mr. Dupuy de Lôme, Spanish minister, Oct. 11, 1895, For. Rel. 1895, II. 1213.

Mr. Taylor, United States minister at Madrid, telegraphed, Oct. 21, 1895, that the minister of state "was disposed to grant at once to consuls of the United States in Cuba all rights guaranteed to German consuls under the treaty of 1870." (For. Rel. 1895, II. 1214.)

"Mr. Olney's note to Mr. Dupuy de Lôme, of the 11th instant, answers his communication in the sense indicated by the minister of state, and thus anticipated his excellency's gratifying assurances." (Mr. Uhl, Act. Sec. of State, to Mr. Taylor, min. to Spain, Oct. 23, 1895, For. Rel. 1895, II. 1214.)

See Mr. Uhl, Assist. Sec. of State, to Mr. Barker, consul at Sagua la Grande, No. 31, Dec. 7, 1895, 150 MS. Inst. Consuls, 368.

See, also, President Cleveland, annual message, Dec. 2, 1895.

The consul-general of the United States at Havana having sought permission to ascertain and report upon the health and welfare of an American citizen confined in Cabanas fortress, the captain-general of Cuba, Gen. Weyler, replied that the prisoner was in good health, but that if the consul-general desired to make a personal examination he might visit him or any other American prisoner on giving a day's notice, so that the prisoner might be in the guardroom nearest the entrance to the fortress at the time of the visit.

For. Rel. 1896, 834.

Certain persons in New York having sent a letter and a draft for money to the consul-general of the United States at Havana for delivery to an American political prisoner in the Cubanas fortress, the consul-general transmitted the documents to the Department of State and recommended that they be returned to the senders with the suggestion that they be forwarded by another channel, since the consulate, unless otherwise directed, should not take charge of the prisoner's private correspondence. The action of the consul-general as to the letter was approved, but the draft was sent back to him with the instruction that he might, with the knowledge and assent of the authorities, deliver the proceeds of the draft, with a statement of the source from which it came. This was done with the ready assent of the acting governor-general of Cuba, who remarked that the application for the consent of the authorities was "the correct course in the matter."

For. Rel. 1896, 770–772.

In 1889 Mr. Williams, consular agent of the United States at Guanajuato, addressed an official letter to the Mexican federal judge at that place, asking, in the name of the United States consul-general at Mexico, that B. F. Davis, an American citizen, who had been "imprisoned since June 12th of last year without anything having been done, be given an immediate trial or be set at liberty." The judge, considering this communication to be disrespectful, imposed on the consular agent a fine of ten dollars, to be paid within three days. The fine not having been paid within that time, Mexican officers entered the consular agent's office and compelled him to deliver up his watch, at the same time informing him that unless the fine should be paid the watch would be sold at public auction to defray the fine and cost. The fine subsequently was paid. The Department of State of the United States, while admitting that the tone of Mr. Williams's letter was "somewhat peremptory and not wholly warranted by the relations that subsist between a consular agent of the United States and a Mexican federal judge," thought that the proceedings against Mr. Williams "were marked by a lack of consideration for the character and dignity of the official against whom they were directed;" that the consular agent, if his communication was considered disrespectful, should have been requested to withdraw it; and that if he refused to do so, and the circumstances were thought to warrant it, complaint should have been made to his government. The discussion of the case was discontinued in view of the fact that Mr. Williams vacated the office of consular agent soon after the incident in question.

Mr. Adee, Act. Sec. of State, to Mr. Ryan, min. to Mexico, Sept. 2, 1889, MS. Inst. Mexico, XXII. 443.

See, also, Mr. Adee, Act. Sec. of State, to Mr. Ryan, Sept. 26, 1889, id. 462; Mr. Blaine, Sec. of State, to Mr. Whitehouse, Nov. 6, 1889, id. 479.

In April, 1897, the legation of the United States at Mexico, acting under instructions, complained of the failure of the judge at Piedras Negras to reply to two inquiries of the United States consul at that place in relation to the case of R. H. Doane, an American citizen, who was arrested in Mexico in December, 1896, on a charge of complicity in robbery. The Mexican government, April 19, 1897, replied that the governor of the State of Coahuila would be asked to report upon the state of the proceedings for the legation's information, but added that the failure of the judge to answer the consul's inquiries did not justify any complaint against his official conduct, "for the reason that the Mexican judges are not obliged to give any information to foreign consuls, neither have the latter a right to ask it, as may be seen in the law of the 26th of November, 1859, which is always sent to said officials when they are furnished with their exequatur."

The government of the United States, May 5, 1897, answered that the Mexican law at most excluded, only by omitting to mention it, the right of a consul to make a request for proper information in regard to a case such as that in question; that such inquiries were "usual in the consular intercourse of nations," and were often made under express instruction of the Secretary of State; that the fact that the preliminary proceedings in criminal cases were secret did not preclude a respectful inquiry from a consul "as to the general nature of the offense charged or as to the status of a pending case;" that the United States anticipated "a courteous response to such inquiries made by its consuls abroad, just as it expects like courteous response by the judicial officers of the United States to the inquiries of foreign consuls in this country;" that this position had been "uniformly recognized as just and proper" in other countries, and that an exception could not be made in the case of Mexico without a marked departure from the usage which obtained elsewhere.

The Mexican government replied: "The authorities of the Republic can not recognize in consular agents faculties not expressed in the laws that define their attributes. . . . Therefore this Department does not consider that the judge . . . has incurred any official responsibility in not replying to the letters addressed to him by the consul. . . . However, the fact that the judge did not reply to the two letters mentioned should be considered a mere lack of social courtesy, aggravated by the official position occupied by the commercial agent of a friendly government; and in this light the gov-

ernor of the State of Coahuila has been requested to charge the said functionary with the performance of that social duty."

Mr. Mariscal, Mex. Min. of For. Aff., to Mr. Sepulveda, Am. chargé, April 19, 1897, For. Rel. 1897, 395; Mr. Sherman, Sec. of State, to Mr. Sepulveda, May 5, 1897, id. 396; Mr. Mariscal to Mr. Clayton, Am. min., June 18, 1897, id. 398.

See, also, Mr. Blaine, Sec. of State, to Mr. Ryan, min. to Mexico, No. 363, Oct. 9, 1890, MS. Inst. Mex. XXII. 644.

In a case where the commander of a United States vessel of war, at the instigation of an acting United States consul, intervened and presented some written interrogatories to a jefe politico, in regard to a case which had been pending before him, but which was then in the hands of the supreme court of Mexico, the Department of State, which had not authorized the intervention of the acting consul in the matter, which was "already receiving satisfactory diplomatic attention," disavowed the action of the acting consul and the commander of the man-of-war with an expression of regret.

Mr. Hay, Sec. of State, to Mr. Clayton, min. to Mexico, No. 354, May 11, 1900, MS. Inst. Mexico, XXV. 183.

The United States consul-general at Frankfort having requested from the police president of the city information as to the number of Americans living there, the latter replied that under instructions from his superiors he could not answer questions of that character unless they were presented through diplomatic channels. The consul-general protested, and the American embassy laid the matter before the imperial government, which took the ground that consular officers were authorized by Article VIII. of the convention of Dec. 11, 1871, to require information from the local authorities only in certain specified cases. The United States concurred in this view, holding that, under the article in question, there were only three cases in which such demands of consular officers upon the local authorities were authorized: (1) For the redress of any infraction of the treaties and conventions between the two countries; (2) for the redress of any infraction of international law; (3) to the end of protecting the rights and interests of their countrymen.

Mr. Hay, Sec. of State, to Mr. Tower, ambass. to Germany, No. 42, April 1, 1903, For. Rel. 1903, 447.

"Requests have occasionally been made upon the government of the United States to permit its diplomatic and consular officers to extend their protection to citizens or subjects of a foreign government who may desire it and who may be sojourning at places where there are no diplomatic or consular representatives of that government. This government has from time to time, upon the request of friendly

powers, given to its diplomatic and consular officers authority to take upon themselves, with the consent of the government within whose jurisdiction they reside, the function of representing those powers at places where the latter had no such officers. It has understood this authority to be restricted simply to the granting of the services and good offices of our representatives, with their own consent, to meet what has ordinarily been a fortuitous and temporary exigency of the friendly government. When this function is accepted, which must be done only with the approval of the Department of State, the diplomatic or consular officer becomes the agent of the foreign government as to the duties he may perform for its citizens or subjects. He becomes responsible to it for his discharge of those duties, and that government alone is responsible for his acts in relation thereto. He does not, however, for this purpose become a diplomatic or consular officer of the foreign government."

Consular Regulations of the United States (1896), § 174, p. 60.

As to consular protection in Eastern countries, see supra, §§ 287–290.

See, as to aid and protection rendered by the United States consul at St. Pierre, Martinique, to the German bark *Elizabeth Ahrens*, which had been scuttled by her crew, For. Rel. 1897, 183–185.

Although, under Article I., section 9, clause 8, of the Constitution, a consul of the United States can not also become the consular officer of another government, yet he may be permitted to assume such official care and protection over the citizens or subjects of another power, within his consular jurisdiction, as may be compatible with the regulations of the government of the country and in consonance with well-defined principles of international comity in such cases.

Mr. Blaine, Sec. of State, to Mr. Hirsch, min. to Turkey, No. 65, March 18, 1890, MS. Inst. Turkey, V. 109.

As to the protection of American interests by the British consul in the Independent State of the Congo, see For. Rel. 1901, 205.

As to the protection by the United States consul of British interests in the Azores, see For. Rel. 1901, 224.

As to the erection by the Navy Department of a tablet at Santiago de Cuba, in memory of Frederick W. Ramsden, late British consul, as a mark of appreciation of his services to American naval prisoners during the Spanish-American war, see For. Rel. 1901, 215. See, also, For. Rel. 1898, 380.

As to the protection of Panaman interests by consular officers of the United States, see circular of Mr. Hay, Sec. of State, to the Dip. officers of the United States, Jan. 19, 1904, For. Rel. 1904, 1.

As to the use of good offices for the citizens of third powers, see, further, supra, §§ 653–655.

The consul-general of the United States at Panama, Colombia, was, on the request of the government of Greece, preferred through its consul-general in New York, instructed, Nov. 14, 1900, to employ his

good offices for the protection of Greek subjects so far as the local authorities might permit him to do so.

Mr. Cridler, Third Assist. Sec. of State, to Mr. Cobb, U. S. vice-consul at Colon, Dec. 1, 1900, 175 MS. Inst. Consuls, 302.

4. ADMINISTRATION OF OATHS.

§ 720.

The right of consuls to take depositions is secured by conventions with Austria-Hungary, Belgium, Colombia, France, Germany (of American citizens), Italy, Independent State of the Congo, Netherlands, Roumania, Servia, and Salvador.

Consular Regulations of the United States (1896), § 87, p. 34.

By section 1750 of the Revised Statutes of the United States, which is quoted in § 845 of the Consular Regulations, authority is given to consular officers of the United States to administer oaths and take depositions and to perform any notarial act which a notary public is authorized to do in the United States. By section 1674 of the Revised Statutes, § 783 of the Consular Regulations, the term "consular officer" includes a consular agent. The consular agent therefore has all the power to administer oaths which is given by section 1750 of the Revised Statutes to any consular officer of the United States. The Department of State can give him no additional or special authority in such matter.

Mr. Sherman, Sec. of State, to Mr. Terres, chargé at Port au Prince, May 6, 1897, For. Rel. 1897, 342.

This instruction related to a request made by an attorney in the United States to the American consular agent at Port de Paix to take certain depositions to be used in preparing a diplomatic claim against the Haytian Government. In the course of the instruction Mr. Sherman said: "The testimony, as the Department understands it, is not to be used in the Haytian courts. If it were to be so used, it would be necessary that it be taken in accordance with the requirements of the Haytian law. . . . While the consular agent at Port de Paix has the authority within his territorial jurisdiction to take depositions in a matter of this kind, which depositions would be unhesitatingly accepted by this Department, it does not follow that he is obliged to abandon his public duties and go about the country obtaining this evidence. This is a matter which Mr. Kelly [the attorney] will have to settle with the agent; he has no right to demand this service."

It was once ruled by Mr. Frelinghuysen that, while a "commercial agent" had in all respects the same general notarial powers as a consul, yet a "consular agent," not being "a consular officer in the accepted or legal sense," had not. (Mr. Frelinghuysen, Sec. of State, to Mr. Hale, Jan. 29, 1885, 154, MS. Dom. Let. 105.)

Under § 1750 R. S. [U. S. Comp. Stats. 1901, p. 1196] conferring on consular officers the power "to perform any notarial act which any notary public is required or authorized by law to do within the United States," a consular officer is a notary public, in the sense of the Nebraska statute, authorizing notaries public to take and certify affidavits for use in the courts of the State.

Browne *v.* Palmer (1902), 92 N. W. 315.

Under the laws of Pennsylvania, an acknowledgment of a power of attorney, made by a married woman before a deputy consul-general, is valid.

Stewart *v.* Linton (1902), 204 Pa. 207, citing Moore *v.* Miller, 147 Pa. 378, holding that an acknowledgment of a deed, made by a married woman before a United States commercial agent in Canada, was sufficient.

"I transmit herewith a copy of a letter from ———, esq., dated the 12th instant, in which he complains that you refused to administer and certify, on the application of certain parties by the name of ———, the oath of verification to a petition intended to be filed by the said parties in the surrogate court of the county of New York.

"Consular officers of the United States are authorized by Congress and by some of the States and Territories to administer oaths, take affidavits and depositions, and to perform other notarial services. Such services, when rendered under State or Territorial authority, are unofficial, and consular officers are not compelled to perform them.

"The Department presumes that in the case in question you had good reasons for your action, but, as a general rule, when the notarial act requested can be performed without interference with official business and without giving offense to the local government, consular officers are expected, upon the tender of a suitable remuneration, to perform it.

"Applying these general instructions to the case of Mr. ———, it follows that, in the absence of any of the above-mentioned reasons for refusing the application of his clients, you should, upon being satisfied of the identity of the said applicants, have administered the oaths and signed the certificates as requested, and should still do so if the parties appear before you again for that purpose.

"You will understand that these instructions relate exclusively to your exercise of notarial functions. They are not to be considered as in any way bearing on the question of your right to issue certificates on matters of law or of fact."

Mr. Adee, Second Asst. Sec. of State, to Mr. Johnson, Apr. 20, 1887, 121 MS. Inst. Consuls, 102.

The Spanish legislation is not opposed to the consuls of the United States "receiving the oath which, according to the custom-house regulations of the Union, should be taken on making the invoices of merchandise destined to its ports;" and if it should be proved that such an oath has been taken falsely, the person who may have taken it will be condemned for the crime of falsity, and the competent judge will impose upon him the penalty designated for such cases in the 227th article of the penal code.

Señor Calderon de la Barca, min. of state, to the Am. min. at Madrid, March 17, 1854, enclosure B, with Mr. Soulé, min. to Spain, to Mr. Marcy, Sec. of State, April 7, 1854, MS. Desp. from Spain.

On June 24, 1874, the German foreign office called the attention of the American legation at Berlin to a case in which the United States district court at New York had issued an order directing certain American consuls in Germany, or their authorized agents, with the assistance of United States commissioners to be specially sent to Europe for the purpose, to take the sworn testimony of certain German subjects within the German Empire. The German foreign office pointed out that consular officers were not authorized by Article IX. of the consular convention between the two countries to discharge such functions. The German foreign office did not object to commissioners appointed by courts in the United States, whether the commissioners so appointed were consuls or other persons, obtaining information and making inquiries, provided that witnesses who were not American citizens gave such information voluntarily and were protected in so doing. But it pointed out that the exceptional privilege extended to United States consuls, by the consular convention between the two countries, of taking testimony under oath was expressly confined to witnesses of the same nationality as the consul. The German courts, said the foreign office, cheerfully complied, without any treaty obligation to that effect, with any request made by foreign courts of law for the examination under oath of designated persons. And the German law also provided that in such examination the parties might be represented, and that the attorneys might exercise a proper influence by putting questions through the judges.

For. Rel. 1874, 446, 458–464.

The German government has adhered to the position thus taken in regard to obtaining testimony under oath. (Mr. Wharton, Assist. Sec. of State, to Mr. Englehart, March 13, 1891, 181 MS. Dom. Let. 234.)

"The German government has recently brought to the attention of the Department its objections to the taking of testimony of German subjects by our consular officers. In view of this our consul-general at Berlin issued, under date of June 26 last, a circular to the consular officers within his jurisdiction giving the opinion of our ambas-

sador at Berlin that, under the existing regulations, it is not advisable for United States consular officers in Germany to take by commission, issued out of the courts, whether Federal or State, of the United States the testimony of German subjects. The German government prefers that the testimony shall be taken through letters rogatory."

Mr. Uhl, Act. Sec. of State, to Messrs. Dickinson, Thurber, and Stevenson, Nov. 11, 1895, 205 MS. Dom. Let. 684.

Although there is said to be no statute in Germany which prohibits consular officers from taking testimony, yet it has in fact been found that the only way of securing testimony there under a commission is to have it done under the direction of a German court. (Mr. Porter Act. Sec. of State, to Mr. Jenks, Nov. 27, 1886, 162 MS. Dom. Let. 464.)

"Where the law, either of the United States or of one of the States of this Union, requires a notarial act to be performed by a consular officer of the United States, the performance of such act by a foreign consular officer, temporarily charged with the protection of American interests in a foreign country, is not valid or effective. Such is the case in respect of declarations made abroad by applicants for *pensions*, to which you refer. The statutes of the United States expressly provide that such declarations shall be made either before a diplomatic or consular officer of the United States, 'or before some officer of the country duly authorized to administer oaths for general purposes.'

"In this connection reference to Mr. Olney's instruction No. 896, of March 10, 1898, to Mr. Terrell, minister of the United States at Constantinople, is made, . . .

"The case in point was that of Louis Jones, whose claim for a pension was rejected by the Commissioner of Pensions, on the ground that there was no valid declaration on file, the officer before whom the declaration had been executed (the British vice-consul at Varna) not being an officer of the country authorized to administer oaths for general purposes.

"Mr. Terrell inquired, in view of the fact that there was no American representatives in Bulgaria and that the British consular officers there are charged with American interests, whether there was any one in the country who was 'authorized to administer oaths for general purposes.'

"Mr. Olney replied: 'The laws of the United States (Revised Statutes 4714, as amended by 27th Statutes, 272) authorize the Commissioner of Pensions to accept declarations of claimants *residing in foreign countries* made either: 1, before a United States minister or consul, or, 2, before some officer of the country duly authorized to administer oaths for general purposes, and whose official character and signature shall be duly authenticated by the certificate of a United States minister or consul. If there is an official of the Turkish government at Varna authorized to administer oaths gen-

erally, the simplest way would seem to be to have the affidavit made before him and his official character authenticated as required by the statute.'

"The law relative to applications for *patents* is substantially the same. It provides that the oath of the applicant residing in a foreign country shall be taken before a diplomatic or consular officer holding a commission under the government of the United States, or before 'any notary public of the foreign country in which the applicant may be.'

"On the other hand, in respect of *declarations* on invoices of *merchandise* intended for export to the United States, the laws of the United States provide that such declarations may be certified by a consular officer of the United States or 'by a consul of a nation at the time in amity with the United States. If there is no such consul in the country, the authentication shall be made by two respectable merchants, if any there be, residing in the port from which the merchandise shall have been imported.'"

Mr. Hay, Sec. of State, to Mr. Elliot, Jan. 12, 1900, 170 MS. Inst. Consuls, 476.

A commission to a United States vice-consul or commissioner named, returned executed under his signature as such, is admissible on proof of his signature and that he was reputed and acted as vice-consul before executing the commission. Stiff *v.* Nugent, 5 R. 217.

Hennen's La. Dig. ed. 1861, p. 573.

An affidavit, under the code, section 158, providing that proof of service outside the State shall be made by affidavit, without prescribing before whom it shall be made, may be made before a consular agent of the United States authorized by Rev. Stat. U. S. 1878, p. 311, to take affidavits.

Marine Wharf & Storage Co. *v.* Parsons (S. C. 1897), 26 S. E. 956.

5. Authentication of Documents.

§ 721.

Consuls are not entrusted with the power of authenticating the laws of foreign nations, and their certificates alone are not sufficient proof of such laws.

Church *v.* Hubbart (1804), 2 Cranch, 187, 237.

The certification of the official character of a foreign notary is not such a notarial act as a consul of the United States is required to perform.

Stanbery, At. Gen., 1866, 12 Op. 1.

Under the act of 28 February, 1837, No. 38, the certificate of an American consul or commercial agent in any foreign county is legal evidence of the attributes, official station, and authority of any civil officer in such country, under its laws. Succession of Wedderburn, 1 R. 263; Succession of Farmer, Ib. 270; Succession of Hinde, Ib. 271.

Hennen's La. Dig. ed. 1861, p. 582.

"The power to take the acknowledgment of deeds and other instruments by consuls of the United States is a power conferred upon them by State legislation, and is wholly outside of their functions as consuls or officers of the general government.

"The recording acts of the several States are understood to differ as to their requirements and forms of certificates. It would be assuming a responsibility which might be criticised, and which might lead to mistakes resulting in serious consequences, were this Department to undertake to instruct its officers in the discharge of powers which it does not object to their performing for the convenience of the public, but which are imposed or conferred upon them by the legislation of several of the States, each one prescribing at its pleasure its own forms and requirements of proof or identification. This Department does not profess to be informed as to the various requirements, whether by statute or possibly resulting from judicial decisions in the several States.

"It is therefore deemed most advisable to leave the execution of the power conferred by State legislation on persons holding diplomatic or consular functions under the general government to the special instructions which may be given by them who desire to avail of their services."

Mr. Fish, Sec. of State, to Mr. Weeks, Jan. 21, 1875, 106 MS. Dom. Let. 260.

Where the laws of a State require that the acknowledgment of a deed made abroad to real property in the United States shall be taken "before a minister or consul," the acknowledgment should be taken before one of the officers specified. Although a "commercial agent" has the same general notarial powers as a consul, yet the law officer of the Department of State does not look upon the taking of such an acknowledgment as an ordinary notarial act. This objection also applies a fortiori to a "consular agent," who, not being a consular officer in the accepted or legal sense, has not general notarial functions.

Mr. Frelinghuysen, Sec. of State, to Mr. Hale, Jan. 29, 1885, 154 MS. Dom. Let. 105.

United States consuls are not competent to authenticate the seals of local officials of the States of the Union. The Department of State

authenticates only the State seals, and can not authorize consuls to certify documents which it can not itself attest.

Mr. Cridler, Third Assist. Sec. of State, to Mr. Chester, No. 63, Dec. 26, 1899, 170 MS. Inst. Consuls, 296.

This rule is not varied by Art. IX. of the consular convention with Austria-Hungary of July 11, 1870.

In 1853 the Spanish consul at New York refused to authenticate the official signature of the Secretary of State of the United States to a document executed before a notary public by "the brothers Arango." The consul's action was justified by the Spanish legation on the ground that the brothers Arango were "fugitive criminals," condemned by default in the island of Cuba for treason, and that the document was therefore null and void, for which reason the consul could not legalize it, to say nothing of the fact that to do so would be "to afford the brothers Arango the means of eluding the law of Spain." The Department of State, declaring that it was the first case of the kind that had occurred in the history of the government, protested against the refusal, maintaining that the consul should not have looked beyond the genuineness of the signature which he was requested to authenticate. The United States, it was said, in granting to the consul an exequatur, expected that "citizens and inhabitants" of the country "would have the benefit of the usual consular acts," among which the authentication of the official signature of the Secretary of State was one of the most common. The duty of authentication was not conceived to be "discretionary," nor was it to be "exercised arbitrarily with reference to the persons who may have executed the accompanying documents." Such a right of discrimination between individuals was not believed to be enjoyed or exercised by any magistrate in the United States; and, "as such a power would involve a right to make impertinent inquiries into private business, it would by no means be in conformity with public sentiment in this country and therefore would never be sanctioned by this government." In maintaining this position the Department had sought to "vindicate a general principle." It had not been influenced either by the former relations to Her Catholic Majesty's government of the parties to the instrument in question, "or by their present or prospective relations to the government of the United States;" and still less "by any desire to impart to documents executed in this country for the purpose of being used in Her Catholic Majesty's dominions any legal effect to which they may not be entitled under the law of nations, the treaties between the United States and Spain, and the municipal laws of the latter country."

Mr. Marcy, Sec. of State, to Mr. Magallon, Spanish min., Jan. 19, 1854, MS. Notes to Span. Leg. VII. 10.

See, also, Mr. Magallon to Mr. Marcy, Jan. 10, 1854, MS. Notes from Spain; Mr. Marcy, Sec. of State, to Mr. Nones, Dec. 23, 1853, 42 MS. Dom. Let. 121.

Russian consular officers are forbidden to authenticate for use in Russia the papers of natives of that country who emigrated without permission. The United States has remonstrated against this regulation without effect.

Mr. Blaine, Sec. of State, to Mr. Wurtz, chargé, No. 41, June 27, 1889, MS. Inst. Russia, XVI. 602; Mr. Blaine, Sec. of State, to Mr. Distleman, June 2, 1892, 186 MS. Dom. Let. 578; Mr. Foster, Sec. of State, to Mr. Carey, M. C., Oct. 6, 1892, 188 MS. Dom. Let. 401.

See, also, supra, § 175.

The refusal to authenticate documents under such circumstances was applied in the case of a person claiming, after attaining her majority, property in Russian Poland, as next of kin of her mother, where the claimant accompanied as a minor her father on his unauthorized emigration from Russia. (Mr. Bayard, Sec. of State, to Mr. Wurtz, chargé, No. 140, Sept. 11, 1888, MS. Inst. Russia, XVI. 553.)

Where the Russian consul-general at New York refused to authenticate certain signatures in a matter of real estate in Russia, it was on one occasion advised that the documents be authenticated under the great seal of the State of New York, with a view to their being authenticated by the Department of State and then by the Russian minister at Washington. (Mr. J. C. B. Davis, Assist. Sec. of State, to Mr. Walter, June 16, 1882, 142 MS. Dom. Let. 429.)

The refusal of Russian consular officers to visé the passports of Jews or to authenticate the documents of Jews relating to property in Russia has been the subject of unavailing remonstrance on the part of the United States.

Mr. Bayard, Sec. of State, to Mr. Wurtz, chargé, No. 140, Sept. 11, 1888, MS. Inst. Russia, XVI. 553; Mr. Wharton, Act. Sec. of State, to Mr. White, min. to Russia, No. 60, Feb. 28, 1893, id. XVII. 147.

See, also, supra, § 175.

The refusal of an Austro-Hungarian consul to certify to the official character of a notary public, "while it may be deemed unfriendly or unneighborly, affords no ground for a complaint to the Austro-Hungarian government, or for a claim for damages. It has been held that an American consul can not be required to certify to the official character or acts of a foreign notary public. (12 Opinions Attorneys-General, 1.) . . . This Department can not undertake to procure for you the certification of the Austro-Hungarian legation or of the consul to the official character of your acts."

Mr. Adee, Act. Sec. of State, to Mr. Moeser, July 13, 1894, 197 MS. Dom. Let. 671.

6. Administration of Estates.

§ 722.

"In Austria-Hungary, Belgium, Germany, Italy, and Netherlands (and colonies) the local authorities are required to inform consuls of the death of their countrymen intestate or without known heirs. In Germany, Roumania, and Servia consuls have the right to appear for absent heirs or creditors until regularly authorized representatives appear. In Mascat [Muscat], Morocco, Persia, Peru, Salvador, Tripoli, and Tunis they may administer on the property of their deceased countrymen. In Colombia they may do so, except when legislation prevents it. In Costa Rica, Honduras, and Nicaragua they may nominate curators to take charge of such property, so far as local laws permit. In Paraguay they may become temporary custodians of such property. In Germany they may take charge of the effects of deceased sailors."

Consular Regulations of the United States (1896), § 91, p. 35.

With reference to a communication touching the efforts of the British consul in New England to obtain possession of the effects of the late Governor Delancey, of Tobago, who had died at Portsmouth, N. H., Mr. Pickering, citing a clause in Article XVI. of the Jay treaty to the effect that consuls should "enjoy those liberties and rights which belong to them by reason of their function," said: "Now, I conceive one of the consular rights and a duty to be to receive, inventory, take care of and account for the effects of any subject of the nation by which the consul is appointed, and who dies within his jurisdiction or consulate." He added that the subject was often explicitly regulated by treaties, but that he understood it to be "a general usage to which civilized nations have tacitly or practically assented."

Mr. Pickering, Sec. of State, to Mr. Smith, May 13, 1799, 11 MS. Dom. Let. 324.

"There is believed to be no difference between the death of a consul and that of any other private foreigner in respect to his effects. The consular office is not known to create any. Upon the death of any foreigner, whether consul or not, if he has left no family nor relations to take charge of his estate at the place of his death, a practice prevails to allow the consul of the country of the deceased to put his official seal upon the effects of the deceased, until the local law operates upon them by a grant of administration, or if no such administration be granted, for the purpose of transmission to the kindred of the deceased."

Mr. Clay, Sec. of State, to Mr. Vaughan, British min., Nov. 12, 1827, MS. Notes to For. Legs. III. 400.

"The consuls of the United States are authorized and required to act as administrators on the estates of all citizens of the United States dying intestate in foreign countries and leaving no legal representative or partner in trade. Indeed, this is one of the most sacred and responsible trusts imposed by their office, and in this respect they directly represent their government in protecting the rights and interests of the representatives of deceased citizens. The consul of the United States, therefore, was the only person who could legally touch the property left by the deceased Parsons. It was his duty to deposit the proceeds thereof in the Treasury of the United States, there to await the decision of the proper authorities as to its final disposition."

Mr. Marcy, Sec. of State, to Mr. Aspinwall, Aug. 21, 1855, 44 MS. Dom. Let. 270.

"The consuls of the United States in Mexico have no authority to appoint administrators of the estates of American citizens dying in Mexico. There is no consular treaty or convention existing between the United States and Mexico, and, in the absence of treaty regulations on the subject, the administration of the estates of United States citizens who die in that country is subject to and regulated by the local law. Upon the death of a citizen of the United States, if there is no legal representative of the deceased, it is the duty of the consul, so far as the law of the place will permit, to take charge of the property left by his deceased countryman for the purpose of preserving such property from loss or waste; but it is also his duty to surrender such charge and control of the property to any legal representative of the deceased who presents himself with authority duly and legally authenticated. In such cases, however, the authority of the consul is limited to the rendering of such aid to the legal representative of the deceased in the care and preservation of the property as he may have it in his power to render consistent with the local law."

Mr. Fish, Sec. of State, to Mr. Hunt, Feb. 21, 1873, 97 MS. Dom. Let. 575.
"There are other powers possessed by the consul in relation to the estates of deceased citizens, which will be found enumerated in the acts of Congress of 1792, Stats., vol. 1, 255, and act of 1856, vol. 11, p. 52." (Ibid.)
See, also, For. Rel. 1893, 419.

The settlement of the estates of persons who die abroad and who are not citizens of the United States is a subject with which the Department of State has no official concern; and where a consular officer of the United States is employed by the parties interested and undertakes to act for them, he does so wholly in his individual capacity and not as an officer of the government. The Department of

State, in answering requests for the names of consular officers with a view to their being employed in such settlements, does not assume any responsibility for the manner in which the business is performed, although it may, when requested to do so, make inquiries as to the progress of the matter. Any proceedings against the consul for delay or mismanagement must be taken against him, if at all, in his personal and not in his official capacity, his bond holding him only for default towards his government.

Mr. J. C. B. Davis, Assist. Sec. of State, to Mr. Marvin, March 5, 1873, 98 MS. Dom. Let. 58.

"In the case of American citizens dying abroad it is made by law the duty of the United States consul within whose jurisdiction such death occurs to take charge of the effects of the deceased, cause an inventory of such effects to be taken, and dispose of any that may be deemed perishable by sale at public auction, and the proceeds of which, together with all other property and moneys of the deceased, he is to hold subject to the demand of the legal representatives of the deceased. In case such representatives do not appear and demand the estate within a year, the consul is required to transmit the effects to the Treasury Department, there to await final distribution to the parties entitled to receive them.

"The Department possesses no discretionary power to dispense with these requirements of the statute, and it will, therefore, be necessary for some person to administer on the estate. Upon receiving a copy of such letters of administration, duly authenticated, the Department will give the necessary instructions to the consul at Matanzas to forward the effects of the late Mr. Chadwick directly to the address of his legal representatives."

Mr. Cadwalader, Acting Sec. of State, to Mr. Chadwick, Aug. 19, 1875, 109 MS. Dom. Let. 450.

"When a citizen of the United States, not a seaman, dies abroad without leaving a will, it is made the duty of a consul to take charge of any property he may leave in the consular district, and, after paying the debts of the deceased contracted there, to send the proceeds of the property at the expiration of a year to the Treasury of the United States, there to be held in trust for the legal representative. In case, however, a legal representative shall appear and demand the effects, the consul is required to deliver the property to him, after deducting the lawful fees. The statute on this subject may be found in section 1709 of the Revised Statutes of the United States."

Mr. Cadwalader, Asst. Sec. of State, to Mrs. Hopkins, Mar. 27, 1876, 112 MS. Dom. Let. 456.

With reference to a statement of the American consul at Buenos Ayres that, unless the heirs of a citizen of the United States who died there presented their claims within a year from his decease, certain moneys left by him would, under the local law, escheat to the State, Mr. Evarts said: "Considering the terms of Article IX. (of the treaty of 1853) give the consul the right to administer the property *for the benefit of the heirs and creditors* (only, however, in conformity with the laws of the country), it is conceived that any local law passed before or after the treaty of 1853 which should operate or be held to operate to sequester for the State the effects of American citizens dying (or murdered) there, with such unseemly haste, must be looked upon as hostile to the true animus of the provisions of Article 9 of the treaty and to the preservation of harmonious relations between the two countries." The minister of the United States at Buenos Ayres was therefore directed to present the matter to the Argentine government with all due courtesy, with a view to "such exercise of the central power of the government as will effect a much longer period of delay of final action so adverse to all good consideration."

Mr. Evarts, Sec. of State, to Mr. Osborn, No. 101, Feb. 4, 1879, MS. Inst. Argentine Republic, XVI. 154.

In reply to a request for intervention for the recovery of the personal estate of a deceased American citizen who had died in British India, the Department of State said that it would instruct the consul-general of the United States at Calcutta to apply to the government of India for the delivery to him of the proceeds of the estate, should they consent to comply with such request; and that, to that end, a proper power of attorney should be given to "John A. Leonard, esquire, at present consul-general at Calcutta, or his successor, or either of them," to act in the premises, such power to be attested by the governor of the State in which the interested parties lived, under its seal, and then successively by the Department of State and the British legation.

Mr. Porter, Assist. Sec. of State, to Messrs. Hogan, April 22, 1885, 155 MS. Dom. Let. 169.

By a decree of the Brazilian Government, No. 855, of November 8, 1851, the principle of reciprocity is adopted with regard to the administration of the estates of deceased aliens by their consular representatives. The decree, among other things, vests (article 2) in the judge of the probate court under certain circumstances, acting with the consular representative, the administration of the alien's estate; determines (article 3) in which way the estate in such cases is to be advertised and kept, subject to taxes, till the period of distribution

arrives; authorizes (article 4) the consular representative, when the estate is liquidated, to deliver the proceeds to the persons entitled to them in conformity with the instructions which he shall receive, being then considered by the courts of the country as a representative of the heirs; and provides (article 6) that, in default of a consular representative, the probate judge shall take charge of the estate.

The Department of State stated that it could not accept the provisions of the decree, on the ground (1) that the United States could not by treaty establish such conditions with regard to Brazilian subjects dying in any of the States of the Union; (2) that the provisions of the decree conflicted with the rules which generally prevailed in several States, (a) in that it contained no provision requiring consuls when acting as administrators to give security, (b) that it appeared to recognize the administration taken out of the estate of possibly a mere transient resident as the principal instead of ancillary administration, and (c) that it contained no provision recognizing the *lex domicilii* as to the distribution of personalty.

Mr. Bayard, Sec. of State, to Mr. Armstrong, No. 137, Jan. 30, 1889, MS. Inst. Brazil, XVII. 393.

The practice in the settlement of estates of deceased aliens in Brazil is treated in a full and interesting despatch of Mr. Trail to Mr. Bayard, No. 77, March 19, 1887, For. Rel. 1887, 60. In this despatch certain correspondence is cited in relation to the treaty of 1828 between the United States and Brazil.

In July, 1888, Mr. Vifquain, United States consul at Colon, Colombia, sold at auction to a Mr. Potoin three houses belonging to the estate of a Mrs. Smith, a deceased citizen of the United States, and situated on land leased from the Panama Railroad Company. This action was taken by the consul under section 10, Article III., of the consular convention between the United States and Colombia, which provides that the consuls of the contracting parties may take possession of and sell the "movable property" of individuals of their nation who may die without leaving executors or heirs at law. The Colombian courts afterwards held, in a suit for the possession of the houses, that they were not "movable property;" that the consul could not make title to them, and that Mr. Potoin must surrender them to a curator appointed by the local authorities. Subsequently, Mr. Potoin applied to the United States for reimbursement. The Department of State replied that it had no funds at its disposal and no authority to pay such a claim, and that the money paid by Mr. Potoin for the houses had been used by the consul in paying costs and the decedent's debts, with the exception of less than a hundred dollars which had been paid to her heirs. The Department of State added that the local courts undoubtedly had jurisdiction to pass on the question whether the houses were "movable

property;" that, in view of the difference of legal opinion which had been entertained concerning it, it could not be said that there had been a denial of justice, and that there appeared therefore to be no ground for presenting a claim against the Colombian government.

Mr. Abbott, min. to Colombia, to Mr. Blaine, Sec. of State, Dec. 12, 1889, For. Rel. 1890, 231; same to same, April 24, 1890, id. 254; Mr. Blaine to Mr. Abbott, No. 67, May 29, 1890, id. 255; Mr. Abbott to Mr. Blaine, Aug. 22, 1890, id. 262, 266; Mr. Blaine to Mr. Abbott, No. 114, Oct. 10, 1890, id. 268, and No. 115, Oct. 10, 1890, id. 269; Mr. Abbott to Mr. Blaine, Oct. 24, 1890, id. 270; Mr. Gresham, Sec. of State, to Messrs. Hunter and Popham, Jan. 5, 1894, 195 MS. Dom. Let. 48.

The right under sec. 10, Art. III., of the convention of 1850, on the part of consuls to take possession of and sell "movable property" is subject to the proviso that consular officers shall not discharge such functions "in those States whose peculiar legislation may not allow it." In the course of the discussion, the United States took the ground that this qualification applied only to legislation of the various States of the United States or of the various States or Departments of Colombia, and by a reasonable construction precluded the national governments, assuming that they possessed power for the purpose, from prohibiting consuls to exercise the functions in question. The Colombian government dissented from this view. (For. Rel. 1890, 255, 262; For. Rel. 1891, 469–486.)

The view taken by the United States as to the rights of the consul to act as administrator under the treaty finds support in Mr. Marcy, Sec. of State, to Mr. Aspinwall, Aug. 21, 1855, 44 MS. Dom. Let. 270.

It was alleged in the case of one Pisani, an Italian subject who died near Brownsville, Texas, in 1883, that the local authorities failed to give the notice required by the treaty with Italy of his death to the Italian consul, and that the estate of the deceased had been so administered as to cause its practical loss to his heirs. In view of these allegations, the Italian minister at Washington proposed that Italian consuls in the United States be authorized, as he said that American consuls were in Italy, directly to settle the estates of their deceased countrymen. The Department of State replied that, in view of the fact that the administration of estates in the United States was under the control of the respective States, it was thought that such an international agreement should not be made. The Department added that it was highly probable that the local courts, in cases where foreigners died within their jurisdiction intestate and without heirs or creditors, would, on application of decedent's consular representatives residing in their jurisdiction, grant him the administration of the estate.

Mr. Uhl, Act. Sec. of State, to Baron Fava, Italian ambass., May 24, 1894, For. Rel. 1894, 366; Mr. Uhl, Act. Sec. of State, to gov. of Texas, May 10, 1894, 196 MS. Dom. Let. 658.

Mr. Uhl, in his note to Baron Fava, adverted to the practical difficulties sometimes growing out of the fact that the local courts, in which estates were administered, were frequently remote from the place where the nearest consular officer was stationed, as, for example, in the State of Texas, in whose vast territory there was only one Italian consul, who was stationed at Galveston.

By the law of nations a consular officer is the provisional conservator of the property within his consular district belonging to his countrymen who die therein. The United States Consular Regulations direct consular officers, when foreign local authorities institute proceedings in relation to the property of deceased Americans who leave no representative in the foreign country, to intervene by way of observing the proceedings, "but it is not understood that this involves any interference with the functions of a public administrator." In conformity with this rule are to be construed the stipulations in the treaties of the United States with Austria-Hungary, Belgium, Germany, Great Britain, Roumania, and Servia, which give to consular officers the right to appear personally or by delegate in all proceedings on behalf of the absent heirs or creditors of their deceased countrymen, until they are otherwise represented.

Mr. Hay, Sec. of State, to Mr. Wolcott, U. S. S., Feb. 3, 1900, 242 MS. Dom. Let. 522.

See, to the same effect, Mr. Wharton, Act Sec. of State, to Count d'Arschot, Belgian chargé, Oct. 5, 1891, MS. Notes to Belg. VII. 531.

Paragraph 409 of the Consular Regulations of 1896 is not altogether consistent, for, while it declares that "a consular officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his countrymen deceased therein," and that it is his duty "to take possession of the personal estate left by any citizen of the United States," yet it goes on to say that "he has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization," and restricts his duties to "guarding, and collecting the effects and to transmitting them to the United States, or to aid others in so guarding, collecting, and transmitting them, to be disposed of pursuant to the law of the decedent's State." "This qualifying limitation upon his powers follows an opinion of Attorney-General Cushing (7 Op. Att. Gen. 274). It implies that the power and duty of the consul to so guard, collect, and transmit the decedent's estate is not exclusive. If those powers are not conferred upon him by treaty, local law, or usage, it is his alternative duty to aid others upon whom those functions devolve under local law. . . . Section 389 of the Consular Regulations prescribes that 'the authority of con-

suls with respect to the effects of deceased citizens can be exercised, however, only so far as is permitted by the authorities of the country, or is accorded by established usage, or is provided for by treaty or the laws of the country,' meaning the *lex loci*. There is no treaty stipulation between the United States and Great Britain on this point. Article IV. of the treaty of 1815, which is still in force, subordinates the consul's action to the laws of the country to which he is sent."

Mr. Hay, Sec. of State, to Mr. White, chargé at London, No. 1109, Jan. 15, 1903, For. Rel. 1903, 487. The quotation made above, which refers to par. 409, Consular Regulations of 1896, is given from the text of Mr. Hay's instruction, which does not follow the precise language of the Regulations.

Consuls can not intervene as of right in the administration of a decedent's estate, except by way of surveillance.

Cushing, At. Gen., 1856, 8 Op. 98.

A provision in a treaty that a consul may ex-officio administer upon the estates of citizens of his nationality dying within his jurisdiction without legal heirs there, gives no right of reclamation against the United States for the value of the property of such a decedent improperly administered on by a State court, the consul having omitted to avail himself of legal remedies to obtain possession of the goods.

Black, At. Gen., 1859, 9 Op. 383.

8. Neither under the law of nations, nor the laws of the United States, nor any treaty with the King of Sweden and Norway, can the consul of the latter take from an administrator the succession of a Swede, opened in this State, in which, though not domiciled, the deceased has left property. Succession of Thompson, 9 A. 96.

9. Such a right would be incompatible with the sovereignty of the State, whose jurisdiction extends over the property of foreigners, as well as that of citizens found within its limits. C. C. 9; Ib. Constitution, II. (c), 1, No. 4.

Hennen's Louisiana Digest, ed. 1861, p. 13.

A foreign consul in the United States has authority to receive the distributive shares to which persons residing in his country are entitled from the estate of a person dying in the United States.

In re Tartaglio's Estate, 12 Misc. 245, 33 N. Y. S. 1121.

Article VIII. of the consular convention between the United States and the German Empire of December 11, 1871, authorizing consuls to act as the "legal representatives" of their absent countrymen in certain cases, does not authorize a consul to sue in the capacity of administrator to recover wages due to a deceased countryman, unless

he represents heirs who are entitled to the money and who are also his countrymen.

The Gen. McPherson, 100 Fed. Rep. 860.

Under article 44 of the alien law in force in Cuba the consul of an intestate alien is entitled to intervene and administer the estate, subject to certain exceptions.

Griggs, At. Gen., April 26, 1900, 23 Op. 93.

Julius Saposnik, a Russian subject, died at Cambridge, Mass., in 1902, leaving personal property to be administered there. He had at the time of his death a wife and three minor children in Russia; he left no heirs at law or next of kin in the United States. The Russian vice-consul at Boston applied to the probate court to be appointed administrator of his estate, but the court dismissed the petition and granted letters to the public administrator. From this decision an appeal was taken to the supreme judicial court. This court, Lathrop, J., delivering the opinion, reversed the judgment of the probate court. By Art. VIII. of the treaty between the United States and Russia of 1832, it is stipulated that consular officers "shall enjoy the same privileges and powers of the most favored nations." The treaty between the United States and the Argentine Republic of 1853 (Art. IX.) gives to consular officers the right to intervene in the administration of the intestate estates of their deceased countrymen. A similar clause may be found in Art. VIII. of the treaty between the United States and Costa Rica of 1851, as well as in other treaties. The supreme judicial court (disapproving Lanfear *v.* Ritchie, 9 La. Ann. 96; and approving Estate of Tartaglio, 12 N. Y. Misc. 245, and In re Fattosini, 33 id. 18) held that these stipulations were within the treaty-making power; that the vice-consul therefore had a right to administer on the estate; and that, as he had applied for letters of administration, and had thus submitted himself to the court, he should be required to give bond and to conduct himself in other respects as would any other administrator.

Wyman *v.* McEvoy (1906), Supreme Judicial Court of Massachusetts. I am indebted for an advance report of this interesting decision to Frederic R. Coudert, esq., of the New York bar, who was of counsel for the Russian vice-consul. The decision has since been published in the *New York Law Journal* of April 16, 1906.

7. Representation of Private Interests.

§ 723.

The services of American consular officers cannot be claimed by citizens of the United States for the transaction of private business. Consular officers are at liberty to lend their services in such matters

not conflicting with their consular duties; but in such cases they act as the private agents of their employers and not as representatives of the Department of State; their services are personal and not official, and they are entitled to proper compensation, which is a matter of private arrangement.

Mr. Cadwalader, Assist. Sec. of State, to Mr. Davis, March 11, 1875, 107 MS. Dom. Let. 151; Mr. F. W. Seward, Assist. Sec. of State, to Mr. Schoenberger, Dec. 2, 1878, 125 id. 438; Mr. Evarts, Sec. of State, to Mr. Downey, July 12, 1879, 129 id. 62; Mr. Hunter, Second Assist. Sec. of State, to Mr. Diller, April 28, 1881, 137 MS. Dom. Let. 262.

"It is entirely a matter of their own volition, and not only is it proper that all expenses to which they may be put should be provided for, but this Department has moreover allowed them to charge a reasonable fee for their own services." If payment of such expenses is refused, the Department will direct the attention of the delinquent parties to be called to such refusal. (Mr. Evarts, Sec. of State, to clerk of Peoria court, May 15, 1880, 133 MS. Dom. Let. 48.)

"It is no part of the duty of diplomatic or consular officers to attend to the prosecution of private claims of American citizens in foreign countries, especially when the courts of justice are open to them." (Mr. Evarts, Sec. of State, to Mr. Yoder, May 24, 1880, 133 MS. Dom. Let. 146.)

"United States consuls in foreign countries, and especially in the East (China and Japan), are allowed and instructed to act for citizens of the United States in regard to their private matters, and to give them advice as to the settlement of controversies between themselves or between them and the citizens or subjects of any other government residing in the country of the consul's official residence, when called upon to do so by such American citizens, and when a consular officer can do this without prejudice to the due discharge of his official duties. The paragraphs of the regulations to which you refer are simply intended to impress upon the consul more earnestly his obligations to his countrymen in this regard."

Mr. Davis, Asst. Sec. of State, to Mr. Weiller, Feb. 20, 1884, 150 MS. Dom. Let. 67.

"In reply to the suggestion contained in yours of the 13th instant, that instructions be made to consuls regarding inquiries on the financial standing of foreign individuals and firms, I would say that such a matter does not come within the proper functions of the Department. While endeavoring to meet all demands made upon it in the interest of manufacturers and merchants of the United States, it could not undertake to give the information you ask for, nor could it impose such a task upon consuls without injury to the public service. To pass upon the solvency of a firm or an individual is, under any circumstances, a matter of great difficulty, involving many delicate considerations, which it is impossible for a consul, having so

many other duties incident to his office, to duly weigh and so to arrive at a conclusion that will be just to the person making the inquiry as to the firm or individual in question."

Mr. Porter, Acting Sec. of State, to Messrs. Stearns & Co., Jan. 19, 1886, 158 MS. Dom. Let. 492.

8. Abstention from Politics.

§ 724.

Interference by a consul of the United States in the political affairs of the country of his residence will be a sufficient ground for his recall.

Mr. Forsyth, Sec. of State, to Mr. Hunter, Nov. 16, 1836, MS. Inst. Brazil, XV. 32.

When the British forces attacked Canton in 1856, the American flag was displayed in the fight in the city.. According to one report, it was borne by the American consul at Hongkong, who had left his post and accompanied the British forces. The American commissioner to China was directed to ascertain whether the consul had been guilty of "such a rash and ill-advised step." A letter was also enclosed to the commissioner, removing the consul from office in case it should be found "that he bore the American flag upon the walls or within the city of Canton, at the time the British made their attack upon it, or that he had any agency in displaying our flag on that occasion," or if it should be found that he was "then at Canton, and took a part in the military operations upon or in the city."

Mr. Marcy, Sec. of State, to Mr. Parker, commissioner to China, No. 9, Feb. 2, 1857, S. Ex. Doc. 30, 36 Cong. 1 sess. 3–5.

"It is a standing instruction to United States consuls abroad to abstain from interference in the political affairs of the countries where they reside."

Mr. Cass, Sec. of State, to Mr. Bertinatti, Italian min., Nov. 16, 1859, MS. Notes to Italy, VI. 207.

One Tobiaz, a reactionary chief in Mexico, having exacted a fine from Mr. Blake, who was acting as a consular agent under Mr. Hantus, United States consul at Manzanillo, Mexico, Mr. Hantus arranged a meeting with Tobiaz and entered into an understanding with him that Mr. Blake should be accredited to his, "Tobiaz's, dominions, as an exequatur from President Juarez he should never recognize in his territories." Mr. Hantus, in reporting his action, stated that this arrangement, which was "flattering to the vanity" of Tobiaz, he considered very "cheap" and "willingly accepted," and

that, so far, it had seemed "to work well." The Department of State received the report with "great surprise," and, in order to mark the President's "displeasure" with the consul's "extraordinary course" in "entering into an arrangement with a rebel chief so inconsistent with a proper respect for the constitutional authorities of Mexico," by whom the consul had been "officially recognized," revoked the consul's commission.

Mr. F. W. Seward, Assist. Sec. of State, to Mr. Hantus, "late United States consul," June 18, 1863, 33 MS. Desp. to Consuls, 167.

The consul of the United States at Rome, by appearing in the field with the Pontifical army; by remaining while the army was under fire, and assisting a wounded combatant; by getting slightly wounded himself; and by taking up a musket in self-defense and driving away an assailant, "did indeed become 'mixed up' in the affair, and not as an idle spectator but in the precise character of a belligerent." For these reasons his conduct was "entirely disapproved," and it was left to depend upon his "better conduct hereafter," and to a certain extent on circumstances "not yet fully understood," whether the Department of State would be content "to leave the case with this reprimand."

Mr. Seward, Sec. of State, to Mr. Cushman, consul at Rome, No. 27, Jan. 21, 1868, 46 MS. Desp. to Consuls, 516.

VIII. *SHIPPING AND SEAMEN.*

1. Consular Powers.

§ 725.

Exclusive jurisdiction over disputes between masters, officers, and crews of the vessels of their respective countries is conferred on consuls by various treaties between the United States and other powers.

The right to reclaim deserting seamen also is often so conferred.

By other treaties consuls are empowered to adjust damages suffered at sea and in matters of wreck and salvage.

Consular Regulations of the United States (1896), §§ 88, 89, 90, p. 34–35.

The right given to seamen by Revised Statutes, section 4567, to lay their complaints before the American consul in foreign ports, is one which a court of admiralty will carefully protect.

Morris *v.* Cornell, 1 Sprague, 62.

The advice of a consul in a foreign port gives to the master of a vessel no justification for an illegal act.

Wilson *v.* The Mary, Gilpin, 31.

Consuls have no authority to order the sale of a ship in a foreign port, either on complaint of the crew or otherwise. If, on such sale, the consul retain the money for the payment of seamen's wages, the United States are not liable to the owners for the money thus illegally received by the consul.

Cushing, At. Gen., 1854, 6 Op. 617.

Under the 28th section of the act of August 18, 1856, consuls have the authority to enforce the payment of wages in certain cases and consular fees, but not a general power of deciding upon all manner of disputed claims and demands against United States vessels. By the act of 1803 the consul is made the party to bring suit for penalties incurred under it, but not the judge to decide it. He cannot demand the penalty, decree it to be due, and enforce its payment by detaining the ship's papers.

Black, At. Gen., 1859, 9 Op. 384.

Article VIII. of the consular convention with France of Feb. 23, 1853, provides that "the local authorities shall not, on any pretext, interfere" in differences between masters and crews of vessels of the contracting parties, but that such persons "shall be arrested at the sole request of the consuls, addressed in writing to the local authority," etc. By the act of June 11, 1864, 13 Stat. 121, R. S. §§ 4079–4081, for the execution of treaties relating to the jurisdiction of consuls over seamen, it is provided that the application for arrest may be made "to any court of record of the United States, or any judge thereof, or to any commissioner appointed under the laws of the United States," and that the warrant of arrest shall be directed to the United States marshal. Under these provisions an application to the local chief of police is irregular and an arrest made by such chief of police is unauthorized. But where a seaman so arrested is brought before a United States district court on habeas corpus, it is the duty of the court to examine the case and commit the defendant to prison if he comes within the terms of the treaty, and the formal irregularity in the arrest is obviated by the examination.

Dallemagne *v.* Moisan (1905), 197 U. S. 169.

Neither Art. VIII. of the consular convention with France of Feb. 23, 1853, nor the act of June 11, 1864, 13 Stat. 121, R. S. §§ 4079–4081, limits the time during which an arrested seaman may be held in custody to the stay of his ship in port. The statute limits the time to two months and the seaman, when properly in custody, may be held during that time, whether the ship departs or not.

Dallemagne *v.* Moisan (1905), 197 U. S. 169.

"No consul, pursuant to our law or regulations, has the right to grant a clearance to any American vessel, even if his post is at a port conquered and possessed by the enemy of the country from whose government he may have received his exequatur. It is the exclusive province of the belligerent authority for the time being—civil, military, or naval—to grant such clearances, and the consul, as is required in time of peace, should not deliver the vessel's papers until the clearance shall have been presented to him by the master. The consul's course is not to be governed or influenced by the components of the cargo of the vessel. If these, according to the existing authority, may lawfully be exported, the consul can not properly gainsay that opinion."

Mr. Evarts, Sec. of State, to Mr. Christiancy, min. to Peru, Mar. 2, 1880, message of Jan. 26 and 27, 1882, relating to the War in South America and Attempts to bring about a Peace, p. 331. This instruction is recorded in MS. Inst. Peru, XVI. 437.

"You are instructed to make a courteous application to the government of Venezuela to permit by some general regulation the consuls of the United States to visit vessels of their nationality in their official capacity without a special permit from the local authorities."

Mr. Bayard, Sec. of State, to Mr. Scott, min. to Venezuela, No. 156, March 22, 1888, For. Rel. 1888, II. 1640–1641.

Under the act of February 28, 1803, § 2, the master of an American vessel which touches at a foreign port to obtain advices, but does not enter nor do any business there, is not bound to deposit the register with the consul of the United States; such presence in port is not an "arrival" within the meaning of that act.

Harrison *v.* Vose, 9 Howard, 372; Mason, At. Gen., 1845, 4 Op. 390; Johnson, At. Gen., 1849, 5 Op. 161; Cushing, At. Gen., 1853, 6 Op. 163; Black, At. Gen., 9 Op. 256.

Masters of American vessels are subject to prosecution in the name of the consul for omission to deposit with him the papers according to law, but not to indictment. (2 Stat. 203, § 2; Rev. Stat. § 4309.)

Cushing, At. Gen., 1855, 7 Op. 395.

The master of an American vessel sailing to or between ports in the British North American provinces is required, on arriving at any such port, to deposit his ship's papers with the American consul.

Bates, At. Gen., 1866, 11 Op. 72.

Section 1720, Revised Statutes, does not change or affect the duties of masters of American vessels running regularly by weekly or

monthly trips or otherwise, to or between foreign ports, as imposed by act of 1803. (2 Stat. L., 203; Rev. Stat., § 4309.)

Bates, At. Gen., 1866, 11 Op. 72.

If an American vessel is obliged by the law or usage prevailing at a foreign port to effect an entry, and she does enter conformably to the local law or usage, her coming to such foreign port amounts to an arrival within the meaning of section 2 of the act of 1803 (2 Stat. L., 203; Rev. Stat., § 4309), independently of any ulterior destination of the vessel, or the time she may remain or intend to remain at such port, or the particular business she may transact there.

Bates, At. Gen., 1866, 11 Op. 72.

The masters of fishing vessels, enrolled but not registered, are not required by sections 4309 and 4310 of the Revised Statutes to deposit their ships' papers with the United States consul when they arrive at a foreign port where there is such a consular officer.

Harmon, At. Gen., 1895, 21 Op. 190.

A consul of the United States in a foreign port has no power to retain the papers of vessels which he may suspect are destined for the slave trade.

Black, At. Gen., 1860, 9 Op. 426.

Coal barges, which are rough, square-cornered boxes, from 165 to 180 feet long, about 26 feet wide, and from 8 to 10 feet deep; which have no propelling power, no master or crew, nor any tackle, apparel, or furniture, nor any name, being generally designated by number; and which neither have a license, nor can be enrolled or licensed under any law of the United States, are not "ships" within the meaning of admiralty rule No. 20, and can not be made the subject of a possessory suit thereunder.

Wood *v.* Two Barges (1891), 46 Fed. Rep. 204.

The court, in the course of its opinion, said: "That they can be held, under proper circumstances, within the admiralty jurisdiction in cases of certain maritime contracts—towage, for instance—in salvage cases, or in connection with a maritime tort, is not disputed; but, as for that matter, other articles of property under proper circumstances may be the subject of a maritime contract, or be subject to salvage services, and thus brought within the admiralty jurisdiction; and many things, not pretending to be ships, even constructions on land, may be brought within the admiralty jurisdiction in connection with maritime torts."

A steam dredge, without motive power, engaged in deepening navigable waters, and capable of being towed from place to place,

is a "vessel," within Revised Statutes, sec. 3, and is within the admiralty jurisdiction, and the persons employed on her and her scows in such work are "seamen," within Rev. Stat. sec. 4612, and are entitled to a maritime lien for their services.

Saylor *v.* Taylor, 77 Fed. Rep. 476, 23 C. C. A. 343.

2. Shipment and Discharge of Seamen.

§ 726.

An American consul could not, without exercising a jurisdiction not conferred upon him by treaty or by the statutes of the United States, refuse to ship Dutch seamen on American vessels in Netherlands ports on the ground that they had not complied with the laws of their own country with regard to the performance of military duty.

Mr. Bayard, Sec. of State, to Mr. de Weckherlin, Dutch min., Feb. 6, 1888, For. Rel. 1888, II. 1337.

The American consul at Montevideo having requested instructions as to certain British subjects, seamen on board the American whaler *Sunbeam*, who asked to be discharged because war had broken out between the United States and Spain, the Department of State replied: "War no ground for discharging seamen peaceful vessel."

Mr. Cridler, Third Assist. Sec. of State, to Mr. Swalm, consul at Montevideo, tel., June 16, 1898, 162 MS. Inst. Consuls, 355.

A seaman is not to be discharged for slight or venial offenses, nor for a single offense, unless of a very aggravated character. If he is charged with insubordination, it should satisfactorily appear that he is incorrigibly disobedient, and that he persists in such conduct. Hence it was advised, where a seaman refused one day to work on account of sickness, which proved to be intoxication, and again refused to work the next day, when he was unable to do so from illness consequent upon his intoxication, that the offenses charged "would hardly have constituted sufficient grounds for his discharge without his consent."

Griggs, Atty. Gen., Sept. 20, 1898, 22 Op. 212, 213, citing The Superior, 22 Fed. Rep. 927; The T. F. Oakes, 36 Fed. Rep. 442. In this case the seaman was discharged by the consul on the joint request of the master and himself, and the consul's action was held to have been justified, apparently on the ground that he apprehended that the seaman, if he returned to the vessel, would be subjected to cruel treatment, "owing to the evident ill will displayed by the master toward the seaman."

A consul who had discharged a seaman stated that his principal reason for so doing was the fact that he felt it would be unsafe to send the man back to the vessel, owing to the evident ill will displayed toward him by the master. Advised that, although no cruel treatment was actually recorded, yet, if the consul discharged the seaman because of such treatment, " or because he feared such treatment might supervene," he was justified in so doing, it appearing that the master and the seaman had joined in an application for the latter's discharge.

Griggs, At. Gen. Sept. 20, 1898, 22 Op. 212.

Notwithstanding the Revised Statutes, section 4576, and section 8 of act of 1840 (5 Stat. 395), requiring masters of American vessels to give bond for the return of all the crew, unless discharged in a foreign country with consent of a consul, these sections, construed with the aid of the other parts of these statutes, do not require a master to return to the United States foreign seamen shipped at their own home for a particular cruise, ending where it began, and discharged there according to the terms of their contract, though without the consent of a consul. The consent of a consul could not be rightly withheld in such a case, and there is no law requiring it to be asked.

United States *v.* Parsons, 1 Lowell, 107.

Under sec. 20, act June 26, 1884, amending Rev. Stat. § 4576, a master may make a contract with seamen providing for their discharge abroad without being required to pay extra wages on such discharge.

The action of a consul in discharging a seaman in a foreign port is not conclusive where a libel is filed for wages.

Campbell *v.* Steamer Uncle Sam, McAllister, 77.

After the discharge of a seaman in a foreign port before a consul, with a settlement of his wages and an order on the owners for payment signed by the master with knowledge of all the facts, an offset can not be allowed for an alleged fine against the ship for the seaman's alleged smuggling, the proofs as to such fine being doubtful.

Healey *v.* The Maracaibo (1896), 79 Fed. Rep. 809.

A consul can not detain seamen in prison as a punishment, after he has discharged them from their contract at the request of the master.

Jordan *v.* Williams, 1 Curtis, 69.

Where a consul intervened, on the invitation and by mutual consent of the master and crew of a foreign-built yacht owned by a citizen of the United States, and discharged certain dissatisfied mem-

bers of the crew, and a question was afterwards raised by the Department of State as to his power to discharge the seamen of such a vessel, it was held that, as he had exercised no consular authority, but had in effect acted as arbitrator by consent of parties, no question arising out of his action was then pending in the administration of the Department.

Harmon, At. Gen., July 26, 1895, 21 Op. 201–203.

3. Desertion.

§ 727.

See, also, the cases under the next section.

The fact that a fireman on a steamship is required to perform extra watches, in place of a sick seaman, does not justify desertion; nor does the fact that his contract of service may have been harsh, or the term long (three years); and one so deserting can not recover wages.

Steindl *v.* The Lady Furness, 84 Fed. Rep. 679.

Condonation of neglect of duty and of unauthorized absences does not imply consent to a subsequent termination of the contract of service by the seaman by leaving the vessel without permission.

Diochet *v.* The Occidental, 87 Fed. Rep. 485.

A voyage was described in the shipping articles as "from the port of San Francisco to Port Hadlock, Washington, and thence to San Francisco for final discharge, either direct or via one or more ports of the Pacific coast." Held, that, under these terms, the vessel might proceed from Port Hadlock immediately to San Francisco, or stop at one or more intermediate ports; but that when she passed by San Francisco and went to San Pedro, and, after discharging there, returned to Port Hadlock, before going to San Francisco, there was a deviation; and that it consequently was not a desertion, warranting forfeiture of wages, for the crew to leave the vessel at San Pedro without the master's consent.

Bradley *v.* The J. M. Griffith, 71 Fed. Rep. 317.

Where seamen were arrested at Honolulu, on request of the American consul, for desertion, on their failure to appear for work at the proper hour, held, in a suit for wages, that the mere certificate of the consul that the men had deserted, without any record of an examination before him, was not legal evidence of desertion, and that, in the absence of other proof, the evidence was insufficient to sustain any offsets on the ground of desertion.

Graves *v.* The W. F. Babcock (1897), 79 Fed. Rep. 92.

"To make proceedings before the consul evidence, there must," said the court, "be either a duly proved copy of his record, or else his deposition, as in the case of other witnesses."

The fact that a sailor who was arrested for desertion in a foreign port and detained in jail by the local authorities, appeared before the consul and was subsequently detained by the police, does not, in the absence of any record or testimony from the consul, other than a mere certificate, raise a presumption of a judicial investigation by the consul and a finding of causeless desertion.

Graves *v.* The W. F. Babcock (1898), 85 Fed. Rep. 978, 29 C. C. A. 514. 79 Fed. Rep. 92, reversed.

Shipping articles which provide for a voyage to one or more foreign ports, or for a coasting voyage, at the option of the master, do not sufficiently state the nature of the voyage as required by Rev. Stat. § 4511, and are void.

The Occidental, 101 Fed. Rep. 997.

A consul of the United States has no authority to demand and receive from the master of a vessel the money and effects belonging to a deserter from the vessel.

Williams, At. Gen., 1875, 14 Op. 520.

4. Recovery of Wages.

§ 728.

Claims of mariners for wages are highly favored by the courts, and discharges are not justified for trivial causes.

The Idlehour, 63 Fed. Rep. 1018.

The powers and duties of American consuls as to seamen's wages are confined to vessels owned by citizens of the United States and constituting a part of our mercantile marine by sailing under our flag.

Berrien, At. Gen., 1831, 2 Op. 448.

Seamen left behind in a foreign country on account of inability, from sickness, to return in the vessel in which they went out, are within the provisions of the act of February 28, 1803, supplementary to the act concerning consuls, and for them the master should deposit with the consul three months' pay over wages, &c., as in other cases of voluntary discharge.

Wirt, At. Gen. (1823), 1 Op. 593.

Under the act of June 26, 1884, but one month's extra wages can be exacted in this or any other case.

The act of July 20, 1840, did not authorize any distinction to be made, in the payment of extra wages to American seamen discharged abroad, between a seaman shipped in a foreign port and one shipped in the United States.

Mr. Calhoun, Sec. of State, to Mr. Don, consul at Valparaiso, Feb. 26, 1845, 11 MS. Desp. to Consuls, 344.

Section 3, act of June 19, 1886, permitting a seaman to stipulate in his shipping agreement before a shipping commissioner for an allotment of wages to a creditor, was by implication repealed by the act of February 18, 1895.

Grossett *v.* Townsend, 86 Fed. Rep. 908.

As to shipping commissioners' expenditures, see United States *v.* Reed, 9 C. C. A. 563.

The act of August 19, 1890, having been by the act of February 18, 1895, so amended as to exempt vessels in the coastwise trade (except between ports on the Atlantic and ports on the Pacific), and vessels engaged in trade between the United States and Canada, from the requirements of the act of 1872 as to keeping official log books, the wages of seamen deserting from such vessels may be adjudged forfeited without proof that they were ever noted in the log books as deserters.

The Victorian (1898), 88 Fed. Rep. 797.

The act of Feb. 18, 1895, in providing for the omission of item No. 8 of section 4511 of the Revised Statutes, relating to the allotment of wages, in its application to the form and contents of shipping articles in the coastwise trade, did not repeal, by implication, the positive enactments of the acts of June 26, 1884 (23 Stat. 55), and June 19, 1886 (24 Stat. 80), permitting allotments.

Hogan *v.* The J. D. Peters (1897), 78 Fed. Rep. 368.

The act of December 21, 1898, makes many changes in the laws relating to American seamen, and consequently alters the Consular Regulations of 1896 in various particulars in respect of such matters. Under these changes, while a consular officer is still required to see that all arrears of wages and extra wages that are due to a seaman on his discharge are paid by the master, either directly to the seaman or to the consul for the seaman's use, the consul is no longer required to use these wages in the maintenance and transportation of the seaman.

Circular to consular officers of the United States, Feb. 6, 1900, transmitting a decision of the Comptroller of the Treasury, dated Jan. 11, 1900, as to the effect of the act of Dec. 21, 1898, on the accounts of consular officers in connection with American seamen. (State Dept. Circulars.)

Where a seaman was shipped by the owners for a voyage on a vessel which was afterwards wrongfully taken possession of by the master and diverted from her voyage, in a distant port, where there was no court accessible through which the seaman could collect the wages due him, it was held that he was justified in staying with the vessel and was entitled to wages until returned to the port of discharge.

The Gen. McPherson, 100 Fed. Rep. 860.

Seamen who go on board a vessel as mariners, voluntarily but without any valid contract, may be required by the master to perform such services as are necessary to the navigation of the vessel while at sea, but they are not bound to continue with the vessel through the voyage, and may leave it at any port without forfeiting the wages earned, although they can not in such case require the owner to return them to the port of shipment.

The Occidental, 101 Fed. Rep. 997.

Shipping articles described the voyage as "from the port of San Francisco, Cal., to Port Blakeley, thence to San Francisco, for final discharge, either direct or via one or more ports of the Pacific coast, either north or south of the port of discharge. Voyage to be repeated one or more times." The vessel proceeded to Port Blakeley, and thence with a cargo to San Pedro, where, after unloading, the master announced his intention of returning to Port Blakeley. The crew thereupon demanded their pay, claiming that the voyage ended at San Pedro. Held, that the shipping articles did not permit a return from San Pedro to Port Blakeley before going to San Francisco, and that the seamen were entitled to their wages upon the master's announcement of his intention to return direct to Port Blakeley, and did not forfeit them by leaving the ship upon his refusal of their demand.

Heinrici *v.* The Laura Madsen (1897), 84 Fed. Rep. 362.

Shipping articles described the voyage as follows: "From port of San Francisco, Cal., to any port or ports on Puget Sound or British Columbia for orders. At Puget Sound or British Columbia, vessel may be ordered to load cargo for any port or ports in Alaska, as the master may direct. If the vessel is ordered to Alaska, the trips between Puget Sound or British Columbia and Alaska to be repeated one or more times; thence to San Francisco for final discharge, either direct or via one or more ports on the Pacific coast, for a term of time not exceeding six months." Held, that the articles set forth the nature, duration, and termination of the voyage with sufficient certainty to satisfy Revised Statutes, section 4511.

Diochet *v.* The Occidental (1898), 87 Fed. Rep. 485.

Seamen who have signed shipping articles for a foreign voyage on a steamship, and, in pursuance of the articles, have presented themselves for the service of the ship several times and are finally discharged, before the commencement of the voyage, in consequence of an accident to the steam pipe which renders their discharge proper, may recover compensation in rem, under section 4527 of the Revised Statutes, for the period of the voyage, not exceeding the one month specified in the statute.

Clark *v.* The St. Paul (1897), 77 Fed. Rep. 998.

Fishermen are seamen and, except as modified by their peculiar contracts, express or implied, are protected by the law as other seamen are, and for their wages may look to the vessel, her master, and ordinarily her owners.

The Carrier Dove, 97 Fed. Rep. 111, 38 C. C. A. 73; Rich *v.* Williams, id.

The fact that the master, who is part owner of a fishing vessel, charters it from his coowners for a voyage on the "quarter clear lay," and afterwards engages a crew, agreeing to give them the same share of the catch as though they had together chartered the vessel, does not render the members of the crew cocharterers, but they have all the rights of seamen, including the right to a lien on the vessel, as for wages, for the value of their share of the catch.

The Carrier Dove, 97 Fed. Rep. 111, 38 C. C A. 73; Rich *v.* Williams, id.

Seamen shipped for a whaling voyage who are required to perform extra labor in connection with trading ventures carried on without their previous knowledge were held to be entitled to share in the profits of the trading, in the same proportions as their lay in the catch.

Lopes *v.* Luce (1897), 84 Fed. Rep. 465.

Persons employed as seal hunters, after purchasing interests in the vessel from the master and giving mortgages thereon for unpaid balances, may, as against the master and other part owners, maintain a suit in rem for their wages.

White *v.* The M. M. Morrill (1897), 78 Fed. Rep. 509.

Persons employed as hunters for a sealing voyage, although they have purchased an interest in the vessel from the master and have agreed that half their wages might be applied in payment, are within the protection of Revised Statutes, § 4536, forbidding the assignment of seamen's wages.

White *v.* The M. M. Morrill, 78 Fed. Rep. 509.

Members of the crew of a fishing vessel who leave her without permission in order to carouse on shore and are in consequence left behind by the vessel, should be subjected to the loss resulting from their failure to perform duty, but a member of the crew who is left behind while trying, in the vessel's interest, to induce his associates to return, is entitled to recover his share of the catch, his expenses, and the value of his outfit carried away.

Flynn *v.* The Nereid, 67 Fed. Rep. 602.

Where the shipping articles provide that the members of the crew shall not be entitled to wages until return to the home port, their refusal, in a foreign port, to proceed with the voyage, no excuse for such refusal appearing, works a forfeiture of their right to wages.

The H. C. Wahlberg (1898), 87 Fed. Rep. 361; Lorentzen *v.* Schlehen, id.

There is no custom exempting the crew from the duty of handling cargo when it consists of ice, in the absence of an express stipulation in the shipping articles.

O'Brien *v.* The Cramp (1898), 84 Fed. Rep. 696.

Seamen are not justified in leaving the ship by reason of abusive words from the master, nor is their subsequent statement to him that they desire to leave the vessel, coupled with a demand for their wages, such insolence as will justify him in discharging them and claiming forfeiture of their wages. And where, in such case, he tells them they may leave, but that he will not pay their wages, they are entitled to recover, not full wages, but wages to the time of leaving.

Richards *v.* The Topgallant (1898), 84 Fed. Rep. 356.

Seamen are not entitled to extra wages for services rendered in unloading cargo in a harbor of refuge, in order to free the vessel from water; and a promise by the master to pay extra compensation, upon their refusal to work without it, is void.

The Potomac, 72 Fed. Rep. 535, 19 C. C. A. 151; Niagara Falls Paper Co. *v.* Crouckett, id.

The Potomac, 66 Fed. Rep. 348, reversed.

A seaman who quits ship without legal cause, before expiration of time for which he shipped, is not entitled to recover as upon a quantum meruit for services rendered in part performance of his contract.

The Leiderhorn, 99 Fed. Rep. 1001.

A seaman one day refused to work on the ground of sickness, which proved to be intoxication, and the next day again refused to work,

being unable to do so in consequence of illness caused by his previous drunkenness. For these offences the master deducted from his wages four days' pay and eight days' pay, respectively, amounting in all to $14. Advised that, although section 4528, Revised Statutes, provides that a seaman is not entitled to wages for any period during which he unlawfully refuses or neglects to work when required, the circumstances stated did not amount to such unlawful refusal or neglect, and that the master had no authority to impose and collect the "fines" mentioned.

Griggs, At. Gen., Sept. 20, 1898, 22 Op. 212.

The negligence of a seaman, contributing to an injury, which made it necessary to put into a port and leave him, does not debar him from recovering his full wages, which include all that would have accrued upon the completion of the voyage.

The Robert C. McQuillen, 91 Fed. Rep. 688.

Where the answer admits that wages have been earned, but claims deductions for payments on account and other offsets, the burden is on the master to show such payments.

Hogan *v.* The J. D. Peters, 78 Fed. Rep. 368.

Pending a suit for seamen's wages, one of the libelants, needing money, wrote to the master, offering to accept a certain sum in payment, and saying that if such sum was paid into court the suit, so far as concerned his claim, might be dismissed. The sum was accordingly paid into court, but libelant never called for it, and subsequently pressed the suit for the full amount. Held, that this conduct did not prejudice his right to recover the larger sum.

Hogan *v.* The J. D. Peters, 78 Fed. Rep. 368.

Conviction and imprisonment of a seaman in a foreign country for an assault on the master, committed on board ship, within the territorial jurisdiction of such country, will bar a suit for wages.

Hindsgaul *v.* The Lyman D. Foster, 85 Fed. Rep. 987.

In this case the wages due at the time of the assault were paid into the hands of the American consul, who paid therefrom the costs of prosecution and turned the remainder over to the seaman. It was held that the ship was not liable for the misapplication, if there was any, of the money by the consul.

The mere fact that the master suspended seamen from duty and imprisoned them, in good faith, on suspicion of an intent to burn the vessel, is not ground for forfeiting their wages if they in fact were not guilty.

Krueger *v.* The John and Winthrop (1897), 84 Fed. Rep. 503.

A seaman discharged by a consul because of unusual or cruel treatment is entitled to the one month's extra wages allowed by statute, and "some reasonable discretion is to be permitted to the consular authority in determining this extra allowance in reference to actual or anticipated ill treatment and a discharge consequent thereon."

Griggs, At. Gen., Sept. 20, 1898, 22 Op. 212, 214.

The filing of a libel for wages, after the master has announced his intention to sail for a port unauthorized by the shipping articles, and after the seamen have, in consequence, demanded their wages, is not premature, although they continue at work several hours longer, and until the vessel is about to proceed to sea.

Heinrici *v.* The Laura Madsen, 84 Fed. Rep. 362.

Where the owner of the ship is also the owner of the cargo, the seamen have a lien on the cargo for wages in the nature of a charge upon the freight.

Tibbol *v.* The Marion, 79 Fed. Rep. 104.

Where vessel and cargo are owned by the same persons and the proceeds of the vessel are insufficient, the seamen have a lien for their wages on the cargo to an amount equal to a reasonable freight thereon.

The Marion, 88 Fed. Rep. 96.

5. Recovery of Damages.

§ 729.

Where a seaman, while painting a mast, fell to the deck and was injured, and it appeared that there was negligence both on his part and on that of the master, it was held that, under the rule in admiralty requiring the division of damages in proportion to the negligence of the master and servant, respectively, the seaman was entitled to recover one-half his actual damage.

Wm. Johnson & Co. *v.* Johansen, 86 Fed. Rep. 886.

As to personal injuries, see Natchez & N. O. Packet & Navigation Co. *v.* Price, 21 C. C. A. 145.

The liability of a British ship or her owners for injuries caused to a seaman on the high seas, by neglect of the master to furnish sufficient ropes or gear, is measured by the British law, which does not give in such case an action in rem.

Peterson *v.* The Lamington (1898), 87 Fed. Rep. 752.

Where a boatswain is engaged, with a detail of seamen, in lowering a mast, and the mate of the ship, in assisting to do the work, causes injury to the boatswain by his negligence, the act of the mate is that of an operative, and the boatswain can not recover.

The Miami (1898), 87 Fed. Rep. 757.

The risk to a seaman of injury from perils of navigation from the negligence of fellow-servants, or from defects in tackle or other appliances, which are not obvious or discoverable by the exercise of reasonable care, is incidental to the employment and is assumed by him.

The Robert C. McQuillen, 91 Fed. Rep. 685.
See Wm. Johnson & Co. *v.* Johansen, 30 C. C. A. 675.

Libelants shipped as seamen on a whaling ship for a voyage not to exceed one year, and were to receive a share of the proceeds as compensation. During the year the ship became fast in the ice and was not released until some time after the end of the year. After being released, the master, against the protest of the men, went on another cruise. Held, that the detention of the ship while imprisoned in the ice and while afterwards taking up the members of the crew who had been sent on shore while she was so imprisoned was an incident to navigation in that latitude for which the ship was not liable, but that for the time occupied by the subsequent cruise, after it became the duty of the ship under the articles to return libelants to the port of discharge, she was liable to them for damages in an amount sufficient to compensate them for their loss of time.

The Belvedere, 100 Fed. Rep. 498.

6. Provisions for Crew.

§ 730.

After the adoption by shipping articles of the statutory scale for provisions (Revised Statutes, § 4612) the master issued provisions according to a "method" of his own, whereby there was a shortage of bread. The seamen protested, and the statutory scale was professedly followed for a few days, but the seamen, being dissatisfied with the manner in which it was carried out, asked the master to return to his "method." He did so, on condition that they would "agree to be perfectly satisfied in the future and make no more complaints," and an agreement to this effect was entered on the log. Held, that the contract was void, and that the seamen might sue for the extra compensation allowed by Revised Statutes, § 4568, in cases of shortage.

Broux *v.* The Ivy, 62 Fed. Rep. 600.

By Revised Statutes, § 4569, the master is required to serve his crew with a regular daily allowance of antiscorbutics. It is not sufficient that limes were on board, from which they were at liberty to help themselves.

Peterson *v.* J. F. Cunningham Co., 77 Fed. Rep. 211.

It was also held that the penalty imposed for failure to serve antiscorbutics did not inure to the benefit of the crew.

The usual length of a certain voyage by sailing vessel being 45 days, a delay, by bad weather or accident, prolonging it to 59 days, does not justify the master in shortening the schedule allowance of provisions to the crew.

Peterson *v.* J. F. Cunningham Co., 77 Fed. Rep. 211.

It was further held in this case that a compound, ⅓ flour and ⅔ copra (dried cocoanut), was not a proper equivalent for ship bread.

Also, that the failure of the master properly to provision his ship was actionable, unless provisions, the allowance of which was reduced, could not be procured in sufficient quantities, or were unavoidably lost or injured, and proper and equivalent substitutes were obtained in a reasonable time.

A sailing vessel on a voyage from the Pacific coast of the United States to Alaska may, by analogy, be considered as within Revised Statutes, § 4569, and the act of June 26, 1884, § 11, allowing only 10 per cent profit on articles sold to seamen from the slop chest.

Hogan *v.* The J. D. Peters, 78 Fed. Rep. 368.

Every master, when sailing to or from a foreign port, is bound to see, before he sets sail, that his vessel is properly provisioned, including a surplus to meet all reasonable contingencies of the seas, and if, in consequence of omission, there is a short allowance, the withholding of suitable food is not justifiable.

United States *v.* Reed (1897), 86 Fed. Rep. 308.

Where there is evidence that every one of a crew was afflicted with scurvey, of which several died, and that the ordinary cause of that disease is lack of suitable food, the jury are justified, unless some other cause is shown, in finding that there was such lack of suitable food.

United States *v.* Reed (1897), 86 Fed. Rep. 308.

Where a master by reason of difficulties at sea changes his voyage to a much longer one, he must exercise the same care as at first setting out to provision the ship for the change of course.

United States *v.* Reed, 86 Fed. Rep. 308.

Where a master by reason of stress of weather changes his voyage to a much longer one, for which his supplies are plainly insufficient, he was held liable in damages to the crew on account of their sufferings from want of provisions where he failed to call at certain intermediate ports for additional supplies, as he might easily have done.

Robinson *v.* The T. F. Oakes, 82 Fed. Rep. 759.

On an indictment under § 5347, Revised Statutes, for withholding suitable food and nourishment from the crew each statutory element of the offense must be proved beyond a reasonable doubt.

United States *v.* Reed, 86 Fed. Rep. 308.

The fact that the master of a vessel did not furnish his crew with the full supply of lime juice required by the law and the shipping articles, does not, in the absence of any claim that the men complained, or that they suffered or were made sick by such deprivation, authorize them to abandon the ship before the end of her voyage and recover their wages, nor does it entitle them to extra wages.

The Belvidere, 90 Fed. Rep. 106.

The refusal of the master, after complaint made to him, to furnish a warm room for the seamen in cold weather, as required by the act of Dec. 21, 1898 (30 Stat. 755), constitutes a breach of the shipping articles, which justifies the men in leaving the ship and entitles them to recover wages for the time served.

The Ida McKay, 99 Fed. Rep. 1002.

7. Relief of Seamen.

§ 731.

"Seamen of the United States entitled to relief when destitute are:

"1. Merchant seamen, being citizens of the United States, or persons coming under the provisions of section 2174 of the Revised Statutes, and who, at the time of applying for relief, are by habit and intent bona fide members of the American merchant marine, although their last service may not have been in an American vessel.

"2. Foreigners regularly shipped in an American vessel in a port of the United States."

"The seamen of the merchant marine of the United States alone are those whom the law contemplates relieving; and no provision has been made for the relief of destitute Americans other than seamen. No relief, therefore, is authorized to be granted to such destitute Americans, or to seamen, whether citizens or foreigners, discharged

or deserting from naval vessels of the United States; and expenditures for such relief will not be allowed if found in the consular accounts. Seamen on American yachts are regarded as American seamen within the meaning of the statute."

Consular Regulations of the United States (1896), §§ 260, 261, pp. 97, 98. See circular to consuls, Jan. 12, 1889, transmitting Executive order of Jan. 7, 1889, cited in Mr. Wharton, Act. Sec. of State, to Mr. Bennington, No. 33, Aug. 24, 1889, 131 MS. Inst. Consuls, 162.

The act of June 26, 1884 (23 Stat. c. 121), for the protection of American seamen, and the amendments thereto, apply only to Americans, but to all Americans whose vocation is that of mariner, whether shipping on domestic or foreign vessels.

United States *v.* Nelson, 100 Fed. Rep. 125.

A Porto Rican serving as a seaman in the American merchant marine, including that of Porto Rico, is an American seaman within the meaning of the statutes relating to relief by consuls.

Griggs, At. Gen., Feb. 19, 1901, 23 Op. 400.

All seamen serving on foreign-built but American-owned vessels "are within the jurisdiction of the United States consuls abroad as to shipment and discharge, and (in China) as to all disputes between master and men, growing out of the discipline or police of the ship, and such seamen should be shipped and discharged before the consul. As to extra wages and relief, it is different." But "an American citizen shipped on an American vessel either in a port of the United States or a foreign port, under proper conditions is always entitled to relief, protection and extra wages."

Mr. Hunter, Act. Sec. of State, to Mr. Wingate, consul at Foochow, No. 53, Sept. 20, 1884, 111 MS. Inst. Consuls, 543.

Where a minor, having concealed himself, without the knowledge of his father, on board of a whaling-ship, and not being discovered until the vessel was at sea, was then left by the master in the care of the American consul at the first port at which he touched, it was held to be the duty of the consul to provide for and send him home to the United States.

Luscom *v.* Osgood, 1 Sprague, 82.

With regard to two stowaways who were put ashore by a Pacific Mail steamer at Mazatlan, Mexico, and when the American consul there requested the captain of the steamer to return to San Francisco, the Department of State said: "If they were paupers and a burden to the community where they were thrown by the company, or if they

belonged to the criminal class, it was the province of the local authorities to protect themselves. If they had complained through the consul and required the steamship company to take the stowaways back, the consul could not have ignored the complaint, as it would have been morally incumbent upon the company to remedy the act of its agent."

Mr. Hunter, Second Assist. Sec. of State, to Mr. Lane, March 12, 1885, 154 MS. Dom. Let. 455.

A young man, a citizen of the United States, who had not been a seaman, finding "a chance to go to sea for the summer" as a seaman on a British vessel, shipped at New York for Australia. He was discharged at Melbourne; and afterwards, having reached Sydney, N. S. W., appealed to the American consul there to send him back to the United States. The consul held that he was not authorized to do so. The consul's action was approved. The fact that the applicant for relief was "an American citizen" was not, said the Department of State, "decisive of the question. The test of his right to relief as an American seaman is not his citizenship, but his actual and bona fide service in the American merchant marine."

Mr. Cridler, Third Assist. Sec. of State, to Mr. Lodge, U. S. S., Aug. 28, 1897, 220 MS. Dom. Let. 480.

Certain seamen of the American bark *Hilo*, which was wrecked near the Hawaiian Islands, reached Honolulu in an "utterly destitute" condition. The American consul-general supplied their wants and shipped them to San Francisco, where they were to be discharged and paid off; and he wrote to the shipping commissioner at San Francisco, enclosing an account of the necessaries furnished and requesting that the amount supplied to each seaman be deducted from his wages. Held, that, under §§ 4577, 4579, Revised Statutes, the amount retained by the commissioner, in accordance with the consul-general's request, should not be retained by the government, but should be refunded to the seamen.

Olney, At. Gen., 1894, 21 Op. 25, 34.

"The only provision of the existing statutes requiring the retention of seamen's wages to meet their expenses appears in section 4581, Revised Statutes, as amended (23 Stat. 55, 25 Stat. 80), which provides that, 'If any seaman, *after his discharge*, shall have incurred any expense for board, or other necessaries . . .'" (Id. 35.)

Licensed yachts are not required to "clear at the custom-house" (section 4214, R. S. act March 3, 1883), and have been permitted to depart to foreign countries without obtaining the collector's certification to their crew lists and articles, but they are entered at the custom-house on their return (section 4218, R. S.). The crew is not accounted for at the custom-house, however, under section 4576, Revised

Statutes. Such yachts are liable to seizure and forfeiture for any violation of the provisions of Title XLVIII. Revised Statutes of the United States (section 4214, R. S., act March 3, 1883). It has been held that the provisions of law relating to the shipment of seamen do not apply to such vessels, but shipping commissioners have been permitted to allow the shipment of seamen on the vessels before them, if requested to do so by the private persons concerned.

The Treasury Department, June 8, 1892, basing its action on an opinion of the First Comptroller, "that seamen of the merchant marine alone are those within the contemplation of the law providing relief for American seamen," held that seamen discharged from an American yacht, either documented or simply carrying naval commissions, or both, were not entitled to relief in cases of destitution, the First Comptroller citing in his opinion Matthews *v.* Offley, 3 Sumner, and 15 Opinions Attorney-General, 683. A subsequent First Comptroller, however, took a different view, and held that seamen on American yachts were entitled to the relief provided for American seamen in the same manner and to the same extent as if the seamen were on other private vessels. (First Comptroller's Decisions, 1893–94, p. 309.) The Treasury Department accordingly changed its ruling, and declared that the Comptroller's decision covered both registered and licensed yachts.

Circular to United States consular officers, Sept. 29, 1897, State Dept. Circulars.

"Foreign-built yachts purchased and owned by American citizens in foreign countries . . . are not vessels 'of the United States' or regularly documented vessels within the meaning of the laws of the United States, and, according to paragraph 349 of the Consular Regulations, may, when in foreign ports, be subject to tonnage and other consular fees from which regularly documented vessels are exempt.

"With reference to shipment, discharge, and relief of seamen of such vessels, and the collection and disposition of wages, you are referred to Articles XII. to XX. of the Consular Regulations as modified by the act of December 21, 1898, and the Department's circular of February 6, 1900.

"In connection with the foregoing, you should examine carefully the Department's circular of September 29, 1897, in regard to the shipment and discharge of seamen on American registered or licensed yachts. The relation of a consular officer to seamen on board foreign-built yachts, purchased and owned by American citizens abroad, should be the same as to seamen upon American registered or licensed yachts, except as otherwise provided by the Regulations."

Mr. Cridler, Third Assist. Sec. of State, to Mr. Thackara, July 20, 1900, 173 MS. Inst. Consuls, 433.

The consul, where a seaman is entitled to the privileges of an American seaman, and is destitute, is the proper judge as to the ship on board of which he should be placed for his return to the United States.

Matthews *v.* Offley, 3 Sumner, 115.

IX. *SALARY AND FEES.*

1. Salary and Allowances.

§ 732.

"Whatever weight of argument there may be intrinsic to the case itself, or resulting from the practice of some other nations, in favor of a consular establishment supported by salaries, it is perfectly certain that no such system will be sanctioned by the Congress of the United States."

Mr. J. Q. Adams, Sec. of State, to Mr. Hill, consul at Rio de Janeiro, April 30, 1819, 2 MS. Desp. to Consuls, 159, in reply to a communication urging the expediency of allowing salaries to consuls generally.

For Mr. Livingston's report of March 2, 1833, on the American consular system, see S. Doc. 83, 22 Cong., 2 sess.

Section 3 of act of 1866 (Revised Statutes, § 1729) is limited to unsalaried consuls and commercial agents and does not embrace consular agents.

Stanbery, At. Gen., 1866, 12 Op. 97.

A diplomatic and consular appropriation act which transfers a consulate from the class in which it had stood to a lower class, with a smaller salary, repeals, by necessary implication, so much of the prior legislation as had placed the consulate in the previous class with a higher salary.

Matthews *v.* United States (1887), 123 U. S. 182.

Where Congress omitted to appropriate for the continuance of the office of consul-general of the United States at Cairo, the Department of State accepted, with thanks, the offer of the incumbent "to keep the office open and to perform such services as may be required of you by this government without other compensation than the honor attached to such a post," pending the submission to Congress, at its next session, of the reasons "showing the necessity of keeping up the post."

Mr. John Davis, Act. Sec. of State, to Mr. Comanos, No. 81, Aug. 20, 1884, MS. Inst. Egypt, XVI, 363.

A substitute or vice-consul, left in charge of the consulate during the temporary absence of the consul, is to be compensated out of the

statute emoluments of the office, subject to regulations of the Department. An acting consul in charge of a consulate during actual vacancy of the consulate is entitled to receive the statute compensation of the office.

Cushing, At. Gen., 1856, 7 Op. 714.

The Revised Statutes confer upon the President full power, in his discretion, to appoint vice-consuls and fix their compensation, to be paid out of the allowance made by law for the principal consular officer in whose place such appointment may be made. The fact that the minister resident and consul-general at Siam had obtained leave of absence and was ill and unable to discharge his duties, and that the vice-consul previously appointed had failed to qualify, created a temporary vacancy and justified the emergency appointment of a vice-consul to fill it; and the person so appointed was entitled to receive the salary fixed by law for the minister resident and consul-general, which salary was single and indivisible.

United States *v.* Eaton (1898), 169 U. S. 331.

Where a vice-consul-general is appointed by the diplomatic representative to fill the office in case of an emergency, and immediately enters on the discharge of the duties thereof, and is recognized by the Department of State, he is entitled to compensation from the time of appointment, though his bond is not executed until sometime later.

United States *v.* Eaton (1898), 169 U. S. 331, 18 S. Ct. 374.
See Boyd *v.* United States, 31 Ct. Cl. 158.

A vice-consular officer, acting during his principal's absence, is entitled to compensation for the whole term of such absence, though it may extend beyond the statutory period of 60 days.

Boyd *v.* United States, 31 Ct. Cl. 158.

A consul's bond takes effect from the time of its approval by the Secretary of State. (R. S. § 1697.) And where an appointee was commissioned consul on the 18th of January and his bond, dated the 13th of the same month, was not approved until the 27th, this was held valid.

Williams, At. Gen., 1872, 14 Op. 7.

Attestation is not essential to the validity of a consular bond.

Wirt, At. Gen., 1820, 1 Op. 378.

In the instructions of a consul of the United States to Tunis, there occurred the following: "On your way to Tunis, (perhaps at Malaga or Marseilles,) you may probably devise means for the liberation of our unfortunate captives at Algiers. . . . Should you find a

suitable channel, therefore, through which you can negotiate their immediate release, you are authorized to go as far as three thousand dollars a man; but a less sum may probably effect the object. . . . If success should attend your efforts, you will draw upon this Department for the necessary funds for paying their ransom, and providing for their comfortable return to their country and friends." The consul employed an agent at Cadiz for a certain hire and a promise of additional pay in case of success, to endeavor to effect the release of the captives, and then drew bills on the Department of State, in favor of a merchant at Gibraltar, for the compensation stipulated to be paid, etc. It was advised that the employment of an agent was justified under the power. Objection, however, was made to the manner of the employment, as being inconsistent with the true meaning of the instructions; and, after a consideration of all the proceedings, which were much complicated by several matters somewhat foreign to the main business, it was advised that an application to Congress would be necessary.

Rush, At. Gen., 1816, 1 Op. 196.

An expenditure of $5.73 by the vice-consul at Bangkok, for lights on the celebration of the king's birthday, when approved by the State Department, should be allowed by the Treasury accounting officers.

United States *v.* Eaton, 169 U. S. 331, 18 S. Ct. 374.

The provision of the act of Congress of May 1, 1810, fixing a salary to the consul at Algiers, and assigning to him certain duties, treating that place as belonging to a Mohammedan power, ceased to be operative when the country of which it was the principal city became a province of France. (See acts of March 1, 1855, and August 18, 1856.)

Mahoney *v.* United States, 10 Wall. 62.

By the act of April 5, 1906, entitled "An act to provide for the reorganization of the consular service of the United States," consuls-general are divided into seven classes, with salaries, respectively, of $12,000, $8,000, $6,000, $5,500, $4,500, $3,500, and $3,000; consuls are divided into nine classes with salaries respectively of $8,000 (including only Liverpool), $6,000 (including only Manchester), $5,000, $4,500, $4,000, $3,500, $3,000, $2,500, $2,000.

Act of April 5, 1906, section 2.

2. Fees.

§ 733.

"The question considered, as to what are 'official services' performed by consuls under the Consular Regulations of 1874 and 1881,

prescribed by the President by virtue of the provisions of § 1745 of the Revised Statutes.

"Fees collected by a consul for the examination of Chinese emigrants going to the United States on foreign vessels; and fees for certificates of shipment of merchandise in transit through the United States to other countries; and fees for recording instruments which are not official documents recorded in the record books required to be kept by the consul, but relate to private transactions for individuals not requiring the use of the consul's title or seal of office; and fees for cattle-disease certificates; and fees for acknowledgements and authentications of instruments certifying the official character and signature of notaries public; and fees for settling private estates; and fees for shipping and discharging seamen on foreign-built vessels sailing on the China coast under the United States flag; are not moneys which he is required to account for to the United States.

"Fees collected by him for certifying extra copies of quadruplicate invoices of goods shipped to the United States; and money received for interest on public moneys deposited in bank; and fees collected for certificates of shipments or extra invoices; and fees for certifying invoices for free goods imported into the United States; are moneys which he is required to account for to the United States.

"The practice of consuls to do acts which are not official is recognized by the statutes and the Consular Regulations.

"The claimant had a judgment in the Court of Claims against the United States for $13,839.21. Both parties appealed. The items of the disallowance of which the claimant complained did not amount to more than $3,000. But it was held that he could avail himself of anything in the case which properly showed that the judgment was not for too large a sum; and this court, disallowing one of the items allowed to him, allowed one of the items disallowed, and rendered a judgment in his favor for a less amount than that rendered below."

Syl., United States *v.* Mosby (1890), 133 U. S. 273.

Under Revised Statutes, section 1709, which makes it the duty of consuls and vice-consuls to administer upon the personal estate left by Americans dying within their consulates, and under the Consular Regulations of 1888, paragraph 508, the fee of five per cent allowed for such services is an official fee, to be accounted for to the Treasury.

United States *v.* Eaton, 169 U. S. 331; 18 S. Ct. 374.

Under sections 1703 and 1733, Revised Statutes, consular agents may retain, as compensation for their services, a sum not to exceed $1,000 annually out of the fees received by them, and the residue, if any, is to be paid to and retained by the principal consular officer, provided that such residue, together with similar fees received from other

consular agencies or vice-consulates in his territory, does not exceed $1,000 a year.

Griggs, At. Gen., Aug. 1, 1898, 22 Op. 163.

A consul, who is entitled to retain in any year not more than a certain amount out of fees collected by a consular agent in his district, and who is removed during the fiscal year, is not allowed to retain all the fees then collected up to the full annual limit, but, under Revised Statutes, § 2687, only an amount proportionate to the part of the fiscal year during which he continued in office.

Marston v. United States, 71 Fed. Rep. 496, 18 C. C. A. 216.

Claimant, who had been appointed consul at P., was instructed by the Department of State that N., which was previously embraced within the limits of his consulate, had been made an independent consulate. During the time he acted as consul, the consular agent at N. collected and failed to account for a large amount of fees. Held, that the amount of fees embezzled by the consular agent should not be charged to claimant.

Sampson *v.* United States, 30 Ct. Cl. 365.

Consular fees received for unofficial and notarial services and for fees and fines collected in the consular courts belong to the consul.

Boyd *v.* United States, 31 Ct. Cl. 158.

The certification of invoices of merchandise shipped from a foreign port in transit through the United States, in bond, to another foreign port is an unofficial act, and the fee is the personal emolument of the consular officer, though the goods are stopped in transit and duties paid.

Wilson *v.* United States (1896), 32 Ct. Cl. 64.

"When a consul of the United States, in his regular accounts and settlements with the Treasury, charges himself with fees received by him as consul for which he is not obliged to account, and pays the same into the Treasury with each settlement, and retires, and makes his final settlement with the Treasury on the same basis, can not, in an action commenced in the Court of Claims three years after his retirement, recover back such payments, but they will be regarded as wholly voluntary payments."

United States *v.* Wilson (1897), 168 U. S. 273.

"Court fees are fixed in each country by the United States minister, independently of the action of the minister in any other country.

"Fees for *official* services are fixed by the President under section 1745 R. S. Fees for *judicial* services are fixed by the respective ministers in non-Christian countries under section 4120, R. S.

"Under the present law uniformity can be required only among consulates in the same country."

Mr. Rives, Assist. Sec. of State, to Fifth Auditor of the Treasury, Feb. 11, 1888, 167 MS. Dom. Let. 161.

"SEC. 7. That every consular officer of the United States is hereby required, whenever application is made to him therefor, within the limits of his consulate, to administer to or take from any person any oath, affirmation, affidavit, or deposition, and to perform any other notarial act which any notary public is required or authorized by law to do within the United States; and for every such notarial act performed he shall charge in each instance the appropriate fee prescribed by the President under section seventeen hundred and forty-five, Revised Statutes.

"SEC. 8. That all fees, official or unofficial, received by any officer in the consular service for services rendered in connection with the duties of his office or as a consular officer, including fees for notarial services, and fees for taking depositions, executing commissions or letters rogatory, settling estates, receiving or paying out moneys, caring for or disposing of property, shall be accounted for and paid into the Treasury of the United States, and the sole and only compensation of such officers shall be by salaries fixed by law; but this shall not apply to consular agents, who shall be paid by one half of the fees received in their offices, up to a maximum sum of one thousand dollars in any one year, the other half being accounted for and paid into the Treasury of the United States. And vice-consuls-general, deputy consuls-general, vice-consuls, and deputy consuls, in addition to such compensation as they may be entitled to receive as consuls or clerks, may receive such portion of the salaries of the consul-general or consuls for whom they act as shall be provided by regulation.

"SEC. 9. That fees for the consular certification of invoices shall be, and they hereby are, included with the fees for official services for which the President is authorized by section seventeen hundred and forty-five of the Revised Statutes to prescribe rates or tariffs; and sections twenty-eight hundred and fifty-one and seventeen hundred and twenty-one of the Revised Statutes are hereby repealed.

"SEC. 10. That every consular officer shall be provided and kept supplied with adhesive official stamps, on which shall be printed the equivalent money value of denominations and to amounts to be determined by the Department of State, and shall account quarterly to the Department of State for the use of such stamps and for such of them as shall remain in his hands.

"Whenever a consular officer is required or finds it necessary to perform any consular or notarial act he shall prepare and deliver to the party or parties at whose instance such act is performed a suitable and appropriate document as prescribed in the consular regulations and affix thereto and duly cancel an adhesive stamp or stamps of the denomination or denominations equivalent to the fee prescribed for such consular or notarial act, and no such act shall be legally valid within the jurisdiction of the Government of the United States unless such stamp or stamps is or are affixed and canceled.

"SEC. 11. That this Act shall take effect on the thirtieth day of June, nineteen hundred and six."

Act of April 5, 1906, sections 7–11, entitled "An act to provide for the reorganization of the consular service of the United States."

As to salaries of consuls-general and consuls under this act, see supra, § 732.

"The abstract right of Hayti to act in such matters [the fixing of fees to be charged by her consuls] according to her discretion is not denied. It is only when charges of the kind become so excessive as virtually to constitute an export tax, that they may properly be remonstrated against in a friendly spirit."

Mr. Evarts, Sec. of State, to Mr. Langston, min. to Hayti, No. 5, Nov. 8, 1877, MS. Inst. Hayti, II. 119, acknowledging the receipt of a dispatch of Mr. Langston's predecessor, Mr. Bassett, No. 544, Oct. 23, 1877, relative to the fees chargeable by Haytian consuls.

CHAPTER XVII.

TREATIES.

I. *POWER TO MAKE.*

1. Prior to the Constitution.

§ 734.

"On the 29th of November, 1775, Congress appointed a 'committee of secret correspondence,' whose duty it would be to correspond with the friends of the colonies in other parts of the world. On the 3d of March, 1776, this committee instructed Silas Deane to proceed to France to enter into communication with M. de Vergennes, and to ascertain, if possible, 'whether, if the colonies should be forced to form themselves into an independent state, France would . . . enter into any treaty or alliance with them for commerce or defense, or both.' These instructions were signed by Dr. Franklin, Benjamin Harrison, John Dickinson, Robert Morris, and John Jay; and the practical wisdom of the signers is displayed in the first instruction they contain: 'When you come to Paris . . . you will be introduced to a set of acquaintance, all friends to the Americans; by conversing with them you will have a good opportunity of acquiring Parisian French.'

"On the 17th day of the following September, nearly two years prior to the adoption of the Articles of Confederation, 'Congress took into consideration the plan of treaties to be proposed to foreign nations, with the amendments agreed to by the committee of the whole,' and thereupon adopted a plan of treaty to be proposed to His Most Christian Majesty the French King, which will be found in the secret journal.

"This remarkable state paper contains the germ (often expressed in the identical language) of many of the provisions of subsequent treaties of the United States.

"In one respect it was many years in advance of provisions actually incorporated into any treaty. Its first and second articles stipulated that the citizens of each country in the ports of the other should pay no other duties or imports than the natives were required to pay, and should enjoy the same privileges, immunities, and exemptions in trade, navigation, and commerce which natives enjoyed; and the twelfth article contemplated a similar reciprocal agreement in respect of some exports. It was not until after the peace of 1814 that this principle of reciprocity was incorporated into a treaty of the United States.

"The commissioners who were originally selected by the Continental Congress to conclude treaties with the European powers were Dr. Franklin, Silas Deane, and Thomas Jefferson. Jefferson having declined, Arthur Lee was elected in his place.

"On the 6th of February, 1778, these commissioners concluded a treaty of alliance and a treaty of amity and commerce with the King of France. These important acts were followed by the conclusion of treaties of amity and commerce with the Netherlands, in 1782; and with Sweden in 1783; of the treaty of peace with Great Britain, in 1783 (to which the names of Adams, Franklin, and Jay were attached under a special power); of a treaty of amity and commerce with Prussia in 1785; of a treaty of peace and friendship with Morocco in 1787; and of a consular convention with France, in 1788.

"In regulating the commercial and political relations between the United States and other powers, these several treaties secured the recognition of the independence of the United States, and also the assent of other powers to many important principles, some of which were not then universally recognized as constituting part of the public law which should govern the intercourse of nations with each other. It is not difficult to recognize, in these provisions, the impress of the statesmanlike intelligence and humane and elevated characters of the members of the Continental Congress, and of the American plenipotentiaries who negotiated the several treaties.

"The evils of war were lessened by agreements that, in case it should break out, time should be given to the citizens of each in the territories of the other to close their business and remove their properties; or that, should differences arise, resort should not be had to force until a friendly application should be made for an arrangement.

"A restraint was imposed upon private war by provisions forbidding the citizens of either power to accept commissions or letters of marque from enemies of the other power when at war; and the acceptance of such commissions or letters was declared to be an act of piracy, which placed the offender beyond the claim of national protection.

"The rights of neutrals to maintain and carry on their commerce and trade on the high seas during time of war were fully recognized. For this purpose articles which were to be held to be contraband of war were expressly defined and limited; and in the treaty of 1785 with Prussia, which bears the signatures of John Adams, Dr. Franklin, and Jefferson, it was even agreed that no articles should be deemed contraband, so as to induce confiscation, or condemnation, and a loss of property to individuals. It was further agreed that free ships should make free goods; and that neutral goods found in an enemy's ship should not be confiscated if they had been put on board before the declaration of war, or within such short period thereafter that an ignorance of the state of war might fairly be implied.

"Precise rules were laid down to be observed in the visit of neutral vessels on the high seas, the humane regulations were made respecting vessels on which articles contraband of war should be discovered.

"'To prevent the destruction of prisoners of war by sending them into distant and inclement countries or by crowding them into close and noxious places,' regulations were made for their treatment; and it was agreed that women and children, scholars, and cultivators, 'all others whose occupations are for the common subsistence and benefit of mankind,' should be allowed to continue their respective employments in time of war; that merchant and trading vessels employed in rendering the necessaries of human life more easy to be obtained, should be allowed to pass unmolested in such time; and that no commissions should be granted to private armed vessels.

"The power of the new nation whose existence had been recognized by these treaties, to regulate and control its commercial relations with foreign powers was uniformly asserted in this series of treaties. They placed each of the other powers, in respect of commerce and navigation within each and every state, on the footing of the most-favored nation; and it was agreed with Prussia that the ports of each power should be open to the other; and that the duties, charges, and fees, to be imposed by each upon articles the growth, produce, or manufacture of the other, should be only such as should be paid by the most-favored nation.

"In the articles affecting the relations between the United States and the several States, these early treaties asserted the nationality of the United States in a no less marked manner.

"They prohibited the exaction in any State of the droit d'aubaine or other similar duty. They allowed aliens to hold personal property and to dispose of it by testament, donation, or otherwise, and to succeed to it, and they prohibited the exaction in such case by any State of dues, except such as the inhabitants of the country were subject to.

They allowed aliens, without obtaining letters of naturalization, to inherit real estate and things immovable in every State, but in such case the Prussian alien was required to sell the real estate and withdraw the proceeds, which he was to be permitted to do without molestation; and in case of withdrawal no droit de détraction was to be exacted.

"The right to aliens to frequent the coasts and countries of each and all the several States, and to reside there and to trade in all sorts of produce, manufactures, and merchandise was granted by the National Government; and the States were prohibited from imposing upon such aliens any duties or charges to which the citizens of the most-favored nation were not made subject. Resident aliens were also assured against State legislation to prevent the exercise of an entire and perfect liberty of conscience, and the performance of religious worship; and, when dying, they were guaranteed the right of decent burial, and undisturbed rest for their bodies.

"The consular convention concluded with France by Jefferson maintained a yet-wider supremacy for the national authority. It authorized French consuls to administer, in certain cases, upon the estates of their deceased countrymen in the several States; to exercise police over all the vessels of their nation in whatever American port they might discharge their functions; to arrest the officers or crews of such vessels, to require the courts to aid them in the arrest of deserters; and it even elevated them into judges, and authorized them to determine all differences and disputes arising between their countrymen in the United States.

"The same statesmen contemplated at one time a postal convention between France and the United States. A scheme was submitted by the French minister; after considering which Jay submitted a counter proposal, but nothing further appears to have been done. Had the scheme been carried out it would have anticipated by half a century the modern international postal conventions of the United States.

"The several treaties and conventions, thus negotiated, have served as the basis or model of many of the commercial and general conventions entered into by the United States since the adoption of the Constitution."

Mr. J. C. B. Davis, Notes, Treaty Volume (1776–1887), 1219.

"Between 1776, when independence was proclaimed, and 1789, when the government under the Constitution was inaugurated, the United States entered into fourteen treaties—six with France, three with Great Britain, two with the Netherlands, and one each with Sweden, Prussia, and Morocco; but a majority of all were negotiated and signed in France, at Paris or at Versailles. Eight were subscribed, on the part of the United States, by two or more plenipotentiaries; and among their names we find, either alone or in association, that of Franklin, ten times; the name of Adams, seven times; that of

Jefferson, three times: and that of Jay, twice." (Moore's American Diplomacy, 33.)

As to the making of treaties by the United States prior to and under the Articles of Confederation, see Crandall, Treaties, Their Making and Enforcement, 19–43.

"The committee [of the Continental Congress] to prepare a form of union had reported July 12 [1776], but the plan was not adopted until November 15, 1777, and did not become binding until March 1, 1781, with the ratification of the Maryland delegates. The draft of the Articles of Confederation in John Dickinson's handwriting reported July 12, and the Articles as finally adopted, agree essentially in the provisions relating directly to treaty making. In both not only is the sole and exclusive right and power to make treaties vested in Congress, but the States without the consent of Congress are specifically prohibited from entering into any treaty with a foreign prince or state, or any treaty, confederation or alliance whatever with another State of the Confederation. No treaty shall be made by Congress unless nine States 'assent to the same.' Congress is expressly prohibited from entering into any treaty whereby the States shall be restrained from imposing such duties and imposts on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods whatsoever. On the other hand, the States are expressly prohibited from laying imposts or duties which may interfere with any stipulations in treaties entered into with any foreign power in pursuance of any treaties already proposed by Congress to the courts of France and Spain."

Crandall, Treaties, Their Making and Enforcement, 27.

2. Under the Constitution.

§ 735.

"He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

Constitution of the United States, Art. II., sec. 2, clause 2.

See Crandall, Treaties, Their Making and Enforcement, 54 et seq.

See, generally, the Treaty-Making Power of the United States, by Charles Henry Butler, New York, 1902, 2 vols.

As to different kinds of treaties, see Martens' Law of Nations, Cobbett's translation (Philadelphia, 1795), § 3, p. 53.

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one county owning property in

another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement."

Geofroy v. Riggs (1890), 133 U. S. 258, 266–267.

Treaty provisions giving to consular officers the right to administer on the estates of their deceased countrymen will prevail over any inconsistent State legislation.

In re Fattosini's Estate (1900), 67 N. Y. Supp. 1119, 33 Misc. 18; In re Lobrasciano's Estate (1902), 77 N. Y. Supp. 1040, 38 Misc. 415; Wyman v. McEvoy (1905), Supreme Judicial Court of Massachusetts, New York Law Journal, April 16, 1905.

The government of the United States "can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein."

In re Ross (1891), 140 U. S. 453, 463.

The clause in the tariff act of October 1, 1890, which authorized the President to enter into reciprocity arrangements, was attacked on the ground that it delegated to the President both legislative and treaty-making powers. The Supreme Court, in holding this objection to be unfounded, said: "That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. . . . What the President was required to do was simply in execution of the act of Congress."

Field v. Clarke, 143 U. S. 649, 692, cited in *Yale Law Journal* (Dec. 1901), XI, 74–75.

See, also, Mr. E. B. Whitney, in *Columbia Law Review*, Jan. 1901.

The regulation of fisheries in navigable waters within the territorial limits of the several States is, in the absence of a treaty, a subject of State rather than of Federal jurisdiction; but the Government of the United States has power to enter into treaty stipulations

on the subject, e. g., with Great Britain, for the regulation of the fisheries in the waters of the United States and Canada along the international boundary; and the fact that a treaty provision would annul and supersede a particular State law on the subject would be no objection to the validity of the treaty.

Griggs, At. Gen., Sept. 20, 1898, 22 Op. 214.

"By the Constitution of the United States, this department of legislation is confined to two branches only, of the ordinary legislature: the President originating, and the Senate having a negative. To what subject this power extends, has not been defined in detail by the Constitution, nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract, or it would be a mere nullity, res inter alios acta. (2) By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and can not be otherwise regulated. (3) It must have meant to except out of these the rights reserved to the States; for surely the President and Senate can not do by treaty what the whole government is interdicted from doing in any way. (4) And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some, on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others.

"The Constitution thought it wise to restrain the Executive and Senate from entangling and embroiling our affairs with those of Europe. Besides, as the negotiations are carried on by the Executive alone, the subjecting to the ratification of the Representatives such articles as are within their participation, is no more inconvenient than to the Senate. But the ground of this exemption is denied as unfounded. For, examine, e. g., the treaty of commerce with France, and it will be found that out of thirty-one articles, there are not more than small portions of two or three of them which would not still remain as subjects of treaties, untouched by these exceptions."

Jefferson's Man. of Parl. Prac. (N. Y. 1876), 110.

"During the administration of John Quincy Adams several treaties were concluded, in which broader views in commercial matters began to prevail. It was agreed that whatever kind of produce, manufacture, or merchandise of any foreign country could be from time to time lawfully imported into the United States in their own vessels might also be imported in vessels of the other power. These treaties were subscribed by Henry Clay, Secretary of State of the United States, and the provisions have often since been repeated in conventions with other powers. The expanding commerce of the United

States induced the revival at this time of some of the powers respecting national vessels in foreign ports, and respecting disputes between the officers and crews of such vessels, and concerning deserters, which had been conferred upon consuls by Jefferson's convention with France in 1788. These important provisions were now inserted in the treaties of commerce, and continued to be so until the revival of the practice of concluding exclusively consular conventions, which had lain dormant from the time of Jefferson's mission in Paris.

"Many commercial treaties were concluded during the administrations of President Jackson and President Van Buren, through which the principles, which had become part of the policy of the United States, were extended in every quarter of the globe. By the former administration also, long-pending differences with France were set at rest by a convention signed July 4, 1831; and a treaty was concluded with the Ottoman Porte, under which, for nearly forty years, it was not doubted that the citizens of the United States within the dominions of the Porte enjoyed certain rights of exterritoriality. . . .

"President Polk carried out with assiduity the policy of the nation by extending the number of its treaties for the regulation of commerce and navigation, for the abolition of unjust taxes, and for the regulation of international postal relations, and he added to the national domain by the treaty of peace with Mexico, and concluded a treaty with Great Britain, which was intended on the part of the United States to be a final settlement of the disputed northwestern boundary. He also caused the United States to enter into a treaty with New Granada, whereby they agree to 'guarantee positively and efficaciously to New Granada . . . the perfect neutrality of the before-mentioned Isthmus' (Panama) . . . and 'the rights of sovereignty and property which New Granada has and possesses over the said territory,' the first international obligation of this nature incurred since 1778.

"During President Taylor's short administration several treaties of commerce were entered into with other powers. . . .

"President Buchanan released the commerce of the United States from the Danish dues at the Sound and Belts, made wider and broader the friendly relations with Japan, and he added to the number of the treaties for the regulation respectively of commerce, of extradition, and of international postage.

"William H. Seward was the Secretary of State during the administrations of President Lincoln and of President Johnson. Under his direction of the Department of State, the treaties of commerce and the consular and extradition conventions were widely extended. The commerce of the United States was relieved from the Brünshausen dues, the navigation of the Dardanelles and of the Bosphorus was

regulated, and the Scheldt dues were extinguished. A treaty was entered into for the suppression of the African slave trade, in which, for the first time since the adoption of the Constitution, it was agreed that an alien might sit as a judge in a court holding its sessions within the territories of the United States. Several treaties were made securing the recognition of the right of expatriation and naturalization, and the protection of trade-marks was also made the subject of a treaty. The relations with China, too, were essentially modified."

Davis, Notes, Treaty Volume (1776–1887), 1224.

"From the beginning and throughout the whole existence of the Federal government, it [the treaty-making power] has been exercised constantly on commerce, navigation, and other delegated powers, to the almost entire exclusion of the reserved, which, from their nature, rarely ever come in question between us and other nations. The treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations, and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers. So far, indeed, is it from being true, as the report supposes, that the mere fact of a power being delegated to Congress excludes it from being the subject of treaty stipulations, that even its exclusive delegation, if we may judge from the habitual practice of the government, does not—of which the power of appropriating money affords a striking example. It is expressly and exclusively delegated to Congress, and yet scarcely a treaty has been made of any importance which does not stipulate for the payment of money. No objection has ever been made on this account. The only question ever raised in reference to it is, whether Congress has not unlimited discretion to grant or withhold the appropriation."

Mr. Calhoun, Sec. of State, to Mr. Wheaton, June 28, 1844, MS. Inst. Prussia, XIV. 75.

This instruction related to a reciprocity treaty which Mr. Wheaton had negotiated with Prussia and other German States. The Senate Committee on Foreign Relations reported it adversely, on the ground of the want of "constitutional competency" to make it. With reference to this report, Mr. Calhoun, in a sentence immediately preceding the passage above quoted, said: "If this be the true view of the treaty-making power, it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution."

For the report of the Senate committee, made by Mr. Choate June 14, 1844, see Compilation of Reports of the Com. on For. Rel., VIII. 36.

July 19, 1899, the Department of State declined a proposal of the British Government to negotiate a treaty to prevent discrimina-

tory legislation by the several States of the United States, subjecting foreign fire-insurance companies to higher taxes than domestic companies. The reason given for the declination was that the negotiation of such a treaty would probably be futile on account of the indisposition of the people to permit any encroachment upon the exercise of powers of the local legislation.

Mr. Hay, Sec. of State, to Mr. Tower, British chargé, July 19, 1899, For. Rel. 1899, 347.

Mr. Gallatin, in his speech in the House of Representatives on March 10, 1796, on Jay's treaty, said that "if the treaty-making power is not limited by existing laws, or if it repeals laws that clash with it, or if the Legislature is obliged to repeal the laws so clashing, then the legislative power in fact resides in the President and Senate, and they can, by employing an Indian tribe, pass any law under the color of treaty." "The argument," says Mr. Adams in his Life of Gallatin, "is irresistible; it has never been answered; and indeed the mere statement is enough to leave only a sense of surprise that the Federalists should have hazarded themselves on such preposterous ground."

Adams's Life of Gallatin, 161.

The Constitution of the United States confers absolutely on the government of the United States the power of making war and of making treaties, from which it follows that that government possesses the power of acquiring territory either by conquest or by treaty.

American Insurance Co. *v.* Canter, 1 Pet. 542. See, also, supra, § 94.

It is a sound principle of national law, and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty.

Lattimer *v.* Poteet, 14 Pet. 14.

"There is no secret treaty of the kind you describe between the United States and Russia, and I may well add that there are no effective secret engagements of any kind between the United States and other sovereignties, all concluded treaties becoming effective only upon the ratification and public proclamation by the President."

Mr. Bayard, Sec. of State, to Mr. Samuels, May 5, 1885, 155 MS. Dom. Let. 291.

3. Question of Constitutional Limitations.

§ 736.

That a treaty is no more the supreme law of the land than is an act of Congress is shown by the fact that an act of Congress vacates pro tanto a prior inconsistent treaty. Whenever, therefore, an act of Congress would be unconstitutional, as invading the reserved rights of the States, a treaty to the same effect would be unconstitutional.

Prevost *v.* Greneaux, 19 How. 7.

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government and of that of the States. It woud not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259; *Hauenstein* v. *Lynham*, 100 U. S. 483; 8 Opinions Attys. Gen. 417; *The People* v. *Gerke*, 5 California, 381."

Geofroy *v.* Riggs (1890), 133 U. S. 258, 267.

"It [the treaty-making power] is . . . limited by all the provisions of the Constitution which inhibit certain acts from being done by the government, or any of its departments; of which description there are many. It is also limited by such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary, of which a striking example is to be found in that which declares that 'no money shall be drawn from the Treasury but in consequence of appropriations to be made by law.' This not only imposes an important restriction on the power, but gives to Congress as the law-making power, and to the House of Representatives as a portion of Congress, the right to withhold appropriations; and, thereby, an important control over the treaty-making power, whenever money is required to carry a treaty into effect; which is usually the case, especially in reference to those of much importance. There still remains another, and more important limitation, but of a more general and indefinite character. It can enter into no stipu-

lation calculated to change the character of the government; or to do that which can only be done by the constitution-making power; or which is inconsistent with the nature and structure of the government."

Calhoun's Discourse on the Constitution and Government of the United States, 1 Works, 203.

"The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It would be difficult to find a reputable lawyer in this country who would not yield a ready assent to this proposition. Mr. Dillon's counsel admitted it in his argument for the consul's privilege before the court in California. The sixth amendment to the United States Constitution gives, in general and comprehensive language, the right to a defendant in criminal prosecutions to have compulsory process to procure the attendance of witnesses in his favor. Neither Congress nor the treaty-making power are competent to put any restriction on this constitutional provision. There was, however, at the time of its adoption, some limit to the range of its operation. It did not give to such a defendant the right to have compulsory process against all persons whatever, but only against such as were subject to subpœna process at that time, such as might by existing law be witnesses. There were then persons and classes of persons who were not thus subject to that process, who, by privileges and mental disqualifications, could not be made witnesses, and this constitutional provision did not confer the right on the defendant to have compulsory process against them. As the law of evidence stood when the Constitution went into effect, ambassadors and ministers could not be served with compulsory process to appear as witnesses, and the clause in the Constitution referred to did not give to the defendant in criminal prosecutions the right to compel their attendance in court. But what was the case in this respect as to consuls? They had not the diplomatic privileges of ambassadors and ministers. After the adoption of the Constitution the defendant in a criminal prosecution had the right to compulsory process to bring into court as a witness in his behalf any foreign consul whatsoever. If he then had it, and has it not now, when and how has this constitutional right been taken from him? Congress could not take it away, neither could the treaty-making power, for it is not within the competence of either to modify or restrict the operation of any provision of the Constitution of the United States."

Mr. Marcy, Sec. of State, to Mr. Mason, min. to France, Sept. 11, 1854, MS. Inst. France, XV. 210.

"It is not, as you will perceive by examining Mr. Drouyn de L'Huys's dispatch to the Count de Sartiges, the application of the 'principle' to the particular case of M. Dillon which is to be disavowed, but the

broad and general proposition that the Constitution is paramount in authority to any treaty or convention made by this government. This principle, the President directs me to say, he can not disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law." (Mr. Marcy, Sec. of State, to Mr. Mason, Jan. 18, 1855, MS. Inst. France, XV. 249.)

Mr. Marcy here referred to the case of the French consul at San Francisco, M. Dillon, who, on failing to respond to a subpœna duces tecum, was brought into court on an attachment to testify in behalf of Señor Del Valle, Mexican consul at San Francisco, who had been indicted in the United States district court for the northern district of California on a charge of having violated the neutrality act of 1818. When brought into court, M. Dillon presented, through counsel, a protest, based on Articles II. and III. of the consular convention between the United States and France of 1853. Argument was heard, and Judge Ogden Hoffman, before whom the trial was pending, decided that the consul was exempt from compulsory process. Judge Hoffman based this decision on the ground that the constitutional provision was designed, not to subject every individual to process, but to secure to the accused equal rights with the prosecution in obtaining testimony. (See supra, § 714, where a fuller account is given.)

With regard to Mr. Marcy's argument or admission that ambassadors and ministers were exempt because the law so stood when the Constitution went into effect, it is proper to point out that consuls, though not possessing the same general immunity, then frequently enjoyed specific immunities of a similar nature, as they still do, by virtue of treaty stipulations; and, as compulsory process was used to compel M. Dillon to answer a subpœna duces tecum, involving, as he alleged, the invasion of the archives of his office, it is by no means certain that there was not embraced in the controversy a privilege secured by international law. The existence of such a question would not, however, have invalidated, though it might have rendered less fully applicable to the case then pending, the principle, which Mr. Marcy asserted, that a constitutional provision must prevail over a treaty stipulation, should a conflict be found to exist between them.

See also, Mr. Marcy, Sec. of State, to Mr. de Figanière, Portuguese chargé d'affaires, March 27, 1855, saying that, although the language of Article II. of the consular convention between the United States and France of February 23, 1853, exempting consuls from compulsory process, is general and unrestricted in terms, "yet it is here held that it does not take away the right which the defendant in a criminal prosecution has to resort to such process to procure the witnesses in his favor, for this right is secured to him by the express language of the United States Constitution." That instrument is paramount in authority to the laws of Congress or of any of the States, and to all treaty stipulations. (MS. Notes to Portugal, VI. 145.)

"In reply, the undersigned hastens to inform Mr. Aspurúa that it is believed not to be competent to the treaty-making power of the United States to enter into such an engagement as that contained in the twenty-fifth article of the convention concluded at Caracas on the 20th day of September by the plenipotentiaries of Venezuela and the United States, viz:

"'Whenever one of the contracting parties shall be engaged in war with another state, no citizen of the other contracting party shall accept a commission or letter of marque for the purpose of assisting or co-operating hostilely with the said enemy against the said party so at war, under the pain of being considered as a pirate.'

"The Constitution of the United States provides that Congress shall 'define and punish piracies and felonies committed on the high seas.' Although several conventions have been made by this government with foreign governments, some of which still continue in force, containing, in substance, the stipulation just quoted, they were evidently contracted by an oversight of one of the provisions of the Constitution—the supreme law of this country. The President, entertaining this opinion, can not consent to transmit the convention negotiated by Mr. Eames, which in all other respects meets with his approval, to the Senate for ratification without presenting to that body his objections to the article aforementioned."

Mr. Marcy, Sec. of State, to Mr. Aspurúa, Nov. 15, 1854, MS. Notes to Venezuela, I. 35.

A treaty, no less than the statute law, "must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the government and the nation."

Mr. Blaine, Sec. of State, to Mr. Chen Lan Pin, March 25, 1881, For. Rel. 1881, 335, 337.

November 23, 1864, Mr. Adams, United States minister at London, acting under instructions, gave the stipulated six months' notice of a wish to terminate the arrangement of April 28–29, 1817, in relation to armaments on the Great Lakes. The arrangement in question was originally effected by an exchange of notes. It was afterwards approved by the Senate, but no exchange of ratifications ever took place. The notice given by Mr. Adams was "adopted and ratified" by a joint resolution of Congress approved February 9, 1865. The arrangement was thus to end on May 23, 1865. March 8, 1865, however, Mr. Seward, in view of the changed situation along the Lakes, stated that the United States was willing that the convention "should

remain practically in force;" and on June 15, 1865, he informed the British minister at Washington that this "was intended as a withdrawal of the previous notice within the time allowed, and that it is so held by this government." As between the United States and Great Britain this act of withdrawal was "no less authoritative than the notification itself." Into the authority of the Secretary of State either to give or to withdraw the notice, the British government was "incompetent to inquire;" it "could only accept and respect the withdrawal as a fact." The question of competency, "being a matter of domestic administration, affecting the internal relations of the executive and legislative powers," in no wise concerned Great Britain. The raising by her of a question as to "the authority of the executive power" in the matter, would have constituted "an unprecedented and inadmissible step in the international relations of governments." As a question of "domestic administration and powers," the action of Mr. Seward "opens the door to nice argument in theory touching the constitutional aspects of the transaction," but as a matter of "practical effect" the subject may be deemed "more interesting than material." As an international understanding limiting the naval force to be maintained by either party on the lakes, the arrangement of 1817, even if lacking express legislative sanction, violated no existing legislation. "As between the two countries the arrangement is, therefore, to be regarded as still in existence, and only terminable in good faith by six months' notice of abrogation on either side."

Report of Mr. Foster, Sec. of State, to the President, Dec. 7, 1892, H. Doc. 471, 56 Cong. 1 sess. 4, 36. This report originally accompanied the message of President Harrison to the Senate of Dec. 7, 1892, S. Ex. Doc. 9, 52 Cong. 2 sess.

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives. The Constitution gives Congress the control of the Army. Participation in this control would be snatched from the House of Representatives by a treaty with a foreign power by which

the United States would bind itself to keep in the field an army of a particular size. The Constitution gives Congress the right of declaring war; this right would be illusory if the President and Senate could by a treaty launch the country into a foreign war. The power of borrowing money on the credit of the United States resides in Congress; this power would cease to exist if the President and Senate could by treaty bind the country to the borrowing of foreign funds. By the Constitution "no money shall be drawn from the Treasury, but in consequence of appropriations made by law;" but this limitation would cease to exist if by a treaty the United States could be bound to pay money to a foreign power. . . . Congress would cease to be the law-making power as is prescribed by the Constitution; the law-making power would be the President and the Senate. Such a condition would become the more dangerous from the fact that treaties so adopted, being on this particular hypothesis superior to legislation, would continue in force until superseded by other treaties. Not only, therefore, would a Congress consisting of two houses be made to give way to an oligarchy of President and Senate, but the decrees of this oligarchy, when once made, could only be changed by concurrence of President and of Senatorial majority of two-thirds.'"

Wharton, Int. Law Digest, § 131*a*, I. 26, citing Über den Abschluss von Staatsverträgen, von Dr. Ernest Meier, Professor der Rechte an der Universität Halle: Leipsig, 1874.

4. Cessions of Territory.

§ 737.

The question has on several occasions been discussed, whether the treaty-making power of the United States extends to the cession of territory belonging to a State of the Union without the State's consent.

In the convention by which the Constitution of the United States was framed Colonel Mason, in seconding a proposed article for limiting the right of originating bills for the raising of revenue to the House of Representatives, said that he did so because "he was extremely earnest to take this power from the Senate, who, he said, could already sell the whole country by means of treaties.

"He [Mr. Mercer] contended (alluding to Mr. Mason's observations) that the Senate ought not to have the power of treaties. This power belonged to the Executive department; adding, that treaties would not be final, so as to alter the laws of the land, till ratified by legislative authority. This was the case of treaties in Great Britain; particularly the late treaty of commerce with France.

"Colonel Mason did not say that a treaty would repeal a law; but that the Senate, by means of treaties, might alienate territory, &c., without legislative sanction. The cessions of the British Islands in the West Indies, by treaty alone, were an example. If Spain should possess herself of Georgia, therefore, the Senate might by treaty dismember the Union."

Nothing in contradiction of this statement is reported to have been said.

Madison Papers, III. 1330–1332, quoted in 1 Butler's Treaty-Making Power, 317.

In the draft of the instructions of March 18, 1792, to Messrs. Carmichael and Short, who were appointed to negotiate with Spain concerning commerce, navigation, and boundaries, Jefferson, who was then Secretary of State, expressed the opinion that the right to alienate even an inch of the territory of any State did not belong to the central government. In another part of the instructions, however, he admitted that, as the result of a disastrous war, the abandonment of territory might be necessary. Hamilton denied the validity of the limitation which Jefferson sought to place on the treaty-making power, especially as to uninhabited territory. The instructions, however, remained unchanged.

Crandall, Treaties, their Making and Enforcement, 111–112, citing Am. State Papers, For. Rel. I. 252, 255; Writings of Jefferson (by Ford), V. 443, 476; I. 219.

See extract from Jefferson's Ana, March 11, 1792, 2 Randall's Jefferson, 55; and, for views of Hamilton and King, 5 Lodge's Hamilton, 134, 310.

During the existence of the northeastern boundary dispute, the government of the United States at one time entered into a negotiation with the State of Maine with a view to obtain entire liberty of action in regard to a settlement. It was proposed that the legislature of Maine should provisionally surrender to the United States all territory claimed by the State north of the St. John and east of the River St. Francis, Maine to be indemnified by adjoining territory for the ultimate loss of any part of the territory thus surrendered, and, so far as the adjoining territory should prove inadequate, by Michigan lands, at the rate of a million acres of such lands for the whole of the territory surrendered, the lands thus appropriated to be sold by the United States and the proceeds paid into the treasury of Maine. An agreement or "treaty" to this effect was actually signed in 1832 by Edward Livingston, Secretary of State; Louis McLane, and Levi Woodbury, on the part of the United States, and by William Pitt Preble, Ruel Williams, and Nicholas Emery, on the part of Maine.

It never was ratified. Nor did the fact that it was concluded become public till long after the proposed transaction had failed.

Moore, Int. Arbitrations, I. 138, citing S. Ex. Doc. 431, 25 Cong. 2 sess.

On April 14, 1838, Edward Everett, who was then governor of Massachusetts, confidentially asked the opinion of Mr. Justice Story concerning a resolution of the Massachusetts legislature, which had been presented to him for his signature, in which it was declared that no power delegated by the Constitution to the United States authorized the government to cede to a foreign nation any territory lying within the limits of a State of the Union. Mr. Everett called attention to the fact that in § 1502 of Story's Commentaries on the Constitution, in which certain restrictions on the treaty-making power were named, that of ceding a part of a State was not mentioned, but that the remark was added, "Whether there are any other restrictions necessarily growing out of the structure of the government will remain to be considered whenever the exigency shall arise." Mr. Everett further observed that the restriction in question, if it existed, must be one of this character, but that the pending controversy did not appear to him to create such an exigency, since it was a question not of ceding an admitted part of the territory of Maine, but of ascertaining the boundary between British and American territory. Mr. Justice Story, on the 17th of April, replied that he could not admit it to be universally true that the Constitution of the United States did not authorize the government to cede to a foreign nation territory within the limits of a State, since such a cession might, for example, be indispensable to purchase peace, or might be of a nature calculated for the safety of both nations or be an equivalent for a like cession on the other side. The learned justice added that he had some years previously had a conversation on the subject with Chief Justice Marshall. "He was," said Mr. Justice Story, "unequivocally of opinion, that the treaty-making power did extend to cases of cession of territory, though he would not undertake to say that it could extend to all cases; yet he did not doubt it must be construed to extend to some."

Story, Life of Joseph Story, II. 286–289.

Writers generally state that the extent of the treaty-making power in confederated governments depends upon the nature of the federal constitution. The government of the United States has always exercised the right of settling international boundaries by treaty, but has in only one case professedly ceded territory belonging to a State. This was the case of the northeastern boundary, in 1842, when the assent of Maine and Massachusetts was obtained to the settlement. Those States were not parties to the treaty, but were mentioned in the 5th article. Great Britain, however, disclaimed all responsibility

for any matters between the United States and the several States. The action of the United States in this instance may have been influenced in some measure by the desire to reduce the British demands. Kent, in his Commentaries, says that the better opinion would seem to be that the power of cession belongs exclusively to the United States, though a sound discretion might forbid its exercise without the assent of the local governments immediately affected, except in cases of great necessity, when their consent might be presumed. This view is adopted by Duer in his work on constitutional law. Woolsey cites Kent's opinion, but suggests that the existence of a whole State could be blotted out only in extreme necessity. The Supreme Court of the United States, in the case of Lattimer *v.* Poteet, said that the treaty-making power might settle all questions of disputed boundary without any obstruction by States or individuals. In Geofroy *v.* Riggs, however, there is a dictum to the effect that the consent of a State is necessary to a cession of its territory. Mr. Justice White, in his opinion in the insular cases, gives expression to the view that territory forming part of the United States can not be alienated by the simple action of the treaty-making power, but remarks that it may be done "from the exigency of a calamitous war or the necessity of a settlement of boundaries," if the alienation be expressly or impliedly ratified by Congress. Butler, in his work on the treaty-making power, strongly maintains that the national government may, by treaty, cede even an entire State, if it be necessary to preserve the interests of the whole Union.

1 Kent Comm. pp. **167, 284; Duer, Constitutional Jurisprudence of the United States, 138; Woolsey, Int. Law, § 103; Lattimer *v.* Poteet, 14 Pet. 14; Geofroy *v.* Riggs, 133 U. S. 267; supra, § —; Insular Cases, 182 U. S. 315; 1 Butler, Treaty-Making Power, 411–413; 2 id. 238 et seq., and, particularly, 387–394.

See, also, Halleck, Int. Law, 3rd ed., by Baker, London, 1893, cap. IX., §§ 2, 3, 5, 6, pp. 307–311; Wheaton, Elements, by Lawrence (1863), 873–876; Dana's Wheaton, § 543, note 250.

"The negotiations for a convention to settle the boundary question can hardly be said to have made any positive progress, since last year. . . . The interest of both parties undoubtedly requires a compromise, and I have no doubt that the position which Maine has assumed is the only obstacle to bringing such a compromise about. The English government can not treat with us about a compromise, unless we say we have authority to consummate what we agree to; and although I entertain not the slightest doubt of the just authority of this government to settle this question by compromise, as well as in any other way, yet in the present position of affairs, I suppose it will not be prudent to stir, in the direction of compromise without the consent of Maine."

Mr. Webster, Sec. of State, to Mr. Kent, gov. of Maine, Dec. 21, 1841, Van Tyne's Letters of Daniel Webster, 248.

This letter, which was marked "Private," was written by Mr. Webster while he was engaged as Secretary of State in the negotiations for the settlement of the northeastern boundary. It was written in the settlement of the northeastern boundary. It was written in reply to a private letter from Governor Kent of December 15, 1841.

5. Descent and Tenure of Property.

§ 738.

Jay's treaty provided that British subjects then holding lands in the territories of the United States might continue to hold them according to their respective titles. It has been held by the Supreme Court of the United States that this provision is part of the supreme law of the land, being a constitutional exercise of the treaty-making power.

Fairfax *v.* Hunter, 7 Cranch, 603.

By the treaty of amity and commerce between the United States and France of 1778 it was provided that the subjects and inhabitants of the one country should not be reputed aliens in the other; that they should have the right to dispose of their goods by testament, donation or otherwise, and that their heirs might succeed ab intestato without being obliged to obtain letters of naturalization. In 1793 J. B. C., a native of France, settled in Maryland. In 1795 he took an oath of citizenship under a Maryland law, and next day received a conveyance of lands in that State. July 6, 1798, he was naturalized under the laws of the United States, and in the next year he died, leaving no legitimate relations except certain natives and residents of France. By a Maryland law of 1780 French subjects were accorded the rights of free citizens, but it was expressly provided that they should not have the right to hold lands, except for life, unless they qualified themselves as citizens of the State. It was argued that the estate of which J. B. C. died seized was in his lifetime escheatable, because, when he was naturalized under the Maryland law, that law had virtually been repealed by the constitution of the United States and the naturalization act passed by Congress, and when he purchased the land he had not been naturalized under the Federal law. Marshall, C. J., said it was unnecessary to inquire into the consequences of this state of things, since the treaty of 1778 enabled French subjects to hold lands in the United States; nor was it necessary to inquire into the effect of this treaty under the Articles of Confederation, since, when J. B. C. emigrated to the United States "the confederation had yielded to our present

Constitution, and this treaty had become the supreme law of the land."

Chirac *v.* Chirac (1817, 2 Wheat. 259.

By an act of Maryland of 1780 French subjects, though empowered to hold real estate, were required, within ten years after inheriting, to settle in and become citizens of the State, or else to enfeoff a citizen of some one of the United States. By Article VII. of the treaty of September 20, 1800, it was provided that, where the laws of either country restrained the exercise by aliens of rights as to real estate, such estate might "be sold, or otherwise disposed of," to a citizen of the country where it lay. Held, that this clause conferred a general power to sell which endured for life, and, even where an estate had vested under the act prior to the conclusion of the treaty, substituted the term of life in that regard for the term of ten years under the act.

Chirac *v.* Chirac (1817), 2 Wheat. 259, 276.

A treaty giving to the citizens of a foreign state [Switzerland] the privilege of holding real estate in the United States is a constitutional exercise of the treaty-making power and is the supreme law of the land.

Hauenstein *v.* Lynham, 100 U. S. 483, citing Chirac *v.* Chirac, 2 Wheat. 259; Carneal *v.* Banks, 10 Wheat. 181; Frederickson *v.* Louisiana, 23 How. 445.

See, as to the treaty with France of 1853, Geofroy *v.* Riggs, 133 U. S. 258; Bahuaud *v.* Bize (1901), 105 Fed. Rep. 485.

The treaty of 1828 with Prussia makes provision for the disposition and succession of both personal and real estate in each country by the citizens or subjects of the other. Of this provision Mr. Cushing, when Attorney-General, held that it was "a stipulation of treaty constitutional in substance and form; which, as such, is the supreme law of the land; and which abrogates any incompatible law of either of the States."

Cushing, At. Gen., 1857, 8 Op. 417.

A different view was expressed by Wirt, At. Gen., 1819, 1 Op. 275, but it has not been sustained by the courts.

See, also, Doehrel *v.* Hillmer (Iowa, 1897), 71 N. W. 204; Wilcke *v.* Wilcke (Iowa, 1897), id. 201, 102 Iowa, 173; Opel *v.* Shoup (Iowa, 1896), 69 N. W. 560.

The treaty between the United States and France, providing that citizens of that country shall not be subjected to taxes on transfers or inheritances to which citizens of this country are not liable, in

States where existing laws permit Frenchmen to hold property, is applicable to Louisiana.

Succession of Rabasse, 49 La. Ann. 1405, 22 So. 767.

A State statute removing the disabilities of alienage as to the holding and disposition of property, if not in conflict with the actual provisions of a treaty, is not an invasion of the treaty-making power of the United States.

Blythe *v.* Hinckley (1900), 127 Cal. 431, 59 Pac. 787.

"By the Federal Constitution the several States retained all the attributes of sovereignty which were not granted to the general government. The right of regulating successions in relation to the subject in question is not among those conceded rights; consequently it was reserved to, and is still vested in, the several States. But by the same Constitution it is provided that treaties made under the authority of the general government shall be the supreme law of the land, anything in the constitution or laws of a State to the contrary notwithstanding.

"This very brief exposition shows at once the cause of the want of comity in the laws of the United States to which you advert, and indicates the remedy which a treaty between the two nations would effectually apply."

Mr. Livingston, Sec. of State, to Mr. de Sacken, Russian chargé, June 13, 1831, MS. Notes to For. Legs. IV. 396.

Replying to a proposal of the British government for the negotiation of a convention respecting the succession to estates of citizens or subjects of the one party within the dominions of the other, Mr. Cass stated that the authority of the government of the United States to conclude such a convention as would supersede the laws of the respective States on the subject might be considered "questionable;" that suits growing out of a tax on succession in Louisiana were pending before the Supreme Court, and that the President would prefer to delay negotiations at least until those suits should have been definitively determined.

Mr. Cass, Sec. of State, to Lord Napier, British min., Feb. 7, 1859, MS. Notes to Great Britain, VIII. 199.

In Frederickson *v.* Louisiana (23 How. 445), the question whether the government of the United States may regulate by treaty or otherwise the inheritance or testamentary disposition of real estate is reserved, as well as the similar question as to other property. In respect of real estate, the Federal government has generally gone no

further in its treaties than to recommend suitable legislation to the States.

Mr. Fish, Sec. of State, to Count de Colobiano, Feb. 1870, MS. Notes to Italy, VII. 53.

By Art. VII. of the consular convention with France of Feb. 23, 1853, the President engaged to recommend to the particular States "that if, pursuant to their then existing laws, French subjects were not then allowed to hold real estate in any State, that right might be conferred upon them." (Mr. Fish, Sec. of State, to the governor of Maine, May 9, 1870, 84 MS. Dom. Let. 422.)

In 1870 Mr. Bancroft, then American minister at Berlin, was furnished with a full power authorizing him to conclude with the government of Baden a treaty to regulate inheritances and marriages. In sending the full power, Mr. Fish, who was then Secretary of State, said that, in view of doubts which had been raised "by extreme constructionists touching the constitutional power of this government to conclude such a treaty, doubts in which I do not share," and in view also of the action of the Senate on several recent treaties to which the Department of State had "committed the purely executive branch of the government," he had thought it best, in advance of any negotiations, to obtain an expression of opinion from the Senate through the chairman of the Committee on Foreign Relations, the correspondence with whom on the subject he enclosed.

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Prussia, No. 193, April 22, 1870, MS. Inst. Prussia, XV. 121. The Committee on Foreign Relations "advised the negotiations of a treaty" for the purpose in question if possible. (Davis, Notes, Treaty Vol. (1776–1887), 1239, citing Mr. Sumner, chairman of Com. on For. Rel., to Mr. Fish, Sec. of State, April 21, 1870, MS. Misc. Let.)

"The estates of decedents are administered upon and settled in the United States under the laws of the State of which the decedent was a resident at the time of his death, and on this account, in the absence of any treaty regulations on the subject, interference in the disposition of such measures as may be prescribed by the laws of the particular State in such cases is not within the province of the Federal authorities."

Mr. Fish, Sec. of State, to Aristarchi Bey, May 19, 1874, MS. Notes to Turkey, I. 115.

"Were the question whether a treaty provision which gives to aliens rights to real estate in the States to come up now for the first time, grave doubts might be entertained as to how far such a treaty would be constitutional. A treaty is, it is true, the supreme law of the land, but it is nevertheless only a law imposed by the Federal government, and subject to all the limitations of other laws imposed by

the same authority. While internationally binding the United States to the other contracting powers, it may be municipally inoperative because it deals with matters in the States as to which the Federal government has no power to deal. That a treaty, however, can give to aliens such rights, has been repeatedly affirmed by the Supreme Court of the United States (see Chirac *v.* Chirac, 2 Wheat. 259; Carneal *v.* Banks, 10 Wheat. 181; Hauenstein *v.* Lynham, 100 U. S. 483); and consequently, however much hesitation there might be as to advising a new treaty containing such provisions, it is not open to this Department to deny that the treaties now in existence giving rights of this class to aliens may in their municipal relations be regarded as operative in the States."

Mr. Bayard, Sec. of State, to Mr. Miller, June 15, 1886, 160 MS. Dom. Let. 481.

II. *NEGOTIATION AND CONCLUSION.*

1. Full Powers.

§ 739.

The negotiation and modification of treaties is a prerogative of the Executive, with which the courts cannot interfere.

Frelinghuysen *v.* Key, 110 U. S. 64; Great West. Ins. Co. *v.* United States, 19 Ct. Cls. 206; s. c., 112 U. S. 193, to the same effect; Angarica de la Rua *v.* Bayard, 4 Mackey, 310.

Where a diplomatic representative of the United States is entrusted with the negotiation of a treaty, a full power will be given to him. "In case of urgent need," a compact may be entered into "in the absence of specific instructions or powers;" but in such cases the agreement should be put into the form of a simple protocol, which should contain the explicit statement that it is signed subject to the approval of the signer's government.

Instructions to Diplomatic Officers of the United States (1897), §§ 242, 243, p. 99.

In 1894, when the Chinese and Japanese plenipotentiaries met at Hiroshima, in Japan, to conclude a peace, it was found that the powers of the Chinese plenipotentiaries authorized them "to meet and negotiate the mater with plenipotentiaries appointed by Japan," but directed them to "telegraph to Tsung-li yamên for the purpose of obtaining our command, by which you will abide."

The powers of the Japanese plenipotentiaries authorized them to conclude and sign "preliminaries of peace," and stated that the Emperor had "confided to them full powers for that purpose," and

would ratify all the stipulations they might agree on, if on examination such stipulations were found to be proper and in good and due form.

The Japanese plenipotentiaries declined to accept the powers of the Chinese plenipotentiaries, on the ground that they did not authorize the latter to conclude or sign anything, or even indicate the subject of negotiations, and were silent on the subject of ratification. The negotiations were suspended in order that the Chinese plenipotentiaries might obtain new powers, which they did.

For. Rel. 1894, App. I. 97–106.

2. Formalities.

§ 740.

Language.

In transmitting to Congress the consular convention with France, which Dr. Franklin had concluded, Mr. Jay remarked that it appeared to be in the French language, and he added that it seemed to be expedient "to provide that, in future, every treaty or convention which Congress may think proper to engage in should be formally executed in two languages, viz, the language of the United States, and such other language as the party contracting with them may prefer."

Mr. Jay, Sec. for For. Aff., to President of Congress, June 23, 1785, 1 MS. Am. Let. 311.

"Until about the beginning of the eighteenth century treaties between European powers were generally written in Latin, but it has since been customary for negotiators of countries which do not use the same language to prepare their treaties in both languages. . . . Our treaties with Russia are an exception to the general rule, most of them being written in French and English." (Mr. Fish, Sec. of State, to Miss Fraser, Nov. 18, 1874, 105 MS. Dom. Let. 221.)

With reference to the form of treaties with a country where a language other than English is officially employed, the standing instructions of diplomatic officers of the United States contain the following directions: "(a) The texts in the two languages should be engrossed in parallel columns on the same page, if possible, or on opposite pages of the same sheet. Two separate copies in different languages are not advisable, although this expedient is sometimes resorted to in eastern countries. (b) In the copy of the treaty to be retained by the diplomatic representative for transmission to this government, the United States should be named first throughout both texts in all places where the alternative change may be made conveniently. Conversely, in both texts, throughout the copy the foreign government is to retain, it should be first named. (c) The language of the respective government should always occupy the

left-hand place in the copy to be delivered to it. (d) The utmost care should be taken to insure the substantial equivalence of sense of the two texts, so as to exclude any erroneous effect due to translation. Though a strictly literal translation is often harsh and sometimes impossible, the absolute identity of the idea conveyed is indispensable. To this end, the punctuation of the two texts should also be attentively scrutinized and brought into substantial conformity."

Instructions to Diplomatic Officers of the United States (1897), § 245, p. 100.

The alternat.

In the case of the treaty of Ghent, Great Britain took priority over the United States in both copies, and the American plenipotentiaries signed under those of Great Britain. In order that this might not be made a precedent, it was thought proper in the exchange of ratifications to advert to the circumstance and to say that it was not intended to imply any waiver by the United States of the rule that each sovereign should take priority over the other in the copy retained by his government.

Mr. Monroe, Sec. of State, to Mr. Adams, min. to England, March 13, 1815, MS. Inst. U. States Mins. VII. 388.

In the course of the instructions Mr. Monroe said: "In all other treaties between the United States and other powers, the ministers of each party sign in the same line. This was done in the treaty of peace with Great Britain and in the subsequent treaties with her government. In the treaty with France in 1803, the United States took rank in the instrument delivered to this government, which was reciprocated in that delivered to the government of France. In the treaty with Spain in 1795 Mr. Pinckney signed before the Prince of [the] Peace; the United States had rank likewise over Spain in the instrument delivered to them. It is understood that, in the treaties between all powers, this principle of equality is generally if not invariably recognized and observed." (Ibid.)

It should be remarked, however, that both in the preliminary and in the definitive treaty of peace with Great Britain of 1782 and 1783, and in the Jay treaty of 1794, Great Britain was permitted to take rank of the United States in the text of both copies; so also in the convention of March 15, 1798, and of January 8, 1802. In the commercial convention of July 3, 1815, the alternat was observed, as has always since been the case.

"It is the practice of the European governments, in the drawing up of their treaties with each other, to vary the order of naming of the parties, and of the signatures of the plenipotentiaries, in the counterparts of the same treaty so that each party is first named, and its plenipotentiary signs first in the copy possessed and published by itself. This practice has not been invariably followed in the treaties to which the United States have been parties, and having been omitted

in the treaty of Ghent, it became a subject of instructions from this Department to your predecessor. The arrangement was therefore insisted on at the drawing up and signing of the commercial convention of July 3, 1815, and was ultimately acquiesced in on the part of the British government, as conformable to established usage. You will consider it as a standing instruction to adhere to it, in the case of any treaty or convention that may be signed by you."

Mr. Adams, Sec. of State, to Mr. Rush, min. to England, Nov. 6, 1817, MS. Inst. U. States Ministers, VIII. 152.

See, to the same effect, Mr. Adams, Sec. of State, to Mr. Dearborn, min. to Portugal, No. 2, June 26, 1822, MS. Inst. U. States Ministers, IX. 142.

This rule is embodied in the standing instructions to diplomatic officers of the United States, who are directed in all cases to adhere to the principle of the "alternat." (Instructions (1897), § 244, p. 100.)

Signature.

Commissioners to execute a treaty must all agree to it, and subscribe their names and attach their seals thereto.

Lee, At. Gen., 1796, 1 Op. 66.

"The effect of adhesion to a treaty is to make the adhering power as much a party to all its provisions and responsibilities as though a like treaty had been concluded *ad hoc* between it and the other signatory. For example, were the United States to 'adhere' to the proposed treaty between Great Britain and Zanzibar and effect such 'adhesion' in such a way as to internationally bind themselves and Zanzibar, each and every provision would necessarily be enforceable as between the United States and Zanzibar, including the assumption on the part of the United States of control over certain subjects of future arrangement between Zanzibar and any third power."

Mr. Bayard, Sec. of State, to Mr. von Alvensleben, May 6, 1886, MS. Notes to Germany, X. 435; same to Sir L. S. S. West, May 6, 1885, MS. Notes to Great Britain, XX. 254.

3. Presents.

§ 741.

"A custom prevails among European sovereigns, upon the conclusion of treaties, of bestowing presents of jewelry, or other articles of pecuniary value, upon the minister of the power with which they were negotiated; the same usage is repeated upon the minister's taking leave at the termination of his mission. In Russia this present usually consists of a gold snuffbox with the portrait of the Emperor enchased in diamonds, the value of which is proportionate to the rank of the minister and to the degree of satisfaction which the Emperor thinks proper to manifest with his conduct during the mis-

sion. The acceptance of such presents by ministers of the United States is expressly prohibited by the Constitution; and even if it were not, it can scarcely be consistent with the delicacy and reciprocity of intercourse with foreign powers for the ministers of the United States to receive from foreign princes such favors as the ministers of those princes to the United States never can receive from this government in return. The usage, exceptional in itself, can be tolerable only by its reciprocity. It is expected by the President that every offer of such present which may in future be made to any public minister or other officer of this government abroad will be respectfully but decisively declined."

Mr. Adams, Sec. of State, to Mr. Middleton, min. to Russia, No. 2, June 7, 1820, MS. Inst. U. States Ministers, IX. 14.

4. VALIDITY.

§ 742.

The term "validity," as applied to treaties, admits of two descriptions—necessary and voluntary. By the former is meant that which results from the treaties having been made by persons authorized by, and for purposes consistent with, the Constitution. By voluntary validity is meant that validity which a treaty, voidable by reason of violation by the other party, still continues to retain by the silent acquiescence and will of the nation. It is voluntary, because it is at the will of the nation to let it remain or to extinguish it. The principles which govern and decide the necessary validity of a treaty are of a judicial nature, while those on which its voluntary validity depends are of a political nature.

Jones *v.* Walker, 2 Paine, 688.

A consideration is essential to give effect to a contract, but it is possible to conceive of a treaty which has no consideration.

Whart. Com. Am. Law, § 157.

As to the position of the United States in reference to the effect of silence in treaties, see 3 Phill. Int. Law (3d ed), 799.

Coercion, while invalidating a contract produced by it, does not invalidate a treaty so produced. Thus there can be no question of the binding force of the treaty which followed the French-German war which led to the dethronement of Napoleon III., though its terms were assented to under coercion. The same may be said of the consent of France to the settlement enforced by the allies after Waterloo, and so of the treaty by which Mexico ceded California and the adjacent territory to the United States. On the other hand, a treaty

produced by material fraud or by physical force applied to the negotiator may be repudiated.

See Woolsey Int. Law, § 104; Crandall, Treaties, Their Making and Enforcement, 14–15.

"It is commonly laid down that neither the plea of 'duress' nor that of '*læsio enormis*' (a degree of hardship, that is, so plain and gross that the sufferer can not be supposed to have contemplated what he was undertaking)—pleas recognized, directly or circuitously, in one form or another, by municipal law both ancient and modern can be allowed to justify the nonfulfilment of a treaty. To cases of personal duress this, of course, does not apply. *Any* force or menace applied to the *person* of a negotiator is on the face of it unlawful, because a consent wrung from the pain or terror of an individual can not with any pretense of reason be regarded as the consent of the nation. The cession, therefore, extorted from Ferdinand the Seventh at Bayonne, the engagements obtained a few years back from Mr. Eden by the chiefs of Bhootan, were void: They were beyond the reason, and therefore beyond the scope, of the rule. But the intolerable hardships and sufferings inflicted by France on Prussia after the battle of Jena did not invalidate the peace of Tilsit or the series of subsequent conventions which bound the conquered but unsubdued nation in fetters of steel."

Bernard, Lectures on Diplomacy, 184.

III. *RATIFICATION.*

1. Question of Duty.

(1) opinions of writers.

§ 743.

"On the 21st of July it was ordered that the Secretary of Foreign Affairs attend the Senate to-morrow and bring with him such papers as are requisite to give full information relative to the consular convention between France and the United States. Jay was the Secretary thus 'ordered.' He was holding over, as the new Department was not then created. The bill to establish a Department of Foreign Affairs had received the assent of both Houses the previous day, but had not yet been approved by the President. Jay appeared, as directed, and made the necessary explanations. The Senate then resolved that the Secretary of Foreign Affairs under the former Congress be requested to peruse the said convention, and to give his opinion how far he conceives the faith of the United States to be engaged, either by former agreed stipulations or negotiations entered

into by our minister at the court of Versailles, to ratify in its present sense or form the convention now referred to the Senate. Jay made a written report on the 27th of July that in his judgment the United States ought to ratify the convention; and the Senate gave its unanimous consent. The statute to carry the convention into effect was passed the 14th of April, 1792."

Davis's Notes, U. S. Treaty Volume (1776–1887), 1294, citing Annals of Congress, 1 Cong. 1 sess. 52 et seq.

For Jay's report, see Exec. Journal of the Senate, I. 7; Dip. Cor. 1783–1789, I. 304–322.

"At this time, to avoid all danger and difficulty, princes reserve to themselves the right of ratifying that which has been concluded by their minister in their name. The full power is merely a commission, cum libera. If this commission were to have its full effect, it should be given with the utmost circumspection; but, as princes can be constrained to fulfill their obligations only by force of arms, the custom has arisen of relying upon their treaties only after they have sanctioned and ratified them. Whatever the minister has concluded remaining ineffectual until the ratification of the prince, there is less danger of giving him a full power. But to refuse, with honor, to ratify that which has been concluded in virtue of a full power, the sovereign must have strong and solid reasons for it, *and, particularly, he must show that his minister has transcended his instructions.*"

Vattel, book 2, chap. 12, § 156, cited by Mr. Adams, Sec. of State, to Mr. Forsyth, min. to Spain, Aug. 18, 1819, Am. State Papers, For. Rel. IV. 657; same to Mr. Vives, Span. min., May 8, 1820, id. 685, 686.

See Crandall, Treaties, Their Making and Enforcement, 12–14.

"Everything that has been stipulated by an agent, in conformity to his full powers, ought to become obligatory for the state, from the moment of signing, without even waiting for the ratification. However, not to expose a state to the errors of a single person, it is now become a general maxim that public conventions do not become obligatory till ratified. The motive of this custom clearly proves that the ratification can never be refused with justice, except when he who is charged with the negotiation, keeping within compass with respect to his public full powers, has gone beyond his secret instructions, and consequently has rendered himself liable to punishment, or when the other party refuses to ratify."

Martens, Summary of the Law of Nations, book 2, chap. 1, § 3, cited in Mr. Adams, Sec. of State, to Mr. Forsyth, min. to Spain, Aug. 18, 1819, Am. State Pap. For Rel. IV. 657, 658; same to Mr. Vives, Span. min., May 8, 1820, id. 685, 686.

"The rule that a treaty is vitiated by a material error is logically deducible from the notion of a contract. The rule, on the other hand, that a treaty concluded by an authorized agent who has not exceeded his instructions, has nevertheless no force till it is ratified, can not be so proved; it appears at first sight to be at variance with ordinary legal analogies, and with morality; and jurists, trespassing beyond their proper province, have commonly laid down that ratification under such circumstances is a moral duty. It is, however, a settled rule, with the advantage, which a settled rule possesses, of being a thing ascertained and indisputable. It is an extra precaution, an artificial safeguard, against improvident or ill-considered engagements, exactly analogous to those rules of private law which require for certain private contracts a specified form of words, a notarial act, a payment of earnest, or a signature. That it is salutary and convenient, is an opinion, sound, I have no doubt, but which may be disputed like any other opinion; that it is a settled rule is a fact, which may be proved by evidence like any other fact."

Bernard, Lectures on Diplomacy, 173.

"If, then, an embassador, in conformity with a full power received from his sovereign, has negotiated and signed a treaty, is the sovereign justified in withholding his ratification? This question has no significance in regard to states, by whose form of government the engagements made by the executive with foreign powers need some further sanction. In other cases, that is wherever the treaty-making power of the sovereign is final, the older writers held that he was bound by the acts of his agent, if the latter acted within the full power which he had received, even though he had gone contrary to secret instructions. But Bynkershoek defended another opinion which is now the received one among the text-writers, and which Wheaton has advocated at large with great ability. (Wheaton's Elements, Book III, 2 § 5; Bynkershoek, Quæst. J. P., II, 7; de Martens, § 48.) If the minister has conformed at once to his ostensible powers and to his secret instructions, there is no doubt that in ordinary cases it would be bad faith in the sovereign not to add his ratification. But if the minister disobeys or transcends his instructions, the sovereign may refuse his sanction to the treaty without bad faith or ground of complaint on the other side. But even this violation of secret instructions would be no valid excuse for the sovereign's refusing to accept the treaty, if he should have given public credentials of a minute and specific character to his agent: for the evident intention in so doing would be to convey an impression to the other party, that he is making a sincere declaration of the terms on which he is willing to treat.

"And even when the negotiator has followed his private instructions, there are cases, according to Dr. Wheaton, where the sovereign may refuse his ratification. He may do so when the motive for making the treaty was an error in regard to a matter of fact, or when the treaty would involve an injury to a third party, or when there is a physical impossibility of fulfilling it, or when such a change of circumstances takes place as would make the treaty void after ratification.

"All question would be removed, if in the full power of the negotiators or in a clause of the treaty itself, it were declared that the sovereign reserved to himself the power of giving validity to the treaty by ratification. This, if we are not deceived, is now very generally the case."

Woolsey, § 111.

"Some publicists, especially Vattel, consider a minister as invested with the power of a mandatory, and hold that his acts are subject to the same rules as those by which the acts of mandatories are governed. Hence they conclude that as obligations entered into by a mandatory within the scope of his authority bind the mandatant, so the same obligations entered into by a plenipotentiary within the scope of his authority bind his sovereign. (Vattel, Droit des Gens, liv. II, ch. xii, § 156. Kluber, Dr. des Gens, § 141; Grotius, De Jure Belli, liv. II, ch. xi, § 12; Pufendorf, De Jure Naturæ, liv. III, ch. ix, § 2.) * * * This theory has been rightly contested by other publicists, among whom are Schmalz, Bynkersoek, Pinheiro-Ferreira, and Wheaton, and more recently by Calvo. (Bynkersoek, Quest. Jur. Pub., liv. II, ch. vii; Vergé, Note sur Martens, § 48; Schmalz, Dr. des Gens, ch. iii, 53; Ortolan, Diplomatie de la Mer, liv. I, ch. v; Wheaton, Dr. Int., t. I, ch. ii, § 5; Heffter, Dr. Int., § 85; Calvo, Dr. Int., § 697.) These authors maintain that a mission confided by a sovereign to his diplomatic agents for the purpose of concluding an international convention on a specific basis cannot be assimilated to a mandate, and is not, therefore, governed by the rules by which mandates are governed. . . . As a matter of strict law we can not accept the rule of Bluntschli that when the representatives of a state have received the necessary power to definitely conclude a treaty, the signature of the protocol or of the special document incorporating the treaty definitely binds the contracting parties (Dr. Int., § 419), or that of Field (Int. Code, § 192), who admits the necessity of ratification only in cases in which the treaty itself expresses the condition of ratification. In our opinion, the power of contracting a binding international agreement is an act of sovereignty which only the person invested with such sovereignty is capable of performing. A minister is not such a person; he is only a negotiator. Nevertheless, according to

the laws of diplomatic comity and of honor, it should be admitted that a sovereign ought not, unless for grave public reasons, to refuse to ratify a treaty signed by an envoy with full power."

Wharton, Int. Law Digest, II. 14, citing 2 Fiore, droit int., §§ 991, 993 (French trans. by Antoine), Paris, 1885.

With those who maintain that a full power may be considered as a mandate, may be classed Phillimore (2nd ed.), II. 75. See, also, Heffter, § 87.

(2) AMERICAN DISCUSSIONS.

§ 744.

"It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty, negotiated and signed by such officers, as final and conclusive, until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians; for, though such treaties, being, on their part, made by their chiefs or rulers, need not be ratified by them, yet, being formed on our part by the agency of subordinate officers, it seems to be both prudent and reasonable that their acts should not be binding on the nation, until approved and ratified by the government. It strikes me that this point should be well considered and settled, so that our national proceedings in this respect may become uniform, and be directed by fixed and stable principles."

President Washington, special message, Sept. 17, 1789, Richardson's Messages, I. 61.

"When one government has been solemnly pledged to another in a mutual engagement by its acknowledged and competent agent, and refuses to fulfil the pledge, it is perfectly clear that it owes it, both to itself and to the other party, to accompany its refusal with a formal and frank disclosure of sufficient reasons for a step which, without such reasons, must deeply injure its own character, as well as the rights of the party confiding in its good faith."

Mr. R. Smith, Sec. of State, to Mr. Jackson, British min., Oct. 19, 1809, Am. State Papers, For. Rel. III. 311.

Case of the Florida treaty.

The treaty of February 22, 1819, which provided for the cession of the Floridas by Spain to the United States, and for the mutual adjustment of various claims, stipulated for the exchange of ratifications within six months. Before the treaty was signed, Mr. Onis, the Spanish minister, delivered to Mr. Adams, who was then Secretary of State, his full powers,

which contained the following clause: "Obliging ourselves, as we do hereby oblige ourselves, and promise, on the faith and word of a king, to approve, ratify, and fulfill, and to cause to be inviolably observed and fulfilled, *whatsoever may be stipulated and signed by you;* to which intent and purpose, I grant you all authority and full power, in the most ample form, thereby as of right required." With reference to this passage, Mr. Adams, after citing Vattel, book 2, chapter 12, § 156, and Martens's Summary, book 2, chapter 1, § 3, said: "The obligation of the King of Spain, therefore, in honor and in justice, to ratify the treaty signed by his minister, is as perfect and unqualified as his royal promise in the full power; and it gives to the United States the right, equally perfect, to compel the performance of that promise." Mr. Adams then proceeded to point out that, if the rejection or amendment of treaties by the United States should be cited, it was to be observed "that, by the nature of our Constitution, the full powers of our ministers never are or can be unlimited," but that whatever they signed must be submitted to the Senate, for its constitutional action, so that, if ratification was withheld or the treaty amended, "no promise or engagement of the state" was violated; while, in Spain, the King possessed "the sole, entire, and exclusive power of ratifying treaties," so that, when he promised to ratify whatever his minister should sign, he committed "his own honor and that of his nation to the fulfillment of his promise." Mr. Adams also affirmed that Mr. Onis did not transcend his instructions. "It is too well known," declared Mr. Adams, "and they will not dare to deny it, that Mr. Onis's last instructions authorized him to concede much more than he did."

Mr. Adams, Sec. of State, to Mr. Forsyth, min. to Spain, Aug. 18, 1819, Am. State Papers, For. Rel. IV. 657 et seq.

See also, Mr. Adams, Sec. of State, to Mr. Vives, Spanish min., May 8, 1820, Am. State Papers, For. Rel. IV. 685, quoting Vattal, book 2, chap. 12, § 163, and Martens's Summary, book 2, chap. 3, § 31.

"The President considers the treaty of 22d February last as obligatory upon the honor and good faith of Spain, not as a perfect treaty (ratification being an essential formality to that), but as a compact which Spain was bound to ratify; as an adjustment of the differences between the two nations, which the King of Spain, by his full power to his minister, had solemnly promised to *approve*, *ratify*, and *fulfill*. This adjustment is assumed as the measure of what the United States had a right to obtain from Spain, from the signature of the treaty. The principle may be illustrated by reference to rules of municipal law relative to transactions between individuals. The difference between the treaty unratified and ratified may be likened to the difference between a covenant to convey lands

and the deed of conveyance itself. Upon a breach of the covenant to convey, courts of equity decree that the party who has broken his covenant shall convey, and, further, shall make good to the other party all damages which he has sustained by the breach of contract.

"As there is no court of chancery between nations, their differences can be settled only by agreement or by force. The resort to force is justifiable only when justice can not be obtained by negotiation; and the resort to force is limited to the attainment of justice. The wrong received marks the boundaries of the right to be obtained.

"The King of Spain was bound to ratify the treaty; bound by the principles of the law of nations applicable to the case; and further bound by the solemn promise in the full power. He refusing to perform this promise and obligation, the United States have a perfect right to do what a court of chancery would do in a transaction of a similar character between individuals, namely, to compel the performance of the engagement as far as compulsion can accomplish it, and to indemnify themselves for all the damages and charges incident to the necessity of using compulsion. They can not compel the King of Spain to sign the act of ratification, and, therefore, can not make the instrument a perfect treaty; but they can, and they are justified in so doing, take that which the treaty, if perfect, would have bound Spain to deliver up to them; and they are further entitled to indemnity for all the expenses and damages which they may sustain by consequence of the refusal of Spain to ratify. The refusal to ratify gives them the same right to do justice to themselves as the refusal to fulfil would have given them if Spain had ratified, and then ordered the governor of Florida not to deliver over the province."

Mr. Adams, Sec. of State, to Mr. Lowndes, chm. Com. For. Rel., Dec. 16, 1819, Am. State Papers, For. Rel. IV. 673.

"These facts will, it is presumed, satisfy every impartial mind that the government of Spain had no justifiable cause for declining to ratify the treaty. A treaty concluded in conformity with instructions is obligatory, in good faith, in all its stipulations, according to the true intent and meaning of the parties. Each party is bound to ratify it. If either could set it aside without the consent of the other, there would be no longer any rules applicable to such transactions between nations. By this proceeding the government of Spain has rendered to the United States a new and very serious injury.* It has been stated that a minister would be sent to ask certain explanations of this government but if such were desired, why were they not asked within the time limited for the ratification? Is it contemplated to open a new negotiation respecting any of the articles or conditions of the treaty? If that were done, to what consequences might it not lead? At what time and in what manner would a new negotiation terminate? By this proceeding Spain has formed a relation between the two countries which will justify any measures on the part of

the United States which a strong sense of injury and a proper regard for the rights and interests of the nation may dictate." (President Monroe, Annual Message, Richardson's Messages, II. 55.)

"The refusal to ratify a second treaty within the time stipulated, and then to send a minister to demand new conditions, the sanction of which was to depend upon the government of Madrid without his becoming responsible for it, was an occurrence with which I have known no parallel." (Mr. Monroe, President, to Mr. Gallatin, May 26, 1820, 2 Gallatin's Writings, 140.)

Condition implied from Senate's functions.

"It may be replied that in all cases of a treaty thus negotiated, the other contracting party being under no obligation to ratify the compact before it shall have been ascertained whether, and in what manner, it has been disposed of in the United States, its ratification can in no case be rendered unavailing by the proceedings of the government of the United States upon the treaty; and that every government contracting with the United States, and with a full knowledge that all their treaties until sanctioned by the constitutional majority of their Senate are, and must be considered, as merely inchoate and not consummated compacts, is entirely free to withhold its own ratification until it shall have knowledge of the ratification on their part. In the full powers of European governments to their ministers, the sovereign usually *promises* to ratify that which his minister shall conclude in his name; and yet if the minister transcends his instructions, though not known to the other party, the sovereign is not held bound to ratify his engagements. Of this principle Great Britain has once availed herself in her negotiations with the United States. But the full powers of our ministers abroad are necessarily modified by the provisions of our Constitution and promise the ratification of treaties signed by them, only in the event of their receiving the constitutional sanction of our government."

Mr. Adams, Sec. of State, to Mr. Rush, Nov. 12, 1824, MS. Inst. U. States Ministers, X. 215.

President J. Q. Adams's message of Dec. 27, 1825, with correspondence explanatory of the action of the Senate in modifying the slave trade convention of that year, is given in 5 Am. State Papers For. Rel. 782.

Mere signing, by the Executive, of a treaty containing a clause for its ratification, in the usual form, is no guarantee that the treaty should be ratified, nor does a payment of an installment of money by the Executive as a preliminary payment under such a treaty which provides for a lease of foreign property bind the government to future payments.

Mr. Evarts, Sec. of State, to Mr. Delmonte, Feb. 19, 1880, MS. Notes to Dominican Republic, I. 41.

"The ratifications are exchanged on the authority of powers conferred by the President. The power of ratification is not delegated.

"As all treaties must receive this final ratification, the President may at will, so far as depends on his constitutional power, withhold from the Senate a treaty already negotiated. Of treaties thus withheld the Monroe-Pinkney treaty with Great Britain of December 31, 1806, a treaty with Mexico signed March 21, 1853, relative to a transit way across the Isthmus of Tehuantepec, an extradition convention with Colombia signed March 30, 1872, a convention with Switzerland signed February 14, 1885, for the protection of trademarks, and the convention adopted in April, 1890, by the First International American Conference for the establishment of a tribunal of arbitration, are examples. Or the treaty may be submitted, accompanied with recommendations for amendments. President Pierce in submitting on February 10, 1854, the Gadsden treaty of December 30, 1853, recommended certain amendments. President Cleveland in submitting, July 5, 1888, an extradition treaty signed May 7, 1888, with Colombia, called attention to changes suggested by the Secretary of State. On December 16, 1845, President Polk communicated to the Senate an extradition treaty, signed January 29, 1845, with Prussia and certain other German States, and at the same time suggested a modification of Article III., in which it was stipulated, contrary to the rule then consistently maintained by the United States, that the contracting parties should not be bound to deliver up their own citizens. The Senate having failed to make the amendment in its resolution of June 21, 1848, advising the ratification, the President, for this as well as for other reasons, refused to ratify the treaty.

"So also treaties may be withdrawn from the consideration of the Senate either to effect changes by negotiation or to terminate proceedings on them. A treaty with Belgium, signed November 4, 1884, regulating the right of succession to and the acquisition of property, was withdrawn from the Senate by President Arthur by a message of February 17, 1885, and was not resubmitted. President Cleveland in messages of March 13, 1885, April 2, 1885, and March 9, 1893, requested the return of treaties concluded by his predecessors—November 18, 1884, with Spain for commercial reciprocity; December 1, 1884, with Nicaragua relative to the construction of an interoceanic canal; December 4, 1884, with the Dominican Republic for commercial reciprocity; an article signed June 23, 1884, with the Argentine Confederation supplementary to the treaty of commerce of July 27, 1853; and the Hawaiian annexation treaty signed February 14, 1893. President Roosevelt, in a message of December 8, 1902, requested the return of a commercial convention with the Dominican Republic signed June 25, 1900, together with an additional article thereto, and a conven-

tion with Great Britain signed January 30, 1897, relative to the demarcation of the Alaskan boundaries. Instances of withdrawals for the purpose of making slight changes are quite numerous. The convention with Spain, signed August 7, 1882, supplementary to the extradition convention of January 5, 1877, was returned for verbal changes at the request of the Secretary of State made to the chairman of the Committee on Foreign Relations."

Crandall, Treaties, Their Making and Enforcement, 82–84.

2. Prerogatives of the Senate.

(1) Necessity of Senate's approval.

§ 745.

By the Constitution of the United States, as we have seen, the President has power to make treaties, "by and with the advice and consent of the Senate, . . . provided two-thirds of the Senators present concur."

The Secretary of the Treasury and the Secretary of War being of opinion that it was constitutional and expedient to empower Mr. Jay to conclude a treaty of commerce with Great Britain, his powers were drawn conformably with this idea. Their reasons for so holding they committed to writing; and the same course was pursued by Mr. Edmund Randolph, then Secretary of State, who entertained different sentiments on the subject. Mr. Randolph took the view that to permit a treaty of commerce to be signed by Mr. Jay and transmitted to the United States for ratification would be "to abridge the power of the Senate to judge of its merits," since, "according to the rules of good faith, a treaty which is stipulated to be ratified ought to be so, unless the conduct of the minister be disavowed and punished;" and that, if Mr. Jay was permitted to sign a treaty, "no form of expression can be devised to be inserted in it which will not be tantamount to a stipulation to ratify or leave the matter as much at large as if he had no such power."

Mr. Randolph, Sec. of State, to the President, May 6, 1794, 6 MS. Dom. Let. 251.

Since, in the United States, "the pleasure of the Senate must be known before a treaty can be ratified, and as delays may accordingly supervene," the government of the United States prefers that it should be provided that the exchange of ratifications shall be effected "as soon as possible," rather than within a specified time.

Instructions to Diplomatic Officers of the United States (1897), § 246, p. 101.

"From the first there has been inserted in the full powers of the negotiators a reservation of the right of ratification, which has regularly, although not uniformly, explicitly provided that the ratification should be by the President, by and with the advice and consent of the Senate. In commenting on Jefferson's rough draft of the instructions of March, 1792, to the commissioners to negotiate with the court of Spain, Hamilton suggested a variation of the stipulation, reserving the right of ratification, so as to indicate the participation of the Senate. Jefferson, however, considered a stipulation that the treaty should be ratified to be sufficient, without designating by what body of individuals. The instruction was unmodified, and the treaty of October 27, 1795, was drawn up accordingly. In the treaty with Great Britain of November 19, 1794, however, as has been the more usual practice, a clause was inserted specifying that it should be ratified by the President with the advice and consent of the Senate."

Crandall, Treaties, Their Making and Enforcement, 72–73, citing Am. State Papers, For. Rel. I. 471, 533; S. Doc. 62, 55 Cong. 3 sess. pt. 1, p. 16; Writings of Jefferson (by Ford), V. 445.

Concurrence by the Executive alone in the establishment of permanent international courts for the adjudication of questions arising out of the slave trade is not compatible with the limitations of the Constitution of the United States.

Mr. Adams, Sec. of State, to Mr. Stratford Canning, Dec. 30, 1820, MS. Notes to For. Legs. II. 412.

By Article VII. of the treaty of Ghent it was provided that commissioners, to be appointed under the 6th article of the treaty, should be "authorized . . . to fix and determine," according to the "true intent" of the treaty of peace of 1783, that part of the boundary extending from the water communication between Lake Huron and Lake Superior to the most northwestern point of the Lake of the Woods, "to decide to which of the two parties the several islands lying in the lakes, water communications and rivers, forming the said boundary, do respectively belong," in conformity with the "true intent" of the treaty of 1783, and "to cause such parts of the said boundary as require it to be surveyed and marked." The treaty of 1783 merely provided that the line in question should run from the water communication between Lake Huron and Lake Superior "through Lake Superior northward of the Isles Royal and Philipeaux to the Long Lake; thence through the middle of said Long Lake, and the water communication between it and the Lake of the Woods, to the said Lake of the Woods; thence through the said Lake to the most northwestern point thereof."

The commissioners having differed as to what body of water was meant by the Long Lake, the British commissioner consented as a compromise to adopt a route from Lake Superior by the Grand Portage to the Pigeon River, and thence by the most easy and direct route to Lac la Pluie, provided that the American commissioner would consent that the boundary should be conducted from water to water, overland, through the old and accustomed portages, in those places where navigation was obstructed. Subsequently the British commissioner made a proposition, by which he offered to enter and ascend the Pigeon River and proceed to Lake Namekan by a water communication somewhat south of that proposed by the American commissioner, *provided that the Grand Portage should remain free to both parties.*

The American commissioner having asked for instruction, the Department of State said:

"Your powers are to be found in the treaty of Ghent, and they do not authorize your contracting any new engagements in behalf of the United States. The President is incompetent to vest you with authority to enter into any such new engagements, except in the mode in which the Constitution of the United States prescribes. According to that mode it would be necessary that you should possess a diplomatic character, and that any compact you might form in concurrence with a representative of Great Britain having a similar character should be submitted to the Senate of the United States for their advice and consent."

Mr. Clay, Sec. of State, to Mr. Porter, Nov. 13, 1826, 21 MS. Dom. Let. 422.

"A mere declaration by a congress of the representatives of a few powers would hardly be a proper instrument to send to the Senate for ratification. If it came from each government in an authentic form the difficulty might perhaps in that way be got over. Then it would assume the character of a contract, and a treaty is nothing more."

Mr. Marcy, Sec. of State, to Mr. Mason, min. to France, Dec. 8, 1856, MS. Inst. France, XV. 351.

The foregoing passage related to the declaration concerning maritime law, signed by the representatives of the powers in the Congress of Paris of 1856. Mr. Marcy's criticism seems to have related merely to the form of the declaration.

Mr. Marcy, on the part of the United States, offered to adhere to the declaration, on condition of its being amended so as to exempt private property at sea from capture, the whole to be embodied in a treaty. With reference to this offer, Mr. Marcy said: "I do not see that the provisions of the declaration of the Paris conference, amended as this government has proposed, could embarrass the government of the Emperor of the French in the way you apprehend. The amendment does not require France to go aside from the declaration; it goes a little beyond that declaration, but precisely in the same direc-

tion. The proposed treaty would contain all of the declaration. The engagement of the imperial government, with the other signatory powers, is not to negotiate on maritime rights without embracing the principles of the declaration, and that engagement would not in the slightest degree be departed from by the proposed treaty." (Ibid.)

May 16, 1894, Mr. Alexander, American minister at Athens, was authorized to conclude with Greece a convention concerning the registration of trade-marks. After conference with the minister for foreign affairs, who represented that a convention would require the ratification of the Greek chamber of deputies, which in the condition of affairs then existing might be attended with great delay, Mr. Alexander, on July 19, 1894, signed with him a declaration which purported to secure the desired end by way of an interpretation of the treaty of December 10–22, 1837. The Department of State, however, being of opinion that the treaty of 1837 would not bear the interpretation given to it, considered the declaration to be "practically a new treaty," which "could only be ratified by the President of the United States by and with the advice and consent of the Senate." To this position the Department of State adhered, and, as the Greek government was disinclined to negotiate a formal convention, Mr. Alexander was instructed to permit the matter to rest.

Mr. Uhl, Act. Sec. of State, to Mr. Alexander, No. 21, May 16, 1894, For. Rel. 1894, 293; Mr. Alexander to Mr. Gresham, Sec. of State, No. 41, July 21, 1894, id. 295; Mr. Gresham to Mr. Alexander, No. 43, Feb. 21, 1895, For. Rel. 1895, II. 759; Mr. Olney, Sec. of State, to Mr. Alexander, No. 75, Nov. 9, 1895, id. 763; same to same, No. 81, Jan. 21, 1896, id. 764; same to same, No. 90, May 15, 1896, MS. Inst. Roumania, I. 352.

As to the declaration signed at Athens, Jan. 30–Feb. 10, 1890, to the effect that the words "citizens and subjects" in Art. I. of the treaty of 1837 includes corporations, joint-stock companies, and other business associations, which declaration was duly approved and published, see For. Rel. 1889, 480–483; For. Rel. 1890, 509–511.

(2) MODE OF OBTAINING ADVICE AND CONSENT.

§ 746.

"In reply to the committee, appointed by the Senate August 6, 1789, to confer with the President on the method of communication between the Executive and the Senate respecting treaties and nominations, President Washington suggested that 'In all matters respecting treaties, oral communications seem indispensably necessary, because in these a variety of matters are contained, all of which not only require consideration, but some may undergo much discussion to do which by written communications would be tedious without being satisfactory.' The report of the committee, based upon this

suggestion, resulted in the adoption by the Senate, August 21, of a rule regulating the manner in which the President should meet the Senate, either in the Senate chamber or in such other place as it might be convened by him. The rule had just been adopted when a message was received announcing the President's intention to meet the Senate the next day 'to advise with them on the terms of the treaty to be negotiated with the southern Indians.' Following also the practice under the Articles of Confederation of securing prior to the negotiation of Indian treaties an appropriation to defray the necessary expense, President Washington had, on August 7, suggested by special message to both houses the necessity of negotiating with the Indians in the southern district, and the expediency of appointing commissioners for that purpose. The House bill making the appropriation was approved August 20. According to the notification, the President, accompanied by General Knox, who, although not a Cabinet officer at the time, was acquainted with Indian affairs and prepared to answer questions, appeared in the Senate chamber. After listening to a short paper containing a few explanations, the Senate was called upon to give its advice by answering yes or no to seven questions. This it seemed unwilling to do without having first examined the articles. To a motion made by Robert Morris, to refer the papers to a special committee, a Senator well objected that 'No council ever committed anything.' The President added that, while he had not objection to a postponement, he did not understand 'the matter of commitment,' that it would defeat every purpose of his meeting the Senate. The questions were accordingly postponed until Monday, at which time they were settled by the Executive and the Senate. The latter maintained its co-ordinate authority by a partial consent to the propositions.

"Although President Washington did not again meet the Senate in person to ask its advice, he continued to consult it by message prior to the opening of negotiations."

Crandall, Treaties, Their Making, and Enforcement, 54–56.

The method, tried by Washington, of consulting the Senate in person, "was found to be subject to serious objections and quite unsatisfactory, and it was abandoned after this one experience." (The Hon. J. W. Foster, *Yale Law Journal* (Dec. 1901), XI. 69–71.

As to Washington's unsatisfactory experience, see Maclay's Sketches of Debate in the First Senate of the United States, 122–126; 10 Washington's Writings, 26, note by Sparks; 3 Story's Com. on the Constitution, 371.

Gradually the practice of consulting the Senate, by special message, in advance of the negotiation and conclusion of treaties fell into disuse, and it has since the administration of Jefferson only occasionally been resorted to. But it may be superfluous to say that

personal consultations, by the President or the Secretary of State, with individual Senators have not been and are not uncommon.

For examples of the consultation of the Senate by special message, prior to the negotiation or the signing of treaties, see Crandall, Treaties, Their Making and Enforcement, 56–61; *Yale Law Journal* (Dec. 1901), XI. 71.

(3) REJECTION, OR FAIURE TO ACT.

§ 747.

"It is wholly unnecessary to say to statesmen of the intelligence which always marks those of the British Empire that the rejection of a treaty by the Senate of the United States implies no act of discourtesy to the government with which the treaty may have been negotiated. The United States can enter into no treaty without the advice and consent of the Senate; and that advice and consent, to be intelligent must be discriminating; and their refusal can be no subject of complaint, and can give no occasion for dissatisfaction or criticism."

Mr. Fish, Sec. of State, to Mr. Motley, min. to England, May 15, 1869, S. Ex. Doc. 11, 41 Cong. 3 sess. 2–5.

The foregoing instruction related to the rejection by the Senate, April 13, 1869, by a vote of 41 to 1, of the Johnson-Clarendon convention, as to which see Moore, Int. Arbitrations, I. 503–513.

"Of treaties rejected by the Senate through a failure to act on them, or outright, may be mentioned, besides the various recent treaties for commercial reciprocity, the important treaties signed March 25, 1844, with the German Zollverein; July 20, 1855, with Hawaii; October 24, 1867, with Denmark for the cession of the islands of St. Thomas and St. John; November 29, 1869, for the annexation of the Dominican Republic; December 10, 1824, with Colombia for the suppression of the African slave trade; March 6, 1835, with the Swiss Confederation; April 12, 1844, for the annexation of Texas; December 14, 1859, with Mexico relative to transits and commerce; March 5, 1860, with Spain for the settlement of claims; May 21, 1867, with Hawaii for commercial reciprocity; and the following with Great Britain: January 14, 1869, for the adjustment of outstanding claims; June 25, 1886, for the extradition of criminals; February 15, 1888, for the regulation of the fisheries; and January 11, 1897, for the settlement of disputes by arbitration."

Crandall, Treaties, Their Making and Enforcement (1904) 71–72.

(4) PRACTICE OF AMENDMENT.

§ 748.

In instructing the diplomatic representative of the United States at Stockholm to inform the Swedish government that the Senate had amended a treaty between the two countries by striking out one of the articles, the Department of State directed him to "cause it to be distinctly understood" that it was a "fundamental law" of the American system "that every treaty made by a minister of the United States, with whatever exact adherence to his powers and instructions and whatever the nature of its provisions," was "still liable, when presented to the Senate for ratification, to be modified or even to be totally rejected." There were, said the Department, already precedents in the history of the United States for the exercise of such authority, and particular reference was made to the action of the Senate in striking out that part of Article XII. of the Jay treaty relating to the West India trade and to Great Britain's assent thereto. "Above all," added the Department, "you will give the explicit assurance that the rejection of the articles must not be interpreted into the least absence of consideration or respect towards the Government of Sweden."

Mr. Rush, Sec. of State, to Mr. Russell, Aug. 14, 1817, MS. Inst. U. States Mins. VIII. 145.

As to the practice of amendment by the Senate, see The Treaty-Making Powers of the Senate, by Henry Cabot Lodge, *Scribner's Magazine*, Jan. 1902; S. Doc. 104, 57 Cong. 1 sess.

May 12, 1803, a convention for settling the northern boundaries of the United States was signed at London by Rufus King and Lord Hawkesbury. On the 24th of the following October, President Jefferson submitted it to the Senate. The Senate approved it on condition that the 5th article should be expunged. The British government did not accept this amendment, and the ratifications were never exchanged.

Mr. Fish, Sec. of State, to Mr. Motley, min. to England, May 15, 1869, S. Ex. Doc. 11, 41 Cong. 3 sess. 4–5; Moore, Int. Arbitrations, I. 514–515. See, also, Moore, Int. Arbitrations, I. 68–69.

The propriety of a partial approval of a treaty by the Senate was doubted by the British Government. See Mr. Monroe, min. to England, to Sec. of State, June 3, 1804, Am. State Papers, For. Rel. III. 93. For preliminary correspondence in relation to the convention, see id. II. 382, 584, et seq.

As to the amendment of the convention with France of Sept. 30, 1800, and its subsequent ratification, see Davis's Notes, U. S. Treaty Vol. (1776–1887), 1306–7; id. 330–331.

"A convention for the suppression of the African slave trade was signed at London on the 13th of March, and submitted to the Senate by President Monroe, with a message of the 21st of May, 1824. This convention . . . was approved by the Senate with conditions which were not accepted by Great Britain."

Mr. Fish, Sec. of State, to Mr. Motley, min. to England, May 15, 1869, S. Ex. Doc. 11, 41 Cong. 3 sess. 4–5.

See Mr. Clay, Sec. of State, to Mr. Addington, British chargé, April 6, 1825, Am. State Papers, For. Rel. V. 783.

After the Senate gave its advice and consent to the exchange of ratifications of the treaty of commerce with Great Britain of July 3, 1815, resolutions were introduced advising the President to pursue the negotiations in order to secure certain specified objects. See Compilation of Reports of Senate Com. on For. Rel. VIII. 22. See, also, Executive Journal of the Senate, XII. 126.

It was with reference to the Senate's amendment of the foregoing convention that Henry Clay said:

"The government of His Britannic Majesty is well acquainted with the provision of the Constitution of the United States, by which the Senate is a component part of the treaty-making power; and that the consent and advice of that branch of Congress are indispensable in the formation of all treaties. According to the practice of this government, the Senate is not ordinarily consulted in the initiatory state of a negotiation, but its consent and advice are only invoked, after a treaty is concluded, under the direction of the President, and submitted to its consideration. Each of the two branches of the treaty-making authority is independent of the other, whilst both are responsible to the States and to the people, the common sources of their respective powers. It results, from this organization, that, in the progress of the government, instances may sometimes occur of a difference of opinion between the Senate and the Executive as to the expediency of a projected treaty, of which the rejection of the Colombian convention affords an example. The people of the United States have justly considered that, if there be any inconveniences in this arrangement of their executive powers, those inconveniences are more than counterbalanced by the greater security of their interests, which is effected by the mutual checks which are thus interposed. But it is not believed that there are any inconveniences to foreign powers of which they can with propriety complain. To give validity to any treaty, the consent of the contracting parties is necessary. As to the mode by which that consent shall be expressed, it must necessarily depend with each upon its own peculiar constitutional arrangement. All that can rightly be demanded in treating is to know the contingencies on the happening of which that consent is to be regarded as sufficiently testified. This information the government of the United

States has always communicated to the foreign powers with which it treats, and to none more fully than to the United Kingdom of Great Britain and Ireland. Nor can it be admitted that any just cause of complaint can arise out of the rejection by one party of a treaty which the other has previously ratified. When such a case occurs, it only proves that the consent of both, according to the constitutional precautions which have been provided for manifesting that consent, is wanting to make the treaty valid. One must necessarily precede the other in the act of ratification; and if, after a treaty be ratified by one party, a ratification of it be withheld by the other, it merely shows that one is, and the other is not, willing to come under the obligations of the proposed treaty."

Mr. Clay, Sec. of State, to Mr. Addington, Apr. 6, 1825, Am. State Papers, For. Rel. V. 783.

Where a treaty is amended by the Senate of the United States, a new signature of it is not required. If the other government accepts the amendments, it is sufficient that they are duly embodied in the copies of the treaty which are prepared for the exchange of ratifications. Nor is this rule altered by the fact that, between the date of the conclusion of the treaty and the exchange of ratifications, a change of administration has taken place in the United States.

Mr. Hay, Sec. of State, to Mr. Pierce, Feb. 21, 1899, MS. Notes to For. Consuls, IV. 439.

The foregoing note related to the extradition treaty between the United States and the Orange Free State, signed October 28, 1898.

"Not usually consulted as to the conduct of negotiations, the Senate has freely exercised its co-ordinate authority in treaty making by means of amendments. Where the treaty as negotiated is not entirely acceptable to the Senate, it is the practice of that body, if it gives its advice and consent to the ratification, to do so with specific amendments, which renders unnecessary the resubmission of the instrument after the consent of the other party to the designated changes has been obtained. . . . While the Senate's practice of amending treaties continues to meet with criticism by foreign writers, it would not to be contended for a moment that the Senate might not reject in toto, or withhold action altogether until the changes which it might indicate by resolution or otherwise had been negotiated. So far as it affects the other contracting party, it is difficult to distinguish the latter mode from that followed by the United States. . . . The proposed treaty is not infrequently so amended as to be unacceptable to the other power, and no treaty results."

Crandall, Treaties, Their Making and Enforcement, 70–71.

3. Exchange of Ratifications.

(1) act of ratification.

§ 749.

"The approval, whether qualified or unqualified, of the treaty by the Senate is not to be confused with the act of ratification. The latter is performed by the President, and is unconditional, even where it relates to a treaty which, because of amendments by the Senate, differs from the one first signed."

Crandall, Treaties, Their Making and Enforcement, 71.

"The importance of the subject-matter, the frequent changes in the personnel of the contracting organs, the inability to confirm by witness the utterances of a state, render it more necessary that contracts between nations should be carefully expressed in writing than contracts between individuals. While no particular form is essential to the validity of a treaty, it is the practice in formal treaties to make out and sign under seal as many counterparts as there are parties, one counterpart to be retained by each. In case of two parties only, which have no common language, each counterpart is usually made out in the languages of both. The texts sometimes appear on separate sheets, but more often in parallel columns or on opposite pages, the text in the language of the nation by which the counterpart is to be retained occupying the left hand column or page. Likewise with the development of the principle of the equality of states, precedence in the enumeration of the negotiators in the preamble and in the signatures is given in the counterpart to the state which retains. Otherwise the two instruments are identical. In case of several parties having various languages, the instrument often appears in only one language, customarily in Europe, the French. The same precedence is given in the retained counterpart, the order of the other countries being alphabetical or determined by lot. The ratification is not only attached to the instrument retained, but, for the assurance of the other contracting party or parties, is also attached to an exact copy of the retained instrument, which is exchanged for a similar copy from the other party, or in case of several parties is deposited in such place as is designated by the treaty. Each state, in case of two parties only, has then not only its own counterpart with its ratification attached, but a copy of the counterpart retained by the other party with the latter's ratification attached. A protocol signed by the plenipotentiaries by whom the exchange is effected records the act."

Crandall, Treaties, Their Making and Enforcement, 15–16.

(2) EXPLANATORY DECLARATIONS.

§ 750.

In the course of their duties in the enforcement of treaties both the executive officials and the courts are constantly under the necessity of construing the provisions of treaties and interpreting their meaning. In some cases, however, the attempt to construe a treaty by means of an executive agreement has caused a question to be raised as to possible encroachments upon the prerogatives of the Senate. Obviously nothing could legally be added to or subtracted from a treaty by a mere executive agreement without the advice and consent of the Senate, and no attempt to do this has professedly been made. The question really at issue has been whether the action of the Executive fell within the legitimate lines of interpretation or whether it trenched upon the province of the treaty-making power.

Where one of the parties to a treaty, at the time of its ratification, annexes a written declaration explaining ambiguous language in the instrument, or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratification duly exchanged, such distinct stipulation or explanation being duly approved by the constitutional authorities of each ratifying power, the declaration thus annexed is a part of the treaty, and as binding and obligatory as if it were inserted in the body of the instrument. Hence the grant of lands in Florida by the King of Spain to the Duke of Alagon, whether it takes date from the royal order of December 17, 1817, or from the grant of February 6, 1818, is annulled by the treaty between the United States and the King of Spain, of 1819, by virtue of the declaration to that effect made by the President of the United States on presenting the treaty for an exchange of ratifications, and assented to by the King in writing, and again ratified by the Senate of the United States.

Doe *v.* Braden, 16 How. 635.

A treaty between the United States and the New York Indians, having been duly signed, was submitted to the Senate. The Senate adopted several amendments, and then added a proviso (1) that the treaty should have no force or effect till these amendments were duly accepted, and (2) that if any part of the Indians should fail to emigrate, the President should deduct from the quantity of land which the treaty granted them beyond the Mississippi such number of acres as would leave to each emigrant 320 acres only. A question arose as to whether the title acquired by the Indians to western lands under the treaty was a grant in præsenti, or merely an agreement to set apart lands for them in the future. The court said that if the pro-

viso was to be considered as a part of the treaty, it would be difficult to avoid the conclusion that the grant was not intended to take effect immediately, since the power to deduct lands in a certain contingency would imply that there was no intention immediately to convey the whole tract, but merely an intention to allot to each emigrant a certain number of acres. But did the proviso ever become operative? It was not found, said the court, either in the original or in the published copy of the treaty or in the proclamation of the President by which the treaty was published. Continuing, the court, after suggesting that the proviso might have been considered as "mainly directory in its character," or, indeed, "as merely directory to the President," said:

"In any event it is difficult to see how it can be regarded as part of the treaty or as limiting at all the terms of the grant. The power to make treaties is vested by the Constitution in the President and Senate, and, while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. It can not be considered as a legislative act, since the power to legislate is vested in the President, Senate and House of Representatives. There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the Presidential proclamation, contained all the terms of the arrangement. It is true that the proclamation recites that the Senate did, on March 25, 1840, resolve that the treaty, 'together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved of by said tribes,' but, as the proclamation purported to set forth the treaty 'word for word,' as so amended, of course the amendments referred to were those embodied in the treaty as published in the proclamation.

"The case of Doe *v.* Braden, 16 How. 635, relied upon by the government in this connection, is not in point. In this case, in the ratification by the King of Spain of the treaty by which Florida was ceded to the United States, it was admitted that certain grants of land in Florida were annulled and declared to be void, and it was held that a written declaration, annexed to a treaty at the time of its ratification, was as obligatory as if the provision had been inserted in the body of the treaty itself. The question in the case was whether the King had power to annul the grant, which was con-

sidered a political and not a judicial question; but, as the annulling clause was inserted in the ratification and published in both countries as part of the treaty, there was no question whatever of concealment."

New York Indians *v.* United States (1898), 170 U. S. 1, 22–24.

The treaty of peace between the United States and Mexico, signed at Guadalupe Hidalgo, February 2, 1848, was so amended by the United States Senate as to create doubts as to its acceptance by the Mexican government. In order to secure its acceptance, as amended, President Polk sent Messrs. A. H. Sevier and Nathan Clifford, as commissioners, to Mexico, with instructions to explain to the Mexican minister for foreign affairs, or to the authorized agents of the Mexican government, the reasons which had influenced the Senate in adopting the several amendments. Before the arrival of the commissioners at the seat of the Mexican government the Mexican Congress approved the treaty as amended, leaving nothing to be done but the exchange of ratifications, which took place on May 30, 1848. But before the exchange of ratifications the commissioners had several conferences with the agents of Mexico, the results of which were reduced to the form of a protocol, which was signed by Messrs. Sevier and Clifford on the part of the United States and by Señor Luis de la Rosa on the part of Mexico, and the express object of which was to make "suitable explanations" in regard to the amendments of the Senate. The protocol was defended by the administration as a mere explanation which did not purport to alter the meaning of the treaty; the President, in a message to the House of Representatives, saying that "had the protocol varied the treaty, as amended by the Senate of the United States, it would have had no binding effect." The course of the President in not submitting the protocol to the Senate before the exchange of the ratifications of the treaty was much criticised in Congress.

United States Treaty Vol. (1776–1887), 692; Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Nov. 24, 1886, For. Rel. 1887, 274.

As the result of the discussion which took place in Congress early in 1849 concerning the protocol just referred to, "the Mexican minister at Washington (who appears to have been the same person who, as plenipotentiary, exchanged the ratifications of the treaty on the part of Mexico), [was led] to ask of Mr. Buchanan, the Secretary of State, an assurance, in the form of a message from the President, that the United States adhered to the protocol. Buchanan replied that 'the President would violate the most sacred rights of the legislative branch of the government if he were to criticise or condemn any portion of their proceedings, even to his own countrymen: much less,

therefore, can he be called upon by the representative of a foreign government for any explanation, condemnation, defense, or approval of their proceedings. . . . The President will be ever ready, in the kindest spirit, to attend to all representations of the Mexican government, communicated in a form which does not interfere with his own rights or those of Congress.'"

Davis, Notes, United States Treaty Vol. (1776–1887), 1356.

On April 11, 1849, Mr. Clayton, in a note to the Mexican minister, referring to the same subject, said: "It is clear . . . that the protocol must be regarded merely as an instrument stating the opinions of the commissioners of the United States upon the amendments of the Senate, and utterly void if not approved by that body." On March 22, 1849, Mr. Benton offered in the Senate a resolution declaring that the explanations of the commissioners ought to be held binding upon the United States. Next day Mr. Seward offered a resolution declaring the protocol to be no part of the treaty. Neither resolution came to a vote.

Crandall, Treaties, Their Making and Enforcement, 77.

In the exchange of ratifications of the Clayton-Bulwer treaty, Sir Henry Bulwer, by direction of his government, made a declaration to the effect that the British settlement at Honduras and its dependencies were not subject to its provisions against the occupation or colonization of Central America. Mr. Clayton made a counter declaration, accepting this view. This declaration was not submitted to the Senate, but seems to have been shown to the Hon. William R. King, who was chairman of the Committee on Foreign Relations when the treaty was approved by the Senate, and who stated that "the Senate perfectly understood that the treaty did not include British Honduras." Subsequently, when the correspondence was communicated to the Senate, it gave rise to a discussion, in which Mr. Cass bore a leading part. Mr. Cass denied the authority of Mr. King to speak for him, and offered a resolution instructing the Committee on Foreign Relations to inquire and report what measures, if any, should be taken by the Senate in regard to the correspondence. The committee reported that no measures were, in its opinion, necessary, and none were taken.

The Interoceanic Canal and the Hay-Pauncefote Treaty, by J. B. Moore, Washington, 1900, pp. 20–21; Smith's Life of Cass, 756.

The Senate having approved a consular convention between the United States and Belgium, signed March 9, 1880, with an amendment suppressing the word "alone," in the 16th line of the 12th article, the Belgian minister, at the instance of his government,

asked to be informed of the reasons for the omission of the word, which was found in the previous convention of 1868, and, if possible, to be furnished with the minutes of the debate on the subject in the Senate. Mr. Evarts, who was then Secretary of State, replied "that, in view of the independent and coordinate function of the Senate of the United States, under the Constitution, in the completion of treaties, the proceedings of that high body in executive session are held under the seal of secrecy, and the results alone of its deliberations are communicated to the executive branch of the government." Consequently he was, he said, unable to communicate the information which the minister had requested. He proceeded, however, to give his own views as to the omission, which he considered to have been due to the fact that the word in question was redundant and ambiguous.

Mr. Evarts, Sec. of State, to Mr. Neyt, Belgium chargé, Aug. 13, 1880, For. Rel. 1880, 73.

"I have received your No. 305, of the 5th instant, inclosing a communication from M. de Freycinet, in relation to the protocol or declaration adopted at the submarine cables conference in Paris in May last, for the purpose of determining the construction of certain provisions of the convention of March 14, 1884. Immediately upon the reception of your dispatch, I sent you the following telegraphic instructions:

"'McLane, *Minister, Paris:*

"'You are authorized to sign protocol explaining cables convention, subject to Senate's approval. Legislation pending before Congress, which meets December 6.

"'Bayard.'

"In this connection I think it proper to say that I received from the French minister at this capital, under date of the 8th July last, a note transmitting proceedings of the cables conference held at Paris in May last, and requesting me to authorize you, by telegraph, to sign the protocol in question unconditionally. The reason given for this request was that, 'in order to enable the different governments, and especially the London cabinet, to adopt such decisions as may be required by an acceptance of the proposed declaration,' it was important 'to change this draft of a declaration, without delay, to a definitive instrument.'

"With this request to give you authority to sign the declaration definitively, I did not deem it proper to comply, for reasons which I will proceed to state, and which you may make known in a general way to M. de Freycinet.

"The object of the declaration in question is to settle the interpretation and effect to be given to the second and fourth articles of

the convention of the 14th of March, 1884. The first of these articles has reference to the punishment of persons for the 'breaking or injury of a submarine cable, done willfully (*volontairement*) or through culpable negligence,' etc. The second article named provides that the 'owner of a cable who, by the laying or repairing of that cable shall cause the breaking or injury of another cable, shall be required to pay the cost of the repairs which such breaking or injury shall have rendered necessary, but such payment shall not bar the enforcement, if there be ground therefor, of Article II. of this convention.'

"The declaration reads as follows:

"'Certain doubts having arisen as to the meaning of the word *volontairement* inserted in Article II. of the convention of the 14th of March, 1884, it is understood that the imposition of penal responsibility mentioned in the said article does not apply to cases of breaking or of damage occasioned accidentally or necessarily in repairing a cable, when all precautions have been taken to avoid such breakings or damages.

"'It is equally understood that Article IV. of the convention has no other end and ought to have no other effect than to charge the competent tribunals of each country with the determination, conformably to their laws and according to circumstances, of the question of the civil responsibility of the proprietor of a cable who, by the laying or repairing of such cable, causes the breaking or damage of another cable, and in the same manner the consequences of that responsibility if it is found to exist.'

"By the Constitution of the United States treaties made under the authority of the United States are a part of the supreme law of the land, and the convention of the 14th March, 1884, having been made in accordance with the Constitution, is a part of that supreme law.

"But, whilst it is true that treaties are a part of the supreme law of the land, they are nevertheless to be viewed in two lights; that is to say, in the light of politics and in the light of juridical law. Where the construction of a treaty is a matter of national policy, the authoritative construction is that of the political branch of the government. It is the function of the Executive or of Congress, as the case may be. When a political question is so determined, the courts follow that determination. Such was the decision of the Supreme Court in cases arising under the treaty of 1803 with France, of 1819 with Spain, and of 1848 with Mexico.

"But where a treaty is to be construed merely as a municipal law, affecting private rights, the courts act with entire independence of the Executive, in construing both the treaty and the legislation that Congress may have adopted to carry it into effect. And while great weight might be given by the courts to an opinion of the Executive

in that relation, such an opinion would not be regarded as having controlling force.

"The declaration in question is intended, as has been seen, to settle two questions. The first is that of penal responsibility under Article II. of the convention for the accidental or necessary breaking or injury of a cable in an attempt to repair another cable; the second is that of civil responsibility under Article IV. of the convention, for injuries done to a cable in an effort to lay or repair another cable.

"These are judicial questions to be determined by the courts before whom the appropriate suits may be brought. The only power that can authoritatively construe a treaty for the judicial tribunal on questions of the character described is the legislature, or the treaty-making power itself. In either case the result would be a law which would be binding upon the courts.

"It is to be observed in this connection that the treaty in question is not self-executing, and that it requires appropriate legislation to give it effect. If, under these circumstances, the Executive should now assume to interpret the force and effect of the convention, we might hereafter have the spectacle, when Congress acted, of an Executive interpretation of one purport and a different Congressional interpretation, and this in a matter not of Executive cognizance.

"For the reasons stated it was not deemed expedient to authorize you to sign the declaration unconditionally. And as the session of Congress was drawing to a close when the note of the French minister was received, and it seemed impracticable to secure the Senate's ratification of the declaration before adjournment, it was not thought best to send you such telegraphic instructions as were solicited.

"I desire, however, to refer to an incident in our diplomatic history which bears upon the matter under consideration, and which might have been regarded as a precedent for the Executive in this case, if circumstances had seemed to require a different course from that which has been taken. I refer to the protocol which accompanies the treaty of Guadalupe Hidalgo, in the volume of treaties between the United States and other powers. . . . The expressed object of this protocol was to explain the amendments of the Senate. It was defended by the administration on this ground; and in a message to the House of Representatives, the President stated that 'had the protocol varied the treaty, as amended by the Senate of the United States, it would have no binding effect.' But notwithstanding this explanation, the course of the President in not submitting the protocol to the Senate before the exchange of ratifications of the treaty was severely criticised in Congress."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Nov. 24, 1886, For. Rel. 1887, 274.

February 6, 1899, the Senate, by the necessary two-thirds vote, advised and consented to the exchange of ratifications of the treaty of peace with Spain, signed at Paris, Dec. 10, 1898, by which the Philippine Islands were ceded to the United States. Feb. 14, 1899, the Senate, by a vote of 26 to 22, not two-thirds of a quorum, adopted a resolution to the effect that by the ratification of the treaty it was not intended to incorporate the inhabitants of the Philippines into the citizenship of the United States or permanently to annex the islands as an integral part of the territory of the United States, but that it was the intention of the United States to prepare the people for self-government, and in due time to make such disposition of the islands as would best promote the interests of their people and of the United States.

Held, that the meaning of the treaty could not be controlled by subsequent explanations of some of those who may have voted for it, and that the resolution was in this respect "absolutely without legal significance."

The Diamond Rings (1901), 183 U. S. 176.

4. Proclamation.

§ 751.

The proclamation of a ratified treaty can be made only by the President of the United States, and can not be issued by the legation by whom the treaty is negotiated.

Mr. Blaine, Sec. of State, to Mr. Angell, Oct. 10, 1881, MS. Inst. China, III. 266.

IV. *AGREEMENTS NOT SUBMITTED TO THE SENATE.*

1. Simple Executive Acts.

§ 752.

Protocols.

In 1838 the chargé d'affaires of the United States to Texas was furnished with a full power to enable him to conclude a convention for the adjustment of the claims of citizens of the United States against the government of Texas. At the same time he was instructed as follows: "You need not, however, use the power unless it should be required. Claims, where they are few in number and inconsiderable in amount, are frequently adjusted by an informal agreement between the diplomatic agent and the minister of foreign affairs, recognizing the amounts to be paid and the time and manner of payment. Another common method for transacting such business is for the diplomatic agent and the minister

first to agree as to the accountability of the government, and then for each of them to name a commissioner to examine and decide upon the details. You may adopt either course if it should be consented to by that government."

Mr. Forsyth, Sec. of State, to Mr. La Branche, No. 9, May 2, 1838, MS. Inst. Texas, I. 9.

"No case has yet occurred where the Executive has entered into an agreement for the adjustment by arbitration of the private claim of a foreigner against the United States without securing the approval of the Senate in the form of a convention." (The Hon. J. W. Foster, in *Yale Law Journal*, Dec., 1901, XI. 77.)

The following agreements, not submitted to the Senate, for settling by arbitration claims against foreign governments, may be noted: Protocol of Aug. 17, 1874, with Colombia for the settlement by arbitration of claims of citizens for the seizure of the *Montijo;* protocols with Hayti, May 28, 1884, May 24, 1888, and Oct. 18, 1889; with Brazil, Sept. 6, 1902; with the Dominican Republic, Jan. 31, 1903; with Chili, May 24, 1897; with Guatemala, Feb. 23, 1900; with Mexico, Mar. 2, 1897; with Nicaragua, Mar. 22, 1900; with Peru, May 17, 1898; with Salvador, Dec. 19, 1901; with Venezuela, Feb. 17, 1903; with Russia, Aug. 26, Sept. 8, 1900, submitting to arbitration the claims for the detention of American schooners by Russian cruisers, and the agreement with Mexico signed May 22, 1902, submitting to arbitration, in accordance with the provisions of The Hague Convention, the Pious Fund claim.

See a paper by Mr. Lodge on constitutional methods of making and ratifying treaties, S. Doc. 158, 58 Cong. 3 sess.

See, also, "Treaties and Executive Agreements," by J. B. Moore, *Political Science Quarterly* (Sept., 1905), XX. 385, and especially a very meritorious discussion, entitled "International Agreements Without the Advice and Consent of the Senate," by James T. Barnett, of the Michigan Bar, *Yale Law Journal*, XV. (Nov. and Dec., 1905) 18, 63. Mr. Barnett's paper has been revised by him, and reprinted, with additions, at Grand Rapids, Michigan, 1906.

"It has not been the practice of the government to submit to the Senate conventions providing for the adjustment of private claims, unless such a course is indicated in the instrument itself. It does not appear, from an examination of Mr. Turpin's convention, that any ratification or approval of it on the part of the United States is contemplated. But the want of such ratification on the part of this government, does not prevent recourse to that formality at any future period, should it be deemed expedient; nor does it in any respect weaken or invalidate the binding effect of the convention upon Venezuela. Indeed, the good faith of the government of that Republic having been pledged to the provisions of the convention, by the ratification of the proper authorities, there would be no more hesitation on the part of this government to enforce its stipulations, should it become necessary, than if the instrument had been ratified by the United States as well as Venezuela. In order, however, that the

rights of the parties interested may be properly guarded, Mr. Turpin has been instructed to forward to this Department the original convention signed by him, as well as an authenticated copy of the acts of ratification and confirmation by the Venezuelan authorities."

Mr. Cass, Sec. of State, to Mr. Sanford, Oct. 22, 1859, S. Ex. Doc. 10, 36 Cong. 2 sess. 472; cited in Lawrence's Wheaton (1863), 456.

This letter refers to the convention signed by Mr. Turpin, United States minister to Venezuela, and Mr. Sanojo, Venezuelan secretary of foreign relations, Jan. 14, 1859, for the settlement of the Aves Island claims. Venezuela agreed to indemnify the claimants for their losses, and the United States agreed to desist from further claims to the Islands. It was stipulated that the agreement should be submitted for ratification to the "national convention" then sitting in Venezuela. That body ratified it with an amendment, which was accepted by Mr. Turpin. (Id. 458–460.)

On Jan. 12, 1877, Mr. Cushing, as minister plenipotentiary of the United States to Spain, and Señor Calderon y Collantes, as Spanish minister of state, signed at Madrid a "protocol of conference and declarations concerning judicial procedure." The protocol contained certain pledges on the part of Spain as to the treatment of citizens of the United States residing in her ultramarine possessions. On the part of the United States Mr. Cushing made certain declarations as to the state of the existing law in that country.

United States Treaty Volume (1776–1887), 1030.

"An agreement was reached June 6, 1882, by Mr. Frelinghuysen, Secretary of State, and Señor Romero, the Mexican minister, providing for the reciprocal crossing and recrossing of the frontier by the troops of the United States and Mexico in pursuit of marauding Indians, which was successively prolonged until 1886. A more formal agreement for the same purpose was entered into, June 4, 1896, by Mr. Olney and Señor Romero. The Mexican minister was authorized by the Mexican Senate to enter into the agreement."

Crandall, Treaties, Their Making and Enforcement, 87–88, citing For. Rel. 1882, 419, 421, 426; For. Rel. 1896, 438. The agreement between Mr. Frelinghuysen and Mr. Romero, which Mr. Frelinghuysen considered as completed by his note of June 6, 1882, and "thenceforth effective," was afterwards embodied in a memorandum which was signed by them on July 29, 1882.

August 10, 1899, Brig. Gen. J. C. Bates, U. S. Volunteers, negotiated with the Sultan of Sulu and his principal chiefs an agreement, by the first article of which the sovereignty of the United States was acknowledged over the whole of the Sulu [Jolo] Archipelago and its dependencies. It was agreed that piracy should be suppressed; that there should be free trade in the products of the archipelago

with the Philippine Islands and under the American flag; that the Sultan should be protected by the United States against foreign aggression; that the United States should not sell any island of the archipelago without the Sultan's consent, and that certain salaries should be paid to the Sultan and his associates in the administration of the islands. Art. X. provided that any slave in the archipelago might purchase freedom by paying to the master the market value.

"The agreement by General Bates was made subject to confirmation by the President and to future modifications by the consent of the parties in interest. I have confirmed said agreement, subject to the action of the Congress, and with the reservation, which I have directed shall be communicated to the Sultan of Jolo, that this agreement is not to be deemed in any way to authorize or give the consent of the United States to the existence of slavery in the Sulu archipelago. I communicate these facts to Congress for its information and action."

President McKinley, annual message, Dec. 5, 1899, For. Rel. 1899, xlix.

Jan. 24, 1900, Mr. Pettigrew in the Senate referred to the agreement as having been "confirmed by the President of the United States in a letter transmitting the treaty to the Senate" (Cong. Record, of date mentioned, p. 1114); and on Feb. 27, 1900, it is referred to in the House as an agreement "which has been sent to the Senate by the President" (id. 2333). These expressions, if not made under a misapprehension, seem to refer to the President's annual message of Dec. 5, 1899, supra. The agreement was not submitted to Senate, as a treaty, for the special action to which treaties alone are subject. Nor does any affirmative action appear to have been taken by Congress on the agreement.

March 14, 1904, Mr. Crumpacker introduced in the House of Representatives a bill [H. R. 13923] by which it was proposed that "the action of the President and Secretary of War taken" on March 2, 1904, "unqualifiedly abrogating the agreement entered into between Brigadier-General John C. Bates and the Sultan and certain datos of the Sulu Archipelago on the 20th day of August, 1899, and commonly known as the Bates treaty, is hereby confirmed."

Doubtless the most important international agreement ever entered into by the Executive of the United States, without the advice and consent of the Senate, was the armistice, or peace protocol, with Spain, concluded at Washington, August 12, 1898. This protocol constituted upon its face a preliminary treaty of peace; but in its stipulation for the immediate evacuation by Spain of Porto Rico and other islands in the West Indies, in connection with the promise, made in the same instrument, of the subsequent formal cession of those islands to the United States, it seemed in a measure to anticipate the definitive peace.

"Protocols of agreement as to the basis of future negotiations are clearly within Executive authority. Such are, for instance, the

protocols signed with Costa Rica and Nicaragua, December 1, 1900, in reference to possible future negotiations for the construction of an interoceanic canal by way of Lake Nicaragua."

Crandall, Treaties, Their Making and Enforcement, 87.

"The final protocol signed at Peking, September 7, 1901, by the allied powers on the one hand, and by China on the other, at the conclusion of the Chinese troubles, likewise was not submitted to the Senate."

Crandall, Treaties, Their Making and Enforcement, 87.

On various occasions the Executive has entered into an agreement which, because of its provisional character, has been called a modus vivendi. Such agreements are usually made pending negotiations, with a view to a permanent settlement of controversies. They take the shape of an exchange of notes or of a formal protocol, and ordinarily are not submitted to the Senate for approval. A modus vivendi was arranged by the commissioners of the United States and Great Britain pending the ratification of the convention signed February 15, 1888, for the adjustment of the northeastern fisheries question. In 1891 a modus vivendi was arranged with Great Britain to provide for the protection of the fur seals in Bering Sea, pending the negotiation of a treaty of arbitration. Another modus vivendi on the same subject was concluded in 1893, but the latter, as it contemplated the possibility of a future award of damages against the United States, was submitted to the Senate. In 1899 a modus vivendi was concluded with regard to the Alaskan boundary, pending the permanent settlement of the question.

See "The Treaty-Making Power under the Constitution," by the Hon. J. W. Foster, *Yale Law Journal* (Dec. 1901), XI. 77–78.

For a discussion of the question to what extent the Senate may have parted with its functions in the making of treaties in the case of The Hague Convention for the Peaceful Settlement of International Disputes, see id. pp. 75–76; and also the Hon. S. E. Baldwin, in *Yale Law Journal*, Feb. 1901.

Exchange of notes.

The arrangement between the United States and Great Britain of April 28–29, 1817, was effected by an exchange of notes between Mr. Bagot, British minister at Washington, and Mr. Rush, Secretary of State. Orders were at once given by the proper executive officers of the two governments for its execution. April 6, 1818, President Monroe, apparently out of abundant caution, communicated the correspondence to the Senate. (Am. State Papers, For. Rel. IV. 202.) The Senate, on the 16th of the same month, by a resolution in which two-thirds of the Senators

present concurred, "approved of and consented to" the arrangement, and "recommended that the same be carried into effect by the President." The President proclaimed the arrangement April 28, 1818. (11 Stat. 766.) The proclamation, however, does not appear ever to have been officially communicated to the British government, and no exchange of ratifications took place. "The agreement became effective, by means of executive orders on each side, from the date of the original exchange of notes." The legislation in the United States on the subject of armaments on the Great Lakes was of such a nature as to leave the matter within the discretion of the President, within the limits of appropriations actually made. A similar discretion appears to have been exercised by the British government.

Report of Mr. Foster, Sec. of State, to the President, Dec. 7, 1892, S. Ex. Doc. 9, 52 Cong. 2 sess.; H. Doc. 471, 56 Cong. 2 sess. 13–18.

"An exchange of diplomatic notes has often sufficed, without any further formality of ratification or exchange of ratifications, or even of proclamation, to effect purposes more usually accomplished by the more complex machinery of treaties. . . . On December 9, 1850, in a conference held at the foreign office in London between the United States minister, Abbott Lawrence, and Lord Palmerston, it was agreed that the Canadian territory of Horseshoe Reef, in the Niagara River, should be ceded to the United States for the purpose of erecting a light-house thereon. A memorandum, or protocol, of this agreement was drawn up and signed by Mr. Lawrence and Lord Palmerston. On receipt of this protocol, Mr. Webster, January 17, 1851, instructed Mr. Lawrence to 'address a note to the British secretary of state for foreign affairs, acquainting him that the arrangement referred to is approved by this government.' Mr. Lawrence did so on the 10th of February, 1851, and the acknowledgment of his note by the British secretary of state closed the transaction. No ratification occurred on either side. Congress appropriated money for the erection of a light-house, which was built; and the United States thus possesses and exercises full jurisdiction over territory acquired by cession from a foreign power without a treaty."

Report of Mr. Foster, Sec. of State, to the President, Dec. 7, 1892, S. Ex. Doc. 9, 52 Cong. 2 sess.; H. Doc. 471, 56 Cong. 1 sess. 16–17.

An instance of an international arrangement effected by an exchange of notes occurred in our relations with Spain in 1871, in relation to the settlement of certain claims of American citizens arising from acts of the Spanish authorities in Cuba. A basis of settlement having been reached at Madrid in conference and by correspondence, General Sickles, then United States minister to Spain, February 11, 1871, addressed to the Spanish minister of state, Don

Cristino Martos, a note formulating his understanding of the agreement. Señor Martos, February 12, 1871, acknowledged the receipt of General Sickles's statement and said: "I take pleasure in informing you that I entirely concur in the contents of the said memorandum." No treaty or formal protocol was signed, no exchange of ratifications took place, nor was any proclamation issued. "The settlement was reported to Congress for its information, appropriations were voted to carry on the arbitration, an international commission was organized, and after nearly twelve years of labor, during which 140 cases were examined, awards against Spain were made to the amount of $1,293,450.50 and duly paid to the United States, all this being accomplished by a mere exchange of notes."

Report of Mr. Foster, Sec. of State, to the President, Dec. 7, 1892, H. Doc. 471, 56 Cong. 1 sess. 17. This report was originally printed in S. Ex. Doc. 9, 56 Cong. 1 sess. For the proceedings of the mixed commission, see Moore, International Arbitrations, II. 1019 et seq.

"By direction of the President, the undersigned, Secretary of State, hereby makes known to all whom it may concern that a temporary diplomatic agreement has been entered into between the government of the United States and the government of Her Brittannic Majesty in relation to the fishing privileges which were granted by the fishery clauses of the treaty between the United States and Great Britain of May 8, 1871, whereby the privilege of fishing, which would otherwise have terminated with the treaty clauses on the 1st of July proximo, may continue to be enjoyed by the citizens and subjects of the two countries engaged in fishing operations throughout the season of 1885.

"This agreement proceeds from the mutual good will of the two governments, and has been reached solely to avoid all misunderstanding and difficulties which might otherwise arise from the abrupt termination of the fishing of 1885 in the midst of the season. The immunity which is accorded by this agreement to the vessels belonging to citizens of the United States engaged in fishing in the British-American waters will likewise be extended to British vessels and subjects engaged in fishing in the waters of the United States.

"The joint resolution of Congress of March 3, 1883, providing for the termination of the fishing articles of the treaty of May 8, 1871, having repealed in terms the act of March 1, 1873, for the execution of the fishing articles, and that repeal being express and absolute from the date of the termination of the said fishing articles, under due notification given and proclaimed by the President of the United States, to wit, July 1, 1885, the present temporary agreement in no way affects the question of statutory enactment or exemption from customs duties, as to which the abrogation of the fishing articles remains complete.

"As part of this agreement, the President will bring the whole question of the fisheries before Congress at its next session in December, and recommend the appointment of a joint commission by the governments of the United States and Great Britain to consider the matter, in the interest of maintaining good neighborhood and friendly intercourse between the two countries, thus affording a prospect of negotiation for the development and extension of trade between the United States and British North America.

"Copies of the memoranda and exchanged notes on which this temporary agreement rests are appended.

"Reference is also made to the President's proclamation of January 31, 1885, terminating the fishing articles of the treaty of Washington.

"By direction of the President:

"T. F. BAYARD,
"*Secretary of State.*"

For. Rel. 1885, 460.

The memoranda and exchanged notes consisted, first, of a memorandum of Mr. West, British minister at Washington, of March 12, 1885, in which it was suggested that as the articles in question were to terminate in the midst of the fishing season, an agreement should be come to under which they might be in effect extended till January 1, 1886.

Mr. Bayard, Secretary of State, replied, April 22, 1885, communicating to Mr. West a memorandum embodying the results of an informal exchange of views with Sir Ambrose Shea, who represented Canada and Newfoundland. This memorandum contained the substance of what was afterwards embodied in Mr. Bayard's notice which is given above. Mr. Bayard also stated that he was prepared to confirm the arrangement by an exchange of notes.

In a memorandum received at the Department of State June 13, 1885, Mr. West stated that Newfoundland did not make the refunding of duties a condition of her acceptance of the proposed agreement, but relied on the subject's having due consideration before the international commission which might be appointed.

In an informal note to Mr. West of June 19, 1885, Mr. Bayard stated that, the maintenance of good neighborhood and intercourse between the two countries being the object in view, the recommendation of any measures which the commission might deem necessary to that end would seem to fall within its province and could not fail to receive attentive consideration.

Mr. West, in a note of June 20, 1885, remarked that while the colonial governments were asked to guarantee immunity from interference to American vessels resorting to Canadian waters, no such immunity was offered in Mr. Bayard's memorandum, but that the Dominion government presumed that the agreement in this respect would be mutual.

Mr. Bayard, by a note of the same day, confirmed this understanding.

Formal notes confirmatory of the agreement previously reached were exchanged June 22, 1885.

For the correspondence, see For. Rel. 1885, 460–466.

The "fishing articles" of the treaty of May 8, 1871, were Articles XVIII. to XXV., inclusive, and Article XXXII.
As to the notice of termination, see For. Rel. 1883, 413, 435, 441, 451, 464; For. Rel. 1884, 214–215; For. Rel. 1885, 466.

"A modus vivendi was effected October 20, 1899, by exchange of notes between Mr. Hay, Secretary of State, and Mr. Tower, British chargé d'affaires at Washington, fixing a provisional boundary line between Alaska and the Dominion of Canada in the vicinity of Lynn Canal."

Crandall, Treaties, Their Making and Enforcement, 88, citing For. Rel. 1899, 328–330. See supra, § 158.

2. Agreements under Acts of Congress.

(1) commercial arrangements.

§ 753.

"The act of March 3, 1815, declared a repeal of discriminating duties against vessels, and products imported therein, of nations in which discriminating duties against the United States did not exist, the President to determine in each case by proclamation the application of the repeal. The acts of January 7, 1824, and May 24, 1828, likewise authorized the President to suspend by proclamation discriminating duties so far as they affected the vessels of a foreign nation, when possessed of satisfactory evidence that no such discriminating duties were imposed by that nation against the vessels of the United States. Section 11 of the act of June 19, 1886, as amended by the act of April 4, 1888, vests similar power in the President. A partial suspension is allowed by the act of July 24, 1897. On the authority of these statutes numerous arrangements have been reached with foreign states and made operative by proclamation. The evidence accepted by the President as sufficient may be a note or despatch, or a memorandum of an agreement. The proclamations relative to abolishing discriminating duties on trade with Cuba and Porto Rico of February 14, 1884, October 27, 1886, and September 21, 1887, were based on memoranda of agreements signed with Spain, February 13, 1884, October 27, 1886, and September 21, 1887.

"Section 3 of the tariff act of October 1, 1890, authorized and directed the President, whenever the government of any country, producing and exporting certain enumerated articles, imposed duties or other exactions on the products of the United States, which, in view of the free introduction of the enumerated articles into the United States, were in his opinion unreasonable or unequal, to suspend as to that country the privilege of free importation, and subject the articles

in question to certain discriminating duties. Ten commercial arrangements were concluded and made effective by means of this section—January 31, 1891, with Brazil; June 4, the Dominican Republic; June 16, Spain; December 30, Guatemala; January 30, 1892, Germany; February 1, Great Britain; March 11, Nicaragua; April 29, Honduras; May 25, Austria-Hungary; and November 29, Salvador. These were all terminated by section 71 of the tariff act of August 27, 1894. Section 3 of the act of 1890 having been assailed as involving an unlawful delegation of legislative power, its constitutionality was sustained by the Supreme Court in the case of Field *v.* Clark (143 U. S. 649). Section 3 of the act of July 24, 1897, not only provides, as did section 3 of the act of 1890, for the imposition by proclamation of certain differential rates, but also for the conclusion by the President of commercial agreements, with countries producing certain enumerated articles, in which concessions may be secured in favor of the products of the United States; and it further authorizes the President, when such concessions are, in his judgment, reciprocal and equivalent, to suspend by proclamation the collection on those articles of the regular duties imposed by the act, and subject them to special rates as provided in the section. On the authority of this section the President has concluded and made effective the commercial agreements of May 28, 1898, with France; May 22, 1899, with Portugal (protocol making corrections signed January 11, 1900); July 10, 1900, with Germany; and February 8, 1900, with Italy."

Crandall, Treaties, Their Making and Enforcement, 88–90.

(2) INTERNATIONAL COPYRIGHT.

§ 754.

"The international copyright convention signed at Berne, September 9, 1886, originally by ten states, has been acceded to by all the principal nations except Russia, Austria-Hungary, and the United States. International copyright in the United States is regulated by the law of March 3, 1891, section 13 of which empowers the President to extend by proclamation the benefits of the law to citizens and subjects of a foreign state when assured that citizens of the United States are allowed the benefit of copyright in that state on substantially the same basis as its own citizens, or when the state is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which the United States may at its pleasure become a party. Under the first alternative, the President has extended the benefits of the law by proclamation to subjects of Belgium, France, Great Britain and possesions, and Switzerland, July 1, 1891; Germany, April 15, 1892; Italy, October 31, 1892;

Denmark, May 8, 1893; Portugal, July 20, 1893; Spain, July 10, 1895; Mexico, February 27, 1896; Chili, May 25, 1896; Costa Rica, October 19, 1899; the Netherlands and possessions, Nov. 20, 1899; Cuba, March 17, 1903; [and Norway, July 1, 1905]."

Crandall, Treaties, Their Making and Enforcement, 91.

(3) POSTAL CONVENTIONS.

§ 755.

"Following the postal convention with New Granada of March 6, 1844, numerous other conventions of the same nature were concluded by the President and ratified with the consent of the Senate. By the act of June 8, 1872, the Postmaster-General is given the power to enter into money-order agreements with the post departments of foreign governments, and by and with the advice and consent of the President, to negotiate and conclude postal conventions. In virtue of this act, conventions of this class have been concluded by the Executive without submission to the Senate. Among these are the Universal Postal Conventions, signed at Vienna, July 4, 1891, and at Washington, June 15, 1897."

Crandall, Treaties, Their Making and Enforcement, 92.

(4) AGREEMENTS WITH INDIAN TRIBES.

§ 756.

By the Indian appropriations act of March 3, 1871, it was declared that thereafter "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty," but it was also declared that the obligation of any treaty previously made should not be impaired by anything in the act. The effect of the act was to require the Indian tribes to be dealt with in the future through the legislative, and not through the treaty-making power.

Elk *v.* Wilkins, 112 U. S. 94; 16 Stat. 566; Rev. Stat. § 2079.

During the first eighty years of government under the Constitution, agreements with the Indian tribes were made exclusively by the President and the Senate, in the exercise of the treaty-making power. The passage of the act of 1871 was strongly opposed by certain members of the House as well as of the Senate, on the ground that it involved an infringement of the treaty-making power vested in the President and the latter body. It was admitted that if the President should undertake to make a treaty with the Indians, Congress could not interfere with his so doing, by and with the advice and consent of the Senate; but it was on the other hand maintained that Congress had the power to declare whether the tribes were independent

nations for the purposes of treaty making, and to render its declaration effective by refusing to recognize any subsequent treaties with them; and this view prevailed. (See, especially, Congressional Globe, 41st Cong. 3 sess. (1870–1871), part 1, pp. 763–765; part 3, pp. 1821–1825).

V. *ENFORCEMENT OF TREATIES.*

1. Duty of Performance.

§ 757.

"When a party from necessity or danger withholds compliance with part of a treaty, it is bound to make compensation where the nature of the case admits and does not dispense with it."

Opinion of Mr. Jefferson, Sec. of State, April 28, 1793, 7 Jeff. Works, 617.

"When performance [of a treaty], for instance, becomes *impossible*, nonperformance is not immoral; so if performance becomes *self-destructive* to the party, the law of self-preservation overrules the laws of obligation in others;" but "it is not the *possibility of danger* which absolves, . . . for that possibility always exists, and in every case."

Opinion of Mr. Jefferson, Sec. of State, April 28, 1793, 7 Jeff. Works, 613, 614.

When there is a treaty giving certain privileges as to repairing armed vessels of a belligerent, such treaty will be enforced by the neutral state, though the favors it confers on the belligerent may be in excess of what would be conferred by the law of nations.

Moodie *v.* The Phœbe Anne, 3 Dall. 319. See Bee's Adm. R. 40 76.

2. Legislative Aid.

§ 758.

Since by the Constitution treaties made in pursuance thereof are to be the law of the land, they are to be regarded by the courts as equivalent to a legislative act when they operate directly upon a subject; but if they merely stipulate for future legislation by Congress, they address themselves to the political and not to the judicial department, and the latter must await the action of the former.

Foster *v.* Neilson, 2 Pet. 253, cited in Mr. F. W. Seward, Act. Sec. of State, to Mr. Mendez, June 28, 1879, S. Ex. Doc. 205, 46 Cong. 2 sess. 39.

The particular point decided in Foster *v.* Neilson, viz. that art. 8 of the Florida treaty merely imported a contract for future legislation and therefore did not operate of itself, was reversed in United States *v.* Percheman, 7 Pet. 51. See supra, § 99, 1. 415.

May 13, 1786, Mr. Jay, as Secretary of Foreign Affairs, sent a circular to the governors of the various States, asking what had been done towards executing the treaty of peace of 1782–3 with Great Britain. The governor of Massachusetts, James Bowdoin, May 17, 1786, sent in answer copies of acts of the State legislature. (MS. American Letters, II. 323–345.) Other answers were received as follows: Samuel Huntington, governor of Connecticut, June 12, 1786, MS. Am. Let. II. 371; William Livingston, New Jersey, June 15, 1786, id. 410; R. Caswell, North Carolina, June 21, 1786, id. 407; Wm. Moultrie, South Carolina, June 21, 1786, id. 411; John Sullivan, New Hampshire, July 11, 1786, id. 416; Geo. Clinton, New York, July 20, 1786, id. 439; John Collins, Rhode Island, Sept. 4, 1786, id. 450; John Sullivan, New Hampshire (second reply), Sept. 18, 1786, id. 457.

While a treaty is the supreme law of the land, and operates as such in all matters not requiring legislative action, yet, when made dependent on legislative action, it does not take effect until such action is had.

Foster *v.* Neilson, 2 Pet. 253; United States *v.* Percheman, 7 Pet. 51; Garcia *v.* Lee, 12 Pet. 511; Haver *v.* Yaker, 9 Wall. 32; Turner *v.* Baptist Union, 5 McLean 344; Bartram *v.* Robertson, 15 Fed. Rep. 212.

A treaty is the supreme law of the land in respect of such matters only as the treaty-making power, without the aid of Congress, can carry into effect. Where a treaty stipulates for the payment of money for which an appropriation is required, it is not operative in the sense of the Constitution. Every foreign government may be presumed to know that so far as the treaty stipulates to pay money the legislative sanction is required.

Turner *v.* American Baptist Missionary Union, 5 McLean, 347.

"Where a treaty can not be executed without the aid of an act of Congress, it is the duty of Congress to enact such laws. Congress has never failed to perform that duty. But when it can be executed without legislation, the courts will enforce its provisions."

Davis, Notes, United States Treaty Volume (1776–1887), 1228, citing Cushing, At. Gen., 6 Op. 296; Foster *v.* Neilson, 2 Pet. 314; United States *v.* Arredondo, 6 Pet. 735.

Davis's Notes were published in 1873. Where a treaty obviously requires legislation to make it effective, it is customary to stipulate that the treaty shall take effect only when the necessary legislation shall have been adopted. By the reciprocity convention between the United States and Mexico, signed at Washington, Jan. 20, 1883, such a stipulation was made, but a stipulation was added that the necessary legislation and regulations thereunder should "take place within twelve months from the date of the exchange of ratifications." The ratifications were exchanged May 20, 1884, but the necessary legislation was not adopted by the United States, though the time therefor was twice extended by convention.

As to the necessity of legislation to execute treaties that purport to modify revenue laws, see Crandall, Treaties, Their Making and Enforcement, 135 et seq.

In 1816 the Senate passed a bill to carry into effect the commercial convention of 1815 with Great Britain, the bill so passed providing that so much of any existing act as might be contrary to the provisions of the convention should be deemed and taken to be of no effect. The House of Representatives, on the other hand, passed a bill enacting seriatim the provisions of the treaty. The Senate refused to concur, on the ground that the treaty was operative of itself, and therefore that the act should be declaratory only. On the other hand, the House insisted that legislation was necessary to carry the treaty into effect. A committee of conference, Rufus King being chairman of the managers on the part of the Senate and John Forsyth chairman of the managers on the part of the House, agreed on a bill, which was then adopted. The principle upon which this adjustment was made was thus explained by Mr. Forsyth: "Your committee understood the committee of the Senate to admit the principle contended for by the House, that whilst some treaties might not require, others may require, legislative provision to carry them into effect; that the decision of the question, how far such provision was necessary, must be founded upon the peculiar character of the treaty itself."

See Crandall, Treaties, Their Making and Enforcement, 135–140.

By Article X. of the treaty between the United States and Prussia, of May 1, 1828, jurisdiction over disputes between the masters and seamen of vessels of the contracting parties was conferred on their respective consuls. In June, 1844, the Prussian consul at New Bedford, Massachusetts, applied to Mr. Justice Story for the enforcement of an award in such a case. Judge Story decided that the article could not be executed without an act of Congress, and prepared a bill for the purpose, which was found among his papers after his death, and which was sent to the Department of State. The President submitted the matter to Congress with a recommendation that such legislation be adopted as might be necessary to give effect to the treaty.

President Polk, annual message, Dec. 2, 1845; Mr. Buchanan, Sec. of State, to Mr. Rantoul, July 21, 1845, 35 MS. Dom. Let. 251; Mr. Buchanan, Sec. of State, to Judge Betts, Oct. 27, 1845, id. 302.

"The prohibition of Art. II. of the treaty of 1880 not only covers the importation, transportation, purchase, or sale of opium by American citizens in China, but extends also to vessels owned by such citi-

zens, whether employed by themselves or by others in the opium trade. . . . The provision of the treaty is not self-executing. The enforcement of the prohibition, as to American citizens in China, is expressly dependent upon 'appropriate legislation' on the part of the United States. . . . There certainly appears little room to doubt that if the treaty as to opium is dependent on 'appropriate legislation,' it can not become effective in the absence of such legislative action."

Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, May 14, 1886, MS. Inst. China, IV. 155.

See, also, Mr. Denby, min, to China, to Mr. Bayard, Sec. of State, No. 454, Sept. 16, 1887, MS. Desp. China; Mr. Bayard to Mr. Denby, No. 249, Nov. 7, 1887, MS. Inst. China, IV. 320.

The international convention for the protection of industrial property, signed at Paris March 20, 1883, requires legislation to give it effect, and, in the absence of such legislation, is inoperative.

Rousseau *v.* Brown (1903), 21 App. D. C. 73.

3. Appropriations of Money.

§ 759.

Jay's treaty was approved by the Senate by the requisite two-thirds majority. Its ratification was proclaimed by the President on February 29, 1796, and this proclamation was communicated to the two Houses of Congress on March 1, 1796. On the one side it was maintained that the power of the President and Senate as to treaties was absolute, and that the House of Representatives was bound, under the Constitution, to make the appropriations necessary to carry the treaty into effect. On the other side it was contended that under the Constitution the consent of the House was requisite to pass appropriations to carry the treaty into effect, and that this was as much known to the other contracting party as was the consent of the Senate to the preliminary adoption of the treaty. On the latter assumption the House, on March 24, 1796, called on the President for the facts relative to the treaty. On March 30, 1796, the President declined to give such information, his reasons being stated in a message to the House, given below.

See also 8 Lodge's Hamilton, Federal ed., 161–181.

For the action taken in Congress on the Jay treaty, see Crandall, Treaties, Their Making and Enforcement, 119–128.

On April 30, 1796, the House, by a vote of 51 to 48, resolved that provision ought to be made by law for carrying the treaty into effect, and on May 6, 1796, an act was approved by which money for the execution of the treaty was appropriated. (Annals of Congress, 4 Cong. 1 sess. 1291.)

"We conceive the constitutional doctrine to be that though the President and Senate have the general power of making treaties, yet wherever they include in a treaty matters confided by the Constitution to the three branches of legislature, an act of legislation will be requisite to confirm these articles, and that the House of Representatives, as one branch of the legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not. On the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation shall be transferred from the President, Senate, and House of Representatives, to the President and Senate, and Piamingo, or any other Indian, Algerine, or other chief."

Mr. Jefferson to Mr. Monroe, Mar. 21, 1795, 4 Jeff. Works, 134.

"Having been a member of the general convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject; and from the first establishment of the government to this moment my conduct has exemplified that opinion, that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward became the law of the land. It is thus that the treaty-making power has been understood by foreign nations, and in all the treaties made with them *we* have declared, and *they* have believed, that, when ratified by the President, with the advice and consent of the Senate, they became obligatory. . . . As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light; and as it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request."

President Washington, special message, Mar. 30, 1796, on Jay's treaty. Richardson's Messages, I. 195.

Jefferson, before entering into negotiations for the purchase of lands lying at the mouth of the Mississippi, obtained from Congress a provisional appropriation of two million dollars for that purpose. Unexpectedly, his commissioners, being confronted with

unanticipated conditions, agreed to purchase the whole Louisiana territory and to pay therefor a sum many times in excess of the provisional appropriation. Jefferson at first drafted a message to submit the treaty to both Houses of Congress, but he afterwards decided to submit it to the Senate only. He informed the House, however, by his annual message, on the same day, that the treaty, as soon as the Senate had approved it, would be communicated to Congress "for the exercise of their functions, as to those conditions which are within the powers vested by the Constitution in Congress." After the treaty was approved and the ratifications were exchanged, it was communicated to Congress for consideration in its legislative capacity, the President saying: "You will observe that some important conditions can not be carried into execution but with the aid of the legislature." The measures proper for the execution of the treaty were voted without any reassertions of the principle of independent responsibility laid down by the House in 1796.

See Crandall, Treaties, Their Making and Enforcement, 128–130.

Although the action of Congress in its legislative capacity may be necessary to carry into effect a treaty duly approved by the President and Senate, such action may be regarded as a political duty under ordinary circumstances, and in no case has such legislative aid been heretofore refused.

Cushing, At. Gen., 1854, 6 Op. 296.

"The question of the prerogatives of the House, when the efficiency of a treaty depends upon its action, came again into prominence in relation to the treaty of 1868 with Russia for the cession of Alaska. In that treaty it was provided that the territory should be transferred on the exchange of ratifications (art. 4), and that Russia should be paid an indemnity of $7,200,000. The treaty was ratified by the Senate on May 28, 1867, there being but two voices in the negative. On June 20, 1867, President Johnson issued a proclamation in which, after reciting the treaty, he declared: 'Now, therefore, be it known that I, Andrew Johnson, President of the United States, have caused the said treaty to be made public to the end that the same and every clause and article thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.' The territory was transferred by Russia to the United States on October 18, 1867. When, however, the question of appropriation came before Congress at the ensuing session, it was at once seen that there was a marked division of opinion. The majority of the Committee of Foreign Affairs in the House of Representatives reported as follows: 'The committee reports to the House the following bill, making an appropriation to carry the treaty into effect, with a recommendation that

it be enacted into a law: "A bill to enable the President of the United States to fulfill the treaty between the United States and Russia of March 30, 1867. Be it enacted by the Senate and House of Representatives, that there be, and hereby is, appropriated $7,200,000 in coin to fulfill the stipulations contained in the sixth article of the treaty with Russia, concluded at Washington on the 30th day of March, 1867." A minority report was made in which the worthlessness of the territory ceded was asserted, and in which the rejection of the purchase was recommended.

"The majority report, while conceding that there were cases in which the assent of the House to a treaty might be properly withheld, limited such right to cases plainly inconsistent 'with the fundamental principles, purposes, or interests of the Constitution.' It was further asserted that 'where a treaty is limited to objects consistent with the interests of the government, its first and highest duty is to enact such measures as are necessary to carry the treaty into effect.' It was urged that as the Alaska treaty had infringed no constitutional sanction, laws to carry it into execution should be passed. Protracted debate ensued, beginning on June 30 and proceeding through July, the discussion relating far more to the constitutional rights of the House in such issues than as to the expediency of the purchase of Alaska. The tendency of the majority of the House was evidently to sanction the Alaska purchase, but to couple the approval of the treaty with a reservation of the right of the House to approve or disapprove in all cases in which the sanction of the House is necessary to execute a treaty. The following amendment, adopting this view, passed the Committee of the Whole by a vote of 98 to 49, and the House, on July 14, 1868, by a vote of 113 to 43:

"'Whereas the President of the United States, on the 30th of March, 1867, entered into a treaty with the Emperor of Russia, by the terms of which it was stipulated that, in consideration of the cession by the Emperor of Russia to the United States of certain territory therein described, the United States should pay to the Emperor of Russia the sum of $7,200,000 in coin; and whereas it was further stipulated in said treaty that the United States shall accept of such cession, and that certain inhabitants of said territory shall be admitted to the enjoyment of all the rights and immunities of citizens of the United States; and whereas the subjects thus embraced in the stipulations of said treaty are among the subjects which by the Constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction; and it being for such reason necessary that the consent of Congress should be given to said stipulation before the same can have full force and effect: having taken into consideration the said treaty, and approving of the stipu-

lations therein, to the end that the same may be carried into effect: Therefore,

"'SEC. 1. Be it enacted, That the assent of Congress is hereby given to the stipulations of said treaty.'

"The Senate, on July 17, restored the bill to its original shape, in this way rejecting the distinctive position of the House that the consent of Congress as a legislative body is necessary to the payment of money and the incorporation of territory, when provided for in a treaty. This conflict of opinion between the two Houses led to the two bills being sent to a conference committee, the Senatorial members of which insisted that the House was absolutely bound to carry out the stipulations of a treaty which was duly ratified by the Senate. (See Congressional Globe for 1867–68, 4031, 4159, 4392.) The committee, however, finally united on the following measure:

"'An act making an appropriation of money to carry into effect the treaty with Russia of March 30, 1867.

"'Whereas the President of the United States, on the 30th of March, 1867, entered into a treaty with the Emperor of Russia, by the terms of which it was stipulated that, in consideration of the cession by the Emperor of Russia to the United States of certain territory therein described, the United States should pay to the Emperor of Russia the sum of $7,200,000, in coin; and whereas it was further stipulated in said treaty that the United States shall accept of such cession, and that certain inhabitants of said territory shall be admitted to the enjoyment of all the rights and immunities of citizens of the United States; and whereas said stipulations can not be carried into full force and effect except by legislation to which the consent of both houses of Congress is necessary: Therefore,

"'Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, appropriated from any money in the Treasury not otherwise appropriated $7,200,000 in coin, to fulfill stipulations contained in the sixth article of the treaty with Russia, concluded at Washington on the 30th day of March, 1867.'

"This measure, which was adopted in the House by a vote of 91 to 48, has the features of compromise strongly impressed upon it. All that it gives specific legislative assent to is the appropriation of $7,200,000. The preamble asserts, not merely that $7,200,000 is to be paid for the purchase, but that certain inhabitants of the territory should be admitted to certain privileges. The resolution says nothing about the privileges and confines itself to the appropriation. So far, therefore, as Congress was concerned, there was no action which might be regarded as taking the position that the House has the prerogative of affirming or rejecting, at its discre-

tion, execution of a treaty when such execution is dependent on its action."

Wharton, Int. Law Digest, § 131*a*, II. 21–23.

"That Congress is under no obligation to make the stipulated appropriation has not been seriously advanced by the House since 1868, although individual advocates of this view have not been wanting." (Crandall, Treaties, their Making and Enforcement, 132.)

"We express no opinion as to whether Congress is bound to appropriate the money [which the United States agreed to pay in the treaty of peace with Spain of Dec. 10, 1898]. . . . It is not necessary to consider it [the question] in this case as Congress made prompt appropriation of the money stipulated in the treaty."

De Lima *v.* Bidwell, 182 U. S. 198.

"Treaties of peace, when made by the competent power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect, and the money can not be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith. The department of the government that is intrusted by the Constitution with the treaty-making power is competent to bind the national faith in its discretion; for the power to make treaties of peace must be co-extensive with all the exigencies of the nation, and necessarily involves in it that portion of the national sovereignty which has the exclusive direction of diplomatic negotiations and contracts with foreign powers. All treaties made by that power become of absolute efficacy, because they are the supreme law of the land."

1 Kent's Com. 165.

"Chancellor Kent, I think, expressed astonishment and regret that a resolution, founded on the incidents of Jay's treaty, was passed by the House of Representatives in 1796, declaring what is now understood to be settled English law and practice, that is, if a treaty depend for the execution of any of its stipulations upon a legislative act, the House could and should determine on the expediency of carrying it into effect or letting it abort. Whether the principle of that resolution was abandoned, or only pretermitted on the emergency of 1816, may be questioned. It disappoints expectation, but in reality is not illogical, that the treaty-making power when in the hands of a hereditary monarch should be more trammeled and restricted than when in the hands of an elective Chief Magistrate and Senate. I trust, however, that, should the controversy revive, our Representatives may feel themselves, *maugre* Chancellor Kent, free to be at least

as democratic as the British Commons. It is noticeable that the precedent of a parliamentary stand against a treaty was made during the ministry of Pitt, almost contemporaneously with Jay's; and that while on this side of the Atlantic the popular resistance triumphed, by leading to the withdrawal and abandonment of the measure on our side, notwithstanding an agitation alike universal and violent, we were compelled to swallow, pure and undiluted, the strong concoction of the venerable Chief Justice."

Mr. Dallas to Mr. Ingersoll, May 21, 1860, 2 Dallas's Letters from London, 209.

"If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation; and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nation, just as much as if the breach had been an affirmative act by any other department of the Government. Each nation is responsible for the right working of the internal system, by which it distributes its sovereign functions; and, as foreign nations dealing with it can not be permitted to interfere with or control these, so they are not to be affected or concluded by them to their own injury."

Dana's Wheaton, § 543, note 250, citing 1 Kent, 165–6; Heffter, § 84; Vattel, liv. iv., c. 2, § 14; Halleck, 854.

"D'après la constitution des États-Unis, par laquelle les traités faits et ratifiés par le président, avec l'avis et le consentement du sénat, sont déclarés être 'la loi suprême du pays,' on semble comprendre que le congrès est obligé de dégager la foi nationale ainsi engagée, et d'adopter les lois nécessaires à l'exécution du traité." (Wheaton Eléments du droit int. (5th ed.), 241.)

"520. If a treaty require the payment of money to carry it into effect, and the money can only be raised or appropriated by an act of the legislature, the existence of the treaty renders it morally obligatory on Congress to pass the requisite law; and its refusal to do so, would amount to a breach of the public faith, and afford just cause of war.

"521. That department of the Government which is entrusted by the Constitution with the power of making treaties, is competent to bind the national faith at its discretion; for the power to make treaties must be co-extensive with the national exigencies, and necessarily involves in it every portion of the national sovereignty, of which the co-operation may be necessary to give effect to negotiations and contracts with foreign nations.

"522. If a nation confer on its executive department, without reserve, the rights of treating and contracting with other sovereignties, it is considered as having invested it with all the power neces-

sary to make a valid contract; and that it is competent to alienate the public domain and property by treaty; because that department is the organ of the nation in making contracts; and such alienations are valid because they are made by the deputed assent of the nation."

Duer's Outlines of Constitutional Jurisprudence of the United States, 138.

"Neither government [France or the United States, the question arising at the time of the refusal of the French Chamber of Deputies to make appropriations to carry out the treaty for payment to the United States of French spoliations] has anything to do with the auxiliary legislative measures necessary, on the part of the other state, to give effect to the treaty. The nation is responsible to the government of the other nation for its non-execution, whether the failure to fulfil its proceeds from the omission of one or other of the departments of its government to perform its duty in respect to it. The omission here is on the part of the legislature; but it might have been on the part of the judicial department—the court of cassation might have refused to render some judgment necessary to give effect to the treaty. The King can not compel the Chambers, neither can he compel the courts; but the nation is not the less responsible for the breach of faith thus arising out of the discordant action of the internal machinery of its constitution."

Mr. Wheaton, minister at Copenhagen, to Mr. Butler, Attorney-General, January 20, 1835, adopted in Lawrence's Wheaton (1863), 459; and quoted also with approval in Meier on Abschluss von Staatsverträgen, Leipzig, 1874, p. 168.

For a full review of the case to which the opinion of Mr. Wheaton relates, growing out of the temporary failure of the French Chambers to appropriate money for the payment of the indemnity to the United States under the convention of July 4, 1831, see Moore's Int. Arbitrations, V. 4463 et seq.

Wharton, in a note to Wheaton's opinion, says: "It must be remembered, however, that the case of the action of the French Chamber of Deputies in refusing the appropriation under the treaty of 1831 was not that of a mere refusal to approve a treaty relating exclusively to the future, as was the case with Jay's treaty. The debt which the French Chamber refused to pay was one which had been for many years claimed earnestly, almost to the point of a formal declaration of war, by the United States, and had been over and over again admitted to be due by France. When President Jackson, therefore, advised Congress to resort to reprisals to compel payment of this debt, this was not because the French Chamber of Deputies refused to approve a treaty which had been negotiated between the two governments, but because the French government had repudiated a debt which the United States had declared to be incontestable, and which the French executive had admitted. Reprisals for repudiation of a debt solemnly acknowledged are recognized by the law of nations, and this was a case of repudiation of a debt solemnly acknowledged. There was no discussion, on the part of President Jackson, of the

question as to how far the consent of the French Chamber of Deputies was necessary, under the then French constitution, to the validity of a treaty. All that President Jackson did or said may be regarded as limited to the following position: 'You owe this money; we have already pushed our claim to the verge of war, and you have admitted it to be due. You must pay; your admission you can not dispute, since it was made by your executive, who is the only authority with whom, under the law of nations, we can negotiate.'" (Wharton, Int. Digest, § 131 *a*, II. 20.)

"In every constitutional government the power of raising and granting money is vested in the legislature; that of making treaties, in the executive. In every such government the question may arise, whether the treaty-making power is, in every instance, paramount, and imposes on the legislature the duty of granting without examination the money necessary to pay the subsidies or indemnities promised by the treaty; or, whether the *power* of granting money, vested by the Constitution in that body, does not necessarily imply the *right* of examining and deciding each case according to its original merits.

"The present administration of the United States is of opinion that here the treaty-making power is paramount. It may thence have been too hastily inferred that that power was in France also acknowledged to be supreme and to pledge absolutely the legislature and the nation. There may be in the Constitution of the United States some clauses not to be found in that of France, which sustain the construction adopted by our Executive Magistrate. But even in the United States the question has been considered, at least, as doubtful.

"Mr. Madison's resolution of the year 1796, which asserts the abstract right of the House of Representatives, was adopted by a majority of the House, and remains, unrepealed, of record on its journal. And it can not be denied that, during the sixteen years of the administration of Presidents Jefferson and Madison, that was the avowed construction of the Constitution by the government of the United States. It is not necessary here to inquire whether that construction is correct. I may not be an impartial judge of that question, and only mean to show that, even here, it is one on which opinions have been divided."

Mr. Gallatin to Mr. Everett, January, 1835, 2 Gallatin's Writings, 479.

"The non-compliance with the conditions of a treaty, whether proceeding from the executive or legislative branch of government, does not alone, and when neither arising from a hostile spirit nor accompanied with insult, afford such extreme ground of complaint as to impose on the aggrieved nation the necessity of considering that act as an indignity, and of resorting to war as the only alternative for sustaining her character. The refusal of the British House of

Commons to carry into effect the commercial treaty of Utrecht with France has already been alluded to. I beg leave to remind you of another instance.

"By the treaty of 1794, between America and England, the United States bound themselves to pay to British subjects the amount of the British debts which had been lost by reason of laws passed by several States in contravention of the provisions of the treaty of 1783. And it was expressly provided by that of 1794 that the amount thus payable by the United States should be definitively settled by a joint commission consisting of four members, and, in case of disagreement between these, by a fifth commissioner, chosen by the four primitive members of the board."

Mr. Gallatin to Mr. Everett, January, 1835, 2 Gallatin's Writings, 497.

4. Judicial Action.

(1) province of the courts.

§ 760.

By Art. VI. of the Constitution of the United States it is declared that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land," and that "the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

See, as to the origin of this clause, Coxe, Judicial Power and Unconstitutional Legislation, 272–291; Moore, Int. Arbitrations, I. 272–274.

The execution of a treaty between nations is to be demanded from, and, in general, superintended by, the executive of each nation, and, therefore, whatever the decision of the court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court as an act of Congress; and, although restoration may be an executive act, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and consequently improper.

United States *v.* Schooner Peggy (1801), 1 Cranch, 103, 109.

Johnson, J., delivering the opinion of the court to the effect that instructions of the President could not divest a right actually acquired by the captor, before notice of such instructions, in the captured property, said: "By capture the individual acquires an inchoate statutory right, an interest which can only be defeated by the supreme legisla-

tive power of the Union. Condemnation does nothing more than ascertain that each individual case is within the prize act, and thus throws the individual upon his right acquired by belligerent capture. Should the prize act, in the interim, be repealed, or its operation be suspended by the provisions of a treaty, there no longer exists a law to empower the courts to adjudge the prize to the individual captor."

The Mary and Susan (1816), 1 Wheaton, 46, 58.

The court can not supply a casus omissus in a treaty any more than in a law. By the treaty with Spain of 1795 free ships were to make free goods; and in the 17th article it was provided that a passport, issued in accordance with the form annexed to the treaty, should be conclusive proof of the nationality of the vessel. There being, in fact, no form annexed, it was held that the proprietary interest of the ship must be determined according to the ordinary rules of prize courts, and if shown to be Spanish property, that the cargo was protected from liability.

The Amiable Isabella, 6 Wheat. 1, 76.

"The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself."

Jones *v.* Meehan (1899), 175 U. S. 1, 32, citing Wilson *v.* Wall, 6 Wall. 83, 89; Reichart *v.* Felps, 6 Wall. 160; Smith *v.* Stevens, 10 Wall. 321, 327; Holden *v.* Joy, 17 Wall. 211, 247, and holding that where a tract of land, which had been granted by the United States by treaty to an Indian chief, and which had by tribal custom descended to his eldest son and successor, was leased by the latter, the rights of the lessees under the lease "could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive Departments."

A treaty with an Indian tribe is a part of the law of the land, and, where it prescribes a rule by which private rights can be determined, the courts will apply such rule.

Leighton *v.* United States, 29 Ct. Cl. 288.

After the Senate has passed a resolution stating that a treaty with Indians has been approved by them, and the President has issued a proclamation accepting, ratifying, and confirming the treaty, the courts can not entertain a question as to whether the treaty was in fact approved by the Indians.

New York Indians *v.* United States, 30 Ct. Cl. 413.

Rights claimed under a treaty between a State and an Indian tribe can not be enforced by a member of a tribe, or by the adoption of its members.

Cayuga Nation *v.* State, 99 N. Y. 235.

The appellate jurisdiction of the Supreme Court of the United States extends to cases where, a treaty having been drawn into question, the decision has been against the validity of the treaty or of a right or title claimed under it; and in such case the court is not restricted to the abstract question of treaty construction, but has jurisdiction to examine and render a decision upon the claim of right or title actually made.

Martin *v.* Hunter's Lessee (1816), 1 Wheat. 304.

By sections 751 and 753 of the Revised Statutes of the United States the courts of the United States have power to issue writs of habeas corpus in the case of prisoners in jail who are in "custody in violation of the Constitution or of a law or treaty of the United States."

Wildenhus's Case (1887), 120 U. S. 1.

Complaint having been made in behalf of a British subject that an action of trespass had been begun against him, contrary to the stipulations of the treaty of peace of 1782–3, Mr. Jay replied: "Whether the action commenced against Mr. Marsh is or is not consistent with the treaty is a question to be judicially tried, and he must defend himself in the same manner that all others do who find themselves arrested without just cause. This is a kind of inconvenience to which all persons are exposed and must submit to in free governments, where justice can only be obtained in the settled course of judicial proceedings and not from the prompt and summary decisions of a magistrate guided only by his own discretion or by the discretion and orders of his sovereign. Until the contrary happens and appears, it is to be presumed that the courts will do what is right, and that presumption must obtain in the case of Mr. Marsh as well as others until the final determination of it shall remove all doubts about the matter."

Mr. Jay, Sec. of For. Aff., to Sir John Temple, Dec. 11, 1787, 3 MS. Am Let. 306.

A claim having been put forward in behalf of a citizen of France to an inheritance of lands in North Carolina, by virtue of the 11th article of the treaty of commerce between the United States and France, reply was made that the subject was "purely a question of property which must be decided by the tribunals of the country, who

alone in litigated cases are competent to expound the laws of the land, among which, and of a paramount nature, is the treaty in question."

Mr. Jefferson, Sec. of State, to the French minister, March 20, 1793, 5 MS. Dom. Let. 73.

The seventh article of the treaty of 1778 provided that ships of war and privateers of France might freely carry the ships and goods taken from their enemies into the ports of the United States without being obliged to pay any fees to the officers of the admiralty, or any other judges; that such prizes were not to be arrested or seized when they entered the ports of the United States; that the officers of the United States should not make any examination concerning the lawfulness of the prizes; that they might depart at any time, and carry their prizes to the places expressed in their commissions; but that, on the contrary, no shelter or refuge should be given, in the ports of the United States, to such ships as had been made prize of the subjects, people, or property of France; but if such should come in, being forced by stress of weather or the danger of the sea, all proper means should be vigorously used to induce them to go out and retire as soon as possible.

Under the neutrality act of 1794 there was a series of arrests of French vessels in United States ports, the validity of which arrests was adjudicated by the admiralty courts. Of this intervention of the judiciary the French ministers in the United States complained, holding that French vessels in the United States were under such circumstances entitled to come and go as they pleased. But the reply was that in all cases of disputed rights, the judiciary must be appealed to; and that whether such a right as that claimed by France was given by the treaty was the question at issue, which, under a constitutional system like that of the United States, the courts must, for municipal purposes, pass upon.

The letters of the French ministers, with the accompanying papers, and the replies by Mr. Randolph and Mr. Pickering, are given in 1 Am. State Papers, For. Rel. 559 et seq.

"M. d'Argaïz seems to think that a treaty stipulation can not be subjected to the interpretation of the judicial authority, and proceeds to remark, that, 'if the courts of the Union possess the right of interpreting, considering, and deciding upon treaties contracted between nation and nation, and the executive power can not inquire whether their decrees are or are not conformable with justice, it would be as well to declare, that, in order to give to treaties the force of treaties, or, at least, to render them obligatory, they should be concluded with the judicial power, or, in better words, that treaties should be made, for them to be afterward interpreted as the courts might think proper.' But the undersigned supposes that nothing is

more common, in countries where the judiciary is an independent branch of the government, than for questions arising under treaties to be submitted to its decision. Indeed, in all regular governments, questions of private right, arising under treaty stipulations, are in their nature judicial questions. With us a treaty is part of the supreme law of the land; as such, it influences and controls the decisions of all tribunals; and many instances might be quoted of decisions made in the Supreme Court of the United States, arising under their several treaties with Spain herself, as well as under treaties between the United States and other nations. Similar instances of judicial decisions on points arising under treaties may be found in the history of France, England, and other nations; and, indeed, the undersigned would take the liberty to remind the Chevalier d'Argaïz that this very treaty of 1795 has been made the subject of judicial decision by a Spanish tribunal.

"The undersigned would call to the recollection of the Chevalier d'Argaïz the case of Mr. D. Hareng, in which the Spanish colonial courts decided according to their sense of the intention of the treaty of 1795, and the intendant confirmed their decree, which was, that nothing in that treaty exempted Mr. Hareng from the payment of certain demands. From this decision this government was inclined to dissent, but never questioned the right and duty of a Spanish court to consider the intent and effect of a treaty."

Mr. Webster, Sec. of State, to the Chev. d'Argaïz, Span. min., June 21, 1842, relating to the case of the Amistad, Webster's Works, VI. 399, 400.

A native of Würtemberg, who had been naturalized as a citizen of the United States, died in Louisiana, bequeathing legacies to kindred residing in Würtemberg who were subjects of the King. The legacies were subjected to a tax of ten per cent, under a statute of Louisiana which imposed such a tax on successions devolving on persons not domiciled in that State and not citizens of any other State or of any Territory of the Union. The government of Würtemberg objected to the imposition of the tax on the strength of Art. III. of the treaty of April 10, 1844, which provided that the "citizens or subjects" of each contracting party should have the right to dispose of their personal property within the jurisdiction of the other by testament or otherwise, and that their heirs or legatees, "being citizens or subjects" of the other party, might take or dispose of such property, paying only the duties to which the "inhabitants" of the country where the property lay were liable in like cases. The Supreme Court of the United States having held that, as the decedent was a *citizen of the United States*, the case was not within the provisions of the treaty, the Department of State declared that the government of the

United States had "no power . . . to act upon any other construction of the existing treaty than that adopted by the Supreme Court," and offered to negotiate a new convention in conformity with the construction put by the government of Würtemberg on the treaty then in force.

Mr. Seward, Sec. of State, to Mr. Bancroft, min. to Prussia, Aug. 18, 1868, MS. Inst. Prussia, XV. 2, citing Frederickson *v.* Louisiana, 23 How. 445.

"I am not aware whether or not a treaty, according to the Hawaiian constitution is, as with us, a supreme law of the land, upon the construction of which—the proper case occurring—every citizen would have the right to the judgment of the courts. But, even if it be so, and if the judicial department is entirely independent of the executive authority of the Hawaiian government, then the decision of the court would be the authorized interpretation of the Hawaiian government, and however binding upon that government would be none the less a violation of the treaty. In the event, therefore, that a judicial construction of the treaty should annul the privileges stipulated, and carried into practical execution, this government would have no alternative and would be compelled to consider such action as the violation by the Hawaiian government of the express terms and conditions of the treaty, and, with whatever regret, would be forced to consider what course in reference to its own interests had become necessary upon the manifestation of such unfriendly feeling."

Mr. Blaine, Sec. of State, to Mr. Comly, United States min., June 30, 1881, For. Rel. 1881, 624, 625.

On the strength of Article III. of the treaty between the United States and Italy of 1871, which exempts citizens or subjects of the one country from compulsory military service in the other, as well as "from any contribution whatever, in kind or in money, to be levied in compensation for personal services," complaint was made that certain Italian laborers had been called on to pay a road tax in the State of Iowa. The Department of State replied that the question was one primarily for the consideration of the judicial tribunals; that, under the Constitution of the United States, treaties were a part of the supreme law and were enforceable by the courts, and that this principle was especially applicable where complaint was made that a State law was in conflict with the treaty; that the authorities of Iowa had taken the view that such a conflict did not exist, and had administered the law accordingly; that in such a case provision had been made by law for a review of the matter by the Federal tribunals, and that it was competent for any Italian subject who felt aggrieved by the tax in question "to apply to the courts of the United States, in which,

and not in the executive, our Constitution and laws have lodged the requisite authority for entertaining his suit for relief against the action of which he complains."

Mr. Bayard, Sec. of State, to Baron Fava, Italian min., Dec. 18, 1888, MS. Notes to Italy, VIII. 315.

May 23, 1890, the Chinese legation invoked the protection of the United States for Chinese subjects residing in San Francisco against an ordinance of the city requiring them to remove from their present homes and places of business to a certain prescribed district in a remote suburb of the city and declaring it unlawful and punishable by imprisonment for any Chinese person to reside or carry on business in any other part of the city. The legation was advised that a large number of Chinese had been arrested for failure to comply with the ordinances, and it invoked article 3 of the treaty of 1880, which required the government of the United States to exert all its power to devise measures for the protection of the Chinese and to secure to them the same rights and privileges as might be enjoyed by citizens of the most-favored nation.

Mr. Blaine, in acknowledging, as Secretary of State, the receipt of this note on May 27, 1890, advised the legation that he had referred a copy of its note to the Attorney-General for consideration. At the same time he said:

"Meanwhile, I may ask your attention to the sixth article of the Constitution of the United States, which places treaties on the same juridical basis as laws and makes them the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. By the second section of the third article the judicial power of the United States is made to extend to all cases arising under the treaties. Under these provisions, and the statutes of the United States passed to give them effect, it is believed that the Chinese who are said to have been arrested under the order in question may, in an application to the courts for release from imprisonment or detention, speedily obtain a decision as to their rights and the legality of the order. If the Department be correct in this belief, there does not appear to be any occasion to invoke the stipulation of the third article of the immigration treaty of 1880, by which the government of the United States undertakes to 'exert all its power to devise measures' for the protection of the Chinese and to secure them in their rights, since such measures are already in existence and clearly available."

The Chinese legation replied June 7, 1890, arguing that the government of the United States should adopt special measures, and expressed hope that the Attorney-General would find some prompt and effective way whereby the government of the United States

would exert all its power to devise measures for the protection of the Chinese and to secure to them the same rights as other foreign residents enjoyed without molestation.

Mr. Blaine answered June 14, 1890. He stated that it was not his intention to deny that article 3 of the treaty of 1880 bound the United States to devise such measures as might be found necessary to secure to Chinese subjects the rights and privileges therein referred to. Such was, indeed, the simple language of the article; but their views seemed to differ both as to the scope, the occasion, and the character of the duty imposed on the United States. The contention of the minister appeared to be that the United States was bound, whenever the rights of the Chinese were assailed, to protect them through the executive department of the government, and that executive action was mainly, if not alone, contemplated. Mr. Blaine said that he could find nothing to sustain this view. The treaty merely obliged the United States, where existing measures were found to be ineffective, to exert its powers to devise others to supply the defect, and even if an existing remedy were found to be inefficient it would not follow that the government was bound to devise a remedy of a totally different character, such as a transference of a subject-matter from the judicial to the executive department, even if there were power to do so. The duty imposed by the treaty would be fully discharged in devising a measure to render the existing remedy effective. Mr. Blaine further stated that he had heard from the Attorney-General, who expressed the opinion that the ordinance violated both the 14th amendment to the Constitution of the United States and the treaty stipulations between the United States and China, and that for these reasons it was void; but also advised that the proper mode of determining the question was by application to the courts of the United States. In more than one case, said Mr. Blaine, those courts had maintained the supremacy of the treaties with China against conflicting provisions, not only of the statutes, but also of the constitution of California. He cited as examples In re Ah Fong, 3 Sawyer's Reports, page 144, and Parrott's Chinese case, 6 Sawyer's Reports, page 349.

For. Rel. 1890, 219, 221–223, 223–226.

In a note to the Chinese minister of January 4, 1899, Mr. Hay, referring to the diplomatic discussion which had taken place as to an opinion of the Attorney-General of the United States to the effect that only the classes of persons expressly named in the first clause of article 3 of the treaty of 1894 were entitled to admission into the United States, observed that the Attorney-General would be pleased to have the question "submitted to the courts for deter-

mination," and that if the minister was desirous that such a step should be taken he would, upon a suggestion from the Department of State, proceed, in conjunction with the Secretary of the Treasury, to bring the cases as soon as possible to adjudication.

The Chinese minister, while expressing his confidence in the courts, said: "The questions submitted by me . . . were of a diplomatic character involving the construction of conventions entered into between two equal and sovereign governments, and I could not, by any action on my part, recognize the competency of a domestic tribunal of one of the parties to take such action as would irrevocably bind the other party to the convention. If I am not misinformed, the Supreme Court of the United States has already decided, in what is known as the Scott law case, that if the Congress of the United States legislates in direct violation of the treaty, the courts of the United States must respect and enforce the legislation; but I understand it recognized in the same decision that such legislation did not release the government of the United States from its international obligations under the treaty. And however much the courts may feel bound to follow the legislation of Congress, I apprehend you will not contend that adverse legislation or the judgment of a domestic tribunal can release a government from its solemn treaty obligations."

Mr. Hay, Sec. of State, to Mr. Wu, Chinese min., Jan. 4, 1899, For. Rel. 1899, 194; Mr. Wu, Chinese min., to Mr. Hay, Sec. of State, Jan. 25, 1899, id. 195.

"Legislation such as that enacted by the State of Iowa [imposing discriminating taxes on foreign insurance companies] is beyond the control of the executive branch of the general government, and even did this legislation contravene any existing treaty . . . the remedy would lie in an appeal to the courts of law.

"This Department had . . . called the attention of the governors of the States in which the legislation in question is said to have been adopted, or to be pending, to the violation of certain treaty stipulations made by the United States with other countries, and in some instances assurances have been given that the reports of such intended legislation are unfounded."

Mr. Hay, Sec. of State, to Mr. Tower, British chargé, April 27, 1899, For. Rel. 1899, 346.

(2) RULE AS TO POLITICAL QUESTIONS.

§ 761.

While treaties are a part of the supreme law of the land, they are nevertheless to be viewed in two lights—that is to say, in the light of politics and in the light of juridical law. The decision of political

questions is preeminently the function of the political branch of the government, of the Executive, or of Congress, as the case may be; and when a political question is so determined the courts follow that determination. Such was the decision of the Supreme Court in cases involving boundary and other questions, under the treaty of 1803 with France, of 1819 with Spain, and of 1848 with Mexico.

Doe et al. *v.* Braden, 16 How. 635; Foster *v.* Neilson, 2 Pet. 314; The Amiable Isabella, 6 Wheat. 1; Grisar *v.* McDowell, 6 Wall. 363; United States *v.* Yorba, 1 id. 412; United States *v.* Pico, 23 How. 321; United States *v.* Lynde, 11 Wall. 632; Meade *v.* United States, 9 id. 691; United States *v.* Reynes, 9 How. 127; Davis *v.* The Parish of Concordia, id. 280; Castro *v.* De Uriarte, 16 Fed. Rep. 93; In re Cooper (1891), 143 U. S. 472; Toucey, At. Gen., 5 Op. 67.

Whether the King of Spain had power to annul a grant is a question which was foreclosed in every judicial tribunal of the United States by the action of the President and Senate treating with him as having that power. Nor will the court review the action of the Executive in this respect, it being impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

Doe *v.* Braden, 16 How. 635.

By Article X. of the treaty with the Pottawatomie Indians, proclaimed August 7, 1868, 15 Stat. 531, 533, it was agreed that the claims of the tribe "for depredations committed by others upon their stock, timber or other property," might be presented to the Interior Department accompanied by evidence, and that "examination and report shall be made to Congress of the amount found to be equitably due, in order that such action may be taken as shall be just in the premises." Various claims were presented under this article to the Secretary of the Interior, and reported by him to Congress. By the acts of March 3, 1885, and March 3, 1891, the claims and all the papers relating thereto were referred to the Court of Claims. (23 Stat. 362, 372; 26 Stat. 989, 1011.) Nothing was done under the first-named act because it required strictly legal evidence. The act of March 3, 1891, directed the court to consider all the papers on file or of record; and it used the same words as the treaty, namely, "for the depredations committed by others." The papers showed depredations committed by Indians, as well as by white men, and the Court of Claims gave judgment for all. The United States appealed on the ground that claims for depredations by other Indians were improperly

reported. Held, that Congress, when it legislated, had before it all the claims and did not discriminate between them; that, if the meaning of the treaty was doubtful, it was competent for Congress to resolve the doubt and accept responsibility for all the claims; that it was natural for Congress to adopt the interpretation of the Interior Department; and that, at any rate, the language was broad enough to cover claims arising out of acts of Indians as well as out of acts of white men.

United States *v.* Navarre (1899), 173 U. S. 77.

The United States Supreme Court has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard.

Botiller *v.* Dominguez, 130 U. S. 238; 9 S. Ct. Rep. 525.

A court can not inquire whether a treaty was properly executed or whether it was procured by undue influence.

Leighton *v.* United States, 29 Ct. Cl. 288.

The granting an injunction to restrain the Executive from making payment under a treaty is not within the province of the judiciary.

Grundy, At. Gen., 1839, 3 Op. 471.

"I have had the honor to receive your letter of the 29th ultimo in relation to the pending application in the supreme court of this District for a writ of mandamus against the Secretary of State at the instance of La Abra Silver Mining Company, in which you embody, as your own, the report of Mr. Solicitor-General Phillips to you. . . .

"The suggestion of Chief Justice Carter, as reported by Mr. Phillips, namely, that a pro forma judgment with a view to an appeal to the Supreme Court of the United States was all that was wanted by the parties can not be entertained for a moment with my consent. I have a most decided objection to any judgment, pro forma or otherwise, being rendered against the Secretary of State.

"The pending case involves, as I view it, an important question in regard to the relative powers of the several branches of the national government. It is for this reason, if no other, entitled to a full hearing in every court through which it may have to pass before reaching the Supreme Court of the United States. . . .

"The powers of the President are fixed by the Constitution. He has in this matter only exercised the treaty-making power. Congress, a coordinate branch of the government, can not enlarge those powers, and most certainly can not restrict or limit them."

Mr. Frelinghuysen, Sec. of State, to Mr. Brewster, Dec. 4, 1882, 144, MS. Dom. Let. 577.

5. Date of Taking Effect.

§ 762.

A treaty is binding on the contracting parties, unless otherwise provided, from the date of its signature, the exchange of ratifications having, in such case, a retroactive effect, confirming the treaty from that date.

Davis *v.* Concordia, 9 How. 280; Hylton *v.* Brown, 1 Wash. C. C. 343; Davis, Notes, U. S .Treaty Vol. (1776–1887), 1228; Mr. Buchanan, Sec. of State, to Mr. Clay, min. to Peru, Sept. 18, 1847, MS. Inst. Peru, XV. 56, citing Wheaton's Int. Law, 306.

See, as to the treaty with France of Feb. 23, 1853, Succession of Schaffer, 13 La. An. 113, cited in Hennen's La. Dig. (1861), 1545.

The treaty by which France ceded Louisiana to the United States took effect from its date, April 30, 1803. Its subsequent ratification and the formal transfer of possession have relation to that date. The same rule applies to the treaty of San Ildefonso, Oct. 1. 1800, by which France acquired Louisiana from Spain.

United States *v.* Reynes, 9 How. 127; Davis *v.* Concordia, id. 280.

So far as it affects the relations of the sovereigns concerned, a treaty when ratified operates from the day of its signature. Hence, although the ratifications of the treaty of peace between the United States and Spain, which was signed December 10, 1898, were not exchanged till April 11, 1899, it was held that sec. 10 of the act of March 3, 1899 (30 Stat. 1151), prohibiting unauthorized obstructions to navigation in the waters of the United States, applied to the navigable waters of Porto Rico. It was observed that, while certain provisions of the treaty became operative from the date of the exchange of ratifications and others (as Arts. IV. and VI.) upon signature, "the relinquishment of sovereignty and cession of domain, which were the main purposes of the treaty, and were formulated in several articles, are unqualified and must be regarded as immediate and absolute from the date of signature, subject only to the possibility of a failure of ratification. It is impossible to suppose that the sovereignty of the United States in its full scope did not attach at once or was suspended until ratification should be complete."

Knox, At. Gen., Oct. 17, 1901, 551, 558, citing United States *v.* Arredondo, 6 Pet. 691; Haver *v.* Yaker, 9 Wall. 321; United States *v.* Reynes, 9 How. 127; Davis *v.* Concordia, 9 How. 280; De Lima *v.* Bidwell, 182 U. S. 1, 200; Downes *v.* Bidwell, 182 U. S. 244, 287; Dooley *v.* United States, 182 U. S. 222, 230; Halleck, Int. Law (1861), 815, and discussing Halleck, Int. Law (1861), 855.

The Attorney-General, referring to Halleck, Int. Law (1861), 831, said: "It is difficult to conceive that so far as matters of sovereign do-

minion are concerned there is any break of continuity between the cessation of hostilities and the negotiation of a treaty of cession, or between negotiation and ratification; and if ratification is followed by legislation respecting the acquired territory, which fully emphasizes the assumption of the new duties and rights of sovereignty, I can conceive no valid reason for doubting that this sovereignty extends over all the usual public phases thereof, including the jurisdiction over public waters, from the moment when hostilities resulted in military control of the acquired territory." (23 Op. 556–557.)

The States of New Granada, Ecuador, and Venezuela, formerly constituting the original Republic of Colombia, established by treaty a board of commissioners to hear and determine claims against that Republic and to fix the proportion due thereon from each of such States. The commissioners rejected a claim presented by a citizen of the United States on the ground that the capture, out of which the claim grew, took place a few days before the exchange of the ratifications of the treaty between the United States and Colombia, by which it was stipulated that free ships should make free goods. The Department of State said that this objection was fully answered by the statement "that, although the treaty stipulates that certain of its parts are to *remain* in force twelve years from the exchange of the ratifications, this is by no means tantamount to saying that it was not to be operative *until* that exchange should have been effected. The treaty had been *ratified* by both parties before the capture, and as the exchange of the ratifications is a mere ceremony, intended only to furnish each party with formal proof of the ratification of the other, no doubt is entertained of our right to insist upon the application of the treaty to any case that might have occurred under it subsequently to its ratification by Colombia."

Mr. Forsyth, Sec. of State, to Mr. Semple, chargé d'affaires to New Granada, No. 7, Feb. 12, 1839, MS. Inst. Colombia, XV. 58.

"But a different rule prevails when the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified; it is not considered as concluded until there is an exchange of ratifications."

Davis, Notes, U. S. Treaty Vol. (1776–1887), 1228, citing Davis *v.* Concordia, 9 How. 280; Lessee of Hylton *v.* Brown, 1 Wash. C. C. 343; Haver *v.* Yaker, 9 Wall. 32; United States *v.* Arredondo, 6 Pet. 691.

See, to the same effect, ex parte Ortiz, 100 Fed. Rep. 955; Bush *v.* United States, 29 Ct. Cl. 144.

See Montault *v.* United States, 12 Howard, 47.

The rule that treaties, where individual rights are concerned, take effect not on the date of their signature, but on that of the exchange of ratifications, was held to be applicable to the exaction of duties

on merchandise, in the case of the annexation of Porto Rico by the United States under the treaty with Spain, signed at Paris, Dec. 10, 1898, the ratifications of which were exchanged on April 11, 1899.

Dooley *v.* United States (1901), 182 U. S. 222, citing Haver *v.* Yaker, 9 Wall. 32.

See also, Armstrong *v.* Bidwell (1903), 124 Fed. Rep. 690.

"When a treaty requires a series of legislative enactments to take place after exchange of ratifications before it can become operative, it will take effect as a national compact, on its being proclaimed, but it cannot become operative as to the particular engagements until all the requisite legislation has taken place."

Davis, Notes, U. S. Treaty Vol. (1776–1887), 1228, citing Cushing, At. Gen., 6 Op. 750.

A treaty which does not require legislation to make it operative will be executed by the courts from the time of its proclamation.

Cushing, At. Gen., 1854, 6 Op. 750; Foster *v.* Neilson, 2 Pet. 314; United States *v.* Arredondo, 6 Pet. 725.

The United States adhered to the Industrial Property Convention, "this adhesion to take effect internationally from the date of deposit of their ratifications at Berne." See For. Rel. 1884, 548.

Mr. Bayard, Sec. of State, to Mr. Ervin, April 26, 1887, 164 MS. Dom. Let. 12.

See, however, as to the need of legislation to give effect to this treaty, supra, § 758.

Where an Indian treaty provided that it should be obligatory as soon as it should be ratified by the President and the Senate, it did not take effect until signed by the President, although it should have been previously ratified by the Senate, and accepted by the Indians.

Shepard *v.* Northwestern Life Ins. Co., 40 Fed. Rep. 341.

During the Revolutionary war various States, among which was Virginia, passed acts of sequestration and confiscation, by which it was provided that, if the American debtor should pay into the State treasury the debt due to his British creditor, such payment should constitute an effectual plea in bar to a subsequent action for the recovery of the debt. When the representatives of the United States and Great Britain met at Paris to negotiate for peace, the question of the confiscated debts became a subject of controversy, especially in connection with that of the claims of the loyalists for the confiscation of their estates. Franklin and Jay, though they did not advocate the policy of confiscating debts, hesitated, chiefly on the ground of a

want of authority in the existing national government to override the acts of the States. John Adams, however, when he arrived on the scene, took high national ground, and ended the discussion by declaring, in the presence of the British plenipotentiaries, that, so far as he was concerned, he "had no notion of cheating anybody;" that the question of paying debts and the question of compensating the loyalists were two, and that, while he was opposed to compensating the loyalists, he would agree to a stipulation to secure the payment of debts. It was therefore provided, in the 4th article of the treaty of peace, that creditors on either side should meet with no lawful impediment to the recovery in full sterling money of bona fide debts contracted prior to the war. This stipulation not only purported to override State laws, but was strongly retroactive. The State courts, holding themselves to be bound by the local statutes, refused to enforce it. To meet this difficulty, there was inserted in the Constitution of the United States the clause declaring treaties then made, or which should be made, to be the supreme law of the land, in spite of anything in the constitution or laws of any State to the contrary. On the strength of this provision, the question was carried before the Supreme Court of the United States, by which it was held that the treaty restored to the original creditor his right to sue.

Ware *v.* Hylton, 3 Dallas 199; John Marshall, by J. B. Moore, *Political Science Quarterly* (Sept. 1901), XVI. 393, 400–402.

"In mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation."

Marshall, C. J., United States *v.* Schooner Peggy (1801), 1 Cranch, 103, 109. This language was used with reference to the provisions of the convention between the United States and France of September 30, 1800, for the restoration of property captured but not *definitively* condemned. The convention having intervened since the judgment below, it was held that the Supreme Court was bound to order the restoration, without regard to the merits of the judgment.

By an act of the legislature of Maryland of 1780 French subjects were empowered to inherit real estate in that State, subject to the proviso that, within ten years after inheriting, they should settle in and become citizens of the State, or else enfeoff a citizen of some

one of the United States. Certain French subjects inherited lands under this statute in 1799, but, having failed to perform the conditions of the proviso, claimed that they were protected in their estate by Article VII. of the treaty between the United States and France of September 30, 1800, by which it was provided that, in case the laws of either country should restrict the rights of foreigners with respect to real estate, such real estate "might be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be." It was claimed that these stipulations secured the right of disposal for life, and also that they operated on an estate which was vested when they were entered into. These positions were sustained, Marshall, C. J., delivering the opinion.

Chirac *v.* Chirac (1817), 2 Wheat. 259, 276.

A treaty giving certain rights of succession to realty to subjects of a foreign sovereign is not retroactive so as to affect the succession of a person who died before the treaty.

Prevost *v.* Greneaux, 19 How. 1.

"The principle that a treaty is not to be held to operate retroactively in respect to vested rights does not apply to conventions of extradition. It is a general principle that such conventions apply to offences committed prior to their conclusion, unless there is an express limitation."

Moore on Extradition, I. 99, citing Twiss, Law of Nations (1884), 411; Foelix, Droit int. privé, II. 341; Seijas, El Derecho Hispano-Americano, I. 183; In re Giacomo, 12 Blatchf. 391; Case of Clinton, Forsyth's Cases and Op. on Constit. Law, 366.

A fugitive has no vested right of asylum; nor does the provision of the Constitution of the United States against ex post facto laws apply. (In re Giacomo, 12 Blatchf. 391; Mr. Evarts, Sec. of State, to Mr. Seward, Jan. 30, 1880, 131 MS. Dom. Let. 431.)

A stipulation that a treaty should not apply to crimes "committed anterior to the date hereof," was held to refer to the date of signature. (Matter of Metzer, 5 N. Y. Leg. Obs. 83.)

See, also, In re Vandervelpen, 14 Blatchf. 137.

The covenants or guarantees in a treaty, when dependent on certain concessions, cannot be enforced until the concessions are actually made.

Mr. Fish, Sec. of State, to Mr. Baxter, min. to Honduras, No. 19, Mar. 20, 1871, For. Rel. 1871, 577, as to the guarantee by the United States of the neutrality of the proposed Honduras Interoceanic Railway under Art. XIV. of the treaty of 1864.

VI. *INTERPRETATION.*

1. General Rules.

§ 763.

Treaties should be interpreted "in a spirit of uberrima fides," and in a manner to carry out their manifest purpose.

Tucker *v.* Alexandroff (1902), 183 U. S. 424, 437.

A treaty is to be construed so as to exclude fraud and to make its operation consistent with good faith.

The Amistad, 15 Pet. 518.

That a reservation in a treaty may operate as a grant of lands, see United States *v.* Brooks, 10 How. 442.

That construction of a treaty most favorable to its execution, as designed by the parties, will be preferred.

United States *v.* Payne, 2 McCrary, 289, 8 Fed. Rep. 883.

A treaty is not only a law, but also a contract between two nations, and, under familiar rules, it must, if possible, be so construed as to give full force and effect to all its parts.

Goetze *v.* United States (1900), 103 Fed. Rep. 72.

"Vattel says that the interpretation which would render a treaty null and inefficient can not be admitted; that it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory."

Mr. Hay, Sec. of State, to Mr. Beaupré, No. 331, Nov. 16, 1900, MS. Inst. Colombia, XIX. 123.

"There is no rule of construction better settled either in relation to covenants between individuals or treaties between nations than that the whole instrument containing the stipulations is to be taken together, and that all articles in pari materia should be considered as parts of the same stipulations."

Mr. Livingston, Sec. of State, to Baron Lederer, consul-general of Austria, Nov. 5, 1832, MS. Notes to For. Legs., V. 63; with reference to Articles V.–IX., inclusive, of the treaty with Austria-Hungary, Aug. 27, 1829, as to the treatment of vessels touching duties and other charges.

It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions, if that be practicable.

Geofroy *v.* Riggs (1890), 133 U. S. 258, 270, citing Vattel, Bk. II. ch. xvii.

"*The reason of the law*, or *of the treaty*—that is to say, the motive which led to the making of it, and the object in contemplation at the

time, is the most certain clue to lead us to the discovery of its true meaning; and great attention should be paid to this circumstance, whenever there is question either of explaining an obscure, ambiguous, indeterminate passage in a law or treaty, or of applying it to a particular case. *When once we certainly know the reason which alone has determined the will of the person speaking, we ought to interpret and apply his words in a manner suitable to that reason alone;* otherwise, he will be made to speak and act contrary to his intention, and in opposition to his own views."

Vattel, Book II. ch. 17, sec. 287.

The original of the treaty of 1819 with Spain being in the Spanish language, not corresponding precisely with the original in English, the language of the former is to be taken as expressing the intent of the grantor as to the lands granted and reserved. The King of Spain was the grantor; the treaty was his deed; the exception was made by him; and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted and the thing reserved and excepted in and by the grant. The Spanish version was in his words and expressed his intention, and, though the American version showed the intention of this government to be different, we can not adopt it as the rule by which to decide what was granted, what excepted, and what reserved. The court must be governed by the clearly expressed and manifest intention of the grantor and not the grantee in private, a fortiori in public, grants.

United States *v.* Arredondo, 6 Pet. 691.

It has been settled by the decisions of the Supreme Court (1) that compacts between governments or nations, like those between individuals, should be interpreted according to the natural, fair, and received acceptation of the terms in which they are expressed; (2) that the obligation of such compacts, unless suspended by some condition or stipulation therein contained, commences with their execution by the authorized agents of the contracting parties, and that their subsequent ratification by the principals themselves has relation to the period of signature; (3) that any act or proceeding, therefore, between the signing and ratification of a treaty, by either of the contracting parties, in contravention of the stipulations of the compact, would be a fraud upon the other party, and could have no validity consistently with a recognition of the compact itself; (4) that a nation which has ceded away her sovereignty and dominion over a territory can, with respect to that territory, rightfully exert no power by which the dominion and sovereignty so ceded would be impaired or diminished.

United States *v.* D'Auterive, 10 How. 609.

A treaty of cession is a deed of the ceded territory by the sovereign grantor, and the deed is to receive an equitable construction.

United States v Arredondo, 6 Pet. 710.

In doubtful cases that construction is to be adopted which will work the least injustice—which will put the contract on the foundation of justice and equity rather than of inequality.

Mr. Livingston, Sec. of State, to Baron Lederer, Nov. 5, 1832, MS. Notes to For. Legs., V. 63.

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein* v. *Lynham*, 100 U. S. 483, 487."

Geofry *v.* Riggs (1890), 133 U. S. 258, 271.
See, to the same effect, United States *v.* Auguisola, 1 Wall. 352.

Technical rules of construction ought not to be applied to treaties with the Indians.

Taney, At. Gen., 1831, 2 Op. 465.

A stipulation, though inconvenient, must be fulfilled if it be explicit; but, in case of doubt, the inconveniences which would result from a particular construction may be used as an argument to show that that construction can not be conformable to the intent of the parties.

Mr. Livingston, Sec. of State, to Baron Lederer, Nov. 5, 1832, MS. Notes to For. Legs., V. 63.

The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them.

The Amiable Isabella, 6 Wheat. 1, 73.

In the construction of treaties, the general doctrine is that any special advantage conceded by a party under any one article is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty.

Cushing, At. Gen., 1853, 6 Op. 148.

When a treaty is executed in more than one language, each language being that of a contracting party, each document, so signed and attested, is to be regarded as an original, and the sense of the treaty is to be drawn from them collectively.

United States *v.* Arredondo, 6 Pet. 691, 710.

Where treaties are drawn up in two languages each text is considered as the equivalent of the other and as being in a sense explanatory of it. Thus interpreted the two texts have a common meaning. Both parties to it stand on a footing of equality, and the object sought to be attained by them is accomplished.

Mr. Hay, Sec. of State, to Mr. Beaupré, No. 331, Nov. 16, 1900, MS. Inst. Colombia, XIX. 123.

"Treaties are subjected to the following general rules which govern all contractual engagements:

"(1) There must be a concurrence of minds to one and the same thing.

"(2) The interpretation of obscure terms in a treaty is a matter of fact, as to which extrinsic evidence may be taken for the purpose of explaining objective obscurity.

"(3) Construction of treaties is a matter of law, to be governed by the same rules *mutatis mutandis*, as prevail in the construction of contracts and statutes.

"(4) As contracts may be modified and rescinded, so may treaties.

"(5) Immoral stipulations are void in treaties as they are in contracts.

"(6) 'Construction' is to be distinguished from 'interpretation.' 'Construction' gives the general sense of a treaty and is applied by rules of logic; 'interpretation' gives the meaning of particular terms, to be explained by local circumstances and by the idioms the framers of the treaty had in mind.

"(7) If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it.

"Treaties are distinguishable from contracts as follows:

"(1) Contracts (unless we regard marriage as a contract) are, in all cases, the subjects of a suit for debt or damages, or for a specific thing. But no such suit lies on breach of treaty.

"(2) Contracts can only be vacated or rescinded by consent, or by the action of a court. But this is not necessarily the case with a treaty. There is no court which can be appealed to to dissolve it, and when one party violates its terms the practice is for the other party to declare it not to be any longer binding.

"(3) While a contract may be annulled on the ground of fraudulent influence exercised by strength over weakness, such a reason can not be set up for regarding a treaty as a nullity, since all nations are supposed to stand on the same footing, with equal opportunities of detecting fraud, and there are many cases of finesse and false coloring or suppression of facts which would avoid contracts, which would not, *mutatis mutandis*, avoid a treaty. If *suppressio veri* abrogated treaties to the extent it abrogates contracts, few treaties would stand.

"(4) A treaty based upon a war accepts the results determined by the war, unless otherwise provided, while a contract does not necessarily assume the existing relations of the parties as a basis. 'The *uti possidetis* is the basis of every treaty of peace, unless it be otherwise agreed. Peace gives a final and perfect title to captures without condemnation, and, as it forbids all force, it destroys all hopes of recovery (of vessels) as much as if the vessel was carried *infra præsidia* and condemned.'"

Wharton, Int. Law Digest, § 133, II. 36, citing Kent's Com. 173, as citing The Legal Tender, reported in Wheat. Dig. 302; The Schooner Sophie, 6 Rob. Ad. 138.

Wharton, Com. on Am. Law, § 157, p. 234, is cited by Wharton (Int Law Digest, II. 37), as authority for the additional proposition: "(5) A consideration is essential to give effect to a contract, but it is possible to conceive of a treaty which has no consideration."

On the question of repugnancy the following rules are laid down by President Woolsey:

"1. That earlier clauses are to be explained by later ones, which were added, it is reasonable to suppose, for the sake of explanation, or which at least express the last mind of the parties. So also later treaties explain or abrogate older ones.

"2. Special clauses have the preference over general, and for the most part prohibitory over permissive.

"In treaties made *with different parties* the inquiry in cases of conflict touches the moral obligation as well as the meaning. Here the earlier treaty must evidently stand against the later, and if possible, must determine its import where the two seem to conflict.

"In general, conditional clauses are inoperative, as long as the condition is unfulfilled; and are made null when it becomes impossible. Where things promised in a treaty are incompatible, the promisee may choose which he will demand the performance of, but here and elsewhere an act of expediency ought to give way to an act of justice."

Woolsey, Int. Law, § 113.

"A treaty of cession is a deed of the ceded territory by the sovereign grantor, and the deed is to receive an equitable construction,

The obligation of the new power to protect the inhabitants in the enjoyment of their property is but the assertion of a principle of natural justice."

Davis's Notes, U. S. Treaty Vol. (1776–1887), 1228, citing Soulard *v.* United States, 4 Pet. 511; Delassus *v.* United States, 9 Pet. 117; Mitchell *v.* United States id. 711; Smith *v.* United States 10 Pet. 326.

In the controversy between the United States and Great Britain, which took place in 1876, concerning the refusal of the British Government to surrender Winslow under Article X. of the treaty of 1842 unless a stipulation should be given by the United States that he should not be tried for an offense other than that for which he was delivered up, Mr. Fish stated that the President could not recognize the right of one power to change at its pleasure and without the assent of the other power the terms and conditions of an executory agreement in a treaty duly ratified between them. The British government did not dissent from this principle, but argued that the construction which it had given to the treaty was the correct one.

Mr. Fish, Sec. of State, to Mr. Hoffman, chargé, No. 864, March 31, 1876, For. Rel. 1876, 210, 217; Lord Derby to Mr. Hoffman, May 4, 1876, For. Rel. 1876, 227.

2. Particular Stipulations.

§ 764.

Articles of reciprocity, constituting mutual and correlative engagements, do not come within such expressions as "favor," or "freely if the concessions were freely made," or "if the concessions were conditional on allowing the same compensation."

Cushing, At. Gen., 1853, 6 Op. 148.

By Article VII. of the convention between the United States and France of February 23, 1853, Frenchmen were entitled to hold real property by the same title and in the same manner as citizens of the United States, "in all the States of the Union, whose existing laws permit it." It was held that the District of Columbia as a political community was to be considered as one of "the States of the Union" within the meaning of this provision and that a citizen of France might take land in the District of Columbia by descent from a citizen of the United States.

Geofroy *v.* Riggs (1890), 133 U. S. 258.

Article 6 of the treaty of April 3, 1783, between the United States and Sweden, as revived in article 17 of the treaty of July 4, 1827, between the same powers, provides that the subjects of the contract-

ing parties may "dispose of their goods and effects" by donation or otherwise, and that "their heirs . . . shall receive the succession even ab intestato," and that "these inheritances" shall be exempt from certain charges. Held, that the word "effects" (represented in the French draft of the treaty by the word "biens," which, in civil law, includes immovables as well as movables), when construed with the words "heirs," "succession," and "inheritances," includes real as well as personal property; so that an alien resident of Sweden may inherit land from a resident citizen of Illinois, notwithstanding the provision in the laws of 1887, p. 5, forbidding it.

Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454.

The treaty of the United States with Würtemberg of December, 1844 (article 2), provides that, when an alien shall inherit any real property, he shall be allowed two years in which to sell it, which time may be reasonably prolonged, according to the circumstances. Held, that the clause, "which time may be reasonably prolonged according to the circumstances," should be made effective by the courts, by granting such time as would be reasonable.

Scharpf *v.* Schmidt (1898), 172 Ill. 255, 50 N. E. 182.

A treaty of cession is a deed or grant by one sovereign to another, which transfers nothing to which he had no right of property, and only such right as he owned and could convey to the grantee.

Mitchel *v.* United States, 9 Pet. 711.

A treaty of cession is to be construed in accordance with the state of things at the time existing.

Strother *v.* Lucas, 12 Pet. 410.

Territory acquired by treaty or conquest is subject, so far as concerns titles to property and prior rights of status, to the same law as it was subject to before the transfer.

United States *v.* Moreno, 1 Wall. 400.

A stipulation for the protection of rights of private property covers inchoate as well as matured rights.

Delassus *v.* United States, 9 Pet. 117; Strother *v.* Lucas, 12 Pet. 410.
That benefits granted as equivalents by a treaty are not to be considered as donations, see Forsyth *v.* Reynolds, 15 How. 358.

The term "grant" in a treaty comprehends not only one made in form, but also any concession, warrant, order, or permission to survey, possess, or settle, whether evidenced by writing or parol, or presumed from possession; and in the term "laws" is included custom and

usage, when once settled, though it may be "comparatively of recent date, and is not one of those to the contrary of which the memory of man runneth not, which contributed so much to make up the common-law code."

Strother *v.* Lucas, 12 Pet. 436.

A vessel owned and manned by Makah Indians is not specially privileged to catch fur seal in Bering Sea by reason of the treaty between the tribe and the United States (12 Stat. 940), guaranteeing to such Indians the right of taking fish and of whaling and sealing at usual and accustomed grounds, "in common with all citizens of the United States." The treaty secured to the Indians only an equality of rights and privileges.

United States *v.* The James G. Swan (Dist. Ct.), 50 Fed. Rep. 108.

"Where, by the express terms of a treaty, the mode of receiving payment of money to be paid is submitted without limitation to the party entitled to receive, he alone can make the designation; and it is equally true that those modes which governments may, and often do by express stipulation adopt can not only not be deemed contrary to the rules and customs generally observed, but may be properly resorted to under a treaty, which, by excluding no particular mode, fairly embraces every one which is appropriate to such transactions between nations, and convenient to the party entitled to receive."

Mr. McLane, Sec. of State, to Mr. Serurier, French min., June 3, 1833, 22 Br. & For. State Papers, 664, 671. See, also, Mr. McLane to Mr. Serurier, June 27, 1834, id. 684; and Mr. Serurier to Mr. McLane, Aug. 31, 1833, id. 676.

Under the act of Congress constituting a board of commissioners to pass on claims provided for by the treaty with France of 1831, the decision of the board as between conflicting claimants is not conclusive, and the question of their respective titles is fully open to be adjudicated by the courts.

Frevall *v.* Bache, 14 Pet. 95.

The commissioners appointed by the governments of the United States and Russia for the transfer of Alaska to the United States, under the treaty of March 30, 1867, had no power to determine the question of title to particular property as between the Russian government, the Russian-American Company, and private individuals, and the fact that they placed a certain building in a schedule of property belonging to private individuals does not prejudice the assertion by the United States of title to the property under the treaty,

on the ground that the building was in reality the property of the Russian government.

Kinkead *v.* United States (1893), 150 U. S., 483, Shiras and Field, JJ., dissenting.

Counsel for the claimant cited the case of Comegys *v.* Vasse, 1 Pet., 193, in support of the contention that the classification of the property by the commissioners determined the question of title as a contemporaneous construction of the treaty to the effect that the property of the Russian-American Co., in which the claimant alleged the title to have existed at that time, was not intended to pass to the United States. The court said that the cases were readily distinguishable. Under the Florida treaty, commissioners were to be appointed "to receive, *examine, and decide* upon the amount and validity of all claims." The commissioners were therefore specially invested with judicial power to pass upon claims; but even in that case it was held that their authority did not extend to the adjustment of conflicting rights of different citizens to the amounts warranted by them.

A treaty obligation "to cease all hostilities against persons and property" does not constitute an obligation to pay depredation claims.

Leighton *v.* United States, 29 Ct. Cl., 288.

3. Most-favored-nation Clauses.

(1) reciprocal concessions.

§ 765.

Controversy with France, 1817-1831.

By the act of Congress of March 3, 1815, the vessels of foreign countries were exempted from discriminating duties in ports of the United States, on condition of a like exemption of American vessels in the ports of such countries. The exemption was granted by Great Britain, but not by France, with the result that French vessels continued to pay discriminating duties in the ports of the United States while British vessels became exempt. By article 8 of the treaty of April 30, 1803, ceding Louisiana to the United States, it was provided that "the ships of France shall be treated upon the footing of the most favored nations" in the ports of the ceded territory. On the strength of this stipulation, M. Hyde de Neuville, the French minister at Washington, wrote to Mr. Adams, Dec. 15, 1817, saying that he had been directed by his government to inquire as to the truth of the statement made by several masters of merchant vessels, that French vessels were not treated in the ports of Louisiana upon the footing of the most favored nation. He had found that the allegation was true, and that protests had been made in vain to the local authorities. He therefore

asked that orders be issued by the President so that in future the 8th article of the treaty should receive its entire execution, and that the advantages granted to Great Britain in all ports of the United States should be secured to France in the ports of Louisiana.

In his reply, December 23, 1817, Mr. Adams said:

"The eighth article of the treaty of cession stipulates that the ships of France shall be treated upon the footing of the most-favored nations in the ports of the seded territory; but it does not say, and can not be understood to mean, that France should enjoy as a free gift that which is conceded to other nations for a full equivalent.

"It is obvious that if French vessels should be admitted into ports of Louisiana upon the payment of the same duties as the vessels of the United States, they would be treated, not upon the footing of the most-favored nation, according to the article in question, but upon a footing more favored than any other nation; since other nations, with the exception of England, pay higher tonnage duties, and the exemption of English vessels is not a free gift, but a purchase at a fair and equal price."

Replying, finally, in a note of March 29, 1821, to the argument that any advantages granted to other nations, either reciprocally or unconditionally, must be given to France in the ports of Louisiana, because the treaty stipulation in question was unconditional in form, Mr. Adams declared that this was immaterial, "and that, whether expressed or not, no claims to a favor enjoyed by others could justly be advanced by virtue of any such stipulation without granting the same equivalent with which the advantage had been purchased."

M. Hyde de Neuville, French min., to Mr. Adams, Sec. of State, Dec. 15, 1817. Am. State Papers, For. Rel. V. 152; Mr. Adams to M. de Neuville, Dec. 23, 1817, id. 152–153; M. de Neuville to Mr. Adams, June 16, 1818, id. 153–155; Mr. Adams to M. de Neuville, March 29, 1821, id. 163–165; M. de Neuville to Mr. Adams, March 30, and May 15, 1821, id. 165, 171; Mr. Adams to M. de Neuville, June 15, 1821, id. 180; M. de Neuville to Mr. Adams, June 30, 1821, id. 186; Mr. Adams to M. de Neuville, Aug. 13, 1821, id. 192.

The views expressed by Mr. Adams are restated by President Monroe in his annual message of 1821, with the observation that the claim of France had excited "not less surprise than concern, because there does not appear to be a just foundation for it."

Not long after the close of the discussion between Mr. Adams and M. de Neuville at Washington, the question was renewed by the French government in the negotiations by which Mr. Gallatin, American minister at Paris, sought to effect a settlement of the spoliation claims of citizens of the United States against France. The French government coupled the treaty question with that of the spoliation claims and declined to settle the one without the other. The

views expressed by Mr. Adams as to the treaty question were urged by Mr. Gallatin, particularly in a note of February 27, 1823.

By Article VII. of the treaty of commerce between the United States and France of June 24, 1822, provision was made for the gradual abolition of all discriminating duties so that a perfect equalization was to be effected on October 1, 1827. In anticipation of that event Mr. Clay, as Secretary of State, on May 28, 1827, instructed Mr. Brown, Mr. Gallatin's successor, if France persisted in coupling the disputed question under Article VIII. of the Louisiana treaty with the settlement of claims, to propose the reference to arbitration of the question whether France was entitled to have refunded the alien duties collected on French vessels or their cargoes in Louisiana between the date of the treaty of cession and October 1, 1827. If the French demand was sustained, the arbitrators were to determine the amount to be refunded, and this amount was to be set off against the claims so far as it might go. Mr. Brown was, however, forbidden to include in the arbitration the subject of the claims.

Mr. Clay's proposal did not lead to a settlement, although it was afterwards enlarged so as to include not only the question of reimbursement, but also the true construction and permanent operation of the contested article. On July 20, 1829, new instructions were sent by Mr. Clay's successor, Mr. Van Buren, to Mr. Rives, who had then been sent to represent the United States at Paris. These instructions reaffirmed the position of the United States, but limited the offer of arbitration to the question of reimbursement. "The claim by France," said Mr. Van Buren, "of permanent commercial privileges in the ports of Louisiana without an equivalent, and wholly independent of her own commercial regulations in respect of the vessels and productions of the United States, can never be voluntarily submitted to by them, and the President can not consent to put it in the power of any third party to determine that such shall be the case."

November 8, 1830, Mr. Van Buren wrote to Mr. Rives that, if France should persist in coupling her national claim, as to Article VIII. of the Louisiana treaty, with the spoliation claims of citizens of the United States, a treaty might be concluded "stipulating a reciprocal and reasonable reduction of the duties upon French wines on their importation into the United States, taking proper care, however, that the stipulation for this reduction of duties does not conflict with our engagements to other nations, by which we are bound to impose no higher duties upon articles the produce of the soil or industry of those nations, than upon similar articles of other nations, when imported into the United States, and a correspondent reduction of the duties upon our cotton, when imported into France." This instruction was in substantial conformity with a proposition already made by Mr. Rives to the French government.

July 4, 1831, Mr. Rives concluded a treaty on this basis. France agreed to pay 25,000,000 francs on account of American claims, while the United States agreed to pay 1,500,000 francs in settlement of certain French claims. The United States also agreed to reduce the duties on French wines, and in consideration of this France agreed to relinquish her claims respecting Article VIII. of the Louisiana treaty.

Mr. Gallatin, min. to France, to Viscount Chateaubriand, Feb. 27, 1823, Am. State Papers, For. Rel. V. 673; Mr. Clay, Sec. of State, to Mr. Brown, min. to France, May 28, 1827, H. Ex. Doc. 147, 22 Cong. 2 sess. 5, 16; Mr. Van Buren, Sec. of State, to Mr. Rives, min. to France, July 20, 1829, id. 18, 29, 30; same to same, Nov. 8, 1830, id. 41; Mr. Rives to Mr. Livingston, Sec. of State, Sept. 28, 1831, id. 214.

See Lawrence's Wheaton (1863), 494; 2 Lyman's Dip. ch. vi; and see discussions with Austria, infra, in this section.

Arrangement with Colombia.

Article II. of the treaty between the United States and Colombia, of October 3, 1824, provided for most-favored-nation treatment, freely if the concession was freely made or for the same compensation if it was conditional. Subsequently it was provided by a treaty between Colombia and Central America that discriminating duties should to a certain extent be abolished as between the two countries. Thereupon the American minister at Bogotá demanded the extension of the benefits of the treaty to vessels of the United States. The Colombian government "justly and naturally answered that the privilege given to Central America . . . was conceded on the condition of a reciprocal advantage, and that . . . we could not claim to enjoy it without granting a reciprocal privilege to Colombian vessels in our ports." The justice of this was so apparent that the American minister at once concluded a reciprocal arrangement by which, in conformity with the provisions of the arrangement between Colombia and Central America, vessels of the United States and their cargoes which should "go direct" from ports of the United States were to pay no higher or other duties than Colombian vessels. As the acts of January 7, 1824, and May 24, 1828, empowered the President to issue his proclamation suspending discriminating duties only where all such duties were abolished by the foreign government, it was suggested that Congress should pass an act authorizing the President to exempt from duties in the United States Colombian vessels and their cargoes which should go directly from ports of that nation to the United States.

Report of Mr. Livingston, Sec. of State, to the President, Jan. 9, 1832, 4, MS. Report Book, 319.

An act was accordingly passed May 19, 1832, 4 Stat. 515.

As to the question of refunding the discriminating duties charged on the French ship *Pactole* at Pensacola, Florida, in 1827, see Mr. Living-

ston, Sec. of State, to Mr. McLane, Sec. of Treas., Nov. 2, 1832, 25 MS. Dom. Let. 187.

Discussions with Austria.

By Article V. of the treaty with Austria-Hungary, of August 27, 1829, it was reciprocally provided that no higher or other duties should be imposed on the importation into the one country of the produce of the other than should be payable on the like article, being the produce of any other foreign country. By Article IX. of the same treaty it was stipulated that each party should accord to the other most-favored-nation treatment, freely if freely granted or for the same compensation if conditional. In virtue of this treaty the Austrian government claimed that its wines should be admitted into the United States on payment of the same duties as were imposed on French wines under the treaty of July 4, 1831. The United States declined to admit this claim. In a note of November 5, 1832, Mr. Livingston, Secretary of State, observed that it could not readily be imagined that either Austria or the United States intended to forego the advantages that might be derived from compacts with other nations for "equivalent reductions" in rates of duty. Article V., said Mr. Livingston, should be read in connection with Article IX., which plainly showed that the contracting parties did not intend to grant to each other gratuitously what had been conceded to another nation for a high price. Mr. Livingston maintained, however, that there was no contradiction between the two articles; Article IX. merely confirmed Article V. The meaning was that the same duties should be paid, and that if duties were lessened in favor of another nation the contracting parties should obtain a reduction for the same equivalent.

Mr. Livingston, Sec. of State, to Baron Lederer, Austrian consul-general, Nov. 5, 1832. MS. Notes to For. Legs. V. 63.

Feb. 28, 1840, the Department of State issued a notice referring to a convention which had been concluded between Turkey and Great Britain, by which certain privileges were granted to British commerce. The notice stated that the United States was entitled to the same privileges under the most-favored-nation clause in the treaty with Turkey of May 7, 1830. (30 MS. Dom. Let. 497.)

As to the most-favored-nation guaranty under the treaty of 1830 and an alleged attempt of Armenian merchants to secure a monopoly of the Turkish output of opium, see Mr. Foster, Sec. of State, to Mr. Newberry, No. 419, Nov. 14, 1892, MS. Inst. Turkey, V. 415.

The Austrian chargé d'affaires having claimed, under the most-favored-nation clause, the benefit of the stipulation in the treaties of the United States with Russia and certain other countries, conferring upon consuls jurisdiction of disputes between the masters and crews of vessels, the Department of State replied: "Seeing that the right now under consideration, where it can be claimed under a

treaty wherein it is expressly conferred is, in every such instance, given in exchange for the very same right conferred in terms equally express upon the consuls of the United States, it can not be expected that it will be considered as established by the operation of a general provision which, if it were allowed so to operate, would destroy all reciprocity in this regard, leaving the United States without that equivalent in favor of their consuls, which is the consideration received by them for the grant of this right wherever expressly granted."

Mr. Buchanan, Sec. of State, to the Chev. Hülsemann, May 18, 1846, MS. Notes to German States, VI. 130.

Positions taken, 1869–1875.

Replying to a proposal of the Argentine government for a treaty providing for fixed rates of duty on articles usually imported from the one country into the other, Mr. Fish stated that such treaties were not in conformity with the usual policy of the United States, since the fixing by a treaty of rates of duty on merchandise from abroad, while it might be at the moment convenient, might subsequently prove to be "seriously the reverse." "Another serious objection," added Mr. Fish, ". . . is that the United States have treaties with many other governments which would give the latter the right to claim for their productions imported into the United States the same rate of duties as those provided for in the treaty such as you propose. In most instances, therefore, the conclusion of such a treaty with one power would be tantamount to a treaty with all others, and this to a repeal by the treaty-making power of the acts of Congress establishing the duties on articles imported from foreign countries. The constitutionality at least of such a proceeding would be questionable. Under these circumstances I have to express my regret that it would not be advisable for us to conclude the treaty to which you refer."

Mr. Fish, Sec. of State, to Mr. Garcia, Argentine min., May 14, 1869, MS. Notes to Argentine Leg. VI. 71.

This note is cited in Mr. Hurtado, Colombian min., to Mr. Foster, Sec. of State, July 28, 1892, For. Rel. 1894, Appendix I. 477–482.

By virtue of article 2 of the treaty with Sweden of April 3, 1783, and articles 8 and 17 of the treaty with Sweden and Norway of July 24, 1827, the provisions of article 4 of the treaty with Belgium of July 17, 1858, exempting steam vessels of the United States and of Belgium, engaged in regular navigation between their respective countries, from the payment of tonnage and certain other duties, became immediately applicable, mutatis mutandis, to steam navigation between the United States and Sweden and Norway.

Williams, At.-Gen. 1874, 14 Op. 468.

The Attorney-General afterwards held that steam vessels of Bremen, plying regularly between that port and the United States, were entitled to a similar exemption under Art. IX. of the treaty between the United States and the Hanseatic Republics of Dec. 20, 1827, in connection with Arts. VIII. and XVII. of the treaty with Belgium. (Williams, At. Gen., 1875, 14 Op. 530.)

Congress, by a joint resolution of June 17, 1874, requested notice to be given to Belgium of the termination of the treaty of 1858, pursuant to its 17th article. Such notice was given July 1, 1874, with an explanation of the reasons therefor.

"In complying with the official instruction in my No. 176, you may verbally assure the minister for foreign affairs, as I have already assured Mr. Delfosse, that this notice is given only because it has become necessary for this government to abrogate the fourth and thirteenth articles of the treaty. These articles in their practical operation, and under the favored-nation clause in the treaties with the Hanseatic Republics, work a discrimination against our commercial marine, and in favor of foreign vessels, and is giving us considerable trouble. The United States have no desire to disturb the rest of the treaty, and should the Belgian government prefer to agree to the abrogation of those articles, leaving the rest of the treaty to stand, we shall be willing to send you a power to sign a new treaty embracing the remaining articles." (Mr. Fish, Sec. of State, to Mr. Jones, min. to Belgium, No. 177, June 17, 1874, MS. Inst. Belg. II. 64.)

See, also, Mr. Fish, Sec. of State, to Mr. Delfosse, Belg. min., Nov. 9, 1874, For. Rel. 1875, I. 72.

A new treaty was concluded March 8, 1875, excluding the objectionable clauses, but also including some new provisions.

See Notes to Treaties, Treaty Vol. (1776–1887), 1248–1249.

Treaty with Hawaii, 1875.

By Article I. of the reciprocity convention between the United States and the Hawaiian Islands of January 30, 1875, the government of the United States, "in consideration of the rights and privileges granted by His Majesty the King of the Hawaiian Islands," and "as an equivalent therefor," agreed to admit certain articles, including unrefined sugar and molasses, free of duty. By Article II. various things, the produce or manufacture of the United States, were on reciprocal grounds to be admitted free of duty into the Hawaiian Islands. By Article IV. it was agreed that the King of Hawaii should not, so long as the convention remained in force, "lease or otherwise dispose of or create any lien upon any port, harbor, or other territory in his dominions, or grant any special privileges or rights of use therein, to any other power, state or government, nor make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty, hereby secured to the United States."

By an act of Congress of August 15, 1876, 19 Stats. 200, provision was made for the carrying of the convention with Hawaii into effect. By this act the President of the United States was authorized, whenever he should receive satisfactory evidence that the legislature of the Hawaiian Islands had passed laws to give the convention effect, to issue his proclamation declaring that he had such evidence; and it was further enacted that from the date of such proclamation the various articles specified in the convention, being the growth, manufacture, or produce of the Hawaiian Islands, should be introduced into the United States free of duty, so long as the convention remained in force. The proclamation thus authorized was made by the President on September 9, 1876.

When the convention went into effect a duty of 10 per cent ad valorem was levied in Hawaii upon various articles; but by an act of the Hawaiian legislature of September 27, 1876, it was provided that on and after the 9th of the ensuing October the duty should in certain cases be raised to 25 per cent. Among the articles on which the duty was thus increased were some which, when they were produced in the United States, were to be admitted under the convention free of duty.

Against this discrimination both the British and German governments protested. By Article IV. of the treaty between Great Britain and Hawaii, concluded July 10, 1851, it was stipulated that no other or higher duties should be imposed in the one country on the importation of any article the growth, produce, or manufacture of the other country, than should be payable on like articles from any other foreign country. The German opposition was based on general grounds, there being then no commercial treaty between Germany and the Hawaiian Islands.

The question thus raised led to the sending abroad by the Hawaiian government of Mr. H. A. P. Carter, as special envoy, to effect an arrangement with Great Britain and Germany. On October 25, 1877, Lord Derby presented to Mr. Carter a proposal by which it was to be agreed that the duties on British products should not exceed 10 per cent ad valorem, and that whenever this was done the provisions of Article IV. of the treaty of 1851 should "become and remain inoperative," as long as the law should continue in force. With reference to this proposal Lord Derby, in an instruction to the British representative at Honolulu January 25, 1878, said: "In consideration of the peculiar circumstances of the commercial relations of the Hawaiian Islands, as explained by Mr. Carter, and the statements made by you after communication with British merchants interested in the trade with those islands, Her Majesty's government proposed this method of settlement of the points in discussion between the two governments. But it was only as a temporary arrangement, the

reciprocity treaty of 1875 being limited in duration, and only under the peculiar circumstances of the case, that Her Majesty's government could agree to any sort of differential treatment of British goods, and a formal agreement to the reduction of the 25 per cent duties to 10 per cent as a maximum was a necessary condition of any such arrangement." By an act of the Hawaiian legislature approved August 1, 1878, the duties in question were restored to the former rate of 10 per cent ad valorem.

During the discussion with the British government it transpired that Lord Clarendon caused the Hawaiian government to be informed in 1856, with reference to the unratified reciprocity treaty between the United States and Hawaii, signed at Washington in the preceding year, that "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 can not as a matter of right claim the same advantages for her trade under the strict letter of the treaty of 1851."

From London Mr. Carter proceeded to Berlin where, on September 19, 1879, he concluded a commercial treaty. By Article III. of this treaty it was provided that each party should extend to the other in matters of commerce and navigation most-favored-nation treatment, freely if it was freely granted, or for the same compensation if it was conditional; and by Article IV. it was provided that no other or higher duties should be imposed in the one country on the products of the other than were payable on like articles produced in any other foreign country. A separate article was added to the treaty, reading as follows:

"Certain relations of proximity and other considerations having rendered it important to the Hawaiian government to enter into mutual arrangements with the government of the United States of America by a convention concluded at Washington, the 30th day of January, 1875;

"The two High Contracting Parties have agreed that the special advantages granted by said convention to the United States of America, in consideration of equivalent advantages, shall not in any case be invoked in favor of the relations sanctioned between the two High Contracting Parties by the present treaty."

July 1, 1878, before the questions with Great Britain and Germany were definitely settled, Mr. Comly, American minister at Honolulu, addressed a note to the Hawaiian minister of foreign affairs, maintaining the views of the United States concerning the reciprocity treaty and the most-favored-nation clause. Referring to this note, Mr. Evarts, in an instruction to Mr. Comly, August 6, 1878, said: "The note which you addressed to the minister for foreign affairs,

claiming that by the 'parity clause of the ordinary form of treaty,' other nations were not entitled to the same privileges as were conceded to the United States by the reciprocity treaty with Hawaii, is in accordance with the views of this Department."

Report of the Com. on For. Aff. of the Legislative Assembly of Hawaii, June 17, 1878, For. Rel. 1878, 384; Report of special committee of the Hawaiian Assembly, July 26, 1878, For. Rel. 1879, 513, 518; Report of Mr. Carter, special envoy, June 25, 1878, For Rel. 1878, 402; act of Hawaiian Assembly, Aug. 1, 1878, For. Rel. 1879, 512; Gen. Miller, British min., to the Hawaiian min. of for. rel., March 28, 1856, communicating the views of Lord Clarendon, For. Rel. 1879, 516; Mr. Comly, Am. min., to Hawaiian min. of for. aff., July 1, 1878, For. Rel. 1878, 404; Mr. Evarts, Sec. of State, to Mr. Comly, No. 28, Aug. 6, 1878, id. 405.

A suit was brought to recover back from the United States certain duties alleged to have been unlawfully exacted on various importations of unrefined sugar and molasses, the produce and manufacture of the island of St. Croix, a part of the dominions of the King of Denmark. The claim was decided against the plaintiff (21 Blatchford, 211), and from this decision an appeal was taken to the Supreme Court.

The claim for free entry was based on the convention between the United States and Denmark of April 26, 1826, and the convention between the United States and the Hawaiian Islands concluded January 30, 1875. By Article I. of the former convention the contracting parties "engage, mutually, not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession were freely made, or upon allowing the same compensation, if the concession were conditional." By Article IV. of the same convention it was agreed that no higher or other duties should be imposed in the one country on articles the produce or manufacture of the other country than should be payable on like articles being the produce or manufacture of any other foreign country.

It was held (1) that the duties were properly collected, if the act under which they were levied was not controlled by the treaty with Denmark after the ratification of the treaty with the Hawaiian Islands; (2) that the act was not so controlled, since the stipulations of the treaty with Denmark, even if conceded to be self-executing as a proviso or exception to the general tariff law, did not cover "concessions like those made to the Hawaiian Islands for a valuable consideration;" (3) that the stipulations in question, while they obliged both countries to avoid hostile or discriminative legislation, were "not intended to interfere with special arrangements with other

countries founded upon a concession of special privileges;" (4) that, if the mutual exemption of certain articles from duty in the treaty between the United States and Hawaii was to be deemed a "particular favor" in respect of commerce and navigation within Article I. of the Danish treaty, it could be claimed by Denmark only upon like compensation to the United States; (5) that it did not appear that Denmark had ever objected to the imposition of duties on goods from her dominions because of the exemption from duty of similar goods imported from the Hawaiian Islands into the United States under the reciprocity convention.

The judgment of the court below rejecting the claim of the plaintiff was affirmed.

Bartram *v.* Robertson (1887), 122 U. S. 116.

See Whitney *v.* Robertson, 21 Fed. Rep. 566.

The most-favored-nation clause in the treaty with Denmark does not entitle a Danish ship to claim exemption from the head money exacted for immigrants under the act of Aug. 3, 1882, 22 Stat. 214. (Thingvalla Line *v.* United States, 24 Ct. Cl. 255.)

Views expressed, 1884.

"While this government can not agree with that of Mexico, that under the provisions of the most-favored-nation clause, another nation becomes entitled to privileges granted by a reciprocity treaty, still as there are various considerations affecting the question as now presented, I content myself with a courteous denial that the most-favored-nation clause applies to reciprocity treaties, without now entering into any argument on the subject."

Mr. Frelinghuysen, Sec. of State, to Mr. Romero, Mex. min., May 2, 1884, MS. Notes to Mex. IX. 1.

"The English contention has hitherto been, under the most-favored-nation clause of the treaties, that it is absolute, and that even when Japan may bargain with any power to give it a favor for an equivalent, the like favor must be granted to England without equivalent.

"The Japanese contention is the reverse of this, being that if a favor for a specific condition be stipulated with any one nation, no other may enjoy the favor except upon identical or equivalent conditions.

"The theory on which this government views the question is akin to that of Japan. For example, the United States have just concluded a commercial treaty with Mexico by which each country especially favors the other by putting on its free list certain dutiable products. Under the favored-nation clause of our treaties with other nations we are not bound to give their products the benefit of our free list, even though such country may not impose any duty on the articles which Mexico has free-listed in our favor; but we would be willing to stipulate to give a third power the favor we give Mexico in exchange for some equivalent favor not general as towards the rest of the world.

"The British contention and our own are in manifest conflict. How far the German proposition may cover our ground depends on the inter-

pretation to be given to the phrase 'provisions of execution' (Ausführungs-bestimmungen). By this, as appears from the instruction of April 4, 1884, is to be understood 'provisions of a purely administrative character, or such as relate to custom-house business.'" (Mr. Frelinghuysen, Sec. of State, to Mr. Bingham, min. to Japan, June 11, 1884, MS. Inst. Japan, III. 253.)

"Mr. Reed's No. 263, of the 10th instant, informs the Department of an interpellation made in the Senate by the Marquis de Muros in regard to the prospect of negotiations between Spain and the United States for a commercial treaty, and the response of the minister of state thereto. It appears that Señor Elduayen deems a specially favoring treaty impracticable at present in view not only of the distressing condition of the Antillean finances, but because he holds that other nations having the most favored [nation] clause in their treaties with Spain would be entitled to all the benefits of any special arrangement with the United States.

The minister's statements can not have failed to impress you with some surprise. You are aware that this government has always assumed that Spain held the same view as ourselves respecting the effect of a reciprocity treaty in connection with the most-favored-nation clause in other treaties. This country has that clause in many of its compacts with foreign states, but it has never occurred to them or to us to suppose that we were thereby constrained to grant to those treaty powers without equivalent the privileges which we had by special engagements stipulated to concede to countries like Hawaii and Canada, for a valuable consideration." (Mr. Frelinghuysen, Sec. of State, to Mr. Foster, min. to Spain, June 28, 1884, MS. Inst. Spain, XIX. 601.)

See, also, Mr. Rives, Assist. Sec. of State, to Mr. Fay, Oct. 5, 1888, 170 MS. Dom. Let. 157; Mr. Bayard, Sec. of State, to Mr. Walker, No. 78, April 28, 1888, For. Rel. 1888, I. 422–423.

"I have the honor to acknowledge the receipt of your note of the 10th ultimo.

Discussions with Great Britain, 1884–1885.

"You therein indicate the view of Her Majesty's government that in consequence of recent treaties or of treaties which may be negotiated, trade carried on between the United States and the Sandwich Islands, Mexico, Central America, the Spanish West Indies, and San Domingo has been, or is likely to be, placed on a more favored footing than trade between the United States and the British West Indies.

"Your government thereupon points out that the United States as a matter of fact enjoy complete most-favored-nation treatment in those colonies, and accordingly asks 'that complete most-favored-nation treatment shall likewise be extended in the United States to articles the growth, produce, or manufacture of the British West India colonies.'

"To this end Lord Granville instructs you to propose a convention or declaration whereby the most-favored-nation treatment stipulated in Article II. of the treaty of the 3rd July, 1815, shall

be made applicable to the trade between the United States and those colonies. . . .

"Lord Granville's proposition does not appear to contemplate the concession to the United States of any special privileges for goods or ships like those which, in the view of this government, are necessary to any such agreement. For instance, the British West Indies impose customs and export duties, similar to those which in negotiating with the countries named by you, the United States would require to be removed or essentially modified by them as a condition of placing their staples on our free list.

"It is clear that the second article of the treaty of 1815 has not authorized, and could not authorize, Great Britain to ask for the products or shipping of the United Kingdom, favors identical with or equivalent to those which Spanish-American and West India colonial products and shipping may receive in the ports of the United States by reason of special reciprocity treaties. The formal extension of this article to the British West India colonies, therefore, would not give them other rights than those now enjoyed by the United Kingdom. Those colonies possess, as a matter of fact, and without express stipulation, the complete most-favored-nation treatment now accorded to the mother country. British vessels and their cargoes from any part of the world are admitted into ports of the United States on the same terms as to duties, imposts, and charges, as those of the United States.

"It may, in view of the limited formulation of Lord Granville's proposition, be premature to assume that his lordship contemplates the negotiation of a reciprocity treaty which shall secure for the trade of the West India colonies with the United States special favors, although the negotiation of the Canadian reciprocity treaty of 1854 would show that this class of international engagements, applying only to particular colonies, is not in violation of the policy of Her Majesty's government."

Mr. Frelinghuysen, Sec. of State, to Mr. West, British min., July 16, 1884. Blue Book, Commercial No. 4 (1885), 4–5; MS. Notes to Great Britain, XIX. 514.

December 4, 1884, Mr. Frelinghuysen submitted to Mr. West a project of a convention for commercial reciprocity between the United States and the British West Indies. Of this project Art. XIII. reads as follows:

"The Contracting Parties, however, mutually agree that the conditional privileges which this convention expressly reserves and confines to the goods and vessels of the respective countries under the national flags are not, under the operation of favored-nation clauses in existing treaties which either of them may have concluded with

other countries, to be deemed as extending to the goods or vessels of such other countries without equivalent consideration on the part of such other countries; and if any foreign country should claim, under existing favored-nation engagements, to share in the benefits of the commercial intercourse which this convention creates as between the United States and the several British colonies aforesaid, and should either party deem such claim to be allowable, it is hereby engaged that the party affected thereby shall have the right to denounce the present convention under Article XII. hereof; or else that any such treaty with any foreign country, so far as it may be contrary to the terms of this convention, may be denounced and terminated, so soon as the terms of such treaty may permit, in which case the alternative right of denunciation of the present convention shall not be exercised."

Mr. Frelinghuysen, Sec. of State, to Mr. West, British min., Dec. 4, 1884, Blue Book, Commercial No. 4 (1885), 10, 17.

"Article XIII. expressly provides that the privileges conceded by the treaty are not to be granted by either party to other nations by reason of the most-favored-nation clause existing in any treaty with such nations, unless any such nation give what, in the opinion of the other party is an equivalent. But her Majesty's government are decidedly of opinion that the exception to most-favored-nation treatment thus contemplated would be an infraction of the most-favored-nation clause as hitherto interpreted in the law of nations. To take an example, such a clause governs the trade between the British West Indies and Belgium. Her Majesty's government can not conceive how the claim of Belgium to have her imports, if she had any, into those islands, placed on the same footing as the similar imports from the United States when any favor is granted to these latter, can be rejected by alleging a subsequent agreement come to between Great Britain and the United States, to which Belgium had not been a party.

"The interpretation of the most-favored-nation clause involved in the United States' proposals is, that concessions granted conditionally and for a consideration can not be claimed under it. From this interpretation Her Majesty's government entirely and emphatically dissent. The most-favored-nation clause has now become the most valuable part of the system of commercial treaties, and exists between nearly all the nations of the earth. It leads more than any other stipulation to simplicity of tariffs and to ever increased freedom of trade; while the system now proposed would lead countries to seek exclusive markets and would thus fetter instead of liberating trade. Its effect has been, with few exceptions, that any given article is taxed in each country at practically one rate only. Thus in France,

although there exists a general tariff and although France has by separate treaties with various countries engaged to reduce the duties of the general tariff on various articles, the list of which varies in each treaty, yet, owing to the operation of the most-favored-nation clause existing in each of those treaties, the goods of all nations having such an article in their treaties are taxed in accordance with the 'conventional' tariff, which accordingly becomes the combination of all the lowest duties on each article appearing in the separate treaties. But should the system contemplated by the United States be widely adopted, there will be a return to the old and exceedingly inconvenient system under which the same article in the same country would pay different duties varying according to its country of origin, the nationality of the importing ship, and, perhaps at some future time, varying also with the nationality of the importer himself.

"It is, moreover, obvious that the interpretation now put forward would nullify the most-favored-nation clause; for any country, say, France, though bound by the most-favored-nation clause in her treaty with Belgium, might make treaties with any other country involving reductions of duty on both sides, and, by the mere insertion of a statement that these reductions were granted reciprocally and for a consideration, might yet refuse to grant them to Belgium unless the latter granted what France might consider an equivalent.

"Such a system would press most hardly on those countries which had already reformed their tariffs, and had no equivalent concessions to offer, and, therefore, Great Britain, which has reformed her tariff, is most deeply interested in resisting it.

"Her Majesty's government are aware that the draft treaty foresees the possibility of one or the other of the contracting parties being unable or unwilling to withhold the advantages of it from governments that might claim them under the most-favored-nation clause; but they can not admit the soundness of a commercial policy based upon treaties which may at any moment have to be broken either owing to the provisions of other treaties previously made by one of the contracting parties, or owing to the subsequent conclusion of treaties extending the area of the policy in question; and which, if so broken, are naturally liable to be denounced at the will of the other contracting party."

Earl Granville, Sec. of State for For. Aff., to Mr. West, British min., Feb. 12, 1885, Blue Book, Commercial No. 4 (1885), 21–22.

"Following the treaty of 1883 with Mexico, which rested on the basis of a reciprocal exemption from customs duties, other similar treaties were initiated by my predecessor.

"Recognizing the need of less obstructed traffic with Cuba and Porto Rico, and met by the desire of Spain to succor languishing

interests in the Antilles, steps were taken to attain those ends by a treaty of commerce. A similar treaty was afterwards signed by the Dominican Republic. Subsequently overtures were made by Her Britannic Majesty's government for a like mutual extension of commercial intercourse with the British West Indian and South American dependencies; but without result.

"On taking office, I withdrew for reexamination the treaties signed with Spain and Santo Domingo, then pending before the Senate. The result has been to satisfy me of the inexpediency of entering into engagements of this character not covering the entire traffic.

"These treaties contemplated the surrender by the United States of large revenues for inadequate considerations. Upon sugar alone duties were surrendered to an amount far exceeding all the advantages offered in exchange. Even were it intended to relieve our consumers, it was evident that, so long as the exemption but partially covered our importation, such relief would be illusory. To relinquish a revenue so essential seemed highly improvident at a time when new and larger drains upon the Treasury were contemplated. Moreover, embarrassing questions would have arisen under the favored-nation clauses of treaties with other nations.

"As a further objection, it is evident that tariff regulation by treaty diminishes that independent control over its own revenues which is essential for the safety and welfare of any government. Emergency calling for an increase of taxation may at any time arise, and no engagement with a foreign power should exist to hamper the action of the government."

President Cleveland, annual message, Dec. 8, 1885, For. Rel. 1885, xvi.

Discussions, 1886–1895.

"A covenant to give privileges granted to the 'most-favored-nation,' it was held by two of the most distinguished of my predecessors, Mr. Clay and Mr. Edward Livingston, only refers to 'gratuitous privileges' and does not cover privileges granted 'on the condition of a reciprocal advantage.' This distinction has since then been repeatedly confirmed and is accepted by foreign publicists with great unanimity. This quality of reciprocity, which takes a case out of the category of gratuitousness, belongs, I apprehend, to all our concessions to foreign states giving their citizens rights to hold real estate in the United States. Such concessions are based on reciprocity. We give the rights to them because they give the right to us. Hence such privileges can not be claimed under 'the most-favored-nation' clause by foreign governments to which they are not specially conceded."

Mr. Bayard, Sec. of State, to Mr. Miller, June 15, 1886, 160 MS. Dom. Let. 481.

"In its commercial aspects the expediency of an unqualified favored-nation clause is questionable. The tendency is towards its formal qualification, by recognizing in terms (what most nations hold in fact and in practice, whether the condition be expressed in the clause or not) that propinquity and neighborliness may create special and peculiar terms of intercourse not equally open to all the world; or by providing that the most-favored treatment, when based on special or reciprocal concessions, is only to be extended to other powers on like conditions.

"You will doubtless have understood that where the words 'qualified' and 'unqualified' are . . . applied to the most-favored-nation treatment, they are used merely as a convenient distinction between the two forms such a clause generally assumes in treaties, one containing a proviso that any favor granted by one of the contracting parties to a third party shall likewise accrue to the other contracting party, freely if freely given, or for an equivalent if conditional—the other not so amplified. This proviso, when it occurs, is merely explanatory, inserted out of abundant caution. Its absence does not impair the rule of international law that such concessions are only gratuitous (and so transferable) as to third parties when not based on reciprocity or mutually reserved interests as between the contracting parties. This ground has been long and consistently maintained by the United States. It was held by two of my predecessors, Mr. Clay and Mr. Livingston, that a covenant to extend to third parties privileges granted to a most-favored nation only refers to 'gratuitous privileges' and does not cover privileges granted 'on the condition of a reciprocal advantage,' i. e., for a consideration expressed."

Mr. Bayard, Sec. of State, to Mr. Hubbard, July 17, 1886, MS. Inst. Japan, III. 425. See Mr. Bayard to Mr. Manning, Sec. of Treas., Nov. 7, 1885, 157 MS. Dom. Let. 582.

Paragraph 608 of the tariff act of August 27, 1894, which puts salt on the free list, contained the proviso "that if salt is imported from any country whether independent or a dependency which imposes a duty upon salt exported from the United States, then there shall be levied, paid, and collected upon such salt the rate of duty existing prior to the passage of this act."

The German government, notwithstanding the fact that American salt was subject to duty in Germany, claimed that German salt was entitled to free admission into the United States by virtue of the most-favored-nation clauses in the treaty between the United States and Prussia of May 1, 1828. (Articles 5 and 9.)

Mr. Olney, the question having been submitted to him for an opinion, held the claim to be untenable. After pointing out that

the most-favored-nation clause in our treaties with foreign powers had "from the foundation of our government been invariably construed" as permitting "commercial concessions to a country which are not gratuitous, but are in return for equivalent concessions, and to which no other country is entitled except upon rendering the same equivalent," and that this position had been acquiesced in by both Germany and Great Britain, he said:

"The form which the provisions of our recent tariff act relating to salt may have assumed is quite immaterial. It enacts, in substance and effect, that any country admitting American salt free shall have its own salt admitted free here, while any country putting a duty upon American salt shall have its salt dutiable here under the preexisting statute. In other words, the United States concedes 'free salt' to any nation which concedes 'free salt' to the United States. Germany, of course, is entitled to that concession upon returning the same equivalent. But otherwise she is not so entitled, and there is nothing in the 'most-favored-nation clause' which compels the United States to discriminate against other nations and in favor of Germany by granting gratuitously to the latter privileges which it grants to the former only upon the payment of a stipulated price."

Olney, At. Gen., Nov. 13, 1894, 21 Op. 80, 82–83.

The concession in this case, it is to be observed, was not based upon any previous agreement or contract. It was simply embodied in an act of Congress, and was carried into effect by the customs officials of the United States, upon proof from time to time of the existence or nonexistence of the specified condition.

Mr. Olney, in his opinion, quoted the language of Bartram *v.* Robertson, 122 U. S. 116, 120. The question on which Mr. Olney's opinion was given was afterwards diplomatically discussed, without definite conclusion, in For. Rel. 1896, 205–209.

See, further, Mr Olney, Sec. of State, to Sec. of Treas. Nov. 21, 1896, 214 MS. Dom. Let. 111, and Jan. 8, 1897, 215 id. 131.

"Since the receipt of your note of December 9, 1893, in which you request to be informed as to the commercial treatment proposed to be accorded by the United States to Russia in view of the friendly action of your government in extending to the productions of the United States the same treatment as certain French productions enjoy on importations into the Empire, the general subject has been considered in several conversations had between us from time to time during the past year, in which I took occasion to refer to the then pending tariff legislation before Congress as preventing a positive declaration on my part as to the future. Since the adoption of the present tariff act you have made oral request for a formal reply to your note.

"You refer in particular to Articles VI. and XI. of the treaty of 1832 between the United States and Russia, the former of which

stipulated reciprocal exemption from higher import duties than those levied upon the like products of any other country, while the latter engaged that any advantage in commerce or navigation granted then or thereafter by either party to a third country should immediately inure to the other, unconditionally or for equivalent considerations, accordingly as it might be freely or conditionally granted to such third country; and you asked the views of this government touching the scope and intendment of those articles, in the light of the Russo-French commercial treaties, by which France gives to Russia reduced rates on mineral illuminants, crude or refined, and Russia gives to France a scheduled reduction of tariff rates on certain French productions.

"The two articles of the treaty of 1832 relate to different subjects, Article VI. applying specifically to customs duties on imports, while Article XI. relates to matters of commerce and navigation, the word 'commerce' being used in its broad sense of intercourse and—in the case of countries separated by the ocean as ours are—necessarily joined with 'navigation.' The conditional favored-nation clause of Article XI., to which you advert as appearing to relieve Russia of all obligation to apply to the United States the same favors as France enjoys in regard to customs duties, is not expressed in Article VI., which explicitly concerns such duties and can not by construction be extended to that article without merging it in Article XI. and treating it as wholly redundant.

"Your note presents no question of differential treatment concerning commerce and navigation between the two countries under Article XI. Article VI. provides that no higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of Russia, and that no higher or other duties shall be imposed on the importation into the Empire of Russia of any article the produce or manufacture of the United States than are or shall be payable on the like article being the produce or manufacture of any other foreign country. Under the laws of the United States now in operation no higher or other duty is imposed on importations which are produced or manufactured in Russia than is imposed on importations produced or manufactured in any other foreign country, with the single exception of certain products of the Hawaiian Islands named in the treaty of commercial reciprocity concluded between the United States and Hawaii on the 30th day of January, 1875. Under this reciprocal arrangement specified articles, the production or manufacture of the Hawaiian Islands, are admitted into the United States free of duty, and in return the Hawaiian government admits into those islands free of duty a large number of specified products and manufactures of the United States mentioned in Article II. of the treaty.

"It has been uniformly held by this government that other countries with which we have treaties containing the most-favored-nation clause, can derive no benefit from this reciprocal commercial arrangement with Hawaii.

"Aside from this special arrangement, Russian products have all the privileges under the tariff laws of the United States that are accorded to the products of any other country, and Russia enjoys the full benefit of Article VI. of the treaty of 1832.

"Your note further relates to consular charges for certifying the origin and value of goods sent from Russia to the United States. These charges were not prescribed by the act of October 1, 1890, but by the act of June 10, of that year, passed to prevent frauds to the detriment of the public revenue. The latter act prescribes the fee for a consular certificate to an invoice of merchandise exported to the United States as $2.50. This fee is chargeable whether the merchandise is subject to duty or free of duty, and whether it is entered under special provisions or otherwise. In this respect Russian products are treated as favorably as those of any other country."

Mr. Gresham, Sec. of State, to Prince Cantacuzène, Russian min., Feb. 16, 1895, For. Rel. 1895, II. 1119.

"Mr. Gresham, late Secretary of State, was pleased to acknowledge by his note of the 16th of February last that Russia enjoyed all the advantages granted by the aforesaid treaty to other powers, with the exception of those granted by the aforesaid treaty to the Hawaiian Islands. He failed, however, to state the reasons and the nature of said exception, which is in contravention of Articles VI. and XI. of our treaty of 1832, which is still in force.

"I should therefore be very grateful to your excellency if you would, if possible, inform me of the reasons of the exception in question, and at the same time state your views with regard to our treaty of 1832, especially as to whether the most-favored-nation clause (Arts. VI. and XI.) is hereafter to inure to the benefit of Russia, notwithstanding the exception made in favor of the Hawaiian Islands, and whether that exception will not be considered by the Federal government as a precedent authorizing it to grant to other powers, by new treaties, the same advantages that have already been granted to the Hawaiian Islands."

Mr. Somow, Russian chargé d'affaires ad interim, to Mr. Olney, Sec. of State, July 22, 1895, For. Rel. 1895, II. 1120, written "in pursuance of instructions received from the Imperial Government."

"The exceptional advantages granted to the Hawaiian Islands by the tariff laws of the United States, in conformity with the provisions of the reciprocity treaty with Hawaii, have been yielded to

that government in return for certain valuable and exclusive considerations and by reason of the peculiar geographical and commercial relations that exist between the two countries. The course of this government has been consistent in holding that such privileges do not fall within the favored-nation clause of any treaty, the concessions which the United States have extended to these islands having been made for considerations of such a character as not to be included within the stipulations for most-favored treatment contained in the treaties with other powers. From the early days of this government it has been held that a covenant to extend to the most-favored-nation privileges otherwise granted only refers to gratuitous advantages, and does not cover those granted on condition of a reciprocal benefit, and the tariff reductions on Hawaiian products have uniformly been considered as falling within this rule. The Hawaiian government has held the same position in the interpretation of its treaties with other powers.

"The views of the Department with regard to the meaning of the most-favored-nation clauses in Articles VI. and XI. of the treaty of 1832 were fully expressed in the note to Prince Cantacuzène of February 16 last.

"As the mutual concessions under the reciprocity treaty between the United States and the Hawaiian Islands are of an exceptional nature, there does not appear to be any present condition leading to a discussion of the question whether the negotiation of this convention has established a precedent to be followed with other countries."

Mr. Adee, acting Sec. of State, to Mr. Somow, Russian chargé d'affaires ad interim, July 30, 1895, For. Rel. 1895, II. 1121.

Discussions under tariff of 1897.

By section 3 of the tariff act of July 24, 1897, the President was authorized to conclude reciprocal agreements within certain limits, and put them into force by proclamation.

By section 4 of the same act, he was authorized to enter into yet other arrangements, which were, however, to be subject to the advice and consent of the Senate.

As to the execution of these powers, see President McKinley, annual messages, Dec. 6, 1897; Dec. 5, 1898; Dec. 5, 1899; Dec. 3, 1900; President Roosevelt, annual messages, Dec. 3, 1901; Dec. 2, 1902.

"This Department, after the appointment of Mr. Kasson as special plenipotentiary for negotiating conventions of reciprocity under the recent tariff act, referred to him for consideration your No. 359, dated June 15, 1897, from which I quote the following observation:

"'While any arrangement might be carried through here contemplating a general tariff reduction on *articles;* the most-favored-nation

clause in the treaties between this country and Europe would be a bar to a plan specifically specifying concessions to a *country*.'

"The plenipotentiary is of opinion, and this Department gives its sanction to the position, that the foregoing construction of the most favored-nation clause is erroneous; that it does not control the right of the nations adopting it to make exclusive compensatory agreements in just reciprocity with other nations.

"The clauses referred to are expressed in various forms of language in the many treaties which contain them; but the intent is the same in all the conventions between civilized countries, whether the favored-nation clause stands alone, or is qualified by the other customary clause respecting particular favors. That intent is to secure for the contracting party equality with all competing nations in the conditions of access to the markets of the other. This meaning is usually expressed substantially in the language of Articles I. and IV. of the treaty (1826) between the United States and Denmark; Articles V. and IX. of the treaty (1828) between the United States and Prussia; Articles VI. and XXIV. of the treaty (1871) between the United States and Italy; and Articles III. and IV. of the treaty (1853) between the United States and the Argentine Confederation. Assuming that the 'favored-nation' clauses of the conventions between the Argentine Republic and the European nations, to which you refer, are of corresponding significance, the rule of interpretation adopted by this Department will equally apply to them.

"It is clearly evident that the object sought in all the varying forms of expression is equality of international treatment, protection against the willful preference of the commercial interests of one nation over another. But the allowance of the same privileges and the same sacrifice of revenue duties, to a nation which makes no compensation, that had been conceded to another nation for an adequate compensation, instead of maintaining destroys that equality of market privileges which the 'most-favored-nation' clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price. It would thus become the source of international inequality and provoke international hostility.

"The neighborhood of nations, their border interests, their differences of climate, soil, and production, their respective capacity for manufacture, their widely different demands for consumption, the magnitude of the reciprocal markets, are so many conditions which require special treatment. No general tariff can satisfy such demands. It would require a certainty of language which excludes the possibility of doubt to justify the opinion that the government of any commercial nation had annulled its natural right to meet these special conditions by compensatory concessions, or held the right only on condition of extending the same to a nation which had no

compensation to offer. The fact that such concessions if made would inevitably inure to the equal benefit of a third competitor would often destroy the motive for, as well as the value of, such reciprocal concessions.

"But instead of such certainty of expression, one of the articles in each of the treaties referred to contains a distinct recognition that special and compensatory commercial arrangements may be made, notwithstanding the 'most-favored-nation' clause; and provides that in such cases the favors granted shall be enjoyed by the party claiming favored-nation treatment, gratuitously, if so granted, or for equivalent compensation if granted for a price.

"What will be an equivalent compensation is to be honorably determined by the governments concerned. So many considerations have necessarily entered into such special concessionary agreements, that no universal rule can be applied. The price has often been special privileges in the market of the other for certain manufactures or products of the contracting country; but it may also be a port, a bay, or an island, or a protectorate, as well as an expanded market, or a privileged export trade. It may be anything within the range of the treaty-making power.

"It is not to be supposed that a right of such importance in many national emergencies has been abandoned by the Argentine Republic; or that it is only held on condition of the repeated and gratuitous payment to other countries of the same consideration stipulated in reciprocity. The right of the other nations to enjoy the same special concessions depends on their ability to offer an equivalent compensation. When they do this the favored-nation clause is rightly invoked.

"Such is the construction of the treaty clauses in question which the government of the United States adopts in carrying out the late provisions of law for reciprocal commercial conventions with other States.

"It rests not only upon sound reason, but upon continuous precedent. Mr. John Quincy Adams declared the same view in 1817 in respect to France; that the 'most-favored-nation clause only covered gratuitous favors, and did not touch concessions for equivalents expressed or implied.' President Monroe in his annual message of 1821, speaking of the most-favored nation clause appealed to by France, said: 'If this should be so construed as that France should enjoy, of right, and without paying the equivalent, all the advantages of such conditions as might be allowed to other powers in return for important concessions made by them, then the whole character of the stipulations would be changed. She would not only be placed on the footing of the most favored nation, but on a footing held by no other nation.' Mr. Gallatin in 1823 in a note to the

Viscount de Chateaubriand, took the same position, and said that 'when not otherwise defined the right of the most-favored-nation treatment is that, and can only be that, of being entitled to that treatment gratuitously if such nation enjoys it gratuitously, and on paying the same equivalent if it had been granted in consideration of an equivalent.' Mr. Livingston, Secretary of State under President Jackson (1832), reaffirmed this position. Mr. Frelinghuysen, Secretary of State under President Arthur (1884), instructing the United States minister in Japan, approved the like position when taken by the Japanese Government, and said 'that if a favor for a specific condition be stipulated with any one nation, no other may enjoy the favor except upon identical or equivalent conditions.' In another instruction (to our minister in Spain) speaking of the 'most-favored-nation' clause, he wrote: 'This country has that clause in many of its compacts with foreign states, but it has never occurred to them or to us to suppose that we were thereby constrained to grant to those treaty powers without equivalent the privileges which we had by special engagements stipulated to concede to countries like Hawaii and Canada for a valuable consideration.' In the case of our reciprocal treaty with Hawaii, both Great Britain and Germany acquiesced in the construction.

"The question here discussed was presented in 1853 for the consideration of the Department of Justice, Caleb Cushing being then Attorney-General. That eminent lawyer, in the course of his opinion, commenting on the favored-nation clauses of our treaty with Denmark (1836), said that such clauses 'are not applicable to advantages growing out of treaties containing various articles of reciprocal pact and stipulation; for such advantages are purchased upon consideration, upon mutual and correlative engagements . . . with perfect reciprocal obligation in terms and manner as to the things to be done or suffered. Such treaty benefits are not favors, boons or concessions. These expressions apply only to things proceeding from the mere will or pleasure of the state granting them, in matters within its own sole jurisdiction, and which the other party, to whom they are proffered, may or may not, in its own good pleasure, accept.'

"The Supreme Court of the United States in 1887 had this precise question before it upon a claim made by importers of Danish sugar. The claimants asserted their right under the most-favored-nation clause of the United States treaty with Denmark (1826, renewed 1858) to the admission of their sugar imported from the Danish island of St. Croix free of duty, because the United States by a recent convention of reciprocity with the Kingdom of Hawaii had conceded to the sugar of Hawaiian production that privilege.

This claim required a construction by the supreme tribunal of the most favored nation clause of our treaty with Denmark.

"The decision of the court is stated in the following language:

"'Our conclusion is that the treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions.' (Bertram et al. *vs.* Robertson, collector of the port of New York, U. S. Sup. Ct. Rep. vol. 122.)

"The construction above given to the clause in question has been so long continued, and so generally acquiesced in by other nations, that it may now be fairly considered as a part of international law.

"Since this memorandum of instruction was prepared, your telegraphic despatch of January 6th has been received. It is supposed from your statement touching the amendment of section 20 of their tariff law, that the Argentine government has asked for authority to make special agreements in reciprocity with other nations, upon the assumption that they are not controlled by the favored-nation clause. If this is a correct interpretation of their new legislation, the question you have presented will not probably be raised by that government. Should it be raised, however, as an objection to a reciprocal arrangement with the United States, you will be guided by this instruction; and may in that case, if desired, read it to the Argentine minister, or give him a copy."

Mr. Sherman, Sec. of State, to Mr. Buchanan, min. to Arg. Rep., No. 303, Jan. 11, 1898, and No. 336, April 9, 1898, MS. Inst. Arg. Rep. XVII. 306, 337.

Annexed to instruction No. 303 was the following (which, however, does not appear to have been transcribed into the record book):

"*Extract from 'Correspondence Relating to Sugar Bounties,' presented to both Houses of Parliament by command of Her Majesty, May, 1898.*

"III. Export Bounties and the Most-Favoured Clause.

"The question raised in connection with the interpretation of the most-favoured-nation clause in its bearing on the importation of sugar receiving an export bounty would appear on examination to strengthen rather than weaken its force, and certainly not to encourage any laxity in its interpretation.

"The effect of an export bounty on sugar is to protect it in the market to which it is exported, that is, to put it in the same position as if a duty equivalent to the bounty were levied on all other sugar in that market receiving no bounty.

"A country which gave no bounty on exportation might justly complain that its rights under the most-favoured-nation clause were destroyed by the admission of sugar receiving a bounty on the same terms as sugar receiving no bounty.

"Such a complaint was actually made by one of the delegates at the last international conference.

"Moreover, the principle was laid down in the debate in the House of Commons in 1878 on the Contagious Diseases (Animals) Bill that

equality of right under the most-favoured-nation clause meant identity of treatment under similar circumstances. In order to carry out that principle all countries were subjected to conditions of compulsory slaughter, with power to the Privy Council to exempt any countries upon being satisfied as to freedom from disease.

"The case of bounties on sugar appears to be a stronger one because the country which gives the bounty deliberately destroys the equality which it is the object of the most-favoured-nation clause to establish.

"Professor Sheldon Amos and Mr. W. P. S. Shepheard, barrister-at-law, gave, in the year 1879, a written opinion on the subject, in which the whole question is carefully examined.

"They concluded by saying:

"'Therefore we are of opinion that imports of sugar into this country may, without contravening the favoured-nation clauses of existing Commercial Treaties, be distinguished as to countries of origin wherein bounties on export are or are not obtainable, and a countervailing duty levied on sugar imported from countries where export bounties are obtainable whilst sugar from all other countries is admitted free.'

"They point out that this is consistent with the fact that the Sugar Convention of 1864 contained an Article admitting the principle of a surtax on sugar receiving a bounty, although most-favoured-nation treaties were in existence or were entered into during the period that that Convention was in force.

"It is contended not only that it is inconsistent with the spirit of the most-favoured-nation clause to admit bounty-fed sugar, but also that the clause demands that such unequal treatment should not be permitted.

"The editor of the 'Spectator' says (21st August, 1880):

"'Clearly we ought not to be obliged, by granting a favoured-nation-clause, to treat nations alike under totally unlike circumstances, for that really means treating them not equally, but unequally. And we heartily agree that if the other difficulties of the case can be got over, we ought, in renewing our Commercial Treaties with the various countries of Europe, to provide against any construction of the favoured-nation clause so harsh that it shall compel us to deal unequally with different nations under the name of dealing equally with all.'"

Similar instructions to those sent by Mr. Sherman to the American minister at Buenos Ayres were sent to the diplomatic representatives of the United States in Germany, Italy, and Santo Domingo.

See, as to the reciprocity negotiations, "Information respecting Reciprocity and the Existing Treaties, by Hon. John A. Kasson, of Iowa, late Special Commissioner Plenipotentiary, etc., etc., Washington, Government Printing Office, 1901."

As to the commercial agreement with France, concluded May 28, 1898, and the rate of duty to be collected thereunder on "brandies, or other spirits manufactured or distilled from grain or other materials," see For. Rel. 1898, 292–306.

That the benefits of the French arrangement were not to be extended to Belgium, see Mr. Moore, Act. Sec. of State, to Count Lichtervelde, Sept. 2, 1898, MS. Notes to Belg. VIII. 236.

Case of the Swiss treaty.

June 29, 1898, Mr. Pioda, Swiss minister at Washington, under instructions of his government, demanded for Swiss imports in the United States the same concessions as were granted to French imports under the reciprocity agreement between the United States and France of the 30th of the preceding month, declaring that his government would consider a refusal as a violation of articles 8, 9, 10, and 12 of the treaty of November 25, 1850, which provided for most-favored-nation treatment in terms "absolutely unlimited."

Article 8 provided that in all that related to "the importation, exportation, and transit of their respective products," the contracting parties should "treat each other, reciprocally, as the most-favored-nation, union of nations, state, or society, as is explained in the following articles," namely, articles 9, 10, 11, and 12.

Article 9 stipulated that neither contracting party should "impose any higher or other duties upon the importation, exportation, or transit of the natural or industrial products of the other, than are or shall be payable upon the like articles, being the produce of any other country."

Article 10 provided that neither party should "grant any favor in commerce to any nation, union of nations, state, or society, which shall not immediately be enjoyed by the other party."

Article 11 reserved to each party the liberty to determine the manner of establishing the origin of its own products in case of the imposition of a differential duty.

Article 12 among its stipulations included the following: "Swiss merchandise arriving under the flag of the United States, or under that of one of the nations most favored by them, shall pay the same duties as the merchandise of such nation. . . . The United States consent to extend to Swiss products, arriving or shipped under their flag, the advantages which are or shall be enjoyed by the products of the most-favored nation arriving or shipped under the same flag."

In reply to Mr. Pioda's demand, the opinion was expressed, July 29, 1898, that these various provisions constituted simply a guaranty of most-favored-nation treatment in matters of commerce, and that in accordance with the principle maintained by the United States that "a reciprocity treaty is a bargain and not a favor," the demand in question was not well founded.

Mr. Pioda, Sept. 26, 1898, renewed his demand, maintaining:

1. That it was valid under article 8. "Every reciprocity treaty," said Mr. Pioda, "is evidently a 'bargain' between the two parties, but the reductions which the United States have granted to France certainly constitute a 'favor' to the latter country, just as the concessions which she has made, by way of compensation, constitute a favor to the United States."

2. That the grounds of the demand were clearly justified by articles 9, 10, and 11, and special attention was called to the precision with which article 10 stipulated for the "immediate" extension to one of the contracting parties of any favor granted by the other to a third nation.

3. That the demand was also valid under article 12; that, as France was the most-favored nation as regarded spirits and other articles comprised in the reciprocity agreement, similar Swiss goods were under that article exempt from higher duties than spirits and other productions of French origin.

4. That the validity of the demand was also proved by the declarations of the American plenipotentiary who negotiated the treaty. In various treaties of the United States, some concluded earlier and some later than 1850, it was provided that the favor, if given gratuitously, should be gratuitously conceded, but if conditional, should be conceded only for an equivalent compensation. No such limitation was found in the treaty with Switzerland, and its absence was intentional. The American plenipotentiary, Mr. Dudley Mann, proposed such a clause, but the Swiss government objected to it, and Mr. Mann abandoned it "out of friendly consideration for Switzerland." It was evidently feared that such a clause would open the door to a discriminating and even prohibitory system of treatment, to prevent which the Swiss government "demanded and obtained a full and unlimited guarantee of the usage of the most-favored nation." In fact, Mr. Mann further proposed, as the records showed, to add to article 10 the following clause: "The United States pledge themselves the more readily to this stipulation inasmuch as the Swiss Confederation has inserted in its constitution certain liberal provisions which specially favor the productions of the United States." This proposal, although it was withdrawn upon the objection of the Swiss negotiators, confirmed the understanding which was otherwise disclosed.

The government of the United States, while affirming the correctness in principle of the construction which it had previously given to the terms of the treaty, took into consideration the understanding of the negotiators, with reference to which it also appeared that the Swiss government had ratified the treaty. It was found upon an examination of the original correspondence that the President of the United States was advised of the same understanding, and that the dispatch in which it was expressed was communicated to the Senate when the treaty was submitted for its approval. It was therefore declared by the United States that "both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect." But, as this admission obliged the government to regard articles 8

to 12, inclusive, "as henceforth constituting an exception to the otherwise uniform policy of the United States," which had been "to treat the commerce of all friendly nations with equal fairness, giving exceptional 'favors' to none," it was stated that unless some practicable arrangement could be agreed upon it might be necessary for the United States to give notice of the termination of the articles in question.

Meanwhile the customs officials of the United States were directed to impose on importations from Switzerland the same rates of duty as were imposed on similar French products under the agreement of May 30, 1898.

This action was followed by complaints from other governments that exceptional favoritism was shown to Switzerland.

March 23, 1899, the minister of the United States at Berne, under instructions, presented to the President of the Swiss Confederation the requisite notice of the intention of the United States to arrest the operation of the convention of November 25, 1850, so far as the articles in question were concerned, in accordance with article 18 thereof, which provided for a year's notice.

The Federal Council decided to accept the denunciation of the articles, which, in conformity with article 18 of the treaty and the notice given thereunder, remained in force till March 23, 1900.

Mr. Pioda, Swiss min., to Mr. Day, Sec. of State, June 29, 1898, For. Rel. 1899, 740; Mr. Day to Mr. Pioda, July 29, 1898, id. 740–741; Mr. Pioda to Mr. Adee, Sec. of State, Sept. 26, 1898, id. 742–744; Mr. Hay, Sec. of State, to Mr. Pioda, Nov. 21, 1898, id. 746–748; Mr. Hay to Mr. Deucher, chargé, Dec. 1898, id. 748.

As to the notice of termination of the articles, see For. Rel. 1899, 753–757.

As to the German claim of the treatment accorded to Switzerland, prior to the denunciation of the articles, see Mr. Hay, Sec. of State, to Mr. White, amb. to Germany, No. 778, Feb. 28, 1899, MS. Inst. Germany, XX. 653.

As to the case of the British West Indies, see Mr. Kasson, special plenipotentiary, to Sec. of Treas., Jan. 18, 1901, 250 MS. Dom. Let. 398.

Views of Germany.

In a debate in the Reichstag, Feb. 11, 1899, Count Kanitz, reviewing the commercial relations between the United States and Germany, referred to the denial to Germany of the benefits of the commercial convention between the United States and France as an absolute breach of the most-favored-nation clause in the treaty of 1828 with Prussia. He proposed that Germany, instead of giving notice of an intention to terminate the treaty, give to it the American interpretation and apply to American products the higher rates of duty prescribed in the general tariff laws.

Minister von Bülow, imperial secretary of state for foreign affairs, replied "that negotiations were being conducted with the United

States government in regard to commercial matters at the present time, and that consequently, in accordance with diplomatic usage, he was not in a position to discuss them. He wanted the house to know, however, the spirit (geist) in which these negotiations were being conducted. Germany's commercial relations with the United States rest upon the treaty between the United States and Prussia of 1828, and the similar treaty with the Hanse Towns of about the same date. He discussed in detail Articles V. and IX. of this treaty, explaining the different interpretations given to them by the two governments concerned. He referred to the treatment of German sugar under the Dingley tariff and stated that German representations in the matter had been so far successful that the indirect export premiums upon sugar exported from other countries were now considered by the American customs officials. He then referred to the question of tonnage dues, reciting the action of our government in 1888 and the reversal of the same in 1896, adding that there appeared to be some probability that this question would be regulated by legislation in the United States. He further stated that the German government had repeatedly informed the American government of its views in these matters, in regard to the refusal to accord to Germany the benefits of the recent agreement with France and the action of the American customs officials in regard to exports from Germany. In his opinion it is probable, in view of the increasing exportation of American goods to Germany, that the friendly discussion now going on will have a satisfactory result, and consequently he expressed the hope that the house would show that it had confidence in the government."

Mr. White, amb. to Germany, to Mr. Hay, Sec. of State, Feb. 13, 1899, For. Rel. 1899, 297.

See Mr. Hay, Sec. of State, to Mr. White, amb. to Germany, Feb. 28, 1899, For. Rel. 1899, 299; Mr. White, amb. to Germany, to Mr. Hay, Sec. of State, March 24, 1899, For. Rel. 1899, 299.

"Reduced to a few words, it appears that Germany's griveances against the United States arise, practically, from the prevailing difference of interpretation of the meaning of the most-favored-nation clause in the treaty with Prussia of 1828. Count Posadowsky referred to this treaty and the commercial treaties with the Hanse Towns of about the same date (mentioning casually that almost all German exportations to America went by way of these 'Towns,') as being recognized by Germany as fully in force. He said that practically the question was this: Either Germany should enjoy all the commercial benefits accorded by the United States to any third country, whether under reciprocity treaties or not, and unrestricted most-favored-nation treatment should prevail, or it must be con-

sidered that restricted ('beschränkte') most-favored-nation treatment should prevail, and that Germany had made a mistake in according to us without concession the benefits of the seven Caprivian treaties of commerce, which were based upon reciprocal concessions. He considered that the most-favored-nation clause had been violated by us when we first put a differential duty upon sugar exported from bounty-paying countries, that it had been further violated when this duty was made compensatory, and still further when we declined to accord to Germany gratuitously the benefits of the recent commercial convention with France, which we have accorded to Switzerland. The value of this last to us he estimated as only about $200,000, while it touched Germany in a particularly sensitive place, as she felt that her 'right' had not been recognized.

"Count Posadowsky was much interested in learning that American products imported into Cuba and Porto Rico and Cuban and Porto Rican products imported into the United States were treated in the same way as imports from any other country, and agreed with Mr. Porter in the hope that better times in America would increase the importation of German products. The practical question, however, he said, was whether Germany should continue in her understanding of the meaning of most-favored-nation treatment, or should adopt that of the United States and decline for the future to accord us the advantages of the Caprivian commercial treaties."

Mr. White, amb. to Germany, to Mr. Hay, Sec. of State, March 27, 1899, For. Rel. 1899, 299.

"Your dispatch No. 804, dated March 27, 1899, communicates the views of Count Pasadowsky, minister of the interior, respecting the interpretation of the most-favored-nation clauses of our treaty. It may be convenient to you to recall a previous occasion when the subject was discussed on the part of Germany.

"The question appears to have arisen between Germany and Hawaii in 1878, as a result of the reciprocity convention of 1875 between the United States and Hawaii. The Hawaiian special envoy to Berlin, Mr. Carter, discussed it at that time, and reported to his government that 'an article was framed by which it was agreed that the special advantages granted to the government of the United States in consideration of equivalent advantages should not in any case be invoked in favor of Germany.' (See Foreign Relations of United States, 1878, p. 403; also pp. 382 and 405.)

"While we do not deny the right of Germany to adopt the same construction which controls the action of this government, it should be remembered that whatever construction is adopted it must be applied uniformly to all governments whose interests are protected by the like treaty clauses. Otherwise Article XXVI. of the conven-

tion would be violated. If the compensatory privileges should be extended to any third nation, which has given no special compensation for them, it is evident that as to that nation the grant would be gratuitous, and, by the express provision of Article XXVI., 'shall immediately become common to the other party, freely.'

"This point should not be overlooked in any serious discussion of the subject on the part of your embassy. It is evident that Germany can not apply one construction in her relations with this government and another in her relations with an European government."

Mr. Hay, Sec. of State, to Mr. White, amb. to Germany, April 8, 1899, For. Rel. 1899, 301.

The passage above quoted from Mr. Carter imperfectly conveys the purport of the article of the German-Hawaiian treaty, which declared that "*certain relations of proximity and other considerations having rendered it important to the Hawaiian government to enter into mutual arrangements with the government of the United States,*" it was agreed that the advantages granted to the United States by the convention of Jan. 30, 1875, in consideration of equivalent advantages, it should not be invoked in favor of Germany.

(2) GEOGRAPHICAL DISCRIMINATIONS.

§ 766.

"On the 26th of June, 1884, the President approved 'An act to remove certain burdens on the American merchant marine and encourage the American foreign-carrying trade, and for other purposes.' This statute contained thirty sections, relating to inspection of vessels, shipping and discharge of seamen, the liabilities of shipowners, and sundry other kindred topics. Section 14 alone related to tonnage dues, but it provided a new system for levying them which radically differed from that formerly in force.

"Section 14 provided that in lieu of the uniform tax of 30 cents a ton per annum previously imposed by law, a duty of 3 cents a ton, not to exceed in the aggregate 15 cents a ton in any one year, should be imposed at each entry on all vessels which should be entered in any port of the United States from any foreign port or place in North America, Central America, the West Indies, the Bahamas, the Bermudas, the Hawaiian Islands, or Newfoundland; and that a duty of 6 cents a ton, not to exceed the old rate of 30 cents a ton per annum, should be imposed at each entry on all vessels entered in the United States from any other foreign ports or places.

"It was, however, provided that the President should suspend the collection of so much of the 3–15 cents duty on vessels entered from any port in Canada, Newfoundland, the Bahamas, the Bermudas, the West Indies, Mexico, and Central America down to and including

Aspinwall and Panama, as might be in excess of the tonnage and light-house dues, or other equivalent tax or taxes, imposed on American vessels by the government of the foreign country in which such port was situated.

"In course of time claims were presented by the governments of Belgium, Denmark, Germany, Italy, Portugal, and Sweden and Norway for the 3–15 cent rate. These claims, excepting in the case of Sweden and Norway, were based upon provisions in treaties of those nations with the United States, by which the contracting parties mutually agree not to grant favors to other nations in respect to commerce and navigation which shall not become common to the other party, either with or without expression of equivalent concessions, as the case may be.

"In the case of Sweden and Norway there was a further treaty stipulation, which reads as follows:

"'The two high contracting parties engage not to impose upon the navigation between their respective territories, in the vessels of either, any tonnage or other duties, of any kind or denomination, which shall be higher or other than those which shall be imposed on every other navigation, except that which they have reserved to themselves, respectively, by the sixth article of the present treaty.' (Article 8, treaty of July 4, 1827.)

"Article 6 referred to coastwise navigation, which the contracting parties reserved to themselves, respectively.

"The question of the conflict of the provisions of section 14 of the act of June 26, 1884, with our conventional obligations having been referred to the Department of Justice, the Attorney-General, on the 19th of September, 1885, gave the following opinion:

"'The discrimination as to tonnage duty in favor of vessels sailing from the regions mentioned in the act, and entered in our ports, is, I think, purely geographical in character, inuring to the advantage of any vessel of any power that may choose to fetch and carry between this country and any port embraced by the fourteenth section of the act. I see no warrant, therefore, to claim that there is anything in the most-favored-nation clause of the treaty between this country and the powers mentioned that entitles them to have the privileges of the fourteenth section extended to their vessels sailing to this country from ports outside of the limitation of the act.'

"This opinion was duly made known to the governments concerned.

"In order to illustrate the views of those governments upon the matter, a passage may be quoted from a note of the German minister at this capital, of the 16th of February, 1886, as follows:

"'This rejection (of the claim of Germany) is based on the ground that that exemption, which is granted to all vessels of all powers sail-

ing between the countries in question (which enjoy the 3–15 cent rate under the act of 1884) and the United States, is purely geographical in its character, and can not, therefore, be claimed by other states under the most-favored-nation clause.

"'I am instructed, and I have the honor most respectfully to reply to this, that such a line of argument is a most unusual one, and is calculated to render the most-favored-nation clause wholly illusory. On the same ground it would be quite possible to justify, for instance, a privilege granted exclusively to the South American states, then one granted also to certain of the nearer European nations, so that finally, under certain circumstances, always on the pretext that the measure was one of a purely geographical character, Germany alone, among all the nations that maintain commercial relations with America, notwithstanding the most-favored-nation right granted to that country by treaty, might be excluded from the benefit of the act.

"'It can not be doubted, it is true, that on grounds of a purely local character, certain treaty stipulations between two powers, or certain advantages autonomically granted, may be claimed of third states not upon the ground of a most-favored-nation clause. Among these are included facilities in reciprocal trade on the border, between states whose territories adjoin each other. It is, however, not to be doubted that the international practice is that such facilities, not coming within the scope of a most-favored-nation clause, are not admissible save within very restricted zones. . . . This law (of 1884) grants definite advantages to entire countries, among others to those situated at a great distance from the United States; these advantages are, beyond a doubt, equivalent to facilities granted to the trade and navigation of those countries, even if they do, under certain circumstances, inure to the benefit of individual vessels of foreign nations. It scarcely need be insisted upon that these advantages favor the entire commerce of the countries specially designated in the act, since they are now able to ship their goods to the United States on terms that have been artificially rendered more favorable than those on which other countries, not thus favored, are able to ship theirs.

"'The treaty existing between Prussia and the United States expressly stipulates that "If either party shall hereafter grant to any other nation any particular favor in *navigation or commerce*, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional." Such a compensation, so far as the reduction of the tonnage tax to 3 cents is concerned, has not been stipulated for by the United States in the aforesaid shipping act. Germany is, therefore, ipso facto, entitled to the reduction of the tax in favor of vessels sailing from Germany to the United States, especially since, according to the constitution of the Empire, no ton-

nage tax is collected in Germany from foreign vessels, that is to say, no tonnage tax of the character of American tonnage taxes in the sense of section 8, paragraph 1, Article 1 of the American Constitution, viz, those designed to pay the debts of the government, and to pay the expenses of the common defense and the general welfare.'

"In the situation thus described matters remained until the 19th of June, 1886, when an act was approved entitled 'An act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, and owners of vessels, and for other purposes.' By the eleventh section of this act the fourteenth section of the act of June 26, 1884, was amended. To the area in respect of which the 3–15 cent rate under the latter act applied, was added, 'the coast of South America bordering on the Caribbean Sea.' The other amendments were as follows:

"As above stated, the act of 1884 provided that the President should suspend the collection of so much of the 3–15 cent duty on vessels entered in the United States from any port in Canada, Newfoundland, the Bahamas, the Bermudas, the West Indies, Mexico, and Central America, down to and including Aspinwall and Panama, as might be in excess of the tonnage and light-house dues, or other equivalent tax or taxes, imposed on American vessels by the government of the foreign country in which such port was situated. In lieu of this, section 11 of the act of 1886 contains the following provisions:

"'*Provided*, That the President of the United States shall suspend the collection of so much of the duty herein imposed on vessels entered from any foreign port, as may be in excess of the tonnage and light-house dues, or other equivalent tax or taxes, imposed in said port on American vessels by the government of the foregin country in which such port is situated, and shall, upon the passage of this act, and from time to time thereafter, as often as it may become necessary by reason of changes in the laws of the foreign countries above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage duty, if any, to be collected under such suspension: *Provided further*, That such proclamation shall exclude from the benefits of the suspension herein authorized the vessels of any foreign country in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues, or duties imposed on the vessels of the country in which such port is situated, or on the cargoes of such vessels.'

"The obvious purpose of the subproviso in the above-quoted extract from section 11 was to exclude from the benefit of the proclamation authorized by the main proviso the vessels of those countries which discriminated in their ports in favor of their own vessels and

against vessels of the United States, which is the ordinary form of discrimination, and in the absence of which no other is likely to exist.

"By the unfortunate employment, however, of the term 'such port' in the subproviso, the grammatical antecedent of which term had to be sought in the main proviso, the effect of the subproviso seemed to be to exclude from the benefits of the proclamation only those countries in whose ports a discrimination was practiced against the United States in favor of the country of the port to which the proclamation applied. For example, suppose a proclamation was issued under the act of 1886, for the abolition of tonnage dues on vessels entering the ports of the United States from Amsterdam. By the terms of the act, any vessel, of whatever nationality, entering the ports of the United States from Amsterdam would have been entitled to exemption from dues, unless barred by the existence of a discrimination against vessels of the United States in the ports of the country to which the vessel in question belonged. In determining whether such discrimination existed, the inquiry would naturally be whether the government of that country discriminates in its ports against vessels of the United States as compared with its own. Thus, if the vessel from Amsterdam were British, the inquiry would be whether a discrimination existed in British ports against vessels of the United States as compared with British vessels. But, upon a strict grammatical construction of the act of 1886, it might have been argued that the inquiry should not be whether in the case supposed such a discrimination was practiced in favor of British vessels, but merely whether vessels of the United States received in British ports the same treatment as the vessels of the Netherlands, the latter being the country in which the port of Amsterdam is situated.

"That such was not the intention of Congress, and that a different and more usual form of discrimination was aimed at, namely, that in favor of national as against foreign vessels, seems to be established by the adoption by Congress, when the matter was brought to its attention, of the act of April 4, 1888, the first section of which amends the eleventh section of the act of 1886 by striking out of the subproviso the words 'such port,' and substituting therefor words which describe the discrimination which the undersigned supposes to have been intended by the original act.

"The undersigned calls attention to this feature of the matter, at the present stage of the discussion, not because it had any bearing upon the treaty claims now under consideration, but in order to avoid the repetition of the terms of the acts of 1884 and 1886, which would be necessary if the subject were left to be mentioned hereafter. In the formulation of proclamations under the act of 1886 the feature just described presented a difficulty which illustrates the complicated character of the subject with which the act attempted to deal and the

practical embarrassments which have been developed in its administration.

"On the 1st of August, 1886, the German minister at this capital, by direction of his government, addressed the undersigned on the subject of the act of 1886, as follows:

"'The new law is evidently based upon the idea of reciprocity. If this idea had been consistently carried out, no objection could be made to it, and the imperial government would have no further ground of complaint. This, however, is not the case, inasmuch as the new law grants special privileges, as did the old, to vessels from the above-mentioned ports, declaring that they, without any compensation on their part, shall pay but 3 cents per ton, even though a duty in excess of that amount is paid by American vessels in the ports concerned. . . .

"'The imperial government has from the outset protested against this one-sided privilege, which is in violation of the treaty stipulations of Germany with the United States. Since this privilege is not only abolished by the new law, but is confirmed and still further extended, the original attitude assumed by the German government towards the old law has been in no wise changed by the new act. . . . As long as vessels from the ports of North and Central America pay but one-half of the tonnage duty that is levied upon vessels from German ports, without being required to furnish proof that less than 6 cents is exacted from American vessels in their ports, *the imperial government will be obliged to maintain its claim for similar usage, viz, to exemption from furnishing such proof.*'

"So far as her treaty claim is concerned, the position of Germany has not been changed.

"After the passage of the act of 1886 the controversy also continued with Sweden and Norway, and on the 9th of March, 1887, the minister of Sweden and Norway at this capital transmitted to this Department copies of correspondence exchanged between the United States and his country shortly after the conclusion of the treaty of 1827, and relative to the construction of the eighth article thereof, which seemed to the undersigned to require of this government the recognition of Sweden and Norway's claim for the 3–15 cent rate. At the time referred to there existed in Norway a schedule of tonnage duties under which different charges were made on vessels: (1) From any place outside of Europe except the Mediterranean; (2) from the Mediterranean; (3) from any European port not on the Mediterranean.

"Under article 8 of the treaty of 1827, then lately ratified, this government claimed the lowest rate of duty, which was that on vessels in the last category. The Swedish and Norwegian government denied our claim on substantially the same grounds as those on which this government has recently declined to recognize a similar claim of

Sweden and Norway. But the government of the United States, through Mr. Clay, then Secretary of State, insisted upon its claim, and the government of Sweden and Norway conceded it, refunding at the same time certain duties which had been charged on tonnage of the United States in excess of the lowest rate under the Norwegian law claimed by the government. The correspondence on this subject accompanied the report of the undersigned, submitting diplomatic correspondence for the year 1887, which was transmitted to Congress on the 26th of June last.

"Believing that this concession of our claim by the government of Sweden and Norway created an honorable obligation on our part similarly to concede to that government the benefit of the construction of the treaty which we had claimed and enjoyed, the undersigned conferred with the Secretary of the Treasury with a view to make that benefit immediately effective. The letter of the undersigned to the Secretary of the Treasury will be found as inclosure 37.

"On the 20th of June, 1887, the Secretary of the Treasury replied, communicating a report of the Commissioner of Navigation to the effect that no relief could be afforded by the Bureau of Navigation; and under the law creating that Bureau the Commissioner holds his decision to be final and not subject to review. (See inclosure 38.) The law provides that 'on all questions relating to the collection of tonnage tax, and to the refunding of such tax when collected erroneously or illegally,' his decision shall be 'final.'

"The undersigned does not desire in the present instance to be understood as dissenting from the commissioner's view that no relief could be afforded in respect of the claim of Sweden and Norway, under the strict letter of the act of 1886. But it may be expedient to suggest that the act of July 5, 1884, in relation to the Bureau of Navigation, might properly be so amended as to give the Secretary of State a voice in the decision of treaty and cognate international questions.

"The undersigned, in view of what has been above stated, has the honor to suggest that a recommendation be made to Congress to amend the act of 1886, so as to give to Sweden and Norway at once the benefit of the 3–15 cent rate; and that all tonnage dues charged in excess of that rate on Swedish and Norwegian vessels entering the ports of the United States from ports of the United Kingdom since the date at which the 3–15 cent rate went into effect under the act of 1884 be refunded.

"RECIPROCAL ABOLITION OF TONNAGE DUES UNDER THE ACT OF 1886.

"Up to the present point, the discussion has related exclusively to the 14th section of the act of June 24, 1884, and the amendatory section of the act of June 19, 1886. But section 12 of the latter act contained the following provisions:

"'That the President be, and hereby is, directed to cause the governments of foreign countries which at any of their ports impose on American vessels a tonnage tax or light-house dues, or other equivalent tax or taxes, or any other fees, charges, or dues, to be informed of the provisions of the preceding section, and invited to co-operate with the government of the United States in abolishing all light-house dues, tonnage taxes, or other equivalent tax or taxes on, and also all other fees for official services to the vessels of the respective nations employed in the trade between the ports of such foreign country and the ports of the United States.'

"Correspondence between the United States and the claimant governments in respect to the acts of 1884 and 1886 having reached a point where the positions of the parties were fully defined, the undersigned, in July, 1887, addressed to our proper representatives in foreign countries a circular of instructions to extend to foreign governments a general invitation for the reciprocal abolition of tonnage and equivalent dues. (Inclosure No. 41.)

"Prior to that step, and on the 8th of November, 1886, the minister of the Netherlands at this capital had given the requisite assurances as to the absence of any tonnage, light, or equivalent charges on vessels of the United States in the ports of the Netherlands in Europe and in certain named ports of the Dutch East Indies, and had requested the suspension of the collection of such dues, under section 11 of the act of 1886, on vessels entering the United States from the ports in question. This request having been duly considered, the President, on the 22d of April, 1887, issued his proclamation for the suspension of dues accordingly. (Inclosure 70.)

"The invitation under the twelfth section of the act of 1886 was extended to the Netherlands as well as to other countries, but the scope of the proclamation of April 22, 1887, has not since been enlarged.

"On the 24th of January, 1888, the German minister at this capital, referring to the invitation above mentioned, gave the necessary assurances as to the absence in the ports of Germany of any charges of tonnage or light-house dues, or any equivalent tax or taxes whatever, as referred to in the act of 1886, on American vessels entering those ports. Accordingly the President, on the 26th of January, 1888, issued his proclamation to suspend the collection of such dues on

vessels entered in the ports of the United States from any of the ports of the German Empire. (Inclosure 54.)

"In the note in which the German minister gave the assurance referred to, he stated that the same absence of the charges in question had been declared in his note of the 15th of February, 1886, in which, prior to the passage of the act of 1886, he had presented the demand of his government for the 3–15 cent rate under the act of 1884; and he expressed the hope that, in view of this fact, the government would deem it proper to refund the dues charged on German ships entering American ports from ports of the German Empire since the date of the approval of the act of 1886.

"To this suggestion the undersigned was unable to respond, the matter being one for the consideration of Congress. But the request assuredly deserves equitable consideration. In this regard it is to be observed that the government of the Netherlands stands in the same position as that of Germany, since it appears by the note of the Dutch minister of the 8th of November, 1886, that the Netherlands legislation abolishing dues on vessels entering the ports thereof bears date June 3, 1875. (Inclosure 69.)

"The proclamations respecting Germany and the Netherlands are the only ones so far issued for the abolition of dues under the act of 1886. It thus appears that in no case has that act been the means of securing the abolition of dues on American vessels in foreign ports. In respect of all countries in which such dues were charged when the act of 1886 was approved, an unfavorable response on one ground or another, has been made to our invitation; and Germany is the only country in respect of which the amendatory features of the act of 1886 have resulted in relief from future treaty claims.

"But a question of a different description has arisen in the administration of the German and Dutch proclamations. Those proclamations provide, in accordance with the law, for the abolition of dues on vessels entering the ports of the United States from ports of Germany or of the Netherlands, as the case may be.

"If, however, a vessel clears from a port in Germany or in the Netherlands for a port in the United States, and on her way to the latter calls at an intermediate port, the question has arisen whether she is under the law entitled to exemption from dues when entering in the United States. This question has arisen in a number of cases, of which that of the steamers of the North German Lloyds line is an example. (Inclosure 54.) These steamers run regularly from Bremen to New York by way of Southampton, touching at the port last named, while such passengers, mails, and merchandise as there may be are transferred from a connecting vessel. The voyage of the steamer is denoted on the manifests from Bremen as being from that port to New York via Southampton.

"It has been claimed that these steamers should be exempt from dues in the United States as coming from a German port, it being argued that their described and principal voyage is from Bremen to New York, and that the stoppage off Southampton is not such as to deprive the run of its character of a voyage from a German port to a port in the United States, within the meaning of the act of 1886 and the proclamation. But it has been held by the Commissioner of Navigation that the voyage can not be so regarded, and that the vessels must pay dues as coming from Southampton, a British port. Similar rulings have been made in respect to other vessels of different nationality.

"Another instance of complication is that of a vessel starting from, we will say, a 6–30 cent port, and calling, on her way to the United States, at a 3–15 cent port and a free port. Other combinations will readily suggest themselves and need not be stated. But in each case the vessel is required in effect to pay the highest rate, without reference to the amount of cargo obtained at the various ports from which she comes. Thus a penalty may practically be imposed in many cases on indirect voyages.

"It is conceived that in many instances the main purpose of the act may be defeated by these rulings, but it must be admitted that the law contains no provision to meet such cases, and that there would be great difficulty in the executive branch of the government undertaking to decide that any particular measure of deflection from a direct voyage should or should not determine its character. This appears to be a proper subject for the consideration of Congress.

"But the undersigned has the honor to submit whether it would not at least be practicable in the case of vessels coming from two or more ports as to which different rates of tonnage dues are imposed in the United States, to apportion such dues on the basis of the relative portions of cargo brought from such ports.

"In regard to the questions raised by the claims of various governments, under their treaties with the United States, for the 3–15 cent rate of tonnage duty, the undersigned begs to suggest that the present condition of matters would be greatly simplified, if not by the abolition, at least by the equalization of tonnage duties on the basis of a uniform charge of 3–15 cents; and this without reference to any question of treaty construction, except in the case of Sweden and Norway, in respect to which a specific recommendation, for reasons stated, has already been made. Such an equalization of duties would extend the same relief to commerce with all parts of the world as has already, by the acts of 1884 and 1886, been offered to commercial intercourse within certain geographical areas. This change in the law having been effected, the invitation for the reciprocal abolition of dues would still remain as an offer of yet more liberal treatment on

the most advantageous basis to this country. In this way the interests of our commerce would be subserved, and the government would enjoy the additional advantage of having so adjusted its laws as to be free from future demands based upon its conventional agreements, and from the necessity of claiming for them a less liberal construction than the other high contracting parties are willing to admit."

Report of Mr. Bayard, Sec. of State, to the President, January 14, 1889, H. Ex. Doc. 74, 50 Cong., 2 sess.

INCLOSURES.

PART I.

Belgium:

No. 1. Mr. Tree to Mr. Bayard. No. 26. December 13, 1885.
No. 2. Mr. Porter to Mr. Tree. No. 20. January 2, 1886.
No. 3. Mr. Bayard to Mr. Tree. No. 72. January 5, 1887.
No. 4. Mr. Tree to Mr. Bayard. No. 196. January 24, 1887.
No. 5. Mr. Bounder to Mr. Bayard. June 19, 1885. (Also, For. Rel. 1885, 64.)
No. 6. Mr. Bayard to Mr. Bounder. November 7, 1885. (Also, For. Rel. 1885, 65.)

Denmark:

No. 7. Mr. Lovenörn to Mr. Bayard. August 27, 1885.
No. 8. Mr. Bayard to Mr. Lovenörn. November 7, 1885.

Germany:

No. 9. Mr. Bayard to Mr. Pendleton. No. 181. January 5, 1887.
No. 10. Mr. Alvensleben to Mr. Bayard. August 3, 1885. (Also, For. Rel. 1885, 443.)
No. 11. Mr. Bayard to Mr. Alvensleben. November 7, 1885. (Also, For. Rel. 1885, 444.)
No. 12. Count Leyden to Mr. Bayard. November 17, 1885.
No. 13. Mr. Alvensleben to Mr. Bayard. February 16, 1886.
No. 14. Mr. Bayard to Mr. Alvensleben. March 4, 1886.
No. 15. Mr. Alvensleben to Mr. Bayard. August 1, 1886.

Italy:

No. 16. Baron Fava to Mr. Bayard. February 16, 1886. (Also, For. Rel. 1886, 556.)
No. 17. Mr. Bayard to Baron Fava. March 12, 1886. (Also, For. Rel. 1886, 557.)

Portugal:

No. 18. Mr. Bayard to Viscount Nogueiras. May 21, 1885. (Also, For. Rel. 1885, 653.)
No. 19. Same to same. November 7, 1885. (Also, For. Rel. 1885, 654.)

Sweden and Norway:

No. 20. Mr. Porter to Mr. Magee. No. 49. August 5, 1887.
No. 21. Mr. Magee to Mr. Bayard. No. 101. November 7, 1887.
No. 22. Mr. Bayard to Mr. Magee. No. 55. November 28, 1887.
No. 23. Mr. Magee to Mr. Bayard. No. 106. December 14, 1887.
No. 24. Same to same. No. 133. July 17, 1888.
No. 25. Mr. Reuterskiöld to Mr. Bayard. June 17, 1885. (For. Rel. 1885, 789.)
No. 26. Same to same. October 4, 1885. (For. Rel. 1885, 790.)

Swèden and Norway—Continued.

No. 27. Mr. Bayard to Mr. Reuterskiöld. November 7, 1885. (For. Rel. 1885, 790.)

No. 28. Mr. Reuterskiöld to Mr. Bayard. November 11, 1885. (For. Rel. 1885, 791.)

No. 29. Same to same. March 8, 1886. (For. Rel. 1887, 1038.)

No. 30. Mr. Bayard to Mr. Reuterskiöld. March 29, 1886. (For. Rel. 1887, 1039.)

No. 31. Mr. Reuterskiöld to Mr. Bayard. March 31, 1886. (For. Rel. 1887, 1039.)

No. 32. Same to same. June 30, 1886. (For. Rel. 1887, 1040.)

No. 33. Same to same. November 15, 1886. (For. Rel. 1887, 1042.)

No. 34. Mr. Bayard to Mr. Reuterskiöld. December 20, 1886. (For. Rel. 1887, 1043.)

No. 35. Same to same. December 20, 1886. (For. Rel. 1887, 1046.)

No. 36. Mr. Reuterskiöld to Mr. Bayard. March 9, 1887. (For. Rel. 1887, 1049.)

No. 37. Mr. Bayard to Mr. Fairchild. June 2, 1887.

No. 38. Mr. Fairchild to Mr. Bayard. June 20, 1887.

No. 39. Mr. Woxen to Mr. Bayard. November 10, 1888.

No. 40. Mr. Bayard to Mr. Woxen. December 6, 1888.

PART II.

Austria:

No. 41. Mr. Bayard to United States ministers. July 9, 1887. (Also, For. Rel. 1887, 1135.)

No. 42. Mr. Roosevelt to Mr. Bayard. No. 51. April 7, 1888.

Belgium:

No. 43. Mr. Tree to Mr. Bayard. No. 251. August 18, 1887.

Brazil:

No. 44. Mr. Jarvis to Mr. Bayard. No. 139. August 6, 1888.

China:

No. 45. Mr. Denby to Mr. Bayard. No. 450. September 8, 1887.

No. 46. Same to same. No. 453. September 15, 1887.

No. 47. Same to same. No. 458. September 21, 1887.

Denmark:

No. 48. Mr. Anderson to Mr. Bayard. No. 208. February 24, 1888.

No. 49. Same to same. No. 209. February 25, 1888.

France:

No. 50. Mr. Vignaud to Mr. Bayard. No. 471. August 29, 1887.

Germany:

No. 51. Mr. Coleman to Mr. Bayard. No. 496. August 25, 1887.

No. 52. Mr. Alvensleben to Mr. Bayard. January 24, 1888.

No. 53. Mr. Bayard to Mr. Alvensleben. January 26, 1888.

No. 54. Same to same. January 30, 1888. (For. Rel. 1888, I. 671.)

No. 55. Mr. Alvensleben to Mr. Bayard. February 25, 1888.

No. 56. Mr. Bayard to Mr. Alvensleben. February 28, 1888.

Great Britain:

No. 57. Mr. Phelps to Mr. Bayard. No. 625. November 19, 1887.

Italy:

No. 58. Mr. Dougherty to Mr. Bayard. No. 167. October 15, 1887.

No. 59. Mr. Ferrara to Mr. Bayard. July 18, 1887. (Also, For. Rel. 1887, 651.)

No. 60. Mr. Bayard to Mr. Ferrara. July 26, 1887. (Also, For. Rel. 1887, 651.)

Italy—Continued.

No. 61. Mr. Ferrara to Mr. Bayard. July 27, 1887. (Also, For. Rel. 1887, 652.)

No. 62. Mr. Bayard to Count Foresta. August 23, 1887. (Also, For. Rel. 1887, 653.)

Japan:

No. 63. Mr. Hubbard to Mr. Bayard. No. 383. September 24, 1887.

Mexico:

No. 64. Mr. Manning to Mr. Bayard. No. 204. August 31, 1887.

No. 65. Mr. Connery to Mr. Bayard. No. 244. October 10, 1887.

Netherlands:

No. 66. Mr. Bayard to Mr. Bell. No. 81. January 5, 1887. (Also, For. Rel. 1887, 888.)

No. 67. Mr. Bell to Mr. Bayard. No. 214. January 21, 1887. (Also, For. Rel. 1887, 889.)

No. 68. Mr. Bayard to Mr. Bell. No. 82. February 10, 1887.

No. 69. Mr. Weckherlin to Mr. Bayard. November 8, 1886. (Also, For. Rel. 1887, 905.)

No. 70. Mr. Bayard to Mr. Weckherlin. April 22, 1887. (Also, For. Rel. 1887, 906.)

No. 71. Mr. Weckherlin to Mr. Bayard. May 3, 1887. (Also, For. Rel. 1887, 908.)

No. 72. Same to same. June 28, 1887. (Also, For. Rel. 1887, 909.)

Peru:

No. 73. Mr. Buck to Mr. Bayard. No. 282. September 1, 1887.

Russia:

No. 74. Mr. Wurts to Mr. Bayard. No. 136. August 11, 1887.

No. 75. Mr. Lothrop to Mr. Bayard. No. 159. February 18, 1888.

Sweden and Norway:

No. 76. Mr. Magee to Mr. Bayard. No. 99. October 24, 1887.

As to Sweden, see Baron Stackelberg, Swedish chargé, to Mr. Clay, Sec. of State, April 3, 1828; Mr. Clay to Baron Stackelberg, April 28, 1828; Swedish min. for. aff., to Mr. Appleton, American chargé, Sept. 10, 1828: For. Rel. 1887, 1050, 1051, 1053.

See, as to the Portuguese claim, Mr. Bayard, Sec. of State, to Mr. Manning, Sec. of Treas., March 26, 1885, 154 MS. Dom. Let. 597.

"I renew my recommendation of two years ago for the passage of a bill for the refunding to certain German steamship lines of the interest upon tonnage dues illegally exacted." (President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, xiii.)

"I renew the recommendation of my special message, dated January 16, 1890, for the adoption of the necessary legislation to enable this Government to apply in the case of Sweden and Norway the same rule in respect to the levying of tonnage dues as was claimed and secured to the shipping of the United States in 1828 under article 8 of the treaty of 1827." (President Harrison, annual message, Dec. 9, 1891.)

See, as to Germany, For. Rel. 1890, 318–320; Mr. Windom, Sec. of Treas., to Mr. Blaine, Sec. of State, June 17, 1890, MS. Misc. Let.

The Secretary of the Treasury, in a circular letter to collectors of customs, Nov. 26, 1890, held: "The fact that a vessel touches at an intermediate port, at which it neither enters nor clears, and which touching is merely an incident in the voyage, will not deprive such vessel of the rights derived from sailing from a free port, such being its port of departure." (For. Rel. 1890, 320.)

See, in this relation, For. Rel. 1888, II. 1344, as to calling at an intermediate port, in distress.

By proclamation issued by President Cleveland, December 3, 1896, the proclamation of January 26, 1888, suspending the collection of tonnage taxes on German vessels in the United States, was revoked on and after January 2, 1897. The ground of the revocation was that the reciprocal exemption of American vessels in German ports, which was the basis of the proclamation of 1888, had been ascertained not to exist. The German government did not deny that tonnage dues were charged in German ports, but contended that the dues which were charged were not tonnage dues "in the sense of the American Constitution," namely, duties collected "for the purpose of paying the debts of the government, and meeting the costs of a general defense and meeting the expense of general welfare," under chapter 1, section 8, article 1, of the Constitution. The dues, for example, collected at Hamburg were not used "for general public purposes, but for the maintenance" of the harbor works and the channel of the Elbe. This explanation was not considered satisfactory.

For. Rel. 1896, 142–163.

See report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxix.

"Following is a list of the ports from which vessels may enter the United States without paying tonnage taxes under the so-called reciprocal agreement, with the dates of the President's proclamations bearing on the subject:

"Aspinwall and Panama, United States of Colombia; Island Montserrat, West Indies; Ontario (Province of); San Juan and Mayaguez, Puerto Rico, January 31, 1885; Greytown, Nicaragua, February 26, 1885; Island of Trinidad, West Indies, April 7, 1885; Boca del Toro, September 9, 1885.

"All ports in Europe of the Kingdom of the Netherlands and free ports in Dutch East Indies, April 22, 1887.

"Guadeloupe, April 16, 1888; Island of Tobago, December 2, 1891; Grenada, May 2, 1894."

Mr. Chamberlain, Comr. of Nav., to Mr. Moore, Act. Sec. of State, 1898, MS.

July 19, 1898, a proclamation was issued exempting from tonnage taxes vessels from Copenhagen. (Report of Comr. of Nav. 1898, 55; Mr. Sherman, Sec. of State, to Sec. of Treas., March 21, 1898, 226 MS. Dom. Let. 574.)

On an examination of the dues charged on American vessels in Belgian ports it was decided that an exemption from tonnage taxes of vessels entering the United States from Belgium should not be granted under section 11 of the act of June 19, 1886. (For. Rel. 1897, 37–41.)

In 1895 the consul-general of the United States at Ottawa reported that the Canadian authorities levied a tax of a dollar on American vessels entering and clearing from a Canadian port. This charge was brought to the attention of the British embassy at Washington, to

the end that the charges on American and British vessels in Canadian ports might be equalized, so that British vessels might continue to possess the exemption which they were enjoying in the United States. (Mr. Adee, Act. Sec. of State, to Lord Gough, British chargé, July 11, 1895, For. Rel. 1895, I. 707.) The Canadian government in its reply stated that a similar complaint was made by the United States in 1887, and that it was then shown that the fees exacted from American vessels entering Canadian ports were but small as compared with those exacted from Canadian vessels in American ports. Since then certain fees in American ports had been abolished; but the fees were still fully equal to and in some cases exceeded those required of American vessels in Canadian ports. (For. Rel. 1895, I. 710–712.) The United States considered this response irrelevant, since the question at issue was not whether higher duties were charged in the ports of the one country than in those of the other, but whether the charges that were actually made were uniform as to all vessels, both domestic and foreign. (Mr. Olney, Sec. of State, to Sir Julian Pauncefote, British ambassador, Feb. 18, 1896, For. Rel. 1895, I. 712.)

With regard to the proclamations as to Trinidad and Tobago, supra, it afterwards appeared that from and after July 1, 1898, tonnage or equivalent taxes were imposed on vessels entering those islands. As this apparently destroyed the basis on which the proclamations were issued, the matter was brought to the attention of the British government, which replied that the dues in question were not tonnage dues on vessels but were in reality landing charges on merchandise imposed to defray the cost of harbor works, although they were calculated on the cargo actually landed or shipped, that mode of collection having been found to be the most convenient. The Secretary of the Treasury, being clearly of opinion that the dues in question came within the provisions of the act of Congress, proclamations were issued, March 13, 1899, revoking the proclamations of April 7, 1885, and December 2, 1891.

For Rel. 1899, 332–338.

By the act of July 24, 1897, the President is authorized to suspend the operation of §§ 4219, 2502, Rev. Stats., so that foreign vessels from a country imposing partial discriminating tonnage duties on American vessels, or partial discriminating import duties on American merchandise, "may enjoy in our ports the identical privileges which the same class of American vessels and merchandise enjoy in said foreign country."

(3) RETALIATORY OR COMPULSIVE DISCRIMINATIONS.

§ 767.

By section 3 of the tariff act of October 1, 1890, commonly called the McKinley Act, it was provided that whenever the President of the United States should be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, or any of such articles, imposed duties on the agricultural or other products of the United States, which, in view of the free introduction of the specified articles into the United States, he might deem to be "reciprocally unequal and unreasonable," it should be his duty by proclamation to suspend the free admission of the articles mentioned from such country, which were thereupon to become subject to certain duties.

Under this section agreements were concluded and proclaimed with Austria-Hungary, Brazil, Dominican Republic, German Empire, Great Britain (for the British West Indies), Guatemala, Honduras, Nicaragua, Salvador, Cuba, and Porto Rico. Agreements were also concluded with Costa Rica and France.

Message of President Harrison, June 27, 1892, S. Ex. Doc. 119, 52 Cong. 1 sess. See, also, President Harrison's annual messages, Dec. 9, 1891, and Dec. 6, 1892.

As to the claims made by various European powers for equal privileges in Santo Domingo, see Mr. Wharton, Act. Sec. of State, to Mr. Coleman, chargé at Berlin, confid., No. 375, March 11, 1892, MS. Inst. Germany, XVIII. 551; Mr. Wharton, Act. Sec. of State, to Mr. Durham, No. 8, Dominican series, March 11, 1892, MS. Inst. Hayti, III. 238; Mr. Blaine, Sec. of State, to Mr. Durham, No. 19, Dominican series, April 30, 1892, MS. Inst. Hayti, III. 248; Mr. Foster, Sec. of State, to Mr. Durham, No. 36, Dominican series, Aug. 4, 1892, id. 274; Mr. Foster to Mr. Terres, No. 59, Dominican series, Nov. 18, 1892, id. 298.

Spain admitted the claim of Great Britain to equal treatment with the United States in Cuba and Porto Rico under the most-favored-nation clause, but gave notice of the termination of the treaty containing the clause and afterwards declined to insert a similar clause in a new treaty. (Mr. Grubb, min. to Spain, to Mr. Blaine, Sec. of State, No. 246, May 7, 1892, MS. Desp. Spain; Mr. Blaine, Sec. of State, to Mr. MacNutt, chargé, No. 219, May 23, 1892, MS. Inst. Spain, XXI. 137.)

As to the imposition in Spanish ports of duties on paraffine and lubricating oils exported from the United States at a higher rate than on similar articles from England and Germany, see Mr. Foster, Sec. of State, to Mr. Flagg, Dec. 22, 1892, 189 MS. Dom. Let. 525.

March 15, 1892, a proclamation was issued in conformity with the foregoing section, imposing duties on sugars, molasses, coffee, tea, and hides produced in or exported from Colombia. The Colombian minister, March 23, 1892, protested against the proclamation as a

violation of the treaty between the United States and New Granada of December 12, 1846. By Article II. of that treaty each country engaged to grant to the other most-favored-nation treatment; and by Article V. it was agreed that no higher or other duties should be imposed in the one country on the importation of the produce of the other than should be payable on like produce "of any other foreign country." The Colombian minister affirmed that the imposition of import duties by the United States on certain articles of Colombian produce, while the like articles were admitted free from other countries, established a discrimination against Colombian produce which his government held "to be contrary to the spirit and express stipulations of the treaty of 1846." Mr. Blaine replied that the President did not regard the law in question nor his action under it as a violation of the treaty. "The law cited," said Mr. Blaine, "applies the same treatment to all countries whose tariffs are found by the President to be unequal and unreasonable."

Mr. Blaine, Sec. of State, to Mr. Hurtado, Colombian min., May 31, 1892, For. Rel. 1894, Appendix I. 472, 473; S. Ex. Doc. 56, 53 Cong. 2 sess.

In a subsequent note Mr. Hurtado amplified his protest, pointing out that President Polk, in his message to the Senate of February 15, 1847, submitting the treaty of 1846 for approval, said: "This treaty removes the heavy discriminating duties in the ports of New Granada which have nearly destroyed our commerce and navigation with that Republic and which we have been in vain endeavoring to abolish for the last twenty years." The nations that enjoyed the privilege of free importation of hides and coffee into the United States might, said Mr. Hurtado, be divided into two classes—(1) those which, like Mexico and the Argentine Republic, freely received the favor, and (2) those which, like Brazil and certain others, had acquired the privilege by making certain concessions in favor of United States produce. He claimed that, in virtue of the stipulations of Article I., the concessions made by the United States in either case became common to Colombia. In this relation he cited a similar clause in Article XV. of the treaty between the United States and Great Britain of 1794 and the construction put upon it by Mr. Madison and others in the debates in Congress; the similar clause in article II. of the commercial convention with Great Britain of 1815, negotiated while Mr. Madison was President; the concession by Great Britain in 1846 of the demands of the United States in the rough rice case; and the note addressed by Mr. Fish, as Secretary of State, to Mr. Garcia, Argentine minister at Washington, March 14, 1869, supra, § 765, declining to enter into reciprocity negotiations with that Republic. He also contended that the discrimination, growing out of the proclamation, constituted a violation of that clause of Article V. of the treaty of 1846 which reads: "Nor shall any prohibition be imposed on the . . . importation of any articles the produce or manufacture . . . of the Republic of New Granada, to . . . the United States, . . . which shall not equally extend to all other nations." (Mr. Hurtado, Colombian min., to Mr. Foster, Sec. of State, July 28, 1892, For. Rel. 1894, Appendix I. 477–482.)

For further correspondence between Mr. Hurtado and the Department of State, see For Rel. 1894, Appendix I. 482–496.

For a discussion in the report of the Colombian minister for foreign affairs for 1894, see For Rel. 1894, 198–199.

(4) BOUNTIES.

§ 768.

By the tariff act of August 28, 1894, an additional duty of one-tenth of a cent a pound was imposed on sugars which were imported from or were the product of a country that paid a bounty on the exportation of such sugars. Against this additional duty the German ambassador, as well as the diplomatic representatives of certain other governments, protested. The protest of the German ambassador was based on the treaty between the United States and Prussia of May 1, 1828. By Article V. of that treaty it is stipulated that no higher or other duties shall be imposed in one country on the produce or manufactures of the other than shall be payable on like articles from any other foreign country; and by Article IX. provision is made for most-favored-nation treatment.

October 12, 1894, Mr. Gresham, Secretary of State, in a report upon the protest of the German ambassador, stated that the stipulations in question gave either party "the right, special engagements of reciprocity being excepted, to take the duties levied by the other on articles the produce or manufacture of any other country, and to demand the same treatment for its own products and manufactures. It is obviously no answer to this to say that certain discriminating duties levied by one party on the products or manufactures of the other are not confined to the latter, or to any country by name, but apply equally to all countries that may happen to fall in a certain category. If there is any other country, or if there are other countries, which, either by name or by a general classification, are exempt from the duty (special engagements of reciprocity being excepted), the requirements of the treaty are not fulfilled. To say that the discrimination is not specifically and explicitly national, or that it applies to more than one country, is a mere argumentative subterfuge, inconsistent with the clear intention of the treaty."

In this relation Mr. Gresham referred to the discussion between Great Britain and the United States of the question of duties on rough rice as affected by Article II. of the treaty between the United States and Great Britain of July 3, 1815, which was in terms similar to Article V. of the treaty between the United States and Prussia of 1828, and to the action of the British Government in equalizing the duties in response to the protest of the United States.

Mr. Gresham also discussed the question whether the payment by a government of a bounty on the exportation of an article of its produce or manufacture could be considered in the light of a discrimination which might warrant another government in laying, in spite of a most-favored-nation clause, an additional or countervailing duty. He answered this question in the negative, on the ground that the payment of bounties was a domestic measure which could no more be considered a discrimination than could the imposition of a protective or practically prohibitive duty for the purpose of encouraging domestic manufactures.

Report of Mr. Gresham, Sec. of State, to the President, Oct. 12, 1894, For. Rel. 1894, 236.

"The German government has protested against that provision of the customs tariff act which imposes a discriminating duty of one-tenth of one cent a pound on sugars coming from countries paying an export bounty thereon, claiming that the exaction of such duty is in contravention of articles five and nine of the treaty of 1828 with Prussia.

"In the interests of the commerce of both countries and to avoid even the accusation of treaty violation, I recommend the repeal of so much of the statute as imposes that duty, and I invite attention to the accompanying report of the Secretary of State containing a discussion of the questions raised by the German protests." (President Cleveland, annual message, Dec. 3, 1894, For Rel. 1894, ix.)

The government of Austria-Hungary also protested against the discriminating duty, on the strength of Art. V. of the treaty of 1829. (For. Rel. 1895, I. 6–8; S. Ex. Doc. 58, 53 Cong. 3 sess.)

Also the government of Denmark, on the strength of Art. V. of the treaty of April 26, 1826. (For Rel. 1895, I. 205–207.)

The American interpretation of the most-favored-nation clause "is believed to accord with the interpretation put upon the clause by foreign powers—certainly by Germany and Great Britain. Thus, as the clause permits any internal regulations that a country may find necessary to give a preference to 'native merchants, vessels, and productions,' the representatives of both Great Britain and Germany expressly declared, at the International Sugar Conference of 1888, that the export sugar bounty of one country might be counteracted by the import sugar duty of another without causing any discrimination which could be deemed a violation of the 'most-favored nation clause.'" (Mr. Olney, At. Gen., Nov. 13, 1894, 21 Op. 80, 82.)

As to the London Sugar Bounties Conference of 1888, see For. Rel. 1888, II. 686–688, 706–708, 710, 711, 715–717, 721, 726, 732, 733, 737, 745, 771, 772, 775, 789, 792, 796.

The passage above quoted from Mr. Olney's opinion of Nov. 13, 1894, is embodied in a note of Mr. Sherman, Sec. of State, to the German chargé d'affaires ad interim, Sept. 22, 1897, For. Rel. 1897, 178.

April 13, 1897, the minister of Austria-Hungary at Washington protested against a clause in the new tariff bill then pending, imposing an additional duty on sugars imported from bounty-paying countries. He referred to previous correspondence, and particularly to Mr. Gresham's report of October 12, 1894, and the President's recom-

mendation in his annual message of 1894 of the repeal of the additional duty in the tariff act of that year. The Department of State replied that copies of the note had been sent to the appropriate committees of Congress for their information and consideration. (For. Rel. 1897, 22, 23.)

By Article VII. of the convention adopted by the International Sugar Bounties Conference of 1888, the contracting parties agreed to lay a countervailing duty on sugars imported from any country paying a bounty, either direct or disguised, on their exportation. This was known as the penal clause of the convention. The convention, however, never became effective.

By act of the British Parliament, entitled the "Indian tariff act (1894) amendment bill," a countervailing duty was imposed on Russian sugar imported into India. Against this duty the Russian government, by a note of June 12, 1899, protested on the grounds (1) that no bounty, direct or indirect, was paid in that country on the exportation of sugar, and (2) that, even if such a bounty were paid, the imposition of a countervailing duty would infringe the most-favored-nation clause in the treaty between the two countries of January 12, 1859.

Lord Salisbury, July 15, 1899, replied that the Russian system, under which the excise duty on sugars is repaid in case of exportation, created an "artificial stimulus" which had the same effect as "a bounty of a more direct character," and that the same opinion was disclosed in the legislation of the United States and in the records of the then recent conference at Brussels. In this relation, Lord Salisbury maintained that it was the intention of the most-favored-nation clause "that goods shall enjoy equality of treatment, but not preferential advantages as compared with goods of the most-favored-nation;" and that, where an artificial preference was produced by the direct legislative act of a government which was a party to a most-favored-nation stipulation, the other government might "redress the balance of trade which has thus been artificially disturbed," the remedy being in the hands of the other government to discontinue the bounty or the legislative act producing the artificial stimulus. He offered, however, if the Russian government should be unwilling to accept this view, to give notice of the termination of the treaty.

In the Brussels convention of March 5, 1902, a penal clause similar to that in the unratified convention of 1888 was embodied. To the convention of 1902 Russia was not a party, nor was she represented in the conference by which it was framed. In a communication to the British government, July 8, 1902, it was stated that Russia would consider the application by that government of the countervailing duty to Russian sugars as a violation of the treaty of 1859. For this view the same reasons were given as in 1899.

July 30, 1902, Lord Lansdowne, besides referring to the fact that Lord Salisbury's note of July 15, 1899, had not been answered and that the Indian countervailing duties had meanwhile continued in operation, cited the records of the Brussels conference as proving that Russia paid an indirect bounty and also called attention to the fact that by Article VII. of the convention of 1902 provision was made for an international commission to determine the question of bounty in each case, so that if Russia should become a party to the convention she would have the benefit of the examination authorized by that article. He also reiterated the views expressed by Lord Salisbury as to the operation of the most-favored-nation clause.

The Russian government, in reply, contended, by a memorandum of September 24, 1902, that under the British government's interpretation of that clause the merchandise of countries which granted to exported produce favorable railway rates or maritime freights might be subjected to higher customs duties; that countervailing duties might even be imposed because goods were subject to lower taxes in one country than in another, or because the natural conditions of industry in a particular country were specially favorable; that, on the same principle, it would be necessary to lower the duties on goods which had to pay an export duty, or if, as in the case of England, there were no import duties to lower, then to pay a bounty. This principle, so the memorandum affirmed, Russia altogether rejected. She maintained that the most-favored-nation clause did not fetter the right of either party to adopt such domestic legislation as it might deem useful for the development and encouragement of national industry. In conclusion, the Russian government offered to submit the question to arbitration.

November 20, 1902, Lord Lansdowne, replying to the Russian memorandum, stated that, with regard to such forms of encouragement as the reduction of railway rates, etc., it would be the duty of the international commission, to be established under the Brussels convention, to decide whether such internal measures were or were not "in effect equivalent to bounties." He denied, however, that a rebate or a bonus might be claimed on sugar subject to an export duty in the country of origin, since "the remedy in this instance also would obviously lie in the hands of the exporting state." He further stated that His Majesty's government did not consider the question at issue one proper to be submitted to arbitration. The course they had taken was, he declared, dictated solely by a desire to secure "equality of conditions" for those engaged in the production and refining of sugar; and as other states did not hesitate to impose high and prohibitive tariffs for the protection of their trade in their own markets, His Majesty's government failed to see with what reason the Russian government could "complain of a measure

not of favor, but of simple and elementary justice to British trade." In conclusion, he renewed the offer to denounce the treaty of 1859.

In a memorandum of January 14, 1903, the Russian government, adhering to its previous position, remarked that it might, if it thought fit to do so, alter its legislation, but that it could not be required to do so in order to avoid the application of penal measures which violated the most-favored-nation clause. The memorandum also maintained that the opinion prevailed in the sugar bounties conference of 1888 that the enforcement of the penal clause in respect of bounty-fed sugars would necessitate the denunciation of commercial treaties based on the most-favored-nation principle. In conclusion, the memorandum, referring to the statement that the Brussels convention would be applied to Russian sugar only in case the international commission should find that bounties resulted from the Russian system, observed that the question must still be considered an open one, concerning which a further exchange of views should be suspended till the decision of the commission.

Correspondence with the Russian Government Respecting the Interpretation of the Most-Favored-Nation Clause in Connection with Countervailing Duties on Bounty-Fed Sugar; Parliamentary Papers, Commercial, No. 1 (1903).

See, also, Correspondence relating to the sugar conference at Brussels, 1901–1902, presented to Parliament April, 1902; Correspondence relating to the Brussels Sugar Bounty Conference, Miscellaneous, No. 5 (1902).

It appears that Denmark declined to sign the convention of 1888, owing to a belief that Article VII. conflicted with the most-favored-nation clause in several of her treaties. (Mr. White, sec. of legation, to Mr. Bayard, Sec. of State, Sept. 10, 1888, For. Rel. 1888, I. 746.)

See, also, For. Rel. 1888, I. 749–750; Olney, At. Gen., Nov. 13, 1894, 21 Op. 80, 82.

For a return of most-favored-nation clauses in existing treaties of commerce and navigation between Great Britain and foreign powers, in force July 1, 1903, see Parl. Papers, Commercial, No. 9 (1903).

Where a tax is imposed on all sugar produced, but is remitted on all sugar exported, and the exporter obtains from his government, solely by reason of such exportation, a certificate which has an actual value and is salable in the open market, the remission of the tax is in effect a bounty which subjects the sugar, on its importation into the United States, to an additional duty to the entire amount of the bounty, according to the act of Congress of July 24, 1897, 30 Stat. 205.

Downs *v.* United States (1903), 187 U. S. 496.

(5) MISCELLANEOUS CASES.

§ 769.

"It may fairly be considered then as the rational and received interpretation of the diplomatic term '*gentis amicissimæ*' [most-favored-nation] that it has not in view a nation unknown in many cases [as was the United States at the time when the older treaties containing the phrase were used] at the time of using the term, and so dissimilar in all cases as to furnish no ground of just reclamation to any nation."

Mr. Jefferson, Sec. of State, Report to the President, Mar. 18, 1792, 7 Jefferson's Works, 584; 1 Am. State Papers, For. Rel. 255.

See Lawrence's Wheaton (1863), 493; Visser, La Clause de "La Nation la plus favorisée" dans Traités de commerce (Revue de Droit Int. tom. IV., deuxième série, pp. 66, 159).

"Indeed, we are infinitely better without such treaties [i. e., treaties of commerce] with any nation. We can not too distinctly detach ourselves from the European system, which is essentially belligerent, nor too sedulously cultivate an American system, essentially pacific. But if we go into commercial treaties at all, they should be with all, at the same time, with whom we have important commercial relations. France, Spain, Portugal, Holland, Denmark, Sweden, Russia, all should proceed *pari passu*. Our ministers, marching in phalanx on the same line, and intercommunicating freely, each will be supported by the weight of the whole mass, and the facility with which the other nations will agree to equal terms of intercourse, will discountenance the selfish higglings of England, or justify our rejection of them. Perhaps, with all of them, it would be best to have but the single article *gentis amicissimæ*, leaving everything else to the usages and courtesies of civilized nations." (Mr. Jefferson to President Madison, Mar. 23, 1815, 6 Jefferson's Works, 453.)

"Though treaties which merely exchange the rights of the most-favored nations are not without all inconvenience, yet they have their conveniences also. It is an important one, that they leave each party free to make what internal regulations they please, and to give what preferences they find expedient to native merchants, vessels, and productions. And as we already have treaties on this basis, with France, Holland, Sweden, and Prussia, the two former of which are perpetual, it will be but small additional embarrassment to extend it to Spain. On the contrary, we are sensible it is right to place that nation on the most-favored footing, whether we have a treaty with them or not, and it can do us no harm to secure by treaty a reciprocation of the right."

Report of Mr. Jefferson, Mar. 18, 1792, 7 Jefferson's Works, 587; 1 Am. State Papers, For. Rel. 256.

The provision in Art. III. of the treaty between the United States and Great Britain of 1794 for the equalization in certain cases of the

import duties on "goods and merchandise" did not extend to tonnage dues.

Breckenridge, At. Gen., 1806, 1 Op. 155.

In 1825 Mr. Clay instructed Mr. Poinsett, in his negotiations with Mexico, to endeavor to substitute for the rule of the most-favored nation, as embodied in the treaty between the United States and Colombia of 1824, the rule of placing the commerce and navigation of the one country on the same footing as that of the other, so far as that rule was exemplified by the act of January 7, 1824. The rule of the most-favored nation, said Mr. Clay, might not be and scarcely ever was equal in its operation between two contracting parties, nor was it so simple as the proposed substitute. In order to ascertain the *quantum* of favor, which might be claimed in virtue of a stipulation embracing that rule, it was necessary that the claimant "should be accurately informed of the actual state of the commercial relations between the nation on which the claim of equal favor is preferred and all the rest of the commercial world;" and when this information was acquired, it was "not always very easy to distinguish between what was a voluntary grant and that which was a concession by one party for an equivalent yielded by the other." Sometimes the equivalent for the alleged favor might be diffused through all the stipulations of the treaty, and sometimes might not even be clearly deducible from it. From some or all of these causes it so happened that in the practical application of the rule of the most-favored nation perplexing and embarrassing discussions sometimes arose.

Mr. Clay, Sec. of State, to Mr. Poinsett, min. to Mexico, March 25, 1825, Am. State Papers, For. Rel. VI. 578.

Engagements of extradition, whether of fugitives from justice or from service, stand in each case on particular stipulations of treaty, and are not to be inferred from the "favored-nation" clause in treaties.

Cushing, At. Gen., 1853, 6 Op. 148.

Treaty stipulations declaring what shall and what shall not be regarded as contraband do not come within the operation of the most-favored-nation clause.

The James and William (1902), 37 Ct. Cl. 363.

The most-favored-nation clause is applicable to stipulations giving the right to consular officers to administer on the estates of their deceased countrymen.

In re Fattosini's Estate (1900), 67 N. Y. Supp. 1119, 33 Misc. 18.

By Art. VIII. of the treaty between the United States and Russia of Dec. 18, 1832, consular officers of the contracting parties are to enjoy at their respective ports "the same privileges and powers as those of the most-favored nations." By Art. X. of the treaty between the United States and the Argentine Confederation of July 27, 1853, if a citizen of either party "shall die without will or testament" in the territory of the other, the proper consul-general or consul, or, if he be absent, his representative "shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." Similar clauses may be found in other treaties of the United States. Held, that, under these clauses, by virtue of the most-favored-nation stipulation, the Russian vice-consul at Boston was entitled, in preference to the public administrator, to administer on the personal estate of a Russian subject who died intestate within the vice-consul's jurisdiction, leaving a wife and three minor children in Russia.

Wyman *v.* McEvoy (1906), Supreme Judicial Court of Massachusetts. I am indebted for an advance report of this decision to Frederic R. Coudert, esq., of the New York bar, who was of counsel for the vice-consul. It has since been published in the *New York Law Journal* of April 16, 1906.

The provision of an American pilotage law, exempting from pilotage American coastwise vessels, is not an infringement of the treaty stipulation that "no higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United State."

Olsen *v.* Smith (1904), 195 U. S. 332, 344.

Article VI. of the treaty of amity and commerce between the United States and Mexico of April 5, 1830, provided that the same duties should be paid on the importation into the one country of the products of the other, whether the importation was made in a Mexican vessel or in a vessel of the United States. It was held that this stipulation did not prevent the two governments from imposing discriminating duties on the productions of other countries when imported in Mexican or American vessels. The Department of State referred, however, to Article III. of the treaty, which stipulated that the citizens of the two countries, respectively, should not pay higher or other duties than the citizens of the most-favored nation, and to Article V. of the treaty between Mexico and Denmark of July 19, 1827, which stipulated that the products of any country other than Denmark might be carried to Mexico from any part of the world without paying higher duties than were charged on the same articles

imported in the vessels of the most-favored nation. This would seem, said the Department, to give to Danish vessels the right to import United States products into Mexico on the same terms as American vessels, and if this were so, American vessels would have the right to carry Danish productions, or those of any other country, to Mexico on the same terms. The Department, however, added: "The phrase 'most favored nation' is, however, very vague, and, as the records of this Department most amply show, is liable to a strict or liberal construction according to the views or supposed interests of foreign governments with which we have had treaties containing it. Under these circumstances, it would be advisable for our merchants engaged in the trade to Mexico, if they wish to avoid the exaction of the discriminating duty referred to, to be cautious how they send foreign goods thither in their own vessels, until the construction which that government may put in its decree, especially in connection with its treaty with Denmark, shall be known."

Mr. Marcy, Sec. of State, to Mr. Hargous, May 1, 1854, 42 MS. Dom. Let. 412.

A treaty between France and the Hawaiian Islands having conceded to consuls exclusive cognizance of all crimes, misdemeanors, and differences affecting the internal order of merchant ships where the disputants, besides being officers or members of the crew, were "exclusively French or Hawaiian subjects," it was advised that the consul of the United States at Honolulu had, in consequence of this stipulation, exclusive cognizance of disputes on American vessels between citizens of the United States, the treaty between the United States and Hawaii stipulating that the consular officers of the contracting parties should "enjoy the same privileges and powers with those of the most-favored nation."

Speed, At. Gen., June 26, 1866, 11 Op. 508.

"The articles [of the treaty between France and Madagascar of December 7, 1885] dealing with and defining the French protectorate are of course not open to extension under favored-nation clauses to other powers. The United States could not, for example, rest on their existing treaty to claim a share in the protectorate or the indemnity. These are not *favors*, but relations growing out of a state of war and involving rights analogous to those founded on conquest."

Mr. Bayard, Sec. of State, to Mr. Robinson, consul at Tamatave, No. 129, May 12, 1886, 117 MS. Desp. to Consuls, 571.

By Art. VII. of the treaty with Hayti of 1864 the coasting trade of the contracting parties "is respectively reserved by each exclu-

sively, to be regulated by its own laws." This reservation " is in the usual phraseology of modern treaties, and is only applicable to the respective coasting trades when confined to the flag of the contracting party. Any regulation of the trade by municipal law, which admits the flag of a foreign country to a domestic privilege, may be claimed for the flag of the United States under the favored-nation clause of Art. II. of the treaty." In such case, however, it must be ascertained whether the privilege extended to the foreign flag in question rests on a conventional arrangement, and if so, whether it is gratuitous or for an equivalent consideration.

Mr. Bayard, Sec. of State, to Mr. Thompson, min. to Hayti, No. 52, May 27, 1886, MS. Inst. Hayti, II. 553.

As to Art. VI. of the treaty with Costa Rica of 1851 and the discrimination made by Costa Rica in favor of goods imported by a certain line of steamers, see Mr. Bayard, Sec. of State, to Sec. of Treas. Feb. 6, 1888, 167 MS. Dom. Let. 114.

See, as to treaty with China, Mr. Hay, Act. Sec. of State, to Chinese min. Aug. 23, 1880, For. Rel. 1880, 304.

By Article XI. of the treaty between Spain and Nicaragua of July 25, 1850, Spanish subjects in Nicaragua are exempt " from every extraordinary charge, or contribution, or forced loan." On the strength of this stipulation, in connection with the most-favored-nation clause in Article IX. of the treaty between the United States and Nicaragua of 1867, the Department of State approved the action of the minister of the United States in Nicaragua in notifying American citizens in that country that they were exempt from an extraordinary loan called for by the Nicaraguan government of $500,000 for war purposes, apportioned among citizens and aliens alike on a property basis.

Mr. Olney, Sec. of State, to Mr. Baker, No. 458, June 1, 1896, MS. Inst. Central America, XX. 639.

" I have received your No. 410, of September 14, 1896, in regard to the treaty of trade and commerce concluded April 4, 1896, between the governments of Japan and Germany, relative to trade-marks and patents. In view of the provisions of that convention you add:

" ' It appears to me that under the most-favored-nation clause of our treaty with Japan, American citizens are, subject to the same terms and conditions, entitled to the same privileges and protection in regard to trade-marks, patents, etc., that the new German treaty secures in Japan to German subjects. . . .'

"Article IX. of our treaty with Japan of March 31, 1854, contains, it is presumed, the most-favored-nation clause to which you refer. It reads as follows:

"'It is agreed that if at any future day the government of Japan shall grant to any other nation or nations privileges and advantages which are not herein granted to the United States and to the citizens thereof, that these same privileges and advantages shall be granted likewise to the United States and to citizens thereof, without any consultation or delay.'

"By the treaty of July 29, 1858, such of the provisions of the treaty of 1854 as conflict with those of the former are revoked by Article XII. thereof. (See Treaty Vol. (1776–1887), p. 1256, Art. VI.) The quoted provision would not seem to be of that class, however. But without discussing that feature of the case, I may remark that, in the Department's judgment, the provision of the treaty of 1854, to which you refer, does not mean if Japan shall grant privileges to Germany in consideration of similar privileges granted by the latter to the former, the same privileges shall be granted gratuitously to the United States. The clause 'that these same privileges and advantages shall be granted likewise to the United States and to the citizens thereof, without any consultation or delay,' only refers, in my opinion, to privileges granted gratuitously to a third power and not to privileges granted in consideration of concessions made by another government.

"'A covenant to give privileges granted to the "most-favored nation" only refers to gratuitous privileges, and does not cover privileges granted on the condition of a reciprocal advantage.' (Mr. Livingston, Secretary of State, to President Jackson, January 6, 1832. Wharton's International Law Digest, sec. 134, p. 39, Vol. II.)

"You will find this subject of the 'most-favored-nation' treatment discussed in Mr. Frelinghuysen's instruction to Mr. Bingham, No. 827, of June 11, 1884, touching treaty revision in Japan. (See Wharton's Digest, sec. 68, p. 507, Vol. I.) It states, among other things, that the English contention has hitherto been under the most-favored-nation clause of the treaties that it is absolute, and that even when Japan may bargain with any power to give it a favor for an equivalent the like favor must be granted to England.

"The Japanese contention is the reverse of this, being that if a favor for a specific condition be stipulated with any one nation, no other may enjoy the favor except upon identical or equivalent conditions.

"'The theory on which this government views the question is akin to that of Japan,' observes Mr. Frelinghuysen, who then proceeds to cite a pertinent example and to fully discuss the whole subject.

"This theory was further exemplified and given practical application under the commercial arrangements concluded with foreign powers pursuant to section 3 of the tariff act of 1890.

"It may possibly be, as you conjectured, that American citizens are, 'subject to the same terms and conditions,' entitled to the same privileges and protection in regard to trade-marks and patents that the new Japanese-German treaty secures to German subjects in Japan, but the Department is compelled to think it at least doubtful. But even supposing your view to be correct, it is not perceived how it could be declared that the conditions exist except by a treaty, convention, or law pursuant to the act of Congress of March 3, 1881 (Stat. L., vol. 21, p. 502). That law protects trade-marks owned by persons 'located in any foreign country . . . which by treaty, convention, or law affords similar privileges to citizens of the United States.'

"In the absence of either one of the expressed conditions, Japanese subjects can not register their trade-marks in this country, and consequently we can not claim corresponding privileges in Japan.

"Now Article XVI. of the treaty of commerce and navigation concluded with that Empire November 22, 1894, says:

"'The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other the same protection as native citizens or subjects in regard to patents, trade-marks, and designs upon the fulfillment of the formalities prescribed by law.'

"When this treaty goes into effect on July 17, 1899, the matter can be simply and effectively adjusted. One of the conditions imposed by our statute will then have been fulfilled and due cognizance can be taken thereof.

"It is possible that a formal declaration reciting the provisions of the above treaty after submission to the Senate and proclamation by the President, by and with the advice and consent of that body, might meet the case. But as this declaration could not become operative in advance of the treaty's taking effect, it is perceived that such an arrangement would serve no practical purpose. Hence the only safe way is to conclude a formal convention to that end or wait until July 17, 1899, when the treaty of November 22, 1894, will come into existence."

Mr. Olney, Sec. of State, to Mr. Dun, min. to Japan, Nov. 12, 1896, For. Rel. 1896, 429 et seq.

See, also, Mr. Hay, Sec. of State, to Mr. Pioda, Swiss min., May 1, 1900, MS. Notes to Swiss Leg. I. 594.

It being provided by article 9 of the consular treaty between Germany and Spain of Feb. 22, 1870, that consular officers should have the right to remonstrate with the local authorities against the infraction of treaties and conventions and against abuses complained of by their countrymen, the United States claimed the same privilege for American consuls in the Spanish dominions under the most-favored-nation clause in article 19 of the treaty of 1795.

For. Rel. 1895, II. 1209–1214; For. Rel. 1896, 777–778.

By the consular convention between the United States and the German Empire of 1871 the citizens of each country are required to pay, in case of inheritance in the other, only such duties or taxes as are imposed on citizens of the country in which the property is situated or in which the judicial administration may be exercised. This stipulation was held by the attorney-general of Louisiana to inure to the benefit of the citizens of countries having with the United States the most-favored-nation clause.

Mr. Uhl, Acting Sec. of State, to the governor of Louisiana, May 22, 1895, 202 MS. Dom. Let. 292.

In 1896 and 1897 the United States complained to the German government of discriminating charges made on American woods on railways in Germany under government control. The discrimination was justified by the German government on the ground (1) that the American woods belonged to a particular genus not cultivated for commercial purposes in middle Europe, and (2) that the American woods were of greater value than those of middle Europe. The United States denied the assertion involved in the first point as well as that involved in the second.

For. Rel. 1897, 237–246.

Lord Salisbury, in an instruction to Sir F. Plunkett, British minister at Brussels, July 28, 1897, with reference to the treaty of commerce and navigation with Belgium of July 22, 1862, stated the reasons which had decided Her Majesty's government to give notice of its termination. He said that "the general stipulations of the treaty in question, being based on the principle of most-favored-nation treatment, are in accordance with the present views of Her Majesty's government," but he excepted Art. XV., which reads as follows:

"Articles, the produce or manufacture of Belgium, shall not be subject in the British colonies to other or higher duties than those which are or may be imposed upon similar articles of British origin."

Lord Salisbury pronounced this stipulation to be, in its effect, "entirely unusual in commercial treaties," so that it was probable that its insertion was due to oversight or to want of adequate consideration. He adverted to the fact that the British self-governing colonies had for many years "enjoyed complete tariff autonomy," and that by reason of the engagement in question they found themselves committed by treaty to a commercial policy which was "not in accordance with the views of the responsible colonial ministers, nor adequate to the requirements of the people." Besides, the article constituted "a barrier against the internal fiscal arrangements of the British Empire, which is inconsistent with the close ties of com-

mercial intercourse which subsist, and should be consolidated, between the mother country and the colonies." In conclusion, Lord Salisbury expressed a desire to conclude "a new treaty, from which the stipulations of Article XV. shall be excluded, and which, whilst containing a clause providing for the facultative adhesion of the British self-governing colonies, shall in other respects be similar to the treaty now denounced."

On the same day Lord Salisbury addressed a note, in substance the same, to Sir F. Lascelles, British ambassador at Berlin, giving notice of termination of the treaty with the German Zollverein of May 30, 1865, Article VII. of which was the same, mutatis mutandis as Art. XV. of the treaty with Belgium.

Both notices were received without objection by the governments to which they were addressed.

Blue Book, Commercial, No. 7 (1897).

"Under the most-favored-nation clause of the treaty of 1858 [with China] citizens of the United States are entitled to frequent and reside at any port open to commerce by the treaty with any power."

Report of Mr. Penfield, solicitor for the Department of State, Nov. 23, 1897, adopted in Mr. Sherman, Sec. of State, to Mr. Denby, min. to China, Nov. 30, 1897, For. Rel. 1897, 76, 79.

As to the claim for American missionaries in China, under the most-favored-nation clause, of the rights secured by the agreement between China and France, known as the Berthemy convention, concerning the purchase of real property in China, see Mr. Adee, Act. Sec. of State, to Mr. Denby, min. to China, No. 1109, July 18, 1895, MS. Inst. China, V. 208.

By the Franco-Haytian commercial treaty of 1900, a reduction was made in Hayti on the tonnage dues paid by French sailing vessels and in the duties on merchandise landed from French steamers, such merchandise being of French origin.

By Article X. of the treaty between the United States and Hayti of November 3, 1864, it was provided that all kinds of merchandise that could be lawfully imported into Hayti in her own vessels might also be imported in vessels of the United States, and that "no higher or other duties upon the tonnage or cargo of the vessels shall be levied or collected than shall be levied or collected of the vessels of the most favored nation."

On the strength of this stipulation an inquiry was made as to whether the Haytian government intended to impose higher or other tonnage dues upon American vessels carrying merchandise of French origin to Hayti than upon French vessels carrying such merchandise.

The Haytian government replied that the reciprocal character of the Franco-Haytian treaty withdrew the subject from the sphere of

the most-favored-nation clause, and, in connection with Article X. of the treaty of 1864, which the United States had cited, invoked the provisions of Article II. of the same treaty, which provided for the extension by each contracting party to the other of any favor granted to a third power, "gratuitously" if the concession was gratuitous, or "in return for an equivalent compensation" if it was conditional.

The United States answered that in its opinion Article X. of the treaty of 1864 "is quite independent of Article II. and creates absolute rights, which this government cannot fail to insist upon. Should, therefore, any higher charges be collected on American tonnage than that of any other country they will be reclaimed."

Mr. Hill, Act. Sec. of State, to Mr. Powell, min. to Hayti, Feb. 8, 1901; Mr. Hay, Sec. of State, to Mr. Powell, min. to Hayti, March 1, 1901, For. Rel. 1901, 278, 279.

VII. *TERMINATION.*

1. General Rules.

§ 770.

"A treaty may be modified or abrogated under the following circumstances:

"(1) When the parties mutually consent.

"(2) When continuance is conditioned upon terms which no longer exist.

"(3) When either party refuses to perform a meaterial stipulation.

"(4) When all the material stipulations have been performed.

"(5) When a party having the option elects to withdraw.

"(6) When performance becomes physically or morally impossible.

"(7) When a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists.

"In most of the old treaties were inserted the '*clausula rebus sic stantibus*,' by which the treaty might be construed as abrogated when material circumstances on which it rested changed. To work this effect it is not necessary that the facts alleged to have changed should be material conditions. It is enough if they were strong inducements to the party asking abrogation.

"The maxim, '*Conventio omnis intelligitur rebus sic stantibus*,' is held to apply to all cases in which the reason for a treaty has failed, or there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice."

Wharton, Int. Law Digest, II. 58, citing Whart. Com. Am. Law, § 161.

It being argued that the treaty of peace between the United States and Great Britain of 1783 was to be considered by the courts as suspended or abrogated by Great Britain's failure to execute certain parts of it, Mr. Justice Iredell said: "It is a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void. If Congress, therefore (who, I conceive, alone have such authority under our government), shall make such a declaration, . . . I shall deem it my duty to regard the treaty as void, . . . But the same law of nations tells me, that until that declaration be made, I must regard it (in the language of the law) *valid and obligatory*."

Ware *v.* Hylton (1796), 3 Dallas, 199, 261.

"Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent's Comm. 174."

In re Thomas, 12 Blatch. 370, cited in Terlinden *v.* Ames (1902), 184 U. S. 270, 287.

"The question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and . . . the courts ought not to interfere with the conclusions of the political department in that regard."

Terlinden *v.* Ames (1902), 184 U. S. 270, 288, citing In re Thomas, 12 Blatch. 370; Foster *v.* Neilson, 2 Pet. 253, 314; Doe *v.* Braden, 16 How. 635, 656.

"Cessation of independent existence [when Hanover and Nassau were incorporated by conquest into the Kingdom of Prussia] rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties can not be regarded as avoided because of impossibility of performance."

Terlinden *v.* Ames (1902), 184 U. S. 270, 283.

"Without considering whether extinguished treaties can be renewed by tacit consent under our Constitution," it was held that the question whether a treaty had ever been terminated was one in respect of which governmental action "must be regarded as of controlling importance."

Terlinden *v.* Ames (1902), 184 U. S. 270, 285.

"Treaties, as I understand the Constitution, are made *supreme* over the constitutions and laws of the particular States, and, like a subsequent law of the United States, over pre-existing laws of the United States; provided, however, that the treaty be within the prerogative of making treaties, which, no doubt, has certain limits.

"That the contracting powers can annul the treaty can not, I presume, be questioned, the same authority, precisely, being exercised in annulling as in making a treaty.

"That a breach on one side (even of a single article, each being considered as a condition of every other article) discharges the other, is as little questionable; but with this reservation, that the other side is at liberty to take advantage or not of the breach, as dissolving the treaty. Hence I infer that the treaty with Great Britain, which has not been annulled by mutual consent, must be regarded as in full force by all on whom its execution in the United States depends, until it shall be declared, by the party to whom a right has accrued by the breach of the other party to declare, that advantage is taken of the breach, and the treaty is annulled accordingly. In case it should be advisable to take advantage of the adverse breach, a question may perhaps be started, whether the power vested by the Constitution with respect to treaties in the President and Senate makes them the competent judges, or whether, as the treaty is a law, the whole legislature are to judge of its annulment, or whether, in case the President and Senate be competent in ordinary treaties, the legislative authority be requisite to annul a *treaty of peace*, as being equivalent to a declaration of war, to which that authority alone, by our Constitution, is competent."

Mr. Madison to Mr. Edmund Pendleton, Jan. 2, 1791, 1 Madison's Works, 523, 524.

In 1876 a controversy arose between the United States and Great Britain in the case of one Winslow, whose extradition was demanded from the British government on a charge of forgery, as to whether a fugitive from justice, delivered up under Article X. of the treaty of 1842, might be tried for an offense other than that for which he was surrendered. In consequence of this controversy the operation of the treaty was suspended for six months. The execution of the treaty was then resumed without any express agreement as to the point of dispute which had occasioned its suspension.

For. Rel. 1876, 204–309; For. Rel. 1877, 271–289.

In the discussion of the foregoing case, Mr. Fish said that, if Her Majesty's government should conclude that the British Parliament had by the act of 1870 attached a new condition to the performance by that government of its engagements, the President did not see how

he could avoid regarding the refusal by Great Britain to adhere to the provisions of the article as an "infraction and termination" of it.

Mr. Fish, Sec. of State, to Mr. Hoffman, chargé, No. 864, March 31, 1876, For. Rel. 1876, 210, 218.

The British government denied that it had imposed a new condition upon the execution of the treaty. (Lord Derby to Mr. Hoffman, May 4, 1876, For. Rel. 1876, 227–230.)

In his message to Congress of June 20, 1876, President Grant, varying the form, but not the substance, of Mr. Fish's statement, said that the position taken by the British government, if adhered to, could not "but be regarded as the abrogation and annulment of the article of the treaty on extradition." (For. Rel. 1876, 254.)

The continued violation of a treaty provision by one of the contracting parties will justify the other in regarding the provision as temporarily suspended.

Mr. Bayard, Sec. of State, to Mr. Fairchild, Sec. of Treasury, Feb. 6, 1888, For. Rel. 1888, I. 124–125.

"The Duke [of Wellington, then prime minister] has left a memorandum on the cabinet table showing clearly from treaties that this [the overthrow of the Bourbons in 1830] is not a case in which we were bound to interfere. We engaged to support a constitutional monarch against revolutionary movements, but the monarch having violated the constitution has broken the condition."

2 Lord Ellenborough's Diary, II. 341, entry of Aug. 23, 1830.

2. Termination by Notice.

§ 771.

It is a common practice to insert in treaties a provision by which they may be terminated by notice of a certain duration given by one contracting party to the other. In the United States a question has arisen as to how this notice, when given by the President, should be authorized. Usually it has been given under the authority of a joint resolution of Congress. In the case of the treaty of commerce with Denmark of April 26, 1826, notice of an intent to terminate it was given by President Pierce, acting under a resolution unanimously passed by the Senate in executive session. This action having been questioned by Mr. Sumner, the Committee on Foreign Relations of the Senate made a report sustaining what had been done, but observed that no special legislation had been passed to carry the treaty into effect.

See Crandall, Treaties, their Making and Enforcement, 251–253.

October 24, 1864, Mr. Seward, Secretary of State, instructed Mr. Adams, then United States minister in London, to give to the British government the stipulated six months' notice of an intention to terminate the arrangement between the United States and Great Britain of April 28–29, 1817, in relation to armaments on the Great Lakes. The arrangement in question was originally effected by an exchange of notes, but a year later the correspondence was communicated to the Senate, which approved the arrangement and recommended that it be carried into effect. The arrangement had, however, already been carried into effect by executive orders on both sides, and no formal exchange of ratifications ever took place.

Mr. Adams duly communicated to the British government the notice which he was instructed to give. This was done by a note addressed to Earl Russell, November 23, 1864. By a joint resolution of Congress, approved February 9, 1865, the notice thus given was "adopted and ratified." The arrangement was thus to come to an end on May 23, 1865. March 8, 1865, however, Mr. Seward, in view of a change of the situation along the Lakes, instructed Mr. Adams to say to Earl Russell that the United States was "quite willing that the convention should remain practically in force," and that it was hoped and expected that, so long as this determination should be observed by the United States, Her Majesty's government would adhere to the provisions of the arrangement. June 15, 1865, Sir Frederick Bruce, British minister at Washington, informed the Department of State that he was "instructed to ascertain whether the despatch to Mr. Adams of the 8th of March was intended as a formal withdrawal of the notice given . . . on November the 23d, or whether, as the period of six months from the date of that notice has now elapsed, the agreement of 1817 is virtually at an end, and the abstinence of either party from increasing its force on the Lakes, without further notice, rests merely on the good pleasure of each, unfettered by any diplomatic engagement." Mr. Seward, June 16, 1865, replied that his communication to Mr. Adams of the 8th of March "was intended as a withdrawal of the previous notice within the time allowed, and that it is so held by this government."

"Here the correspondence in regard to the termination of the arrangement of 1817 ceased. Since that time it has been regarded by both governments as in continuing force and effect."

Report of Mr. Foster, Sec. of State, to the President, Dec. 7, 1892, H. Doc. 471, 56 Cong. 1 sess. 13–16, 30–34. This report originally accompanied the message of President Harrison to the Senate of Dec. 7, 1892, S. Ex. Doc. 9, 52 Cong. 2 sess.

In the course of his report, Mr. Foster says: "Whether the Secretary of State was himself competent to withdraw the notification is not material to the international aspect of the case, because, being a matter of domestic administration, affecting the internal relations of the

> executive and legislative powers, it in no wise concerns Great Britain . . . As a question of domestic administration and powers, the action of the Secretary of State . . . opens the door to nice argument in theory touching the constitutional aspects of the transaction, but as a matter of practical effect such consideration may now be deemed more interesting than material." (H. Doc. 471, 56 Cong. 1 sess. 36.)

By Article XXXV. of the treaty between the United States and New Granada [Colombia] of Dec. 12, 1846, it is stipulated that the treaty shall remain in force twenty years from the date of the exchange of ratifications; but that "if neither party notifies to the other its intention of re-forming any of, or all, the articles . . . twelve months before the expiration of the twenty years," the treaty "shall continue binding on both parties beyond the said twenty years, until twelve months from the time that one of the parties notifies its intention of proceeding to a reform. The ratifications were exchanged June 10, 1848. January 23, 1867, Gen. Salgar, the Colombian minister to the United States, addressed to the Department of State a note, in which he stated that he had been instructed to set on foot a negotiation for a renewal of the treaty, with some modifications. The receipt of this note was acknowledged Jan. 29, 1867. On the 23d of the following April General Salgar communicated to the Department the changes which his government desired and offered to discuss them. To this note no reply appears to have been made; nor is there anything of record to show that the proposed discussion took place, or that General Salgar's notes were recorded or received as such a notice as the clause above quoted specifies. In a correspondence that took place in 1871 it was expressly agreed on both sides that the treaty remained in force. On the part of Colombia, it was declared that the notes of General Salgar did not constitute a notice of termination, while, on the part of the United States, Mr. Fish said: "Although literally and technically, pursuant to the clause of the 35th article . . . , this government might hold that the application made by General Salgar for a revision of the treaty, in anticipation of a lapse of the time fixed for its termination, might be held to have brought about that result, the intentions of the parties at the time may, as you observe, be allowed to govern the question. General Salgar in his notice did not say that if his proposition should not be accepted the Colombian government would regard the treaty as at an end, and Mr. Seward does not appear to have received that proposition as a formal notice of termination. His silence upon the subject may fairly be construed as indicative of an opinion on his part that, so far as the interests of the United States were concerned, no change in the treaty was required, and the form of the application of Colombia may also be construed to imply that, although she might prefer the changes proposed in that application,

she did not regard them as indispensable to its continuance. Under these circumstances it may be said to comport with the interests of both parties to look upon the treaty as still in full force, but as subject to revision or termination in the form and upon the terms stipulated."

Mr. Fish, Sec. of State, to Mr. Perez, Colombian min., May 27, 1871, For. Rel. 1871, 247. See, also, Mr. Fish to Mr. Perez, Feb. 8, 1871; Mr. Perez to Mr. Fish, April 15, 1871; For. Rel. 1871, 243, 246.

"We have certain rights still existing under our old treaty with Brazil of 1828 which, in the matter of the collection and administration of estates, should place us upon as favorable a footing as any of the European powers. You will observe, by turning again to Mr. Partridge's No. 123, and the papers there referred to, that, after certain correspondence on this subject, Brazil admitted that Article XI. of the treaty was in force, but maintained that it did not touch upon consular rights, and this with some show of reason, it appears to me; for Article XXXII. of the treaty states, in effect, the necessity of a consular convention to declare especially the powers and immunities of consuls; and this matter of estates, as it is nowhere else referred to in the treaty as coming under consular jurisdiction in any way, would presumably have been one of the subjects to be included in the proposed convention.

"Our treaty contains, however, the most-favored-nation clause, Article II., and although the treaty 'in all parts relating to commerce and navigation' ceased and determined December 12, 1841, and the words 'in respect to commerce and navigation' occur in the body of that article, still I think it tenable to maintain that the article itself is yet in force, and entitles us among other favors to the privilege enjoyed by the European powers in the settlement of estates. It would certainly seem that under the peace and friendship parts of the treaty, which are to be permanently and perpetually binding on both powers, is included Article II., and that Brazil could not consistently withhold from us the privileges it confers."

Mr. Trail, min. to Brazil, to Mr. Bayard, Sec. of State, No. 77, March 19, 1887, For. Rel. 1887, 60, 62.

Replying to an inquiry whether, under article 13 of the International Metrical Convention of 1875, a government desiring to retire therefrom must give notice one year before the end of the specified twelve years, or whether it might give notice at any time after that period, the Department of State, while observing that the question properly pertained to the Treasury Department, which had the Bureau of Weights and Measures under its charge, called attention to the fact that Professor J. E. Hilgard, inspector of United States

standard weights and measures, in a report of March 3, 1876, said: "Provision is made in the convention for the withdrawal of any of the contracting parties *after* a term of twelve years.

Mr. Rives, Assist. Sec. of State, to Mr. Latimer, March 15, 1888, 167 MS. Dom. Let. 472.

In 1888 a question arose as to whether Article XII. of the treaty between the United States and Guatemala of March 3, 1849, was still in force. By this article the courts of each country were opened to the citizens of the other "on the same terms which are usual and customary with the natives or citizens of the country." The question as to whether the article was in force was raised by the exaction of a large bond from Mr. C. Pinto, an American citizen, in a suit which he had brought against a bank in Guatemala.

By Article XXXIII. of the treaty it was stipulated that "all its parts relative to commerce and navigation" should be terminable on a year's notice; but that "all those parts which relate to peace and friendship" should be "perpetually binding on both Powers."

It appeared that on September 12, 1873, Señor Soto, Guatemalan minister of foreign affairs, notified Mr. Williamson, United States minister, that the President of Guatemala, on the 28th of the preceding month, had directed the termination of all treaties with foreign countries in order that more suitable treaties might be entered into; and to this end Señor Soto gave notice that the treaty of 1849 would be regarded as denounced on and after the receipt of the notice at Washington. Mr. Williamson, not being clear as to the meaning of this communication, called attention, September 16, 1873, to the fact that by Article XXXIII. the treaty would continue in effect for twelve months after the date of the notice. October 30, 1873, the Guatemalan minister at Washington gave notice of the desire of his government to terminate the treaty, in accordance with Article XXXIII. Mr. Fish, on November 15, 1873, replied that Mr. Williamson had been advised that "the treaty would terminate . . . one year from the receipt of the notice by this government." No further correspondence on the subject took place.

With regard to the question raised in 1888, Mr. Bayard, who was then Secretary of State, said that, as notice was given pursuant to Article XXXIII. of the treaty so far as time was concerned, and as the stipulations of that article were thus recognized in the denunciation of the treaty, it might be argued that the parts relating to "peace and friendship" were to be regarded as still in force. As to what parts related to "peace and friendship," as distinguished from those relating to "commerce and navigation," the treaty furnished no test; and it was therefore necessary, said Mr. Bayard, to look to the substance of the various provisions in order to find under which

head they fell. "In international relations," said Mr. Bayard, "peace and friendship have certain incidents, which constitute the comity of nations as distinguished from rights of commerce; that is to say, of buying, selling, and trading. One of those incidents is the right of resort to the courts for the protection of persons and property." He therefore considered Article XII. as being still in force, as well as Article XIII., which guaranteed freedom from molestation on account of religious belief as well as undisturbed rights of burial.

These views having been duly laid before the Guatemalan government, Señor Barrutia, minister for foreign affairs, replied: "We are . . . perfectly in accord on this point, and for the reasons expressed, the convention (treaty), except as regards the stipulations of a terminable character which it contains, can not be considered as having terminated."

Mr. Bayard, Sec. of State, to Mr. Hosmer, chargé, No. 574, April 30, 1888, For. Rel. 1888, I. 149–151; Señor Barrutia to Mr. Hosmer, June 9, 1888, id. 159.

"This treaty [with Guatemala of 1849] was terminable in all its parts relating to commerce and navigation, but in all those parts which relate to peace and friendship Article XXXIII. declares that it shall be 'perpetually binding on both powers.' Notice of the determination of the treaty was given by Guatemala in 1874, but July 9, 1888, that government declared in a note to Mr. Hosmer, chargé d'affaires of the United States, that Article XII. and some other provisions, being parts of the treaty which relate to peace and friendship and are based on the general principles of popular rights, 'are to be completely observed, although no treaty exists which would establish them.' The letter closes with the declaration that 'the convention (treaty), except as regards the stipulations of a terminable character which it contains, can not be considered as having terminated.' (Foreign Relations, 1886, pp. 149, 159.)"

Mr. Olney, Sec. of State, to Mr. Young, min. to Guatemala, Jan. 30, 1896, For. Rel. 1895, II. 775.

Question as to Art. XXIX., treaty of Washington.

April 5, 1883, there was transmitted to the American minister in London a copy of a joint resolution of Congress of March 3, 1883, directing the President to give notice on July 1, 1883, or as soon thereafter as might be, of the termination of Articles XVIII. to XXV., inclusive, and of Article XXX. of the treaty of Washington of May 8, 1871.[a] A copy of the resolution was communicated to the British

[a] Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, April 5, 1883, For. Rel. 1883, 413; 22 Stat. 641.

government April 18, 1883,[a] and on July 2, 1883, the 1st of July being Sunday, formal notice of termination was given.[b] Articles XVIII. to XXV. related to the fisheries, and Article XXX. to certain privileges in the coasting trade. August 22, 1883, Lord Granville inquired whether it was intended to include in the notice of termination Article XXXII. of the treaty, by which Newfoundland was admitted to the arrangement then about to be terminated with regard to the fisheries.[c] October 16, 1883, the United States instructed its minister in London to say that Article XXXII. would fall with the others, as it was wholly dependent upon them.[d] The British government was so advised, and the notice was accepted in that sense.[e] By a proclamation of the President, issued January 31, 1885, notice was given that Articles XVIII. to XXV., Article XXX. and Article XXXII. would expire on July 1, 1885.[f]

"I have the honor to acknowledge the receipt of your letter of the 8th ultimo, asking for the views of the Department on the question whether article 29 of the treaty of Washington, relating to the transit of goods in bond, is still operative.

"The joint resolution approved March 3, 1883, directed the President to give notice to the government of Her Britannic Majesty of the termination of 'articles numbered eighteen to twenty-five, inclusive, and of article thirty' of that treaty. No express reference was made in the resolution to article 29, but in the third section, which repealed the act of March 1, 1873, to carry into effect the articles intended to be terminated, as well as article 29, it was provided that that act should be repealed only 'so far as it relates to the articles of said treaty so to be terminated.' . . .

"It was agreed in article 29 that it should remain in force 'for the term of years mentioned in Article XXXIII.,' which also defined the duration of Articles XVIII.–XXV. and Article XXX. This term was 'a period of ten years from the date at which they (Articles XVIII. to XXV., inclusive, and Article XXX.) may come into operation; and further until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward.' These pro-

[a] For. Rel. 1883, 435.

[b] For. Rel. 1883, 441.

[c] For. Rel. 1883, 451.

[d] Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, Oct. 16, 1883, For. Rel. 1883, 464.

[e] For. Rel. 1884, 214–215.

[f] For. Rel. 1885, 466.

visions constituted a term certain of twelve years, and so long thereafter as the contracting parties might desire. It may be observed that article 29 refers to the 'term' of years mentioned in Article XXXIII., while article 30 referred to the 'terms' of years mentioned in the same article. But it will be found that this variation has no significance, as the words 'term' and 'terms' are employed indifferently in the articles which refer to article 33 for the definition of their existence.

"It may be assumed, and the history of the negotiations seems to show, that article 29, relating to transit of goods in bond, was agreed upon as part of the system of reciprocities of which the fisheries articles of the treaty formed one and the principal part, and article 30, providing for a qualified participation by the citizens or subjects of either of the contracting parties in the coasting trade of the other, formed an additional and different part. But it does not appear that either article 29 or article 30 was so united with the fisheries articles that neither could stand without the latter. Such was unquestionably the view both of the Senate and the House of Representatives when, without a division, they passed a joint resolution directing the notice of termination of articles 18–25 and article 30 to be given, and repealed the legislation which had been adopted to carry them into effect. The records of the debates of both bodies show that the only question raised in either House as to the resolution directing notice to be given was whether that part of the resolution which repealed the legislation carrying into effect the articles directed to be terminated would affect the provisions of the act of March 1, 1873, which gave effect to article 29. And it was in order to avoid the repeal of those provisions by implication that the provision that the act of 1873 should be repealed 'so far as it relates to the articles of said treaty so to be terminated' was inserted. Those words were not in the resolution as originally reported to the Senate, but were inserted to meet the objection above stated.

"You will also see, by a memorandum accompanying this letter, that in the debates in Congress during the last session on the various bills introduced in relation to the Canadian fisheries, it was generally understood and stated that article 29 remained in force.

"But the best evidence that the notice of termination of articles 18–25, inclusive, and article 30, was not intended or supposed by Congress to affect the continued existence of article 29, is the fact already adverted to that the provisions of the act of March 1, 1873, carrying into effect the stipulations of that article, were not included in that clause of the resolution of 1883 which repealed the municipal legislation enacted to carry certain articles of the treaty, including article 29, into effect, and it would, therefore, seem that the transit of goods

in bond, according to the terms of article 29, is still authorized by act of Congress."

Mr. Bayard, Sec. of State, to Sec. of Treasury, July 6, 1887, S. Ex. Doc. 40, 52 Cong. 2 sess. 11; 164 MS. Dom. Let. 700.

The memorandum above referred to will be found attached to a letter from the Treasury Department of July 18, 1889, MS. Misc. Let. It is printed in S. Ex. Doc. 40, 52 Cong. 1 sess. 12–15.

The joint resolution of March 3, 1883, was reported to the Senate by Mr. Edmunds from the Committee on Foreign Relations on the 9th of the preceding month. When it was taken up February 21, Mr. Windom raised the question whether the 3d section, which repealed the act of March 1, 1873, would affect the bonded transit system. The section, as it then stood, provided that, on the termination of the articles mentioned, the act of March 1, 1873, "shall be and stand repealed." After some debate Mr. Edmunds said that, in order to guard against all possible misconstruction, he would move to amend the section so as to make it read that the act of March 1, 1873, "so far as it relates to the articles of said treaty so to be terminated shall be and stand repealed." The amendment was adopted.

The resolution as thus amended was brought up in the House by Mr. Rice Feb. 26, 1883. To an inquiry by Mr. Washburn, whether it repealed sec. 2866, R. S., in relation to bonded transit, Mr. Rice replied that those provisions were excepted from the operation of the resolution by its terms. Mr. Washburn remarked that if this was the case he had no objection to the passage of the resolution; otherwise he would have objection. The resolution then passed without objection.

The text of the resolution may be found in 22 Stat. 641.

"It seems quite plain that article twenty-nine of the treaty of 1871, . . . terminated the first day of July, 1885. The article itself declares that its provisions shall be in force 'for the term of years mentiond in article thirty-three of this treaty.' Turning to article thirty-three we find no mention of the twenty-ninth article, but only a provision that articles eighteen to twenty-five, inclusive, and article thirty shall take effect as soon as the laws required to carry them into operation shall be passed by the legislative bodies of the different countries concerned, and that 'they shall remain in force for the period of ten years from the date at which they may come into operation, and further 'until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same.'

"I am of the opinion that the 'term of years mentioned in article thirty-three,' referred to in article twenty-nine as the limit of its duration, means the period during which articles eighteen to twenty-five, inclusive, and article thirty, commonly called the 'fishery articles,' should continue in force under the language of said article thirty-three.

"That the Joint High Commissioners who negotiated the treaty so understood and intended the phrase is certain, for in a statement containing an account of their negotiations, prepared under their supervision and approved by them, we find the following entry on the subject:

"'The transit question was discussed, and it was agreed that any settlement that might be made should include a reciprocal arrangement in that respect for the period for which the fishery articles should be in force.'

"In addition to this very satisfactory evidence supporting this construction of the language of article twenty-nine, it will be found that the law passed by Congress to carry the treaty into effect furnishes conclusive proof of the correctness of such construction.

"This law was passed March 1, 1873, and is entitled 'An act to carry into effect the provisions of the treaty between the United States and Great Britain, signed in the city of Washington the eighth day of May, eighteen hundred and seventy-one, relating to the fisheries.' After providing in its first and second sections for putting in operation articles eighteen to twenty-five inclusive, and article thirty of the treaty, the third section is devoted to article twenty-nine as follows:

"'Section 3. That from the date of the President's proclamation authorized by the first section of this act, and so long as the articles eighteenth to twenty-fifth inclusive, and article thirtieth of said treaty shall remain in force according to the terms and conditions of article thirty-third of said treaty, all goods, wares, and merchandise arriving, etc., etc.—'

"following in the remainder of the section the precise words of the stipulation on the part of the United States as contained in article twenty-nine, which I have already fully quoted.

"Here, then, is a distinct enactment of the Congress limiting the duration of this article of the treaty to the time that articles eighteen to twenty-five, inclusive, and article thirty, should continue in force. That in fixing such limitation it but gave the meaning of the treaty itself, is indicated by the fact that its purpose is declared to be to carry into effect the provisions of the treaty, and by the further fact that this law appears to have been submitted before the promulgation of the treaty to certain members of the Joint High Commission representing both countries, and met with no objection or dissent.

"There appearing to be no conflict or inconsistency between the treaty and the act of the Congress last cited, it is not necessary to invoke the well-settled principle that in case of such conflict the statute governs the question.

"In any event, and whether the law of 1873 construes the treaty or governs it, section twenty-nine of such treaty, I have no doubt,

terminated with the proceedings taken by our government to terminate articles eighteen to twenty-five, inclusive, and articles thirty of the treaty. These proceedings had their inception in a joint resolution of Congress passed May 3, 1883, declaring that in the judgment of Congress these articles ought to be terminated, and directing the President to give the notice to the government of Great Britain provided for in article thirty-three of the treaty. Such notice having been given two years prior to the first day of July, 1885, the articles mentioned were absolutely terminated on the last-named day, and with them article twenty-nine was also terminated.

"If by any language used in the joint resolution it was intended to relieve section three of the act of 1873 embodying article twenty-nine of the treaty from its own limitations, or to save the article itself, I am entirely satisfied that the intention miscarried."

Special message of President Cleveland to Congress, Aug. 23, 1888, H. Ex. Doc. 434, 50 Cong. 1 sess.

Mr. Edmunds, speaking in the Senate, August 24, 1888, stated that in his judgment the opinion expressed by President Cleveland that Article XXIX. was not in force was "gravely erroneous;" that it had been "often agreed in this body in former discussions of topics that touch this question," and "was agreed when we passed the act directing the President to terminate the other articles named" that Article XXIX. was not terminated.[a]

Mr. Edmunds also cited a letter of Mr. Bayard, Secretary of State, to Senator Reagan, January 7, 1887, in which it was stated that the articles of the treaty relating to "commercial intercourse" were still in force.[b]

Senator Sherman cited a conference report to the Senate on the retaliatory act of 1887, the conferees on the part of the Senate being Mr. Morgan, of Alabama, and Mr. Edmunds, of Vermont, in which it was stated that "Article XXIX. was not terminated."[c] Subsequently, in a speech in the Senate, September 18, 1888, Mr. Sherman referred to the President's opinion as being supported "upon a narrow and technical construction of Article XXXIII."[d]

The view thus maintained was elaborately set forth by Senator Cullom, who argued that "the term of years mentioned in Article XXXIII.," which was to be the duration of Article XXIX., meant the terms of ten years and in addition two years after notice was given, and not the term during which the fisheries articles might continue in force.[e]

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[a] Cong. Record, Aug. 25, 1888, 50 Cong. 1 sess. XIX. 7904.

[b] Id. 7906.

[c] Id. 7919.

[d] Cong. Record, Sept. 19, 1888, 50 Cong. 1 sess. XIX. 8669.

[e] Cong. Record, Aug. 31, 1888, 50 Cong. 1 sess. XIX. 8921.

The opinion of the President was elaborately sustained by Senator George.[a]

It may be observed that Senators Sherman, Edmunds, Frye, Evarts, and Dolph, in their report from the Committee on Foreign Relations, May 7, 1888, against the ratification of the treaty signed on the 15th of February, spoke of Article XXIX. as "not having been terminated;" while Senators Morgan, Saulsbury, Brown, and Payne, in their minority report, made a similar statement.[b]

Mr. Morgan, however, subsequently maintained that under section 2866, Revised Statutes, embodying section 3 of the act of 1873, the termination of Articles XVIII.–XXV. and Article XXX. ended the legislative authority by which Article XXIX. was executed.[c]

The question was also discussed in the House.[d]

In the latter part of 1897 inquiries were made of the Treasury Department by the commissioner of customs for the Dominion of Canada concerning the transportation of merchandise by transshipment in bond, in British or Canadian bottoms, to places in British Columbia on the Yukon and Stikine rivers in connection with Article XXIX. of the treaty of Washington. In replying to these inquiries, which were communicated by the Treasury Department to the Department of State, Mr. Sherman, who was then Secretary of State, referred to the opposing views of Mr. Bayard and President Cleveland with regard to the termination of Article XXIX. and also to an examination of the question made in the Department of State in 1890. After adverting to these matters, Mr. Sherman said:

"Some two years later, the subject of the existence or non-existence of article 29 of the treaty of Washington received exhaustive treatment by President Harrison, in his message to Congress of February 3, 1893. . . . Mr. Harrison's conclusions, which rested in great part on an opinion of the Attorney-General, were recapitulated under seven heads, the first being, 'That article 29 of the treaty of Washington has been abrogated,' and the second, 'That, even if this article were in force, there is no law in force to execute it.'

"This important message of President Harrison was . . . in response to the House resolution of July 23, 1892, which dealt with certain details of our legislation in regard to the transit of important merchandise on land from one port in the United States to another over Canadian territory, and in respect to the inspection of such merchandise and the sealing of the containing cars upon departure and arrival at the United States ports. While mainly applicable to the

[a] Cong. Record, Sept. 1, 1888, id. 8979–8980.

[b] S. Report 3, confidential, May 7, 1888, 50 Cong. 1 sess. 14, 41.

[c] Cong. Record, Sept. 26, 1888, 50 Cong. 1 sess. XIX. 8763, 9830.

[d] See, particularly, the speeches of Messrs. Belmont and Hitt, Sept. 5 and Sept. 6, 1888, Cong. Record, 50 Cong. 1 sess. XIX. 9115, 9164.

questions before him, the conclusions of the President, in generally regarding the power to regulate such transit as wholly one of our domestic competence, have a pertinent bearing on the subject of your present inquiry, which entitles them to respectful consideration at this juncture. I quote the third and fourth of Mr. Harrison's conclusions: 'Third. That when in force the treaty imposed no obligation upon the United States to use the concessions as to transit made by Canada, and no limitation upon the powers of the United States in dealing with merchandise imported for the use of our citizens through Canadian ports or passing from one place in the United States to another through Canada, upon the arrival of such merchandise at our border. Fourth. That, therefore, treaty or no treaty, the question of sealing cars containing such merchandise and the treatment of such sealed cars when they cross our border is, and always has been, one to be settled by our laws according to our own convenience and our interests as we may see them.'

"Another consideration may appear in this relation. As would seem to be the case from the presentation of the matter in the inquiry made of your Department by the Canadian commissioner of customs, the question is one of the transit, by transshipment or otherwise, of Canadian merchandise from one port in Great Britain, or in Canada, by way of ports or territory of the United States, to another port or place in Canada. The regulation of such transit or transshipment appears to be a matter within our domestic province, to be governed by existing law, or by such measures as your Department may be competent to prescribe to meet the case.

"In this view of the case it may be pertinent to inquire as to the applicability of the language of article 29 of the treaty of Washington to the case in point, for if it be not in terms applicable, the question as to the continued validity of that article ceases to be material to the issue before me.

"As well recited in President Harrison's message, that article made provision—

"'First, for the transit in bond, without the payment of duties, of goods arriving at specified ports of the United States, and at others to be designated by the President, destined for Canada.

"'Second, for the transit from Canada to ports of the United States, without the payment of duties, of merchandise for export.

"'Third, for the transit of merchandise arriving at Canadian ports, destined for the United States, through Canadian territory to the United States, without the payment of duties to the Dominion government.

"'Fourth, for the transit of merchandise from the United States to Canadian ports for export, without the payment of duties.

"'And fifth, for the transit of merchandise, without the payment of duties, from the United States through Canada to other places in the United States.'

"The first of these provisions might be applicable, admitting article 29 to be in force, in the case presented by the Canadian commissioner's inquiry, of 'goods sent from Great Britain by the all-sea route and transshipped at St. Michael's into river boats for the Yukon district in Canada,' if St. Michael's were one of the ports designated in article 29, or since especially designated by the President of the United States, for the purpose mentioned in the treaty. It would not be applicable to goods carried in British vessels from Vancouver, B. C., to St. Michael's, Alaska, in transit for Port Cudahy in Canada (via Yukon River). I am not informed that St. Michael's has ever been designated by the President as a port of transit for the purposes of article 29, either within the express duration thereof or since July 1, 1885, at which date the messages of Presidents Cleveland and Harrison regard it as having terminated. If not, nothing in the treaty article, granting it to be still in force, requires the designation of St. Michael's as such a port: if it had been so designated, the regulation of the conditions of such transshipment would still be a matter to be regulated by the United States within their sole discretion.

"On the whole, I do not discern in your present inquiry adequate occasion for precipitating the question whether article 29 of the treaty of Washington has ceased to exist by reason of the termination, July 1, 1885, of the 18–25 and 30th articles by notice given and accepted. That question has not in any manner been raised as between the United States and Great Britain during the twelve years and more that have since passed, and its abrupt presentation now might well be deemed inexpedient as to a solitary phase concerning which Great Britain could not even claim a treaty right."

Mr. Sherman, Sec. of State, to Sec. of Treasury, Jan. 7, 1898, 224 MS. Dom. Let. 260.

See also a reference in the same letter to art. 23 of the treaty of Washington. Also, to art. 26, relating to the free navigation of the rivers Yukon, Stikine, and Porcupine.

The opinion of the Attorney-General, mentioned by Mr. Sherman as the basis of President Harrison's message of Feb. 3, 1893, may be found in S. Ex. Doc. 40, 52 Cong. 2 sess. 16–28, where the opinion of Attorney-General Miller is printed in full.

3. Change in Conditions.

§ 772.

April 18, 1793, President Washington submitted to the various members of his Cabinet a series of questions touching the relations between the United States and France. One of these questions was,

whether a minister from the Republic of France should be received; another, whether, if received, it should be done absolutely or with qualifications; yet another, whether the United States were obliged to consider the treaties previously made with France as still in force. It was unanimously agreed that a minister from the French Republic should be received; but, on the next question, Hamilton, supported by Knox, thought that the reception should be qualified. The President, Jefferson, and Randolph inclined to the opposite opinion. In a subsequent written opinion Hamilton argued that the reception of the French minister should be qualified by a previous declaration to the effect that the United States reserved the question whether the treaties by which the relations between the two countries were formed were not to be deemed temporarily and provisionally suspended. He maintained that the United States had an option so to consider them, and would eventually have the right to renounce them, if such changes should take place as could bona fide be pronounced to make a continuance of the connections which resulted from them disadvantageous and dangerous. He also thought the war plainly offensive on the part of France, while the alliance was defensive. Jefferson, on the other hand, maintained that the treaties were not "between the U. S. & Louis Capet, but between the two nations of America & France," and that "the nations remaining in existence, tho' both of them have since changed their forms of government, the treaties are not annulled by these changes."

When the French minister, Genet, arrived at Philadelphia, an unqualified reception was promptly accorded him; and the treaties were held by the United States as continuing in force till Congress in 1798 declared them to be abrogated for causes other than the change in the constitution in France.

See Hamilton's Works, by Lodge, IV. 74–79, 101; Writings of Jefferson, by Ford, VI. 219, 220; Moore, Int. Arbitrations, V. 4405 et seq.; Jefferson to G. Morris, March 12, 1793, Jefferson's Works (by Washington), III. 521, 522.

See, also, Lawrence's Wheaton (1863), 490–492; Rives's Life and Times of Madison, III. 327, 329; Hildreth's History of the United States, IV. 413, 414.

Jefferson, in writing on April 28, 1793, to Madison, said, "Would you suppose it possible that it should have been seriously proposed to declare our treaties with France void on the authority of an ill-understood scrap in Vattel . . . , and that it should be necessary to discuss it?"

Madison, on May 8, replied as follows:

"Peace is, no doubt, to be preserved at any price that honor and good faith will permit. But the least departure from these will not only be most likely to end in the loss of peace, but is pregnant with

every other evil that could happen to us. In explaining our engagements under the treaty with France, it would be honorable, as well as just, to adhere to the sense that would at the time have been put upon them. . . . If a change of government is an absolution from public engagements, why not from those of a domestic as well as foreign nature; and what then becomes of public debts, &c.? In fact, the doctrine would perpetuate every existing despotism, by involving, in a reform of the government, a destruction of the social pact, an annihilation of property, and a complete establishment of the state of nature. What most surprises me is, that such a proposition should have been discussed."

Writings of Jefferson, by Ford, VI. 232; 3 Rives's Life and Times of Madison, III. 332. To same effect, see Jefferson's opinion of April 28, 1793, Jefferson's Works, VII. 613.

A successful revolution does not relieve the country revolutionized from liability on its prior engagements to foreign states.

Mr. Fish, Sec. of State, to Mr. Bassett, min. to Hayti, Feb. 21, 1877, MS. Inst. Hayti, II. 91.

"An alliance between two nations can not absolve either of them from the obligations of previous treaties" with third powers.

Mr. Adams, Sec. of State, to Don Luis de Onis, Spanish min., March 12, 1818, Am. State Papers, For. Rel. IV. 468, 476.

By Article XVII. of the treaty between the United States and Tunis of 1797 each of the contracting parties is "at liberty to establish a consul in the dependencies of the other," and such consul "may import for his own use all his provisions and furniture without paying any duty." In 1895 the Tunisan minister of foreign affairs, who was also the French minister resident, sought to withdraw this and other consular privileges from the vice-consul of the United States by making a distinction between unsalaried consular officers, of whom the United States vice-consul was one, and salaried consuls, or "consuls de carrière." The United States maintained that the treaty did not admit of such a distinction, the question of salary being simply one of arrangement between the consul and his own government. In the course of the discussions a reference was made to Article III. of the convention between Great Britain and Tunis of July 19, 1875, which provides that the privilege of free importation "shall only be accorded to consular officers who are not engaged in trade," and the hope was expressed that the United States would not insist on privileges granted by an old treaty in excess of that conceded in the British treaty. The United States replied (1) that "neither expansion nor restriction of existing treaty stipulations is

inferable from any later treaty of either contracting party with a third power," and (2) that the rule in the British treaty was different from that proposed by the French resident.

Mr. Olney, Sec. of State, to Mr. Eustis, ambassador to France, June 17, 1895, For. Rel. 1895, I. 419, 420.

"At the close of the wars of Napoleon, the treaty of 1795 with Spain alone, of all of the commercial treaties, survived. President Madison contemplated using the opportunity to mould all the treaties of this nature into a general system. Mr. Monroe, in an early stage of negotiations with Holland, for this purpose, informed the Dutch minister at Washington that 'the treaties between the United States and some of the powers of Europe having been annulled by causes proceeding from the state of Europe for some time past, and other treaties having expired, the United States have now to form their system of commercial intercourse with every power, as it were, at the same time.' But the only general commercial treaties which Monroe succeeded in concluding, either as Secretary of State under President Madison, or as President with John Quincy Adams as Secretary of State, were the treaty of 1815 with Great Britain, the limited arrangements made with France in 1822, and the treaty with Colombia in 1824."

Davis, Notes, Treaty Vol. (1776–1887), 1224.

"In 1814 and 1815 a set of treaties were made by a general congress of the states of Europe, which affected to regulate the external, and some of the internal, concerns of the European nations, for a time altogether unlimited. These treaties, having been concluded at the termination of a long war, which had ended in the signal discomfiture of one side, were imposed by some of the contracting parties, and reluctantly submitted to by others. Their terms were regulated by the interests and relative strength at the time of the victors and vanquished, and were observed as long as those interests and that relative strength remained the same. But as fast as any alteration took place in these elements, the powers, one after another, without asking leave, threw off, and were allowed with impunity to throw off, such of the obligations of the treaties as were distasteful to them, and not sufficiently important to the others to be worth a fight. The general opinion sustained some of those violations as being perfectly right; and even those which were disapproved were not regarded as justifying a resort to war. Europe did not interpose when Russia annihilated Poland; when Prussia, Austria, and Russia extinguished the Republic of Cracow; or when a second Bonaparte mounted the throne of France. . . .

"Did any impartial person blame Prussia or Austria because, in 1813, they violated the treaties which bound them to the first Napoleon, and not only did not fight in his ranks, as their engagements required, but brought their whole military force into the field against him, and pursued him to his destruction? Ought they, instead of cancelling the treaties, to have opened a negotiation with Napoleon, and entreated him to grant them a voluntary release from their obligations, and if he did not comply with their request to be allowed to desert him, ought they to have faithfully fought in his defense? Yet it was as true of those treaties as it is of the treaty of 1856, that, disadvantageous and dishonorable as they might be, they had been submitted to as the purchase-money of peace, when the prolongation of war would have been most disastrous; for, had the terms been refused, Napoleon could with ease have conquered the whole of Prussia, and, at least, the German dominions of Austria, which is considerably more, I presume, than England and France could have done to Russia, after the fall of Sebastopol. . . .

"What means, then, are there of reconciling, in the greatest practicable degree, the inviolability of treaties and the sanctity of national faith, with the undoubted fact that treaties are not always fit to be kept, while yet those who have imposed them upon others weaker than themselves are not likely, if they retain confidence in their own strength, to grant a release from them? To effect this reconcilement, so far as it is capable of being effected, nations should be willing to abide by two rules. They should abstain from imposing conditions which, on any just and reasonable view of human affairs, can not be expected to be kept. And they should conclude their treaties as commercial treaties are usually concluded, only for a term of years. . . .

"If these principles are sound it remains to be considered how they are to be applied to past treaties, which, though containing stipulations which, to be legitimate, must be temporary, have been concluded without such limitation, and are afterwards violated, or, as by Russia at present, repudiated, on the assumption of a right superior to the faith of engagements.

"It is the misfortune of such stipulations, even if as temporary arrangements they might have been justifiable, that if concluded for permanency they are seldom to be got rid of without some lawless act on the part of the nation bound by them. If a lawless act, then, has been committed in the present instance, it does not entitle those who imposed the conditions to consider the lawlessness only, and to dismiss the more important consideration, whether, even if it was wrong to throw off the obligation, it would not be still more wrong to persist in enforcing it. If, though not fit to be perpetual, it has been imposed in perpetuity, the question when it becomes right to throw it

off is but a question of time. No time having been fixed, Russia fixed her own time, and naturally chose the most convenient. She had no reason to believe that the release she sought would be voluntarily granted on any conditions which she would accept; and she chose an opportunity which, if not seized, might have been long before it occurred again, when the other contracting parties were in a more than usually disadvantageous position for going to war."

J. S. Mill on "Treaty Obligations," 8 Fortnightly Review, N. S. (1870), 715.

"Such a guarantee [as an organic connection between the German Empire and Austria-Hungary, which should not be published like ordinary treaties, but should be incorporated in the legislation of both empires and require for its dissolution a new legislative act on the part of one of them] has a tranquillising effect on the mind; but whether it would stand the actual strain of events may reasonably be doubted, when it is remembered that the constitution of the Holy Roman Empire, which in theory had much more effective sanctions, yet failed to assure the cohesion of the German nation, and that we should never be able to embody our relation with Austria in any more binding treaty-form than the earlier confederation treaties, which in theory excluded the possibility of the battle of Königgrätz. All contracts between great states cease to be unconditionally binding as soon as they are tested by 'the struggle for existence.' No great nation will ever be induced to sacrifice its existence on the altar of fidelity to contract when it is compelled to choose between the two. The maxim 'ultra posse nemo obligatur' holds good in spite of all treaty formulas whatsoever, nor can any treaty guarantee the degree of zeal and the amount of force that will be devoted to the discharge of obligations when the private interest of those who lie under them no longer reinforces the text and its earliest interpretation. If, then, changes were to occur in the political situation of Europe of such a kind as to make an anti-German policy appear *salus publica* for Austria-Hungary, public faith could no more be expected to induce her to make an act of self-sacrifice than we saw gratitude do during the Crimean war, though the obligation was perhaps stronger than any [that] can be established by the wax and parchment of a treaty."

Bismarck, his Reflections and Reminiscences (London, 1898), II. 270.

As to the question of "gratitude" raised by Prince Bismarck, with reference to Russia's aid to Austria in 1849, it may be instructive to recur to the manifesto of the Emperor Nicholas of April 26, 1849, by which it appears that, in intervening to crush the Hungarian insurrection, he was influenced by the consideration of the prominent part which some of his "Polish rebels of 1831" were playing in that movement, which had, in his opinion, reached "the most menacing proportions." The enemies of Austria, in this instance, he declared to be "common

enêmies" of that country and of Russia. (38 Brit. & For. State Papers, 1099–1100.)

"History is full of broken guarantees and alliances and of disputes about the casus fœderis, which have not arisen from bad faith, nor from the common uncertainties of language, but are peculiar to this class of compacts, and against which no precision of phrase can ever completely guard. Multiply engagements as you will; clinch them as firmly as you may; but never count on them to make a nation draw sword in a quarrel it deems unjust, and for objects in which it is to have no share. The successive coalitions against the first Napoleon showed how hard a task it is to induce several powers to act steadily together even in presence of a general, instant, formidable danger."

Bernard, Lectures on Diplomacy, 85.

4. Changes in Sovereignty and Government.

§ 773.

As to the treaties between the United States and France and the French Revolution, see the preceding section.

Spain and Colombia.

With reference to the question whether Colombia during her war for independence was bound by the stipulation that free ships make free goods in the treaty between the United States and Spain, concluded in 1795, when Colombia was a part of the Spanish empire, John Quincy Adams said: "It is asserted that by her declaration of independence, Colombia has been entirely released from all the obligations, by which, as a part of the Spanish nation, she was bound to other nations. This principle is not tenable. To all the engagements of Spain with other nations, affecting their rights and interests, Colombia, so far as she was affected by them, remains bound in honor and in justice. The stipulation now referred to is of that character; and the United States, besides the natural rights of protecting by force, in their vessels on the seas, the property of their friends, though enemies of the Republic of Colombia, have the additional claim to the benfit of the principle by an express compact with Spain, made when Colombia was a Spanish country."

Mr. Adams, Sec. of State, to Mr. Anderson, min. to Colombia, May 27, 1823, 13 Brit. & For. State Papers, 459, 480–481.

A question arose as to whether the stipulation in the treaty between the United States and Colombia of 1824, that free ships should make free goods, was applicable to the capture of the *Mechanic*, which was

made prior to the exchange of ratifications. The Department of State maintained that it was, but added that even if it were not so, the similar stipulation in the treaty between the United States and Spain of 1795 would meet the case. The treaty of 1795, except as to parts obviously temporary in their nature, was, said the Department, "unlimited in duration. The article containing the stipulation adverted to having, therefore, been agreed to while Colombia was a Spainsh possession, continued obligatory upon that country not only so long as it remained subject to Spain, but after it had achieved its independence and had been acknowledged by the United States. It is presumed that the government of New Granada will not deny the correctness of this doctrine, as it has so recently given a practical acknowledgment of it by assenting to the operation within its territory of the treaty between the United States and Colombia, after the dissolution of the Colombian confederacy and until that covenant expired by its own limitation"

Mr. Forsyth, Sec. of State, to Mr. Semple, chargé d'affaires to New Granada, No. 7, Feb. 12, 1839, MS. Inst. Colombia, XV. 58. See the statement of the case of the *Mechanic*, infra.

In May, 1824, the American schooner *Mechanic*, while on a voyage to Tampico, Mexico, with a general cargo, was captured by the Colombian privateer *General Santander* and carried into Puerto Cabello, where the entire cargo was condemned as Spanish property, Colombia being then at war with Spain. A claim was made by the American insurers for indemnity, and in support of their claim they cited Article XV. of the treaty between the United States and Spain of 1795, by which the principle of free ships free goods was established between those countries. At that time Colombia was a part of the Spanish empire. It was contended, however, that by her subsequent declaration of independence she freed herself from the obligations which the treaty imposed on the Spanish nation. So much of the claim as represented Ecuador's proportion of the liability for the obligations of the old Republic of Colombia came before the mixed commission under the convention between the United States and Ecuador of November 25, 1862. Mr. Hassaurek, commissioner on the part of the United States, held that the government of the United States had the right, under the circumstances, to expect that the Colombian cruisers and prize courts would respect property covered by the American flag. In this relation, he cited the instructions of Mr. Adams, Secretary of State, to Mr. Anderson, the first American minister to Colombia, of May 27, 1823, supra. The same principle, said Mr. Hassaurek, had constantly been invoked by the Republics of Ecuador, New Granada, and Venezuela, which formerly constituted the original Republic of Colombia and which

had claimed rights granted by the treaties between Colombia and foreign nations until they had substituted for such treaties treaties of their own. In support of this statement he gave several examples. Ecuador, having recognized and acted upon this principle whenever advantage could be derived from it, could not, said Mr. Hassaurek, deny it when it imposed an obligation. He therefore held, with the concurrence of the Ecuadorean commissioner, that the condemnation of the *Mechanic's* cargo was wrongful, and awarded an indemnity to the claimants.

Moore, Int. Arbitrations, III. 3221–3227.

Mr. Hassaurek cited 1 Kent's Commentaries, 25; Bello, Principios de Derecho Internacional, 2nd ed., p. 20; Phillimore, Int. Law, I., pt. 2, chap. 7, §§ 137, 158; Grotius, B. II. chap. 9, § 10. See, also, Mr. Forsyth, Sec. of State, to Mr. Semple, Feb. 12, 1839, infra.

Mexico and Texas.

In 1838 the Treasury Department of the United States instructed collectors of customs to give the benefits of Articles V. and VI. of the treaty of commerce between the United States and Mexico of April 5, 1831, abolishing discriminating duties, to the vessels and productions of Texas; and the government of Texas was advised that the benefits of the article would be expected for vessels and productions of the United States arriving in that country. The government of Texas, on the other hand, expressed an intention not to acknowledge the binding force of the treaty, although the Texan minister at Washington appears to have invoked certain of its stipulations touching the restraint of Indian incursions and hostilities. Discriminating tonnage duties were in fact for a time exacted in Texas upon American vessels; but the United States expressed the expectation that instructions would be given for the "exact fulfillment" of Articles V. and VI. of the Mexican treaty, and that all discriminating tonnage duties which had been levied since a certain date would be refunded. The government of Texas yielded the point. In an instruction to the chargé d'affaires of the United States in 1841, Mr. Webster said: "The treaty between the United States and Mexico, which has been held to be binding upon Texas in all its parts, contains a stipulation that either party may put an end to the commercial articles upon giving a year's notice to the other. The letter of Mr. Amory, the representative of Texas here, to me of the 19th ultimo, . . . gives formal notice of the determination of the Texan government to take that course. The commerce between the two countries will consequently be subject to their respective laws only after the 19th of May next, and until a new and separate treaty shall be negotiated and concluded between the two governments."

Mr. Forsyth, Sec. of State, to Mr. La Branche, chargé d'affaires to Texas, No. 6, Feb. 24, 1838, MS. Inst. Texas, I. 6; same to same, No. 9, May 2, 1838, id. 9; Mr. Vail, Act. Sec. of State, to Mr. La Branche, No. 16, Oct. 25, 1838, id. 14; Mr. Webster, Sec. of State, to Mr. Eve, chargé d'affaires to Texas, No. 1, June 14, 1841, id. 31.

In his instruction to Mr. La Branche of May 2, 1838, Mr. Forsyth, referring to the conclusion of the boundary convention between the United States and Texas of April 25, 1838, which recognized as obligatory the treaty of limits between the United States and Mexico of January 12, 1828, said: "The conclusion of this compact of course deprives the Texan government of all pretext for disowning the binding force as to that country of the treaty of commerce between the United States and Mexico, which we were surprised to learn was their intention."

Sardinia and Italy.

The Italian minister having inquired whether, in the opinion of the Department of State, Article XVIII. of the treaty of November 26, 1838, between Sardinia and the United States, might be interpreted as exempting Italians from a tax imposed in Louisiana on the transfer of real estate by inheritance to aliens, Mr. Fish replied that "a preliminary question might be raised whether inhabitants of the duchies of Parma and Modena, or of Venitia and Lombardy, though now subjects of the King of Italy, are entitled to the benefits of a treaty made with that monarch when he was King of Sardinia, and the territories just mentioned did not belong to his dominions;" but, "waiving that question and assuming that the heirs" in question were "inhabitants of the former Kingdom of Sardinia," Mr. Fish added that he took pleasure in stating the course of adjudications upon the question.

Mr. Fish, Sec. of State, to Count Colobiano, Feb., 1870, MS. Notes to Italy, VII. 53.

Case of the Netherlands.

The government of the Netherlands having claimed for a Dutch line of steamers an exemption from tonnage dues in the United States under Article II. of the treaty of October 8, 1782, the government of the United States, after a long historical exposition, informed the Dutch minister at Washington that the treaty was "no longer binding on the parties." In 1793, said Mr. Fish, a war broke out between the United Provinces of the Netherlands and France. In 1795 the Stadtholder was driven from the country and the Batavian Republic was established. This was succeeded by the Kingdom of Holland, after which the country was incorporated into the French Empire, and remained a part of that empire until the abdication of Napoleon. On the reconstruction of Europe at the Congress of Vienna a new kingdom was formed, called the Kingdom of the Netherlands, in which was included the territories which had formed the United Provinces of the Nether-

lands. The new power opened diplomatic relations with the United States by sending a minister to Washington, who proposed "to open negotiations for a treaty of amity and commerce." Mr. Monroe replied to this in a letter already quoted. The negotiations having been suspended, the Dutch minister called the attention of Monroe to "the overtures made by Changnion for the purpose of consolidating the commercial relations between the countries by a renewal or a modification of the treaty of commerce of 1782." Mr. Monroe answered: "Mr. Changnion having intimated, by order of his government, that the treaty of 1782 was to be considered, in consequence of the events which have occurred in Holland, as no longer in force, and having proposed also to enter into a new treaty with the United States, this government has since contemplated that result. It is presumed that the former treaty cannot be revived without being again ratified and exchanged in the form that is usual in such cases, and in the manner prescribed by our Constitution." Mr. Ten Cate replied, "His Majesty will undoubtedly be disposed to enter into the views of the American government with regard to the consolidation, by some means, of the commercial relations between the two states." The negotiations failed for reasons stated in the President's message to Congress. The United States subsequently attempted to maintain that the treaty was not abrogated, but the claim was resisted, and a long correspondence ensued. The Dutch foreign minister maintained that from 1795 to 1814 "the political existence of Holland was then terminated," that "Holland had ceased for a long time to form an independent state." The United States acquiesced in this statement.

Mr. Fish, Sec. of State, to Mr. Westenberg, April 9, 1873, For. Rel. 1873, II, 720; as summarized in Davis's Treaty Notes, Treaty Volume (1776–1887), 1235.

Barbary Powers.

While it may be true that, as a general rule, when one country is absorbed in another the treaties of perhaps the more inconsiderable of the two are often regarded as annulled, it is believed that the absorption of a state is not always attended by an admitted annulment of its treaties. The union between the United States and Texas was effected by the legislation of the parties. It necessarily canceled the treaties between Texas and foreign powers, so far at least as those treaties were inconsistent with the Constitution of the United States, which requires customs duties to be uniform throughout the Union. The treaties of Algiers with other governments were also annulled by the conquest of that country by France. This conquest was made pursuant to a regular war of such notoriety that its origin, progress, and result could not fail to come to the knowledge of all the parties having treaties with

Algiers and to be regularly recorded as an historical fact. Such was not the character of the contest by which the Porte acquired the ascendancy which it afterwards claimed in Tripoli. That contest was of a comparatively obscure character, and, as was believed, had been but faintly and imperfectly recorded in the published annals of the time. The two Sicilies and certain of the States of the Church were conquered by the arms of Sardinia. The United States at the time of that conquest had a treaty of commerce with the Two Sicilies, which it did not regard as canceled thereby; nor did it regard the treaty of commerce which it had with Sardinia itself as applicable either to the Two Sicilies or to the States of the Church.

Mr. Fish, Sec. of State, to Aristarchi Bey, Turkish min., Sept. 18, 1876, MS. Notes to Turkey, I. 170.

Case of Loochoo.

July 11, 1854, Commodore Perry entered into a treaty with Loochoo (Lew Chew), and the ratifications were duly exchanged. It stipulated that citizens of the United States coming to Loochoo should be treated with courtesy and friendship and should be allowed to trade; that ships wrecked on the coast should be hospitably treated, and that skillful pilots should be appointed by the local government. Both China and Japan claimed to possess certain suzerain powers over the islands, and gradually Japan came to assert supreme control over them. The Japanese government issued compulsory orders that all business in Loochoo should be transacted with the Japanese department of foreign affairs, and that Japanese officials should manage all matters with foreign countries. Upon the question whether these orders interfered with the rights of the United States under the treaty with Loochoo, the Department of State said that the independence of the islands was a disputed matter in which the United States could not interfere unless its rights under treaty stipulations with any of the powers concerned in the controversy be endangered. The Department had therefore confined its instructions to guarding against any infraction of the treaty with Loochoo, in the event of a consolidation of the islands with Japan. In a note to the legation of the United States at Tokio, in 1876, the Japanese minister of foreign affairs stated that his government had not at any time interfered with the rights of the United States under the treaty with Loochoo, and that whenever any change in that treaty should become necessary due notice would be given to the legation. This declaration was not thought to be inconsistent with the stipulations of the treaty, nor were the orders of the Japanese government, above referred to, in the assertion of its supreme control conceived to be inconsistent with the treaty. Under these circumstances it is desired that you should abstain, until otherwise instructed, from making any official representations on the part of

this government, in behalf of the Loochoo Islands, to the Government of Japan. You are, however, at liberty to exert your personal friendly offices towards an amicable settlement of the pending dispute should your mediation be requested."

Mr. F. W. Seward, Act. Sec. of State, to Mr. Bingham, min. to Japan, No. 380, Oct. 9, 1878, MS. Inst. Japan, II. 455.

See, as to the final absorption of the Loochoo Islands by Japan, 5 Moore, Int. Arbitrations, 5046–5048.

Case of Madagascar.

February 12, 1896, the French minister at Washington wrote to the Department of State that the French government, owing to the difficultiess which had arisen in the exercise of its protectorate over Madagascar, had been obliged to intervene by military force for the purpose of causing its rights to be respected and of securing guaranties for the future. The French government had thus been "led to occupy the island with its troops and to take final possession of it." This notice was acknowledged by the Department of State "with due reserve as to the effect of the action of the government of France upon the treaty rights of the United States."

February 18, 1896, the French authorities in Madagascar notified the United States consul at Tamatave that, the island having become a French possession, justice would thenceforth be rendered to Americans by the French tribunals in accordance with a decree of the President of France of December 29, 1895.

On the strength of these communications the United States requested of the government of France an explicit statement of its understanding as to the effect of its "definite occupation" of the island upon the treaties between the United States and Madagascar, and particularly as whether those treaties were to remain operative or were to be replaced by the treaty engagements of the United States with France.

The French government replied that in its opinion the maintenance of the treaties with Madagascar was inconsistent with the new order of things which had been created in the island, and that the government of the Republic was "disposed to extend to the great African island the whole of the conventions applicable to the government or citizens of the United States in France and in French possessions." It was further stated that under the decree of December 28, 1895, French magistrates had been appointed for the island, so that the continuance of the American consular court would be unnecesary, and that it was proposed to introduce the French tariff, under which the specific duties would be higher than the duty of 10 per cent ad valorem which the native government had levied.

The United States in acknowledging these statements expressed the desire that they "be so confirmed by the French government as to leave no question touching the extinction of our Madagascar treaty and its replacement by those we have with France, in virtue of complete absorption of Madagascar and the substitution of a wholly French government for that of the Hovas, with which this government has heretofore maintained relations." But, pending the receipt of a positive statement from the French government, the United States consul at Tamatave was directed to suspend, till further instructed, the exercise of consular judicial functions in all cases where the operation of an established French court was ascertained to be available for the disposition of judicial cases affecting American citizens or interests.

To the request for a categorical statement, M. Hanotaux replied that the government had just introduced in the Chamber of Deputies a bill declaring Madagascar and the neighboring islands to be a French colony, and that this measure would "convey to the government of the Union the categorical assurance" which was desired. The bill was duly passed. It contained this clause: "The island of Madagascar, with its dependent islands, is declared a French colony." The French ambassador, in acquainting the United States with the passage of the act, stated that it implied "the abrogation of the particular conventions formerly signed by the Hova government, for which is substituted the system of conventions in use in the French colonies," and that it consequently had "the effect of extending to the great African island the whole of the conventions concluded between France and the United States," which were "henceforward to replace" the treaties between the United States and Madagascar. The instructions previously given to the United States consul at Tamatave were considered sufficient to insure the regular transfer of his judicial powers to the French courts.

Mr. Olney, Sec. of State, to M. Patenôtre, French amb., Feb. 26, 1896, For. Rel. 1896, 119; Mr. Olney to Mr. Eustis, amb. to France, March 30, 1896, id. 119, 121; M. Bourgeois, min. of for. aff., to Mr. Eustis, April 16, 1896, id. 123–124; M. Patenôtre to Mr. Olney, April 18, 1896, id. 124; Mr. Olney to Mr. Eustis, April 27, 1896, and May 2, 1896, id. 125; Mr. Olney to M. Patenôtre, May 2, 1896, id. 126; M. Patenôtre to Mr. Olney, July 22, 1896, id. 133. See, also, For. Rel. 1896, 130, 134, 135; Mr. Adee, Second Assist. Sec. of State, to Mr. Beramji, Dec. 10, 1897, 223 MS. Dom. Let. 304.

Annexation of Hawaii.

"I have the honor to acknowledge the receipt of your note of the 19th instant, whereby you acquaint me with the views entertained by your government in regard to the proposed annexation of the Hawaiian Islands to the United States, and, under instructions from your government, you

make formal protest against annexation on the grounds: First, that the maintenance of the status quo of Hawaii is essential to the good understanding of the powers which have interests in the Pacific; second, that the annexation of Hawaii would tend to endanger certain rights of Japanese subjects in Hawaii, under the treaties, constitution and laws of that country, and, third, that such annexation might lead to the postponement by Hawaii of the settlement of claims and liabilities already existing in favor of Japan under treaty stipulations.

"This recital of the grounds of protest is of itself proof that your government has misapprehended the statements and assurances contained in my note of the 16th instant and in its relation to the treaty question involved, strongly suggests confusion between the formal stipulations of treaties and the vested rights which the subjects of one country may acquire in another under treaty, or the law of the land. The principle of public law whereby the existing treaties of a state cease upon its incorporation into another state is well defined by Halleck, who says: 'But the obligations of treaties even where some of their stipulations are in terms perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things.' (Halleck's Int. Law, ch. 18, sec. 35.) So, also Wheaton, in the 275th section of his Elements of International Law. Both of the stated conditions necessarily attend the annexation of one state or of its territory to another. Vattel went further, holding in effect, that even a partial loss of sovereignty, as in the case of alliance, causes the ancient treaties to fall if incompatible with such alliance. This, however, is a refinement not necessary to examine here. The question concerns the absolute union of two states, whereby one ceases to exist, and becomes merged in the body politic of the other. The history of Europe, of America, of the whole world is full of examples from remote periods to our own days, where independent states have ceased to be such through constrained or voluntary absorption by another, with attendant extinction of their former treaties with other states. It needs no stipulation in a formal annexation treaty to work this result, for it attends de facto annexation however accomplished. The forcible incorporation of Hanover into the Prussian kingdom instantly destroyed previous Hanovarian treaties. The admission of Texas to statehood in our Union by joint resolution extinguished the treaties of the independent Republic of Texas. The recent French law declaring Madagascar to be a colony of France ended the former treaties of that kingdom. It is the fact, not the manner of absorption that determines treaties. It does not even follow that the existing treaties of the absorbing state extend to the ac-

quired territory. The treaties of the German Empire are held not to apply to the ceded French provinces of Alsace and Lorraine.

"What the Hawaiian treaty of annexation proposes, is the extension of the treaties of the United States to the incorporated territory to replace the necessarily extinguished Hawaiian treaties, in order that the guarantees of treaty rights to all may be unquestionable and continuous. To this end the termination of the existing treaties of Hawaii is recited as a condition precedent. The treaty of annexation does not abrogate those instruments, it is the fact of Hawaii's ceasing to exist as an independent contractant that extinguishes those contracts.

"As to the vested rights, if any be established in favor of Japan, or of Japanese subjects in Hawaii, the case is different, and I repeat what I said in my note of the 16th instant, that, 'there is nothing in the proposed treaty prejudicial to the rights of Japan.' Treaties are terminable in a variety of ways, that of 1886 between Japan and Hawaii, to which your protest is supposed to relate, is denounceable by either party on six months' notice, but its extinction would no more extinguish any vested rights previously acquired under its stipulations, than the repeal of a municipal law affects rights of property vested under its provisions.

"These observations, I am persuaded, fully meet the second and third points of your protest."

Mr. Sherman, Sec. of State, to Mr. Toru Hoshi, Japanese min., June 25, 1897, MS. Notes to Jap. Leg. I. 521.

This position was reaffirmed by Mr. Sherman in another note to Mr. Toru Hoshi, Aug. 14, 1897, id. 533.

"I have the honor to acknowledge the receipt of your note of the 4th instant, in which, under instructions from your government, you request two copies of the 'decree of July 16, 1898,' abrogating all existing treaties between Hawaii and other States.

"In reply I beg to state that no such decree has been issued by this government. The treaties of the Hawaiian Islands with foreign countries are abrogated by the joint resolution, approved July 7, 1898, to provide for the annexing of those islands to the United States. The language of the fourth paragraph of the resolution is as follows:

"'The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States, nor to any

existing [law] of the United States, shall remain in force until the Congress of the United States, shall otherwise determine.'

"I send you two copies of the joint resolution."

Mr. Hay, Sec. of State, to Marquis Camillo Romano, No. 447, March 7, 1899, MS. Notes to Ital. Leg. IX. 337.

Treaties affecting Spain's former colonies.

In 1899 the Spanish government gave notice that, with the termination of Spanish sovereignty over Cuba, Porto Rico, and the Philippine Islands, the accession of the telegraph administration of those countries to the International Telegraph Convention of St. Petersburg, of July 10–22, 1875, must be regarded as cancelled. As the United States was not a party to the convention, it was not in a position to renew, as to Porto Rico and the Philippines, which had been ceded to it, the accession which had been withdrawn by Spain, nor could it do so in behalf of Cuba, which Spain had relinquished; nor did the United States, since it was not a signatory power, feel called upon to express an opinion as to the conclusiveness of the withdrawal by Spain, herself a signatory, of the adherence of Cuba, Porto Rico, and the Philippines to the convention of 1875.

Mr. Hill, Act. Sec. of State, to Mr. Tower, No. 1575, Oct. 6, 1899, MS. Notes to Brit. Leg. XXIV. 640.

See, as to the Universal Postal Union, 1897, Mr. Hay, Sec. of State, to Mr. Leishman, No. 191, Dec. 18, 1899, MS. Inst. Switz. III. 230.

The German embassy, by a note of July 31, 1900, referring to orders of the military authorities of the United States restricting trade with the Sulu archipelago, took the ground that the protocols between Germany, Great Britain, and Spain of March 11, 1877, and March 7, 1885, by which exceptional trade privileges in the archipelago were conceded to German and British vessels, created a local easement which was not affected by the change of sovereignty.

Advised, that on the cession of the archipelago by Spain to the United States, treaties between Spain and other powers in relation to commerce ceased to exist.

Mr. Magoon, law officer, division of insular affairs, War Department, Oct. 8, 1900, Magoon's Reports, 316, citing Hall's Int. Law, 4th ed., pp. 98, 104; Halleck's Int. Law, 3rd ed., Vol. I, chap. 8, sec. 35; Opinion of the At. Gen., July 26, 1900; Treaties and Conventions of the U. S. 415.

See, to the same effect, Mr. Hay, Sec. of State, to Sec. of War, Nov. 10, 1899, 241 MS. Dom. Let. 157; same to Sec. of Navy, Jan. 21, 1900, 242 id. 376.

Complaint having been made by the owner of a British vessel that the military authorities of the United States in the Philippines dis-

regarded the terms of the protocols of March 11, 1877, and March 7, 1885, between Germany, Great Britain, and Spain, by which it was declared that British and German ships were free to trade in the Sulu archipelago without touching in the first instance at any stated point therein, and that Spain would in no way obstruct the import or export of merchandise, it was advised that upon the cession of the Sulu archipelago by Spain to the United States the treaties of Spain respecting trade with the islands ceased to exist.

Mr. Magoon, law officer, division of insular affairs, War Department, October 24, 1899, Magoon's Reports, 302, citing Hall's Int. Law, 4th ed., pp. 98, 104; Halleck's Int. Law, 3rd ed., Vol. I, chap. 8, sec. 35; Brit. and For. State Papers, VII, 79–97; Marten's Nouv. Rec. Gen., II, 210–216.

"With reference to the British embassy's confidential memorandum of May 31, 1900, the United States government does not regard existing treaties as embodying rights and immunities of British subjects in Cuba, Cuba's affairs having been withdrawn from British treaties with Spain and not having been embraced by British treaties with the United States, which antedated intervention."

Memorandum of the Department of State, March 2, 1901, For. Rel. 1901, 225.

With this memorandum, the Department of State enclosed an opinion of Attorney-General Griggs, of April 26, 1900, holding that the rights and immunities of foreigners in Cuba during the American occupation were governed by the Spanish alien law of 1870, which was held to be in force in Cuba.

Canada and British Columbia.

By Article XXI. of the treaty between the United States and Great Britain, concluded at Washington May 8, 1871 it was agreed that for a certain term of years the produce of the fisheries "of the United States, or of the Dominion of Canada, or of Prince Edward's Island," should be reciprocally admitted into each country free of duty. This stipulation was to take effect as soon as the necessary laws were passed and legislation was duly adopted both in the United States and in Canada. Meanwhile, July 20, 1871, the province of British Columbia was admitted as a part of the Dominion of Canada, and the government of the Dominion, after Article XXI. took effect, claimed that under it fish and fish oil from British Columbia should be admitted into the United States free of duty. The United States customs authorities having denied this claim, the question was referred by the British government to the law officers of the Crown, who advised that the words "Dominion of Canada," in Article XXI. of the treaty, must be governed by the state of things existing in May, 1871, and could not receive a wider construction

from the fact that additional territory had since been added to the Dominion. It was also observed that Articles XVIII. and XIX. of the treaty, with which Article XXI. was in sense and in operation connected, applied only to fisheries on the eastern or Atlantic side of the continent, and that the legislation adopted by the United States and Canada to carry the fishery articles into effect must be construed with reference to the "Dominion of Canada" as that Dominion existed on May 8, 1871. Under these circumstances the British government declined to instruct its minister at Washington to bring the matter to the notice of the United States.

Earl of Derby, British for. sec., to Sir Edward Thornton, British min. at Washington, Aug. 11, 1875, 66 Brit. and For. State Pap. (1874, 1875), 963, 968.

Cases under German treaties.

By the formation of the North German Union the entire navy of the union was placed under the command of Prussia. It was advised that the provision of the treaty between the United States and Prussia of May 1, 1828, for the arrest of deserters from the public ships of the respective countries applied to public vessels sailing under the flag of the North German Union.

Evarts, At. Gen., 1868, 12 Op. 463.

In a note to Baron von Thielmann, German ambassador, of February 25, 1896, Mr. Olney, referring, as Secretary of State, to the opinion he gave as Attorney-General on the question of the duty on German salt, remarked that he was, "as Secretary of State, still without the information which I lacked while Attorney-General, as to whether the treaty with Prussia is to be taken as effective as regards other portions of the Empire, or whether the German salt, for which free admission into this country is demanded, is a product or manufacture of Prussia proper or of some other part or parts of the German Empire." He stated that it would much facilitate his examination of the subject if he were "informed of the grounds, if any, for regarding the treaty stipulation concluded with Prussia in 1828 as now operative with respect to the whole German Empire." No response to this request is given.

For. Rel. 1896, 208–209.
See supra, § 765.

In 1873 the Department of State, referring to the desirableness of revising the extradition treaties between the United States and various German States, said: "The extradition treaties with France,

concluded in 1843 and 1845, which may be contended to be in force as to the portions of Alsace and Lorraine which were ceded to Germany, contain a different enumeration of crimes."

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Germany, April 14, 1873, For. Rel. 1873, 1. 279, 281.

Charles E. Heinzman, a native of Alsace, came to the United States with his mother, then the wife of a citizen of the United States, in 1881, when thirteen years old, and in 1889 became duly naturalized. In 1891, being then in Alsace, he was ordered to report for military duty. This order, it was found, was based on the contention that the Bancroft naturalization treaties of 1868 do not apply to Alsace-Lorraine, and that he consequently must prove his loss of German nationality under the imperial law of June 1, 1870, touching the acquisition and loss of allegiance. The German foreign office intimated that a pardon would be granted to Heinzman for his failure to perform military duty, and that his name would be stricken from the military lists, if he would procure his discharge from German allegiance under that law. Heinzman accepted this suggestion, and his petition was sent by the Department of State to the American legation at Berlin for presentation to the German government.

For. Rel. 1892, 177, 179, 180.

Mr. Blaine in 1881 proposed the conclusion of a protocol extending the naturalization and extradition treaties between the United States and the North German Union to the whole German Empire. (Mr. Blaine, Sec. of State, to Mr. Von Schlözer, Nov. 29, 1881, MS. Notes to Germany, X. 112.)

In reply to an inquiry whether subjects of Waldeck could invoke the existing treaties between the United States and Prussia, the Department of State said that by a treaty of accession of July 18, 1867, the Prince of Waldeck surrendered his principal sovereign rights to the King of Prussia for ten years, retaining merely nominal power; that by a treaty of March 2, 1887, the arrangement was continued, subject to termination on notice; and that it was therefore "presumed that subjects of Waldeck are entitled to the rights and privileges of existing treaties between the United States and Prussia."

Mr. Gresham, Sec. of State, to Mr. Scott, March 19, 1894, 196 MS. Dom. Let. 118.

"The establishment of the German Empire in 1871 and the complex relations of its component parts to each other and to the Empire necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the States

composing the Empire. It can not be said that any fixed rules have been established.

"Where a State has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

"Where no treaty has been negotiated with the Empire, the treaties with the various States which have preserved a separate existence have been resorted to.

"The question of the existence of the extradition treaty with Bavaria was presented to the United States district court on the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas corpus*, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

"Such a question is, after all, purely a political one."

Davis's Notes, Treaty Vol. (1776–1887), 1234, cited in Terlinden *v.* Ames (1902), 184 U. S. 270, 287. The case referred to, in which the United States district court held the treaty with Bavaria still in force, was In re Thomas, 12 Blatch. 370.

The passage from Davis's Notes, as to the treaties with Hanover, is cited in Mr. Hill, Assist. Sec. of State, to Mr. Hitt, M. C., Dec. 20, 1900, 249 MS. Dom. Let. 584.

June 16, 1852, an extradition treaty was concluded by the United States with the King of Prussia, in his own name and in the names of eighteen other States of the Germanic Confederation, and it was afterwards acceded to by six other States. After the war between Prussia and Austria of 1866 the Germanic Confederation was succeeded by the North German Union, under the præsidium of Prussia. By Article III. of the treaty of naturalization concluded by the United States February 22, 1868, with the King of Prussia on behalf of the North German Confederation, the extradition treaty of 1852 was "extended to all the States" of that confederation. Subsequently there was formed the German Empire, the constitution of which contained no provision for the abrogation of the separate treaties of the constituent States; and extradition between the United States and Germany continued to be granted under the treaty of 1852. In 1889 the German foreign office, in a memorandum on the subject of extradition, stated that, as laws and treaties binding upon the whole union in the matter had not been made, the several States were "not hindered from independently regulating extradition by agreements with foreign states or by laws enacted for their own territory." In this relation the memorandum referred to conventions made by individual States of the Empire with various foreign countries, including France, Netherlands, Austria-Hungary, and Russia, and added: "With the United States of America also extradition is

regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the States of the former North German Union, and also to Hesse, south of the Main, and to Würtemberg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively."

Held, that a German subject, charged under the treaty of 1852 with being a fugitive from justice, could not be permitted to call upon the courts of the United States to adjudicate as to the correctness of the conclusions of the Empire concerning its powers and the powers of its members, especially as the executive department of the government of the United States had accepted and acted upon those conclusions; and that the treaty must be considered as still continuing in force.

Terlinden *v.* Ames (1902), 184 U. S. 270, 282–286, citing Moore's Report on Extradition with Returns of All Cases, 93, 94, and Laband's Das Staatsrecht des Deutschen Reiches (1894), 122, 123, 124, 142.

Admission of Louisiana.

The stipulation in the treaty of cession of Louisiana for the protection of the inhabitants in their property, etc., ceased, by its own limitation, to operate when the State was admitted into the Union.

New Orleans *v.* Armas, 9 Pet. 224.

5. Legislative Abrogation.

§ 774.

"Whereas the treaties concluded between the United States and France have been repeatedly violated on the part of the French government; and the just claims of the United States for reparation of the injuries so committed have been refused, and their attempts to negotiate an amicable adjustment of all complaints between the two nations have been repelled with indignity: and whereas, under authority of the French Government, there is yet pursued against the United States a system of predatory violence, infracting the said treaties and hostile to the rights of a free and independent nation:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the United States are of right freed and exonerated from the stipulations of the treaties and of the consular convention, heretofore concluded between the United States and France: and that the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States.

"Approved, July 7, 1798."

1 Stat. 578.

"The act of July 7, 1798, annulling the treaties with France, was followed by an act of July 9, 1798, which, without any formal declaration of war, not only authorized the President to instruct the com-

manders of public armed vessels of the United States to capture any French armed vessel, such captured vessel with her apparel, guns, and appurtenances, with the goods and effects on board the same, being French property, to be brought into the United States, and proceeded against and condemned as forfeited; but the President was authorized to grant special commissions to private armed vessels which shall have the same license and authority. 1 Stat. L. 578." (Lawrence's Wheaton (1863), 507.)

See Davis, Notes to the Treaties of the United States; Moore, Int. Arbitrations, V. 4425–4431.

After the act of Congress of July 7, 1798, the obligations of France to the United States must be determined by the law of nations. (The Atlantic (1901), 37 Ct. Cl. 17.)

It was afterwards held, however, that the decree of the French government abrogating so much of the treaty of 1778 as related to contraband goods did not impair any treaty right of the United States. (The James and William (1902), 37 Ct. Cl. 303.)

The French government did not admit that the act of 1798 effected a valid international abrogation of the treaties. During the negotiation of the convention of 1800, the American negotiators presented a draft, in which it was provided that the commissioners, who were to pass upon claims of the citizens of one nation upon the government of the other, should, in determining questions of capture or condemnation, "decide the claims in question according to the original merits of the several cases, and to justice, equity, and the law of nations; and in all cases of complaint existing prior to the 7th of July, 1798, according to the treaties and consular convention then existing between France and the United States." The French plenipotentiaries replied that they were "not aware of any reason" which could "authorize a distinction between the time prior to the 7th of July, 1798, and the time subsequent to that date." The American plenipotentiaries then referred to the act of Congress of that date, declaring the treaties to be at an end. The French plenipotentiaries declined to negotiate on this basis, and the American negotiators in the end found it necessary either to postpone the subject or to abandon the negotiations. They took the former course, and inserted in the convention, which they signed Sept. 30, 1800, an article by which it was agreed that the question of claims should form the subject of a future negotiation, and that the treaties meanwhile should not be operative. The Senate of the United States struck out this article, and Napoleon, on exchanging the ratification, made a declaration to the effect that by the Senate's amendment it was to be understood that "the two states renounce the respective pretensions, which are the object of the said article." This declaration was accepted by the United States; and hence the argument, on which the "French spoliation claims" are founded, that the government of the United States, in spite of the act of 1798, in the end purchased a release from

the obligations of the treaties with the relinquishment of the claims of its citizens, for the payment of which it thus became liable.

Moore, Int. Arbitrations, V. 4429–4432.

By an act of the legislature of Maryland passed in 1780 to define the privileges of French subjects in that State, various rights were conferred upon them, including that of holding lands, subject to certain conditions. A claim being set up under this act, after the "repeal" of the treaties between the United States and France of 1778, it was contended that the act was passed for the sole purpose of enforcing rights under those treaties, and was repealed by implication when they were repealed. Marshall, C. J., delivering the opinion of the court, said: "The court does not think so. The enactment of the law is positive, and in its terms perpetual. Its provisions are not made dependent on the treaty; and, although the peculiar state of things then existing might constitute the principal motive for the law, the act remains in force from its words, however that state of things may change."

Chirac *v.* Chirac (1817), 2 Wheat. 259, 272.

A cargo of goods owned by a British subject, but insured by citizens of the United States, was captured as lawful prize, on board of an American ship, by a French vessel, after the passage of the act of July 7, 1798 (1 Stat. 578), abrogating the treaties between the United States and France. Claimant, as assignee, of the owner, sought to recover the value of the goods from the United States out of the indemnity received from France on account of spoliation claims. Held, that after the abrogation of the treaties between the United States and France, the goods of the enemy of France found on board of an American vessel were not entitled to protection; that the owners, having no right to claim indemnity for their seizure, could transfer no greater right to the assignee; and that, the United States having no right to demand indemnity from France on account of such seizure, the claim was not entitled to satisfaction out of the general indemnity funds paid to the United States by France.

The William, 23 Ct. Cl. 201; Haskins *v.* United States, id.; Adams *v.* Same, id.; Blagge *v.* Same, id.

Subsequent legislation may municipally abrogate a treaty which may nevertheless continue to bind internationally.

Cherokee Tobacco, 11 Wall. 616, affirming United States *v.* Tobacco Factory, 1 Dill. 264; Taylor *v.* Morton, 2 Curtis, 454; 2 Black, 481; Ropes *v.* Clinch, 8 Blatch. 304; Bartram *v.* Robertson, 15 Fed. Rep. 212; In re Ah Lung, 18 Fed. Rep. 28.

The decree of the French government abrogating so much of the treaty of 1778 as related to contraband goods on neutral vessels, though it justified French cruisers in seizing and French courts in condemning vessels, did not abrogate any treaty right of the United States.

The James and Williams (1902), 37 Ct. Cl. 303.

"It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country."

La Abra Silver Mining Co. *v.* United States (1899), 175 U. S. 423, 460, citing Head Money Cases, 112 U. S. 580, 599; Whitney *v.* Robertson, 124 U. S. 190, 194; Chinese Exclusion Case, 130 U. S. 581, 600; Fong Yue Ting *v.* United States, 149 U. S. 698, 721.

The intention to abrogate a treaty must plainly appear.

In re Chin. A. On, 18 Fed. Rep. 506.

"I have had the honor to receive your note of the 24th ultimo, in which you inform me that your government, in view of the abrogation of the commercial arrangement between the two countries by the tariff law of the 28th of August last, has directed you to communicate to me the fact that, 'in virtue of the stipulation contained in the notes exchanged between the negotiators of the said international agreement, and dated January 31, 1891, it (the government of Brazil) deems it necessary' definitely to inform me of 'its intention and decision to consider at an end said commercial agreement, in accordance with the stipulation therein contained regarding its duration, so that the termination of said agreement shall begin to take effect on the 1st day of January of the year 1895.'

"In concluding your note you express the assurance that 'the cessation of our reciprocity agreement will in no wise affect the commercial relations between our two countries, considering that their mutual interests and spirit of cordial friendship now rest on a firmer basis than a written contract.'

"This satisfactory and well-founded assurance, in which the President directs me to say that he fully concurs, would seem to render any comment on your note superfluous, if it were not for your previous statement that your government, notwithstanding the abrogation of the arrangement in question by the act of August 28, deems it necessary, in accordance with the stipulations contained in the notes exchanged on January 31, 1891, to give notice of its intention to consider the arrangement as terminated on and after the 1st of January next.

"By section 104 of the act of August 28, section 3 of the act of 1890, under which the commercial arrangements with Brazil and certain other countries were negotiated, was repealed; but it was also provided that nothing in the repealing section should be held to abrogate or affect such arrangements, except where they were inconsistent with the provisions of the new law. Notice, therefore, of an intention to terminate those arrangements was not contemplated by the new law; and, so far as they were inconsistent with the provisions of that law, such notice was rendered unnecessary by the fact of their immediate termination.

"Your note, however, seems to imply that the United States and Brazil had contracted an obligation not to terminate the arrangement between them in any manner whatsoever except that stipulated in the communications exchanged on January 31, 1891. There is no disposition on the part of this government to avoid the question thus raised.

"The circumstances under which the late commercial arrangement between the United States and Brazil was negotiated are disclosed in the official correspondence that preceded its conclusion. It appears that on the 3d of November, 1890, the Secretary of State of the United States notified the minister of Brazil in Washington that, by the third article of the tariff law then recently enacted, provision was made for the admission into the ports of the United States, free of duty, of sugar, not above No. 16 Dutch standard, molasses, coffee, tea, and hides; and that in the same section it was declared that these remissions of duty were made 'with a view to secure reciprocal trade with the countries producing those articles.' It was also stated that, whenever the President should become satisfied that 'reciprocal favors' were not granted to the products of the United States in the countries referred to, it was made his duty to impose upon the articles above enumerated the rates of duty set forth in the section above cited. In view of these facts, the government of Brazil was invited to enter into a reciprocal arrangement, and the Secretary of State, in concluding his note, said:

"In the happy event of an agreement between the two governments, the same can be notified to each other and to the world by an official announcement simultaneously issued by the executive departments of the United States of America and the United States of Brazil; and such an agreement can remain in force so long as neither government shall definitely inform the other of its intention and decision to consider it at an end.'

"The minister of Brazil, in his response of January 31, 1891, enumerated certain articles which the government was prepared to admit either free, or at reduced rates of duty, and announced that he held himself ready to agree 'upon a time when an official announce-

ment of this legislation may be simultaneously issued by the executive departments of the two governments with the understanding that the commercial arrangement thus put in operation shall remain in force so long as neither government shall definitely, at least three months in advance, inform the other of its intention and decision to consider it at an end at the expiration of the time indicated; provided, however, that the termination of the commercial arrangement shall begin to take effect either on the 1st of January or on the 1st day of July.'

"In a note of the same date the Secretary of State accepted the terms that were offered, but the arrangement did not go into effect till the 1st day of April, 1891, which was the date fixed in the act of Congress for the free admission of sugars into the United States.

"It is manifest that the arrangement thus concluded rested wholly on legislation adopted by the United States of America and the United States of Brazil, respectively, and that the terms of this legislation were well known to the executive departments of both governments, and were recognized by them as the basis of their action. So far, therefore, as the arrangement may have been considered as an international agreement it was made subject to the terms of that legislation.

"It is not suggested that the third section of the act of 1890 assumed to confer on the executive departments of this government any power to bind Congress in its future action as to the laying of duties and the raising of revenue. It merely provided that, on and after January 1, 1891, the President 'whenever and so often' as he should be satisfied that countries exporting certain specified articles to the United States imposed 'duties or exactions upon the agricultural or other products of the United States,' which, in view of the free admission of the specified articles into the United States, he might deem to be 'reciprocally unequal and unreasonable,' should 'suspend' by proclamation the free entry of those articles, which should then become subject to certain fixed rates of duty. It is obvious that this act did not contemplate the creation of a condition of things which it would not be within the power of this government, or any other government that might be affected at any time, to alter.

"The Constitution of the United States, like the constitution of Brazil, points out the way in which treaties may be made and the faith of the nation duly pledged. In the United States treaties are made by the President, by and with the advice and consent of the Senate; in Brazil they are made by the President, subject to the approval of the Congress. Of such provisions in each other's constitutions governments are assumed to take notice. 'The municipal constitution of every particular state,' says Wheaton, 'determines in

whom resides the authority to ratify treaties negotiated and concluded with foreign powers, so as to render them obligatory upon the nation;' and it is, he declares, 'consequently an implied condition in negotiating with foreign powers that the treaties concluded by the executive government shall be subject to ratification in the manner prescribed by the fundamental laws of the state.' (Elements of International Law, Dana's ed., pp. 337, 338.)

"Of all subjects in relation to which the treaty-making power has been exercised, it may be said that there is none of greater importance, or of greater delicacy, than that of taxation. As the power to tax is an essential power of government, any attempt to contract or restrict it by the exercise of the treaty-making power has always been regarded in this country with jealousy, and in a few cases in which reciprocity treaties have been ratified and carried into effect by the United States they have encountered criticism and opposition on that ground.

"In view of these well-known principles of law and matters of fact, it can not be supposed that it was intended, by the simple exchange of notes on January 31, 1891, to bind our governments, as by a treaty, to certain duties or remissions of duty on the specified articles, beyond the time when the Congress of the United States might, in the exercise of its constitutional powers, repeal the legislation under which the arrangement was concluded. By the terms of that legislation the President, so long as it was enforced, was invested with power to suspend its provisions touching the free entry of the specified articles, under certain conditions the existence of which was to be determined by himself. It is to be assumed that the stipulation in the notes referred to, in relation to the termination of the arrangement with Brazil was made with reference to that power, and that it was intended by the Executive merely as a declaration of the manner in which he would, in the particular case, exercise the special power conferred upon him. No other effect, it is conceived, can reasonably be ascribed to the stipulation."

Mr. Gresham, Sec. of State, to Mr. Mendonça, Brazilian min., Oct. 26, 1894, For. Rel. 1894, 79.

This correspondence is referred to in President Cleveland's annual message, Dec. 3, 1894.

"Referring to our conversation this forenoon, I have the honor to inform you that the so-called reciprocity arrangement between the United States and Guatemala was based on the third section of the statute known as the McKinley law, which was repealed, by the going into effect of our existing tariff law, at midnight on the 27th ultimo.

"This is in accordance with the opinion of the Secretary of the Treasury, in which I concur." (Mr. Gresham, Sec. of State, to Mr. Arriaga, Guatemalan min., Sept. 20, 1894, For. Rel. 1894, 332.)

As to an effort which it was reported would be made in the Brazilian Congress in 1891 to repeal or alter the executive decree putting in

force the arrangement referred to in Mr. Gresham's note to Mr. Mendonça, supra, see Mr. Adee, Act. Sec. of State, to Mr. Conger, min. to Brazil, No. 51, May 23, 1891, MS. Inst. Brazil, XVII. 517.

6. Implied Revocation or Repeal.

(1) earlier by later treaty.

§ 775.

By Article IV. of the treaty between the United States and Japan of June 17, 1857, it was provided that Americans "committing offenses in Japan" should be "tried by the American consul-general or consul" and "punished according to American laws." By Article VI. of the treaty of July 29, 1858, it was provided that "Americans committing offenses against Japanese" should be tried in American consular courts and punished according to American law; and by Article XII. of the same treaty it was declared that, as "all the provisions" of the treaty of 1857 were incorporated in the latter treaty, the former was "revoked." Held, that the revocation of the treaty of 1857, since it was made upon the declared assumption that all its provisions were incorporated in the treaty of 1858, must be held to be limited to the provisions which were in fact so incorporated, and not to extend to the unincorporated provisions; and that the American consuls continued to possess the right to try and punish American citizens for offenses against persons other than Japanese. Such had in reality been the practical construction given to the alleged revocation by the authorities of both countries.

In re Ross (1891), 140 U. S. 453, 465; 11 Supreme Ct. Reporter, 897.

The treaty between the United States and France of April 16, 1869, was impliedly repealed by the industrial-property treaty of 1883 (25 Stat. 1372) since the latter treaty covered the whole subject-matter of the former one.

La Republique Française *v.* Schultz, (1893), 57 Fed. Rep. 37.

The treaty of 1844 between the kingdom of Würtemberg and the United States, providing that where land owned by a citizen or subject of one country should descend to a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject might sell it, and withdraw the proceeds, exempt from all duties of detraction, was abrogated by the treaty of December 11, 1871, between the United States and the German Emperor, who, under the constitution of the empire, of which the kingdom of Würtemberg had become a part, represents the empire among nations, enters into alliances with foreign countries, etc.

In re Strobel's Estate, 39, N. Y. S. 169.

The fact that by the treaty between the United States and Great Britain of 1794 tar and turpentine were placed in the list of contraband did not release France from the obligation of the stipulation in the treaty with the United States of 1778, so long as it remained in force, that those articles should "not be reputed contraband."

The James and William (1902), 37 Ct. Cl. 303.

In 1885 the Siamese minister in London suggested to Mr. Phelps, then American minister at that capital, whether some agreement could be arrived at as to the construction of the term "munitions of war" in Article II. of the treaty between the United States and Siam of March 20, 1833. Mr. Phelps, in reporting this conversation to the Department of State, suggested that the first point to be determined was whether the treaty of 1833 was superseded by the subsequent treaty of 1856. The Department replied: "As a general rule . . . , unless a particular contract undertakes to abrogate all former contracts between the parties, it only vacates such portions of former contracts as are inconsistent with its terms. The same rule is applied to statutes covering more or less the ground of former legislation. If this rule be applied in the present case, then the clause in the treaty of 1833 precluding the importation or sale in Siam (except to the King) of 'munitions of war' is still in force. . . . My conclusion, under all the circumstances, is that it is so in force."

Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, No. 181, Jan. 7, 1886, MS. Inst. Great Britain, XXVII. 640.

(2) Treaty, by Later Statute.

§ 776.

"Provisions of treaties and of statutes are made by the Constitution alike the supreme law of the land, and such law remains in full force and equally binding until repealed, abrogated, or set aside by competent authority.

"But it is difficult to deduce from the Constitution or elsewhere any standard by which to measure the relative weight to be accorded to law, when made by the negotiation of a treaty, over that made by enacting a statute.

"It has been held quite frequently that a subsequent treaty supersedes an act of Congress with which it is in conflict, as in Ware *v.* Hylton, 3 Dall. 199; Dean *ex dem.* Fisher *v.* Herndon, 1 Paine C. C. 55; and the converse that an act of Congress subsequent to a treaty must be enforced as the supreme law of the land, although in violation of the provisions of the treaty, has been held quite frequently. (Taylor *v.* Morton, 2 Curtis C. C. 455; Ropes *v.* Church, 8 Blatch.

304; The Clinton Bridge, 1 Woolworth, 155; The Cherokee Tobacco Cases, 11 Wall. 616.)

"You consider the decision in the Cherokee tobacco cases, however, *obiter*, because the treaty was an Indian treaty. Still the general question was distinctly passed on by the court, and no such question was there raised, and it has been decided on legal authority that a treaty with Indian tribes has the same dignity and effect as a treaty with a foreign power, being a treaty within the meaning of the Constitution, and the supreme law of the land. (Turner *v.* The American Baptist Missionary Union, 5 McL. C. C. 349.)

"Mr. Crittenden, while Attoreny-General, held, in reference to the Florida claims, that 'an act of Congress is as much a supreme law of the land as a treaty. They are placed on the same footing, and no preference or superiority is given to the one over the other.' (5 Op. Att. Gen. 345.)

"In the general discussion of the question in the early cases, such as the United States *v.* The Schooner Peggy, 1 Cranch, 109, and Foster *v.* Elam, 2 Pet. 314, a treaty is considered as equivalent, not superior, to an act of Congress.

"Judge Story, too, declares that treaties are subject to legislative enactment; and Judge Cooley, in his edition, and in a note to Judge Story's text, states the rule very broadly that an act of Congress may supersede a prior treaty.

"In a strict legal sense the difficulty lies in considering law, when enacted, regardless of the method of enactment, as other than binding in the highest degree.

"Of course, in speaking of the effect of subsequent legislation upon the provisions of a prior treaty, I refer only to the effect in the country where the legislation is enacted, and upon the officers and people of that country.

"The foreign nation whose rights are invaded thereby has no less cause of complaint and no less right to decline to recognize any internal legislation which presumes to limit or curtail rights accorded by treaty."

Mr. Fish, Sec. of State, to Mr. Cushing, min. to Spain, July 20, 1876, MS. Inst. Spain, XVII. 558.

"The result of several late decisions in this country, as well as two at least of the opinions of the Attorneys-General, seem to lead to the conclusion that an act of Congress of later date than a treaty, although in violation of its terms, must be obeyed as municipal law within the country, although in no manner binding on the foreign state, and although it in no manner affords a sufficient excuse for a violation of treaty provisions." (Mr. Fish, Sec. of State, to Mr. Cushing, Feb. 13, 1877, MS. Inst. Spain, XVIII. 110.)

Although Art. VI. of the treaty with Russia of 1832 stipulates that no higher duties shall be imposed on goods imported from Russia than

on like articles imported from other places, if Congress has imposed a higher duty on Russian hemp it must be collected. (Taylor *v.* Morton, 2 Curtis, 454; Ropes *v.* Clinch, 8 Blatch. 304.)

That the same principle, as to legislative repeal, applies to Indian as to other treaties, see not only the Cherokee tobacco cases, cited by Mr. Fish, but also United States *v.* Old Settlers (1893), 148 U. S. 427, and Thomas *v.* Gay, 169 U. S. 264, 271, 18 Sup. Ct. Rep. 340, reversing 46 Pac. Rep. 578.

See Marshall, C. J., in 1 Cranch, 109, and Cushing, At. Gen., 6 Op. 658.

A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do. But a treaty may also confer private rights on citizens or subjects of the contracting powers which are of a nature to be enforced in a court of justice, and which furnish, in cases otherwise cognizable in such courts, rules of decision. The Constitution of the United States makes the treaty, while in force, a part of the supreme law of the land in all courts where such rights are to be tried. In this respect, so far as the provisions of a treaty can become the subject of judicial cognizance in the courts of the country, they are subject to such acts as Congress may pass for their enforcement, modification, or repeal.

Head Money Cases, 112 U. S. 580.

See, to the same effect, Horner *v.* United States, 143 U. S. 570, 12 S. Ct. 522.

By the Constitution of the United States a treaty is placed juridically on the same footing, and made of like obligation, with an act of legislation. When the two relate to the same subject the courts will always endeavor to construe them so as to give effect to both, if this can be done without violating the language of either; but if the two are inconsistent, the one later in date will control, provided that the stipulation of the treaty is self-executing.

Whitney *v.* Robertson (1888), 124 U. S. 190.

In the course of its opinion, which was delivered by Mr. Justice Field, the court said: "If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress."

See, also, Bartram *v.* Robertson, 122 U. S. 116; Kelly *v.* Hedden, 124 U. S. 196; s. c. 43 Fed. Rep. 17; Ely's Adm. *v.* United States (1898), 171 U. S. 220, 223–4; Williams *v.* The Welhaven, 55 Fed. Rep. 80; The Clinton Bridge, 1 Woolworth, 150; United States *v.* Lee Yen Tai (1902), 185 U. S. 213; Lone Wolf *v.* Hitchcock (1903), 187 U. S. 553.

By Article I. of the treaty between the United States and China of November 17, 1880, it was agreed that the government of the United States might regulate, limit, or suspend, but not absolutely prohibit, the coming or residence of Chinese laborers. By Article II. of the same treaty it was declared that Chinese laborers who were then in the United States should be allowed to go and come of their own free will, and should be accorded all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most-favored nation. By acts approved May 6, 1882, 22 Stat. 58, and July 5, 1884, 23 Stat. 115, provision was made for the execution of these stipulations, and, among other things, for the issuance to the exempted class of Chinese laborers on their departure from the United States of certificates establishing their right to return under the treaty. By an act of Congress approved October 1, 1888, 25 Stat. 504, it was provided that no further certificates under the acts of 1882 and 1884 should be issued; that every certificate previously issued in pursuance thereof was void and of no effect, and that the Chinese laborer claiming admission under such certificate should not be permitted to enter the United States. It was held that the act of October 1, 1888, was a constitutional exercise of legislative power, and that, so far as it conflicted with existing treaties, it operated to that extent to abrogate them as part of the municipal law of the United States, though it could not have the effect of destroying their international obligation.

The Chinese Exclusion Case (1889), 130 U. S. 581, 9 S. Ct. 623.

See, to the same effect, Fong Yue Ting *v.* United States (1893), 149 U. S. 698.

"A treaty duly ratified is as much a part of the supreme law of the land as a statute. The later expression of the lawgivers will replace preceding law if inconsistent or repugnant, even if there is not an express repeal. While repeals by implication are not favored, where a later law entirely substitutes new provisions for the scheme of the earlier law, it is displaced by the later statute."

Knox, At. Gen., Oct. 10, 1901, 23 Op. 545, affirming 21 Op. 347, and holding that Art. II. of the convention with China of December 8, 1894, repealed a part of sec. 7 of the act of December 13, 1888, 25 Stat. 476, assuming that the act was in force—a question reserved in Li Sing *v.* United States, 180 U. S. 486, 488, 490, where it was held that, without regard to the question whether the act ever became effective, sec. 12 could not be considered as in force.

On the question of conflict between a treaty and a statute, the Attorney-General cited Cherokee Tobacco *v.* United States, 11 Wall. 616; Foster *v.* Neilson, 2 Pet. 314; Taylor *v.* Morton, 2 Curtis, 454; Murdock *v.* Mayor of Memphis, 12 Wall. 590; United States *v.* Tynen, 11 Wall. 88.

"As regards the conflict between the treaty of 1858 and that of 1880, there can be no question that the latter, being more recent, is to prevail. If there be a question between either treaty and subsequent Chinese legislation, the Department's opinion is that, internationally, such legislation can not affect treaty obligations. I therefore affirm your suggestion that 'in cases in which an American is sued by a Chinese subject, the United States consul shall invite the proper official of the plaintiff's nationality to sit with him at the hearing, to watch the proceedings, to present and examine and cross-examine witnesses, and to protest, if he pleases, in detail.'"

Mr. Bayard, Sec. of State, to Mr. Denby, Dec. 12, 1885, MS. Inst. China, IV. 101.

"In the tariff act a wrong was done to the Kingdom of Hawaii which I am bound to presume was wholly unintentional. Duties were levied on certain commodities which are included in the reciprocity treaty now existing between the United States and the Kingdom of Hawaii, without indicating the necessary exception in favor of that Kingdom. I hope Congress will repair what might otherwise seem to be a breach of faith on the part of this government."

President Harrison, annual message, Dec. 1, 1890, For. Rel. 1890, vii.

Richard Braeg, a native of Germany, was admitted to citizenship of the United States at San Francisco, California, July 19, 1879. He returned to Europe in 1880, and settled on an estate in Switzerland near the German frontier, though he conducted a business at Constance on the German side of the line. He was soon afterwards charged before a court at Constance with having made insulting remarks about the German Emperor and the Grand Duke of Baden at a place near the frontier in Switzerland. He was acquitted on the ground that not being a German he was not answerable for the commission of the alleged offense in Switzerland. An appeal was taken by the state's attorney to the imperial court at Leipzig, by which his American naturalization was held to be invalid, on the ground that, as the evidence showed that he had resided in Europe from June, 1874, till April, 1879, he was not naturalized in conformity with the treaty between the United States and the North German Union of February 22, 1868. He sought, however, to invoke the treaty between the United States and Baden of July 9, 1868, which recognizes as citizens of the United States citizens of Baden who have resided uninterruptedly within the United States five years and have become American citizens "before, during, or after that time." The court held that this clause did not cover the case of Braeg; but it also went further and declared that if the treaty with Baden were differently

construed it would conflict with the German municipal law, and that in such case the court would be obliged to enforce the latter. In reporting the case the American minister at Berlin said: "As the case had been decided adversely from another standpoint, this declaration would seem to be of an abstract nature, and may not perhaps call for any representation . . . . but I have thought it would be of some interest to the Department to be made acquainted with the view held by the supreme court of this land regarding the sanction of the provisions of a treaty with a foreign country, as compared with those of municipal law."

President Harrison, annual message, Dec. 1, 1890, For. Rel. 1890, vii. enclosing the text of the decision of the imperial court at Leipzig, June 2, 1881, MS. Desp. Germany.

"The arbitrator is not called upon to decide the question elaborately argued by the honorable representative of Hayti that under the constitution and laws of Hayti the commune of Port-au-Prince is alone responsible for the unlawful collection of the license taxes. The question submitted is, Is the Republic of Hayti liable upon this claim; and if so, to what amount? I do not deem it necessary to inquire as to whether the proceedings of the officials were strictly in accordance with local laws. The law which they were attempting to enforce was a law of the Republic of Hayti in violation of the treaty between the two nations. It need hardly be stated that the obligations of a treaty are as binding upon nations as are private contracts upon individuals. This principle has been too often cited by publicists and enforced by international decisions to need amplification here. I find that the law authorizing double taxation upon foreigners, so far as it relates to American citizens, was in violation of treaty rights, and that the seizure and sale of Metzger & Co.'s goods under the facts established or conceded in this case was under a law sought to be enforced in violation of treaty rights. About $1,200 worth of their goods was seized and sold. . . . I am of opinion that the Republic of Hayti, in compensation for the goods and reparation for their seizure and sale in the manner herein found, should pay to the claimants . . . the sum of $5,000."

Award of the Hon. William R. Day, arbitrator, in the matter of the claims of John D. Metzger & Co. *v.* Hayti, protocol of Oct. 18, 1899, For. Rel. 1901, 262, 272–276.

It is the duty of the courts not to construe an act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction.

Lem Moon Sing *v.* United States (1895), 158 U. S. 538.

If it can be reasonably done, an act of Congress should be so construed

as to further the execution of a treaty, and not to violate its provisions. (United States *v.* Mrs. Gue Lim (1900), 176 U. S. 459.)

The Secretary of the Treasury stated that in a case of doubtful construction he would be slow to construe an act of Congress so that it might be held to do violence to a treaty stipulation; but that, in regard to the duty on tin cans under the act of February 8, 1875, he considered the language of the statute to be so clear as to admit of no doubt, and that it required the assessment of duty on such cans containing fish imported under the treaty of May 8, 1871.

Mr. Cadwalader, Act. Sec. of State, to Sir Edward Thornton, British min., June 19, 1875, MS. Notes to Great Britain, XVI. 580.

(3) STATUTE BY LATER TREATY.

§ 777.

A treaty, constitutionally concluded and ratified, abrogates whatever law of any one of the States may be inconsistent therewith.

A treaty, assuming it to be made conformably to the Constitution in substance and form, has the legal effect of repealing, under the general conditions of the legal doctrine that "*leges posteriores priores contrarias abrogant*," all pre-existing Federal law in conflict with it, whether unwritten, as law of nations, of admiralty, and common law, or written, as acts of Congress. A treaty, though complete in itself, and the unquestioned law of the land, may be inexecutable without the aid of an act of Congress. But it is the constitutional duty of Congress to pass the requisite laws. But the need of further legislation, however, does not affect the question of the legal force of the treaty per se.

Cushing, At. Gen., 1854, 6 Op. 291. See also Akerman, At. Gen., 1870, 13 Op. 354.

See Davis *v.* Concordia, 9 How. 280; Fellows *v.* Blacksmith, 19 How. 366, 372; The Clinton Bridge, 1 Woolworth 150; Kull *v.* Kull, 37 Hun (N. Y.) 476.

The provisions of the convention with China proclaimed December 8, 1894, were self-executing, so as to modify or repeal a prior statute with which they were in conflict.

Knox, At. Gen., Oct. 10, 1901, 23 Op. 545, approving opinions of Conrad, Act. At. Gen., May 20, 1896, 21 Op. 347, and Harmon, At. Gen., May 26, 1896, 21 Op. 357.

The words "confirmed by law" mean confirmation by the act of that power which under our system enacts laws. A confirmation by treaty is a confirmation by law, inasmuch as a treaty is to be regarded

as an act of the legislature, whenever it operates without the aid of a legislative provision.

Coffey, At. Gen. ad interim, 1863, 10 Op. 507.

(4) STATE CONSTITUTIONS AND STATUTES BY TREATIES.

§ 778.

"A treaty, constitutionally concluded and ratified, abrogates all State laws inconsistent therewith. It is the supreme law of the land, subject only to the provisions of the Constitution."

Davis, Notes, U. S. Treaty Volume (1776–1887), 1227, citing Cushing, At. Gen., 6 Op. 293, and cases there cited: United States *v.* Schooner Peggy, 1 Cranch, 103; Ware *v.* Hylton, 3 Dallas, 199; Gordon's Lessee *v.* Kerr, 1 Wash. C. C. 322; Lessee of Fisher *v.* Harnden, 1 Paine 55. See also Cushing, At. Gen., 8 Op. 417; Akerman, At. Gen., 13 Op. 354.

As to the effect of treaties, see also Wunderle *v.* Wunderle, 144 Ill. 40.

Ware, administrator of Jones, sued one Hylton and others on a penal bond, dated July 7, 1774, for a certain sum of money. Jones was a British subject. The defendants, who were citizens of Virginia, pleaded various acts of the State of Virginia, passed during the Revolutionary war, which, if valid, barred the recovery of the debt. The plaintiff, in reply to this plea, relied upon the provisions of the 4th article of the treaty of peace of September 3, 1783, by which it was provided that creditors on either side should not meet with any legal impediment to the recovery in sterling money of bona fide debts theretofore contracted. The defendants rejoined (1) that the provisions of the treaty were inapplicable to the case, and (2) that the treaty had been violated and suspended by the acts of the British in carrying away negroes, in refusing to surrender the western posts, and in exciting the Indians to war. Held, that the plaintiffs were entitled to recover.

Ware *v.* Hylton (1796), 3 Dallas, 199. Iredell, J., who had delivered the opinion in the court below, holding that the plaintiffs were not entitled to recover, alone dissented.

The convention of 1800, between France and the United States, enabling the people of one country holding lands in the other to dispose of them by testament, and to inherit lands in the other, without being naturalized, was held to dispense with limitations in a State statute on the alien inheritance.

Chirac *v.* Chirac, 2 Wheat. 259.

See, to the same effect, Hauenstein *v.* Lynham, 100 U. S. 483; Gordon *v.* Kerr, 1 Wash. C. C. 322; Fisher *v.* Harnden, 1 Paine, 55; Kull *v.* Kull, 37 Hun (N. Y.) 476.

A legislative act of the State of Oregon, which prohibits the employment, by contractors, of Chinese upon street improvements or public works, but permits all other aliens to be so employed, is in conflict with the treaty between the United States and the Emperor of China, which secures to the Chinese resident the same right to be employed and labor for a living as the subjects of any other nation, and is therefore void.

Baker *v.* Portland, 5 Sawyer C. C. 566.
See Mr. Wharton, Act. Sec. of State, to Mr. Denby, min. to China, No. 553, Sept. 24, 1890, For. Rel. 1890, 196.

7. Effect of War.

§ 779.

Nature of treaties.

By Article VI. of the treaty of peace between the United States and Great Britain of September 3, 1783, it was declared that there should be "no future confiscations made, nor any prosecutions commenced against any person or persons for, or by reason of the part which he or they may have taken in the present war," and that no person should, "on that account, suffer any future loss or damage, either in his person, liberty or property." By Article IX. of the treaty between the same powers of November 19, 1794, it was agreed "that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens." By Article XXVIII. the first ten articles of the treaty were declared to be "permanent," while the subsequent articles, with one exception, were "limited in their duration to twelve years."

The question whether the stipulations of Article IX. were affected by the war of 1812 came before the Supreme Court of the United States in the case of the Society for the Propagation of the Gospel, a British association, against the Town of New Haven; and a decision was rendered to the effect that the stipulations remained in full force. The court, in the course of its opinion, said: "We think . . . that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived

by the parties, or new or repugnant stipulations are made, they revive in their operation at the return of peace."

Society for the Propagation of the Gospel *v.* New Haven (1823), 8 Wheat. 464, 494.

See, also, Carneal *v.* Banks, 10 Wheat. 181; Schr. Rapid, 1 Gall. 295, 303. In the former case it was held that titles to land in the United States acquired by French subjects under the sanction of the treaty of 1778 were not divested by the abrogation of that treaty or the expiration of the convention of 1800.

Seven years later, in 1830, the same question was decided by the court of chancery in England, in the case of Sutton *v.* Sutton, in which a citizen of the United States claimed the right, under Article IX. of the treaty of 1794, to hold and convey, in spite of his alienage, certain real estate in London. It appeared that in 1797 an act of Parliament (37 Geo. III. c. 97) was passed to carry the treaty into effect. Of this act, sections 24 and 25 related to Article IX., and the last section, which was the 27th, declared: "This act shall continue in force so long as the said treaty between His Majesty and the United States of America shall continue in force, and no longer." It was argued, both upon the strength of this section and upon general principles, that, as the result of the war of 1812, the treaty of 1794 had ceased to be in force; that "it was impossible to suggest that the treaty was continuing in force in 1813," that is to say, during the existence of the war; that it "necessarily ceased with the commencement of the war;" that "the 37 G. 3, c. 97, could not continue in operation a moment longer without violating the plainest words of the act;" and that the word "permanent" was used, "not as synonymous with 'perpetual or everlasting,' but in opposition to a period expressly limited."

It is to be observed that counsel impliedly conceded that if the word "perpetual" had been employed in the article, there would have been no doubt as to its survival.

Sir John Leach, Master of the Rolls, decided that the article continued in full force at all times, saying:

"The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

"The act of the 37 G. III. gives full effect to this article of the treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent, and independent of a state of peace or war, then the act of Parliament must be held, in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the act is to continue in force, so long only as a state of peace shall subsist, it can not be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the act only as would in their nature depend upon a state of peace."

A decision was therefore rendered in favor of the right claimed by the American citizen.

Sutton *v.* Sutton, 1 Russell & Mylne, 663.

"Your letter of the 10th instant has been received. It asks whether there was in 1872 any treaty between the United States and Great Britain relative to the inheritance of lands situated in this country by British subjects.

"The only provision found in any treaty between the United States and Great Britain touching this point is in the ninth article of the treaty of 1794, whereby it was agreed that 'British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens.'

"The operation of this stipulation is limited to lands held in the United States and Great Britain respectively, in 1794, and as to the subsequent title to lands so held at that time, the effect of the treaty may be deemed permanent.

"Permit me to refer you to the cases of Shanks and others against Dupont and others, 3 Pet. 242, and to New York *v.* Clarke, 3 Wheat. 1, for legal decisions as to the construction of the 9th article of the treaty.

"The treaty of 1794, however, is held by the highest authorities to have actually lapsed by reason of the subsequent state of war in 1812–'15, and neither the treaty of Ghent (1814) nor any treaty between the two countries since then has re-enacted its provisions in whole or part.

"There is, therefore, no treaty engagement of any character between Great Britain and the United States, which would give to the

subjects or citizens of the respective countries the original right to acquire since 1794 any real property by inheritance or purchase, except in accordance with the laws of the State or Territory where the property is situated."

Mr. Bayard, Sec. of State, to Messrs. L. and E. Lehman, June 23, 1885, 156 MS. Dom. Let. 80.

As to trade-marks agreements, see Mr. Moore, Assist. Sec. of State, to Mr. Ellison, May 19, 1898, 228 MS. Dom. Let. 613.

"The general rule of national law is that war terminates all subsisting treaties between the belligerent powers. . . . Perhaps the only exception to this rule, if such it may be styled, is that of a treaty recognizing certain sovereign rights as belonging to a nation which had previously existed independently of any treaty engagements. . . . It will scarcely be contended that the Nootka Sound convention belongs to this class of treaties."

Mr. Buchanan, Sec. of State, to Mr. Packenham, British min., July 12, 1845, 34 Br. & For. State Papers, 93, 97.

Mr. Pakenham, July 29, 1845, replied: The Nootka Sound convention "embraced, in fact, a variety of objects; it partook, in some of its stipulations, of the nature of a commercial convention; in other respects it must be considered as an acknowledgment of existing rights, an admission of certain principles of international law, not to be revoked at the pleasure of either party, or to be set aside by a cessation of friendly relations between them." (Id. 102.)

"A state of war abrogates treaties previously existing between the belligerents."

President Polk, annual message, Dec. 7, 1847. See, however, infra, § 1053.

Treaties applicable to state of war.

Stipulations in treaties having sole reference to the exercise of belligerent rights can not be applied to govern cases exclusively of another nature, and belonging to a state of peace.

The Marianna Flora, 11 Wheat. 1.

April 23, 1898, on the outbreak of war with the United States, the Spanish government issued a decree which, among other things, declared: "The war existing between Spain and the United States terminates the treaty of peace and friendship of the 27th October, 1795, the proctocol of the 12th January, 1877, and all other agreements, compacts, and conventions that have been in force up to the present between the two countries."

By Article XIII. of the treaty of October 27, 1795, it was agreed that, if a war should break out between the two nations, one year after the declaration of war should be allowed to the merchants in the cities

and towns where they should live for collecting and transporting their goods and merchandise. A rumor having got abroad that the Spanish government contemplated the issuance of a decree of expulsion against citizens of the United States who might be within the Spanish dominions, the Department of State caused the attention of the Spanish government to be drawn to this stipulation through the British ambassador at Madrid. The Spanish government replied that it considered all treaties between the two countries to be at an end, but offered to enter into a special convention for the provisional application during the war of the stipulation in question. The United States declined to accept this proposal on the ground that the stipulation, instead of being abrogated by the state of war, must be considered as finding therein its full force and effect. Here the correspondence closed. No decree of expulsion was issued.

Mr. Moore, Act. Sec. of State, to Mr. Hay, amb. to England, tel., April 30, 1898, For. Rel. 1898, 972; Mr. Hay to Mr. Day, Sec. of State, tel., May 7, 1898, ibid.; Mr. Day to Mr. Hay, tel., May 8, 1898, ibid.; Mr. Hay to Mr. Day, No. 387, May 10, 1898, and No. 393, May 14, 1898, id. 973; Mr. Day to Mr. Hay, No. 668, June 1, 1898, id. 974.

"If it were true that war abrogates such stipulations [as Art. XIII. of the treaty of 1795], they would be subject to the singular fate of ceasing to be in force whenever they should become applicable." (Mr. Moore, Act. Sec. of State, to Mr. Wheeler, May 3, 1898, 228 MS. Dom. Let. 245.)

See, also, Mr. Moore, Assist. Sec. of State, to Mr. Heymann, June 13, 1898, 229 MS. Dom. Let. 308.

That treaties applicable to a state of war are not abrogated by war, see Lawrence's Wheaton (1863), 472–473, and authorities there cited.

Treaties relating to debts.

By a decree of the Spanish government, issued April 23, 1898, all treaties between the two countries were declared to be terminated by the war which had then broken out. In the treaty of peace, concluded at Paris, Dec. 10, 1898, there is no stipulation for the revival of such treaties. By Article VII. the contracting parties "mutually relinquish all claims for indemnity," but this relinquishment is expressly restricted to claims "that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications." During the negotiation of the treaty, however, the American commissioners proposed an article by which all the treaties in existence between the two countries at the outbreak of the war were enumerated and declared to continue in force. This article was taken up for consideration at the conference held on the 8th of December. The president of the Spanish commission stated that the Spanish commissioners were unable to accept the article, but added: "Some of the treaties to which it referred were obsolete or related to conditions which no longer existed, and it would involve a more extended

examination than the joint commission was in a position to give. But this does not imply that the two governments might not take up the subject themselves."

Ex. Doc. B, 55 Cong. 2 sess., part 2, p. 254; S. Doc. 62, 55 Cong. 3 sess. part 1.

"All treaties, agreements, conventions, and contracts between the United States and Spain prior to the treaty of Paris shall be expressly abrogated and annulled, with the exception of the treaty signed the 17th of February, 1834, . . . for the settlement of claims . . . , which is continued in force by the present convention." (Art. XXIX., Treaty of Friendship and General Relations, between the United States and Spain, July 3, 1902.)

As to Art. XI. of the treaty of 1795, see Mr. Hay, Sec. of State, to Messrs. Turner, McClure, and Ralston, March 28, 1900, 244 MS. Dom. Let. 59.

By a decree of April 30, 1898, the Spanish government declared that the war then existing with the United States had terminated all agreements, compacts, and conventions between the two countries. Among the treaties in force between the United States and Spain at the outbreak of the war between the two countries there was a convention signed at Madrid, February 17, 1834, under which an indemnity was provided for certain claims of citizens of the United States against the Spanish government. The claims in question grew chiefly out of the seizure and confiscation of American vessels and cargoes for alleged violations of decrees issued by Spanish commanders during the war between Spain and her American colonies. British subjects had similar claims, for the enforcement of which their government resorted to reprisals; and satisfaction was made by Spain in 1828 by the payment of 600,000 pounds sterling, in inscriptions redeemable within a fixed time. The United States forbore to press the claims of its citizens, except by negotiation, and they were not adjusted till February 17, 1834. By Article I. of the convention signed at Madrid on that day, Spain agreed to pay the United States, in settlement of the claims, "the sum of twelve millions of rials vellon, in one or several inscriptions, as preferred by the government of the United States, of perpetual rents, on the Great Book of the Consolidated Debt of Spain, bearing an interest of five per cent per annum." The inscriptions were to be issued in conformity with a model annexed to the convention, and they, or the proceeds thereof, were to be distributed by the government of the United States among the claimants entitled thereto, in such manner as it might deem just and equitable. The interest on the inscriptions was to be paid in Paris every six months.

The form of the inscription, as annexed to the treaty, is as follows:

No.
Cupon de
pesos fuertes de
renta pagadero en
de de
183
Cupon No. 1°.

Renta perpetua de España,
pagadera en Paris
á razon de 5 p. 0-0 al año,
inscrita en el gran libro de la Deuda consolidada.

Esta Inscripcion se expide á consecuencia de un convenio celebrado en Madrid en de de entre S. M. Catolica la Reyna de España y los Estados Unidos de America, para el pago de las reclamaciones de los ciudadanos de dichos Estados.

Inscripcion No.

Capital.		*Renta.*
Pesos fuertes	:	Pesos fuertes
ó sean francos.	:	ó sean francos.

El portador de la presente tiene derecho á una renta anual de pesos fuertes, ó sea de francos, pagaderos en Paris por semestres, en los dias de y de por los banqueros de España en aquella capital, á razon de 5 francos y 40 centimos por peso fuerte, con arreglo al Rl. decreto de 15 de Diciembre de 1825.

Consiguiente al mismo real decreto se destina cada aña á la amortizacion de esta renta uno por ciento de su valor nominal, á interes compuesto, cuyo importe sera empleado en su amortizacion periodica al curso corriente por dichos banqueros.—*Madrid,* de de

El Secretario de Estado y del Despacho de Hacienda.

El Director de la Rl. Caja de Amortizacion.

This inscription, using for the purpose the English text of the treaty wherever applicable, may be translated as follows:

No.
Coupon of –
hard pesos of
interest payable on
the – the –
183 –
Coupon No. 1.

Perpetual Rent of Spain
payable in Paris
at the rate of 5 per cent. per annum, inscribed in the great book of the consolidated Debt.

This inscription is issued in pursuance of a convention concluded at Madrid on the of , between Her Catholic Majesty, the Queen of Spain, and the United States of America, for the payment of the claims of the citizens of said States.

Inscription No.

Principal.	Interest.
Hard pesos or francs.	Hard pesos or francs.

The bearer of this is entitled to an annual interest of hard pesos, or francs, payable in Paris semiannually, on the day of and of , by the bankers of Spain in that capital, at the rate of 5 francs and 40 centimes for

> the hard peso, in accordance with the royal decree of December 15, 1825.
>
> Pursuant to the same royal decree there is set aside each year for the amortization of this rent one per cent of its nominal value, at compound interest, which amount shall be employed in such periodical amortization at the current rate by said bankers.—Madrid, of of
>
> *The Secretary of State for the Treasury.*
> *The Director of the Royal Bureau for Amortization.*

The inscriptions, in proper form, with the coupons annexed, were delivered to the United States and deposited in Paris. On June 7, 1836, an act of Congress was approved, under which a commissioner was appointed for the purpose of deciding upon the merits of the various claims to an interest in the inscriptions. By the same act the Secretary of the Treasury was authorized to distribute in ratable proportions among persons in whose favor awards were to be made any money received into the Treasury under the international settlement, and to cause certificates to be made to awardees showing the proportions to which they were entitled. The act was duly carried into effect; and certificates were issued on which the interest on the "perpetual rents," as it was from time to time received, was distributed. The first four semiannual installments of interest were duly paid; but, owing to lack of funds, payments were then suspended until 1841, when they were resumed at the rate of $60,000 a year till the arrears were discharged. Subsequently an arrangement was made, under which the sum of $28,500 was paid each year to the Department of State in full discharge of the annual interest. During the war this payment was not made. The operation of the convention of 1834 was thus, in fact, suspended.

As the treaty of peace contained no stipulation on the subject, the question as to the continuing obligation of the debt, and of the convention by which it was guaranteed, remained to be determined by the two governments on the general principles of international law.

July 17, 1899, Mr. Hay instructed the legation of the United States at Madrid to bring to the attention of the Spanish government the subject of the overdue interest. August 16, 1899, the Spanish government replied that as the debt arose "out of a treaty which was suspended in virtue of the late war," the matter could not be resolved till the two governments had reached a decision as to the renewal of the conventional agreements between the two countries; but that "the government of His Majesty, wishing to give a proof of its constant good faith," had "already taken the proper steps in order to completely guarantee the interests of the holders of the debt of 1834," without prejudice to the common agreement which must be arrived at, by providing for the necessary sum in the budget lately presented to the Cortes. The Department of State, Oct. 12, 1899,

answered that, as the obligation to pay the interest was by the terms of the convention perpetual, no connection was perceived between the performance of that obligation and the conclusion of treaties on the subject of commerce and navigation, of extradition, or of consuls; and that, as the note of the Spanish government was not understood "as repudiating or denying its permanent and continuing obligation" under the treaty of 1834, the subject of the payment of the debt "would seem to have no relevancy to the negotiation of new treaties."

November 17, 1899, the ministers of state announced that the council of ministers had decided to waive any further delay and to pay the overdue coupons at once; and on Dec. 1, 1899, the minister of the United States was formally advised that proper measures had been taken to enable the Spanish minister at Washington to pay to the Department of State the installments for 1898 and 1899. The ministry of state added: "In thus paying the two annuities, which on account of the last war had been suspended, the punctiliousness with which the government of His Majesty attends to its international obligations will be clearly shown." December 20, 1899, the Spanish minister at Washington, in transmitting to the Department of State the requisite drafts, said: "The two sums of $28,500 which I have the honor to transmit to you represent the annual payments of 1898 and 1899, the government of His Majesty having in this way fulfilled an obligation which the events of 1898 heretofore made it impossible to discharge." In acknowledging the payment, Mr. Hay, Dec. 21, 1899, expressed for the United States "sincere gratification . . . by reason of the friendly and just spirit shown by the Spanish government in meeting the obligations in question."

Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, No. 29, July 17, 1899, For. Rel. 1899, 708; Mr. Dupuy de Lôme, Under Sec. of State of Spain, to Mr. Sickles, U. S. chargé, Aug. 16, 1899, id. 709; Mr. Adee, Act. Sec. of State, to Mr. Storer, No. 84, Oct. 12, 1899, id. 710; Mr. Storer to Mr. Hay, No. 123, Nov. 17, 1899 (reporting the announcement of the Minister of State), id. 710; Mr. Dupuy de Lôme to Mr. Storer, Dec. 1, 1899, id. 711; Duke of Arcos, Span. min., to Mr. Hay, Dec. 20, 1899, id. 712; Mr. Hay to Duke of Arcos, Dec. 21, 1899, id. 713.

See, also, report of Mr. Davis, Com. on For. Rel., Jan. 11, 1899, S. Rep. 1467, 55 Cong. 3 sess.

As to the manner, time, and place of payment of the inscriptions, see memorandum enclosed with Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, Dec. 22, 1899, MS. Inst. Spain, XXII. 652.

As to the effect of war on debts, see *Columbia Law Rev.* (April, 1901), I. 214 et seq.; also, infra, § 1053.

"We contended [at Ghent] that the whole treaty of 1783 must be considered as one entire and permanent compact, not liable, like ordinary treaties, to be abrogated by a subsequent war between the parties to it; as an instrument recognizing the rights and liberties enjoyed by the people of the United States as an independent nation, and containing the terms and conditions on which the two parts of one empire had mutually agreed thenceforth to constitute two distinct and separate nations."

Views of publicists.

J. Q. Adams, The Duplicate Letters, The Fisheries and the Mississippi 54.

"It can not be necessary to prove that the treaty of 1783 is not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties. To suppose that it is, would imply the inconsistency and absurdity of a sovereign and independent state, liable to forfeit its right of sovereignty by the act of exercising it on a declaration of war." (Mr. Gallatin and Mr. Rush, commissioners, 1817, quoted in 2 Lyman's Diplomacy of the United States, 91.)

As a general rule, subject to exceptions in peculiar cases, such obligations of treaties as are transient are considered as dissolved by a subsequent war between the parties. (Mr. Adams, Sec. of State, to Mr. Rush, Nov. 6, 1817, MS. Inst. U. States Ministers, VIII. 152.)

"I this day received a letter from C. A. Rodney, the Senator from Delaware, with a new English authority against the doctrine that all treaties are abrogated by war. It is the opinion of Mr. Fox, expressed in Parliament in the debate on the definitive treaty of peace of 1783." (6 Memoirs J. Q. Adams, 54.)

"After the conclusion of the treaty of Ghent, it was claimed by Great Britain that the rights which the Americans had enjoyed in the British fisheries before the war, under the treaty of 1783, had been lost through the abrogation of the treaty in consequence of the war. John Quincy Adams, who was the United States minister at London at that time, contended that the treaty of 1783 was not 'one of those which by the common understanding and usage of civilized nations is or can be considered as annulled by a subsequent war between the same parties.' Lord Bathurst replied: 'To a position of this novel nature Great Britain can not accede. She knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same parties.' During the negotiations which followed Great Britain never abandoned that position, and the United States may be said to have acquiesced in it. By it they secured the exclusion of Great Britain from the Mississippi, the free and open navigation of which was granted to the subjects of Great Britain forever by the treaty which Lord Bathurst set aside." (Davis, Treaty Notes, Treaty Volume, 1776–1887, p. 1237.)

"There is a very important difference between *transitory covenants* and *treaties*, with respect to their duration. When once a transitory covenant has been fulfilled, and has been continued on afterwards without being renewed, or its future duration has been defined

by the contracting parties, it still continues in force. No changes that may take place afterwards as to the person of the sovereign, the form of government, or the sovereignty of the state can in the least impair the validity of the covenant while it is observed on the other side. If a war even should break out between the contracting parties, the covenant does not, on that account merely, become entirely null, although the effects of it may be suspended during the war. But, it must be admitted, that one party, in order to obtain due satisfaction, has a right to declare, that his adversary has forfeited all the rights he enjoyed in virtue of the treaties existing between them."

Martens, Law of Nations, Cobbett's translation (1795), 55–56. See, also, id. 53.

See, to the same effect, G. F. de Martens, Précis du Droit des Gens (Paris, 1831), cited in Lawrence's Wheaton (1863), 460.

"Stipulations which relate to boundaries, to the tenure of property, to public debts, &c., and which are permanent in their nature, are suspended by war, but revive as soon as hostilities cease. The treaties of 1783 and 1794, between the United States and Great Britain, respecting confiscations and alienage, were of a permanent character, and the Supreme Court held that they were not abrogated by the war of 1812, although their enforcement was, for the time being, suspended. Stipulations relating to prizes, prisoners of war, blockades, contraband, &c., are unaffected by a declaration of war between the contracting parties, and can only be annulled by new treaties, or in the manner provided in the instruments themselves."

1 Halleck's Int. Law (Baker's ed.), 294, citing 1 Kent's Com. 177; 1 Benton's Thirty Years, 487; Bas *v.* Tingey, 4 Dall. 37.

"The older text writers made the survival of treaty rights dependent upon the origin of the war. If the war arose in the breach of the treaty, the provisions were annulled; but if the war was what was called a new war—that is, one arising from a cause independent of the treaty—though the exercise of rights acquired under the treaty would be interrupted by the war, they would not be lost, unless by conquest. (Grotius, liv iii., ch. 20, §§ 27, 28; Vattel, liv. iv., ch. 4, § 42.) Kent notices this distinction without remark. Woolsey says of it, 'This rule, which would be a very important one if admitted, and yet perhaps one attended with practical difficulties, is not, so far as we are informed, insisted on by later text writers, nor introduced into the code of nations.' (Introduction, § 152.) Indeed, it seems plain that the test of survival is to be found in the nature of the provision, and not in the origin of the war."

Dana's Wheaton, 353, Dana's note, No. 143.

"As to the effect of war upon treaties, we find in the publicists much contrariety of views; but it may be affirmed that the proposition

that all treaties are extinguished or annulled by war is unsupported by authority at the present day. The misconception sometimes betrayed on the subject is due to the failure to note the narrow sense in which the word treaties has frequently been used in this relation. By a classification originating with the earlier publicists, and often repeated by their successors, treaties have been divided into two classes—*pacta transitoria*, or 'transitory conventions,' as the words have been unfortunately translated, and 'treaties, properly so-called.' In the former class were included international compacts by which a status was permanently established, or a right permanently vested; and, in the latter, compacts which looked to future action, and the execution of which presupposed the continuance of a state of peace between the contracting parties. In accordance with the distinction thus drawn, it was said that 'treaties' were terminated by war, the word treaties being used in a limited technical sense. As a result of this double use of the term, controversies have occurred in which the abrogation of treaties by war has been affirmed as a universal principle on the one side and denied on the other, when in reality the word was used by the parties in different senses—by the one in its general and usual sense and by the other in its special and restricted sense. For example, in the correspondence between John Quincy Adams and Lord Bathurst as to the question whether the 'liberties' of American fishermen under the treaty of peace of 1783 were terminated by the war of 1812, Mr. Adams maintained that the 'treaty of peace' 'was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties.' Lord Bathurst replied: 'To a position of this novel nature Great Britain can not accede. She knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same parties.' Nevertheless, his lordship in the same note declared: 'The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary character.' And it may be assumed that if the treaty had been composed wholly of provisions deemed by his lordship to be of the former character, there would have been no controversy between him and Mr. Adams.

"It is evident that in the arguments of these statesmen, as well as in the classification of treaties above referred to, there was a recognition of the principle, which is now received as fundamental, that the question whether the stipulations of a treaty are annulled by war depends upon their intrinsic character. If they relate to a right which the outbreak of war does not annul, the treaty itself remains unannulled.

"Says Vattel: 'The conventions, the treaties mades with a nation, are broken or annulled by a war arising between the contracting parties, either because these compacts are grounded on a tacit supposition of the continuance of peace, or because each of the parties, being authorized to deprive his enemy of what belongs to him, takes from him those rights which he had conferred on him by treaty. Yet here we must except those treaties by which certain things are stipulated in case of a rupture—as, for instance, the length of time to be allowed on each side for the subjects of the other nation to quit the country—the neutrality of a town or province, insured by mutual consent, etc. Since by treaties of this nature we mean to provide for what shall be observed in case of a rupture, we renounce the right of cancelling them by a declaration of war.'

"The reasoning of Vattel has been repeated by many writers, and among others by Riquelme, who observes that war annuls 'all the treaties which form the international legislation between the belligerent states,' and that 'the reason why these treaties perish by war is because they are made with reference to peace; and, since it is lawful to take possession of whatever belongs to the enemy government, with greater reason it is proper to deprive it of the rights which grow out of the treaties.' The limitation by Riquelme in this passage of the general right of seizure to things belonging 'to the enemy government' (cuanto pertenece al gobierno enemigo), will be noted.

"Says Kent: 'Where treaties contemplate a permanent arrangement of national rights, or which by their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war.' Wheaton expresses himself to the same effect. Phillimore ascribes the errors of some writers in discussing the effect of war on treaties to their failure to distinguish between treaties temporary in their nature and treaties which contain 'a final adjustment of a particular question, such as the fixing of a disputed boundary or ascertaining any contested right or property.' To questions of *private property* he declares that the doctrine of the abrogation of treaties by war is 'certainly not applicable.' Rivier expresses the same opinion. Hall, referring to the effect of war on 'treaties with political objects, intended to set up a permanent state of things by an act done once for all,' declares that compacts of this kind 'must in all cases be regarded as continuing to impose obligations until they are either suspended by a fresh agreement or are invalidated by a sufficiently long adverse prescription;' and he further declares that where treaties, such as conventions to abolish the droit d'aubaine or regulate the acquisition and loss of nationality, may be considered as suspended during war, 'the effects of acts previously done under their sanction must remain unaltered.'

"Says Fiore: 'As to treaties between belligerents, it cannot be admitted that the state of war extinguishes them all, but only such as are incompatible with that state.' Pillet declares that the view that the declaration of war annuls all treaties between the belligerents, 'is no longer held by any one.'

"While forbearing to cite the many other authorities to the same effect, we may quote from Calvo the following statement:

"'What effect does the declaration of war produce on treaties which bind the contracting parties at the moment of the rupture of their pacific relations? Are these international acts all and wholly annulled in strict law, or yet do some of them fall, while others remain in force? The solution of these questions depends naturally upon the particular character of the engagements contracted. Thus all are agreed in admitting the rupture of conventional ties concluded expressly with a view to a state of peace, of those whose special object is to promote relations of harmony between nation and nation, such as treaties of amity, of alliance, and other acts of the same nature having a political character. As to customs and postal arrangements, conventions of navigation and commerce, and agreements relative to private interests, they are generally considered as suspended till the cessation of hostilities. By necessary consequence, it is a principle that every stipulation written with reference to war, as well as all clauses described as perpetual (*qualifiées de perpétuelles*), preserve in spite of the outbreak of hostilities their obligatory force so long as the belligerents have not, by common accord, annulled them or replaced them with others.'"

J. B. Moore, in *Columbia Law Review* (April 1901), Vol. I., no. 4, pp. 209–223, citing Mr. Adams to Lord Bathurst, Sept. 25, 1815, 4 Am. State Papers, For. Rel. 352; Lord Bathurst to Mr. Adams, Oct. 30, 1815, id. 354, 355; Vattel, (Phila. ed. 1858), book iii. ch. x. sec. 175, p. 371; Riquelme, Elementos de Derecho Público Internacional (Madrid, 1849), I. 171; Kent, Comm. I. 177; Wheaton, Lawrence's ed. (1863), 460, 471, 475; Phillimore, Int. Law (2nd ed.), III. 796; Rivier, Principes du Droit des Gens, II. 137; Hall, Int. Law (4th ed.), 404; Fiore, Nouveau Droit Int. Pub. (1886), III. 83; Pillet, Les Lois actuelles de la Guerre, 77, sec. 43; Calvo, Droit Int. (4th ed.), IV. 65, sec. 1931.

"As a general rule, the obligations of treaties are dissipated by hostility, and they are extinguished and gone forever, unless revived by a subsequent treaty. But if a treaty contain any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place. All those duties of which the exercise is not necessarily suspended by the war subsist in their full force." (Kent, Comm. I. 176.)

See, further, Field's Int. Code, § 905, citing Bluntschli, § 718. Also, debate in the House of Commons on the declaration of Paris of 1856;

dispatch of Mr. Marcy to Mr. Mason, of Dec. 8, 1856; speeches of Sir George Lewis and Mr. Bright of March 11 and 17, 1862, and of the Earl of Derby, of Feb. 7, 1862, all cited in a note in Lawrence's Wheaton (1863), 472–473.

See, also, Pradier-Fodéré, Traité de Droit Int. Pub. II. 508, § 910; Funck-Brentano et Sorel, Précis du Droit des Gens (Paris, 1877), 247; Lawrence (T. J.), Principles of Int. Law (1895), 313; Twiss' Oregon Question, chap. x.

For an interesting discussion of the effect of war on treaties, in connection with the Peace of Amiens, see Hansard, XXXVI. 164, 593, 596, 704, 714, 761–762, 770, 771, 802–803, 806. (This debate relates partly to British rights in Spanish Honduras.)

See Correspondence as to the Spanish Marriages, 35 Br. and For. State Papers, 717–849; 3 Phillimore, Int. Law, 806.

8. Survival of Vested Rights.

§ 780.

By a statute of Maryland of 1780, French subjects were enabled to inherit lands in that State, but were required, within ten years after inheriting, to settle in and become citizens of the State, or else to enfeoff a citizen of some one of the United States. Certain French subjects who inherited lands in Maryland in 1799, but who afterwards failed to perform these conditions, subsequently invoked the 7th article of the treaty between the United States and France of September 30, 1800, by which it was provided that, in case the laws of either country should restrain foreigners from exercising their rights of property with respect to real estate, such real estate might be "sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be." It was contended that this stipulation, though it conferred a right to sell which endured for life, could not be invoked because the treaty had expired. Held, that the right to sell, having once vested under the treaty, continued, though the treaty had expired. Marshall, C. J., delivering the opinion of the court, said: "A right once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty, or any other law, has performed its office by giving a right, the expiration of the treaty or law can not extinguish that right. Let us, then, inquire, whether this temporary treaty gave rights which existed only for eight years, or gave rights during eight years which survived it.

"The terms of this instrument leave no doubt on this subject. Its whole effect is immediate. The instant the descent is cast, the right of the party becomes as complete as it can afterwards be made. The French subject who acquired lands by descent the day before its expiration has precisely the same rights under it as he who acquired them the day after its formation. He is seised of the same estate,

and has precisely the same power during life to dispose of it. This limitation of the compact between the two nations would act upon and change all its stipulations, if it could affect this case. But the court is of opinion that the treaty had its full effect the instant a right was acquired under it; that it had nothing further to perform; and that its expiration or continuance afterwards was unimportant."

The Chirac *v.* Chirac (1817), 2 Wheat. 259, 277.

Whether a treaty is ipso facto extinguished by war depends upon its nature; but rights of property, which have vested under a treaty, are not divested by the breaking out of war.

Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464; Carneal *v.* Banks, 10 Wheat. 182.

A guarantee in a treaty of cession of vested rights in the ceded territory covers only rights which emanated from a prior rightful sovereign.

United States *v.* Pillerin, 13 How. 9.

In the case of the act of Congress of October 1, 1888, which declared null and void certificates issued to Chinese laborers under the acts of May 6, 1882, and July 5, 1884, for the purpose of enabling such laborers to enjoy the right to go and come of their own free will, as stipulated in Article II. of the treaty between the United States and China of November 17, 1880, it was held that the right of return thus conferred might be taken away by legislation, the court saying: "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character."

The Chinese Exclusion Case (1889), 130 U. S. 581, 609, citing Head Money Cases, 112 U. S. 580, 598.

CHAPTER XVIII.

CONVENTIONAL AND DIPLOMATIC RELATIONS.

I. *ARGENTINE REPUBLIC.*

§ 781.

A history of the diplomatic relations of the United States with Buenos Ayres and the Argentine Republic is given in instructions from Mr. Marcy, Secretary of State, to Mr. Peden, June 29, 1854.

MS. Inst. Arg. Rep. XV. 68.

See the following matters:

Discussion of proposed tariff legislation in 1894, For. Rel. 1894, 3–18.

Duties on lumber and cotton-seed oil, For. Rel. 1897, 1–2, 2–4.

"The claim of Thomas Jefferson Page against Argentina, which has been pending many years, has been adjusted. The sum awarded by the Congress of Argentina was $4,242.35." (President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, lxviii.)

The sum was expressed in Argentine paper currency and was paid in 6 per cent internal debt bonds. (For. Rel. 1898, 4.)

As to the boundary dispute with Chile and the appointment of Mr. Buchanan, American minister, as a member of the limits commission, see For. Rel. 1898, 1, 4, 179.

II. *AUSTRIA-HUNGARY.*

§ 782.

In the diplomatic correspondence between the United States and Austria-Hungary the following matters, not elsewhere noticed, may here be mentioned:

Information as to capital punishment in the United States. (Mr. Foster, Sec. of State, to M. de Mezey, chargé, July 9, 1892, MS. Notes to Aust. Leg. IX. 78.)

Adoption of the metric system by Austria-Hungary, under laws of 1871 and 1875. (For Rel. 1897, 16.)

Restrictions on the importation of American fruit. (For. Rel. 1898, 32.)

For correspondence as to the duty exacted in Austria on salt in which meats are packed. (For. Rel. 1899, 40–48.)

Reception of Admiral Dewey at Trieste. (For. Rel. 1899, 51–52.)

See, as to the assassination of the Empress of Austria, at Geneva, and condolences, For. Rel. 1898, 35.

As to the treaties between the United States and Austria-Hungary, see Davis's Notes, Treaty Volume, 1776–1887, p. 1241.

As to the military cases of Janowitz and Kranz, under Article II. of the naturalization treaty of September 20, 1870, see For. Rel. 1891, 21–26, 26–28.

For further correspondence concerning the treaty of September 20, 1870, see the chapter on Nationality, supra.

III. *BARBARY POWERS.*

1. Early Relations.

§ 783.

"'Before the war of Independence, about one-sixth of the wheat and flour exported from the United States, and about one-fourth in value of their dried and pickled fish, and some rice, found their best markets in the Mediterranean.'

"This trade then employed about 12,000 men and 20,000 tons of shipping, and was protected by British passes.

"The war of the Revolution having abrogated this protection, Congress early took into consideration plans for substituting another in its place.

"In a sketch for a treaty which that body, on the 17th of September, 1776, agreed that their commissioners should endeavor to conclude with the French King, an article was inserted to the effect that France should protect, defend, and secure, as far as in its power, the subjects, people, and inhabitants of the United States and their

vessels and effects against all attacks, assaults, violences, injuries, depredations, or plunderings, by or from the King or Emperor of Morocco, or Fez, and the states of Algiers, Tunis, and Tripoli, and any of them, and every other prince, state, and power on the coast of Barbary, and the commissioners were instructed that this article 'ought to be obtained, if possible; but should be waived rather than that the treaty should be interrupted by insisting upon it.' The commissioners did not obtain such protection. Instead of it, the King of France, in the treaty of 1778, agreed to 'employ his good offices and interposition' with those powers, 'in order to provide as fully and efficaciously as possible for the benefit, conveniency, and safety of the said United States, and each of them, their subjects, people, and inhabitants, and their vessels and effects, against all violence, insults, attacks, or depredations on the part of the said princes and states of Barbary, or their subjects.'

"The recognition of the independence of the United States by Great Britain found no steps taken in this direction, for reasons which appear in the official correspondence. Mr. Adams, therefore, wrote to the President of Congress on the 10th September, 1783: 'There are other powers with whom it is more necessary to have treaties than it ought to be; I mean Morocco, Algiers, Tunis, and Tripoli. . . . If Congress can find funds to treat with the Barbary Powers, the ministers here are the best situated. . . . Ministers here may carry on this negotiation by letters, or may be empowered to send an agent, if necessary.'

"Congress authorized a commission to be issued to Mr. Adams, Dr. Franklin, and Mr. Jefferson, which was done on the 12th of May, 1784, empowering them, or a majority of them, to treat with Morocco, Algiers, Tripoli, and Tunis, as well as with the several powers of Europe.

"On the 28th of March, 1785, these commissioners addressed a joint note to Count de Vergennes, asking his advice upon the conduct of their negotiations, and requesting that the good offices of the French King should be interposed with the Emperor of Morocco, according to the tenor of the eighth article of the treaty of 1778.

"Franklin left Paris for America on the 12th of July, 1785, and Adams and Jefferson, finding themselves engaged in the negotiation of treaties with European powers, and having received authority to empower substitutes to negotiate with the Barbary states, in October of that year commissioned Thomas Barclay to negotiate with Morocco, and John Lamb to negotiate with Algiers, and they reported their proceedings to Jay, who referred them to Congress, with a recommendation that they should be approved.

"In the spring of the next year Jefferson was induced to go to London to meet Abdrahaman, the Tripoline embassador, who expressed a

desire to negotiate with the commissioners. They found 'that 30,000 guineas for his employers, and £3,000 for himself, was the lowest terms upon which a perpetual peace could be made,' and that Tunis would treat upon the same terms, 'but he would not answer for Algiers or Morocco.' These demands were so exorbitant that the negotiations were suspended.

"Barclay was, however, instructed to continue his negotiations with Morocco.

Morocco.

"By the 16th of July, 1786, a treaty with Morocco was nearly agreed upon. After its conclusion Count de Vergennes wrote to the French minister in the United States: 'You can assure the Congress that the King will seize with eagerness all occasions to facilitate their good intelligence with the Barbary Powers. . . . The treaty which has been recently signed with this last power (Morocco) . . . will be the best refutation of the suspicions which many public papers are willing to inspire against our system of policy.'

"On the death of the Emperor who concluded the treaty, $20,000 was appropriated by Congress 'to the purpose of effecting a recognition of the treaty . . . with the new Emperor;' and instructions were sent to secure the recognition for the $20,000, if possible; if not, for $25,000.

"The treaty was renewed, or rather recognized, by the new Emperor, who wrote to President Washington: 'We have received the present at his [the consul's] hands with satisfaction. . . . Continue writing letters to us; . . . we are at peace, tranquillity, and friendship with you, in the same manner as you were with our father, who is in glory.'

"In 1803 a Moorish pirate captured an American vessel, which was released by force by an American frigate; and when hostile demonstrations were threatened for this breach of the treaty, the Emperor issued an order that 'the American nation are still, as they were, in peace and friendship with our person, exalted of God.'

"The treaty concluded in 1787, to endure for fifty years, was, in its forty-ninth year, renewed for another fifty years, and for such further time as it should remain unaffected by notice.

"In 1865 a convention was concluded for maintaining a light-house at Cape Spartel. The correspondence respecting it will be found in the Senate documents.

Algiers.

"About the commencement of the year 1791 Mr. Jefferson, the Secretary of State, reported to President Washington that there were held captive as slaves in Algiers two American masters, for whose ransom 3,000 sequins each were demanded; two mates, for whom 2,000 sequins each were asked; and ten sailors, held at 750 sequins each; and he reported to Congress that

the navigation into the Mediterranean had not been resumed at all since the peace; and that the sole obstacle had been the unprovoked war with Algiers, and the sole remedy must be to bring that war to an end, or to palliate its effects.

"On the 8th of May, 1792, President Washington asked the Senate whether in case a treaty should be concluded with Algiers for the ransom of the thirteen Americans for a sum not exceeding $40,000, the Senate would consent; and whether they would consent to a treaty of peace stipulating for the payment of $25,000, on the signature of the treaty, and a like sum annually? The Senate answered each question in the affirmative, and the President appointed Admiral John Paul Jones a commissioner to negotiate a treaty, with Thomas Barclay as a substitute, in case Jones should not act. Jones died before the appointment could reach him, and Barclay died soon after, without going to Morocco. Col. David Humphreys, then the minister of the United States at Lisbon, was thereupon appointed a plenipotentiary in their place. Eight hundred thousand dollars were placed at his disposal, and he was instructed that 'the President has under consideration the mode in which the $800,000 may be expended in the purchase of a peace; that is, how much shall be applied to the ransom, and how much to the peace.' More precise instructions followed on the 25th of August, 1794. A Swede named Skjoldebrand, brother of the Swedish consul at Algiers, interested himself in the unfortunate captives, and informed Humphreys (who remained at Lisbon) that a peace could be obtained for the United States for about the following sums (in dollars), viz: 'For the treasury, in money or timber of construction, fifty thousand; for the great officers and relations of the Dey, one hundred thousand; consular present, thirty thousand; redemption of slaves, from two hundred to two hundred and fifty thousand; in all, between six and seven hundred thousand; together with an annual tribute of from twenty-five to thirty thousand, and a consular present every two years of about nine or ten thousand dollars.' Humphreys sent this communication home, and received instructions 'that Skjoldebrand's terms are to be acceded to if better cannot be obtained.' Only a few days before this instruction was written the Secretary of State had informed Colonel Humphreys of the wishes of the Government and the country on this subject: 'You are by this time,' he said, 'apprised of the expectation of the President, that you will continue your labors on this head, and of your title to draw for eight hundred thousand dollars, to soothe the Dey into a peace and ransom. The humanity of our countrymen has been long excited in behalf of our suffering fellow-citizens.' In March, 1795, Donaldson, the consul to Tunis and Tripoli, was associated with Humphreys, and the latter was also authorized to employ Skjoldebrand in negotiating

the treaty with the Dey. Joel Barlow was added to the negotiators by Monroe and Humphreys in Europe. Donaldson arrived in Algiers on the 3d of September, and concluded the treaty on the 5th, on which day Barlow arrived, and they joined in their report to Humphreys.

"Congress was informed by President Washington, in his speech at the opening of the second session of the Fourth Congress, of the probability that the treaty would be concluded, 'but under great, though inevitable disadvantages in the pecuniary transactions occasioned by that war.' A few days later the House called for information as to the measures taken to carry the treaty into effect, which was communicated confidentially on the 9th January, 1797. The bill making appropriations for these objects was discussed with closed doors, and was passed February 22, 1797, by 63 ayes and 19 nays. The Secretary of the Treasury estimated the whole expense of fulfilling the treaty at $992,463.25. In March, 1802, President Jefferson was able to advise Congress that 'the sums due to the government of Algiers are now fully paid up.'

"In 1808, an inquiry being made by Congress respecting the payments to Algiers, the Secretary of State reported that they were 'of two kinds: (1) That stipulated by treaty, viz: twelve thousand sequins, equal to twenty-one thousand six hundred dollars, made annually in naval stores. (2) Those made in conformity with what is called usage at Algiers, by which it is understood we are bound. These are: (1) The present on the presentation of a consul, $20,000. (2) The biennial presents to the officers of the Government, estimated at $17,000. (3) Incidental and contingent presents, as well on the promotion of the principal officers of the Dey and regency, as for the attainment of any important object. Of these no estimate can be made.'

"The course pursued by Algiers during the last war with Great Britain induced President Madison, in February, 1815, to recommend Congress to declare war against the Dey. The committee to whom the message was referred reported that war existed and was being waged by the Dey against the United States. A naval force was despatched to Algiers, and an Algerine frigate and brig were captured en route to that place. The squadron arrived off Algiers on the 28th of June, and on the 29th opened communications with the Government. The next day the Dey proposed a treaty. The American negotiators replied by forwarding a draft for a treaty, and by declaring that 'the United States would never stipulate for paying tribute under any form whatever.' The Dey and his officers asked for time, but it was refused. They even pleaded for three hours. The reply was, 'not a minute,' and the treaty was signed and the prisoners released.

"The papers relating to the only remaining treaty with Algiers (that of 1816) will be found in 5 F. R. F. 133 et seq.

"[Algiers through conquest became in 1830 a colonial province of France.]

"On the 4th of November, 1796, Barlow concluded a treaty with the Bashaw of Tripoli. 'The price of the peace was advanced' to the United States by the Dey of Algiers. But the Bashaw did not long rest contented. In April, 1800, he told Cathcart, the American consul, to say to the President that he was 'pleased with the proffers of friendship,' but 'that had his protestations been accompanied with a frigate or brig of war, . . . he would be still more inclined to believe them genuine.' On the 12th of May he said to him, 'Why do not the United States send me a voluntary present? . . . I am an independent prince as well as the Bashaw of Tunis, and I can hurt the commerce of any nation as much as the Tunisians.' The same month he wrote to the President, 'Our sincere friend, we could wish that these your expressions were followed by deeds, and not by empty words. . . . If only flattering words are meant, without performance, every one will act as he finds convenient. We beg a speedy answer, without neglect of time, as a delay on your part can not but be prejudicial to your interests.'

Tripoli.

"The answer made was a naval squadron and a war against Tripoli on land and sea, which was terminated on the 4th of June, 1805, by a treaty signed on board of an American man-of-war in the harbor of Tripoli. Nothing was paid for the peace. Prisoners were exchanged man for man, and $60,000 were paid by the United States for the release of the number of American prisoners in the hands of the Tripolines over and above the number of Tripolines in the hands of the Americans. They were about two hundred.

"The treaty with Tunis was negotiated under the directions of Barlow in 1797. It cost one hundred and seven thousand dollars, viz: $35,000, regalia; $50,000, peace; $12,000, peace presents; $4,000, consul's presents; and $6,000, secret service. The Senate advised its ratification, on condition that the 14th article should be modified. This modification appears to have been assented to in 1799. See 2 F. R. F. 799, and 3 F. R. F. 394, for correspondence, &c., respecting other questions arising between the two powers.

Tunis.

"In 1824 the modified articles were agreed to in the form in which they now stand.

"In the interesting report of Jefferson to the House of Representatives concerning the Mediterranean trade, which has been already referred to, three modes of dealing with the Barbary pirates are

indicated: (1) To insure vessels and cargoes and to agree upon a fixed rate of ransom for prisoners. (2) To purchase peace. (3) To conquer a peace; and he concludes: 'It rests with Congress to decide between war, tribute, and ransom as the means of reestablishing our Mediterranean commerce.'

"Under the policy adopted by Congress the 'total amount of real expenditures' 'exclusive of sundry expenses incurred but not yet paid' were stated by the Secretary of the Treasury, on the 30th July, 1802, at $2,046,137.22. This was before the war with Tripoli.

"The statutes under which payments were made are the following: 1791, ch. 16, 1 Stat. L. 214; 1792, ch. 24, id. 256; 1796, ch. 19, id. 460; 1797, ch. 12, id. 505; 1797, ch. 12, id. 553; 1798, ch. 18, id. 544; 1799, ch. 28, id. 723; 1800, ch. 47, 2 Stat. L. 66; 1803, ch. 19, id. 215; 1804, ch. 21, id. 269; 1805, ch. 21, id. 321; 1806, ch. 33, id. 388; 1807, ch. 29, id. 436; and from this time forward there was an annual appropriation until the tribute was terminated."

Davis, Notes, Treaty Vol. (1776–1887 1242.

For an account of negotiations with the Barbary Powers, see 3 Life of Pickering, 271; 2 Lyman, Diplomacy of United States, chap. xiii; Allen, Our Navy and the Barbary Corsairs; Moore, American Diplomacy, chap. iii.

For the details of the negotiations with Algiers in 1795–'96, see Todd's Life of Barlow, 1886, chap. vi.

By the act of Congress of 1791 the President was authorized to take measures for procuring the recognition of the treaty with the United States by the new Emperor of Morocco. The act allowed $20,000 for this object, but it was decided not to use more than $13,000 in the first instance, if at all. (Mr. Jefferson, Sec. for For. Aff., to Sec. of Treasury, March 12, 1791, 4 MS. Am. Let. 211.)

For passport of Nov. 10, 1798, for the armed schooner *Lelah Eisha*, as a gift to the Dey of Algiers, under treaty stipulations, see 11 MS. Dom. Let. 176.

As to treaty relations with Algiers and the redemption of captives, see Mr. Pickering, Sec. of State, to the President, July 27, 1796, 9 MS. Dom. Let. 231.

2. Algiers.

§ 784.

"These citations appear to show (1) that separate tariffs have been established for France and Algeria; (2) that France is regarded as the mother country and Algeria is a French colony for customs purposes, and (3) that duties are imposed on importations from Algeria into France, and from France into Algeria."

Mr. Hay, Sec. of State, to Mr. Thiébaut, French chargé, No. 274, January 27, 1900, MS. Notes to French Leg. XI. 7, 14.

3. Morocco.

§ 785.

April 7, 1888, an agreement was entered into between Mr. Lewis, United States consul at Tangier, and the Moorish authorities, for the arbitration of claims against the government of Morocco, growing out of the neglect or refusal of that government to observe and enforce treaty rights of American citizens and protégés. The Sultan having refused to approve the agreement, Mr. Strobel, secretary of the United States legation at Madrid, was directed, April 28, 1888, to proceed to Tangier to assist in the negotiations. He arrived at Tangier on the 2d of May, and on the 8th of the same month, with the assistance of Commander Folger, of the U. S. S. *Quinnebaug*, a new arrangement was completed satisfactory to all parties. By this agreement a tribunal was to be constituted, to be composed of Mr. Lewis and of two persons designated by the Sultan, who were, however, to have but one vote. The agreement contained an enumeration of four matters which were to be disposed of, but stipulated that other claims of American citizens in regard to debts, commercial intercourse, and robberies, might be presented. The tribunal was to endeavor to make its report by June 1, 1888, and its decisions were to be binding. In the event of a disagreement, one of the foreign representatives at Tangier was to be named as umpire. The tribunal met and agreed upon an award, which was signed by Mr. Lewis and the two representatives of the Sultan. This award embraced the matters specifically enumerated in the agreement, and stipulated that the other claims should be left to the examination and decision of certain other persons. Complaint was afterwards made of the nonobservance by the Moorish Government of the provisions of the award in respect of two of the four enumerated matters.

Mr. Bayard, Sec. of State, to Mr. Lewis, consul at Tangier, March 1, 1889, 129 MS. Inst. Consuls, 112.

4. Tripoli.

§ 786.

[See supra, § 267.]

"The Department is well aware of the importance attached in the Turkish dominions to formal observances. It is apprehended, however, that in accrediting you, as had been done with your predecessors, to the head of the government at Tripoli, thereby apparently disregarding those changes in the relations between that country and the Porte, which in previous dispatches you have so clearly and fully explained, the force of the precedent had more

influence than anything else. It is not known that the Tripolitan government ever objected to receiving such a credence or the government at Constantinople to its being bestowed. Had this been the the case, it certainly would have been discontinued."

Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Vidal, consul to Tripoli, July 10, 1873, MS. Inst. Barbary Powers, XV. 558.

"There can be no doubt that the treaty of 1805, between the United States and Tripoli, is still in force." (Mr. J. C. B. Davis, Acting Sec. of State, to Mr. Vidal, July 25, 1871, MS. Inst. Barbary Powers, XV. 546.)

"Our relations with Tunis and Tripoli are defined by treaties. The treaty with Tunis was concluded in 1797 and altered in 1824; that with Tripoli was concluded in 1805. During the long term of years that has elapsed since the conclusion of these treaties they have been referred to and have controlled the settlement of all differences and all questions that have arisen between the high contracting parties to them. They have been acquiesced in without dissent, and if the Porte has at any time complained, either of the continued obligation of those treaties or of their provisions, the fact of such complaint does not at present, occur to me.

"I am not aware that the United States have ever been asked to renounce either of the treaties, or that they have either in terms or by implication renounced either their obligations or their rights under them. Nor am I aware that any facts or change of condition or of the organization of either of those governments have been brought to the notice of this government which would direct its attention to the consideration of the effect which such change might produce upon the further observance or requirement by this government of the terms of the treaties. . . .

"In August last an outrage was committed and the terms of our treaty with Tripoli violated by an insult to our consul stationed at the port of Tripoli. As is the custom and right and duty of this government, prompt measures were taken for the protection of the consul and the maintenance of the honor and dignity of this government, and also to secure reparation and satisfaction for this insult. These measures were effectual, and it is a source of satisfaction that an ample apology, with the assurances against a recurrence of a similar indignity which was demanded by the United States was accorded by the Tripolitan authorities. It is with much satisfaction that the President learns that the Porte promptly interposed the authority which it may exercise in Tripoli to the effect that reparation should be made; but this fact does not appear in the correspondence between the United States consul and the governor of Tripoli."

Mr. Fish, Sec. of State, to Mr. Maynard, min. to Turkey, Oct. 8, 1875, MS. Inst. Turkey, III. 140.

"I have carefully considered the question presented by you in your notes of the 9th and 30th of December, in regard to the recognition of the sovereignty of the Porte over Tripoli. The United States has never formally acknowledged such sovereignty nor has it ever formally denied it. The question was never officially presented to this government until it was referred to in your conversation with me in May last. The affair at Tripoli has emphasized the request made by you at that time for formal recognition of the fact that Tripoli is a province under the government of the Porte, and the request that a decision may be arrived at in the matter seems to be reasonable and proper. The decision of this question, however, in the manner desired by your government, involves the virtual abrogation of a treaty which has been in force and has governed the relations of the United States with Tripoli for nearly three quarters of a century. The subject is an important one in itself and on account of the principle involved, and it is believed can only be properly disposed of by a convention between the two powers. Consequently, as the Porte has proposed that there shall be a convention for the revision of the treaty between the United States and Turkey, I have the honor to suggest for the consideration of the Ottoman government the propriety of deferring all matters bearing upon the treaty with Tripoli, so far as they may affect the relations between the United States and the Porte, until that convention shall be considered."

Mr. Fish, Sec. of State, to Aristarchi Bey, Turkish min., May 3, 1876, MS. Notes to Turkey, I. 151.

At the close of the eighteenth, and for some time after the beginning of the nineteenth, century Tripoli was one of the four countries in Africa bordering on the Mediterranean which did not scruple to send forth armed vessels under their respective flags to capture, without any declaration or ostensible cause of war, peaceable merchantmen and to imprison and enslave their crews. The United States for a time obtained protection from such captures under the treaty with Tripoli of November 4, 1796. What the relations between the Porte and Tripoli then were does not distinctly appear. But it is certain that the United States did not hold the Ottoman government accountable for the acts of the Bey of Tripoli. In spite, however, of the treaty of 1796, the flag of the United States was still disregarded by the Tripolitan cruisers, and at length Congress passed the act of February 2, 1802, for the protection of the commerce and seamen of the United States against those cruisers. This was virtually a declaration of war against Tripoli. No trace of objection to it on the part of the Ottoman government, either as a sovereign or ally of Tripoli, is found in the archives of the United States. The manner

in which the war was prosecuted by the United States is well known. Peace was restored by the treaty of June 4, 1805. The Ottoman government took no part either in the war or in its conclusion, so far as the United States is aware. In 1835 hostilities were waged by the Ottoman government against the authorities of Tripoli, and these hostilities are understood to have resulted in the success of the Turkish arms. A governor from Constantinople was appointed, but no new credentials were required of the American consul. Down to 1849 all the eight successive American consuls to Tripoli had been accredited to the Bashaw of that country. In that year Mr. Gaines, a new consul, who was accredited, as his predecessors had been, solely to the Bashaw, was notified by the governor that his letter of credence would be sent to Constantinople. It may be that as a matter of routine a similar course was followed in regard to consuls to Tripoli subsequently appointed by the United States; but neither Mr. Gaines nor his successors were authorized or instructed to apply at Constantinople for recognition, and such applications do not appear to have been either sanctioned or disapproved. They were, at any rate, never regarded by the United States as an acknowledgment that the treaty between that government and Tripoli of 1805 was thereby canceled. The salute said to have been given by the American men-of-war *Congress* and *Guerrière* to the Ottoman flag at Tripoli on a certain occasion may be ascribed to inadvertance, and no undue significance should be attached to it. The treaty of 1862 between the United States and the Ottoman Porte made no express reference to Tripoli. It was indeed stipulated that its provisions should include all the possessions of the Sultan in Africa, but this left open the character of the dominion of the Porte over Tripoli.

Mr. Fish, Sec. of State, to Aristarchi Bey, Turkish min., Sept. 8, 1876, MS. Notes to Turkey, I. 170.

In appointing, in 1876, a new consul at Tripoli, the United States, while applying to the Porte for his recognition, objected to a berat, or firman, containing a clause which seemed to imply that the treaty with Tripoli, of 1805, was no longer in force, and declared that, unless a berat or firman should be granted in the usual form, the consul would be recalled and the consulate discontinued.

Mr. Fish, Sec. of State, to Mr. Maynard, min. to Turkey, Nov. 25, 1876, MS. Inst. Turkey, III. 204.

5. TUNIS.

§ 787.

[See Tripoli, supra, § 786.]

By Article IV. of the treaty between France and Tunis of May 12, 1881, by which the former assumed a protectorate over the latter, the government of the French Republic "guarantees the execution of the treaties actually existing between the government of the Regency and the different European powers." In 1896 the French government proposed to the United States the abrogation of the treaties of the latter power of 1797 and 1824 with Tunis. The United States expressed a willingness to meet the views and wishes of the French government so far as it could be done without prejudice to the rights and interests of the United States and its citizens. To this end, the United States proposed the conclusion of a convention by which the obligations of the conventions of 1797 and 1824, so far as they were not obsolete, and all other international obligations of Tunis, should be regarded as the obligations of France so long as the existing protectorate of France over Tunis should continue, and by which the provisions of the consular conventions between the United States and France, so far as they were not inconsistent with the foregoing stipulation, were to be declared to extend to Tunis.

Mr. Olney, Sec. of State, to M. Patenôtre, French ambassador, Dec. 3, 1896, and Jan. 15, 1897, MS. Notes to France, X. 430, 433, referring to notes of the French embassy of Oct. 22, Nov. 7, and Dec. 29, 1896, and Jan. 6, 1897.

See, also, Mr. Adee, Act. Sec. of State, to Gen. Porter, amb. to France, July 27, 1897, MS. Inst. France, XXIII. 506.

"There has as yet been no change in the old treaties, but . . . negotiations tending to extend French treaties to the protectorate of Tunis, in lieu of the old United States treaties with the Bey, have been proposed by the French government and are now under consideration."

Mr. Day, Assist. Sec. of State, to Mr. Gorham, Nov. 16, 1897, 222 MS. Dom. Let. 459.

See, also, Mr. Day, Assist. Sec. of State, to Mr. Hawley, Feb. 4, 1898, and to Mr. Catchings, Feb. 18, 1898, 225 MS. Dom. Let. 217, 563; Mr. Hay, Sec. of State, to Mr. Porter, amb. to France, Jan. 5, 1899, MS. Inst. France, XXIV. 134.

IV. *BELGIUM.*

§ 788.

Under Belgium the following matters, not elsewhere given, may be mentioned:

Prohibition of American cattle and meats. (For. Rel. 1897, 32–37.)

Duties imposed in the United States on Belgian sugars and the restrictions in Belgium on the importation of American cattle. (For. Rel. 1898, 90–101.)

Regulations as to the importation of preserved and salted meats. (For. Rel. 1899, 162; For. Rel. 1899, 89.)

Universal Exposition at Brussels, 1897. (President McKinley, annual message, Dec. 5, 1898.)

V. *BOLIVIA.*

§ 789.

As to the imprisonment of Captain John S. Bowles, a citizen of the United States, see For. Rel. 1899, 110–112.

VI. *BRAZIL.*

§ 790.

"On the 26th of March, 1840, Mr. Chaves, the Brazilian minister at Washington, wrote thus to the Secretary of State: 'The Imperial Government is obliged not to prolong the duration of the treaty concluded between the Empire and this Republic, of December 12, 1828; therefore, by the terms contained in article 11 of the said treaty, at the expiration of twelve months from this date the said treaty will be terminated, only for the articles relating to commerce and navigation.' (MS. Records, Dept. of State.) This notice was received on the 27th of March, 1840, and was answered by Mr. Forsyth, Secretary of State, on the 20th of June, 1840, thus: 'Although each party has reserved to itself the right of terminating the treaty at the expiration of twelve months from the date of the notification of its intention; yet the privilege of giving such notification is so restricted that neither party can give it before the expiration of the twelve years stipulated for the duration of the treaty; that consequently the earliest date at which the notice intended to be conveyed by Mr. Chaves' note can be given, is the 12th of December of this year, and that the earliest period at which, under any circumstances, the treaty can cease to be operative, is the 12th of December of the year 1841. The President, however, anxious at once to gratify the wishes of the Brazilian Government, and to show, by his readiness to comply with the spirit of the treaty, the sincerity of the disposition with which, in all

its clauses, it has been fulfilled by the United States, is willing to overlook the departure from the strict letter of the instrument involved in the premature notice given in Mr. Chaves' note, and to receive said notice as if given in accordance with the terms of the treaty at the expiration of the twelve years.'"

Davis, Notes, Treaty Vol. (1776–1887), 1250.

For the correspondence in the negotiation of the treaty, see House Ex. Doc. 32, 25 Cong. 1 sess.

As to commercial discriminations formerly practised in Brazil, see Mr. Forsyth, Sec. of State, to Mr. Hunter, Nov. 29, 1836, MS. Inst. Brazil, XV. 34; Mr. Upshur, Sec. of State, to Mr. Proflit, Aug. 1, 1843, MS. Inst. Brazil, XV. 87; Mr. Cass, Sec. of State, to Mr. Meade, Sept. 15, 1857, MS. Inst. Brazil, XV. 269.

By the commercial arrangement between the United States and Brazil of January 31, 1891, it was provided that no increased export tax should be levied in Brazil on any article admitted free into the United States. On the strength of this provision the United States protested against the imposition by the State of Bahia, January 11, 1892, of a duty of 19 per cent on skins exported to the United States; and by the State of Pernambuco, February 1, 1892, of an additional export tax on sugars sent to the United States. The government of Bahia decided that the tax on skins could not be levied, and the refund of the moneys already collected was promised. The governor of Pernambuco engaged to recommend to the State legislature similar action.

For. Rel. 1893, 26–31.

The United States also protested against the collection in Brazilian custom-houses of an expediente tax on wheat flour imported from the United States, on the ground that the tax constituted a violation of the stipulated free entry of the article in question under the reciprocity arrangement of January 31, 1891. The tax was ultimately refunded.

For. Rel. 1893, 36–38; For. Rel. 1894, 73–76.

As to the refund of expediente charges, referred to in Foreign Relations 1894, 73–76, Mr. Thompson, minister to Brazil, inclosed to Mr. Gresham, Secretary of State, January 15, 1895, a circular of the Treasury Department of Brazil, dated January 2, 1895, reviewing the origin of the claims and explaining how the expediente duties came to be levied in the face of the express provisions of the commercial agreement. The circular revoked the circular of May 21, 1894, and directed the custom-houses to forward the claims to the Treasury Department, in order that the necessary credit might be provided for their payment, owing to the fact that, as the duties had been paid in the last fiscal years, it was impossible to return them without an appropriation. (For. Rel. 1895, I. 43–47. At page 47 there is a copy of a resolution of the National Congress authorizing the refund of the duties.)

"The Empire of Brazil, in abolishing the last vestige of slavery among Christian nations, called forth the earnest congratulations of this government in expression of the cordial sympathies of our people."

President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, xv.

"The recent political disturbances in the Republic of Brazil have excited regret and solicitude. The information we possessed was too meager to enable us to form a satisfactory judgment of the causes leading to the temporary assumption of supreme power by President Fonseca; but this government did not fail to express to him its anxious solicitude for the peace of Brazil and for the maintenance of the free political institutions which had recently been established there, nor to offer our advice that great moderation should be observed in the clash of parties and the contest for leadership. These counsels were received in the most friendly spirit, and the latest information is that constitutional government has been reestablished without bloodshed."

President Harrison, annual message, Dec. 9, 1891, For. Rel. 1891, v.

"The termination of the civil war in Brazil has been followed by the general prevalence of peace and order. It appearing at an early stage of the insurrection that its course would call for unusual watchfulness on the part of this government, our naval force in the harbor of Rio de Janeiro was strengthened. This precaution, I am satisfied, tended to restrict the issue to a simple trial of strength between the Brazilian government and the insurgents, and to avert complications which at times seemed imminent. Our firm attitude of neutrality was maintained to the end. The insurgents received no encouragement of eventual asylum from our commanders, and such opposition as they encountered was for the protection of our commerce and was clearly justified by public law."

President Cleveland, annual message, Dec. 3, 1894, For. Rel. 1894, vii.

As to the attempted assassination of President Moraes, and the message of the President of the United States expressing his congratulations at the former's escape, see For. Rel. 1897, 44–49.

As to the visit of the South Atlantic Squadron of the United States to Brazil in 1900, see For. Rel. 1900, 65.

By a decree of Sept. 5, 1895, regulations were adopted with regard to foreign life insurance companies operating in Brazil.

For. Rel. 1895, I. 59–63.

By a Brazilian law of Nov. 14, 1899, the use of trade-marks written wholly or partly in a foreign language was forbidden to national factories, and it was also forbidden to import goods made abroad

bearing labels wholly or partly in Portuguese, except when imported from Portugal or when made for factories. Remonstrances were made by various governments, including the United States, against the injurious effects of this law, and the law was amended so as to allow the importation of manufactured articles with labels in Portuguese, it being required, however, that the country of origin should be indicated.

For. Rel. 1900, 54, 62, 64–65.

VII. *CENTRAL AMERICA.*

An historical sketch of the relations of the United States with the Federation of Central America is given in instructions of Mr. Buchanan, Sec. of State, to Mr. Hise, June 3, 1848, and Mr. Clayton, Sec. of State, to Mr. Squier, May 1, 1849, MS. Inst. Am. States, XV. 51; H. Ex. Doc. 75, 31 Cong. 1 sess. 92–96.

The following matters may also be noticed:

A general treaty between the five Central American States, signed Feb. 16, 1887. (For. Rel. 1888, 1. 165.)

The Central American Exhibition, at Guatemala City, March 15–July 15, 1897. (For. Rel. 1897, 333–336.)

A treaty of non-intervention and arbitration between Guatemala, Nicaragua, Honduras, and Salvador, signed Nov. 2, 1903. (For. Rel. 1904, 351.)

The treaty between the United States and the Federation of the Centre of America of Dec. 5, 1825, expired by its own limitation in 1837. In 1849, and at subsequent periods, treaties were negotiated with Nicaragua for the revival of its commercial articles, but they did not become operative.

Mr. Seward, Sec. of State, to Sec. of Treasury, Dec. 2, 1863, 62 MS. Dom. Let. 376.

The treaty of Dec. 5, 1825, is given in Am. State Papers, For. Rel. VI. 269.

A treaty of amity, commerce, and navigation was concluded with Nicaragua June 21, 1867, and was afterwards ratified and proclaimed.

1. Costa Rica.

§ 791.

By Article VI. of the treaty between the United States and Costa Rica of 1851, it is provided that the same duties shall be paid on the importation into the one country of any article being the growth, produce, or manufacture of the other country, whether the importation be made in vessels of the former country or of the latter. It was maintained by the United States that the allowance by Costa Rica of a rebate of 5 per cent on all goods imported into the coun-

try by a Spanish line of steamers, under a special agreement between the Costa Rican government and the line, was an infraction of Article VI., which justified the imposition on goods imported into the United States on Costa Rican vessels of discriminating duties under section 2502 of the Revised Statutes.

Mr. Bayard, Sec. of State, to Mr. Fairchild, Sec. of Treasury, Feb. 6, 1888, For. Rel. 1888, I. 124–125; Mr. Fairchild, Sec. of Treasury, to Mr. Bayard, Sec. of State, Sept. 12, 1888, For. Rel. 1888, I. 166.

For the fuller correspondence on the subject, see For. Rel. 1888, I. 90–98, 124–131, 141, 148–154, 159, 166. The view of the Costa Rican government, which maintained that rebates granted to particular foreign lines, under special contracts for service, constituted no national discrimination and did not violate the treaty, is set forth in a note of Mr. Esquivel, min. of for. relations, Jan. 10, 1888, For. Rel. 1888, I. 127 et seq.

By Article VIII. of the treaty between the United States and Costa Rica of July 10, 1851, the consul of the United States at San José has the right to nominate a curator to take charge of the property of a deceased American citizen in Costa Rica, and it would be the duty of the local authorities to appoint the curator thus nominated, unless prohibited by the local law from so doing. The curator thus nominated has the right to take charge of the property in pursuance of the treaty, but not to determine the respective rights of the estate and its creditors. The decision of such questions belongs to the courts.

Mr. Adee, Act. Sec. of State, to Mr. Merry, No. 357, Aug. 18, 1900, MS. Inst. Central America, XXII. 35.

Under the twelfth section of the act of 1861 (12 Stat. 147), to carry into effect the convention with Costa Rica of 1860, certified copies or duplicates of papers filed in the State Department, and not translations, must be substituted by the commissioner of Costa Rica for the originals withdrawn by him.

Bates, At. Gen., 1863, 10 Op. 450.

As to the proceedings under the convention here referred to, see Moore, Int. Arbitrations, II. 1551.

"In November, 1884, the Costa Rican minister for foreign affairs notified Minister Hall that the concessions made by the province of Chiriqui had been annulled by the courts of Costa Rica, and further that a contract made by the government of Costa Rica with Mr. A. W. Thompson, July 24, 1860, had not been approved by the Legislature and had become null and void."

Mr. Hill, Act. Sec. of State, to Mr. Armstrong, January 10, 1901, 250 MS. Dom. Let. 154.

"The long-pending boundary dispute between Costa Rica and Nicaragua was referred to my arbitration; and by an award made on the 22d of March last, the question has been finally settled to the expressed satisfaction of both of the parties in interest."

President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, I. xv.

See, as to the contested boundary between Costa Rica and Nicaragua, Mr. Webster, Sec. of State, to Mr. Walsh, April 29 and April 30, 1852; Mr. Everett, Sec. of State, to Mr. Kerr, Jan. 5, 1853: MS. Inst. Am. States, XV. 123, 129, 152.

For the proceedings in the Costa Rican-Nicaraguan boundary arbitration mentioned by President Cleveland, see Moore, Int. Arbitrations, II. 1945 et seq.

As to the proceedings under a convention between Costa Rica and Nicaragua of April 8, 1896, to carry the award into effect, by means of another arbitral proceeding, see Moore, Int. Arbitrations, II. 1968; V. 5074. See, also, For. Rel. 1894, 439–441.

As to the abolition of trial by jury in Costa Rica, see For. Rel. 1903, 688.

2. Honduras.

§ 792.

December 9, 1898, Mr. Allison, United States consul at Tegucigalpa, reported that President Bonilla had informed him that the treaty of July 4, 1864, "was denounced in 1878–79, but that al clauses of the treaty had been recognized as if it was really in existence." The Department of State, however, found in its archive no record of any notification made either by the United States or by Honduras of an intention to terminate the treaty.

Subsequently, Mr. Allison reported that he found in the records of his consulate the following entry: "By decree of provisional government of Dr. Marco Aurelio Soto, dated in La Paz, April 25, 1877, were denounced several existing treaties, including the general convention with United States signed May 28, 1849, and the one signed May 10, 1863. This act was approved by Congress in decree of March 20, 1879."

The Department of State instructed Mr. Hunter, United States minister in Honduras, that it was unable to find in its archives that any treaties bearing date May 28, 1849, and May 10, 1863, were ever concluded with the government of Honduras, or that any notification of the termination of the treaty of July 4, 1864, had ever reached the Department. Mr. Hunter was directed further to investigate the matter.

For. Rel. 1899, 362–364.

"In reply to your dispatch No. 681 of the 7th instant, I have to say that the Department is not aware that any notice of the termination of the treaty between the United States and Honduras of July 4, 1864, or any of its articles, has ever been given." (Mr. Bayard, Sec. of State, to Mr. Hall, No. 485, July 30, 1887, MS. Inst. Cent. Am. XIX. 45.)

3. Guatemala.

§ 793.

For a circular of instructions to the local authorities touching the conduct to be observed toward foreigners, see For. Rel. 1888, I. 167–168.

As to courtesies shown to the U. S. S. *Philadelphia*, and the U. S. S. *Newark*, at San José, Guatemala, see For. Rel. 1899, 360, 372–373.

For a convention between Mexico and Guatemala, signed May 17, 1898, extending the time for the completion of the labors of the boundary commission, see For. Rel. 1899, 501.

4. Nicaragua.

§ 794.

Relations.

"Everybody wishes the Spanish-American states well, and yet everybody loses patience with them for not being wiser, more constant, and more stable. Such, I imagine, is the temper in which every foreign state finds itself when it proposes to consider its relation to those republics, and especially the republics of Central America. I know, at least, that this has always been the temper of our best statesmen in regard to Nicaragua. Union, or, at least, practical alliance with Nicaragua has always been felt by them as a necessity for the United States, and yet no one ever deems it prudent to counsel the establishment of such intimate relations. Possessing one of the continental transits most interesting to the United States, Nicaragua is at once jealous of foreign intervention to render it available, and incompetent to open and maintain it herself. But Nicaragua, like the other Spanish-American states, has far better excuses for its shortcomings than it generally has credit for. That state became precociously mature, and it adopted our model of government with little of that preliminary popular education and discipline which seem necessary to enable any people to administer, maintain, and preserve free republican institutions. The policy pursued by foreign nations towards Nicaragua has not been liberal or generous. Great Britain, in her wars with Spain, early secured a position in the state very detrimental to its independence, and used it to maintain the Indians in a condition of defiance against the creole population, while it did nothing, at least nothing effectually, to civilize the tribes whom it had taken under its protection. Unwilling to lend the aid necessary to the improvement of the country, Great Britain used its protectorate there to counteract domestic efforts and intervention from this government to make that improvement which was necessary for the interest of

Nicaragua herself, and hardly less necessary for all the western nations. Our own Government has been scarcely less capricious, at one time seeming to court the most intimate alliance, at another treating the new Republic with neglect and indifference, and at another indirectly, if not directly, consenting to the conquest and desolation of the country by our own citizens for the purpose of re-establishing the institution of slavery, which it had wisely rejected. It may be doubtful whether Nicaragua has not until this day been a loser instead of a gainer by her propinquity to, and intercourse with, the United States.

"Happily this condition of things has ceased at last. Great Britain has discovered that her Mosquito protectorate was as useless to herself as it was injurious to Nicaragua, and has abandoned it. The United States no longer think that they want slavery re-established in that state, nor do they desire anything at the hands of its government but that it may so conduct its affairs as to permit and favor the opening of an interoceanic navigation, which shall be profitable to Nicaragua and equally open to the United States and to all other maritime nations.

"You go to Nicaragua in this fortunate conjuncture of circumstances. There is yet another comfort attending your mission. Claims of American citizens upon the government of Nicaragua have long been a source of diplomatic irritation. A convention which provides for the settlement of these claims has been already negotiated. It wants only the consent of the Senate of the United States to an amendment proposed by Nicaragua, which, it is believed, would not materially change the effect of the convention, and such consent may, therefore, be expected to be given at the approaching special session of Congress.

"Your instructions, therefore, will be few and very simple. Assure the Republic of Nicaragua that the President will deal with that government justly, fairly, and in the most friendly spirit; that he desires only its welfare and prosperity. Cultivate friendly dispositions there toward the United States. See that no partiality arises in behalf of any other foreign state to our prejudice, and favor, in every way you can, the improvement of the transit route, seeking only such facilities for our commerce as Nicaragua can afford profitably to herself, and yield, at the same time, to other commercial nations."

Mr. Seward, Sec. of State, to Mr. Dickinson, min. to Nicaragua, No. 2, June 5, 1861, Dip. Cor. 1861, 419.

Claims.

Up to 1894 numerous claims on behalf of American citizens had from time to time been made against Nicaragua, amounting nominally, as presented, to more than $6,000,000. The claims for the killing of American citizens in Virgin

Bay in 1855 constituted but a minor part of the whole, but they seem to have received special consideration during the negotiations between the two countries for the general settlement of claims. They were presented shortly after they originated by Mr. Marcy, as Secretary of State, and were urged by his successor, Mr. Cass. February 28, 1860, Mr. Dimitry, then American minister to Nicaragua, reported that he had submitted a draft of a convention for the general settlement of claims, but no reply to his proposal seems to have been made. Mr. Dickinson, Mr. Dimitry's successor, did not think it advisable in 1863 to press the matter, but in the following year he expressed the opinion that negotiations might be advantageously renewed. July 8, 1867, however, he reported that in the preceding month, when he went to Managua to open negotiations for a treaty of friendship, commerce, and navigation, the minister of foreign affairs of Nicaragua declined to negotiate unless the United States would recognize the claims of that government growing out of the bombardment of Greytown. August 14, 1867, Mr. Seward replied that the United States had "no expectation of recurring to any (claims) which Nicaragua may suppose she has" growing out of that incident. May 24, 1869, Mr. Riotte, Mr. Dickinson's successor, was instructed by Mr. Fish, then Secretary of State, to examine the archives of the legation and report upon the number and amount of pending claims; and Mr. Fish remarked that when this should be done the expediency of vesting him with full powers to conclude a convention would be determined. Mr. Riotte, December 11, 1869, referring to the negotiations that took place while Mr. Cass was Secretary of State, declared that the lapse of nearly ten years had led the Nicaraguans to believe that the United States had abandoned the claims. Mr. Fish, February 18, 1870, replied: "That government can not with propriety infer that because some of those claims—especially those which originated when Walker was in the military service of Nicaragua—have not recently been urged upon its attention they have been definitely abandoned. No claims of citizens of the United States upon foreign governments were pressed during the late civil war in this country." Mr. Riotte was furnished with a copy of the claims convention with Costa Rica of 1860 as a model for one with Nicaragua. September 3, 1871, Mr. Riotte reported that the Nicaraguan government had again refused to enter into such a convention unless the commission under it should have jurisdiction of claims against the United States growing out of the bombardment of Greytown and of the expeditions of the so-called filibusters. October 7, 1871, Mr. Fish expressed his regret at this determination. He denied that there was any liability on the part of the United States for claims arising either from the bombardment of Greytown or from the burning of Granada. Mr. Riotte was authorized to give a copy of this instruction to the Nicaraguan government.

An elaborate reply by that government was transmitted by Mr. Riotte to the Department of State January 11, 1872. On October 26, 1874, Mr. Fish instructed Mr. Williamson, Mr. Riotte's successor, to resume negotiations for a convention and press them to a conclusion, if he should ascertain that Nicaragua might be willing to recede from its position in holding the United States accountable for alleged damage to property of Nicaragua by the bombardment of Greytown. May 24, 1876, Mr. Williamson reported that Nicaragua insisted on including the filibuster and bombardment claims, and he stated that he agreed with the opinion of his predecessor that nothing but a display of force could induce Nicaragua to recede from her position. This opinion he reaffirmed in a dispatch of June 16, 1876. He was instructed by Mr. Fish, July 24, 1876, to make known to the Nicaraguan government that indefinite patience or actual abandonment of its claims could not be expected of the United States. August 28, 1876, Mr. Williamson again adverted to the necessity of using compulsion. Mr. Fish, February 3, 1877, replied that in order to use force the President would require authority from Congress. April 17, 1879, Mr. Logan, then United States minister to Nicaragua, was advised that a select committee of the United States Senate had been appointed to investigate the claims of American citizens against Nicaragua, and he was instructed to transmit to Washington all papers bearing upon them. He complied with this instruction January 6, 1880. In 1880 the special committee reported a bill, which passed the Senate, but did not become a law, merely authorizing the President to make the necessary arrangements for carrying into effect any convention which might be concluded between the United States and Nicaragua for the adjustment of claims. In March, 1882, however, a concurrent resolution passed both Houses of Congress, by which the President was "requested to bring to the attention of the government of Nicaragua the necessity of arranging, by convention, for final settlement of all unadjusted claims existing between the government of the United States and the government of Nicaragua, and claims of citizens of the United States against the government of Nicaragua." Under this resolution, which seemed to contemplate the submission to arbitration of all claims of either government against the other, no action appears to have been taken.

Memorandum of the Diplomatic Bureau, August 15, 1894, enclosed with Mr. Gresham, Sec. of State, to Mr. Morgan, U. S. S., Dec. 1, 1894, 18 MS. Report Book, 545.

The following documents may here be referred to:

Claims of United States citizens against the government of Nicaragua, President's message, Dec. 9, 1878, S. Ex. Doc. 3, 45 Cong. 3 sess.

Resolution appointing committee to examine claims, Feb. 4, 1879, S. Rep. 711, 45 Cong. 3 sess.

Claims of Woolsey Teller and Eliza Livingston. Report advising the negotiation of a treaty for settlement of similar claims, Feb. 6, 1879, H. Report 96, 45 Cong. 3 sess.

Report in favor of the appointment of a select committee to examine into the claims and take evidence, Jan. 13, 1880, H. Report 86, 46 Cong. 2 sess.

Resolution providing for a committee of five to examine claims, June 30, 1879, H. Mis. Doc. 20, 46 Cong. 1 sess.

Report submitting a bill to carry out any claims convention with that government that may be concluded, Apr. 28, 1880, S. Rep. 532, 46 Cong. 2 sess.

Report in favor of authorizing the President to negotiate a treaty for the settlement of claims, Mar. 3, 1881, H. Report 396, 46 Cong. 3 sess.

Report calling on the President to arrange a convention for the consideration of claims, Feb. 7, 1882, H. Report 255, 47 Cong. 1 sess.

Nicaragua Canal route, report in favor of, President's message, Apr. 18, 1879, S. Ex. Doc. 15, 46 Cong. 1 sess.

Article IX., Treaty of 1867.

April 29, 1893, the President of Nicaragua issued a decree imposing a forced loan of $600,000 throughout the republic, to be repaid with ten per cent interest "within two years after constitutional order has been reestablished." By Article IX. of the treaty between United States and Nicaragua of 1867 it was provided that the citizens of the United States residing in that republic should be exempt from forced loans in time of war. The decree in question recited that it was enacted on account of the rebellion which had broken out in the country, and that its purpose was to help maintain the army which it was found necessary to raise in order to restore public order. It appearing, therefore, that the loan in question was a "forced loan in time of war," within the intent of the treaty, the minister of the United States in Nicaragua was instructed that, if the loan was sought to be collected from citizens of the United States, to protest and ask for the refund of any amount so obtained.

Mr. Gresham, Sec. of State, to Mr. Baker, min. at Nicaragua, June 16, 1893, For. Rel. 1893, 198.

Mr. Baker reported that the Nicaraguan government had sought to collect the tax in a few cases, where American citizens, by adoption, had suddenly become possessed of valuable properties which belonged to the Nicaraguans in sympathy with the revolution, and had, without authority, raised the American flag and resisted the payment of the tax. In each case a note to the minister of foreign affairs had secured the suspension of the collection of the tax till the true ownership of the property could be legally established, and it was believed that in the end justice was done and everybody satisfied. (For. Rel. 1893, 201, 211.)

"The Department has received yours of October 26 last, with inclosures, relating to the Nicaraguan government's forcible seizure and occupation of the valuable property near Bluefields, known as

the 'bluffs,' owned in part by United States citizens. In reply to the 'American owners' protest against this action, which you submitted to that government, the minister of foreign affairs has written you that under the constitution of Nicaragua and international law 'no foreigner can solicit the intervention of his government in defense of his rights or pretensions until after he has exhausted all remedies which the laws of the country in which he lives allow him, and his complaints have been disregarded with notorious injustice.'

"What remedies the laws of the country give for such cases are not stated. You appear to think that the courts of Nicaragua should be appealed to for redress before this government can interfere diplomatically. . . . Your suggestion . . . is, as a general proposition, sound, assuming of course that the courts have jurisdiction. But the treaty between the two countries entitles American citizens whose property has been taken by Nicaragua for public purposes, without full and just compensation paid in advance, to invoke in the first instance the diplomatic intervention of the United States in their behalf.

"The very act of the government of Nicaragua in taking the property without full and just compensation paid in advance was a violation of the treaty (sec. 3, Art. IX., treaty of 1867). No action of its courts (assuming them to have jurisdiction of such suits) can change the character of the act, or make it any the less a plain violation of the treaty.

"Should the courts decide in favor of the aggrieved parties and award them compensation, and that compensation be actually paid, the treaty would still remain violated, because the compensation was not paid in advance of the taking of the property. To claim that redress must be sought through the courts is to claim that payment of compensation may be postponed till the property has actually been taken, in face of the treaty which says that payment must be made in advance. One party to a treaty can not thus practically change its terms and evade its requirements.

"The American citizens suffering by this arbitrary appropriation of their property are entitled to the aid of their government in securing from Nicaragua adequate indemnity for any losses they may have sustained."

Mr. Gresham, Sec. of State, to Mr. Baker, min. to Nicaragua, Nov. 15, 1894, For. Rel. 1894, App. I. 353.

In June, 1900, Mr. Merry, United States minister to Nicaragua, was instructed to remonstrate against the action of the Nicaraguan authorities at Bluefields, in requiring citizens of the United States embarking at that port for ports in the United States to obtain "permits" or "passports," on which a stamp tax was exacted, as

being an onerous and unnecessary restriction of the privilege granted by Article IX., paragraph 4, of the treaty between the two countries of June 21, 1867, which provides that "the citizens of the two high contracting parties shall have the unlimited right to go to any part of the territories of the other, and in all cases enjoy the same security as the natives of the country where they reside, with the condition that they duly observe the laws and ordinances." The Nicaraguan government justified the requirement on the ground that the country had been under martial law for several years; but the government of the United States did not consider this "a satisfactory excuse" for imposing an "illegal tax upon American citizens." The Nicaraguan government, however, afterwards took the ground that, by the treaty, citizens of the United States and of Nicaragua were to receive equal treatment as respected the conditions of egress from the country, and also adverted to the fact that the United States required an internal-revenue stamp to be put on all ocean passenger tickets sold in that country. The United States, while pointing out that the guarantee to the citizens of each country of an "unlimited right to go to any part of the territories" of the other, was not restricted by the additional guarantee of such security as was accorded to the natives of the country where they resided, replied that, if the "passport" had merely a fiscal character, or was intended only as a means of identification, the United States would offer no objection to it; but that if, on the contrary, the Nicaraguan government meant that under the treaty it might "arbitrarily prevent the free movements of American citizens coming to or going from its territories, such citizens having committed no crime or misdemeanor, by refusing to issue the so-called 'passport' or 'permit,'" the American minister was instructed to continue to remonstrate against it as a practice in plain violation of the treaty of 1867.

Mr. Hay, Sec. of State, to Mr. Merry, min. to Nicaragua, June 22, Nov. 3, and Dec. 19, 1900, MS. Inst. Central America, XXII. 15, 55, 80.

For remonstrance of the United States against the reappointment of Col. Francisco Torres as governor of Bluefields with extraordinary powers, in 1896, and again in 1899, see For. Rel. 1899, 561.

As to the Moravian missions in the Mosquito Reservation, see For. Rel. 1894, 479.

5. Salvador.

§ 795.

May 30, 1892, the Salvadorean Government gave notice of the denunciation of the treaty of Dec. 6, 1870, saying that it would, in accordance with its terms, be in force till May 30, 1893.

For. Rel. 1892, 43, 45.

VIII. *CHILE.*

§ 796.

See the following matters:

The erection of a monument in the foreigners' cemetery at Valparaiso, by United States naval officers and American residents, to the memory of the officers and seamen of the U. S. frigate *Essex*. (For. Rel. 1893, 223.)

Courtesies shown to the U. S. S. *Newark* by the Chilean Government, at Port Low, Guaytecas Island, including the dispatch of relief ships with coal and supplies. (For. Rel. 1899, 125–127.)

Boundary dispute with the Argentine Republic. (For. Rel. 1899, 1–5.)

IX. *CHINA.*

1. Treaty of 1844.

§ 797.

By the treaty of peace between Great Britain and China, signed at Nanking August 29, 1842, the ports of Canton, Amoy, Foochow, Ningpo, and Shanghai were opened to British subjects and their commerce. Of these five ports one only—Canton—had previously been open to foreign trade. By the same treaty, the island of Hongkong was ceded to Great Britain. A supplementary treaty of commerce and navigation was concluded between Great Britain and China Oct. 8, 1843.[a]

By the act of March 3, 1843, the sum of $40,000 was placed at the disposal of the President to enable him to establish the future commercial relations between the United States and China on terms of "national equal reciprocity."[b]

President Van Buren's message of Feb. 21, 1840, introducing an elaborate report of the Secretary of State on the state of American trade with China, is given in House Ex. Doc. No. 119, 26 Cong. 1 sess. See also H. Docs. 40 and 170, 26 Cong. 1 sess.

President Tyler's message of Dec. 30, 1842, in relation to China and the Sandwich Islands, was written by Mr. Webster. (2 Curtis's Life of Webster, 176, 177.)

May 8, 1843, Mr. Caleb Cushing was appointed minister plenipotentiary and commissioner to China.

"You will state, in the fullest manner, the acknowledgement of this government that the commercial regulations of the Empire, having become fairly and fully known, ought to be respected by all ships and all persons visiting its ports; and if citizens of the United States,

[a] Br. & For. State Papers, vol. 30, p. 398; vol. 31, p. 132.

[b] 5 Stat. 624.

under these circumstances, are found violating well-known laws of trade, their government will not interfere to protect them from the consequences of their own illegal conduct. You will at the same time assert and maintain, on all occasions, the equality and independence of your own country. The Chinese are apt to speak of persons coming into the Empire from other nations as tribute bearers to the Emperor. This idea has been fostered, perhaps, by the costly parade of embassies from England. All ideas of this kind respecting your mission must, should they arise, be immediately met by a declaration, not made ostentatiously, or in a manner reproachful toward others, that you are no tribute bearer; that your government pays tribute to none and expects tribute from none; and that even as to presents, your government neither makes nor accepts presents. . . .

"You will say that the government of the United States is always controlled by a sense of religion and of honor; that nations differ in their religious opinions and observances; that you can not do anything which the religion of your own country or the sentiments of honor forbid; that you have the most profound respect for His Majesty the Emperor; that you are ready to make to him all manifestations of homage which are consistent with your own sense; and that you are sure His Majesty is too just to desire you to violate your duty; that you should deem yourself quite unworthy to appear before His Majesty, as peace bearer from a great and powerful nation, if you should do anything against religion or against honor, as understood by the government and people of the country you come from. Taking care thus in no way to allow the government or people of China to consider you as tribute bearer from your government, or as acknowledging its inferiority, in any respect, to that of China, or any other nation, you will bear in mind, at the same time, what is due to your own personal dignity and the character which you bear. You will represent to the Chinese authorities, nevertheless, that you are directed to pay to His Majesty the Emperor the same marks of respect and homage as are paid by your government to His Majesty the Emperor of Russia, or any other of the great powers of the world."

Mr. Webster, Sec. of State, to Mr. Cushing, min. to China, May 8, 1843, 6 Webster's Works, 467, 469, where the full text of the instructions is given.

Before Mr. Cushing went to China, Mr. Paul S. Forbes, United States consul at Canton, was directed to announce his mission to the authorities of the two Kwang provinces, and to advise them of his intention to proceed to Peking. The authorities replied that it would be useless for the envoy to go to Peking. February 27, 1844, Mr. Cush-

ing, writing from the U. S. flagship *Brandywine*, in Macao Roads, announced to the governor-general of the two Kwang provinces, as the nearest high functionary of the Chinese government, his arrival with full powers to negotiate a treaty. Mr. Cushing added that he also had a letter from the President to His Imperial Majesty, and that he would land and remain at Macao till the *Brandywine* could prepare to continue her voyage to the mouth of the Peiho. On the 9th of March, 1844, Ching, acting governor, replied, seeking to dissuade Mr. Cushing from attempting to go to Peking, and arguing that a treaty between the two countries was unnecessary. A treaty had been made with England because the two nations had been at war. But for many years American merchants had been coming to Canton, and had obeyed the laws and been treated with courtesy.[a] Cushing declined to discuss the question of going north and that of the need of a treaty with anyone but an imperial commissioner, and expressed regret that, in view of the notice given of his coming, he did not on his arrival find such a commissioner awaiting him in the frontier province, with full powers. He affirmed, however, that the purposes of the United States was altogether friendly, and said that, if the imperial government wished him to proceed to the court by some other route, instead of being conducted by the United States squadron to the mouth of the Peiho, he would accede to its wishes. Ching promised to memorialize the Emperor on the subject. He also furnished Mr. Cushing, at the latter's request, with a copy of the treaty of peace with Great Britain and of the treaty with Portugal. He stated that a copy of the treaty of commerce with Great Britain had been given to Mr. Forbes. It turned out that the copy furnished of the treaty of peace was not complete.[b] Cushing, in one of his despatches, quotes from the speech of Queen Victoria, in communicating the treaty of peace to Parliament, these words: "Throughout the whole course of my negotiations with the government of China, I have uniformly disclaimed the wish for any exclusive advantages. It has been my desire that equal favor should be shown to the industry and commercial enterprise of all nations." Cushing said that he thought England had "from the outset adhered in good faith to this idea. The establishment at Hongkong is freely open to the ships of the United States, of Holland, and of France."

In the latter part of April, Ching told Cushing that he could not be received till the imperial pleasure was known, and that it would meanwhile be "inconvenient" to hold any official intercourse with

[a] The translation of Ching's note was certified by "Peter Parker, Joint Chinese Secretary of Legation."

[b] In this correspondence between Cushing and Ching, some of the copies are certified by S. Wells Williams, and others by "E. C. Bridgman, Joint Chinese Secretary to the U. S. Legation to China."

him. Cushing, on April 24, 1844, replied that this was not "the way for China to cultivate good will and maintain peace;" that "the late war with England was caused by the conduct of the authorities at Canton, in disregarding the rights of public officers who represented the English Government;" and that if, "in the face of the experience of the last five years, the Chinese government now reverts to antiquated customs, which have already brought such disasters upon her, it can be regarded in no other light than as evidence that she invites and desires [war with] the other great Western powers." On the 9th of May, Cushing again wrote in this sense, enlarging upon the right of legation, and on the following day he stated that, in addition to the ships of war originally intended to compose the American squadron and expected by way of the Cape of Good Hope, the ships composing the Pacific Squadron had been ordered to repair to the coast of China. On the 8th of May, two days before this last communication, Ching informed Cushing of the appointment of Tsiyeng, the negotiator of the treaties with Great Britain, as governor of the two Kwang provinces and imperial commissioner to treat.

June 16, 1844, Tsiyeng arrived outside Macao and next day entered the village of Wang Hiya, within the barrier, but outside the walls of Macao, and with his suite lodged in a temple which had been prepared for him. On the 18th of June he and his associates paid a visit of ceremony to the American legation, and this visit was returned next day. On the 21st of June Cushing communicated to Tsiyeng a project of a treaty. In communicating it Cushing stated (1) that the United States desired to treat on the basis of "cordial friendship and firm peace," (2) that the United States did not desire any portion of the territory of China, and (3) that, while the United States would be happy to treat on the basis of opening all ports and imposing no export duties, precisely as was done in the United States, yet in the project submitted the wishes of China were heeded, and only a free and secure commerce with the five open ports was requested. By agreement between the commissioners, Messrs. Webster, Bridgman, and Parker on the one side, and Messrs. Hwang, Chow, and Pwan on the other, discussed this project day after day, sometimes at the American legation and sometimes at Wang Hiya, under the supervision of the respective commissioners, till it assumed the form in which it was finally signed on July 3, 1844.

The treaty did not provide for diplomatic representation at Peking. During the negotiations Tsiyeng stated that he was not authorized either to obstruct or to facilitate Cushing's proceeding to court, but that if the latter persisted in his purpose to go there he had no power to continue the negotiations. Cushing yielded the point with the express understanding that in case other Western powers should be represented at court the envoy of the United

States should also be honorably received there. In his instructions Cushing was authorized for sufficient reasons to desist from the purpose of delivering in person the President's letter to the Emperor, and to adopt other means of sending it to its destination if assured that it would receive a respectful and friendly answer. It was received by Tsiyeng for transmission to its destination. Cushing also arranged that the United States should have the power to correspond directly with the court (a power previously enjoyed only by Russia), and that the proper ministers on the frontier should be required to receive and forward all such correspondence, the United States choosing at its discretion the minister or board at Peking to address. Cushing suggested that any communications from the Secretary of State of the United States should be addressed either to the "Cabinet" or to the "General Council" at Peking, as there was "no individual minister" there to whom they "ought to be or can be addressed." His reasons for deciding not to insist on going himself to Peking were, in substance, that the interests of the United States in China were "commercial, not political," and that the employment of force or of a show of force in order to reach the capital would have involved a sacrifice of the primary purpose of his mission.[a]

In his report upon his negotiations, Cushing pointed out some differences between his treaty and the British treaty of Nanking. He had, he said, obtained a reduction of duties on some articles of American production, particularly lead and ginseng, and had determined with greater precision what goods were contraband or the subject of monopoly, and had regulated advantageously the mode of paying duties. He pointed out, however, that the British supplementary treaty stipulated that any new privileges granted to other nations should be enjoyed also by Great Britain. He followed the example of the British treaty in securing a stipulation for the exemption of citizens of the United States from Chinese jurisdiction. In discussing this question with the Chinese commissioner, he referred to the imprisonment of Mr. Snow, the American consul at Canton, in 1839, and to the imprisonment of sundry other citizens of the United States there.

S. Ex. Doc. 58, 28 Cong. 2 sess.; H. Ex. Doc. 69, 28 Cong. 2 sess.

Also, S. Ex. Doc. 138, 28 Cong. 2 sess.

The treaty was communicated to the Senate for its advice and consent Dec. 10, 1844; an abstract was published January 22, 1845. (S. Ex. Doc. 58, 28 Cong. 2 sess.)

January 28, 1845, the injunction of secrecy was removed from the correspondence. (S. Ex. Doc. 67, 28 Cong. 2 sess.) The ratifications of the treaty were exchanged, December 31, 1845, and it was proclaimed by the United States, April 18, 1846.

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[a] As to the question of audience at Peking, see supra, § 687.

As to the exemption of aliens from Chinese jurisdiction, see supra, § 270–272.

By agreement between Cushing and Tsiyeng, Dr. Parker and the provincial treasurer, Hwang, drew up regulations providing for the extension of the foreign quarter at Canton, the construction of a solid wall around the factories, the closing up of certain streets, the erection of gates and the establishment of an efficient police about them, and the repression of evil-disposed persons among the Chinese. (S. Ex. Doc. 67, 28 Cong. 2 sess. 86.)

In August, 1844, Mr. Cushing had a correspondence with two American citizens, named Emery and Frazer, who had established a shipyard on the Chinese coast opposite Hongkong and had been ordered away. Cushing advised them that they must acquiesce in the action of the Chinese authorities, in view of the stipulations of the treaty that had just been concluded.

A French diplomatic mission, transported and accompanied by a fleet of warships, entered the roads of Macao on August 13, 1844, and disembarked on the 15th. The mission consisted of a minister plenipotentiary, a first secretary of legation, and a numerous suite. It seems that the minister had instructions not to go to Peking unless unforeseen circumstances should render it necessary for him to do so.

When an attack is threatened on a consulate or diplomatic agency in China, it is the duty of the officers in charge to give notice to the local authorities, and, in failure of adequate aid, such officers may take their defense in their own hands. The Chinese government will afterwards be held liable for any losses occurring from its neglect to give efficient aid. (Mr. Buchanan, Sec. of State, to Mr. A. H. Everett, Jan. 28, 1847, MS. Inst. China, I. 38. See, to the same effect, Mr. Seward, Sec. of State, to Mr. Williams, Aug. 15 and Nov. 20, 1866, MS. Inst. China, I. 408, 418.)

In 1853 Mr. Robert M. McLane was appointed commissioner to China. His instructions were signed by William L. Marcy, as Secretary of State. They refer to the disturbed condition of the country. Mr. McLane was to establish his official residence wherever convenience might require. At last accounts the archives were in charge of the secretary of legation at Canton, and the commissioner was at Shanghai. The United States did not desire "exclusive privileges;" but he was to endeavor to establish "the most unrestricted commercial intercourse" between the two countries. It would be "most desirable" that provision should be made not only for reciprocal free trade and navigation between them, but also for the right of fishing on the coast of China, the free use of the harbors and rivers of the Empire, and the designation of all its ports and harbors as ports of entry. A reciprocal stipulation on these points would not be advisable, since, if the Chinese did not avail themselves of it, it might give rise to claims on the part of some of the powers with which the United States had treaties. Mr. McLane was also empowered to make a similar treaty with Corea, Cochin China, or any other independent Asiatic power with which the United States had no treaty.

He might, if opportunity offered, negotiate with Japan for a commercial arrangement, if Commodore Perry should fail to make one. Perry would be apprised of the objects of his mission, and of the expectation that he would afford McLane any assistance he might need, consistently with the execution of his own mission. With reference to a certain contingency, which was conceived to be possible, Mr. Marcy said: "Should the revolutionary movement now in progress in China be successful, and the political power of the country pass into other hands, you will, at your discretion, recognize the government *de facto*, and treat with it as the existing government of the country. If that vast and populous empire should be divided, and several governments be organized within its present limits, promising stability, you will present yourself to each as the diplomatic representative of the United States, and enter into such treaties with them, respectively, as you may deem advisable."

Mr. Marcy, Sec. of State, to Mr. McLane, commissioner to China, Nov. 9, 1853, S. Ex. Doc. 39, 36 Cong. 1 sess.

President Pierce, February 25, 1856, transmitted to Congress, pursuant to the act of Aug. 11, 1848, for such revision as that body might deem expedient, regulations made by Mr. McLane, as commissioner to China, at Canton, Dec. 5, 1854, and assented to by the consuls at Amoy, Foochow, and Shanghai. The regulations were preceded by a notice enjoining neutrality and nonintervention on the part of citizens of the United States in the domestic conflicts going on in China. The regulations forbade citizens of the United States in China to accept commissions, or to enlist or hire others to enlist, or to fit out and arm, or to attempt to fit out and arm, or to be concerned in fitting out or arming, any ship in the service of the Emperor of China or of any of the provinces, on the one side or the other, and repeated, mutatis mutandis, for China, the specific prohibitions and penalties found in the similar provisions of the United States neutrality laws. (S. Ex. Doc. 32, 34 Cong. 1 sess.)

July 15, 1856, President Pierce transmitted to Congress certain other regulations, orders, and decrees made by Mr. McLane. (H. Ex. Doc. 125, 34 Cong. 1 sess.)

As to the prohibition of steamers flying the American flag from using the Strawshoe channel of the Yangtsze, see S. Ex. Doc. 34, 40 Cong. 3 sess.

See, as to the navigation of junks and fishing boats, For. Rel. 1897, 87.

For regulations by Mr. Peter Parker, Mr. McLane's successor, as to the judicial jurisdiction of acting consuls and vice-consuls—Mr. Hyatt, consul at Amoy, dissenting—see S. Ex. Doc. 6, 34 Cong. 3 sess.

December 10, 1857, President Buchanan transmitted to Congress a decree and regulation issued by Mr. Parker (then having his legation at Macao), and assented to by the consuls at Canton, Foochow, and Amoy. The decree declared that, whereas, in consequence of the war between the English and the Chinese at Canton, the trade of the port was suspended, the consulate of the United States and the residences of their citizens in ashes, and all foreigners for the time expelled from the city, so that the consul had been forced from his *territorial*

jurisdiction, the consul should have power and authority to hold his consular court and to perform any other duties specifically belonging to his office at the house of the legation of the United States in China, on board any government vessel of the United States (the commander consenting), or, "in the absence or otherwise" of a national vessel, on any American merchant vessel (with the master's permission), and that any act so executed should have the same force and effect as is done at Canton. It was also declared that the decree should, under similar conditions, apply to the consuls at Amoy, Foochow, Ningpo, and Shanghai. The decree was dated March 4, 1857, and was declared to be in force from that date. (H. Ex. Doc. 9, 35 Cong. 1 sess.)

August 20, 1854, Mr. McLane, writing to Mr. Marcy, said: "Should the combined efforts of the treaty powers be unavailing in inducing the Chinese government to consider the propriety of revising the British treaty at this time, all further expectation of extending our commercial intercourse by virtue of treaty stipulations must be abandoned, unless Great Britain and the United States shall concur in the policy of exerting a more decided influence on the destiny of China than is compatible with our present neutrality."

September 10, 1854, Mr. McLane reported that the imperial commissioner at Canton had refused to entertain any proposition for the enlargement of existing commercial relations; and on Nov. 25 he recommended a "more positive" attitude on the part of western nations toward China. June 7, 1856, his successor, Mr. Parker, said: "It will be a propitious day for our vast interests in China when the United States commissioner shall have a national vessel available to him whenever, in discharge of his public duties, he shall require her services."

S. Ex. Doc. 22, 35 Cong. 2 sess. 169, 199, 352 et seq.

July 19, 1854, President Pierce communicated to the House correspondence between the Department of State and the late commissioner to China, Mr. Humphrey Marshall. (H. Ex. Doc. 123, 33 Cong. 1 sess.)

The correspondence of Messrs. McLane and Parker, just cited, was communicated by the President to the Senate, December 20, 1858. He withheld their instructions, which were not published till March 12, 1860, when President Buchanan sent them to the Senate, together with a mass of correspondence relating to the proceedings of their successor, Mr. William B. Reed, who was appointed commissioner to China April 18, 1857.

It appeared that Mr. Marcy, writing to Mr. Parker, Feb. 2, 1857, enclosed a letter of recall of one of the American consuls, if, as was reported, he had, bearing the American flag, accompanied the British in their attack upon and entry into Canton. Mr. Marcy also deprecated the course of an American naval officer in taking soundings in

the river during the British attack on the city. "The British government," said Mr. Marcy, "evidently have objects beyond those contemplated by the United States, and we ought not to be drawn along with it, however anxious it may be for our cooperation."

Writing to Parker again on February 27, 1857, Mr. Marcy said that the views of the President on the situation in China had been communicated orally to the French minister. "The President does not believe," said Marcy, "that our relations with China warrant the 'last resort' you speak of, and if they did, the military or naval forces of the United States could only be used by the authority of Congress. The 'last resort' means war, and the executive branch of this government is not the war-making power. There is no obligation, perfect or imperfect, resting upon China to negotiate, in regard to the revision of our treaty, at Peking or any place in the vicinity of that capital. China has agreed to revise the treaty, but no particular place for doing it is designated. This is the view which the President took, when the suggestion of making a demonstration of force, in order to open the way to Peking, was made by France. For the protection and security of Americans in China and the protection of their property it may be expedient to increase our naval force on the China station, but the President will not do it for aggressive purposes."

Mr. Cass, Mr. Marcy's successor, writing to Mr. Reed, May 30, 1857, said that the objects of Great Britain and France were understood to be (1) the right of diplomatic presentation and residence at Peking, (2) an extension of commercial intercourse at places other that the five ports, (3) a reduction of duties on domestic produce in transit to the coast, (4) a stipulation for religious freedom to all foreigners in China, (5) an arrangement for the suppression of piracy, and (6) the extension of the benefits of the proposed treaty to all civilized powers. These objects, said Mr. Cass, the President considered "just and expedient," and Mr. Reed was to aid in their attainment so far as he could do so by "peaceful cooperation," leaving it to his government to determine what course should be adopted if his representations should prove to be fruitless. If Russia should have succeeded in establishing diplomatic representation in China, he would confer with the minister of that country as well as with the ministers of England and France. "This country," said Mr. Cass, "you will constantly bear in mind, is not at war with the government of China, nor does it seek to enter that empire for any other purposes than those of lawful commerce, and for the protection of the lives and property of its citizens. The whole nature and policy of our government must necessarily confine our action within these limits, and deprive us of all motives either for territorial aggrandizement or the acquisition of political power in that distant region."

Mr. Reed was to impress this upon the Chinese authorities, and perhaps our "fortunate position" might enable us to act as a means of communication between the belligerents.

Mr. Cass subsequently instructed Mr. Reed not to adopt the plan suggested by Mr. Parker of asking the British minister to include the American claims in any demands for pecuniary redress which he might make upon the Chinese government.

In the end of December, 1857, the British and French fleets, their demands having been refused by Yeh, governor of the two Kwangs, attacked and took Canton. The Russian minister had then arrived in Chinese waters; and in February, 1858, each of the four ministers—American, British, French, and Russian—addressed a communication to the council of ministers at Peking. Mr. Reed announced his intention to proceed to Shanghai, and asked that an imperial commissioner be sent thither to negotiate with him. Should this request be not granted, he should feel at liberty, alone or in conjunction with the other powers, to approach still nearer to Peking, or to take such other course as the President of the United States might direct. He arranged for sending this letter by a man-of-war to Shanghai and for a concentration of force on the north.

Mr. Cass, April 28, 1858, said that Mr. Reed was fully justified in joining the envoys in their representations. But, should the combined movement fail, the President appreciated the importance of the inquiry as to what should be done next. Great Britain and France were already at war with China. With the United States the case was different. Though they had serious complaints against China, it had not been thought wise to seek redress by war. The United States might be forced to this by continued refusal of justice, or in the "possible but improbable contingency . . . that the Chinese authorities should decline to admit the United States to an equal participation in such privileges as may be granted to the belligerents at the close of the present contest." But in such case the President would have to apply to Congress, without whose authority war could not be undertaken. At present the President was not prepared to make such a request.

Message of March 12, 1860, and accompanying correspondence, S. Ex. Doc. 30, 36 Cong. 1 sess. See, also, S. Ex. Doc. 47, 35 Cong. 1 sess.

"The effort of the Chinese government to prevent the importation and the consumption of opium was a praiseworthy measure, rendered necessary by the prevalent use and the terrible effects of that deleterious drug. All accounts agree as to the magnitude of the evil, and the widespread desolation caused by it. Upon proper occasions, you will make known to the Chinese officers with whom you may have communication that the government of the United States does not seek for their citizens the legal establishment of the opium trade, nor will it uphold them in any attempt to violate the laws of China by the

introduction of that article into the country." (Mr. Cass, Sec. of State, to Mr. Reed, min. to China, May 30, 1857, S. Ex. Doc. 30, 36 Cong. 1 sess.)

"It is difficult to lay down any precise rule for regulating the trade of our citizens with the hostile sections of the people of China. While they should not traffic in the plunder that one party may have seized from the other, yet they ought not to be restricted in a free trade at any of the ports opened to them by our treaty under the pretext that such a trade is more favorable to one party than to the other. It would be well if our citizens confined themselves to their customary mode of dealing in China. The purchase of property known to be the spoils of the contending parties would undoubtedly be regarded as a species of participation in the civil conflict. It ought to be discountenanced and restrained." (Mr. Marcy, Sec. of State, to Mr. Parker, Oct. 5, 1855, MS. Inst. China, I. 127.)

The Chinese government having obstinately and persistently refused to pay a claim for personal damages admitted to be due a citizen of the United States, instructions were sent in 1855 to the United States minister at China, at his discretion, "to resort to the measure of withholding duties to the amount thereof." (Mr. Marcy, Sec. of State, to Mr. Parker, Oct. 5, 1855, ibid.)

See Mr. Cass, Sec. of State, to Mr. Appleton, "private," Feb. 3, 1860, for a free discussion of the policy of the United States. (51 MS. Dom. Let. 424.)

2. Treaties of 1858.

§ 798.

"You were informed by my last annual message that our minister had been instructed to occupy a neutral position in the hostilities conducted by Great Britain and France against Canton. He was, however, at the same time, directed to cooperate cordially with the British and French ministers in all peaceful measures to secure by treaty those just concessions to foreign commerce which the nations of the world had a right to demand. It was impossible for me to proceed further than this on my own authority without usurping the war-making power, which under the Constitution belongs exclusively to Congress.

"Besides, after a careful examination of the nature and extent of our grievances, I did not believe they were of such a pressing and aggravated character as would have justified Congress in declaring war against the Chinese Empire without first making another earnest attempt to adjust them by peaceful negotiation. I was the more inclined to this opinion, because of the severe chastisement which had then but recently been inflicted upon the Chinese by our squadron in the capture and destruction of the Barrier forts to avenge an alleged insult to our flag.

"The event has proved the wisdom of our neutrality. Our minister has executed his instructions with eminent skill and ability.

In conjunction with the Russian plenipotentiary, he has peacefully, but effectually, cooperated with the English and French plenipotentiaries; and each of the four powers has concluded a separate treaty with China, of a highly satisfactory character. The treaty concluded by our plenoipotentiary will immediately be submitted to the Senate."

President Buchanan, annual message, Dec. 6, 1858, Richardson's Messages, V. 506.

The treaty above referred to was concluded at Tientsin, June 18, 1858; ratifications were exchanged at Pehtang, Aug. 16, 1859; and it was proclaimed by the United States, Jan. 26, 1860.

The treaties of 1858 secured a limited right of residence of foreign diplomatic representatives at Peking. These treaties closed a war disastrous to China, but before they were put into effect another war became necessary to enforce them. See Mr. Cass, Sec. of State, to Mr. Appleton, "private," Feb. 3, 1860, 51 MS. Dom. Let. 424; Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Prussia, Aug. 31, 1869, For. Rel. 1870, 304.

Dec. 27, 1858, President Buchanan transmitted to Congress regulations made by Mr. Reed at Hongkong, Feb. 27, 1858, on the U. S. S. *Minnesota*, in relation to judicial assignments and other matters. (S. Doc. 11, 35 Cong. 2 sess.; H. Doc. 21, 35 Cong. 2 sess.)

"The friendly and peaceful policy pursued by the government of the United States towards the empire of China has produced the most satisfactory results. The treaty of Tien-Tsin of the 18th June, 1858, has been faithfully observed by the Chinese authorities. The convention of the 8th November, 1858, supplementary to this treaty, for the adjustment and satisfaction of the claims of our citizens on China, referred to in my last annual message, has been already carried into effect, so far as this was practicable. Under this convention the sum of 500,000 taels, equal to about $700,000, was stipulated to be paid in satisfaction of the claims of American citizens out of the one-fifth of the receipts for tonnage, import, and export duties on American vessels at the ports of Canton, Shanghai, and Fuchau; and it was 'agreed that this amount shall be in full liquidation of all claims of American citizens at the various ports to this date.' Debentures for this amount, to wit, 300,000 taels for Canton, 100,000 for Shanghai, and 100,000 for Fuchau, were delivered, according to the terms of the convention, by the respective Chinese collectors of the customs of these ports to the agent selected by our minister to receive the same. Since that time the claims of our citizens have been adjusted by the board of commissioners appointed for that purpose under the act of March 3, 1859, and their awards, which proved satisfactory to the claimants, have been approved by our minister. In the aggregate they amount to the sum of $498,694.78. The claimants have already received a large proportion of the sums awarded to them out of the

fund provided, and it is confidently expected that the remainder will ere long be entirely paid. After the awards shall have been satisfied, there will remain a surplus of more than $200,000 at the disposition of Congress. As this will, in equity, belong to the Chinese government, would not justice require its appropriation to some benevolent object in which the Chinese may be specially interested?"

President Buchanan, annual message, Dec. 3, 1860, Richardson's Messages, V. 642.

For the proceedings of the Commission appointed to carry into effect the convention of Nov. 8, 1858, see Moore, Int. Arbitrations, V. 4627 et seq. The convention yielded $735,238.97; the claims allowed amounted to $489,187.95; there was thus a surplus left of about $250,000. Congress having taken no action, this money was remitted to the United States in 1867 and invested. Two claims were afterwards paid out of it. Finally, under an act of Congress of March 3, 1885, the sum of $453,400.90, representing the remainder of the fund and its accretions, was paid over to the Chinese minister at Washington. (For. Rel. 1885, 181–184.)

See Moore, Int. Arbitrations, V. 4636–4637; H. Ex. Doc. 29, 40 Cong. 3 sess.; H. Ex. Doc. 69, 41 Cong. 2 sess.; H. Report 113, 45 Cong. 3 sess.; H. Report 1124, 46 Cong. 2 sess.; H. Report 970, 48 Cong. 1 sess.

For Mr. Denby's adverse report on the Ward estate claim, and the approval of the report by the Department of State, see For. Rel. 1888, I. 199, 227.

"Your despatch of December 24, No. 6, has been received. It gives us an account of the capture and occupation of the city of Ningpo by rebels, and of the proceedings adopted on that occasion by the American consul there in concert with the British and French representatives.

"No one here could draw any inference of the condition of things at Ningpo now, from even the fullest information of what it was so long ago. Revolutions are apt to effect sudden and even great changes in very short periods. In such a case you ought not to be trammeled with arbitrary instructions, especially in view of the peculiar character and habits of the Chinese people and government. In a different case the President would certainly instruct you to refrain most carefully from adopting any means which might disturb the confidence of the imperial government or give it any cause of solicitude, even though it might seem to be required for the safety of the property and interests of American citizens. But how can we know here what ability the imperial government may have, or even what disposition, to extend the protection to foreigners which it had stipulated? Nevertheless, I think that it is your duty to act in the spirit which governs us in our intercourse with all friendly nations, and especially to lend no aid, encouragement, or countenance to sedition

or rebellion against the imperial authority. This direction, however, must not be followed so far as to put in jeopardy the lives or property of American citizens in China. Great Britain and France are not only represented in China by diplomatic agents, but their agents are supported by land and naval forces, while, unfortunately, you are not. The interests of this country in China, so far as I understand them, are identical with those of the two other nations I have mentioned. There is no reason to doubt that the British and French ministers are acting in such a manner as will best promote the interests of all the western nations. You are therefore instructed to consult and cooperate with them, unless, in special cases, there shall be very satisfactory reasons for separating from them, and in every aspect of affairs you will keep me well advised. Our domestic affairs are improving very rapidly, and I trust we shall soon be able to send a war steamer to your support."

Mr. Seward, Sec. of State, to Mr. Burlingame, min. to China, Mar. 6, 1862, Dip. Cor. 1862, 839.

In June, 1863, Mr. Burlingame, then United States minister in China, wrote to Mr. Seward as follows: "In despatch No. 18, of June 2, 1862, I had the honor to write, 'if the treaty powers could agree among themselves to the neutrality of China, and together secure order in the treaty ports, and give their moral support to that party in China, in favor of order, the interests of humanity would be subserved.' Upon my arrival at Peking, I at once elaborated my views, and found, upon comparing them with those held by the representatives of England and Russia, that they were in accord with theirs."

In a long letter to the consul-general of the United States at Shanghai, June 15, 1864, touching the rights and duties of American citizens under the treaties, Mr. Burlingame described the policy which he was advocating as "an effort to substitute fair diplomatic action in China for force;" and he stated that he had submitted his letter to the British, French, and Russian ministers, and that they authorized him to state that "they entirely approve its views and policy." When Mr. Burlingame's report of his action was received in Washington, Mr. Seward, as Secretary of State, wrote: "It is approved with much commendation."

Dip. Cor. 1863, II. 859; Dip. Cor. 1864, III. 426, 430, 440.
For rules for the joint investigation of customs cases in China, see S. Ex. Doc. 19, 40 Cong. 3 sess.

By Article XI. of the treaty between the United States and China, of June, 1858, it is stipulated that American citizens in China shall be placed on a common footing of amity and good will with Chinese

subjects, and shall enjoy the protection of the local authorities against attacks either upon their persons or upon their property, and that the local officers, on requisition of the consul, shall immediately despatch a military force to disperse any rioters, and apprehend and punish the guilty. The treaty contains no reciprocal stipulation with regard to Chinese subjects in the United States, for the reason that no such stipulations were necessary to enable Chinese subjects to go to the United States, take up their residence, and pursue any lawful business.

Mr. Blaine, Sec. of State, to Mr. Chen Lan Pin, March 25, 1881, For. Rel. 1881, 335.

3. Treaty of 1868.

§ 799.

In the summer of 1868, a legation from China arrived at Washington with Mr. Burlingame, who had left the service of the United States and entered that of China, as chief. On July 28, 1868, he and his associates signed with Mr. Seward a treaty. After signing the treaty the representatives of China departed for Europe, with a view to conduct negotiations with the governments there. In this mission they had the moral support of the United States. In a confidential note to the Spanish minister, August 14, 1868, Mr. Seward expressed the hope that the government of Spain would not be averse to concluding with the Chinese embassy an engagement similar to that which had been made by the United States. The United States, he declared, had in its intercourse with China "no selfish or exclusive object," but on the contrary heartily desired the cooperation of the other treaty powers, under the belief that the steps being taken would surely lead, though perhaps gradually, to such changes in Chinese policy as would be useful to all the powers concerned, including China, and to the general interests of civilization.

At one time it was rumored that the treaty with the United States would not be ratified by China; but on the 10th of December, 1869, a telegram was received at Washington from Mr. Burlingame, stating that the ratifications had been exchanged on the 23d of November. Mr. Fish assured Mr. Burlingame that "this announcement was received with much satisfaction by the President and his Cabinet." "The government and the people of the United States," said Mr. Fish, "do not share the distrust as to the beneficent results of that treaty, and those of a similar tenor which have been negotiated with the leading maritime powers, which has to some extent been manifested by the foreign residents in China. We have too much confidence in the wisdom and magnanimity of the Emperor and his distinguished counsellors to believe that they will encourage or con-

sent to base upon treaties, the first of which was concluded with the United States, and a prominent feature of which was a provision against undue external intervention in the domestic affairs of China, a narrow or exclusive policy. On the contrary, they believe that upon a fair consideration of all our past dealings with China her statesmen and people will see that we cherish for their ancient government and institutions the utmost respect, and that friendship and mutual interest alike would prevent us from urging their adoption of any course which would be injurious to them.

"Western Powers have, in an experience of several centuries of active commercial intercourse, demonstrated the fact that those nations become the most wealthy, powerful and happy which develop most extensively those commercial dealings with other nations which afford markets for their surplus productions and secure in exchange money and such productions of other countries as can be more readily produced by them.

"To those who have witnessed the prosperity resulting from such commercial dealings it is clear that every influence which cheapens and makes more easy the transportation to the seaports of the merchandise gathered up from the interior of a great country like China, very greatly increases the activity and the profits of trade, and gives greater employment to the laborers employed in the production of the articles required.

"The considerations thus referred to induce the President to believe that the sagacious and eminent men charged with the direction of affairs in China will, by the policy which they pursue, show how unfounded is the distrust to which I have alluded, and confer upon their country the enduring benefits to be derived from a fuller development of its vast resources, and they can rest assured that the government and people of the United States will unite with them in perpetuating the friendship and fair dealing which ought to exist between such near neighbors."

Mr. Seward, Sec. of State, to Señor Goni, "confidential," Aug. 14, 1868, MS. Notes to Span. Leg. VIII. 221; Mr. Seward to Mr. Burlingame, "confidential," Sept. 15, 1868, MS. Notes to China, I. 129; Mr. Fish, Sec. of State, to Mr. Burlingame, Dec. 24, 1869, MS. Notes to China, I. 9.

For Commodore Perry's views on Chinese immigration, see his letter to the Secretary of the Navy, June 25, 1853, S. Ex. Doc. 34, 33 Cong. 2 sess. 29.

By Art. VIII. of the Burlingame treaty, the United States and the Emperor of China "cordially recognize the inherent and inalienable right of man to change his home and allegiance." This clause, even before the ratification of the treaty, gave rise to protests in the United States. The opposition to Chinese immigration grew rapidly. For resolutions of the legislature of California in 1872, urging the adoption of treaty regulations and legislation to discourage further Chinese immigration, see H. Misc. Doc. 120, 42 Cong. 2 sess.

As to the exclusion of Chinese, see, generally, supra, §§ 567–578.
As to the population of China, see For. Rel. 1889, 79.
As to taxation in China, see For. Rel. 1889, 88.
A statement concerning Chinese claims of suzerainty may be found in For. Rel. 1888, 1. 222.
The following miscellaneous matters may here be referred to:
The Emperor's life and habits, For. Rel. 1892, 81.
The state of the government in 1898, For. Rel. 1898, 217.
The navigation of the Yangtse River and the bond system, For. Rel. 1893, 225.
The Peking police system, For. Rel. 1893, 227.
The building industry in China, For. Rel. 1893, 232.
The coolie trade in China, For. Rel. 1894, 138.
Railroads in China in 1893, For. Rel. 1893, 236.
The growth of the customs service under Sir Robert Hart, For. Rel. 1893, 235.
The postal service and proposals of Sir Robert Hart, For. Rel. 1893, 237.
An account of the visit of Li Hung Chang to the United States in 1896, is given in For. Rel. 1896, 93–97.
As to the case of Louis McCaslin, see For. Rel. 1891, 354, 367.

The chargé d'affaires of North Germany at Washington having inquired of Mr. Fish, in 1869, after the change of administration, whether the President still adhered to the principles of the treaty of July 28, 1868, and having intimated the desire of his government to harmonize its policy with that of the United States in the Pacific, Mr. Fish, besides communicating the views of the President to the chargé d'affaires, set them forth at much length in an instruction to Mr. Bancroft, then American minister at Berlin, who was expected soon to meet Mr. Burlingame and his colleagues on their mission in Europe. Mr. Fish stated that the great principle which underlay the treaty of 1868 was "the recognition of the sovereign authority of the imperial government at Peking over the people of the Chinese Empire, and over their social, commercial and political relations with the Western Powers." While many governments, including the United States, had previously made treaties with the imperial government, yet it was, said Mr. Fish, scarcely an exaggeration to say that their relations were at that time "rather those of force than of amity." The commercial footholds along the coast had been gained by conflict or by demonstrations of force and were held in the same way; but the occupation, which was originally hostile, had become commercial. The rivalry of different nationalties had checked the original tendency of some of them to acquire territory, until foreign jurisdiction had become limited to the essential matters of the municipal government of the communities of Europeans, and the exercise of jurisdiction over their persons and properties. Nevertheless, the Chinese policy had continued to be one more or less of isolation; and, in spite of the fact that the treaties of 1858 secured the right to maintain

legations at Peking, and that afterwards diplomatic representatives resided there, the new policy was not favored by Chinese statesmen; it did not measurably increase the personal intercourse between the natives and the Europeans; and many of the wisest of the Chinese rulers honestly dreaded any step in that direction as tending to introduce into China labor-saving machinery, which in their judgment would throw multitudes of people out of employment and inflict irreparable woes. The treaty negotiated by Mr. Burlingame and his colleagues "was a long step in another direction." It came voluntarily from China, and placed that power, in theory, on the same diplomatic footing with the nations of the western world. It recognized the imperial government as the power to withhold or to grant further commercial privileges, and also as the power whose duty it was to enforce the peaceful enjoyment of rights already conferred. "While it confirms," said Mr. Fish, "the interterritorial jurisdiction conferred by former treaties upon European and American functionaries over the persons and properties of their countrymen, it recognizes at the same time the territorial integrity of China, and prevents such a jurisdiction from being stretched beyond its original purpose. While it leaves in China the sovereign power of granting to foreigners hereafter the right to construct lines of railroads and telegraphs, of opening mines, of navigating the rivers of the Empire with steamers, and of otherwise increasing the outlets for its wealth, by the use of the appliances of western civilization, it contemplates that China shall avail herself of these appliances by reasonable concessions, to be made as public necessities and the power of the government to influence public opinion will permit."

Prince Kung had deemed it advisable to defer the exchange of ratifications of the treaty till the return of the Chinese plenipotentiaries. This desire was understood to be due to the peculiar attitude of China toward all the treaty powers, and the President, said Mr. Fish, had not pressed for an earlier ratification, feeling confident that, as the treaty was so much in the interest of China, the statesmen of that empire must inevitably see the propriety of authorizing the ratifications to be exchanged. Rumors that the imperial government had decided not to ratify the treaty were not credited; and there were, said Mr. Fish, some things that tended to the conclusion that China possibly might reverse her ancient policy. In this relation, Mr. Fish said:

"Not long after the treaties of Tien-tsin, what is known as the coöperative policy of the great powers in China began; I think this dates from about the year 1863, but it is immaterial for my present purpose whether it began earlier or later. Under this policy, favored by the fact that most or all of the treaties with the Western

Powers contained the most-favored-nation clause, the Christian communities of all nationalities in China have been regarded as having a common political as well as commercial interest, to be pursued under joint counsels, and it has followed from this that in important matters the Chinese officials have been made to see, sometimes even with a show of ostentation, that there was a substantial unity of design among all the powers. The apprehension has been expressed lest the operation of the eighth article of the treaty of July should put a stop this coöperative policy; and I am bound to say that, so far as that policy was aggressive and attempted to force upon China measures which could not be enforced upon a European or American state by the rules of the equitable code which regulates the intercourse of civilized nations, in my judgment, that article may, when ratifications are exchanged, prevent the United States from participating in such a policy.

"The question becomes a practical one from the fact that the revision of the British treaty of 1858 is under consideration. The twenty-seventh article of that treaty provided that either party might 'demand a further revision of the tariff and of the commercial articles of the treaty at the end of ten years; but if no demand be made on either side within six months after the end of the first ten years, then the tariff shall remain in force for ten years more, reckoned from the end of the preceding ten years.'

"The thirtieth article of the treaty between China and the United States of 1858 provides that 'should at any time the Ta-Tsing Empire grant to any nation, or the merchants or citizens of any nation, any right, privilege, or favor, connected either with navigation, commerce, political, and other intercourse, which is not conferred by this treaty, such right, privilege, or favor shall at once inure to the benefit of the United States, its public officers, merchants, and citizens.' Thus the United States became directly interested in the revision of the British concessions.

"It being well understood that Great Britain would, when the time came, demand, among other things, the right to navigate the interior waters of the Empire with steam, the right to construct and to hire warehouses in the interior for the storage of goods, and the right to work coal mines, the government at Peking, on the 12th of October, 1867, took steps to get information from the different parts of the Empire upon the subject of the revision. Among others, Tsang-Kwohfan, acting governor of the provinces of Kiangsu, Nganhioui, and Kiangri, 'a man over seventy years of age and of distinguished reputation throughout the Empire,' received these instructions, and made, in answer to them, the able report . . . herewith inclosed. . . .

"Though the work of a conservative mind that clings to the traditions of the past, and sees few good results in change, it is moderate and temperate, and must be conceded to be, from the Chinese standpoint, a not unwise view of the subject. With all its conservatism it is easy to trace in it the enlarging and modifying influences of contact with the West.

"In substance, however, it recommends the Emperor's advisers not to grant the important new concessions asked for by the government of Great Britain.

"In November last the expected demands were made on the part of Great Britain by Sir Rutherford Alcock, in a personal interview with Prince Kung and some of the other ministers. They were made in strong language, as necessary to the proper enjoyments of the rights conceded by the treaty of 1858, and the Chinese government was warned in advance of the probable course Great Britain would pursue in case of refusal. The American minister gave Sir Rutherford Alcock the support of his presence at the interview, and afterward received from Sir Rutherford full copies of an account of it which was drawn up in the British legation and transmitted to Prince Kung. I inclose . . . copies of these documents.

"Prince Kung, on his part, soon replied in a dignified and moderate way to the peremptory demands of Sir Rutherford Alcock. He admitted the substantial accuracy of Sir Rutherford's account of the interview. He said that China and Great Britain could not be coerced into a similarity, neither could either wholly adopt the usages of the other. He deprecated the entire submission of China to the demands of the foreign merchants. He denied that there had been willful violations of the treaty. He stated, in detail, many points in which China is prepared to make concessions, which will, he thinks, give to the foreign merchants all they ought to ask. But to admit steamers on the interior lakes and rivers, to establish hongs, and to carry on mining operations in the interior, will, in the judgment of the Prince, be so distasteful to the people that it will be impracticable for the government to attempt to carry out the terms of such a concession should it be made; and Great Britain, in that case, would have just cause to upbraid China for bad faith.

"To the representation that these concessions would be beneficial to China, the Prince replies that a good physician ascertains the condition of his patient before deciding on the remedies, and intimates that he knows the condition of China better than Sir Rutherford Alcock does; and he closes by furnishing the British envoy with a memorandum of the basis for a revision which will be acceptable to the Chinese government. . . .

"As Mr. Browne had, in pursuance of the cooperative policy, interfered personally and in writing on behalf of the British claim for

a revision, Prince Kung, about the same time, addressed a note to him, of which I inclose a copy.

"The basis for a revision, which was proposed by the Chinese government, conceded the opening of landing stages on the Yangtse at points to be agreed upon; the working of mines in the vicinity of one or more of the treaty ports; the right of inland navigation by vessels not propelled by steam, this restriction to cease when Chinese use vessels propelled by steam; a steam tug on the Poyang Lake; and the free right to travel throughout the land, and to hire lodgings and accommodations for produce or goods.

"Mr. Ross Browne, who sympathized and coöperated with the British minister throughout the negotiations, appears to think that the points gained may become of importance as a starting point for negotiations hereafter. I inclose you a copy of his letter to Sir Rutherford Alcock on the subject.

"The British minister at Washington, on the 9th day of June last, notified the United States of the decision of Her Majesty's government on this subject, by which it would appear that they have decided to accept the situation and wait quietly the operation of the causes which are working in the Chinese mind. I inclose a copy of an extract from a letter from the board of trade, which has been sent to Sir Rutherford Alcock for his guidance. Such course strikes me as wiser than the more vigorous policy which Sir Rutherford Alcock seems to have contemplated. The points gained may not be as important as could be desired, yet they have been gained peaceably, by negotiation, and are yielded by China as a right flowing legitimately and necessarily from former treaties.

"It certainly looks, on the face of this correspondence, as if the conduct of the Emperor's ministers had been inspired from the first by a sense of duty, by a desire to observe good faith toward the Western Powers, and by a willingness to extend commercial relations with those powers, when they felt that they could do so without prejudice to their own position and without injury to the people whose government was intrusted to them.

"I will not dwell upon the obvious difficulty of inoculating new ideas upon such a people, nor upon the evident fact that intelligent statesmen like Prince Kung and his associates measure those difficulties quite up to their full value.

"Every consideration, from whatever point of view, leads me to believe that it is neither wise nor just to force the Emperor's advisers into a position of hostility so long as we have cause to think that they are willing to accept the present situation, and to march forward, although with the prudence taught them by a Chinese education. You will undoubtedly meet Mr. Burlingame and his associates in Berlin. You will, if you please, ascertain from him whether he has

definite information as to the intentions of the ministry at Pekin. Unless it shall appear that they have already decided not to ratify the treaty of 1868, or unless you shall be satisfied that such will be their decision, and that the policy inaugurated by Mr. Burlingame is to be reversed, you will render him and his associates whatever assistance you can, in securing the coöperation of North Germany in the new Chinese policy. You will also doubtless have an opportunity to impress upon Mr. Burlingame the importance to China of an early ratification of the treaties. I have stated already that the President has no solicitude as to the purpose of the Emperor's advisers in that respect. But he thinks it would be well to have defined in a permanent law, as soon as possible, the relations that are hereafter to exist between the United States and China.

"Many considerations call for this beside those which may be deduced from what has gone before in this instruction. Every month brings thousands of Chinese emigrants to the Pacific coast. Already they have crossed the great mountains, and are beginning to be found in the interior of the continent. By their assiduity, patience, and fidelity, and by their intelligence, they earn the good will and confidence of those who employ them. We have good reason to think that this thing will continue and increase. On the other hand, in China there will be an increase in the resident American and European population, not by any means commensurate with the growth of the Chinese immigration to this country, but corresponding with the growth of our country, with the development of its resources on the Pacific slope, and with the new position in the commerce of the world which it takes with the completion of the Pacific Railroad. These foreigners settling in China, occupying the various quarters assigned to them, exercising municipal rights over these quarters by virtue of land regulations, either made by them or for them, by their home governments, cease to be an aggressive element in China, when once the principles of the treaty of July, 1868, are promulgated as the law hereafter to regulate the relations between Christendom and that ancient empire. You will also say to Mr. Burlingame that, while the President cordially gives his adhesion to the principles of the treaty of 1868, and while he will, should that instrument be ratified by China, cause it to be faithfully observed by the United States, yet he earnestly hopes that the advisers of His Majesty the Emperor may soon see their way clear to counsel the granting of some concessions similar to those asked for by Sir Rutherford Alcock and Mr. Ross Browne. He will not assume to judge whether the temper of the people of China will or will not at present justify their rulers in doing so; but he thinks that he may, without impropriety, say, that when it can be done without disturbing the good order of the Empire, the results must be eminently favorable to the welfare and well-being of the

Chinese people. And he trusts that the statesmen of China, enlightened by the experience of other nations, will hasten at the earliest moment, when in their judgment it can safely be done, to respond to the friendly feeling and good wishes of the United States by moderating the restrictions which fetter the commerce of the great Empire over whose destinies they preside. He relies upon Mr. Burlingame and his associates to impress upon their chiefs at home that the views of such men as Tsang Kevohfan, however honest, are delusive; that experience, patent before them in every country through which they travel, has shown them that the evils which seem to be dreaded by the oriental rulers do not follow the free use of steam and of the telegraph; but that, while these inventions improve the condition of all ranks in the community which uses them, their greatest meliorating influence is felt among the laboring classes.

"Since writing the foregoing instructions, I have received from Mr. Burlingame a telegraphic dispatch dated August 31, 1869, in which he says: 'I have received a dispatch from the Chinese government expressing strongly their satisfaction with, and acceptance of, the treaty negotiated at Washington.'"

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Prussia, No. 148, Aug. 31, 1869, For. Rel. 1870, 304.

The enclosures referred to by Mr. Fish in the foregoing instruction are printed in For. Rel. 1870, as follows:

Report of Tsang-Kvohfan, acting governor of Kiangsu, etc., p. 308.

Sir Rutherford Alcock to Prince Kung, Nov. 9, 1868, p. 311.

Sir Rutherford Alcock to the Yamên, Nov. 9, 1868, p. 313.

Prince Kung to Sir Rutherford Alcock, Dec. 5, 1868, p. 315.

Memorandum of basis for revision of treaties of Tientsin, Dec. 8, 1868, p. 320.

Mr. Browne to Prince Kung, Nov. 23, 1868, p. 316.

Prince Kung to Mr. Browne, Dec. 17, 1868, p. 321.

Mr. Browne to Sir Rutherford Alcock, Dec. 17, 1868, p. 321.

Extract from a letter from the board of trade, May 19, 1869, p. 323.

"It was deemed advisable last summer to acquaint Mr. Bancroft, in anticipation of the arrival of the Chinese mission at Berlin, with the views of the present administration concerning the policy to be pursued toward China. As these instructions contain the substance of most that it is necessary to say to you before you sail to your post, I inclose a copy of them herewith and invite your special attention to them.

"You will observe that the President adheres to the policy adopted in 1868, when the articles additional to the treaty of 1858 (commonly known as the Burlingame treaty) were concluded. You will therefore so shape your private as well as your official conversation as to demonstrate to Prince Kung the sincerity of the United States in its wishes for the maintenance of the authority of the central govern-

ment and for the peaceful spread of its influence. You will make clear to the government to which you are accredited the settled purpose of the President to observe with fidelity all the treaty obligations of the United States, and to respect the prejudices and traditions of the people of China when they do not interfere with rights which have been acquired to the United States by treaty. On the other hand, you will not fail to make it distinctly understood that he will claim the full performance, by the Chinese government, of all the promises and obligations which it has assumed by treaties or conventions with the United States. On this point, and in the maintenance of our existing rights to their full extent, you will be always firm and decisive. While you will put forward these claims where occasion requires, with prudence and moderation, you will be unyielding in demanding the extreme protection to American citizens, commerce, and property which is conceded by the treaties, and in requiring the full recognition of your own official position to which you are entitled.

"The instructions to Mr. Bancroft set forth so fully the policy of the United States toward China, the ends to be accomplished there, and the peaceful spirit which is to animate your mission, that I content myself with again referring you to them for your guidance in those respects."

Mr. Fish, Sec. of State, to Mr. Low, min. to China, Dec. 3, 1869. For. Rel. 1870, 303.

In April, 1870, on the invitation of North Germany, orders were given to the naval forces of the United States to cooperate with those of other maritime powers in China in combined measures against the pirates in Chinese waters. It was stated that the cooperation of the American forces would be "limited to cases of recognized piracy," and that they would be instructed to proceed in such a way as not to wound the sensibilities of the Chinese government, or to interfere with the lawful commerce of Chinese subjects, or to conflict with the peaceful policy in which the governments of North Germany and the United States so happily agreed.

Baron Gerolt, Prussian min., to Mr. Fish, Sec. of State, Feb. 19, 1870, For. Rel. 1870, 329; Mr. Fish to Baron Gerolt, March 31, 1870, id. 331; Mr. Fish, to Sec. of Navy, April 4, 1870, id. 331; Mr. Fish to Mr. Low, min. to China, No. 8, April 30, 1870, id. 334.

On application of the German government the United States legation in China was instructed in 1870 to use its good offices to aid Germany in securing from China the use of the island of Kulangsen as a coaling station, not seeking, however, to acquire the sovereignty thereof.

Mr. Fish, Sec. of State, to Mr. Low, May 26, 1870, MS. Inst. China, II. 112.

November 1, 1870, the ministers of the United States at Paris and Berlin were instructed to propose to France and North Germany a suspension of hostilities between their fleets in the East. This proposal was prompted by the condition of things growing out of the massacre at Tientsin. Mr. Low, the American minister at Peking, originally expressed the opinion that the disturbance was local and unpremeditated, and that the government at Peking sincerely desired to prevent a repetition of it and to preserve peace; but he afterwards became apprehensive lest they might be unable to do so. His doubts were "founded on the injudicious course pursued by the French chargé d'affaires in demanding the summary execution of the Tientsin officials as an ultimatum, and upon the hopes the populace in the large Chinese cities derived from the state of war existing between Germany and France," which they argued would neutralize the force of those powers. Under these circumstances the President, after consultation with his Cabinet, decided to make the proposal above referred to, believing that any advantage which one belligerent might gain over the other in Eastern waters would be of small consequence to the victor compared with the preservation of peace in China. In making the proposal he did not intend to depart from the policy outlined in Mr. Fish's No. 148, of August 31, 1869, to Mr. Bancroft. He did not propose to take part, nor did he invite North Germany to take part, in any controversy between France and China growing out of the massacre of Tientsin. He only desired that "so far as the impression of the neutralization of German and French influence by the state of hostilities operated to enfeeble the central government, that impression may be removed; and that should unfortunately a general war be declared by China, or should an outbreak against foreigners take place which the Government can not prevent nor punish, the several powers may be in a position to afford the fullest measure of protection."

Soon after the ministers of the United States at Paris and Berlin were instructed to make the proposal information was received that the commanders of the French and Prussian fleets, apparently acting on their own responsibility, had, in view of the situation in China, come to an understanding temporarily to suspend hostilities.

Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Bancroft, min. to Prussia, Nov. 8, 1870, For. Rel. 1870, 397.

"Anticipating trouble from this cause [the effect of the war between France and Germany in aggravating the difficulties of foreigners in China], I invited France and North Germany to make an authorized suspension of hostilities in the East (where they were temporarily suspended by the commanders), and to act together for the future protection, in China, of the lives and properties of Americans and Europeans." (President Grant, annual message, Dec. 5, 1870, For. Rel. 1870, 8.)

As to the protection of American interests in China and Japan, see S. Ex. Docs. 52 and 58, 41 Cong. 1 sess.

4. Immigration and Other Treaties, 1880–1894.

§ 800.

November 17, 1880, two treaties were concluded between the United States and China, at Peking, one of which related to the restriction of Chinese immigration to the United States; the other related to commercial intercourse and judicial procedure.

As to Chinese exclusion, see supra, §§ 567–578.

As to extraterritorial privileges, see supra, §§ 270–272.

See, also, the following documents, relating to Chinese immigration:

Resolution favoring such a change in the treaty with China of 1868 as will prevent the great influx of Chinese into the United States, Apr. 20, 1876, S. Mis. Doc. 93, 44 Cong. 1 sess.

Character, extent, and effect of, in the United States. Report of Joint Special Committee as to, with evidence taken, Feb. 27, 1877, S. Rept. 689, 44 Cong. 2 sess.

Address upon the social, moral, and political effect of, prepared by a committee of the senate of California, Nov. 7, 1877, H. Mis. Doc. 9, 45 Cong. 1 sess.

View of Oliver P. Morton, Jan. 17, 1878, S. Mis. Doc. 20, 45 Cong. 2 sess.

Resolution of California in favor of modification of treaty, Feb. 4, 1878, H. Mis. Doc. 20, 45 Cong. 2 sess.

Views of Joseph C. G. Kennedy, Feb. 25, 1878, S. Mis. Doc. 36, 45 Cong. 2 sess.

Report in favor of negotiating with China and Great Britain to restrict, Feb. 25, 1878, H. Rept. 240, 45 Cong. 2 sess.

Resolution in favor of the modification of the treaty, May 7, 1878, S. Mis. Doc. 62, 45 Cong. 2 sess.

Report of Committee on Education and Labor, Jan. 14, 1879, H. Rept. 62, 45 Cong. 3 sess.

Report adverse to taking action on certain memorials, Feb. 18, 1879, H. Rept. 111, 45 Cong. 3 sess.

Veto of the bill. Message of President, Mar. 1, 1879, H. Ex. Doc. 102, 45 Cong. 3 sess.

Causes of general depression in labor and business, Dec. 10, 1879, H. Mis. Doc. 5, 46 Cong. 2 sess.

Amendments to a pending bill, Mar. 10, 1880, H. Rept. 519, 46 Cong. 2 sess.

Report of the Select Committee on the Causes of the Present Depression of Labor, Mar. 19, 1880, H. Rept. 572, 46 Cong. 2 sess.

Character of the instructions given to United States minister to China on subject. President's message, Apr. 12, 1880, H. Ex. Doc. 70, 46 Cong. 2 sess.

Report recommending suspension of, for twenty-five years, Jan. 26, 1882, H. Rept. 67, 47 Cong. 1 sess.

Veto of Senate bill 71, President's message, Apr. 4, 1882, S. Ex. Doc. 148, 47 Cong. 1 sess.

Minority report. Discretion as to number of years to suspend, lies with this Government. Apr. 14, 1882, H. Rept. 1017, part 2 (part 1 not printed), 47 Cong. 1 sess.

Report of George F. Seward, minister to China, President's message, May 15, 1882, S. Ex. Doc. 175, 47 Cong. 1 sess.

Letter from the Secretary of the Treasury relating to the enforcement of the "Act to execute certain treaty stipulations relating to Chinese" (with map). Jan. 18, 1884, S. Ex. Doc. 62, 48 Cong. 1 sess.

Majority and minority reports on the bill to amend the act approved May 6, 1882, Mar. 4, 1884, H. Rept. 614, 48 Cong. 1 sess.

See, also, the following documents:

China, famine in. Relief asked by citizens of New York and Boston. Feb. 8, 1878, H. Mis. Doc. 25, 45 Cong. 2 sess.

Publication of order for service of summons on absent defendants in consular courts. President's message, Mar. 22, 1882, H. Ex. Doc. 213, 47 Cong. 1 sess.

Slavery in. President's message, Mar. 11, 1880, H. Ex. Doc. 60. 46 Cong. 2 sess.

Rent of consular premises in China. President's message, transmitting report of Sec. of State, June 19, 1884, H. Ex. Doc. 171, 48 Cong. 1 sess.

As to discrimination against foreign shipping at Canton, in violation of the spirit of the treaty of commerce of 1880, see For. Rel. 1892, 99.

As to Art. III. of the treaty of commerce of 1880, see Mr. Gresham, Sec. of State, to Mr. Denby, No. 782, March 14, 1893, MS. Inst. China, IV. 690.

"The harmony of our relations with China is fully sustained.

"In the application of the acts lately passed to execute the treaty of 1880, restrictive of the immigration of Chinese laborers into the United States, individual cases of hardship have occurred beyond the power of the Executive to remedy, and calling for judicial determination.

"The condition of the Chinese question in the Western States and Territories is, despite this restrictive legislation, far from being satisfactory. The recent outbreak in Wyoming Territory, where numbers of unoffending Chinamen, indisputably within the protection of the treaties and the law, were murdered by a mob, and the still more recent threatened outbreak of the same character in Washington Territory, are fresh in the minds of all, and there is apprehension lest the bitterness of feeling against the Mongolian race on the Pacific slope may find vent in similar lawless demonstrations. All the power of this Government should be exerted to maintain the amplest good faith toward China in the treatment of these men, and the inflexible sternness of the law in bringing the wrong-doers to justice should be insisted upon.

"Every effort has been made by this Government to prevent these violent outbreaks and to aid the representatives of China in their investigation of these outrages; and it is but just to say that they are traceable to the lawlessness of men not citizens of the United States engaged in competition with Chinese laborers.

"Race prejudice is the chief factor in originating these disturbances, and it exists in a large part of our domain, jeopardizing our domestic peace and the good relationship we strive to maintain with China.

"The admitted right of a government to prevent the influx of elements hostile to its internal peace and security may not be questioned, even where there is no treaty stipulation on the subject. That the exclusion of Chinese labor is demanded in other countries where like conditions prevail is strongly evidenced in the Dominion of Canada, where Chinese immigration is now regulated by laws more exclusive than our own. If existing laws are inadequate to compass the end in view, I shall be prepared to give earnest consideration to any further remedial measures within the treaty limits, which the wisdom of Congress may devise."

President Cleveland, annual message, Dec. 8, 1885, For. Rel. 1885, vii.

"It is made the constitutional duty of the President to recommend to the consideration of Congress from time to time such measures as he shall judge necessary and expedient. In no matters can the necessity of this be more evident than when the good faith of the United States under the solemn obligation of treaties with foreign powers is concerned.

"The question of the treatment of the subjects of China sojourning within the jurisdiction of the United States presents such a matter for the urgent and earnest consideration of the Executive and the Congress.

"In my first annual message, upon the assembling of the present Congress, I adverted to this question in the following words:

[Here follows the passage above quoted, from the annual message of Dec. 8, 1885.]

"At the time I wrote this the shocking occurrences at Rock Springs, in Wyoming Territory, were fresh in the minds of all, and had been recently presented anew to the attention of this Government by the Chinese minister in a note which, while not unnaturally exhibiting some misconception of our Federal system of administration in the Territories while they as yet are not in the exercise of the full measure of that sovereign self-government pertaining to the States of the Union, presents in truthful terms the main features of the cruel outrage there perpetrated upon inoffensive subjects of China. In the investigation of the Rock Springs outbreak and the ascertainment of the facts on which the Chinese minister's statements rest, the Chinese representatives were aided by the agents of the United States, and the reports submitted, having been thus framed and recounting facts within the knowledge of witnesses on both sides, possess an impartial truthfulness which could not fail to give them great impressiveness.

"The facts, which so far are not controverted or affected by any exculpatory or mitigating testimony, show the murder of a number of Chinese subjects in September last at Rock Springs, the wounding of many others, and the spoliation of the property of all when the unhappy survivors had been driven from their habitations. There is no allegation that the victims by any lawless or disorderly act on their part contributed to bring about a collision. On the contrary, it appears that the law-abiding disposition of these people, who were sojourners in our midst under the sanction of hospitality and express treaty obligations, was made the pretext for an attack upon them. This outrage upon law and treaty engagements was committed by a lawless mob. None of the aggressors, happily for the national good fame, appear by the reports to have been citizens of the United States. They were aliens engaged in that remote district as mining laborers, who became excited against the Chinese laborers, as it would seem, because of their refusal to join them in a strike to secure higher wages. The oppression of Chinese subjects by their rivals in the competition for labor does not differ in violence and illegality from that applied to other classes of native or alien labor. All are equally under the protection of law and equally entitled to enjoy the benefits of assured public order.

"Were there no treaty in existence referring to the rights of Chinese subjects; did they come hither as all other strangers who voluntarily resort to this land of freedom, of self-government, and of laws, here peaceably to win their bread and to live their lives, there can be no question that they would be entitled still to the same measure of protection from violence and the same free forum for the redress of their grievances as any other aliens.

"So far as the treaties between the United States and China stipulate for the treatment of the Chinese subjects actually in the United States as the citizens or subjects of 'the most-favored nation' are treated, they create no new status for them; they simply recognize and confirm a general and existing rule, applicable to all aliens alike, for none are favored above others by domestic law, and none by foreign treaties unless it be the Chinese themselves in some respects. For, by the third article of the treaty of November 17, 1880, between the United States and China, it is provided that:

"ARTICLE III.

"If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most-favored nation, and to which they are entitled by treaty.

"This article may be held to constitute a special privilege for Chinese subjects in the United States, as compared with other aliens; not that it creates any peculiar rights which others do not share, but because in case of ill treatment of the Chinese in the United States, this Government is bound to 'exert all its power to devise measures for their protection,' by securing to them the rights to which, equally with any and all foreigners, they are entitled.

"Whether it is now incumbent upon the United States to amend their general laws or devise new measures in this regard I do not consider in the present communication, but confine myself to the particular point raised by the outrage and massacre at Rock Springs.

"The note of the Chinese minister and the documents which accompany it give, as I believe, an unexaggerated statement of the lamentable incident, and present impressively the regrettable circumstance that the proceedings, in the name of justice, for the ascertainment of the crime and fixing the responsibility therefor were a ghastly mockery of justice. So long as the Chinese minister, under his instructions, makes this the basis of an appeal to the principles and convictions of mankind, no exception can be taken; but when he goes further, and, taking as his precedent the action of the Chinese Government in past instances where the lives of American citizens and their property in China have been endangered, argues a reciprocal obligation on the part of the United States to indemnify the Chinese subjects who suffered at Rock Springs, it became necessary to meet his argument and to deny most emphatically the conclusions he seeks to draw as to the existence of such a liability and the right of the Chinese Government to insist upon it.

"I draw the attention of the Congress to the latter part of the note of the Secretary of State of February 18, 1886, in reply to the Chinese minister's representations, and to invite especial consideration of the cogent reasons by which he reaches the conclusion that, whilst the United States Government is under no obligation, whether by the express terms of its treaties with China or the principles of international law, to indemnify these Chinese subjects for losses caused by such means and under the admitted circumstances, yet that in view of the palpable and discreditable failure of the authorities of Wyoming Territory to bring to justice the guilty parties or to assure to the sufferers an impartial forum in which to seek and obtain compensation for the losses which those subjects have incurred by lack of police protection, and considering further the entire absence of provocation or contribution on the part of the victims, the Executive may be induced to bring the matter to the benevolent consideration of the Congress, in order that that body, in its high discretion, may direct the bounty of the Government in aid of innocent and peaceful strangers

whose maltreatment has brought discredit upon the country, with the distinct understanding that such action is in nowise to be held as a precedent, is wholly gratuitous, and is resorted to in a spirit of pure generosity toward those who are otherwise helpless."

President Cleveland, special message of Mar. 1, 1886, Richardson's Messages, VIII. 383.

As to the indemnity appropriated by Congress, see infra, § 1025.

"Our relations with China have the attentive consideration which their magnitude and interest demand. The failure of the treaty negotiated under the administration of my predecessor for the further and more complete restriction of Chinese labor immigration, and, with it, the legislation of the last session of Congress dependent thereon, leave some questions open which Congress should now approach in that wise and just spirit which should characterize the relations of two great and friendly powers. While our supreme interests demand the exclusion of a laboring element which experience has shown to be incompatible with our social life, all steps to compass this imperative need should be accompanied with a recognition of the claim of those strangers now lawfully among us to humane and just treatment.

"The accession of the young Emperor of China marks, we may hope, an era of progress and prosperity for the great country over which he is called to rule."

President Harrison, annual message, Dec. 3, 1889, For. Rel. 1889, v.

As to the treaty, the failure of which is here referred to, see supra, §§ 567–578.

As to outrages on Chinese in the United States, see For. Rel. 1888, I. 362, 383, 389, 395, 401.

In 1894 a new treaty was concluded for the restriction of Chinese immigration to the United States. It provided for the registration of American citizens in China, as well as of Chinese in the United States.

As to this treaty and other matters relating to the exclusion of Chinese, see supra, §§ 567–578. With reference to the negotiation of the treaty of 1894, see Mr. Gresham, Sec. of State, to Mr. Yang Yu, Jan. 5, 1894, MS. notes to China, I. 443.

November 27, 1896, Mr. Denby reported that it was difficult to apply the provisions of the treaty of 1894 requiring the United States annually to furnish the Chinese government with a register of American citizens in China. As there was no law under which such registration could be enforced, he suggested that a statute be enacted by Congress. Mr. Olney replied that, as it would be difficult to secure such legislation, and as there was doubt as to Mr. Denby's power to make a regulation for the purpose, it was deemed best to send a circular to the United States consuls in China, calling attention to the treaty and directing them to prepare lists of American

citizens residing in their consular districts, showing their full names, age, occupation, and place of residence. (For. Rel. 1896, 90–91.)

"The prohibition of Article II. of the treaty of 1880 not only covers the importation, transportation, purchase, or sale of opium by American citizens in China, but extends also to vessels owned by such citizens, whether employed by themselves or by others in the opium trade. Logically, a building owned by an American citizen and used by another person for the storage of opium, would come within the extended prohibition. But there may be room to question whether, as the treaty stands, the prohibition as to an American owned vessel employed by 'other persons' in the opium trade is not strictly limited to cases where such 'other persons' are agents or factors of the American owner, or where the owner is privy to the unlawful use to which his property is to be put. The intent, however, is clear that no American citizen in China shall engage in or knowingly aid others to carry on the opium traffic. . . . The enforcement of the prohibition, as to American citizens in China, is expressly dependent upon 'appropriate legislation' on the part of the United States. . . . In the absence of such legislation, it is, to say the least, doubtful whether a consul could lawfully interfere to prevent an American citizen from doing an act not in itself contrary to international law or the domestic law of China.

"If, however, the contemplated employment of the American owned premises by a British subject be opposed by China, and the lease sought to be prevented by the authorities of the latter, the consul would be justified in withholding his approval from the sublease.

"Or, to state the case briefly in another form:

"While the Department regards it as perhaps somewhat doubtful whether the treaty of 1880 precludes such a sublease as the one proposed, and finds itself rather unwilling to differ from your conclusions on this point, since, being on the spot, you can best judge of the true condition of affairs, yet there certainly appears little room to doubt that if the treaty as to opium is dependent on 'appropriate legislation,' it can not become effective in the absence of such legislative action; and no legislation has yet been adopted to execute the opium clause of the treaty of 1880, so far as this Government is concerned."

Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, May 14, 1886, MS. Inst. China, IV. 155.

See, also, For. Rel. 1887, 174, 186.

Complaint was made by the Chinese legation that Article III. of the treaty of 1880, guaranteeing to Chinese subjects in the United States the protection of the laws, was violated by various acts committed at Butte City, Montana. The governor of Montana investi-

gated the complaint and reported that in the particular case, which was believed to have been the cause thereof, the offender had been convicted and sentenced to imprisonment.

For. Rel. 1892, 142, 143.

5. Taxes.

§ 801.

Between 1843 and 1844 the Chinese government, being pressed for revenue, imposed a tax called "likin," which, although the name would seem to indicate that it was assessed on an ad valorem basis, was, at least after 1860, imposed as a specific duty on each bale, piece, or picul, as the case might be. Originally of a temporary character, it eventually became permanent. Likin offices were established in each province, and the tax was in some instances farmed out. These offices, forming so many obstructions to trade, came to be known as "likin barriers." Under the transit pass system, which was founded on Article X. of the British treaty of Aug. 29, 1842 (commonly called the treaty of Nanking), and which was afterwards adopted by all the treaty powers, an effort was made to substitute a transit duty (fixed at half the tariff duty) on foreign goods for inland taxation. The effort, however, was not wholly successful. The likin tax continued to form a subject of controversy, the treaty powers contending that the tax violated the spirit of the treaties, under which rates of duty on imported goods were prescribed, while the Chinese Government maintained the claim to lay inland taxes.

For an historical memorandum on the likin tax, see Mr. Denby, min. to China, to Mr. Bayard, Sec. of State, No. 57, Dec. 18, 1885, For. Rel. 1886, 66–73.

An extended discussion of the likin question may be found in Mr. Bayard, Sec. of State, to Mr. Denby, March 8, 1886, MS. Inst. China, IV. 125.

As to the reduction of the likin tax on petroleum at Canton, see For. Rel. 1887, 224, 234.

See, further, as to the likin tax, For. Rel. 1888, I. 199, 270; and infra, p. 532.

For a discussion between the Chinese Government and the diplomatic corps at Peking, showing the injurious effect of the tax on foreign trade, and the Chinese defense, see For. Rel. 1892, 97, 100, 102.

The action of a consular officer in advising merchants in a certain case to pay the tax under protest, rather than allow their goods to be seized, was approved. (Mr. Olney, Sec. of State, to Mr. Denby, No. 1369, Dec. 3, 1896, MS. Inst. China, V. 392.)

The loss suffered by the depression of the price of petroleum imported or purchased and held at Hongkong, such depression being the result of the imposition of a likin tax at Canton, where it was originally expected that the petroleum in question would find a market, does not afford ground for a claim against the Chinese government. (Mr. Bayard, Sec. of State, to Messrs. Fraser & Co., May 26, 1886, 160 MS. Dom. Let. 308.)

The position of the United States as the only commercial or western nation that is a commercial power of the Pacific Ocean, and as a country exporting largely from and importing largely into China, and this by the nearest line of approach, makes our relations with China peculiarly close, and it is important for our legation to press upon China, in order to carry out freely these commercial relations, "that imported goods, while they retain this quality, and are identified in form and condition of importation, not having been broken up or distributed into the mass of domestic property, are to be subjected to no further taxation antecedent to such distribution, and to no discriminating taxation in their quality of foreign goods after such distribution." There should also be "no discrimination favorable to one foreign nation, directly or covertly, . . . in the adjustment of duties."

Mr. Evarts, Sec. of State, to Messrs. Angell et al., June 7, 1880, MS. Inst. China, III. 113.

In the summer of 1892 an American citizen took out at Hankow transit passes covering certain goods which he shipped into the interior. Kerosene constituted the bulk of the shipment. At a place on the Yangtze the goods were required to pay likin dues. The American minister at Peking requested the refund of the dues by the Chinese government on the ground that it was not competent for the likin authorities to disregard the transit passes and thus collect duties on goods which were properly certified as foreign. The Chinese government agreed to refund the dues, but claimed that the likin officials possessed a discretion in determining whether goods covered by a transit pass were in reality imported goods or goods of native production and subject to likin dues. The Department of State, approving the action of the American minister, said: "Your claim that transit passes are to be taken as conclusive evidence of the fact that the goods have been imported is reasonable, and should be maintained in the absence of allegations supported by proof, that the goods are fraudulently carried on such passes."

Mr. Gresham, Sec. of State, to Mr. Denby, min. to China, Dec. 20, 1893, For. Rel. 1893, 244. See despatch of Mr. Denby, Nov. 2, 1893, id. 237.

As to the provisions of the treaty of Oct. 8, 1903, for the abolition of likin taxes, see President Roosevelt's annual message, Dec. 7, 1903, quoted at the end of § 810, infra, p. 532.

By a protocol between China and Japan, concluded October 19, 1896, it was provided, among other things, that the Chinese government might impose internal taxes on articles manufactured by Japanese subjects in China provided that such tax should be neither other nor higher than that payable by Japanese subjects. In consideration of this concession from the stipulations of Article VI. of

the Shimonoseki treaty, Japan obtained the right to have at each open port settlements for the exclusive use of Japanese, and other privileges.

For. Rel. 1896, 97–98.

As to a proposed tax at Ningpo, in 1885, on tea and opium, for the construction of a bund, see Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, No. 24, Dec. 12, 1885, MS. Inst. China, IV. 98.

No wharfage tax in the ports of China is prescribed in the treaty between the United States and China of 1844, nor by the tariff established by agreement between the two governments in 1858.

Mr. Hay, Sec. of State, to Mr. Conger, No. 207, Sept. 1, 1899, MS. Inst. China, VI. 23.

6. Industries.

§ 802.

"Questions have arisen touching the rights of American and other foreign manufacturers in China under the provisions of treaties which permit aliens to exercise their industries in that country. On this specific point our own treaty is silent, but under the operation of the most-favored-nation clause, we have like privileges with those of other powers. While it is the duty of the government to see that our citizens have the full enjoyment of every benefit secured by treaty, I doubt the expediency of leading in a movement to constrain China to admit an interpretation which we have only an indirect treaty right to exact. The transference to China of American capital for the employment there of Chinese labor would, in effect, inaugurate a competition for the control of markets now supplied by our home industries."

President Arthur, annual message, Dec. 4, 1883, For. Rel. 1883, viii. See, to the same effect, Mr. Frelinghuysen, Sec. of State, to Mr. Young, min. to China, June 23, 1883, confid., MS. Inst. China, III. 448.

January 4, 1897, Mr. Denby, United States minister at Peking, enclosed a copy of a report on cotton mills of a committee of the Shanghai Chamber of Commerce. He stated that it was apparent that the committee looked chiefly to the benefits to be secured to the foreign mill-owner in China, and that he was unable to say how the interests of the United States were to be forwarded by fostering cotton industry in China. February 27, 1897, Mr. Olney, as Secretary of State, concurred in this view, saying: "Our interest is to keep foreign markets open for our manufactures."

For. Rel. 1897, 91–92.

As to the manufacture of cotton goods at Hankow, see S. Doc. 255, 56 Cong. 1 sess.

As to commercial and industrial conditions in China, see S. Rept. 450, 56 Cong. 1 sess.; H. Rept. 484, 56 Cong. 1 sess.; H. Rept. 878, 56 Cong. 1 sess. Important stipulations with regard to the establishment of industries in China were embodied in the commercial treaty between Japan and China signed at Peking on July 21, 1896.

"This Department sees no objection to acting upon your recommendations for the negotiation of a convention with China for the reciprocal protection" of patents and trade-marks.

Mr. Day, Assist. Sec. of State, to Sec. of Int., April 14, 1898, 227 MS. Dom. Let. 372.

A volume entitled "Treaties between the Empire of China and Foreign Powers, together with Regulations for the Conduct of Foreign Trade," edited by William F. Mayers, Chinese secretary to H. B. M. legation at Peking, was published in 1877 by the *North China Herald*, at Shanghai, and was for sale in London by Trübner & Company, 57 and 59 Ludgate Hill.

For. Rel. 1888, I. 244.

7. Travel.

§ 803.

Article 9 of the British treaty of 1858 provides that "'passports must be produced for examination in the localities passed through.' The foreign representatives have construed that clause to mean that, on proper demand by a proper official passports must be exhibited, but the traveler need not voluntarily show his passport, nor go out of the way to hunt up an official for the purpose of showing his passport.

"As to the routes to be followed in traversing districts occupied by the Mantsz, or any other disturbed districts, much must be left to your discretion. If you consider any district to be dangerous, you should inform the American citizen who proposes to travel therein of his danger, and you should advise him not to venture in such locality, and you should at all times furnish whatever information you possess as to the safety of roads or routes.

"It is not within your power to control the movements of your fellow-citizens, but I am sure that our government will not sanction the needless incurring of risk of great danger by its citizens, and there can be no doubt that in consideration of the protection afforded by the government it has the right to demand and will demand the exercise of prudence and discretion from its beneficiaries."

Mr. Denby, min. to China, to Mr. Smithers, U. S. consul at Chungking, March 19, 1897, approved by Mr. Sherman, Sec. of State, in an instruction to Mr. Denby, May 3, 1897, For. Rel. 1897, 98–99.

8. Missionary Privileges and Protection.

§ 804.

While the United States government will not permit any discriminations, against its citizens in China on account of their maintenance of their religious views, this does not imply the countenancing of them in "the obtrusive presentation of certain views in violation of the laws of a country in which the parties voluntarily have entered."

Mr. Fish, Sec. of State, to Mr. G. F. Seward, May 2, 1876, MS. Inst. China, II. 385.

As to the course taken by the United States legation in China touching the protection of missionaries, see Mr. Fish, Sec. of State, to Mr. Avery, No. 56, July 30, 1875, For. Rel. 1875, I. 398, approving Mr. Avery's course as reported in the latter's No. 61, June 1, 1875, id. 332.

See, also, Mr. Fish, Sec. of State, to Mr. G. F. Seward, July 22, 1876, MS. Inst. China, II. 403; and Mr. Seward's dispatch of May 17, 1876.

The appointment of missionaries by our government to official representative positions in China is "a question to be treated with great care, not less for their own protection and that of their colleagues, than for the interests of the public service."

Mr. Frelinghuysen, Sec. of State, to Mr. Young, Mar. 8, 1883, MS. Inst. China, III. 406.

In 1890, 1891, and 1892 serious disturbances occurred in various parts of China. They were marked by a well-defined antiforeign agitation and by violent attacks upon foreigners, especially missionaries. Demands were made upon the Chinese government for the repression of the disorders and for indemnity for the injuries inflicted. The naval forces of the foreign powers in Chinese waters were increased, but the United States, while co-operating with the other powers, for the purpose of securing measures of protection and punishment, sought to confine its action within that limit. When the action of the other powers seemed about to go beyond it, the minister of the United States at Peking was instructed: "This government does not wish to make war on China. Take no further joint action with other powers until further advised."

Mr. Blaine, Sec. of State, to Mr. Denby, min. to China, tel., Nov. 25, 1891, MS. Inst. China, IV. 624.

As to a protocol signed by various foreign representatives at Peking, Sept. 9, 1891, and its publication in a British parliamentary paper, see Mr. Wharton, Act. Sec. of State, to Sir J. Pauncefote, March 28, 1892, MS. Notes to Gr. Br., XXI. 622.

As to antiforeign riots in China, see For. Rel. 1891, 399–427, 435–450, 452, 457–459, 468.

As to riots at Wuhu, see For. Rel. 1892, 91.

As to antiforeign publications, see For. Rel. 1892, 90, 92, 103, 105, 115, 117, 120, 125, 131, 146, 147.

With his No. 1510, April 5, 1892, Mr. Denby enclosed a remarkable pamphlet entitled "Missionaries in China." Its receipt was acknowledged by Mr. Blaine in his No. 724, May 16, 1892. (MS. Inst. China, IV. 656.)

As to antiforeign placards in 1894, see For. Rel. 1894, 150–152.

See a dispatch of Mr. Denby's of Dec. 28, 1891, concerning the life and habits of the Emperor of China. (For. Rel. 1892, 81.)

Sept. 21, 1898, the Emperor issued a decree declaring the Empress Dowager co-regent, and she assumed full power. (For. Rel. 1898, 217–219.)

"The late outbreak against foreigners in various parts of the Chinese Empire has been a cause of deep concern in view of the numerous establishments of our citizens in the interior of that country. This government can do no less than insist upon a continuance of the protective and punitory measures which the Chinese government has heretofore applied. No effort will be omitted to protect our citizens peaceably sojourning in China, but recent unofficial information indicates that what was at first regarded as an outbreak of mob violence against foreigners has assumed the larger form of an insurrection against public order."

President Harrison, annual message, Dec. 9, 1891, For. Rel. 1891, x.

See the following papers and documents:

Missionary affairs and indemnities to missionaries, For. Rel. 1888, I. 219, 220, 238, 243, 266, 270, 292, 309, 325, 349.

Religions of China, For. Rel. 1889, 90.

Missionary troubles at Chingkiang, For. Rel. 1891, 395; at Chinanfu, For. Rel. 1891, 353, 431, 451, 454; For. Rel. 1892, 70–71, 74, 89, 118; at Chik-Horn, For. Rel. 1892, 101; at Chining Chow, For. Rel. 1891, 434; at Fuchau, For. Rel. 1891, 392; at Fukien, For. Rel. 1892, 115; at Shensi, For Rel. 1892, 133; at Wuhu, For Rel. 1891, 393, 396.

As to anti-Christian riots in Mongolia, For. Rel. 1892, 71, 72, 76, 77, 82–87, 96, 100.

As to the University of Peking, established by the Methodist mission, see For. Rel. 1892, 104.

"It has devolved upon the United States minister at Peking, as dean of the diplomatic body, and in the absence of a representative of Sweden and Norway to press upon the Chinese government reparation for the recent murder of Swedish missionaries at Sung-pu. This question is of vital interest to all countries whose citizens engage in missionary work in the interior."

President Cleveland, annual message, Dec. 4, 1893, For. Rel. 1893, v.

In 1893 the Petrel, Monocacy, and Marion were "ordered to the Yangtse River, for the protection of our citizens in case of necessity." (Mr. Gresham, Sec. of State, to Mr. Denby, No. 796, May 12, 1893, MS. Inst. China, IV. 697.)

"The consideration now being given to the question of organizing an independent commission for the investigation of the riots at Szechuan in June last lends, however, a special interest to your dispatch No. 2293, of July 26 last, in which you report the steps taken by you to join an American missionary to the commission proposed to be headed by the British consul at Chungking, and the proceedings of a meeting at Shanghai in favor of a separate American commission, as well as your conclusion that the proposed participation in the British commission would not be sufficiently impressive, in view of which you notified the British minister that the steps taken by you to have an American representative upon that commission were countermanded until you should receive the instructions of the Department.

"These you have already received by cable. The Department's first desire was to continue the Szechuan investigation under the terms of participation originally contemplated by you; but the delay in setting the British inquiry on foot and the subsequent alarming occurrences of Kutien, led it to an independent conclusion in the same line as yours, namely, that in view of the large number of American missionary stations throughout Szechuan and the neighboring provinces and the apparent danger to life and property there, a more impressive demonstration than had been at first arranged had become expedient.

"In your same dispatch, No. 2293, you discuss the advisability of an international commission representing all the western powers in order to accomplish the end proposed by the present expedient of separate investigation; and you suggest that the United States might properly take the initiative in such a movement. This scheme, which appears to have originated at a meeting of foreigners held at Hankow and to have been embodied in certain resolutions passed thereat, does not strike the Department as practicable with regard to the particular investigation of the Chengtu outrage, or as feasible if the purpose be to organize a permanent international tribunal. It is to be remembered that the French commission has already investigated the Chengtu matters and concluded its labors, so that a reinvestigation by France, as a member of the proposed international commission, would seem superfluous if not embarrassing. Again, a commission as complex as that suggested would be found difficult of organization and perhaps inert in its operations. . . .

"Regarding our proposition for an independent examination of the Chengtu business as a crucial test, it has been determined to push it to a successful conclusion on the assumption that if this be done, and the attitude of the United States for the protection of the lives and property of its citizens in China be conspicuously manifested, the

necessity for such procedure on our part will, in all probability, not recur.

"Another consideration may be noted, which is that as an efficient demand on the part of this government may, and in all probability will, include the punishment of delinquent officials in high places, it seems desirable that such demands should rest upon the facts as ascertained by us through separate investigations, and that we should not be dependent upon the reports of any foreign investigation to which we may not be a party—such as that undertaken by the French—or in which our participation may have been only accessory, as in the original proposal to delegate the representation of the United States to the British consul at Chungking.

"Your dispatches have strongly intimated the culpability of the ex-viceroy of the Szechuan, and your demand for his degradation and punishment may be supposed to rest upon the facts elicited in the French investigation. That demand having been made by you and not heeded is to be further supported, if at all, by facts elicited by this government for which it may responsibly vouch."

Mr. Olney, Sec. of State, to Mr. Denby, min. to China, Sept. 19, 1895, For. Rel. 1895, I. 138.

See, also, Mr. Olney, Sec. of State, to Mr. Denby, min. to China, Sept. 21, 1895, For. Rel. 1895, I. 141, emphasizing the point that the "essential aim" of the commission was "to discover and fix any responsibility existing in high places, leaving measures of reparation and indemnity for subsequent consideration;" and that "under no circumstances are they [the commissioners] to participate in the judicial and executive functions of the officers of the provinces, whose guilty connection with the outrages investigated may be the most important outcome of the inquiry."

The commission was sent out. (For. Rel. 1895, I. 145, 151–3, 157, 172.)

See, as to punishments in connection with the Szechuan riots, For. Rel. 1895, I. 145, 150, 162, 163, 170, 172.

See, as to the Huashan massacre, Aug., 1895, For. Rel. 1895, I. 172, et seq.

The claim of the American Baptist Missionary Union for losses in Szechuan, amounting to 14,305 taels, were paid by the Chinese government through the taotai at Shanghai. (For. Rel. 1896, 46–57.)

As to the difficulty of missionaries at Nanking in regard to the privilege of residing during the summer in the hills adjacent to the city, see For. Rel. 1894, 141.

"This government has persistently impressed upon that of China the necessity of awarding signal punishment to the local authorities high in office in the provinces, to whose indifference, or, as events have only too plainly and painfully indicated, actual connivance, the recent attacks against the missionary establishments of our citizens in China have been mainly due. At the same time, overtures have been made to the imperial government looking to the more formal recognition of the right of citizens of the United States engaged in religious and educational teaching in the interior of China to follow their peaceful and humane calling, to acquire and hold prop-

erty, to receive express protection from the general and local officers of the sovereign, and in all things to enjoy the fullest measure of the rights and privileges established by custom or recognized by convention in favor of the citizens or subjects of any other power. The response of the Chinese government has been most encouraging, and the conciliatory disposition thus shown augurs well for an early and entirely satisfactory adjustment of this important class of questions as well as the removal of occasions for similar complaints in the future." (Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxv.)

"The close of the momentous struggle between China and Japan, while relieving the diplomatic agents of this government from the delicate duty they undertook at the request of both countries, of rendering such service to the subjects of either belligerent within the territorial limits of the other as our neutral position permitted, developed a domestic condition in the Chinese Empire which has caused much anxiety and called for prompt and careful attention. Either as a result of a weak control by the central government over the provincial administrations, following a diminution of traditional governmental authority under the stress of an overwhelming national disaster, or as a manifestation upon good opportunity of the aversion of the Chinese population to all foreign ways and undertakings, there have occurred in widely separated provinces of China serious outbreaks of the old fanatical spirit against foreigners, which, unchecked by the local authorities, if not actually connived at by them, have culminated in mob attacks on foreign missionary stations, causing much destruction of property, and attended with personal injuries as well as loss of life.

"Although but one American citizen was reported to have been actually wounded, and although the destruction of property may have fallen more heavily upon the missionaries of other nationalities than our own, it plainly behooves this government to take the most prompt and decided action to guard against similar or perhaps more dreadful calamities befalling the hundreds of American mission stations which have grown up throughout the interior of China under the temperate rule of toleration, custom, and imperial edict. The demands of the United States and other powers for the degradation and punishment of the responsible officials of the respective cities and provinces who by neglect or otherwise had permitted uprisings, and for the adoption of stern measures by the Emperor's government for the protection of the life and property of foreigners, were followed by the disgrace and dismissal of certain provincial officials found derelict in duty, and the punishment by death of a number of those adjudged guilty of actual participation in the outrages.

"This government also insisted that a special American commission should visit the province where the first disturbances occurred, for the purpose of investigation. This latter commission, formed after much opposition, has gone overland from Tientsin, accompanied by a suitable Chinese escort, and by its demonstration of the readiness and ability of our Government to protect its citizens will act, it is believed, as a most influential deterrent of any similar outbreaks.

"The energetic steps we have thus taken are all the more likely to result in future safety to our citizens in China, because the imperial government is, I am persuaded, entirely convinced that we desire only the liberty and protection of our own citizens and redress for any wrongs they may have suffered, and that we have no ulterior designs or objects, political or otherwise. China will not forget either our kindly service to her citizens during her late war nor the further fact that, while furnishing all the facilities at our command to further the negotiation of a peace between her and Japan, we sought no advantages and interposed no counsel."

President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, I. xxii.

With reference to a statement of Mr. Denby that "these riots are inexplicable except on the theory of connivance," the Department of State remarked that "if the connivance of high Chinese officials in this antiforeign demonstration be reasonably shown, stern reprobation and punishment must be expected, with due reparation and safeguards for the future." (Mr. Adee, Act. Sec. of State, to Mr. Denby, min. to China, July 19, 1895, For. Rel. 1895, I. 96.)

In a dispatch of Mr. Denby, minister at Peking, to Mr. Gresham, Secretary of State, March 22, 1895, an account was given of missionary work in China. (For. Rel. 1895, I. 196, 198.)

"In the President's annual message to Congress of December, 1895, reference was made to the outbreaks in various provinces in China against foreigners residing therein and to the sending of a special American commission to the province of Szechuan to there investigate the origin of this hostile spirit; to ascertain whether all those who had in any way taken part in the riots had been duly punished; to determine if possible the best way of preventing the recurrence of such lamentable outbreaks, and to fix the actual losses suffered by American citizens as a basis for indemnification. This commission fully performed the task assigned it and the report which it has made, together with that made by the other commissioners who, at a little earlier date in the same year, investigated jointly with the commissioners of Great Britain similar occurrences in the eastern Chinese province of Fukien, has served as a basis for instructions to our minister at Peking which may lead, it is hoped, to some understanding with the Chinese government rendering such outbreaks less frequent and more readily and satisfactorily dealt with. The claims for losses sustained by our citizens in these antiforeign riots have all been settled by the Chinese government." (Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxv.)

A discussion took place between the United States and China in 1896 as to the best mode of preventing antiforeign riots. The measures deemed by the United States to be best for the purpose embraced (1) the recognition by imperial decree of the right of American missionaries to reside in the interior; (2) a similar recognition of their right to buy land in the interior; (3) the issuance of an imperial decree as to the responsibility and punishment of officials and other persons for riotous injuries to American citizens; (4) the punishment of guilty or negligent officials by rendering them forever incapable of holding office, and by other penalties in proportion to the offense, and (5) the display in every yamên in China of the imperial decrees embodying these measures.

For. Rel. 1896, lxv. 57–64. See, also, For. Rel. 1897, 60–63, 69, 84, 99–102.

The United States demanded the punishment of officials who failed to do their duty in protecting American citizens at Kutien, and the payment of an indemnity to Miss Hartford. (For. Rel. 1896, 64–70; For. Rel. 1897, 63.)

May 12, 1896, a riot took place at Kiangyin, on the south bank of the Yangtse River, 100 miles west of Shanghai and 60 east of Chingkiang, in the province of Kiangsu. Certain officials were punished and an indemnity paid. (For. Rel. 1896, 70–83.)

In June, 1896, Mr. Lingle, of the American Presbyterian mission at Lien Chou, complained of the destruction of missionary property in southern Hunan and the oppression of native Christians. Certain persons were punished and an indemnity paid. (For. Rel. 1896, 84–87.)

For a decree of the Emperor of China in relation to the protection of missionaries in the province of Shantung, see For. Rel. 1898, 208–210.

In a riot at Chiang Pei Ting, in March, 1898, a native hospital attendant was killed and the building rented by the hospital demolished. The case was settled on the basis of the punishment of the guilty, the degradation of certain officials, guarantees for the future, the payment of an indemnity, the opening of the hospital with certain ceremonies, and the issuance of an appropriate proclamation. (For. Rel. 1898, 191, 193–194, 198, 199.)

As to the establishment by American missionaries of a permanent residence at Ch'ang Teh Fu, the first permanent lodgment of foreigners in the province of Hunan, see For. Rel. 1898, 210. But, as to an attack on Mr. Chapin, an American missionary, and his English associate, Mr. Alexander, Hong-Kiang, in Hunan, see id. 213–217.

As to attacks on American missionaries in Shantung in November, 1898, and an indemnity, see For. Rel. 1899, 154, 159, 161, 164, 168, 177.

As to certain German reprisals, see For. Rel. 1899, 166, 168.

As to the direct settlement by missionaries of their claims with the Chinese officials and the ill feeling caused by that mode of procedure, see Mr. Squiers, chargé at Peking, to Mr. Hay, Sec. of State, May 28, 1901, For. Rel. 1901, 97. See, also, Mr. Hay to Mr. Squiers, July 17, 1901, id. 98.

The treaties originally permitted foreigners to reside at the open ports and assured professors of the Christian religion against being

harassed or persecuted on account of their faith. Under the Berthemy convention the right to reside in the interior and to buy land for residential purposes was secured to missionaries. None of the treaties said anything about the right of foreigners residing in the interior to carry on any regular employment there. It became the practice of missionaries, however, all over China to engage in various employments which were adjuncts to their religious and charitable work. There thus arose a sort of complete tolerance of various kinds of activity. The question having arisen as to whether a missionary residing in the interior could lawfully engage in agriculture, stock raising, or trading in order to support himself while laboring as a missionary, the Department of State said:

"The residential privilege embraces all normal uses to which the ground and its belongings can be applied. Residence upon a tract of agricultural land presupposes the devotion of the soil to its natural use. The permitted purchase of such land carries with it the right to till it for the owner's support and advantage. Viewed in this light, the rights accompanying the ownership of a farm seem to be more unquestionably evident than the rights pertaining to the possession of a dwelling house, since the use of the latter as a factory or shop is not a positive necessity, such as is the raising of produce where farm lands are held. The matter is, however, as you intimate, one of tolerant custom, and if attempt be at any time made to restrict the existing usage, the propositions herein outlined would afford ground upon which to base remonstrance and conduct suitable argument."

Mr. Rockhill, Acting Sec. of State, to Mr. Denby, min. to China, March 29, 1897, For. Rel. 1897, 106.

By the commercial treaty with China of October 8, 1903, "we have secured for our missionaries a valuable privilege, the recognition of their right to rent and lease in perpetuity such property as their religious societies may need in all parts of the empire."

President Roosevelt, annual message, Dec. 7, 1903, For. Rel. 1903, xiii. See art. 14 of the treaty.

Chinese converts.

There will be no diplomatic interposition in China to protect from Chinese prosecution a native Chinese Christian preacher charged with a personal offense when the proceedings against him are exclusively for such offense.

Mr. Fish, Sec. of State, to Mr. G. F. Seward, June 12, 1876, MS. Inst. China, II. 389.

"I have the honor to inform you that I have received a letter from an American missionary at Lien Chou, in Kwangtung, in which

he states that Chinese converts to the Christian religion in that prefecture are not allowed to compete at the Government examinations. The matter has been frequently reported to the magistrate of the prefecture by the missionaries, but, while admitting that Christians have the right to enter the examinations, he states that he can do nothing to compel the examiners (Ling Pao) to admit them. The viceroy has year after year been appealed to, through the American consul at Canton, in behalf of the converts. His reply has uniformly been that Christians may compete, but this has had no effect in removing the prohibitions under which they suffer at Lien Chou.

"The principle of religious toleration has been accepted by the Chinese government in treaties with many, if not all, western powers. It is expressly declared in Article XXIX. of the treaty made with the United States in 1858 that those who quietly profess Christian doctrines shall in no case be molested. In Article XII. of the treaty with France of the same year the Chinese government formally abrogates all that has heretofore been officially proclaimed or published against the Christian religion, and this abrogation was reaffirmed less than two years ago in an arrangement entered into by your highnesses and your excellencies with the French minister at Peking. The principle of religious toleration has been repeatedly proclaimed by the Emperor and there is no question that an attempt to place Chinese converts to Christianity under civil disabilities, because of their faith, is a violation of the laws of China as well as of the treaties with foreign powers. So freely is this principle accepted by the government and high officials of China that the defiance of it by obscure local officials in Kwangtung is presumption meriting the most severe punishment.

"I request you to issue stringent orders to the authorities at Lien Chou that no Christian qualified to present himself at any examination shall be hindered or discriminated against because of his religious belief."

Mr. Denby, min. to China, to the Tsung-li Yamên, April 9, 1897, For. Rel. 1897, 83.

Approved by Mr. Sherman, Sec. of State, May 18, 1897, For. Rel. 1897, 84.

As to missionaries in China, see Mr. Denby, min. to China, to Mr. Bayard, Sec. of State, No. 221, Oct. 9, 1886, For. Rel. 1886, 96. The stipulations of art. 29 of the treaty of 1858 for the protection of Chinese converts to Christianity are confirmed and enlarged by art. 14 of the treaty between the United States and China of Oct. 8, 1903.

October 28, 1900, during the negotiations between China and the powers following the Boxer movement, Mr. Conger inquired whether indemnity for Chinese Christians should be demanded. He stated

that such a demand was strongly opposed by the Russian minister. The United States replied "that peremptory demand should be made for securing religious liberty and rights and full guarantee in the future for Chinese Christians not technically under our protection, as well as exemplary punishment of those who have wronged them. The existing treaty entitles us to this. Should the Chinese government be inclined to allow them compensation for their losses and sufferings it should be accepted as an evidence of desire to make all due reparation, and Mr. Conger is directed to use every endeavor to promote such a result."

Mr. Hay, Sec. of State, to Mr. Conger, min. to China, paraphrased tel., Oct. 30, 1900, For. Rel. 1900, 224.

See Mr. Adee, Act. Sec. of State, to Mr. Woodbury, Sept. 18, 1900, 248 MS. Dom. Let. 46.

Mr. Denby, minister to China, February 6, 1896, enclosed to the Department of State translations of certain papers, handed to him, in Chinese, by the French minister at Peking, relating to an order issued by the Tsung-li Yamên to the local authorities to expunge from the Chinese code all clauses placing restrictions on the propagation of the Christian religion. (For. Rel. 1896, 87–89.)

Gunboats of the United States have the right to visit inland ports of China, including those which are not treaty ports, for the purpose of protecting the lives and property of American citizens. Article 52 of the British treaty of 1858, which is reproduced in article 34 of the Austro-Hungarian treaty of 1869, gives full authority for this course, through the most-favored-nation clause.

Mr. Hay, Sec. of State, to Sec. of Navy, Oct. 7, 1903, For. Rel. 1903, 90.

9. Purchase of Land.

§ 805.

The taotai of Nanking, Feb. 11, 1893, gave notice that "henceforth when missionaries, or other citizens of the United States, desire to acquire land and houses, . . . " they must first meet the gentry and elders of the place, and agree with them." By Art. XII. of the treaty between the United States and China, citizens of the United States desiring to buy land are not required to submit the question to the elders and gentry. But, as the terms of the treaty were applicable only to treaty ports, and as Nanking was not one of these, the measure in question, although its adoption at a treaty port "would undoubtedly be a contravention of the treaty," did not afford a ground of intervention. "Your good offices and those of the consul at Ching-Kiang should, however, be used, when available, to prevent abrupt reversal of any established custom at Nanking whereby

the tolerance heretofore accorded in this regard to foreigners there, as in other parts of China, may be impaired or destroyed. The acquisition of land by foreigners outside of the treaty ports being a matter of permission and usage, fortified by long observance, it is desirable that transactions to that end should, as far as practicable, be the same as in localities where the right is stipulated by treaty."

Mr. Gresham, Sec. of State, to Mr. Denby, min. to China, June 5, 1893, For. Rel. 1893, 233.

A long standing dispute between the missionaries and the local authorities at Kiungchow, in the island of Hainan, over a piece of property, in the acquisition of which fraud was alleged, culminated in the forcible seizure of the land by the authorities and the ejection of the occupants.

In this situation the legation of the United States at Peking, taking into consideration all the antecedents of the case, instructed the United States consul at Canton as follows:

"Without putting faith in the Chinese authorities' charges of fraud in the acquisition of this land, I am of opinion that it would be advisable for the mission to give up the land in dispute, take back their purchase money, and agree with the authorities on another site of which they may have peaceable possession. Article XVII. of the treaty of 1844 provides that Americans, in acquiring land, shall not unreasonably insist on particular spots. Article XII. of the treaty of 1858 contains the same provision.

"The viceroy being now directed to investigate this case, the time seems favorable for you to cooperate with him in bringing it to a conclusion. I hope you will be successful in inducing the Chinese authorities and the members of the mission to agree upon a site which may be acquired without opposition and held in peaceful possession."

This instruction was approved as "judicious and in the line of the treaty stipulation requiring mutual agreement as to mission sites."

Mr. Denby, jr., chargé, to Mr. Gresham, Sec. of State, June 18, 1894, For. Rel. 1894, 146; Mr. Adee, Act. Sec. of State, to Mr. Denby, jr., Aug. 8, 1894, id. 149.

The viceroy consented to select a site in cooperation with the missionaries. (For. Rel. 1894, 149.)

"As most encouraging to the future peaceful residence of our citizens in China, it may be mentioned that the Chinese government has extended to our citizens the right to purchase land—a right which it had previously conceded to France."

Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxv.

The different agreements between France and China concerning the rights conceded to religious communities in China to hold real estate, result-

ing from the exchange of notes between the French representatives and the Tsung-li Yamên, have never been made public, on account of their confidential character. (See Mr. Hay, Sec. of State, to Mr. Porter, amb. to France, No. 905, May 31, 1901, MS. Inst. France, XXIV. 393.)

10. Treaty Ports, and Foreign Settlements.

§ 806.

Of the ports of China now (April, 1906) open to trade, I am indebted to Mr. O. P. Austin, chief of the Bureau of Statistics, Department of Commerce and Labor, for the following list, which, if not absolutely, is believed to be practically, complete:

Province of Anhwei: Wuhu.
Province of Chehkiang: Hangchau; Ningpo; Wenchau.
Province of Chili: Chingwantao; Tientsin.
Province of Fukien: Santuao; Fuchau; Amoy.
Province of Holunkiang (Manchuria): Aihun; Hilar; Manchuli; Tsithar.
Province of Hunau: Yochou; Chang sa.
Province of Hupeh: Ichang; Shasi; Hankow.
Province of Kiangsu: Haichou; Chinkiang; Nankin; Suchau; Shanghai; Kiukiang.
Province of Kirin (Manchuria): Sanhsing; Changchun; Hunchun and Ninguta; Harbin.
Province of Kwangsi: Wuchau; Lungchau.
Province of Kwangtung: Swatau; Canton; Samshui; Kongmoon; Kowloon; Lappa; Kiungchau; Pakhoi.
Province of Shantung: Tsinan; Chefoo; Kiaochau.
Province of Shengking (Manchuria): Fatumen; Hsinmintun; Fenghwangcheng; Liaoyang; Mukden; Tungkiangtsu; Tieling; Tatungkou; Antung; Newchwang.
Province of Szechuan: Chung-king.
Province of Yunnan: Mengtse; Szemao; Tengyueh.

In the treaty between the United States and China, of 1844, it was agreed, as had previously been done in the treaty between Great Britain and China, that five ports should be opened to residence and trade, viz, Amoy, Fuchow, Kwang-Chow, Ningpo, and Shanghai. By the treaties of 1858 it was agreed that the open ports should be Canton and Chau-Chau or Swatau, Amoy, Fuh-chau (Fuchow), Taiwan, Ningpo, and Shanghai.

The French concession and the international concession, known as "the foreign settlement," at Shanghai, the American concession being merged in the foreign concession, were organized more than forty years ago. They adjoin each other, and extend in an easterly direction along the Whampoa. In 1896, in consequence of the increase of the foreign population, the diplomatic corps at Peking, through its dean, asked for an extension of the Anglo-American and French

concessions. The Chinese government made an unfavorable reply, and the conduct of the matter seems then to have been left to the consuls at Shanghai. In December, 1898, Mr. Conger, United States minister at Peking, reported a protest of the representatives of the powers against a separate extension of the French concession, and stated that he had remonstrated against any extension "which will bring American-owned property under the jurisdiction of any single foreign power." His remonstrance was approved to this extent, and its validity seems to have been admitted by the French consul, who offered to provide that the right to trial in the American court and of registry of land in the American consulate would be respected should the proposed French extension embrace American property or interests.

Subsequently the French ambassador at Washington complained that the English and American consuls at Shanghai, with the approval of their ministers, were seeking to induce the Chinese authorities of the port to add to the international concession two quarters on the west and southwest of the French concession, on the left bank of the Whampoa, which were intended by the common plan of 1896 to be eventually added to the French concession. It was represented that if their efforts succeeded, the French concession, being inclosed on three sides by the foreign settlement and on the fourth by the Whampoa, would become incapable of enlargement; and the United States was requested to instruct its agents not to deviate from the plan of 1896, *so far as related to the directions* in which the foreign settlement was to be enlarged.

The United States replied that its consul-general at Shanghai had, on January 8, 1900, reported that the Chinese government offered to grant a settlement, open to all nations in common, and that the British and German consuls were favorable to such an extension "for the residence of all foreigners." Although each power would, as an abstract proposition, be entitled to an equivalent separate extension should any be granted to France or to any other single power, yet the United States had not supported any application for a specific American extension, nor had it any desire to do so if it would prevent an equal privilege of extension on the part of France or any other treaty power. But, although the United States was "disposed to favor a general extension for the benefit of all the treaty powers," a more definite reply was promised on the receipt of further information from Peking.

Mr. Hay, Sec. of State, to M. Cambon, French amb., April 20, 1889, For. Rel. 1899, 281, in reply to a note of M. Cambon of March 29, 1899, id. 279.

Subsequently, the Department of State said: "The United States withdraws its opposition to the proposed extension of the French

concession at Shanghai, upon the condition, however, that the French government will guarantee to the United States full extraterritorial rights over any American-owned property which may be, at the date of this assent, situated in the territory that is to be added to the French concession, as well as over the American owners of such property."

Mr. Hay, Sec. of State, to M. Cambon, June 12, 1899, For. Rel. 1899, 283. When this note was written the Department of State was in receipt of a dispatch from Mr. Conger, United States minister at Peking, of March 24, 1899, stating that the additional tract sought by the French was a small one, immediately adjoining their concession, and not desired for the general settlement, and that, while it included some British and American owned property, the French minister promised that such property might be excepted from their exclusive jurisdiction. (For. Rel. 1899, 145.)

"I have to acknowledge the receipt of your despatch No. 228, of the 5th July last, wherein, complying with the Department's instruction No. 168, of April 22, 1899, you report in relation to the arrangements for the extension of the international and French settlements at Shanghai.

"The arrangement you report, by which, in addition to a definite demarkation of the extension granted to the so-called foreign or international settlement, a small extension of the separate French settlement toward the south is defined and marked, appear to be open to no valid objection on our part, inasmuch as the contemplated French extension is stated by you to include no American-owned property whatever, and to be, moreover, in substantial accord, so far as France is concerned, with the agreement reached by the diplomatic corps in 1896. It seems also to be in the line of the Department's instruction to you, No. 168, of April 22 last.

"In your later despatch, No. 231, of July 12, you state that the amended land regulations fixing the boundaries of the extended international settlement, which were sent up to Peking by the Shanghai consular body for formal approval by the diplomatic corps, have been approved by all the corps except the French and Russian ministers. This course meets with approval so far as your action is concerned.

"It appears from your despatch No. 231 that the French and Russian ministers make their approval conditional upon the maintenance of the agreement made in 1896 for the extension of both the international and the French settlements.

"The Department sees no present occasion for opposing the condition asked by the French minister. The opposition lately shown by this government to such extension rested upon the fact that the land at first claimed by the French government included the American-owned hospital, school, and missionary property designated on the

map which you send; and our objection was based upon the undesirability of admitting exclusive jurisdiction by the French over such American property. As the line of the proposed French extension has now been drawn so as to carefully exclude the property mentioned, while no other American-owned property seems to be affected, that objection disappears, and the Department is unaware of any fresh objection on the ground of injury to present or prospective American interests. It is, however, without any information respecting any claim of the Russian government to an independent Russian settlement at Shanghai, and is unaware whether any American-owned property is, or is likely to be, affected thereby. If there be any such property included in the Russian claim, the instructions heretofore given you in respect to the French claim will hold good, and you will be authorized to make specific objection on like ground.

"As was said in Mr. Hay's instruction, No. 168, of April 22, the intention of this government is that 'while reserving all rights of equality of treatment for the United States in whatever solution may be eventually arranged, any steps that you may adopt toward reaching such a solution shall be taken in a spirit of mutual consideration, giving to all ascertained foreign interests in the premises the same respect as you shall ask for the interests of the United States.'

"You will bear this in mind should you ascertain that the British objection to the French extension, the specific grounds of which you had not, at the time of writing, been able to learn, is one in which foreign interests, including those of the United States, may properly share. In the absence of knowledge on this point the Department is not able to instruct you more precisely at present, but leaves the matter to your good judgment, subject to instructions should the circumstances seem to you to require them."

Mr. Adee, Acting Sec. of State, to Mr. Conger, min. to China, Aug. 26, 1899, For. Rel. 1899, 149.

In his No. 228, of July 5, 1899, above referred to, Mr. Conger said: "I believe the exclusive jurisdiction claimed in the French settlement has never been conceded by either the representatives of Great Britain or the United States. But the small extension of territory will change the situation as to this question neither for better or for worse, and it seems to me that it may properly be left for adjustment, if necessary, apart from the question of territorial extension." (For. Rel. 1899, 148.)

See Mr. Adee, Second Assist. Sec. of State, to Mr. Goodnow, consul-general at Shanghai, Nov. 6, 1899, 169 MS. Inst. Consuls, 640.

As to the original adoption of land regulations at Shanghai for the foreign settlements, see Mr. Seward, Sec. of State, to Mr. Browne, No. 14, Jan. 9, 1869, MS. Inst. China, II. 42.

As to the Shanghai municipal ordinances, see supra, § 273; Mr. Fish, Sec. of State, to Mr. Williams, No. 5, Dec. 4, 1869, MS. Inst. China, II. 88.

As to the mixed court at Shanghai, see supra, § 275.

In 1869 three tracts of land were laid out at Tientsin as concessions, or places of settlement, for American, English, and French residents. In 1880 the American concession was relegated to its former condition, with the understanding that an arrangement should be made if it should in future be desired to establish municipal regulations there; and in 1896 the United States relinquished its claim to the tract.

In 1900 and 1901 the governments of Russia, Belgium, France, Austria-Hungary, Italy, Japan, and Germany having given notice of the acquisition of new concessions or the enlargement of old ones, as the case may be, the United States sought to obtain the restoration of its former concession. It transpired, however, that practically all the land in it had come into the possession of two private companies: and in view of this circumstance the United States deemed it undesirable to press the matter further for the time being. It was stated, however, that the government of the United States would expect to have equal favors and facilities with other powers for military purposes at Tientsin should it at any future time become necessary to carry out the purposes of the protocol of Sept. 7, 1901, with respect to keeping open communication between Peking and the sea: and that, if effective assurance in this regard should be given, the question of a commercial concession might be left in abeyance till the development of commerce in that quarter should make it necessary to claim privileges and facilities on the same footing as other powers.

Mr. Hay, Sec. of State, to Mr. Conger, min. to China, Nov. 27, 1901, For. Rel. 1901, 58. See, also, pp. 39, 41–57.

For a review of the history of the American concession at Tientsin, see Mr. Olney, Sec. of State, to Mr. Denby, min. to China, No. 1175, Oct. 18, 1895, MS. Inst. China, V. 265.

"Preliminary negotiations regarding the concession [for a Japanese settlement at Amoy] closed 25th of October. The papers were signed by the Japanese consul, Uyeno, the taotai and acting provincial treasurer, Chew, of Fuchau.

"The area of the concession is about 40,000 ken (one ken equals 6 feet.) The amount of land actually included in the concession measures only 28,000 ken. The Japanese may reclaim enough foreshore in front of the concession to make up the 40,000 ken.

"The houses owned by individuals within the concession are to be purchased by the Japanese, when wanted, at a price to be agreed upon with the Chinese commercial committee.

"There was no formal public ceremony in connection with the transfer, and actual possession was not marked by any overt act or notice to the public beyond the posting of a proclamation by the taotai, several days previous to the signing of the paper, setting forth

the fact that such a settlement was about to be granted, explaining its nature, and urging the people to make no demonstration, as their property rights would be protected.

"The Chinese officials seem to think that the terms of the agreement are very satisfactory from their standpoint.

"The ground included in the concession is not only very limited in area, but is far from being conspicuous on account of its desirability. It has been kept within the limits suggested to me by the Japanese consul at the time I remonstrated against the granting of the large area first surveyed by the Japanese and Chinese officials, which facts have been fully reported by me.

"Owing to the disturbance at the time the boundaries were being marked, it was deemed advisable by Japanese to avoid all public demonstration and rest content for the present with the adjustment of the matter on paper.

"Further resistance on the part of the inhabitants is not anticipated."

Mr. Johnson, consul at Amoy, to Mr. Conger, min. to China, Nov. 21, 1899, For. Rel. 1899, 153.

Pending the negotiations the Department of State, on a request for instructions, directed Mr. Johnson "to remonstrate against any interference with or discrimination against any legitimate American rights."

"This was intended to prevent possible transfer of existing American rights to Japanese administration. He [Mr. Johnson] has not been instructed to ask an American concession, but if China is disposed to grant separate concessions at Amoy, we should expcet no less consideration than any other friendly powers."

Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., March 24, 1899, For. Rel. 1899, 152.

"No effort is at present being made to obtain an international foreign settlement, nor secure to American interests privileges equivalent to those granted to Japan. The few Americans there do not need such a concession, nor could they afford the expense of controlling and keeping it up." (Mr. Conger, min. to China, to Mr. Hay, Sec. of State, Dec. 9, 1889, For. Rel. 1899, 153.)

"Under the treaty of peace between the Empires of China and Japan, five new ports have, under the general provisions of the favored-nation clause of our treaty with China, become opened to American trade. At one of these, Chungking, the great emporium of western China, this government has now a consul, Congress having appropriated for that post during its last session. The interests of many American citizens residing in the remoter parts of western China will now be better and more promptly attended

to, and it is confidently believed that the establishment of this consulate will also contribute to further develop American trade with this rich section of the Chinese Empire."

Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxv.

August 23, 1896, the Tsung-li yamên notified Mr. Denby that, by virtue of article 6 of the treaty of Shimonoseki, between China and Japan, Shashih, Chungking, Soochow, and Hangchow were to be opened as treaty ports, so that trade might there be carried on, and that regulations would be drawn up later. The Yamên had decided that Soochow and Hangchow should be opened on the 26th of September, but Mr. Denby was requested to instruct American merchants that they must not carry on trade at those ports till the customs had been duly established. (For. Rel. 1896, 98–99.)

For the text of the treaty of peace between China and Japan, signed at Shimonoseki, see For. Rel. 1895, I. 200–203.

Mr. Conger, in his No. 208, June 2, 1899, reported that Nanking had been opened as a treaty port. (Mr. Hay, Sec. of State, to Mr. Conger, min. to China, No. 195, July 28, 1899, MS. Inst. China, VI. 9.)

Chi-nan-fu, in Shantung, was opened to foreign trade May 17, 1904, and as branches of it Wei-hsien and Chou Ts'un were also opened. (For. Rel. 1904, 167.)

"The Department's instruction to you (No. 1502, of the 16th ultimo) acknowledged the receipt of your dispatch No. 2794, of the 30th of August last, concerning the right of an American citizen to establish business quarters in the city of Hangchow outside of the limits of foreign concessions, and acquiesced in your conclusion, that in view of the attitude of the other powers on the question you would refrain from further insistence upon such rights in behalf of American citizens unless the diplomatic body should unite in a demand for unrestricted residence in cities open to trade, or unless the right of residence should be exercised by citizens of other powers.

"The circumstances of the question which had regard to the right of residence at Soochow and Hangchow, two of the cities recently opened to foreign residence under the treaty of Shimonoseki, of April 17, 1895 (printed in Foreign Relations, 1895, pp. 200–203), had been presented in your previous dispatches, Nos. 2785, 2787, and 2789, and were made the occasion of an exhaustive examination by the Solicitor of this Department, with the conclusion that the circumstances would not warrant insistence by this government upon a contention for the unrestricted residence of American citizens outside of those foreign concessions, unless the privilege claimed by them be claimed for and conceded to the subjects of Japan or of other nations, in which event this government would be in a position to claim it under the operation of the most-favored-nation clause."

Mr. Sherman, Sec. of State, to Mr. Denby, min. to China, Nov. 30, 1897, For. Rel. 1897, 76, enclosing a report of Mr. Penfield, Solicitor of the Department of State, of Nov. 23, 1897.

"The purpose of the neutral powers is primarily the protection of their own interests at the several treaty ports. The foreign settlements at the open ports are singularly abnormal growths. Under no one flag, they are under the protection of all. In whatever concerns their trade, their shipping, and their vested interests, they are distinctively foreign to the administrative system of China.

"Hence, as you have lately learned, when the possible closing of Canton by the Chinese as a measure of protection against threatened French aggression was seriously contemplated, the other treaty powers felt justified in expecting of France a formal declaration of purpose not to attack Canton. The view of the United States, as expressed to Great Britain, was that neither China nor France had the right to close the treaty ports, but that if they should be attacked by France, China could not be denied a right of defense, to be availed of in any manner legitimate to a state of war."

Mr. Frelinghuysen, Sec. of State, to Mr. Young, No. 239, Mar. 21, 1884, MS. Inst. China, III. 563.

See, to the same effect, same to same, Jan. 22, 1884, id. III. 530.

During the war that ensued between France and China in 1884, the naval commanders of the neutral powers, acting in conformity with an arrangement made between those powers in 1883 with a view to protect their interests in the event of hostilities, cooperated for the protection of neutral interests in the treaty ports. To this end the naval commanders entered into a joint agreement as to the measures to be pursued. The agreement was a temporary expedient, and ceased on the return of peace.

Mr. Frelinghuysen, Sec. of State, to Mr. West, British min., July 17, 1884, MS. Notes to Gr. Br., XIX. 520; Mr. Bayard, Sec. of State to Mr. West, Sept. 5, 1885, id. XX. 171; Mr. Bayard to Mr. Denby, No. 99, Aug. 19, 1886, MS. Inst. China, IV. 186.

See Mr. Gresham, Sec. of State, to Sir J. Pauncefote, Dec. 19, 1894, MS. Notes to Gr. Br. XXII. 659.

"In the summer of 1884 the French attacked and destroyed the Chinese fleet and the Maimoi arsenal at Pagoda anchorage, nine miles below Foochow, on the Min River, but the city was not occupied, the French forces leaving the river a few days after the fight. There are, however, on record several cases of occupation of treaty ports of China by foreign troops, notably the occupation of Canton by the Anglo-French forces from 1857 to 1861 and that of Shanghai by the British from 1860 to 1866."

Mr. Uhl, Act. Sec. of State, to Sec. of Navy, May 24, 1895, 202 MS. Dom. Let. 323.

"The attitude of the United States towards China, as towards the other countries of Eastern Asia, has been consistently a friendly one. We have not attempted to impose our views upon them by force, but have preferred to trust to frank and friendly argument, limiting our demands to what we might with justice ask, and supporting them with frank argument and appeals to the sense of justice of the imperial government; we have been met in a like amicable spirit, and it is believed that the result has been for the advantages of both the nations. As a result of this policy, citizens of the United States have established themselves in the open ports of China, have there engaged in legitimate and useful occupations, benefiting China no less than themselves, and the United States have there invested their capital and the fruits of their labor, and have done all this under the express protection of wise treaty provisions binding upon the imperial government and all Chinese officials. The United States can not assent at this late day to a return to the ancient exclusive system, which will involve destruction of the property of their citizens and abrogation of their vested rights."

Mr. Frelinghuysen, Sec. of State, to Mr. Young, Feb. 26, 1883, MS. Inst. China, III. 396.

At the instance of the Tsung-li yamên, Mr. Denby in 1896 issued stringent instructions to the United States consuls in China to take all possible steps to prevent counterfeiting or the importation of machinery intended to be used for that purpose. (For. Rel. 1897, 107–109.)

By a note of Aug. 7, 1903, Prince Ch'ing informed the dean of the diplomatic corps that as Peking was not a treaty port, foreign merchants would not in future be permitted to buy property there for dwellings or to establish places of business there, the government thus returning to the old regulations, which, after the occupation of the city by the allies in 1900, were in certain cases not observed. The United States made no reply to the note, hoping thus to leave the matter open for discussion as events might require.

For. Rel. 1903, 119–122.

11. Leases to European Powers.

§ 807.

March 9, 1898, Mr. Denby, United States minister at Peking, transmitted to this government a translation of a memorial of the Tsung-li yamên to the Throne in relation to the demands made by Germany in connection with the killing of two German missionaries in the province of Shantung, and to the seizure of Kiaochou. The memorial concludes as follows:

"Considering that there has never been any disagreement existing

between China and Germany, and that the German government came to the assistance of China in securing the evacuation of the Liao-tung Peninsula by the Japanese for which she has never been recompensed; and further, as England, France, and Russia have taken maritime ports in the East, and as Germany has no port as a rendezvous for her vessels and for a coaling station, her position is not equal to the other great powers. Your memorialists have on several occasions received notes and telegrams from Hsu Ching Cheng, Chinese minister to Germany, stating that Kiaochou is the place that Germany has been longing for, hence in February of last year your memorialists asked the sanction of Your Majesty to the building of a dock there. The question of devising some arrangements was therefore taken in hand. In November last the missionary case occurred, and Your Majesty issued a decree ordering Li Ping Heng to cause the arrest of the murderers. That the Germans were planning to get a maritime port, Your Majesty had received due notice of. As a result of the murder of the two missionaries the German vessels of war seized Kiaochou and sent detachments of troops on shore. They went straight to the district city of Chi Mo for the purpose of making observations. The German Emperor has deputed his brother to come to China in command of some vessels of war, and it is impossible to ascertain his purpose.

"The German minister submitted in connection with the missionary case six demands which he insisted should be complied with on the part of China, but he would not say a word as to whether Germany would evacuate Kiaochou. Your memorialists corresponded and argued the question with the German minister. He finally stated that Germany wished to lease Kiaochou and territory inland, extending 100 li, upon the same conditions as the settlements and concessions at the ports, the rent to be paid annually; that the territory should be self-governing, i. e., under Germany, but still belong to China. He sent a communication on the question of leasing this territory, containing five articles, which in the general had for their object the preservation of friendly relations between the two countries. Your memorialists, after due consideration of the terms proposed, decided that the territory should be leased for a period of ninety-nine years, the boundary line inland to be fixed by officials duly appointed for the purpose by the two governments, and to extend 100 li round on all sides.

"Chinese vessels of war and merchant vessels can enter and leave Kiaochou at pleasure.

"As there are dangerous sandbanks around the islands outside of Kiaochou, permission is granted Germany to lay bouys. No dues shall be levied on Chinese naval and merchant vessels on entering

and leaving port. Should Germany wish to hand over Kiaochou to China, China agrees to pay Germany the money she has expended on the place and China will select another suitable port for Germany. This refers to Kiaochou being handed over to China before the expiry of the lease. It is understood that during the term of the lease Germany shall not interfere or remove any of the Chinese lekin stations now established; these shall remain where they are located. Germany is to withdraw her troops stationed outside of the 100-li limit. As to the amount of rent to be paid by Germany, your memorialists will consider this question with the German minister, so that there may be no misunderstanding.

"Your memorialists submit the foregoing to Your Majesty and reverently await your decision in the premises.

"Your memorialists would further state that they have written to the governor of Shantung, so that he may devise all necessary arrangements. Germany commenced all this trouble, and many of the foreign powers have shown a desire to interfere in the matter.

"The Chinese and foreign papers and telegrams have all contained comments on it, and your memorialists decided that China and Germany should alone discuss and decide the questions at stake, and that foreign powers should not be allowed to mediate in the matter, as it is certainly known that foreign powers are not sincere in their purpose to come to China's assistance in the present emergency; it is in appearance only.

"China has suffered a great deal, and there is just a possibility that foreign powers in their contest with each other are merely making China a battlefield, which renders it most difficult for her to do anything.

"The present affairs should therefore be brought to a speedy termination."

For. Rel. 1898, 187, 189.

The convention between the German Empire and China, signed at Peking, March 6, 1898, in conformity with the foregoing memorial is given in Rockhill's Treaties and Conventions with and concerning China and Korea, 46, from *Das Staatsarchiv*, vol. 61, No. 11518. The convention declares that "the incidents connected with the mission in the prefecture of Tsao-chau-foo, in Shantung, being now closed, the Imperial Chinese Government consider it advisable to give a special proof of their grateful appreciation of the friendship shown to them by Germany." It then concedes, subject to China's "rights of sovereignty," in "a zone of 50 kilom. (100 Chinese *li*) surrounding the Bay of Kiao-chau at high water," the "free passage of German troops" at any time. China also agrees "to abstain from taking any measures, or issuing any ordinances therein, without the previous consent of the German Government," while reserving "the right to station troops" there, "in agreement with the German Government, and to take other military measures." China also "cedes to Ger-

many on lease, provisionally for ninety-nine years, both sides of the entrance to the Bay of Kiao-chau," and engages to "abstain from exercising rights of sovereignty in the ceded territory during the term of the lease." China "sanctions the construction by Germany of two lines of railway in Shantung;" and agrees to "allow German subjects to hold and develop mining property for a distance of 30 *li* from each side of these railways and along the whole extent of the lines." China also engages "in all cases where foreign assistance, in persons, capital, or material, may be needed for any purpose whatever within the province of Shantung, to offer the said work or supplying of materials in the first instance to German manufacturers and merchants engaged in undertakings of the kind in question."

Kiao-chau was declared a free port on Sept. 2, 1898. (Reichsanzeiger, Sept. 5, 1898.)

By a convention signed at Peking March 27, 1898, the Emperor of China, "in order to provide for Russia a suitable base on the northern coast of China, and thereby to render her naval position complete and secure," agreed to lease to Russia for the term of twenty-five years, subject to prolongation by mutual agreement, Port Arthur and Talien-wan, with their adjacent waters, as a depot of military and naval supplies, to be fortified and defended by Russia and administered by Russian officials, it being provided that the "sovereign rights" of China should not be "impaired" by the transaction, but also that Chinese troops should be excluded from the leased territory, and, except with Russian permission, from a space to the north, which was to be left uninhabited. It was agreed that Port Arthur should be regarded as a naval station, to be used by Russian and Chinese ships only, and to which neither the men-of-war nor the merchantmen of any other power should have access. Of Talien-wan, one port was to serve as a naval station for Russia and China, but the rest to be "a commercial port, open for the ingress and egress of the ships of all nations." It was further agreed that Russia might construct a railway to Talien, and a branch line from a point between Newchwang and the Yalu River to the seacoast.

The leased territory extended 160 li (53 miles) from north to south, and 70 li (23 English miles) from east to west.

The government of the United States was immediately informed by the Russian legation at Washington that the territory had been "ceded to Russia in usufruct by the Chinese government; that the above-named ports and territories will be immediately occupied by the troops of His Majesty the Emperor of Russia; that the port of Talien-wan will be open to foreign commerce, and that vessels of all friendly nations will be received there with the utmost hospitality."

Subsequently, notice was given that all foreigners desiring to visit either Port Arthur or Talien-wan must bear passports duly viséed by

a Russian consulate, but this was afterwards modified by making the visé optional.

For. Rel. 1898, 182, 183, 184, 185–187.

"The extension of the area open to international foreign settlement at Shanghai and the opening of the ports of Nanking, Tsing-tao (Kiao chao), and Ta-lien-wan to foreign trade and settlement will doubtless afford American enterprise additional facilities and new fields, of which it will not be slow to take advantage." (President McKinley, annual message, Dec. 5, 1899, For. Rel. 1899, xviii.)

"Kwangchau Bay, which has been recently ceded to the French government for ninety-nine years, is situate on the southwestern coast of China, in the district of Leichou, Kwangtung Province. The harbor is said to be a good one. The country back of it is highly productive. One of the chief products is sugar."

Mr. Denby, min. to China, to Mr. Sherman, Sec. of State, April 20, 1898, For. Rel. 1898, 191.

"I have learned from good authority that China has ceded Wei-hai-wei to Great Britain on the same terms that Port Arthur has been ceded to Russia. Wei-hai-wei is an excellent harbor, much larger, and better than Port Arthur. It is exactly at the mouth of the Gulf of Pechili, and is the nearest point on the Gulf to Korea. It commands the Gulf. It is about 40 miles from Chefoo and 80 from Kiaochou. It is supposed here that it will be a second or northern Hongkong. I do not suppose that Wei-hai-wei will be a treaty port; but it will be an open port. There will be no tariff, and the commerce of the world will be treated fairly."

Mr. Denby, min. to China, to Mr. Sherman, Sec. of State, April 5, 1898, For. Rel. 1898, 190.

"The convention leasing to Great Britain Mirs Bay, Deep Bay, and the adjacent islands near Hongkong, was signed yesterday by the Chinese government. It will take effect from and after the 1st of July next."

Mr. Denby, min. to China, to Mr. Day, Sec. of State, June 10, 1898, For. Rel. 1898, 190.

The President of the United States in no case supported the application of a foreign power for a lease of Chinese territory; and the American minister at Peking was instructed to govern himself accordingly, remaining neutral.

Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel. March 2, 1899, MS. Inst. China, V. 649.

September 30, 1898, a mob in the streets attacked foreigners on the way to and from the railway station at Peking. Already foreign

fleets were assembling at Tientsin. On the 7th of October Mr. Conger, American minister to China, reported that the Chinese government was increasing its militia, thus insuring immediate protection, but that the general situation in the Empire was growing serious. The British, German, and Russian ministers had placed large guards in their legations, and other ministers had ordered up guards from the fleets at Tientsin. The Chinese government at first protested against the bringing of any foreign troops to Peking, but afterwards, on the unanimous request of the diplomatic corps, furnished a special train and an escort for them. A guard of marines was sent to the American legation. It remained through the winter, but left in March, 1899.

September 21, 1898, the Emperor of China issued a decree declaring the Empress Dowager coregent, and she assumed full power.

For. Rel. 1898, 217, 218–219, 225–227, 228–232, 239, 240–242.

"Meanwhile, there may be just ground for disquietude in view of the unrest and revival of the old sentiment of opposition and prejudice to alien people which pervades certain of the Chinese provinces. As in the case of the attacks upon our citizens in Szechuan and at Kutien in 1895, the United States minister has been instructed to secure the fullest measure of protection, both local and imperial, for any menaced American interests, and to demand, in case of lawless injury to person or property, instant reparation appropriate to the case. War ships have been stationed at Tientsin for more ready observation of the disorders which have invaded even the Chinese capital, so as to be in a position to act should need arise, while a guard of marines has been sent to Peking to afford the minister the same measure of authoritative protection as the representatives of other nations have been constrained to employ."

President McKinley, annual message, Dec. 5, 1898. For. Rel. 1898, lxxiii.

12. Boxer Movement.

(1) Siege and relief of legations.

§ 808.

Antiforeign movement; the Boxers.

In a despatch of December 7, 1899, Mr. Conger, United States minister to China, reported "a very critical state of affairs among the missionaries and their converts in certain parts of Shantung." He mentioned the appearance in the preceding October of a secret society called Boxers, who, in pursuit of their avowed object of driving out foreigners and extirpating Christians, had come into collision with the authorities.[a]

[a] For. Rel. 1900, 77.

Subsequent disorders arising from the same source and the attitude of the government towards them, formed the subject of later correspondence.[a]

By an imperial decree of January 24, 1900, P'u Ch'un, grandson of Prince Tuan and a brother of the Emperor's father and of the late Prince Kung, was designated as heir apparent.[b]

January 29, 1900, Mr. Conger reported that the numbers of the Boxers and Big Sword Society were daily increasing, and that more serious trouble was threatened.[c]

March 9, 1900, Mr. Conger cabled that the missionary troubles were still spreading, and that the situation was very critical. The ministers of England, France, Germany, Italy, and the United States had sent to the foreign office a second identical note demanding the publication of a strong imperial decree without delay. Mr. Conger and his colleagues telegraphed their respective governments that if the Chinese government should refuse this request a naval demonstration should be made in North China waters.[d]

The government of the United States replied that the Navy Department would detail a ship "for independent protection American citizens and interests in China."[e] Mr. Conger was also instructed to impress upon the Chinese government that the United States, by the recent assurances which it had obtained from the various great powers holding leased territory or areas of influence in China, concerning the freedom of trade in such regions and the maintenance therein of China's rights of sovereignty, "has obtained thereby a renewed assurance of the policy of the treaty powers not to interfere with the integrity of the Chinese Empire.[f]

In a subsequent instruction, relating to the native antagonism excited by German enterprises in the Province of Shantung, Mr. Conger was directed to say to his German colleague "that the government of the United States feels that under the circumstances of the case it can expect that the German authorities in Shantung will see to it that American citizens, and particularly American missionaries in that quarter, shall receive equal treatment with Germans in the matter of necessary protection of life and property. . . . This friendly reliance on German protection within the effective zone of German occupation or action does not, of course, prejudice the course of this

[a] For. Rel. 1900, 86–91.

[b] For. Rel. 1900, 91, 92.

[c] For. Rel. 1900, 93.

[d] For. Rel. 1900, 102–109.

[e] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., March 15, 1900, For. Rel. 1900, 110.

[f] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, March 22, 1900, For. Rel. 1900, 111.

government with respect to the due protection of our citizens in the remoter interior beyond the limits of German control."[a]

May 14, 1900, Mr. Conger reported a native attack upon the British and Chinese commissioners, who were marking the boundary of the British leased territory of Wei-hai-wei, under the impression that they were foreigners who had come to take possession of the territory and oppress the natives with increased taxes.[b]

May 21, 1900, Mr. Conger cabled that the Boxers had greatly increased in and around Peking; that a village forty miles from Peking had been burned; that sixty native Catholics had been killed, but no foreigners attacked. The diplomatic corps had demanded immediate effective measures and the Chinese government had promised the immediate suppression of the disorders.[c]

Guards for the legations.

May 26 Mr. Conger inquired by telegraph whether he might arrange with the admiral for legation guards.[d] He was immediately authorized to do so.[e] The disorders continued to increase.[f] June 1, 1900, Mr. Conger cabled that 350 English, Russian, French, Japanese, Italian, and American guards had arrived during the preceding night, materially quieting the situation in Peking. The Boxers were still active in the country. There were fifty United States marines, with an automatic gun.[g] Murders and persecutions by the Boxers outside of Peking continued to increase. The Paotingfu railway was temporarily abandoned, and work on the Peking-Hankow line was stopped. Foreigners had fled. The Chinese government either could not or would not suppress the disorders, and the troops did not attack the Boxers. Relations between the factions of imperial advisers were much strained and the general situation was very critical.[h]

Instructions to the American minister.

June 4, 1900, Mr. Conger cabled that the situation was worse; that the railways and telegraphs were cut and that it was possible that Peking might be besieged. In that event, he asked, as his colleagues were doing, that the necessary instructions be given to the admirals to take measures for the eventual delivery of the city.[i] He was authorized, in concert with the naval authorities, to take all measures

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[a] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, April 16, 1900, For. Rel. 1900, 118.

[b] For. Rel. 1900, 126.

[c] For. Rel. 1900, 127; see, also, Mr. Conger, min. to China, to Mr. Hay, Sec. of State, May 21, 1900, For. Rel. 1900, 127–131.

[d] For. Rel. 1900, 131.

[e] For. Rel. 1900, 132.

[f] For. Rel. 1900, 132.

[g] For. Rel. 1900, 132–139.

[h] For. Rel. 1900, 139–141.

[i] For. Rel. 1900, 141.

which might be practicable and discreet for the protection of the legation and American interests generally.[a] Mr. Conger was also instructed: "Act independently in protection of American interests where practicable, and concurrently with representatives of other powers if necessity arise."[b] At the same time he was authorized to join his colleagues in demanding an audience with the Emperor, and to state to the throne "that unless Boxer war is immediately suppressed and order restored foreign powers will be compelled themselves to take measures to that end."[c] This authorization was followed up with an instruction in these words: "We have no policy in China except to protect with energy American interests, and especially American citizens and the legation. There must be nothing done which would commit us to future action inconsistent with your standing instructions. There must be no alliances."[d]

Cutting off of Peking.

Meanwhile the troubles in Peking increased. Foreigners were gathered together in various places, and plans were arranged for the temporary defense of the legations.[e] Prince Tuan, father of the heir apparent, was appointed president of the Tsung-li yamen, with three other ministers, all strongly antiforeign.[f] While the powers were preparing to send a larger force to Peking, in order to strengthen the legation guards and keep the railway open, an engagement took place between the foreign ships (except the American) at Taku and the Chinese forts, and two days later the forts were captured. Complete severance of communication with Peking then followed, and the efforts of the powers to reach the capital were redoubled. Mr. Goodnow, United States consul at Shanghai, cabled on June 25, 1900, that there had been no communication with Peking since the 14th, and that the gravest fears prevailed.[g]

Measures of relief; their object.

"I have communicated to the President the telegrams you showed me from the Viceroys Chang Chih Tung and Liu Kun Yih. He is much gratified at the assurances contained in these telegrams, that these distinguished magistrates are determined and are confident of their ability to maintain order in their various provinces and to protect the lives and the

[a] For. Rel. 1900, 142.

[b] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., June 8, 1900, For. Rel. 1900, 143.

[c] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., June 9, 1900, For. Rel. 1900, 143.

[d] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., June 10, 1900, For. Rel. 1900, 143.

[e] For. Rel. 1900, 144–154.

[f] For. Rel. 1900, 154.

[g] For. Rel. 1900, 248.

rights of foreigners within their jurisdiction. He authorizes me to assure you that so long as this is done he has no intention of sending any military or naval forces into regions where their presence is not needed. I have the pleasure also of informing you that I have communicated the assurances of the viceroys and my answer to you to our representatives at the courts of London, Paris, Berlin, St. Petersburg, and Japan."

Mr. Hay, Sec. of State, to Mr. Wu Ting-fang, Chinese minister, June 22, 1900, For. Rel. 1900, 274.

Chang Chih-tung was viceroy of Hunan and Hupeh provinces; Liu Kun Yih, of the Kiangsu, Kiangsi, and Anhui provinces. Their telegrams represented that the southern provinces were at peace; that they were determined to keep the peace and prevent outrages on foreigners in the five provinces under their rule. They begged the United States, besides instructing the American admiral to send no forces into the Yangtze Kiang so long as peace was preserved in those provinces, to request the other powers to take the same course. (For. Rel. 1900, 273.)

See, also, circular telegrams of Mr. Hay, Sec. of State, to United States representatives at Berlin, London, St. Petersburg, and Tokio, June 22 and July 2, 1900, For. Rel. 1900, 311, 312.

"I have the honor to acknowledge the receipt of a copy of the telegram sent you by His Excellency Chang Chih Tung, viceroy of Hunan and Hupeh provinces, on the 23d of June, in which he informs you that the imperial government has no intention whatever of breaking off friendly relations, and desires that this government shall confer with the governments of the several powers, urging them to telegraph instructions to commanders of their respective forces about Tientsin to refrain from further fighting, and to await until the Grand Secretary Li Hung Chang arrives at Pekin and receives imperial instructions to open negotiations with the diplomatic representatives. His excellency also advises you that the viceroys and governors of the provinces bordering on the Yangtze and the coast have assumed the responsibility and are doing all in their power to afford protection to life and property.

"I have communicated this information to the President, who directs me to acknowledge receipt of your communication, and is greatly gratified to receive the viceroy's assurance that the deplorable events of the last few weeks have been without the the authority and against the wishes of the Chinese imperial government. He is also pleased to learn of the disposition of the viceroys to maintain order in their jurisdiction, and to protect the lives and the property of the foreign residents therein.

"He is unable, however, to give any orders to our naval and military officers in China which would prevent them from doing everything in their power to open up communication with our countrymen

who are in peril of their lives in Tientsin and in Peking, and to assist in the restoration of peace and order where it has been so lamentably disturbed, nor can he engage to recommend such action to the other powers. He sincerely hopes that the imperial government of China, in cooperation with the powers, may speedily provide means to put an end to lawlessness and disturbance, and to provide against their renewal."

Mr. Hay, Sec. of State, to Mr. Wu Ting-fang, Chinese min., June 25, 1900, For. Rel. 1900, 275.

It was stated in the telegram of Chang Chih Tung that it had the concurrence of all the viceroys and governors, and that a like message had been cabled to the ministers of foreign affairs of the different countries. It was represented to have the concurrence of Li Hung Chang, acting viceroy of Kwangtung and Kwangsi provinces and grand secretary; Liu Kun Yih, supra; Yuan Shih Kai, governor of Shantung Province; Wang Chih Chun, governor of Anhui Province, and Yu Lien San, governor of Hunan Province. (For. Rel. 1900, 274–275.)

Instructions were sent to the United States consuls to put themselves in communication with the viceroys as to the preservation of peace and order. (For. Rel. 1900, 276.)

July 5, 1900, the following telegram was sent to Mr. Goodnow: "Assurances of Viceroy Liu cordially appreciated. Now that anarchy controls capital, the President trusts to responsible provincial authorities to maintain order and fulfill treaty and international obligations of Chinese nation." (Mr. Hay, Sec. of State, to Mr. Goodnow, consul-general at Shanghai, tel., July 5, 1900, For. Rel. 1900, 252. Liu, viceroy of Nanking, had assured Mr. Goodnow that he would use his utmost endeavors to protect Americans and all other foreigners in the Yangtze Valley.)

July 11, 1900, the Chinese minister at Washington handed to the Secretary of State a copy of an imperial decree, dated June 29, which had been telegraphed by the taotai of Shanghai, who had received it through various hands from the privy council in Peking. In this decree the responsibility for the crisis which had arisen was sought to be ascribed in large measure to various acts of foreign powers, and especially to the attack on the Taku forts. (For. Rel. 1900, 277–278.)

Policy of the United States: Circular of July 3, 1900.

"In this critical posture of affairs in China it is deemed appropriate to define the attitude of the United States as far as present circumstances permit this to be done. We adhere to the policy initiated by us in 1857 of peace with the Chinese nation, of furtherance of lawful commerce, and of protection of lives and property of our citizens by all means guaranteed under extraterritorial treaty rights and by the law of nations. If wrong be done to our citizens we propose to hold the responsible authors to the uttermost accountability. We regard the condition at Peking as one of virtual anarchy, whereby

power and responsibility are practically devolved upon the local provincial authorities. So long as they are not in overt collusion with rebellion and use their power to protect foreign life and property we regard them as representing the Chinese people, with whom we seek to remain in peace and friendship. The purpose of the President is, as it has been heretofore, to act concurrently with the other powers; first, in opening up communication with Peking and rescuing the American officials, missionaries, and other Americans who are in danger; secondly, in affording all possible protection everywhere in China to American life and property; thirdly, in guarding and protecting all legitimate American interests; and, fourthly, in aiding to prevent a spread of the disorders to the other provinces of the Empire and a recurrence of such disasters. It is, of course, too early to forecast the means of attaining this last result; but the policy of the government of the United States is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire.

"You will communicate the purport of this instruction to the minister for foreign affairs."

Mr. Hay, Sec. of State, to the diplomatic representatives of the United States at Berlin, Brussels, The Hague, Lisbon, London, Madrid, Paris, Rome, St. Petersburg, Tokio, and Vienna, circular telegram, July 3, 1900, For. Rel. 1900, 299; For. Rel. 1901, App. 12.

"In reference to your inquiry made this morning on behalf of the Grand Secretary Li Hung Chang, I have the honor to reply that the position and the intention of the United States government in favor of the territorial and administrative integrity of China are set forth with sufficient clearness in our circular of the 3d of July, that we still hold the same attitude, and that we have ground to believe that similar views are entertained by all the other powers." (Mr. Hay, Sec. of State, to Mr. Wu Ting-fang, Chinese min., July 18, 1900, For. Rel. 1900, 279.)

Concurrence of the Powers.

With regard to the declaration, made in the foregoing circular, of the policy of preserving "Chinese territorial and administrative entity," it may be here stated, at the cost of some anticipation in the narrative, that this principle was kept steadily in view, and that it received the general concurrence of the powers.

In a speech made in the French Chamber of Deputies, July 3, 1900, the day on which Mr. Hay's telegram was sent out, M. Delcassé, minister of foreign affairs, declared that France did not desire "the break up of China, which is perhaps without sufficient reflection spoken of;" that she had "no wish for war with

China," but could not "evade the duty of protecting her citizens and of obtaining for her merchants the guarantees obtained by others;" that she was "anxious for the maintenance of the equilibrium in the Far East," and that the "common peril" demanded a "common aim."[a]

Lord Salisbury, in an interview with Mr. Choate, United States ambassador, July 7, 1900, "expressed himself most emphatically as concurring in the present policy of the United States," as set forth in the circular telegram of July 3.[b]

August 8, 1900, Mr. Jackson, American chargé at Berlin, inquired, at the solicitation of the German government, whether the United States would put its forces under the chief command of Field Marshal Count von Waldersee, Japan and Russia having already expressed their willingness to do so. In accepting this proposal, the Department of State declared that the United States "would be gratified to secure the command of so distinguished and experienced an officer as Count Waldersee for any combined military operations in which the American troops take part, after the arrival of that officer in China, to attain the purposes declared by this government in the circular note delivered to the powers under date of July 3."[c]

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[a] For. Rel. 1900, 313. In a conversation with Mr. Hay, July 2, 1900, which was amplified in a note of the same day, M. Thiébaut, French chargé at Washington, communicated the substance of a telegram from M. Delcassé, proposing that the various foreign forces should not act separately, but move united in a single direction, and that the powers should concert measures to that end. (For. Rel. 1900, 317.)

In a speech in the Chamber of Deputies, July 8, 1900, M. Delcassé answered the inquiry as to why war was not declared against China. (For. Rel. 1900, 313.)

[b] For. Rel. 1900, 345. In a statement made in the House of Commons, Aug. 2, 1900, of the policy of the British government, it was declared: "Her Majesty's government are opposed to any partition of China, and believe that they are in accord with other powers in this declaration. Her Majesty's government hold that the future government of China, whether directed from Pekin or decentralized, must be a government by the Chinese, and they are not prepared to substitute for this a European administration. Similarly they hold that in common interest much caution should be observed in any scheme which may be entertained for organizing Chinese troops under foreign officers. Compensation must be made by China for the effects of the existing disturbances." (For. Rel. 1900, 352.)

[c] Mr. Adee, Acting Sec. of State, to Mr. Jackson, chargé, Aug. 10, 1900, For. Rel. 1900, 331–332. Mr. Adee added that the general commanding the American forces in China had already been authorized to agree with other commanders as to a common official direction of the various forces in the combined operations, preserving the integrity of his American division as a separate organization.

The German Emperor expressed in a telegram to President McKinley appreciation of the latter's acceptance of his proposal. (For. Rel. 1900, 332. See, also, 340.)

August 28, 1900, the Russian chargé at Washington called at the Department of State and made to Mr. Adee, Acting Secretary of State, an oral statement to the following effect:

"That, as already repeatedly declared, Russia has no designs of territorial acquisition in China; that, equally with other powers now operating there, Russia has sought safety of legation at Peking and to help the Chinese government to repress the troubles; that, incidentally to necessary defensive measures on Russian border, Russia has occupied Niuchwang for military purposes, and as soon as order is reestablished will retire troops therefrom if action of other powers be no obstacle thereto; that the purpose for which the various governments have cooperated for relief of legations in Peking has been accomplished; that, taking the position that, as the Chinese government has left Peking, there is no need for her representative to remain, Russia has directed Russian minister to retire with his official personnel from China; that the Russian troops will likewise be withdrawn, and that when the government of China shall regain the reins of government and afford an authority with which the other powers can deal, and will express desire to enter into negotiations, the Russian government will also name its representative. Holding these views and purposes, Russia expresses hope that the United States will share the same opinion."

Mr. Adee, Acting Sec. of State, to United States representatives at Berlin, London, Paris, Rome, St. Petersburg, Tokio, and Vienna, circular telegram, Aug. 29, 1900, For. Rel. 1900, 304.

See, also, as to the position of Russia, For. Rel. 1900, 372–375, 380.

"The government of the United States receives with much satisfaction the reiterated statement that Russia has no designs of territorial acquisition in China, and that, equally with the other powers now operating in China, Russia has sought the safety of her legation in Pekin and to help the Chinese government to repress the existing troubles. The same purposes have moved and will continue to control the government of the United States, and the frank declarations of Russia in this regard are in accord with those made to the United States by the other powers. All the powers, therefore, having disclaimed any purpose to acquire any part of China, and now that adherence thereto has been renewed since relief has reached Peking, it ought not to be difficult by concurrent action, through negotiations, to reach an amicable settlement with China by which the treaty rights of all the powers will be secured for the future, the open door assured, the interests and property of foreign citizens conserved, and full reparation made for wrongs and injuries suffered by them.

"So far as we are advised, the greater part of China is at peace, and earnestly desires to protect the life and property of all foreigners, and in several of the provinces active and successful efforts to sup-

press the Boxers have been taken by the viceroys, to whom we have extended encouragement through our consuls and naval officers. This present good relation should be promoted for the peace of China.

"While we agree that the immediate object for which the military forces of the powers have been cooperating—viz, the relief of the ministers at Pekin—has been accomplished, there still remain the other purposes which all the powers have in common, which are referred to in the communication of the Russian chargé and which were specifically enumerated in our note to the powers of July 3.

"These are: To afford all possible protection everywhere in China to foreign life and property; to guard and protect all legitimate foreign interests; to aid in preventing the spread of the disorders to other provinces of the Empire and a recurrence of such disorders; and to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed by treaty and international law to friendly powers, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire.

"In our opinion these purposes could best be attained by the joint occupation of Peking under a definite understanding between the powers until the Chinese government shall have been reestablished and shall be in a position to enter into new treaties with adequate provisions for reparation and guaranties of future protection. With the establishment and recognition of such authority the United States would wish to withdraw its military forces from Peking and remit to the processes of peaceful negotiation our just demands.

"We consider, however, that a continued occupation of Peking would be ineffective to produce the desired result, unless all the powers unite therein with entire harmony of purpose. Any power which determines to withdraw its troops from Peking will necessarily proceed thereafter to protect its interests in China by its own method, and we think that this would make a general withdrawal expedient. As to the time and manner of withdrawal, we think that, in view of the imperfect knowledge of the military situation resulting from the interruptions of telegraphic communication, the several military commanders at Peking should be instructed to confer and agree together upon the withdrawal as a concerted movement, as they agreed upon the advance.

"The result of these considerations is that, unless there is such a general expression by the powers in favor of continued occupation as to modify the views expressed by the government of Russia and lead to a general agreement for continued occupation, we shall give instructions to the commander of the American forces in China to withdraw our troops from Peking, after due conference with the other commanders as to the time and manner of withdrawal.

"The government of the United States is much gratified by the assurance given by Russia that the occupation of Ninchwang is for military purposes incidental to the military steps for the security of the Russian border provinces menaced by the Chinese, and that as soon as order shall be reestablished Russia will retire her troops from those places, if the action of the other powers be not an obstacle thereto. No obstacle in this regard can arise through any action of the United States, whose policy is fixed and has been repeatedly proclaimed."

Mr. Adee, Acting Sec. of State, to the Russian chargé, mem. Aug. 29, 1900, For. Rel. 1900, 304.

This memorandum, and the oral statement of the Russian chargé, to which it was a reply, were communicated by a circular telegram, Aug. 29, 1900, to the representatives of the United States at Berlin, London, Paris, Rome, St. Petersburg, Tokio, and Vienna, with an instruction to communicate them to the minister for foreign affairs "and invite early consideration and response." (For. Rel. 1900, 305.)

Mr. Herdliska, United States chargé at Vienna, reported that the foreign office entertained a well-founded hope that the powers would soon reach an agreement as to the date of the withdrawal of the foreign contingents from Peking, whereby the question would find a satisfactory solution. (For. Rel. 1900, 305.)

In a speech at Foix, Aug. 19, 1900, and in conversations with Gen. Porter, United States ambassador, M. Delcassé, French minister of foreign affairs, strongly expressed the desire of his government to preserve unity of purpose and of action among the powers and to bring about an early settlement. (For. Rel. 1900, 316–317.)

The German government expressed similar views, but intimated that, while it might be proper to allow the legations to leave Peking, the departure of the Chinese government therefrom having rendered their presence futile, an early evacuation of the capital would jeopard the commercial and missionary interests of the powers as well as the native Christians. (For. Rel. 1900, 334–336.)

The British government thought that the time had not arrived for the withdrawal of the forces. (For. Rel. 1900, 348.)

The Italian government disclosed a similar view. (For. Rel. 1900, 358.)

And also Japan. (For. Rel. 1900, 364.)

See, further, as to the position of Russia, For. Rel. 1900, 372–375, where Mr. Peirce, United States chargé, reports the declaration of Comt Lamsdorff that Russia had no intention of retaining "a single inch of territory in either China or Manchuria."

Siege of legations; message from Mr. Conger.

The first direct communication received from any member of the diplomatic corps after the cutting off of Peking was a message from Mr. Conger, the American minister, which was obtained through the instrumentality of the Chinese minister at Washington, July 20, 1900. It was sent July 16, and it read: "For one month we have been

besieged in British legation under continued shot and shell from Chinese troops. Quick relief only can prevent general massacre."[a]

"*The Emperor of China to His Excellency the President of the United States, greeting:*

Message of Emperor of China, July 19, 1900.

"China has long maintained friendly relations with the United States, and is deeply conscious that the object of the United States is international commerce. Neither country entertains the least suspicion or distrust toward the other. Recent outbreaks of mutual antipathy between the people and Christian missions caused the foreign powers to view with unwarranted suspicion the position of the imperial government as favorable to the people and prejudicial to the missions, with the result that the Taku forts were attacked and captured. Consequently there has been clashing of forces, with calamitous consequences. The situation has become more and more serious and critical. We have just received a telegraphic memorial from our envoy, Wu Ting-fang, and it is highly gratifying to us to learn that the United States government, having in view the friendly relations between the two countries, has taken a deep interest in the present situation. Now China, driven by the irresistible course of events, has unfortunately incurred well-nigh universal indignation. For settling the present difficulty China places special reliance in the United States. We address this message to Your Excellency in all sincerity and candidness, with the hope that Your Excellency will devise measures and take the initiative in bringing about a concert of the powers for the restoration of order and peace. The favor of a kind reply is earnestly requested and awaited with the greatest anxiety.

"Kwanghsu, twenty-sixth year, sixth moon, 23d day (July 19, 1900)."

Translation of a cablegram received by Mr. Wu, Chinese min., July 20, 1900, from the taotai of Shanghai, dated July 19, 1900. For. Rel. 1900, 293–294.

See a similar letter to the President of France, the Emperor of Germany, and the Queen of Great Britain. For. Rel. 1900, 314, 329, 346.

[a] For. Rel. 1900, 155–156. Mr. Hay, in a circular telegram to the diplomatic representatives of the United States at Berlin, London, Paris, St. Petersburg, and Tokio, said: "I have . . . received through governor of Shantung and Chinese minister a cipher message from Minister Conger, which left Peking 18th by flying courier, when it appears he was in British legation, which was under continuous fire of shot and shell and gravely imperiled." (For. Rel. 1900, 313–314.)

"*The President of the United States to the Emperor of China, greeting:*

President McKinley's reply of July 23, 1900.

"I have received Your Majesty's message of the 19th of July, and am glad to know that Your Majesty recognizes the fact that the government and people of the United States desire of China nothing but what is just and equitable. The purpose for which we landed troops in China was the rescue of our legation from grave danger and the protection of the lives and property of Americans who were sojourning in China in the enjoyment of rights guaranteed them by treaty and by international law. The same purposes are publicly declared by all the powers which have landed military forces in Your Majesty's Empire.

"I am to infer from Your Majesty's letter that the malefactors who have disturbed the peace of China, who have murdered the minister of Germany and a member of the Japanese legation, and who now hold besieged in Peking those foreign diplomatists who still survive, have not only not received any favor or encouragement from Your Majesty, but are actually in rebellion against the imperial authority. If this be the case, I most solemnly urge upon Your Majesty's government—

"1. To give public assurance whether the foreign ministers are alive, and if so, in what condition.

"2. To put the diplomatic representatives of the powers in immediate and free communication with their respective governments and to remove all danger to their lives and liberty.

"3. To place the imperial authorities of China in communication with the relief expedition, so that cooperation may be secured between them for the liberation of the legations, the protection of foreigners, and the restoration of order.

"If these objects are accomplished it is the belief of this government that no obstacles will be found to exist on the part of the powers to an amicable settlement of all the questions arising out of the recent troubles, and the friendly good offices of this government will, with the assent of the other powers, be cheerfully placed at Your Majesty's disposition for that purpose.

"WILLIAM MCKINLEY.

"JULY 23, 1900.

"By the President:

"JOHN HAY, *Secretary of State.*"

Enclosed by Mr. Hay, Sec. of State, to Mr. Wu, Chinese min., July 23, 1900, with a request to transmit it by telegraph to its high destination, For. Rel. 1900, 294.

Lord Salisbury, with reference to the same imperial Chinese letter, stated that no negotiations were possible till he could communicate freely with the British minister at Peking. (For. Rel. 1900, 346–347.)

Continued advance to Peking.

In the latter part of July, 1900, the viceroy, Li Hung Chang, having arrived at Shanghai, stated that it was his purpose to endeavor to persuade the throne to send ministers to Tientsin, in the hope that military operations might be suspended and that negotiations might follow. He invoked the concurrence of the United States in this programme. He also inquired whether the United States, in case free communication should be established between the ministers and their governments, would arrange that the allies should not advance on Peking pending negotiations. The United States declined both proposals, insisting that the duty of the Chinese government to protect the legations and the right of the foreign governments to hold free communication with their ministers were unconditional.[a]

The same view was taken by the other powers, and the advance to Peking continued.[b]

Special mission to China.

July 19, 1900, the day before the receipt of Mr. Conger's telegram, the President appointed Mr. W. W. Rockhill as special commissioner to China, to examine and report on the situation.[c] On July 27, all communication with Peking having again ceased, Mr. Rockhill was instructed to proceed on his mission. As supplementing the general oral instructions previously given him at the Department of State, he was informed that it would be his duty to report on all subjects bearing on the general condition of affairs in China, and particularly on all points in any way affecting the interests of the United States. As regarded the policy of the United States in China, he was directed to be guided by Mr. Hay's instructions of July 3, and, as supplementary

[a] For Rel. 1900, 260, 263, 264, 315.

[b] For. Rel. 1900, 346, 347. On the request of the viceroys, presented through the Chinese minister at Washington, that Tientsin be not destroyed, the President instructed the United States officers in China that nothing but military necessity would justify the destruction of the city, and that he hoped no such necessity would arise. (Mr. Hay, Sec. of State, to United States ministers at Berlin, London, Paris, and St. Petersburg, tel., July 18, 1900. For. Rel. 1900, 345.)

Mr. Hay, replying, July 20, 1900, to a suggestion, communicated by the French chargé that the interested governments should take measures to prevent the shipment of arms to China, stated that he had requested the Secretary of the Treasury, the Secretary of the Navy, and the Attorney-General to give orders to the officers in their several departments "to exercise the utmost vigilance to prevent the dispatch or the landing in China of arms destined for improper use in that country, and had given direct orders to the consuls of the United States in China to do all in their power in the same direction." (For. Rel. 1900, 319.)

The British government, Aug. 7, 1900, issued an order in council—a proclamation—prohibiting the exportation of arms and ammunition to China. (For. Rel. 1900, 352.)

[c] For. Rel. 1900, 156.

thereto, by Mr. Hay's note to the Chinese minister in Washington of July 19, and the President's letter to the Emperor of China of July 23.[a]

Insistence on conditions in President's letter of July 23.

"Have received telegram from Governor Yuan Shih-Kai to the effect that the Tsung-li yâmen received on the 5th of August an imperial edict allowing all the foreign ministers free communication with their respective governments in cipher."

Telegram from Yu Lien-Yuen, taotai of Shanghai, received by Minister Wu, Aug. 8, 1900, and delivered by the latter on the same day at the Department of State. (For. Rel. 1900, 283.)

"We are availing ourselves of the opportunity offered by the imperial edict of the 5th of August allowing to the foreign ministers free communication with their respective governments in cipher, and have sent a communication to Minister Conger, to which we await an answer.

"We are already advised by him, in a brief dispatch received August 7, that imperial troops are firing daily upon the ministers in Peking. We demand the immediate cessation of hostile attacks by imperial troops upon the legations and urge the exercise of every power and energy of the imperial government for the protection of the legations and all foreigners therein.

"We are also advised by the same dispatch from Minister Conger that, in his opinion, for the foreign ministers to leave Peking as proposed in the edict of August 2 would be certain death. In view of the fact that the imperial troops are now firing upon the legations, and in view of the doubt expressed by the imperial government in its edict of August 2 as to its power to restore order and secure absolute safety in Peking, it is evident that this apprehension is well founded, for if your government can not protect our minister in Peking, it will presumptively be unable to protect him upon a journey from Peking to the coast.

"We therefore urge upon the imperial government that it shall adopt the course suggested in the third clause of the letter of the President to His Majesty the Emperor of China, of July 23, 1900, and enter into communication with the relief expedition, so that cooperation may be secured between them for the liberation of the legations, the protection of foreigners, and the restoration of order. Such action on the part of the imperial government would be a satis-

[a] Mr. Hay, Sec. of State, to Mr. Rockhill, July 27, 1900, For. Rel. 1900, 157, 294, 299. The reference in Mr. Rockhill's instructions to Mr. Hay's note to the Chinese minister of "July 19" should read "July 18." The note of July 18 given, supra, in connection with the circular of July 3, is the one intended.

factory demonstration of its friendliness and desire to attain these ends."

Memorandum handed by Mr. Adee, Acting Sec. of State, to the Chinese minister, Aug. 8, 1900, For. Rel. 1900, 284. See, also, 300, 301.

"Although the foreign settlements at Shanghai are under the joint protection of the several powers, we have assumed the responsibility of protecting the whole region from Shanghai up on the Yangtze River, and no disturbance by lawless characters will be tolerated. There are now anchored in the vicinity about twenty foreign war ships, most of them being British. Information is also received of the expected arrival of two thousand Indian troops at Shanghai, which is causing an alarm and an exodus of merchants and other Chinese. It is feared that the place will, in consequence, become deserted and business paralyzed, in which event the purpose of the movement may be misunderstood at the different ports and disturbances may arise to the great detriment of trade. Please invoke good offices of Secretary of State at once to take steps to stop the movement."

Memorandum handed by Mr. Wu, Chinese min., to Mr. Adee, Acting Sec. of State, Aug. 11, 1900, of a telegram from Viceroys Li Hung Chang, Liu Kun-Yi, and Chang Chih Tung, and Director-General Sheng, dated at Nankin, Aug. 10, 1900, For. Rel. 1900, 284.

"The question whether any power should land troops at Shanghai for the protection of its citizens and interests in that part of China is one which each power must determine for itself. If we consider it necessary for the protection of our citizens at Shanghai to land troops there, we should do so, as we have done at Taku; and we can not question the right of any other power having treaty rights at that port to do the same.

"If the communication delivered by Mr. Wu is to be regarded as an appeal for our good offices with the other powers to prevent action injurious to China, it is impossible that we should take any step in that direction so long as the Chinese government has not complied with the requirements of the President's letter of July 23."

Mem. handed by Mr. Adee, Acting Sec. of State, to Mr. Wu, Chinese min., Aug. 11, 1900, in reply to the foregoing mem., For. Rel. 1900, 285.

August 12, 1900, the Chinese minister at Washington left at the Department of State a memorandum embodying an imperial edict of Aug. 8, appointing Li Hung Chang envoy plenipotentiary, with instructions to propose by telegraph to the foreign governments concerned an immediate cessation of hostilities pending negotiations.

"The government of the United States learns with satisfaction of the appointment of Earl Li Hung Chang as envoy plenipotentiary to conduct negotiations with the powers, and will, on its part, enter upon such negotiations with a desire to continue the friendly relations so long existing between the two countries.

"It is evident that there can be no general negotiation between China and the powers so long as the ministers of the powers and the persons under their protection remain in their present position of restraint and danger, and that the powers can not cease their efforts for the delivery of these representatives, to which they are constrained by the highest considerations of national honor, except under an arrangement adequate to accomplish a peaceable deliverance.

"We are ready to enter into an agreement between the powers and the Chinese government for a cessation of hostile demonstrations, on condition that a sufficient body of the forces composing the relief expedition shall be permitted to enter Peking unmolested and to escort the foreign ministers and residents back to Tientsin; this movement being provided for and secured by such arrangements and dispositions of troops as shall be considered satisfactory by the generals commanding the forces composing the relief expedition."

Mr. Adee, Acting Sec. of State, to Mr. Wu, Chinese min., memorandum, Aug. 12, 1900, For. Rel. 1900, 286, 301, 320.

"The appointment of an envoy plenipotentiary to represent the Chinese government in negotiation with the powers suggests to me that a useful indication of the spirit with which the United States approaches the subject may be afforded by advising you (as I am authorized by the Secretary of War to do) of the tenor of the instructions already sent to General Chaffee. The following is an extract from the telegram cabled to him on the 19th of July last:

"'It is the desire of this government to maintain its relations of friendship with the part of the Chinese people and Chinese officials not concerned in outrages on Americans. Among these we consider Li Hung Chang, just appointed viceroy of Chili. You will to the extent of your power aid the government of China, or any part thereof, in repressing such outrages and in rescuing Americans and in protecting American citizens and interests, and, wherever Chinese government fails to render such protection, you will do all in your power to supply it. . . .'" (Mr. Adee, Acting Sec. of State, to Mr. Wu, Chinese min., Aug. 12, 1900, For. Rel. 1900, 286.)

See, also, For. Rel. 1900, 333.

Li Hung Chang, immediately after his appointment, sought to induce the powers to stay the advance of the allied forces at Tung Chow, and thus prevent their entrance into Peking. The United States adhered however, to the position defined in its memorandum of Aug. 12, especially as Mr. Conger reported that the attacks by the imperial troops upon the legations continued. (For. Rel. 1900, 287–288.)

Relief of the legations.

August 14, 1900, Mr. Conger cabled that the legations had been saved by the arrival on that day of the relief column, which entered the city with very little trouble.[a]

For an account of the siege and relief of the legations, see Mr. Conger to Mr. Hay, Aug. 17, 1900, For. Rel. 1900, 161–188.

As to the siege of Tientsin by the foreign forces, on their way to the relief of the legations, see report of Mr. Ragsdale, United States consul, July 16, 1900, For. Rel. 1900, 268–273. September 21, 1900, Mr. Conger was instructed to extend to Swedish and Norwegian missionaries attached to American missions in China "all possible proper protection."[b]

(2) NEGOTIATIONS FOR SETTLEMENT.

§ 809.

Chinese suggestions of negotiation.

"While the condition set forth in the memorandum delivered to the Chinese minister August 12 has not been fulfilled, and the powers have been compelled to rescue their ministers by force of arms unaided by the Chinese government, still this government is ready to welcome any overtures for a truce, and invite the other powers to join, when security is established in the Chinese capital and the Chinese government shows its ability and willingness to make on its part an effective suspension of hostilities there and elsewhere in China. When this is done—and we hope it will be done promptly—the United States will be prepared to appoint a representative to join with the representatives of the other similarly interested powers and of the authoritative and responsible government of the Chinese Empire to attain the ends declared in our circular to the powers of July 3, 1900."

Mr. Adee, Acting Sec. of State, to Mr. Wu, Chinese min., memorandum, Aug. 22, 1900, For. Rel. 1900, 290, 302. This was in response to two cablegrams from Li Hung Chang, dated Aug. 19 and 21, and communicated to the Department of State Aug. 20 and 21. The first recited that as the relief forces had rescued the legations their declared purpose was accomplished. The second said that Peking was occupied, the Boxers dispersed, and fighting stopped. They accordingly asked suspension of hostilities, withdrawal of troops, and appointment of an envoy to negotiate.

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[a] For. Rel. 1900, 160.

[b] Mr. Hill, Acting Sec. of State, to Mr. Conger, min. to China, tel., Sept. 21, 1900, For. Rel. 1900, 194.

As to the offer of the hospitality of the American hospital ship *Maine* for wounded German soldiers and sailors in China, and the reciprocal action of the German Trained Nurse Association, see For. Rel. 1900, 525.

For the similar response of France, see For. Rel. 1900, 320–321. August 23, 1900, Mr. Jackson, United States chargé, Berlin, reported that as the German government did not know whose representative Li Hung Chang was, or whose authority he bore, it could not enter into negotiations with him. (For. Rel. 1900, 334, 340.)

In a memorandum handed to the Chinese minister at Washington, September 7, 1900, the United States laid down the principle that it was unwilling to negotiate through any person who was believed to share responsibility for the outrages committed upon foreigners in Peking. Mr. Conger was instructed to withhold recognition from all persons proposed as negotiators who were not acceptable under the terms of that memorandum, or who did not possess immediate full powers from the Emperor of China. The legation of the United States was, till otherwise instructed, to remain in Peking under the protection of the military guard which had been ordered to remain there for that purpose. (Mr. Hill, Acting Sec. of State, to Mr. Conger, min. to China, tel., Sept. 29, 1900, For. Rel. 1900, 204.)

In reply to an inquiry of the Russian chargé, Sept. 17, 1900, whether the United States intended to transfer its legation from Peking to Tientsin, it was stated that the United States had no present intention to do so. (For. Rel. 1900, 306.)

Powers of Prince Ching and Li Hung Chang; departure of Chinese court.

September 10, 1900, the Chinese minister at Washington communicated to the Department of State an imperial edict of Aug. 24, transmitted by way of Paoting Fu, which read as follows: "Li Hung Chang, envoy plenipotentiary, is hereby vested with full discretionary powers, and he shall promptly deal with whatever questions may require attention. From this distance we will not control his actions. Let this edict be forwarded with extra expedition at the rate of 600 li per day (to Earl Li) for his information and guidance. Respect this."

The United States informed the minister that it did not feel called upon to express any opinion at the time as to the sufficiency of Li Hung Chang's authority, but expressed the hope that "it will transpire that his credentials are full and authoritative, not only for negotiation, but to enable him without further delay to give assurance that the life and property of Americans will henceforth be respected throughout the Chinese Empire."[a]

By subsequent memoranda the United States was advised that foreign troops having entered Peking, their Majesties the Empress Dowager and the Emperor" had "gone westward on a tour:" that an imperial decree had been issued "ordering the extermination of the Boxers," and that the missionaries at Pao-ting and Ching-ting had been safely escorted and handed, by the acting viceroy of Chihli Province, to the allied troops at Changsin-tien and Lukow-chiao:

[a] Mr. Hill, Acting Sec. of State, to Mr. Wu, Chinese min., Sept. 11, 1900, For. Rel. 1900, 291.

that by an imperial edict of Aug. 27 Prince Ching had been invested with full discretionary power to act in conjunction with Li Hung Chang, and that Prince Ching, Li Hung Chang, and Grand Secretary Jung Lu were prepared to open negotiations.[a]

The government of the United States replied that it accepted "the plenipotentiary authority of Earl Li Hung Chang and Prince Ching as prima facie sufficient for the preliminary negotiations looking toward the return of the Imperial Chinese government and to the resumption of its authority at Peking, and toward the negotiation of a complete settlement by the duly appointed plenipotentiaries of the powers and of China;" and that "to these ends the United States minister in Peking will be authorized to enter into relations with Earl Li and Prince Ching as the immediate representatives of the Chinese Emperor."[b]

Question of punishments.

September 18, 1900, the imperial German chargé at Washington stated that his government considered it a preliminary condition to negotiation that the Chinese government should surrender for punishment such persons as should be determined upon as the first and real perpetrators of the crimes committed in Peking against international law. It was therefore proposed that the representatives of the powers in Peking should be instructed to designate the principal personages whose guilt in the instigation or perpetration of the crimes was beyond doubt.[c]

"In response to your inquiry of the 18th instant as to the attitude of the government of the United States in regard to the exemplary punishment of the notable leaders in the crimes committed in Peking against international law, I have the honor to make the following statement:

"The government of the United States has from the outset proclaimed its purpose to hold to the uttermost accountability the responsible authors of any wrongs done in China to citizens of the United

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[a] For. Rel. 1900, 291–293.

[b] Mr. Hill, Acting Sec. of State, to Mr. Wu, Chinese min., Sept. 21, 1900, For. Rel. 1900, 293.

The Russian government took the same view, but thought that, considering the susceptibilities of the Chinese as to the occupation of Peking and the desirableness of restoring Chinese authority in the capital, it would be better to conduct the negotiations at Tientsin. The Russian minister in fact left Pekiñg, but he returned in October. (For. Rel. 306, 375–376, 377.)

As to the position of Austria-Hungary and Germany, see For. Rel. 1900, 306–307, 336–337.

October 6, 1900, Mr. Conger cabled that he had just received from Earl Li a copy of the imperial decree giving him full powers. (For. Rel. 1900, 212.)

[c] For. Rel. 306. This proposition was accepted by Austria-Hungary. (For. Rel. 1900, 307.) As to the murder of Baron von Ketteler, the German minister, in Peking, June 20, 1900, see For. Rel. 1900, 326, 327–328, 330.

States and their interests, as was stated in the government's circular communication to the powers of July 3 last. These wrongs have been committed not alone in Peking, but in many parts of the Empire, and their punishment is believed to be an essential element of any effective settlement which shall prevent a recurrence of such outrages and bring about permanent safety and peace in China. It is thought, however, that no punitive measures can be so effective by way of reparation for wrongs suffered and as deterrent examples for the future as the degradation and punishment of the responsible authors by the supreme imperial authority itself; and it seems only just to China that she should be afforded in the first instance an opportunity to do this, and thus rehabilitate herself before the world. Believing thus, and without abating in anywise its deliberate purpose to exact the fullest accountability from the responsible authors of the wrongs we have suffered in China, the government of the United States is not disposed, as a preliminary condition to entering into diplomatic negotiations with the Chinese government, to join in a demand that said government surrender to the powers such persons as, according to the determination of the powers themselves, may be held to be the first and real perpetrators of those wrongs. On the other hand, this government is disposed to hold that the punishment of the high responsible authors of these wrongs, not only in Pekin, but throughout China, is essentially a condition to be embraced and provided for in the negotiations for a final settlement. It is the purpose of this government, at the earliest practicable moment, to name its plenipotentiaries for negotiating a settlement with China, and in the meantime to authorize its minister in Peking to enter forthwith into conference with the duly authorized representatives of the Chinese government with a view to bringing about a preliminary agreement whereby the full exercise of the imperial power for the preservation of order and the protection of foreign life and property throughout China pending final negotiations with the powers shall be assured."

Mr. Hill, Acting Sec. of State, to German chargé, Sept. 22, 1900, For. Rel. 1900, 341.

The view of the United States was shared by Russia, For. Rel. 1900, 375–376.

As will be seen the punishments were inflicted by the Chinese.

"A cablegram received from Director-General Sheng, at Shanghai, states that by an imperial edict issued on September 25 Prince Chwang, Prince Yi, Secondary Princes Tsai Lien and Tsai Ying are deprived of all their respective ranks and offices; that Prince Tuan (as an act of clemency) is deprived of office and is handed over to the imperial clan court, which shall consult and decide upon a severe penalty, and his salary is to be stopped; that Duke Tsai Lan and the

president of the censorate Ying Nien are handed over to the said board, who shall consult and decide upon a severe penalty, and that Kang Yi, assistant grand secretary and president of the civil board, and Chao-Shu-Chiao, president of the board of punishments, are handed over to the board of censors, who shall consult and decide upon a penalty."

Memorandum handed by the Chinese minister at Washington to the Secretary of State, Oct. 2, 1900, For. Rel. 1900, 296.

"The Secretary of State has communicated this information to the President, who desires to express his gratification at this proof of the desire of the imperial government to satisfy the reasonable demands of the foreign powers for the injury and outrage which their legations and their nationals have suffered at the hands of evil-disposed persons in China. He regrets, however, that there is a certain vagueness in regard to the punishment which some of the inculpated persons are to receive. It would be most regrettable if Prince Tuan, who appears from the concurrent testimony of the legations in Peking to have been one of the foremost in the proceedings complained of, should escape such full measure of exemplary punishment as the facts warrant, or if Kang Yi and Chao-Shu-Chiao should receive other than their just deserts.

"With a view to forming a judgment on these points the United States minister in Peking will be instructed to report whether the edict completely names the persons deserving chastisement, whether the punishments proposed accord with the gravity of the crimes committed, and in what manner the United States and the other powers are to be assured that satisfactory punishment is inflicted."

Mr. Hay, Sec. of State, to Mr. Wu, Chinese min., memorandum, Oct. 3, 1900, For. Rel. 1900, 296.

It was subsequently represented to the United States that Kang Yi had died, and that Yu Hsien had committed suicide. (For. Rel. 1900, 298.)

With reference to the reported imperial edict of Sept. 25, supra, the German government proposed that the powers instruct their representatives to ascertain (1) whether the list was satisfactory and correct; (2) whether the punishments proposed were sufficiently grave, and (3) in what manner their execution was "to be controlled by the powers." (For. Rel. 1900, 342.)

The United States complied as to the first two points, and as to the third directed an inquiry "in what manner the United States and the other powers are to be assured that satisfactory punishment is inflicted." (Secretary of State to the imperial German chargé, Oct. 3, 1900, For. Rel. 342.)

"*The Emperor of the Ta Tsing Empire to His Excellency the President of the United States, greeting:*

"We are extremely grateful to Your Excellency for taking the initiative in the withdrawal of troops (from Peking) and for consenting, in the interest of friendly relations, to use your kindly offices between China and the friendly powers who have been offended on account of the recent unexpected uprising in China.

"We therefore especially delegate our envoy extraordinary and minister plenipotentiary, Wu Ting-fang, to personally deliver this telegraphic letter to Your Excellency conveying our sincere expression of thanks.

"We beg that Your Excellency, in the interest of peace and international good relations, will exert your friendly influence with the other powers toward the complete effacement of all ill feeling and the speedy determination on their part to negotiate for a peaceful settlement. For this we shall feel unbounded gratitude toward Your Excellency, whose good offices we are now earnestly beseeching."

Telegraphic imperial letter, dated Oct. 14, 1900, forwarded by the privy council from Tung-Kuan (in Shensi) and retransmitted from Shanghai by Director-General Sheng under date of Oct. 16; handed to the President by Mr. Wu, Chinese min., Oct. 17, 1900, For. Rel. 1900, 295.

"WASHINGTON, *October 18, 1900.*

"*His Majesty Kwang Hsu, Emperor of China, greeting:*

"It has afforded me much pleasure to receive your Imperial Majesty's telegraphic letter of October 14, which has been delivered by Your Majesty's minister in Washington.

"I cordially share Your Majesty's wish that there may be a peaceful settlement of all questions between China and the powers whose interests and nationals have so grievously suffered wrong in Your Majesty's dominions, and that the outcome may be the complete effacement of ill feeling between them. The desire of this government that such a settlement may be brought about speedily has been made known to all the powers, and I trust that negotiations may begin so soon as we and the other offended governments shall be effectively satisfied of Your Majesty's ability and power to treat with just sternness the principal offenders, who are doubly culpable, not alone toward the foreigners, but toward Your Majesty, under whose rule the purpose of China to dwell in concord with the world has hitherto found expression in the welcome and protection assured to strangers.

"WILLIAM MCKINLEY."

Communicated to Mr. Wu, Chinese min., for transmission, Oct. 18, 1900, For. Rel. 1900, 295.

In a circular telegram to the diplomatic representatives of the United States at Berlin, London, Paris, Rome, St. Petersburg, and Vienna, Oct. 22, 1900, Mr. Hay, Sec. of State, said: "We have assured the French government of our anxiety to have negotiations begun as soon as we and other powers are satisfied of Emperor's ability and power to deal justly and sternly with responsible offenders. President has also answered an appeal of Chinese Emperor in this sense." (For. Rel. 1900, 307.)

A cablegram from Prince Ching and Li Hung Chang, handed to Sec. of State Nov. 7, 1900, stated that, according to the laws of China, deprivation of rank and official emolument in the case of a prince or duke, together with the prohibition of his descendants to inherit the same, is just one degree less severe than capital punishment. (For. Rel. 1900, 298.)

French proposals of Oct. 4, 1900.

October 4, 1900, the French chargé d'affaires at Washington, by order of his government, addressed to the Secretary of State a note, stating that, as the powers had by their united action attained their first object of rescuing their legations, the next thing to be done was to obtain from the Chinese government, which had given to Prince Ching and Li Hung Chang full powers to treat, "appropriate reparation for the past and substantial guaranties for the future." The French government therefore submitted as the bases of the negotiations that were to be entered upon immediately after the usual verification of the full powers:

1. The punishment of the principal guilty parties who might be designated by the representatives of the powers at Peking.

2. The continuance of the interdiction against the importation of arms.

3. Equitable indemnities for the governments, corporations, and private individuals.

4. The organization in Peking of a permanent guard for the legations.

5. The dismantling of the forts at Taku.

6. The occupation of two or three points on the road from Tientsin to Peking, which road would thus always be open to the legations to pass to the sea or to the forces which might go from the sea to the capital.

The French government was of opinion that these conditions, if presented collectively by the representatives of the powers and backed up by the presence of the international troops, should be speedily accepted by the Chinese government.

On these proposals the United States observed:

1. That as China had already indicated her intention to punish a number of those responsible for the late disorders, the representatives of the powers might suggest additions to the list when negotiations were begun.

2. That as the interdiction of the importation of arms was not understood to be permanent, the duration of it and the details of its regulation seemed a proper subject of discussion by negotiators.

3. That as the obtaining of indemnities was desired by all the powers, the President considered worthy of attention the suggestion of the Russian government that, in case of protracted divergence of views, the matter might be submitted to the International Court of Arbitration of The Hague.

4. That although the government of the United States had in the existing emergency stationed in Peking an adequate legation guard, it was unable to make a permanent engagement of this nature without the authorization of the legislative branch.

5. That the President reserved his opinion as to the dismantling of the forts at Taku, pending the receipt of further information as to the situation in China.

6. That as to the occupation of points on the road from Tientsin to Peking the observations under No. 4 applied; but the President thought it desirable to obtain from China an assurance of the right of the powers to guard their legations in Peking and to have the means of unrestricted access to them whenever required.

In conclusion, "the President believes that the governments of France and the other powers will see in the reserves we have here made no obstacle to the initiation of negotiations on the lines suggested, and he hopes it will be found practicable to begin such negotiations at an early day."

Mr. Hay, Sec. of State, to M. Thiébaut, French chargé, Oct. 10, 1900, replying to the note of M. Thiébaut of Oct. 4, 1900, For. Rel. 1900, 321–323.

October 17 the French chargé gave notice that all the interested powers had adhered to the essential principles of the French note of Oct. 4. (For. Rel. 1900, 323.)

See, also, Mr. Hay, Sec. of State, to French chargé, Oct. 19, 1900, and Oct. 29, 1900, For. Rel. 1900, 323, 325.

As to the British reply to the French proposals, see For. Rel. 1900, 349; and, as to the attitude of Japan, id. 366.

Negotiations at Peking.

"Mr. Conger reports that the following has been submitted by Prince Ching and Earl Li as a general preliminary treaty, together with request for a meeting with the foreign ministers:

"'ARTICLE 1. Laying siege to legations of the foreign ministers is a high offense against one of the important principles of international law. No country can possibly tolerate such a thing. China acknowledges her great mistake in this respect and promises that it will never occur again.

"'ART. 2. China admits her liability to pay indemnity for the various losses sustained on this occasion, and the powers will each

appoint officials to examine and present the above-mentioned claims for final consultation and settlement.

"'ART. 3. As to future trade and general international relations, each power should designate how these matters should be dealt with, whether the old treaties shall continue or new conventions be made slightly adding to the old treaties and negotiating new ones. Any of these plans may be adopted, and when China has approved, further special regulations can be made in each case as required.

"'ART. 4. This convention will be made by China with the combined powers to cover general principles which apply alike to all. This settled, the foreign ministers there should remove the seals they caused to be placed in various parts of the Tsung-li yamên. Then the yamên ministers may go to the yamên and attend to business as usual. And, further, each power should arrange its own special affairs with China so that separate treaties may be settled in due order when the various items of indemnity are all arranged properly, or an understanding has been come to about them. Then the powers will successively withdraw their troops.

"'ART. 5. The troops sent to China by the powers were for protection of the ministers and for no other purpose; so when negotiations begin for treaties of peace, each power should declare an armistice.'

"Mr. Conger has merely acknowledged above, and awaits further instructions before replying; he states that the general negotiations should cover as many points as possible. The general treaty should include, in addition to the above draft, (1) a complete statement of the purpose in landing troops in China; (2) the restoration of order and return of the imperial government or proof of its potential existence; (3) acknowledgment by the imperial government of liability for attacks on all foreigners, as well as ministers; (4) indemnity for expenses and wrongs, as well as losses, some general plan for measuring and paying same, and effective guaranties for the future; (5) provision for a defensible legation settlement and legation and railroad guards; (6) the substitution of a minister for foreign affairs instead of the tsungli yamen; (7) Chinese capital to be a treaty port; (8) adequate punishment of leaders and abettors of crimes against legations and foreigners."

Mr. Conger, min. to China, to Mr. Hay, Sec. of State, Oct. 16, 1900, For. Rel. 1900, 213.

"Mr. Hay acknowledges Mr. Conger's telegram of the 16th instant, and states that the Chinese propositions are, in the main, acceptable to the United States, with the incorporation of his suggestions and of points hereinafter expressed. If Mr. Conger's seventh suggestion

means placing Peking on the footing of a treaty port, it is commendable.

"The French proposition of terms, which was communicated to Mr. Hay on the 4th instant and replied to on the 10th, is probably now in Mr. Conger's possession. The United States accepts the first article, taking the Chinese punishment edict as a starting point; additional names to be suggested by representatives of the powers when negotiations are begun.

"Second. It is not understood that interdiction of importation of arms is to be permanent; its duration and regulation proper subject of discussion.

"Third. All the powers desire equitable indemnity, intention of acquisition of territory being positively disclaimed by all. The United States would favor Russian suggestion to remit the question to The Hague arbitration court in case of a protracted disagreement as to amount of indemnity.

"Fourth. While now maintaining precautionary legation guards, the United States is unable to make permanent engagement without legislative authorization.

"Fifth. As to dismantling Taku forts the President reserves opinion, pending further information in regard to the situation in China.

"Sixth. The United States can not commit itself to participation in military occupation of the road from Tientsin. It would require legislation, but it is desirable that assurance be obtained from China by the powers of the right to guard legations and to have unrestricted access when required.

"Mr. Hay is advised that the French proposition has been acquiesced in by all the powers, with more or less reservations, which, like his, are not calculated to embarrass negotiations. French note received the 17th instant urges that the powers agree to show to China their readiness to negotiate by communicating, without prejudice to discussion of the points reserved as above, the French propositions, either severally or through the dean of the diplomatic corps. Mr. Conger is instructed to confer with his colleagues with a view to doing this. The United States is anxious to have the negotiations begin as soon as it and the other powers are satisfied of the Emperor's ability and power to deal justly and sternly with the responsible offenders, and the President so replied to an appeal of the Emperor, communicated by telegraph yesterday.

"During the negotiations no opportunity to safeguard the principle of impartial trade, to which all the powers are pledged, should be lost."

Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., Oct. 19, 1900, For. Rel. 1900, 217.

November 1, 1900, Mr. Conger telegraphed that the foreign ministers had so far, in addition to the punishment of the leaders, unanimously agreed on the following points: (1) The prohibition at the discretion of the powers of the importation of arms; (2) the suppression for two years of civil and military examinations in criminal districts and the imposition of death punishment on future members of the Boxer organization; (3) indemnities for "governments, societies, individual foreigners, and Chinese employed by foreigners;" (4) the adoption of certain measures for the defense of the legations, including permanent guards; (5) the destruction of Taku and other forts which might interfere with communication between Peking and the sea; (6) the substitution for the Tsung-li yamên of a minister for foreign affairs; and (7) court ceremonials similar to those in European countries.[a]

The Department of State replied that these conditions were approved by the President, but that the dismantling of the Taku forts was preferable to their destruction, and it was suggested that Mr. Conger should consult with the military commander.[b]

Mr. Conger was subsequently instructed to try, if possible, to arrange that Peking might be made a treaty port, and that the Chinese minister for foreign affairs should be required to speak some foreign language. The suggestion was also repeated that posthumous honors be paid to the three friendly Chinese statesmen; and it was intimated that it would be advisable to provide against arbitrary execution, without trial, of high officers of state.[c]

On the 20th of November yet another instruction was sent. It stated that the President was most solicitous that the pending negotiations should not fail "either through the presentation of demands with which it may be impossible for China to comply or by reason of a lack of harmonious cooperation among the powers." Mr. Conger was therefore instructed seriously to consider, in consultation with his colleagues, "whether the presentation of a list of high Chinese officials and the demand for their capital punishment, as an ultimatum, may not result in a failure of negotiations through confession by China of inability to carry out all the death sentences." Similar considerations, it was said, applied to the question of the amount of indemnity to be demanded. "The President favors the

[a] For. Rel. 1900, 224.

[b] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., Nov. 9, 1900, For. Rel. 1900, 225. See, also, Mr. Hay to Mr. Conger, tel., Nov. 9, 1900, id. 226.

[c] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., Nov. 16, 1900, For. Rel. 1900, 226.

exaction of a lump sum, not beyond the limit of China to pay, to be hereafter equitably distributed among the interested powers." [a]

President's annual message, Dec. 3, 1900.

"The recent troubles in China spring from the antiforeign agitation which for the past three years has gained strength in the northern provinces. Their origin lies deep in the character of the Chinese races and in the traditions of their government. The Taiping rebellion and the opening of Chinese ports to foreign trade and settlement disturbed alike the homogeneity and the seclusion of China.

"Meanwhile foreign activity made itself felt in all quarters, not alone on the coast, but along the great river arteries and in the remoter districts, carrying new ideas and introducing new associations among a primitive people which had pursued for centuries a national policy of isolation.

"The telegraph and the railway spreading over their land, the steamers plying on their waterways, the merchant and the missionary penetrating year by year farther to the interior, became to the Chinese mind types of an alien invasion, changing the course of their national life and fraught with vague forbodings of disaster to their beliefs and their self-control.

"For several years before the present troubles all the resources of foreign diplomacy, backed by moral demonstrations of the physical force of fleets and arms, have been needed to secure due respect for the treaty rights of foreigners and to obtain satisfaction from the responsible authorities for the sporadic outrages upon the persons and property of unoffending sojourners, which from time to time occurred at widely separated points in the northern provinces, as in the case of the outbreaks in Sze-chuen and Shan-tung.

"Posting of antiforeign placards became a daily occurrence, which the repeated reprobation of the imperial power failed to check or punish. These inflammatory appeals to the ignorance and superstition of the masses, mendacious and absurd in their accusations and deeply hostile in their spirit, could not but work cumulative harm. They aimed at no particular class of foreigners; they were impartial in attacking everything foreign.

"An outbreak in Shan-tung, in which German missionaries were slain, was the too natural result of these malevolent teachings. The posting of seditious placards, exhorting to the utter destruction of

[a] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., Nov. 20, 1900, For. Rel. 1900, 231. Nov. 23 Mr. Hay cabled to Mr. Conger that a general convention was of the "first importance," and that when it should be concluded each power would have, of course, the liberty to negotiate on any points not expressed in it. (For. Rel. 1900, 232.)

See also Mr. Conger to Mr. Hay, Nov. 26, 1900, For. Rel. 1900, 233.

foreigners and of every foreign thing, continued unrebuked. Hostile demonstrations toward the stranger gained strength by organization.

"The sect, commonly styled the Boxers, developed greatly in the provinces north of the Yang-Tse, and with the collusion of many notable officials, including some in the immediate councils of the Throne itself, became alarmingly aggressive. No foreigner's life, outside of the protected treaty ports, was safe. No foreign interest was secure from spoliation.

"The diplomatic representatives of the powers in Peking strove in vain to check this movement. Protest was followed by demand and demand by renewed protest, to be met with perfunctory edicts from the palace and evasive and futile assurances from the Tsung-li Yamen. The circle of the Boxer influence narrowed about Peking, and while nominally stigmatized as seditious, it was felt that its spirit pervaded the capital itself, that the imperial forces were imbued with its doctrines, and that the immediate counselors of the Empress Dowager were in full sympathy with the antiforeign movement.

"The increasing gravity of the conditions in China and the imminence of peril to our own diversified interests in the Empire, as well as to those of all the other treaty governments, were soon appreciated by this Government, causing it profound solicitude. The United States from the earliest days of foreign intercourse with China had followed a policy of peace, omitting no occasions to testify good will, to further the extension of lawful trade, to respect the sovereignty of its government, and to insure by all legitimate and kindly but earnest means the fullest measure of protection for the lives and property of our law-abiding citizens and for the exercise of their beneficent callings among the Chinese people.

"Mindful of this, it was felt to be appropriate that our purposes should be pronounced in favor of such course as would hasten united action of the powers at Peking to promote the administrative reforms so greatly needed for strengthening the imperial government and maintaining the integrity of China, in which we believed the whole western world to be alike concerned. To these ends I caused to be addressed to the several powers occupying territory and maintaining spheres of influence in China the circular proposals of 1899, inviting from them declarations of their intentions and views as to the desirability of the adoption of measures insuring the benefits of equality of treatment of all foreign trade throughout China.

"With gratifying unanimity the responses coincided in this common policy, enabling me to see in the successful termination of these negotiations proof of the friendly spirit which animates the various powers interested in the untrammeled development of com-

merce and industry in the Chinese Empire as a source of vast benefit to the whole commercial world.

"In this conclusion, which I had the gratification to announce as a completed engagement to the interested powers on March 20, 1900, I hopefully discerned a potential factor for the abatement of the distrust of foreign purposes which for a year past had appeared to inspire the policy of the imperial government, and for the effective exertion by it of power and authority to quell the critical antiforeign movement in the northern provinces most immediately influenced by the Manchu sentiment.

"Seeking to testify confidence in the willingness and ability of the imperial administration to redress the wrongs and prevent the evils we suffered and feared, the marine guard, which had been sent to Peking in the autumn of 1899 for the protection of the legation, was withdrawn at the earliest practicable moment, and all pending questions were remitted, as far as we were concerned, to the ordinary resorts of diplomatic intercourse.

"The Chinese government proved, however, unable to check the rising strength of the Boxers and appeared to be a prey to internal dissensions. In the unequal contest the antiforeign influences soon gained the ascendency under the leadership of Prince Tuan. Organized armies of Boxers, with which the imperial forces affiliated, held the country between Peking and the coast, penetrated into Manchuria up to the Russian borders, and through their emissaries threatened a like rising throughout northern China.

"Attacks upon foreigners, destruction of their property, and slaughter of native converts were reported from all sides. The Tsung-li yamên, already permeated with hostile sympathies, could make no effective response to the appeals of the legations. At this critical juncture, in the early spring of this year, a proposal was made by the other powers that a combined fleet should be assembled in Chinese waters as a moral demonstration, under cover of which to exact of the Chinese government respect for foreign treaty rights and the suppression of the Boxers.

"The United States, while not participating in the joint demonstration, promptly sent from the Philippines all ships that could be spared for service on the Chinese coast. A small force of marines was landed at Taku and sent to Peking for the protection of the American legation. Other powers took similar action, until some four hundred men were assembled in the capital as legation guards.

"Still the peril increased. The legations reported the development of the seditious movement in Peking and the need of increased provision for defense against it. While preparations were in progress for a larger expedition, to strengthen the legation guards and keep the railway open, an attempt of the foreign ships to make a landing

at Taku was met by a fire from the Chinese forts. The forts were thereupon shelled by the foreign vessels, the American admiral taking no part in the attack, on the ground that we were not at war with China and that a hostile demonstration might consolidate the anti-foreign elements and strengthen the Boxers to oppose the relieving column.

"Two days later the Taku forts were captured after a sanguinary conflict. Severance of communication with Peking followed, and a combined force of additional guards, which was advancing to Peking by the Pei-Ho, was checked at Langfang. The isolation of the legations was complete.

"The siege and the relief of the legations has passed into undying history. In all the stirring chapter which records the heroism of the devoted band, clinging to hope in the face of despair, and the undaunted spirit that led their relievers through battle and suffering to the goal, it is a memory of which my countrymen may be justly proud that the honor of our flag was maintained alike in the siege and the rescue, and that stout American hearts have again set high, in fervent emulation with true men of other race and language, the indomitable courage that ever strives for the cause of right and justice.

"By June 19th the legations were cut off. An identical note from the Yamên ordered each minister to leave Peking, under a promised escort, within twenty-four hours. To gain time they replied, asking prolongation of the time, which was afterwards granted, and requesting an interview with the Tsung-li Yamên on the following day. No reply being received, on the morning of the 20th the German minister, Baron von Ketteler, set out for the Yamên to obtain a response, and on the way was murdered.

"An attempt by the legation guard to recover his body was foiled by the Chinese. Armed forces turned out against the legations. Their quarters were surrounded and attacked. The mission compounds were abandoned, their inmates taking refuge in the British legation, where all the other legations and guards gathered for more effective defense. Four hundred persons were crowded in its narrow compass. Two thousand native converts were assembled in a near-by palace under protection of the foreigners. Lines of defense were strengthened, trenches dug, barricades raised, and preparations made to stand a siege, which at once began.

"From June 20th until July 17th, writes Minister Conger, 'there was scarcely an hour during which there was not firing upon some part of our lines and into some of the legations, varying from a single shot to a general and continuous attack along the whole line.' Artillery was placed around the legations and on the overlooking palace walls, and thousands of 3-inch shot and shell were fired, destroying

some buildings and damaging all. So thickly did the balls rain that, when the ammunition of the besieged ran low, five quarts of Chinese bullets were gathered in an hour in one compound and recast.

"Attempts were made to burn the legations by setting neighboring houses on fire, but the flames were successfully fought off, although the Austrian, Belgian, Italian, and Dutch legations were then and subsequently burned. With the aid of the native converts, directed by the missionaries, to whose helpful cooperation Mr. Conger awards unstinted praise, the British legation was made a veritable fortress. The British minister, Sir Claude MacDonald, was chosen general commander of the defense, with the secretary of the American legation, Mr. E. G. Squiers, as chief of staff.

"To save life and ammunition the besieged sparingly returned the incessant fire of the Chinese soldiery, fighting only to repel attack or make an occasional successful sortie for strategic advantage, such as that of fifty-five American, British, and Russian marines led by Captain Myers, of the United States Marine Corps, which resulted in the capture of a formidable barricade on the wall that gravely menaced the American position. It was held to the last, and proved an invaluable acquisition, because commanding the water gate through which the relief column entered.

"During the siege the defenders lost 65 killed, 135 wounded, and 7 by disease—the last all children.

"On July 14th the besieged had their first communication with the Tsung-li yamên, from whom a message came inviting to a conference, which was declined. Correspondence, however, ensued and a sort of armistice was agreed upon, which stopped the bombardment and lessened the rifle fire for a time. Even then no protection whatever was afforded, nor any aid given, save to send to the legations a small supply of fruit and three sacks of flour.

"Indeed, the only communication had with the Chinese government related to the occasional delivery or dispatch of a telegram or to the demands of the Tsung-li yamên for the withdrawal of the legations to the coast under escort. Not only are the protestations of the Chinese government that it protected and succored the legations positively contradicted, but irresistible proof accumulates that the attacks upon them were made by imperial troops, regularly uniformed, armed, and officered, belonging to the command of Jung Lu, the imperial commander in chief. Decrees encouraging the Boxers, organizing them under prominent imperial officers, provisioning them, and even granting them large sums in the name of the Empress Dowager, are known to exist. Members of the Tsung-li yamên who counseled protection of the foreigners were beheaded. Even in the distant provinces men suspected of foreign sympathy were put to

death, prominent among these being Chang Yen-hoon, formerly Chinese minister in Washington.

"With the negotiation of the partial armistice of July 14th, a proceeding which was doubtless promoted by the representations of the Chinese envoy in Washington, the way was opened for the conveyance to Mr. Conger of a test message sent by the Secretary of State through the kind offices of Minister Wu Ting-fang. Mr. Conger's reply, dispatched from Peking on July 18th through the same channel, afforded to the outside world the first tidings that the inmates of the legations were still alive and hoping for succor.

"This news stimulated the preparations for a joint relief expedition in numbers sufficient to overcome the resistance which for a month had been organizing between Taku and the capital. Reinforcements sent by all the cooperating governments were constantly arriving. The United States contingent, hastily assembled from the Philippines or dispatched from this country, amounted to some 5,000 men, under the able command first of the lamented Colonel Liscum and afterwards of General Chaffee.

"Toward the end of July the movement began. A severe conflict followed at Tientsin, in which Colonel Liscum was killed. The city was stormed and partly destroyed. Its capture afforded the base of operations from which to make the final advance, which began in the first days of August, the expedition being made up of Japanese, Russian, British, and American troops at the outset.

"Another battle was fought and won at Yangtsun. Thereafter the disheartened Chinese troops offered little show of resistance. A few days later the important position of Ho-si-woo was taken. A rapid march brought the united forces to the populous city of Tung Chow, which capitulated without a contest.

"On August 14th the capital was reached. After a brief conflict beneath the walls the relief column entered and the legations were saved. The United States soldiers, sailors, and marines, officers and men alike, in those distant climes and unusual surroundings, showed the same valor, discipline, and good conduct and gave proof of the same high degree of intelligence and efficiency which have distinguished them in every emergency.

"The imperial family and the government had fled a few days before. The city was without visible control. The remaining imperial soldiery had made on the night of the 13th a last attempt to exterminate the besieged, which was gallantly repelled. It fell to the occupying forces to restore order and organize a provisional administration.

"Happily the acute disturbances were confined to the northern provinces. It is a relief to recall and a pleasure to record the loyal conduct of the viceroys and local authorities of the southern and

eastern provinces. Their efforts were continuously directed to the pacific control of the vast populations under their rule and to the scrupulous observance of foreign treaty rights. At critical moments they did not hesitate to memorialize the Throne, urging the protection of the legations, the restoration of communication, and the assertion of the imperial authority against the subversive elements. They maintained excellent relations with the official representatives of foreign powers. To their kindly disposition is largely due the success of the consuls in removing many of the missionaries from the interior to places of safety. In this relation the action of the consuls should be highly commended. In Shan-tung and eastern Chi-li the task was difficult, but, thanks to their energy and the cooperation of American and foreign naval commanders, hundreds of foreigners, including those of other nationalities than ours, were rescued from imminent peril.

"The policy of the United States through all this trying period was clearly announced and scrupulously carried out. A circular note to the powers dated July 3d proclaimed our attitude. Treating the condition in the north as one of virtual anarchy, in which the great provinces of the south and southeast had no share, we regarded the local authorities in the latter quarters as representing the Chinese people with whom we sought to remain in peace and friendship. Our declared aims involved no war against the Chinese nation. We adhered to the legitimate office of rescuing the imperiled legation, obtaining redress for wrongs already suffered, securing wherever possible the safety of American life and property in China, and preventing a spread of the disorders or their recurrence.

"As was then said, 'The policy of the government of the United States is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire.'

"Faithful to those professions which, as it proved, reflected the views and purposes of the other cooperating governments, all our efforts have been directed toward ending the anomalous situation in China by negotiations for a settlement at the earliest possible moment. As soon as the sacred duty of relieving our legation and its dependents was accomplished we withdrew from active hostilities, leaving our legation under an adequate guard in Peking as a channel of negotiation and settlement—a course adopted by others of the interested powers. Overtures of the empowered representatives of the Chinese Emperor have been considerately entertained.

"The Russian proposition looking to the restoration of the imperial power in Peking has been accepted as in full consonance with

our own desires, for we have held and hold that effective reparation for wrongs suffered and an enduring settlement that will make their recurrence impossible can best be brought about under an authority which the Chinese nation reverences and obeys. While so doing we forego no jot of our undoubted right to exact exemplary and deterrent punishment of the responsible authors and abettors of the criminal acts whereby we and other nations have suffered grievous injury.

"For the real culprits, the evil counselors who have misled the imperial judgment and diverted the sovereign authority to their own guilty ends, full expiation becomes imperative within the rational limits of retributive justice. Regarding this as the initial condition of an acceptable settlement between China and the powers, I said in my message of October 18th to the Chinese Emperor:

"'I trust that negotiations may begin so soon as we and the other offended governments shall be effectively satisfied of Your Majesty's ability and power to treat with just sternness the principal offenders, who are doubly culpable, not alone toward the foreigners, but toward Your Majesty, under whose rule the purpose of China to dwell in concord with the world had hitherto found expression in the welcome and protection assured to strangers.'

"Taking, as a point of departure, the imperial edict appointing Earl Li Hung Chang and Prince Ching plenipotentiaries to arrange a settlement, and the edict of September 25th, whereby certain high officials were designated for punishment, this Government has moved, in concert with the other powers, toward the opening of negotiations, which Mr. Conger, assisted by Mr. Rockhill, has been authorized to conduct on behalf of the United States.

"General bases of negotiation formulated by the government of the French Republic have been accepted with certain reservations as to details, made necessary by our own circumstances, but, like similar reservations by other powers, open to discussion in the progress of the negotiations. The disposition of the Emperor's government to admit liability for wrongs done to foreign governments and their nationals, and to act upon such additional designation of the guilty persons as the foreign ministers at Peking may be in a position to make, gives hope of a complete settlement of all questions involved, assuring foreign rights of residence and intercourse on terms of equality for all the world.

"I regard as one of the essential factors of a durable adjustment the securement of adequate guarantees for liberty of faith, since insecurity of those natives who may embrace alien creeds is a scarcely less effectual assault upon the rights of foreign worship and teaching than would be the direct invasion thereof.

"The matter of indemnity for our wronged citizens is a question of grave concern. Measured in money alone, a sufficient reparation may prove to be beyond the ability of China to meet. All the powers concur in emphatic disclaimers of any purpose of aggrandizement through the dismemberment of the Empire. I am disposed to think that due compensation may be made in part by increased guarantees of security for foreign rights and immunities, and, most important of all, by the opening of China to the equal commerce of all the world. These views have been and will be earnestly advocated by our representatives.

"The government of Russia has put forward a suggestion, that in the event of protracted divergence of views in regard to indemnities the matter may be relegated to the Court of Arbitration at The Hague. I favorably incline to this, believing that high tribunal could not fail to reach a solution no less conducive to the stability and enlarged prosperity of China itself than immediately beneficial to the powers."

President McKinley, annual message, Dec. 3, 1900, For. Rel. 1900, viii.

"Irrevocable conditions" of the powers; joint note of Dec. 22, 1900.

When the foregoing message was sent to Congress, the foreign ministers at Peking were awaiting instructions from their respective governments as to the signature of a joint note on which they had agreed, embracing the demands to be presented to the Chinese government. In transmitting the text of the note to his government, Mr. Conger stated that concessions were made by each minister for the sake of reaching an agreement. The note required that China should adopt financial measures "acceptable to" the powers for the purpose of guaranteeing the payment of indemnities. The phrase "acceptable to" had been substituted for the words "indicated by," in order to obtain the adherence of the Russian minister. Mr. Conger had himself endeavored to exclude the mention of names in connection with the death penalties by simply saying "all those mentioned in the decree of September 25, and such others as should be designated." He also had urged the dismantling instead of razing the Taku forts. But, finding himself "almost alone on all these propositions," he had yielded in order to avoid indefinite delay.[a]

In the note thus agreed on the demands of the powers were described as "irrevocable conditions." On the 27th of November Mr. Hay cabled that the President disapproved the word "irrevocable;" that he gravely questioned whether it would be possible to have the death sentences executed in all cases; and that he doubted the advisability of the clause prohibiting the importation of materials which

[a] Mr. Conger, min. to China, to Mr. Hay, Sec. of State, Nov. 26, 1900, For. Rel. 1900, 233–234.

entered into the manufacture of munitions of war. Mr. Conger was therefore instructed to urge these views upon his colleagues and report the result, and to submit to the President before signing it a copy of the identic note.[a]

All the ministers except the American, British, and Russian were authorized to sign the note as it was. The Russian minister was instructed to sign only on condition that the death penalty be omitted, and the British, Russian, and Japanese ministers all cooperated with Mr. Conger in securing the amendments which he was directed to urge.

December 4, 1900, Mr. Conger cabled the text of the note as amended, and on that day finally agreed upon "for the sake of immediate and unanimous action." Among the amendments made, the word "irrevocable" was omitted, and it was stated that the powers deemed the enumerated conditions to be "absolutely indispensable." The words "death penalty" and the names of persons were omitted, and a demand was to be preferred for "the severest punishment for the persons designated in the imperial decree of September 25, 1900, and those whom the representatives of the powers shall subsequently designate." The prohibition of the importation of "material for the manufacturing of arms and munitions" was made to read "material used exclusively for the manufacturing of arms and ammunition." Mr. Conger stated, however, that, although his colleagues would agree to the amended text if the United States insisted, a majority of them preferred to retain the word "irrevocable."[b]

Mr. Conger was instructed to "sign joint note as transmitted."[c] But, owing to an error in the cipher, the telegram, as received by him, read: "Sign joint note as *majorities*," an instruction which, although inaccurate in form, was understood by Mr. Conger to respond to his statement of the position of the majority and to authorize him to retain the word "irrevocable." He therefore agreed to its retention; but soon afterwards reported that at the last moment the British minister, who had supposed himself authorized to sign, was instructed to object to the word "irrevocable," and to propose the addition, at the end of the conditions, of this clause: "Until the Chinese government has complied with the above [conditions] to the satisfaction of the powers, the undersigned can hold out no expectation that the occupation of Peking and the province of Chihli by the general forces can be brought to a conclusion."[d]

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[a] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., Nov. 27, 1900, For. Rel. 1900, 235.

[b] Mr. Conger, min. to China, to Mr. Hay, Sec. of State, tel., Dec. 4, 1900, For. Rel. 1900, 235.

[c] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., Dec. 5, 1900, For. Rel. 1900, 238.

[d] For. Rel. 1900, 239, 240, 241, 242, 243.

Mr. Conger was directed to insist on the omission of "irrevocable," and, as to the addition proposed by Great Britain, was instructed that, although the United States individually objected to it, he need not, if it was generally concurred in, stand out against it, but should make it clear that it did not bind the United States to continue conjoint military operations.[a] Subsequently, however, it appearing that a revival of discussion as to the word irrevocable would jeopard the negotiations, Mr. Conger was authorized to sign after stating again the views of his government.[b] The note was signed accordingly, in French. The following is the English version, agreed upon by the American and British ministers:[c]

"During the months of May, June, July, and August of the present year, serious disturbances broke out in the northern provinces of China, and crimes unprecedented in human history, crimes against the law of nations, against the laws of humanity and against civilization, were committed under peculiarly odious circumstances. The principal of these crimes were the following:

"1. On the 20th of June, His Excellency Baron von Ketteler, German minister, proceeding to the Tsung-li yamên, was murdered while in the exercise of his official duties by soldiers of the regular army acting under orders of their chiefs.

"2. The same day the foreign legations were attacked and besieged. These attacks continued without intermission until the 14th of August, on which date the arrival of foreign troops put an end to them. These attacks were made by regular troops who joined the Boxers and who obeyed orders of the court, emanating from the imperial palace. At the same time the Chinese government officially declared by its representatives abroad that it guaranteed the security of the legations.

"3. The 11th of June, Mr. Sugiyama, chancellor of the legation of Japan, in the discharge of an official mission, was killed by regulars at the gates of the city. At Peking and in several provinces foreigners were murdered, tortured, or attacked by Boxers and regular troops, and only owed their safety to their determined resistance. Their establishments were pillaged and destroyed.

"4. Foreign cemeteries, at Peking especially, were desecrated, the graves opened, the remains scattered abroad.

"These events led the foreign powers to send their troops to China in order to protect the lives of their representatives and their nationals, and to restore order. During their march to Peking the allied

[a] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, telegrams, Dec. 17, 1900, and Dec. 19, 1900. For. Rel. 1900, 240, 241.

[b] Mr. Hay, Sec. of State, to Mr. Conger, min. to China, tel., Dec. 21, 1900, For. Rel. 1900, 242.

[c] For. Rel. 1900, 244.

forces met with the resistance of the Chinese armies, and had to overcome it by force. China having recognized her responsibility, expressed her regrets, and manifested the desire to see an end put to the situation created by the disturbances referred to, the powers have decided to accede to her request on the irrevocable conditions enumerated below, which they deem indispensable to expiate the crimes committed and to prevent their recurrence:

"I. (A) Dispatch to Berlin of an extraordinary mission, headed by an imperial Prince, to express the regrets of his Majesty the Emperor of China and of the Chinese government, for the murder of His Excellency the late Baron von Ketteler, German minister.[a]

"(B) Erection on the place where the murder was committed of a commemorative monument suitable to the rank of the deceased, bearing an inscription in the Latin, German, and Chinese languages, expressing the regrets of the Emperor of China for the murder.

"II. (A) The severest punishment in proportion to their crimes for the persons designated in the imperial decree of September 25, 1900, and for those whom the representatives of the powers shall subsequently designate.

"(B) Suspension of all official examinations for five years in all the towns where foreigners have been massacred or have been subjected to cruel treatment.

"III. Honorable reparation shall be made by the Chinese government to the Japanese government for the murder of Mr. Sugiyama, chancellor of the Japanese legation.[b]

"IV. An expiatory monument shall be erected by the imperial Chinese government in each of the foreign or international cemeteries which have been desecrated, and in which the graves have been destroyed.

"V. Maintenance, under conditions to be settled between the powers, of the prohibition of the importation of arms, as well as of material used exclusively for the manufacture of arms and ammunition.

"VI. Equitable indemnities for governments, societies, companies, and private individuals, as well as for Chinese who have suffered during the late events in person or in property in consequence of their being in the service of foreigners. China shall adopt financial measures acceptable to the powers for the purpose of guaranteeing the payment of said indemnities and the interest and amortization of the loans.

"VII. Right for each power to maintain a permanent guard for its legation and to put the legation quarter in a defensible condition. Chinese shall not have the right to reside in this quarter.

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[a] For an account of the expiatory mission of Prince Tschun, and his reception by the German Emperor, Sept. 4, 1901, see For. Rel. 1901, 187.

[b] As to the expiatory mission to Japan of Na Tung, special envoy of the Emperor of China, see For. Rel. 1901, p. 384.

"The Taku and other forts which might impede free communication between Peking and the sea shall be razed.

"IX. Right of military occupation of certain points, to be determined by an understanding between the powers, for keeping open communication between the capital and the sea.

"X. (A) The Chinese government shall cause to be published during two years in all subprefectures an imperial decree embodying—

"Perpetual prohibition, under pain of death, of membership in any antiforeign society.

"Enumeration of the punishments which shall have been inflicted on the guilty, together with the suspension of all official examinations in the towns where foreigners have been murdered or have been subjected to cruel treatment.

"(B) An imperial decree shall be issued and published everywhere in the Empire, declaring that all governors-general, governors, and provincial or local officials shall be responsible for order in their respective jurisdictions, and that whenever fresh antiforeign disturbances or any other treaty infractions occur, which are not forthwith suppressed and the guilty persons punished, they, the said officials, shall be immediately removed and forever prohibited from holding any office or honors.

"XI. The Chinese government will undertake to negotiate the amendments to the treaties of commerce and navigation considered useful by the powers and upon other subjects connected with commercial relations, with the object of facilitating them.

"XII. The Chinese government shall undertake to reform the office of foreign affairs and to modify the court ceremonial relative to the reception of foreign representatives in the manner which the powers shall indicate.

"Until the Chinese government have complied with the above to the satisfaction of the powers the undersigned can hold out no expectation that the occupation of Peking and the province of Chihli by the general forces can be brought to a conclusion.

"PEKIN, *December 22, 1900.*

"For Germany:	A. MUMM.
"For Austria-Hungary:	M. CZIKANN.
"For Belgium:	JOOSTENS.
"For Spain:	B. F. DE COLOGAN.
"For United States of America:	E. H. CONGER.
"For France:	S. PICHON.
"For Great Britain:	ERNEST SATOW.
"For Italy:	SALVAGO RAGGI.
"For Japan:	T. NISSI.
"For Netherlands:	F. M. KNOBEL.
"For Russia:	MICHEL DE GIERS."

The foregoing note was handed to Prince Ching Dec. 24, 1900, and his and Li Hung Chang's full powers were formally presented.[a] The Chinese plenipotentiaries subsequently notified the ministers that their demands were accepted by the Emperor, and requested a further conference. In so reporting Mr. Conger stated that the plenipotentiaries asked that military excursions into the interior should cease, and he expressed the opinion that they should cease at once. Mr. Conger was instructed that the President shared his opinion, and he was also directed to endeavor to have the forts disarmed instead of destroyed.[b]

(3) PROTOCOL OF SEPTEMBER 7, 1901.

§ 810.

Final protocol, Sept. 7, 1901.

In view of the difficulties and delays that attended the preliminary negotiations at Peking the United States, after the delivery of the joint note of Dec. 22, 1900, proposed that the final negotiations should be transferred to Washington or to some place in Europe.[c] This proposal was not accepted. The negotiations at Peking lasted till Sept. 7, 1901, when there was signed a final protocol. Of this instrument, the official text of which is French, the following is a translation:[d]

"The plenipotentiaries of Germany, His Excellency M. A. Mumm von Schwarzenstein; of Austria-Hungary, His Excellency M. M. Czikann von Wahlborn; of Belgium, His Excellency M. Joostens; of Spain, M. B. J. de Cologan; of the United States, His Excellency M. W. W. Rockhill; of France, His Excellency M. Paul Beau; of Great Britain, His Excellency Sir Ernest Satow; of Italy, Marquis Salvago Raggi; of Japan, His Excellency M. Jutaro Komura; of the Netherlands, His Excellency M. F. M. Knobel; of Russia, His Excellency M. M. de Giers; and of China, His Highness Yi-K'uang Prince Ching of the first rank, President of the Ministry of Foreign Affairs, and His Excellency Li Hung-chang, Earl of Su-i of the first rank, Tutor of the Heir Apparent, Grand Secretary of the Wen-hua

[a] For. Rel. 1900, 246–247.

[b] For. Rel. 1900, 248. The Chinese plenipotentiaries, after receiving the note, intimated a wish for some changes in it. As this was contrary to the expectations and understanding of the ministers, they required the plenipotentiaries to sign a protocol, a copy of which was sent to each minister, embodying the demands in extenso and the plenipotentiaries' letter accepting them, together with a copy of the imperial decree of acceptance under the imperial seal. The plenipotentiaries complied with this requirement, but at the same time sent a memorandum containing various inquiries and suggestions concerning the demands. (For. Rel. 1901, App. 63, 64–68.)

[c] For. Rel. 1901, App. 357.

[d] For the French text, see For. Rel. 1901, App. 306.

Throne Hall, Minister of Commerce, Superintendent of the northern trade, Governor-General of Chihli, have met for the purpose of declaring that China has complied to the satisfaction of the Powers with the conditions laid down in the note of the 22d of December, 1900, and which were accepted in their entirety by His Majesty the Emperor of China in a decree dated the 27th of December. (Annex No. 1.)

"ARTICLE I[a].

"By an Imperial Edict of the 9th of June last (Annex No. 2), Tsai Feng, Prince of Ch'un, was appointed Ambassador of His Majesty the Emperor of China, and directed in that capacity to convey to His Majesty the German Emperor the expression of the regrets of His Majesty the Emperor of China and of the Chinese Government for the assassination of his excellency the late Baron von Ketteler, German minister.

"Prince Ch'ün left Peking the 12th of July last to carry out the orders which had been given him.[a]

"ARTICLE I[b].

"The Chinese Government has stated that it will erect on the spot of the assassination of His Excellency the late Baron von Ketteler a commemorative monument, worthy of the rank of the deceased, and bearing an inscription in the Latin, German, and Chinese languages, which shall express the regrets of His Majesty the Emperor of China for the murder committed.

"Their Excellencies the Chinese Plenipotentiaries have informed His Excellency the German Plenipotentiary, in a leter dated the 22nd of July last (Annex No. 3) that an arch of the whole width of the street would be erected on the said spot, and that work on it was begun the 25th of June last.

"ARTICLE II[a].

"Imperial Edicts of the 13th and 21st of February, 1901 (Annexes Nos. 4, 5, and 6), inflicted the following punishments on the principal authors of the outrages and crimes committed against the foreign Governments and their nationals:

"Tsai-I Prince Tuan and Tsai Lan Duke Fu-kuo were sentenced to be brought before the autumnal court of assize for execution, and it was agreed that if the Emperor saw fit to grant them their lives, they should be exiled to Turkestan and there imprisoned for life, without the possibility of commutation of these punishments.

[a] For an account of the explanatory mission, see For. Rel. 1901, p. 187.

"Tsai Hsün Prince Chuang, Ying Nien, President of the Court of censors, and Chao Shu-Chiao, President of the Board of punishments, were condemned to commit suicide.

"Yü Hsien, Governor of Shanhsi, Chi Hsiu, President of the Board of rites, and Hsü Cheng-yu, formerly senior vice-President of the Board of punishments, were condemned to death.

"Posthumous degradation was inflicted on Kang Yi, assistant Grand Secretary, President of the Board of works, Hsü Tung, Grand Secretary, and Li Ping-heng, formerly Governor-General of Szu-ch'uan.

"An Imperial Edict of February 13th, 1901 (Annex No. 7), rehabilitated the memories of Hsü Yung-yi, President of the Board of war, Li Shan, President of the Board of works, Hsü Ching-cheng, senior vice-President of the Board of works, Lien Yuan, vice-Chancellor of the Grand Council, and Yuan Chang, vice-President of the Court of sacrifices, who had been put to death for having protested against the outrageous breaches of international law of last year.

"Prince Chuang committed suicide the 21st of February, 1901, Ying Nien and Chao Shu-chiao the 24th, Yü Hsien was executed the 22nd, Chi Hsiu and Hsü Cheng-yu on the 26th. Tung Fu-hsiang, General in Kan-su, has been deprived of his office by Imperial Edict of the 13th of February, 1901, pending the determination of the final punishment to be inflicted on him.

"Imperial Edicts dated the 29th of April and 19th of August, 1901, have inflicted various punishments on the provincial officials convicted of the crimes and outrages of last summer.

"ARTICLE II.

"An Imperial Edict promulgated the 19th of August, 1901 (Annex No. 8), ordered the suspension of official examinations for five years in all cities where foreigners were massacred or submitted to cruel treatment.

"ARTICLE III.

"So as to make honorable reparation for the assassination of Mr. Sugiyama, chancellor of the Japanese legation, His Majesty the Emperor of China by an Imperial Edict of the 18th of June, 1901 (Annex No. 9), appointed Na Tung, vice-President of the Board of revenue, to be his Envoy Extraordinary, and specially directed him to convey to His Majesty the Emperor of Japan the expression of the regrets of His Majesty the Emperor of China and of his Government at the assassination of the late Mr. Sugiyama.[a]

[a] As to the expiatory mission of Na Tung, see For. Rel. 1901, 384.

"ARTICLE IV.

"The Chinese Government has agreed to erect an expiatory monument in each of the foreign or international cemeteries which were desecrated and in which the tombs were destroyed.

"It has been agreed with the Representatives of the Powers that the legations interested shall settle the details for the erection of these monuments, China bearing all the expenses thereof, estimated at ten thousand taels for the cemeteries at Peking and within its neighborhood, and at five thousand taels for the cemeteries in the provinces. The amounts have been paid and the list of these cemeteries is enclosed herewith. (Annex No. 10.)

"ARTICLE V.

"China has agreed to prohibit the importation into its territory of arms and ammunition, as well as of materials exclusively used for the manufacture of arms and ammunition.

"An Imperial Edict has been issued on the 25th of August, 1901 (Annex No. 11), forbidding said importation for a term of two years. New Edicts may be issued subsequently extending this by other successive terms of two years in case of necessity recognized by the Powers.

"ARTICLE VI.

"By an Imperial Edict dated the 29th of May, 1901 (Annex No. 12), His Majesty the Emperor of China agreed to pay the Powers an indemnity of four hundred and fifty millions of Haikwan Taels. This sum represents the total amount of the indemnities for States, companies or societies, private individuals, and Chinese referred to in Article VI. of the note of December 22nd, 1900.

"(*a*) These four hundred and fifty millions constitute a gold debt calculated at the rate of the Haikwan tael to the gold currency of each country, as indicated below:

Haikwan tael	= marks	3.055
	= Austro-Hungary crown	3.595
	= gold dollar	0.742
	= francs	3.750
	= pound sterling	3s. 0d.
	= yen	1.407
	= Netherlands florin	1.796
	= gold rouble (17.424 dolias fine)	1.412

"This sum in gold shall bear interest at 4 per cent per annum, and the capital shall be reimbursed by China in thirty-nine years in the manner indicated in the annexed plan of amortization. (Annex No. 13.)

"Capital and interest shall be payable in gold or at the rates of exchange corresponding to the dates at which the different payments fall due.

"The amortization shall commence the 1st of January, 1902, and shall finish at the end of the year 1940. The amortizations are payable annually, the first payment being fixed on the 1st of January, 1903.

"Interest shall run from the 1st of July, 1901, but the Chinese Government shall have the right to pay off within a term of three years, beginning January, 1902, the arrears of the first six months, ending the 31st of December, 1901, on condition, however, that it pays compound interest at the rate of 4 per cent per annum on the sums the payments of which shall have thus been deferred. Interest shall be payable semiannually, the first payment being fixed on the 1st of July, 1902.

"(*b*) The service of the debt shall take place in Shanghai, in the following manner:

"Each power shall be represented by a delegate on a commission of bankers authorized to receive the amount of interest and amortization which shall be paid to it by the Chinese authorities designated for that purpose, to divide it among the interested parties, and to give a receipt for the same.

"(*c*) The Chinese Government shall deliver to the Doyen of the Diplomatic Corps at Peking a bond for the lump sum, which shall subsequently be converted into fractional bonds bearing the signatures of the delegates of the Chinese Government designated for that purpose. This operation and all those relating to issuing of the bonds shall be performed by the above-mentioned commission, in accordance with the instructions which the Powers shall send their delegates.

"(*d*) The proceeds of the revenues assigned to the payment of the bonds shall be paid monthly to the commission.

"(*e*) The revenues assigned as security for the bonds are the following:

"1. The balance of the revenues of the Imperial maritime Customs after payment of the interest and amortization of preceding loans secured on these revenues, plus the proceeds of the raising to five per cent effective of the present tariff on maritime imports, including articles until now on the free list, but exempting foreign rice, cereals, and flour, gold and silver bullion and coin.

"2. The revenues of the native customs, administered in the open ports by the Imperial maritime Customs.

"3. The total revenues of the salt gabelle, exclusive of the fraction previously set aside for other foreign loans.

"The raising of the present tariff on imports to five per cent effective is agreed to on the conditions mentioned below.

"It shall be put in force two months after the signing of the present protocol, and no exceptions shall be made except for merchandise shipped not more than ten days after the said signing.

"1°. All duties levied on imports 'ad valorem' shall be converted as far as possible and as soon as may be into specific duties. This conversion shall be made in the following manner: The average value of merchandise at the time of their landing during the three years 1897, 1898, and 1899, that is to say, the market price less the amount of import duties and incidental expenses, shall be taken as the basis for the valuation of merchandise. Pending the result of the work of conversion, duties shall be levied 'ad valorem.'

"2°. The beds of the rivers Peiho and Whangpu shall be improved with the financial participation of China.

"ARTICLE VII.

"The Chinese Government has agreed that the quarter occupied by the legations shall be considered as one specially reserved for their use and placed under their exclusive control, in which Chinese shall not have the right to reside and which may be made defensible.

"The limits of this quarter have been fixed as follows on the annexed plan (Annex No. 14):

"On the west, the line 1, 2, 3, 4, 5.

"On the north, the line 5, 6, 7, 8, 9, 10.

"On the east, Ketteler street (10, 11, 12).

"Drawn along the exterior base of the Tartar wall and following the line of the bastions, on the south the line 12.1.

"In the protocol annexed to the letter of the 16th of January, 1901, China recognized the right of each power to maintain a permanent guard in the said quarter for the defense of its legation.

"ARTICLE VIII.

"The Chinese Government has consented to raze the forts of Taku and those which might impede free communication between Peking and the sea; steps have been taken for carrying this out.

"ARTICLE IX.

"The Chinese Government has conceded the right to the powers in the protocol annexed to the letter of the 16th of January, 1901, to occupy certain points, to be determined by an agreement between them, for the maintenance of open communication between the capital and the sea. The points occupied by the powers are:

"Huang-tsun, Lang-fang, Yang-tsun, Tientsin, Chun-liang Ch'eng, Tang-ku, Lu-tai, Tang-shan, Lan-chou, Chang-li, Ch'in-wang tao, Shan-hai kuan.

"ARTICLE X.

"The Chinese Government has agreed to post and to have published during two years in all district cities the following Imperial edicts:

"(*a*) Edict of the 1st of February (Annex No. 15), prohibiting forever, under pain of death, membership in any antiforeign society.

"(*b*) Edicts of the 13th and 21st February, 29th April, and 19th August, enumerating the punishments inflicted on the guilty.

"(*c*) Edict of the 19th August, 1901, prohibiting examinations in all cities where foreigners were massacred or subjected to cruel treatment.

"(*d*) Edict of the 1st of February, 1901 (Annex No. 16), declaring all governors-general, governors, and provincial or local officials responsible for order in their respective districts, and that in case of new antiforeign troubles or other infractions of the treaties which shall not be immediately repressed and the authors of which shall not have been punished, these officials shall be immediately dismissed, without possibility of being given new functions or new honors.

"The posting of these edicts is being carried on throughout the Empire.

"ARTICLE XI.

"The Chinese Government has agreed to negotiate the amendments deemed necessary by the foreign Governments to the treaties of commerce and navigation and the other subjects concerning commercial relations, with the object of facilitating them.

"At present, and as a result of the stipulation contained in Article VI. concerning the indemnity, the Chinese Government agrees to assist in the improvement of the courses of the rivers Peiho and Whangpu, as stated below.

"(*a*) The works for the improvement of the navigability of the Peiho, begun in 1898 with the cooperation of the Chinese Government, have been resumed under the direction of an international Commission. As soon as the administration of Tientsin shall have been handed back to the Chinese Government, it will be in a position to be represented on this commission, and will pay each year a sum of sixty thousand Haikwan taels for maintaining the works.

"(*b*) A conservancy Board, charged with the management and control of the works for straightening the Whangpu and the improvement of the course of that river, is hereby created.

"This Board shall consist of members representing the interests of the Chinese Government and those of foreigners in the shipping trade of Shanghai. The expenses incurred for the works and the general management of the undertaking are estimated at the annual sum of

four hundred and sixty thousand Haikwan taels for the first twenty years. This sum shall be supplied in equal portions by the Chinese Government and the foreign interests concerned. Detailed stipulations concerning the composition, duties, and revenues of the conservancy board are embodied in annex No. 17.

"ARTICLE XII.

"An Imperial Edict of the 24th of July, 1901 (annex No. 18), reformed the Office of foreign affairs (Tsungli Yamen), on the lines indicated by the Powers, that is to say, transformed it into a Ministry of foreign affairs (Wai-wu Pu), which takes precedence over the six other Ministries of State. The same Edict appointed the principal members of this Ministry.

"An agreement has also been reached concerning the modification of Court ceremonial as regards the reception of foreign Representatives and has been the subject of several notes from the Chinese Plenipotentiaries, the substance of which is embodied in a memorandum herewith annexed (annex No. 19).

" Finally, it is expressly understood that as regards the declarations specified above and the annexed documents originating with the foreign Plenipotentiaries, the French text only is authoritative.

" The Chinese Government having thus complied to the satisfaction of the Powers with the conditions laid down in the above-mentioned note of December 22nd, 1900, the Powers have agreed to accede to the wish of China to terminate the situation created by the disorders of the summer of 1900. In consequence thereof the foreign Plenipotentiaries are authorized to declare in the names of their Governments that, with the exception of the legation guards mentioned in Article VII., the international troops will completely evacuate the city of Peking on the 17th September, 1901, and, with the exception of the localities mentioned in Article IX., will withdraw from the province of Chihli on the 22d of September.

" The present final Protocol has been drawn up in twelve identic copies and signed by all the Plenipotentiaries of the Contracting Countries. One copy shall be given to each of the foreign Plenipotentiaries, and one copy shall be given to the Chinese Plenipotentiaries.

" Peking, 7th September 1901."

Annexes.

The protocol sufficiently indicates the contents of the annexes therein referred to, except Nos. 18 and 19, which respectively relate to the reform of the foreign office and of the Chinese ceremonial. No. 19 is given elsewhere in connection with the general subject. No. 18, being an imperial edict of July 24, 1901, reads as follows:

"The 9th day of the 6th moon the Grand Chancellery received the following Edict:

"'The creation of offices and the determination of their duties has until now been regulated by the requirements of the times. Now, at the present time, when a new treaty of peace is concluded, international affairs take the first place among important business, and it is more than ever necessary to have recourse to competent men to devote themselves to all that relates to establishing friendly relations and confidence in speech.

"'The Office of Foreign Affairs, formerly created to treat international questions, has been in existence, it is true, for years, but, in view of the Princes and Ministers composing it only discharging for the most part their functions accessorily with others, they could not devote themselves to them exclusively. It is naturally, therefore, proper to create special functions, so that each one may have his particular attributions.

"'We command, in consequence, that the Office of Foreign Affairs (Tsung-li ko kuo shih-wu ya-men) be changed into a Ministry of Foreign Affairs (Wai-wu Pu) and take rank before the six ministries. And we designate Yi-K'uang, Prince Ch'ing of the first rank, as President of the Ministry of Foreign Affairs.

"'Wang Wen-shao, Grand Secretary of State of the Ti-jen Ko, is appointed Assistant-President of the Ministry of Foreign Affairs. Ch'ü Hung-chi, President of the Board of Works, is transferred with the same rank to the Ministry of Foreign Affairs, in which he is appointed Assistant-President. Hsü Shou-p'eng, Director of the Imperial Stud, and Lien-fang, Expectant Metropolitan Subdirector of the third or fourth rank, are appointed first and second Directors (or Assistant Secretaries).

"'As regards the fixing of the personnel, the rules to be followed in its choice, the salaries to be given the Ministers, Directors, and other agents, We command the Councilors of State to come to an agreement with the Board of Civil Office and to promptly submit to Us their conclusions in a report.

"'Respect this.'"

Correspondence concerning the reform of the foreign office may be found in For. Rel. 1901, App., 120, 272, 291, 356. The Tsung-li yamên and its archives were handed over to Prince Ching and Li Hung Chang on May 1, 1901. (For. Rel. 1901, App., 153–155.)

Mr. Rockhill's report.

"I reached Shanghai on the 29th of August and proceeded at once to Peking, where I discussed with our minister, Mr. Conger, the situation and the steps he proposed taking to hasten the restoration of order and for the protection of American persons and property, and I was pleased to be able to report to you that I fully concurred with him in all the measures he had been and was advocating.

"After a brief stay at Peking I returned to Shanghai and then visited the Viceroy Liu K'un-yi at Nanking, and later the Viceroy Chang Chihtung at Wu-chang, for the purpose of thanking them, in the name of the United States, for the perfect manner in which they and the other viceroys had maintained peace, and the friendly spirit they and their provincial administrations were showing foreigners during these troublesome times. I wished also to ascertain their views on the question of the restoration of order and the return of His Majesty the Emperor to Peking. The courteous and friendly receptions given me by the two viceroys, and the personal relations which I was thus so fortunate as to establish, and which were kept up during the remainder of my mission in China, did not a little, I think, in the interest of peace and the common benefit of the two countries.

"After returning to Shanghai and conferring with the various American commercial and missionary bodies there, I left again for Peking, where you had directed me to proceed to act as counselor and adviser of the American minister in the negotiations then begun. I discharged this duty, and, I am pleased to say, always in perfect harmony with our minister, until the 23d of February of this year, when Mr. Conger, having obtained from you leave of absence with permission to visit the United States, I was appointed by the President, under telegraphic instructions from you, plenipotentiary to continue the negotiations on the part of the United States. In this capacity I acted until September 7, when the final protocol, embodying the results of the negotiations between the various powers and China, was signed. I then left for the United States and arrived at Washington on October 23.

"The different phases of the negotiations between the powers and China, which extended over a period of about fourteen months, are shown in detail in the correspondence of Mr. Conger and myself with the Department and also in the printed minutes of the various meetings of the conference at Peking. With these before you I shall not go over these questions again. I shall confine myself to summarizing the work of the United States in the conference.

"The circular note which you telegraphed on July 3, 1900, to our embassies in Europe and to our missions in Vienna, Brussels, Madrid, Tokyo, The Hague, and Lisbon defined the policy then already adopted by the United States in the settlement of affairs in China and from which they never departed. Bearing these instructions always in mind, the task of the agents of our government in Peking was a comparatively easy one. Throughout the negotiations our object was to use the influence of our government in the interest of justice and moderation and in a spirit of equal friendship to the powers negotiating jointly with us and the Chinese nation.

"The twelve demands made by the powers on China, the accomplishment of which was deemed necessary for the restoration of normal relations with that country and which were embodied in the joint note of December 22, 1900, may be classified under four principal heads: (1) Adequate punishment for the authors of and those guilty of actual participation in the antiforeign massacres and riots; (2) the adoption of measures necessary to prevent their recurrence; (3) the indemnification for losses sustained by states and foreigners through these riots; and (4) the improvement of our relations, both official and commercial, with the Chinese Government and with China generally.

"As regards the punishment of the responsible authors and actual perpetrators of the antiforeign outrages, the government of the United States, while insisting that all such should be held to the utmost accountability, declined to determine in every case the nature of the punishment to be inflicted, and maintained that the Chinese government itself should in all cases carry them out.

"As soon as the chief culprits had been punished, considering the terrible losses in life and property sustained by China, not only through the Boxers and their adherents, but by the destruction of Tientsin, Peking, and the military occupation of a large portion of the Province of Chih-li, the United States threw the weight of its influence on the side of moderation and the prevention of further bloodshed. To this it was mainly due that the long lists of proscription, which had been prepared by the representatives of the powers, of Chinese in the provinces charged with participation in the massacres or riots, were repeatedly revised before presentation to the Chinese government. The demands for capital punishment were finally reduced from ten to four and many names erroneously or on insufficient evidence placed on the lists were removed, or lighter forms of punishment asked for numbers of those left on them.

"While seeking with the other powers the best means to prevent the recurrence of such troubles and to guard the future American residents in Peking from such dangers as they had passed through, the United States did not lend its support to any plan which contemplated either the prolonged occupation by foreign troops of any portions or points in China or the erection of an international fort in the city of Peking from which to carry on friendly relations with the Chinese government. Our policy has always been in favor of a strong, independent, and responsible Chinese government, which can and will be held accountable for the maintenance of order and the protection of our citizens and their rights under the treaties. Throughout the negotiations we strictly adhered to this just principle, with results which have proved beneficial to all.

"As regards the third point of the negotiations, the equitable indemnification of the various states for the losses and expenses incurred by them in China and in sending expeditionary forces to relieve the legations and foreign residents at Peking and restore order, and also the securing of indemnities to societies, companies, and individuals for their private losses through the antiforeign riots, the government of the United States advocated that the sum total of these indemnities should not exceed a reasonable amount, well within the power of China to pay. After careful inquiry you reached the conclusion that with her present resources and liabilities, China could not pay as indemnities to the powers more than two hundred millions of dollars, and that the exaction of any larger amount would not only entail permanent financial embarrassment on the country, but might possibly result in either international financial control or even loss of territory. The representative of the United States was instructed accordingly, and he was further told that in the opinion of our government the amount should be asked of China by the powers jointly, without detail or explanation, and afterwards divided among them, according to their losses and disbursements. You also stated that every facility of payment should be accorded to China, and that the debt should be paid by bonds issued at par and bearing 3 per cent interest and running for thirty or forty years.

"Though it became necessary, after protracted discussion in the conference, to accept the proposition of the other powers to demand of China the sum total of their losses and disbursements, reaching the enormous sum of $333,000,000, our insistence in pressing for a much lower sum, and the weight of the arguments adduced in favor of such a policy, resulted in closing the indemnities at the above lump sum, when they bid fair to go on swelling indefinitely. This, and the acceptance of your suggestion that the indemnities be paid in bonds issued at par and bearing a low rate of interest (4 per cent was finally agreed upon) and running for forty years, resulted in saving a vast sum to China, hastened the evacuation of the country by the expeditionary forces and the restoration of order and of normal relations with the Chinese government.

"In connection with the question of the indemnity, I should particularly mention that, it having been proved necessary to the powers in their search for revenues applicable to the service of the indemnity debt that the existing nominal 5 per cent ad valorem customs tariff on foreign imports should be made an effective 5 per cent ad valorem, the United States, mindful of the furtherance of lawful commerce in China in the interests of the world, and believing that no opportunity should be lost to secure to foreign trade all the facilities its vast importance entitles it to, and that any additional tax on trade should be met by commercial compensations on the part of China of equal

value, declined to consent to the above increase of the customs tariff on imports unless (1) all the treaty powers and China agreed to cooperate in the long-desired improvement of the water approaches to Shanghai and Tientsin, and (2) that specific duties should be substituted to the present ad valorem ones in the tariff on foreign imports. Both of these conditions were ultimately agreed upon.

"No divergence of views existed fortunately between the representatives of the powers on the question of improving the channels of direct communication between them and the Chinese government. The long-vexed question of the ceremonial to be observed in the public audiences granted by the Emperor of China to foreign representatives was finally settled by the plenipotentiaries on lines perfectly satisfactory to all parties to the negotiations. The Tsung-li Yamên, or bureau of foreign affairs, which the experience of forty years had shown Chinese and foreigners alike was unwieldy and incapable of discharging the duties devolving upon it, was altered in the way suggested by the conference, changed into a responsible ministry of foreign affairs, and organized on lines similar to those adopted in every other country of the world.

"Such, in brief, has been the part played by the United States in the conference of Peking. While we maintained complete independence, we were able to act harmoniously in the concert of powers, the existence of which was so essential to a prompt and peaceful settlement of the situation, we retained the friendship of all the negotiating powers, exerted a salutary influence in the cause of moderation, humanity, and justice, secured adequate reparation for wrongs done our citizens, guaranties for their future protection, and labored successfully in the interests of the whole world in the cause of equal and impartial trade with all parts of the Chinese Empire."

Report of Mr. Rockhill, commissioner to China, to Mr. Hay, Sec. of State, Nov. 30, 1901, For. Rel. 1901, App.; H. Doc. 1, 57 Cong. 1 sess.; S. Doc. 67, 57 Cong. 1 sess.

In connection with the subject of punishments, it may be stated that on Jan. 5, 1901, Mr. Conger reported that En Hai, a Manchu soldier, who was arrested in the preceding September on the charge of having murdered Baron von Ketteler, was publicly beheaded Dec. 31, 1900, by the German military authorities, on the spot where the crime was committed. En Hai was, according to his confession, in immediate command of the soldiers and with them fired on the minister's chair. (For. Rel. 1901, App. 62.)

With regard to the punishments demanded of the Chinese government, Mr. Conger telegraphed, Feb. 6, 1901, that the Chinese plenipotentiaries alleged difficulties in the way of executing Prince Tuan, Duke Lan, and Tung Fu-hsiang; that they promised the death of Chuang and Yü Hsien, but urged leniency for the others and begged that the court be not placed in too difficult a position; that the foreign ministers subsequently agreed to demand capital sentence, to be im-

mediately commuted to exile, for Tuan and Lan, and death penalty for the others mentioned in the decree, adding Yü Hsien, Chi Hsiu, and Hsü Cheng-yu, the two latter then being prisoners of the Japanese in Peking; and that posthumous honors for the members of the Tsung-li Yamên, executed during the preceding summer, were also demanded. (For. Rel. 1901, App. 360.)

February 17, 1901, Mr. Conger reported the receipt "of an unsatisfactory edict decreeing exile for Tuan and Lan without capital sentence, suicide for Chuang, death for Yü Hsien, degradation and imprisonment for Chao Shu-chiao and Ying Nien, and undetermined punishment for Chi Hsiu and Hsü Cheng-yu." (For. Rel. 1901, App. 361.)

Mr. Hay, Feb. 19, 1901, replied: "The decree is not thought by the President to be unsatisfactory. Three of the principal culprits are already dead. By the decree several of high rank are to be put to death; two of the highest rank are to be degraded and exiled, and all the rest severely punished. The President entertains the opinion that, with the fulfillment of these sentences, and considering the material chastisement already inflicted upon the Chinese and their cities, the question of punishment should be regarded by the powers as closed, and other matters should be taken up." (For. Rel. 1901, App. 362.)

In acknowledging the receipt of this telegram, Mr. Conger stated that "a list of local and provincial officials" for whom punishment was to be demanded was then being prepared by the ministers, and that many of those officials "were present and aided in or were directly responsible for the fiendish massacre of the missionaries at interior points." He asked whether he was to oppose any further punishments. (For. Rel. 1901, App. 362.)

February 23, 1901, Mr. Hay replied "that it is difficult at this distance to fully appreciate all the circumstances which induce the ministers to insist upon further prosecutions, and that the President, while disinclined to place Mr. Conger in an attitude of opposition to his colleagues, instructs him to make clear to them the President's earnest desire for peace, the cessation of bloodshed, and the resumption of normal relations." (For. Rel. 1901, App. 363.)

A fortnight later, Mr. Rockhill reported that the Russian minister, acting under instructions, had refused to take part in further discussions as to punishments; that the other foreign representatives insisted upon 10 capital punishments and about 90 minor ones; that he had several times set forth the views contained in the Department's telegrams of February 19 and 23; but that, while asking for no capital punishments, he would, unless otherwise instructed, continue to vote with the majority. (Tel., March 12, 1901, For. Rel. 1901, App. 364.)

Ten days later he cabled that the foreign ministers, except the Russian, had agreed to demand the capital punishment of 4 persons instead of 10, and that, unless instructed to the contrary, he would continue to vote for the joint note. The British minister reserved the right to demand the original lists, unless the joint note should be agreed to. (Tel. March 22, 1901, For. Rel. 1901, App. 366.)

The reply of the United States was as follows: "Mr. Hay, replying to Mr. Rockhill's telegram of the 22d instant, states that in view of his knowledge of all the circumstances he must use his discretion in regard to signing joint note. The President does not desire to delay

action or to risk a failure of the negotiations by giving more definite instructions, but Mr. Rockhill will keep in view and let it be understood by his colleagues that it is the earnest desire of the President that the effusion of blood should cease." (Tel. March 23, 1901, For. Rel. 1901, App. 367.)

For further discussion as to punishments, see For. Rel. 1901, App. 69, 71–82, 88, 92, 94, 95, 96, 98, 112, 123, 125, 129, 166, 178, 192, 193 (list of all the punishments demanded), 219, 254, 303, 343, 344, 360, 361.

As to expiatory missions, see For. Rel. 1901, App. 253. Concerning expiatory monuments, see For. Rel. 1901, App. 230, 296; For. Rel. 1903, 77. Suspension of official examinations, For. Rel. 1901, App. 219, 224, 245, 281.

On the question of indemnity, the position of the United States was set forth in a cabled instruction of Mr. Hay to Mr. Conger, Jan. 29, 1901, in which it was stated that a settlement should be effected by the payment of a reasonable lump sum; that, according to information obtainable in Washington, China could not possibly pay more than $150,000,000; that the acceptance of this amount probably would necessitate the scaling down of the demands of the different powers; that the United States would insist on receiving a fair proportion of whatever was agreed on, its equitable distribution among the claimants to be undertaken by the United States; that the United States losses and disbursements amounted to about $25,000,000; and that, in case of protracted disagreement concerning the indemnity, the subject might be referred to The Hague Tribunal. (For. Rel. 1901, App. 359.)

March 21, 1901, Mr. Rockhill was instructed in a similar sense, and was directed to endeavor to have the total indemnity "kept within the limit of £40,000,000." (For. Rel. 1901, App. 366.)

For further correspondence and discussion concerning the question of indemnity, see For. Rel. 1901, App. 70, 86, 101–109, 113, 119, 121, 127, 128, 139, 141, 143, 144, 155, 165, 169, 171, 173, 175, 176, 179, 181, 184, 186, 187, 208 (report by Mr. Kasson on China's resources), 212 (extended examination of China's resources and revenue system), 224, 226, 227, 230, 243, 244, 246, 250, 252, 255, 275, 283, 289, 298, 299, 339, 361, 364, 365, 367, 368, 369–376, 377, 380.

A translation of the bond given by the Chinese Government for the payment of the indemnity is printed in For. Rel. 1901, 129, App. 339. It was finally agreed that the indemnity should be paid at gold rates, with certain qualifications or conditions. (For. Rel. 1904, 177–184.)

Correspondence concerning the occupation of Peking pending negotiations may be found in For. Rel. 1901, App. 110, 177, 247, 255, 359, 360, 361, 382.

For correspondence on the subject of the razing of the forts, see For. Rel. 1901, App. 135, 137, 140, 160, 284, 293, 366.

As to the prohibition of the importation of arms and ammunition, see For. Rel. 1901, App. 111, 130, 297, 303, 376.

Concerning the future protection of the legations in Peking, see For. Rel. 1901, App. 82–86, 93, 96, 98, 99, 160, 176, 232, 241, 294.

As to the improvement of the navigation of the Peiho and Whangpu (Woosung) rivers, see For. Rel. 1901, App. 257–272, 290, 299, 300, 381, 379; For. Rel. 1904, 186.

Amoy, creation of an international concession at, on the island of Kulang-su; see For. Rel. 1901, App. 278.

As to the proposed revision of commercial treaties, see For. Rel. 1901, App. 217, 251, 358, 369, 376, 378.

For correspondence concerning the death of Li Hung Chang, Nov. 7, 1901, see For. Rel. 1901, 132–133.

"During these troubles our government has unswervingly advocated moderation, and has materially aided in bringing about an adjustment which tends to enhance the welfare of China and to lead to a more beneficial intercourse between the Empire and the modern world; while in the critical period of revolt and massacre we did our full share in safeguarding life and property, restoring order, and vindicating the national interest and honor. It behooves us to continue in these paths, doing what lies in our power to foster feelings of good will, and leaving no effort untried to work out the great policy of full and fair intercourse between China and the nations, on a footing of equal rights and advantages to all. We advocate the 'open door' with all that it implies; not merely the procurement of enlarged commercial opportunities on the coasts, but access to the interior by the waterways with which China has been so extraordinarily favored. Only by bringing the people of China into peaceful and friendly community of trade with all the peoples of the earth can the work now auspiciously begun be carried to fruition. In the attainment of this purpose we necessarily claim parity of treatment, under the conventions, throughout the Empire for our trade and our citizens with those of all other powers."

President Roosevelt, annual message, Dec. 3, 1901, For. Rel. 1901, lii.

As to the visit to the United States of His Highness Prince Pu Lun, as Chinese commissioner in chief to the Louisiana Purchase Exposition, and his reception at Washington, see For. Rel. 1904, 148.

"The signing of a new commercial treaty with China, which took place at Shanghai on the 8th of October, is a cause for satisfaction. This act, the result of long discussion and negotiation, places our commercial relations with the great oriental Empire on a more satisfactory footing than they have ever heretofore enjoyed. It provides not only for the ordinary rights and privileges of diplomatic and consular officers, but also for an important extension of our commerce by increased facility of access to Chinese ports, and for the relief of trade by the removal of some of the obstacles which have embarrassed it in the past. The Chinese Government engages, on fair and equitable conditions, which will probably be accepted by the principal commercial nations, to abandon the levy of "likin" and other transit dues throughout the Empire, and to introduce other desirable administrative reforms. Larger facilities are to be given to our citizens who desire to carry on mining enterprises in

China. We have secured for our missionaries a valuable privilege, the recognition of their right to rent and lease in perpetuity such property as their religious societies may need in all parts of the Empire. And, what was an indispensable condition for the advance and development of our commerce in Manchuria, China, by treaty with us, has opened to foreign commerce the cities of Mukden, the capital of the province of Manchuria, and Antung, an important port on the Yalu River, on the road to Korea."

President Roosevelt, annual message, Dec. 7, 1903, For. Rel. 1903, xxii.

See further, as to the negotiations, For. Rel. 1903, 60, 61, 63, 64–65, 67, 70, 71, 74, 76–77.

As to mining regulations which were considered to violate the provisions of the treaty, see For. Rel. 1904, 150–167.

For the British commercial treaty with China, signed at Shanghai, Sept. 5, 1902, see For. Rel. 1903, 551.

13. Open-door Policy.

"The United States has not been an indifferent spectator of the extraordinary events transpiring in the Chinese Empire, whereby portions of its maritime provinces are passing under the control of various European powers; but the prospect that the vast commerce which the energy of our citizens and the necessity of our staple productions for Chinese uses has built up in those regions may not be prejudiced through any exclusive treatment by the new occupants has obviated the need of our country becoming an actor in the scene. Our position among nations, having a large Pacific coast and a constantly expanding direct trade with the farther Orient, gives us the equitable claim to consideration and friendly treatment in this regard, and it will be my aim to subserve our large interests in that quarter by all means appropriate to the constant policy of our Government. The territories of Kiao-chow, of Wei-hai-wai, and of Port Arthur and Talienwan, leased to Germany, Great Britain, and Russia respectively for terms of years, will, it is announced, be open to international commerce during such alien occupation; and if no discriminating treatment of American citizens and their trade be found to exist, or be hereafter developed, the desire of this government would appear to be realized.

"In this relation, as showing the volume and value of our exchanges with China and the peculiarly favorable conditions which exist for their expansion in the normal course of trade, I refer to the communication addressed to the Speaker of the House of Representatives by the Secretary of the Treasury on the 14th of last June, with its accompanying letter of the Secretary of State, recommending an appropriation for a commission to study the commercial

and industrial conditions in the Chinese Empire and report as to the opportunities for and obstacles to the enlargement of markets in China for the raw products and manufactures of the United States. Action was not taken thereon during the late session. I cordially urge that the recommendation receive at your hands the consideration which its importance and timeliness merit."

President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, lxxii.

(1) THE HAY AGREEMENT.

§ 811.

September 6, 1899, Mr. Hay, Secretary of State, inclosed to the embassy of the United States at Paris, for its confidential information, copies of instructions sent on that day to the United States ambassadors at London, Berlin, and St. Petersburg, in relation to the desire of the United States that Great Britain, Germany, and Russia make formal declaration of an "open-door" policy in the territories held by them in China. The instructions in question are given below.

November 21, 1899, the embassy was instructed to submit informally to the French government the form of declaration outlined in those instructions, and ask whether France would join in it.

December 16, 1899, the embassy received from M. Delcassé, minister of foreign affairs, the following response: "The declarations which I made in the Chamber on the 24th of November last, and which I have had occasion to recall to you since then, show clearly the sentiments of the government of the Republic. It desires throughout the whole of China and, with the quite natural reservation that all the powers interested give an assurance of their willingness to act likewise, is ready to apply, in the territories which are leased to it, equal treatment to the citizens and subjects of all nations, especially in the matter of customs duties and navigation dues, as well as transportation tariffs on railways."

For. Rel. 1899, 128–129.

See Mr. Sherman, Sec. of State, to Mr. White, chargé, tel., March 16, 1898, MS. Inst. Gr. Br. XXXII. 683; Mr. Sherman, Sec. of State, to Mr. Hitchcock, ambass. to Russia, tel., March 16, 1898, MS. Inst. Russia, XVIII. 330.

Correspondence with Germany.

"At the time when the Government of the United States was informed by that of Germany that it had leased from His Majesty the Emperor of China the port of Kiaochao and the adjacent territory in the province of Shantung, assurances were given to the ambassador of the United States at Berlin by the Imperial German minister for foreign affairs that the rights and privileges insured by treaties with China to citi-

zens of the United States would not thereby suffer or be in anywise impaired within the area over which Germany had thus obtained control.

"More recently, however, the British Government recognized by a formal agreement with Germany the exclusive right of the latter country to enjoy in said leased area and the contiguous 'sphere of influence or interest' certain privileges, more especially those relating to railroads and mining enterprises; but as the exact nature and extent of the rights thus recognized have not been clearly defined, it is possible that serious conflicts of interest may at any time arise not only between British and German subjects within said area, but that the interests of our citizens may also be jeopardized thereby.

"Earnestly desirous to remove any cause of irritation and to insure at the same time to the commerce of all nations in China the undoubted benefits which should accrue from a formal recognition by the various powers claiming 'spheres of interest' that they shall enjoy perfect equality of treatment for their commerce and navigation within such 'spheres,' the Government of the United States would be pleased to see His German Majesty's Government give formal assurances, and lend its cooperation in securing like assurances from the other interested powers, that each, within its respective sphere of whatever influence—

"First. Will in no way interfere with any treaty port or any vested interest within any so-called 'sphere of interest' or leased territory it may have in China.

"Second. That the Chinese treaty tariff of the time being shall apply to all merchandise landed or shipped to all such ports as are within said 'sphere of interest' (unless they be 'free ports'), no matter to what nationality it may belong, and that duties so leviable shall be collected by the Chinese Government.

"Third. That it will levy no higher harbor dues on vessels of another nationality frequenting any port in such 'sphere' than shall be levied on vessels of its own nationality, and no higher railroad charges over lines built, controlled, or operated within its 'sphere' on merchandise belonging to citizens or subjects of other nationalities transported through such 'sphere' than shall be levied on similar merchandise belonging to its own nationals transported over equal distances.

"The liberal policy pursued by His Imperial German Majesty in declaring Kiao-chao a free port and in aiding the Chinese Government in the establishment there of a custom-house are so clearly in line with the proposition which this Government is anxious to see recognized that it entertains the strongest hope that Germany will give its acceptance and hearty support.

"The recent ukase of His Majesty the Emperor of Russia declaring the port of Ta-lien-wan open during the whole of the lease under which it is held from China to the merchant ships of all nations, coupled with the categorical assurances made to this Government by His Imperial Majesty's representative at this capital at the time and since repeated to me by the present Russian ambassador, seem to insure the support of the Emperor to the proposed measure. Our ambassador at the court of St. Petersburg has in consequence been instructed to submit it to the Russian Government and to request their early consideration of it. A copy of my instruction on the subject to Mr. Tower is herewith inclosed for your confidential information.

"The commercial interests of Great Britain and Japan will be so clearly served by the desired declaration of intentions, and the views of the Governments of these countries as to the desirability of the adoption of measures insuring the benefits of equality of treatment of all foreign trade throughout China are so similar to those entertained by the United States, that their acceptance of the propositions herein outlined and their cooperation in advocating their adoption by the other powers can be confidently expected. I inclose herewith copy of the instruction which I have sent to Mr. Choate on the subject.

"In view of the present favorable conditions, you are instructed to submit the above considerations to His Imperial German Majesty's minister for foreign affairs, and to request his early consideration of the subject.

"Copy of this instruction is sent to our ambassadors at London and at St. Petersburg for their information."

Mr. Hay, Sec. of State, to Mr. White, amb. to Germany, Sept. 6, 1899. For. Rel. 1899, 129.

The contents of this instruction were communicated to the German Government Sept. 26, 1899.

"Your excellency informed me, in a memorandum presented on the 24th of last month, that the Government of the United States of America had received satisfactory written replies from all the powers to which an inquiry had been addressed similar to that contained in your excellency's note of September 26 last, in regard to the policy of the open door in China. While referring to this, your excellency thereupon expressed the wish that the Imperial Government would now also give its answer in writing.

"Gladly complying with this wish, I have the honor to inform your excellency, repeating the statements already made verbally, as follows: As recognized by the Government of the United States of America, according to your excellency's note referred to above, the Imperial Government has, from the beginning, not only asserted, but also practically carried out to the fullest extent, in its Chinese possessions, absolute equality of treatment of all nations with regard to

trade, navigation, and commerce. The Imperial Government entertains no thought of departing in the future from this principle, which at once excludes any prejudicial or disadvantageous commercial treatment of the citizens of the United States of America, so long as it is not forced to do so, on account of considerations of reciprocity, by a divergence from it by other governments. If, therefore, the other powers interested in the industrial development of the Chinese Empire are willing to recognize the same principles, this can only be desired by the Imperial Government, which in this case upon being requested will gladly be ready to participate with the United States of America and the other powers in an agreement made upon these lines, by which the same rights are reciprocally secured."

Count Von Bülow, min. of for. aff., to Mr. White, United States amb., Feb. 19, 1900. For. Rel. 1899, 131.

Correspondence with Great Britain.

"The Government of Her Britannic Majesty has declared that its policy and its very traditions precluded it from using any privileges which might be granted it in China as a weapon for excluding commercial rivals, and that freedom of trade for Great Britain in that Empire meant freedom of trade for all the world alike. While conceding by formal agreements, first with Germany and then with Russia, the possession of 'spheres of influence or interest' in China in which they are to enjoy special rights and privileges, more especially in respect of railroads and mining enterprises, Her Britannic Majesty's Government has therefore sought to maintain at the same time what is called the 'open-door' policy, to insure to the commerce of the world in China equality of treatment within said 'spheres' for commerce and navigation. This latter policy is alike urgently demanded by the British mercantile communities and by those of the United States, as it is justly held by them to be the only one which will improve existing conditions, enable them to maintain their positions in the markets of China, and extend their operations in the future. While the Government of the United States will in no way commit itself to a recognition of exclusive rights of any power within or control over any portion of the Chinese Empire under such agreements as have within the last year been made, it can not conceal its apprehension that under existing conditions there is a possibility, even a probability, of complications arising between the treaty powers which may imperil the rights insured to the United States under our treaties with China.

"This Government is animated by a sincere desire that the interests of our citizens may not be prejudiced through exclusive treatment by any of the controlling powers within their so-called 'spheres of interest' in China, and hopes also to retain there an open market

for the commerce of the world, remove dangerous sources of international irritation, and hasten thereby united or concerted action of the powers at Pekin in favor of the administrative reforms so urgently needed for strengthening the Imperial Government and maintaining the integrity of China in which the whole western world is alike concerned. It believes that such a result may be greatly assisted by a declaration by the various powers claiming 'spheres of interest' in China of their intentions as regards treatment of foreign trade therein. The present moment seems a particularly opportune one for informing Her Britannic Majesty's Government of the desire of the United States to see it make a formal declaration and to lend its support in obtaining similar declarations from the various powers claiming 'spheres of influence' in China, to the effect that each in its respective spheres of interest or influence—

"First. Will in no wise interfere with any treaty port or any vested interest within any so-called 'sphere of interest' or leased territory it may have in China.

"Second. That the Chinese treaty tariff of the time being shall apply to all merchandise landed or shipped to all such ports as are within said 'sphere of interest' (unless they be 'free ports'), no matter to what nationality it may belong, and that duties so leviable shall be collected by the Chinese Government.

"Third. That it will levy no higher harbor dues on vessels of another nationality frequenting any port in such 'sphere' than shall be levied on vessels of its own nationality, and no higher railroad charges over lines built, controlled, or operated within its 'sphere' on merchandise belonging to citizens or subjects of other nationalities transported through such 'sphere' than shall be levied on similar merchandise belonging to its own nationals transported over equal distances.

"The recent ukase of His Majesty the Emperor of Russia, declaring the port of Ta-lien-wan open to the merchant ships of all nations during the whole of the lease under which it is to be held by Russia, removing as it does all uncertainty as to the liberal and conciliatory policy of that power, together with the assurances given this Government by Russia, justifies the expectation that His Majesty will cooperate in such an understanding as is here proposed, and our ambassador at the court of St. Petersburg has been instructed accordingly to submit the propositions above detailed to His Imperial Majesty, and ask their early consideration. Copy of my instruction to Mr. Tower is herewith inclosed for your confidential information.

"The action of Germany in declaring the port of Kiaochao a 'free port,' and the aid the Imperial Government has given China in the establishment there of a Chinese custom-house, coupled with the oral

assurance conveyed the United States by Germany that our interests within this 'sphere' would in no wise be affected by its occupation of this portion of the province of Shang-tung, tend to show that little opposition may be anticipated from that power to the desired declaration.

"The interests of Japan, the next most interested power in the trade of China, will be so clearly served by the proposed arrangement, and the declarations of its statesmen within the last year are so entirely in line with the views here expressed, that its hearty cooperation is confidently counted on.

"You will, at as early date as practicable, submit the considerations to Her Britannic Majesty's principal secretary of state for foreign affairs and request their immediate consideration.

"I inclose herewith a copy of the instruction sent to our ambassador at Berlin bearing on the above subject."

Mr. Hay, Sec. of State, to Mr. Choate, amb. to Great Britain, Sept. 6, 1899, For. Rel. 1899, 131.

The contents of this instruction were communicated by Mr. Choate to Lord Salisbury in a note of Sept. 22, 1899, at the conclusion of which Mr. Choate said:

"It is therefore with the greatest pleasure that I present this matter to your lordship's attention and urge its prompt consideration by Her Majesty's Government, believing that the action is in entire harmony with its consistent theory and purpose, and that it will greatly redound to the benefit and advantage of all commercial nations alike. The prompt and sympathetic cooperation of Her Majesty's Government with the United States in this important matter will be very potent in promoting its adoption by all the powers concerned." (For. Rel. 1899, 133, 135.)

"With reference to my note of September 29 last, I have the honor to state that I have carefully considered, in communication with my colleagues, the proposal contained in your excellency's note of September 22 that a declaration should be made by foreign powers claiming 'spheres of interest' in China as to their intentions in regard to the treatment of foreign trade and interest therein.

"I have much pleasure in informing your excellency that Her Majesty's Government will be prepared to make a declaration in the sense desired by your Government in regard to the leased territory of Wei-hai Wei and all territory in China which may hereafter be acquired by Great Britain by lease or otherwise, and all spheres of interest now held or that may hereafter be held by her in China, provided that a similar declaration is made by other powers concerned."

Lord Salisbury, min. of for. aff., to Mr. Choate, U. S. amb., Nov. 30, 1899, For. Rel. 1899, 136.

This was the first acceptance of the proposals of the United States.

Correspondence with Italy.

"This Government, animated with a sincere desire to insure to the commerce and industry of the United States and of all other nations perfect equality of treatment within the limits of the Chinese Empire for their trade and navigation, especially within the so-called 'spheres of influence or interest' claimed by certain European powers in China, has deemed the present an opportune moment to make representations in this direction to Germany, Great Britain, Japan, and Russia.

"To attain the object it has in view and to remove possible causes of national irritation and reestablish confidence so essential to commerce, it has seemed to this Government highly desirable that the various powers claiming 'spheres of interest or influence' in China should give formal assurances that—

"First. They will in no way interfere with any treaty port or any vested interest within any so-called 'sphere of interest' or leased territory they may have in China.

"Second. The Chinese treaty tariff of the time being shall apply to all merchandise landed or shipped to all such ports as are within said 'sphere of interest' (unless they be 'free ports'), no matter to what nationality it may belong, and that duties so leviable shall be collected by the Chinese Government.

"Third. They will levy no higher harbor dues on vessels of another nationality frequenting any port in such 'sphere' than shall be levied on vessels of their own nationality, and no higher railroad charges over lines built, controlled, or operated within its 'sphere' on merchandise belonging to citizens or subjects of other nationalities transported through such 'sphere' than shall be levied on similar merchandise belonging to their own nationals transported over equal distances.

"The policy pursued by His Imperial German Majesty in declaring Tsing-tao (Kiao-chao) a free port and in aiding the Chinese Government in establishing there a custom-house, and the ukase of His Imperial Russian Majesty of August 11 last erecting a free port at Dalny (Ta-lien-wan) are thought to be proof that these powers are not disposed to view unfavorably the proposition to recognize that they contemplate nothing which will interfere in any way with the enjoyment by the commerce of all nations of the rights and privileges guaranteed to them by existing treaties with China.

"Repeated assurances from the British Government of its fixed policy to maintain throughout China freedom of trade for the whole world insure, it is believed, the ready assent of that power to our proposals. The commercial interests of Japan will also be greatly served by the above-mentioned declaration, which harmonizes with the assurances conveyed to this Government at various times by

His Imperial Japanese Majesty's diplomatic representative at this capital.

"In view of the important and growing commercial interests of Italy in eastern Asia, it would seem desirable that His Majesty's Government should also be informed of the steps taken by the United States to insure freedom of trade in China, in which it would find equal advantages to those which the other nations of Europe expect.

"You are therefore instructed to submit to His Majesty's minister for foreign affairs the above considerations and to invite his early attention to them, expressing, in the name of your Government, the hope that they will prove acceptable, and that His Majesty's Government will lend its aid and valuable assistance in securing their acceptance by the other interested powers.

"I inclose, for your personal and confidential information, copies of the instructions sent to our ambassadors at Berlin, London, St. Petersburg, and to our minister at Tokyo."

Mr. Hay, Sec. of State, to Mr. Draper, amb. to Italy, Nov. 17, 1899. For. Rel. 1899, 136.

"Supplementary to what you had already done me the honor of communicating to me in your note of December 9, 1899, your excellency informed me yesterday of the telegraphic note received from your Government that all the powers consulted by the Cabinet of Washington concerning the suitability of adopting a line of policy which would insure to the trade of the whole world equality of treatment in China have given a favorable reply.

"Referring to your communications and to the statements in my note of December 23 last, I take pleasure in saying that the Government of the King adheres willingly to the proposals set forth in said note of December 9.

"I beg your excellency to kindly convey the notice of our adhesion to the Cabinet of Washington, and I avail myself of the occasion to renew to you, etc."

The Marquis Visconti Venosta, min. of for. aff., to Mr. Draper, amb. to Italy, Jan. 7, 1900. For. Rel. 1899, 138.

Correspondence with Japan.

"This Government, animated with a sincere desire to insure to the commerce and industry of the United States and of all other nations perfect equality of treatment within the limits of the Chinese Empire for their trade and navigation, especially within the so-called 'spheres of influence or interest' claimed by certain European powers in China, has deemed the present an opportune moment to make representations in this direction to Germany, Great Britain, and Russia.

"To obtain the object it has in view and to remove possible causes of international irritation and reestablish confidence so essential to commerce, it has seemed to this Government highly desirable that the various powers claiming 'spheres of interest or influence' in China should give formal assurances that—

"First. They will in no way interfere with any treaty port or any vested interest within any so-called 'sphere of interest' or leased territory they may have in China.

"Second. The Chinese treaty tariff of the time being shall apply to all merchandise landed or shipped to all such ports as are within said 'sphere of interest' (unless they be 'free ports'), no matter to what nationality it may belong, and that duties so leviable shall be collected by the Chinese Government.

"Third. They will levy no higher harbor dues on vessels of another nationality frequenting any port in such 'sphere' than shall be levied on vessels of their own nationality, and no higher railroad charges over lines built, controlled, or operated within such 'sphere' on merchandise belonging to citizens or subjects of other nationalities transported through such 'sphere' than shall be levied on similar merchandise belonging to their own nationals transported over equal distances.

"The policy pursued by His Imperial German Majesty in declaring Tsing-tao (Kiao-chao) a free port and in aiding the Chinese Government in establishing there a custom-house, and the ukase of His Imperial Russian Majesty of August 11 last in erecting a free port at Dalny (Ta-lien-wan) are thought to be proof that these powers are not disposed to view unfavorably the proposition to recognize that they contemplate nothing which will interfere in any way with the enjoyment by the commerce of all nations of the rights and privileges guaranteed to them by existing treaties with China.

"Repeated assurances from the British Government of its fixed policy to maintain throughout China freedom of trade for the whole world insure, it is believed, the ready assent of that power to our proposals. It is no less confidently believed that the commercial interests of Japan would be greatly served by the above-mentioned declaration, which harmonizes with the assurances conveyed to this Government at various times by His Imperial Japanese Majesty's diplomatic representative at this capital.

"You are therefore instructed to submit to His Imperial Japanese Majesty's Government the above considerations, and to invite their early attention to them, and express the earnest hope of your Government that they will accept them and aid in securing their acceptance by the other interested powers."

Mr. Hay, Sec. of State, to Mr. Buck, min. to Japan, Nov. 13, 1899, For. Rel. 1899, 138.

"I have the honor to acknowledge the receipt of the note No. 176 of the 20th instant, in which, pursuing the instructions of the United States Government, your excellency was so good as to communicate to the Imperial Government the representations of the United States as presented in notes to Russia, Germany, and Great Britain on the subject of commercial interests of the United States in China.

"I have the happy duty of assuring your excellency that the Imperial Government will have no hesitation to give their assent to so just and fair a proposal of the United States, provided that all the other powers concerned shall accept the same."

Viscount Aoki, min. of for. aff., to Mr. Buck, min. to Japan, Dec. 26, 1899, For. Rel. 1899, 139.

Correspondence with Russia.

"In 1898, when His Imperial Majesty had, through his diplomatic representative at this capital, notified this Government that Russia had leased from His Imperial Chinese Majesty the ports of Port Arthur, Ta-lien-wan, and the adjacent territory in the Liao-tung Peninsula in northeastern China for a period of twenty-five years, your predecessor received categorical assurances from the imperial minister for foreign affairs that American interests in that part of the Chinese Empire would in no way be affected thereby, neither was it the desire of Russia to interfere with the trade of other nations, and that our citizens would continue to enjoy within said leased territory all the rights and privilèges guaranteed them under existing treaties with China. Assurances of a similar purport were conveyed to me by the Emperor's ambassador at this capital, while fresh proof of this is afforded by the imperial ukase of $\frac{\text{July 30}}{\text{August 11}}$ last, creating the free port of Dalny, near Ta-lien-wan, and establishing free trade for the adjacent territory.

"However gratifying and reassuring such assurances may be in regard to the territory actually occupied and administered, it can not but be admitted that a further, clearer, and more formal definition of the conditions which are henceforth to hold within the so-called Russian 'sphere of interest' in China as regards the commercial rights therein of our citizens is much desired by the business world of the United States, inasmuch as such a declaration would relieve it from the apprehensions which have exercised a disturbing influence during the last four years on its operations in China.

"The present moment seems particularly opportune for ascertaining whether His Imperial Russian Majesty would not be disposed to give permanent form to the assurances heretofore given to this Government on this subject.

"The ukase of the Emperor of August 11 of this year, declaring the port of Ta-lien-wan open to the merchant ships of all nations

during the remainder of the lease under which it is held by Russia, removes the slightest uncertainty as to the liberal and conciliatory commercial policy His Majesty proposes carrying out in northeastern China, and would seem to insure us the sympathetic and, it is hoped, favorable consideration of the propositions hereinafter specified.

"The principles which this Government is particularly desirous of seeing formally declared by His Imperial Majesty and by all the great powers interested in China, and which will be eminently beneficial to the commercial interests of the whole world, are:

"First. The recognition that no power will in any way interfere with any treaty port or any vested interest within any leased territory or within any so-called 'sphere of interest' it may have in China.

"Second. That the Chinese treaty tariff of the time being shall apply to all merchandise landed or shipped to all such ports as are within said 'sphere of interest' (unless they be 'free ports'), no matter to what nationality it may belong, and that duties so leviable shall be collected by the Chinese Government.

"Third. That it will levy no higher harbor dues on vessels of another nationality frequenting any port in such 'sphere' than shall be levied on vessels of its own nationality, and no higher railroad charges over lines built, controlled, or operated within its 'sphere' on merchandise belonging to citizens or subjects of other nationalities transported through such 'sphere' than shall be levied on similar merchandise belonging to its own nationals transported over equal distances.

"The declaration of such principles by His Imperial Majesty would not only be of great benefit to foreign commerce in China, but would powerfully tend to remove dangerous sources of irritation and possible conflict between the various powers; it would reestablish confidence and security, and would give great additional weight to the concerted representations which the treaty powers may hereafter make to His Imperial Chinese Majesty in the interest of reform in Chinese administration, so essential to the consolidation and integrity of that Empire, and which, it is believed, is a fundamental principle of the policy of His Majesty in Asia.

"Germany has declared the port of Kiao-chao, which she holds in Shangtung under a lease from China, a free port, and has aided in the establishment there of a branch of the imperial Chinese maritime customs. The imperial German minister for foreign affairs has also given assurances that American trade would not in any way be discriminated against or interfered with, as there is no intention to close the leased territory to foreign commerce within the area which Germany claims. These facts lead this Government to believe that the Imperial German Government will lend its cooperation and give

its acceptance to the proposition above outlined, and which our ambassador at Berlin is now instructed to submit to it.

"That such a declaration will be favorably considered by Great Britain and Japan, the two other powers most interested in the subject, there can be no doubt. The formal and oft-repeated declarations of the British and Japanese Governments in favor of the maintenance throughout China of freedom of trade for the whole world insure us, it is believed, the ready assent of these powers to the declaration desired.

"The acceptance by His Imperial Majesty of these principles must therefore inevitably lead to their recognition by all the other powers interested, and you are instructed to submit them to the Emperor's minister for foreign affairs and urge their immediate consideration.

"A copy of this instruction is sent to our ambassadors at London and Berlin for their confidential information, and copies of the instructions sent to them on this subject are inclosed herewith."

Mr. Hay, Sec. of State, to Mr. Tower, amb. to Russia, Sept. 6, 1899, For. Rel. 1899, 140.

"I had the honor to receive your excellency's note dated the 8th–20th of September last, relating to the principles which the Government of the United States would like to see adopted in commercial matters by the powers which have interests in China.

"In so far as the territory leased by China to Russia is concerned, the Imperial Government has already demonstrated its firm intention to follow the policy of 'the open door' by creating Dalny (Ta-lien-wan) a free port; and if at some future time that port, although remaining free itself, should be separated by a customs limit from other portions of the territory in question, the customs duties would be levied, in the zone subject to the tariff, upon all foreign merchandise without distinction as to nationality.

"As to the ports now opened or hereafter to be opened to foreign commerce by the Chinese Government, and which lie beyond the territory leased to Russia, the settlement of the question of customs duties belongs to China herself, and the Imperial Government has no intention whatever of claiming any privileges for its own subjects to the exclusion of other foreigners. It is to be understood, however, that this assurance of the Imperial Government is given upon condition that a similar declaration shall be made by other powers having interests in China.

"With the conviction that this reply is such as to satisfy the inquiry made in the aforementioned note, the Imperial Government is happy to have complied with the wishes of the American Government, especially as it attaches the highest value to anything that may

strengthen and consolidate the traditional relations of friendship existing between the two countries."

Count Mouravieff, min. of for. aff., to Mr. Tower, amb. to Russia, Dec. 18–30, 1899, For. Rel. 1899, 141.

Instructions sent mutatis mutandis to the United States ambassadors at London, Paris, Berlin, St. Petersburg, and Rome, and to the United States minister at Tokyo.

Conclusion.

DEPARTMENT OF STATE,
Washington, March 20, 1900.

SIR: The ——— Government having accepted the declaration suggested by the United States concerning foreign trade in China, the terms of which I transmitted to you in my instructions No. —— of ———, and like action having been taken by all the various powers having leased territory or so-called "spheres of interest" in the Chinese Empire, as shown by the notes which I herewith transmit to you, you will please inform the Government to which you are accredited that the condition originally attached to its acceptance—that all other powers concerned should likewise accept the proposals of the United States—having been complied with, this Government will therefore consider the assent given to it by ——— as final and definitive.

You will also transmit to the minister for foreign affairs copies of the present inclosures, and by the same occasion convey to him the expression of the sincere gratification which the President feels at the successful termination of these negotiations, in which he sees proof of the friendly spirit which animates the various powers interested in the untrammeled development of commerce and industry in the Chinese Empire, and a source of vast benefit to the whole commercial world.

I am, etc., JOHN HAY.

Inclosures.

Mr. Delcassé to Mr. Porter (received Dec. 16, 1899), translation.
Mr. Jackson to Mr. Hay, telegram, Dec. 4, 1899.
Count von Bülow to Mr. White, Feb. 19, 1900, translation.
Lord Salisbury to Mr. Choate, Nov. 30, 1899.
Marquis Visconti Venosta to Mr. Draper, Jan. 7, 1900, translation.
Viscount Aoki to Mr. Buck, Dec. 26, 1899, translation.
Count Mouravieff to Mr. Tower, Dec. 18, 1899, translation.
The correspondence is printed in H. Doc. 547, 56 Cong. 1 sess.

"An agreement by which China cedes to any corporation or company the exclusive right and privilege of opening mines, establishing railroads, or in any other way industrially developing Manchuria, can but be viewed with the gravest concern by the government of the United States. It constitutes a monopoly, which is a distinct breach of the stipu-

Expositions of agreement.

lations of treaties concluded between China and foreign powers, and thereby seriously affects the rights of American citizens; it restricts their rightful trade and exposes it to being discriminated against, interfered with, or otherwise jeopardized, and strongly tends toward permanently impairing the sovereign rights of China in this part of the Empire, and seriously interferes with her ability to meet her international obligations. Furthermore, such concession on the part of China will undoubtedly be followed by demands from other powers for similar and equal exclusive advantages in other parts of the Chinese Empire, and the inevitable result must be the complete wreck of the policy of absolute equality of treatment of all nations in regard to trade, navigation, and commerce within the confines of the Empire.

"On the other hand, the attainment by one power of such exclusive privileges for a commercial organization of its nationality conflicts with the assurances repeatedly conveyed to this government by the imperial Russian ministry of foreign affairs of the imperial government's intention to follow the policy of the open door in China, as advocated by the government of the United States and accepted by all the treaty powers having commercial interests in that Empire.

"It is for these reasons that the government of the United States, animated now, as in the past, with the sincerest desire of insuring to the whole world the benefits of full and fair intercourse between China and the nations on a footing of equal rights and advantages to all, submits the above to the earnest consideration of the imperial governments of China and Russia, confident that they will give due weight to its importance and adopt such measures as will relieve the just and natural anxiety of the United States."

Memorandum of Mr. Hay, Sec. of State, Feb. 1, 1902, expressing the views of the United States respecting the proposed convention and arrangement between China and Russia respecting Manchuria; communicated to Austria, Belgium, China, France, Germany, Great Britain, Italy, Japan, Netherlands, Russia, and Spain. (For. Rel. 1902, 275, 926.)

See Count Lamsdorff to Mr. Tower, Feb. 9, 1902, For. Rel. 1902, 929.

Mr. Conger, American minister at Peking, reported on Dec. 3, 1901, that the proposed convention provided, substantially, that while Manchuria should, under certain conditions, be eventually restored to Chinese jurisdiction and administration, the agreement of 1896 with the Russo-Chinese Bank should be permanently maintained; that the military governor should fix, in concert with the Russian authorities, the number of Chinese troops and the points to be occupied, beyond which China was not to increase nor to advance troops; that troops to protect railways could not be sent by other nations; that the Anglo-Russian railway sphere convention and agreement as to companies borrowing funds was to be maintained, and that no further railway or bridge construction in southern portions should be

allowed, nor railway terminus changed, except by Russia's consent. (For. Rel. 1902, 271.)

For the agreement between the Chinese government and the Russo-Chinese Bank for the construction and management of the Chinese Eastern Railway, see Rockhill's Treaties and Conventions with or Concerning China and Korea, 212.

With regard to a reported concession to the Great Northern Telegraph Company, a Danish corporation, of a monopoly for twenty years of the privilege of landing submarine cables in China, Mr. Blaine said: "This government would certainly view, in an unfriendly light, any act of the Chinese government which precluded our people from an equal participation with the citizens or subjects of any other friendly power, in such enterprises, mutually beneficial to the interests of both countries. We would greatly regret to see China bestow upon any corporation these exclusive privileges." (Mr. Blaine, Sec. of State, to Mr. Holcombe, chargé, No. 142, Dec. 10, 1881; For. Rel. 1881, 317, 318. See, also, id. 292, 299.)

The American minister at Peking, having reported that the Russians were arranging with the Chinese government for a customs service at Talien-wan and some interior Manchurian ports similar to, but independent of, the maritime customs, and under a Russian instead of the English commissioner, as well as for post-offices under the same control, Mr. Hay expressed the opinion that the United States could not take any action against such an arrangement. "The only point," he said, "with which we can be concerned is that the duties levied at these places do not exceed the regular tariff duties levied at all other points in the Chinese Empire open to foreign trade."

Mr. Hay, Sec. of State, to Mr. Conger, min. to China, No. 606, Jan. 3, 1903, For. Rel. 1903, 46, inclosing copy of the note of the Russian minister of foreign affairs to the American ambassador at St. Petersburg, Dec. 18, 1899, Correspondence Concerning American Commercial Rights in China, H. Doc. 547, 56 Cong. 1 sess. 16.

The American minister having reported that the Russian government demanded, as new conditions of the evacuation of Manchuria, that no new treaty ports or foreign consuls should be allowed; that no foreigners except Russians should be employed in the public service; that the status of the administration should remain as before; that the Niuchwang customs receipts should be deposited in the Russian-Chinese Bank; that the sanitary commission should be dominated by Russians; that Russians should have the privilege of attaching wires to all telegraph poles, and that no territory should ever be alienated to any power, Mr. Hay instructed him to insist on the request of the United States for treaty ports and consulates in Manchuria, and to object to the exclusion of all foreigners but Russians from the Chinese service. The discussion of other points was reserved.

Mr. Hay, Sec. of State, to Mr. Conger, min. to China, telegrams, Apr. 25 and 29, 1903, For. Rel. 1903, 54.

With reference to the denial at St. Petersburg of the reported demands, see the note of M. de Plançon, Russian chargé d'affaires at Peking, to Prince Ch'ing, April 18, 1903, For. Rel. 1903, 56, 708.

(2) ANGLO-GERMAN AGREEMENT.

§ 812.

The Imperial German chargé, October 20, 1900, and the British ambassador, on the 23rd of the same month, communicated to the United States the text of the following agreement, at the same time inviting an acceptance of the principles therein recorded:

"Her Britannic Majesty's Government and the Imperial German Government, being desirous to maintain their interest in China and their rights under existing treaties, have agreed to observe the following principles in regard to their mutual policy in China:

"I. It is a matter of joint and permanent international interest that the ports on the rivers and littoral of China should remain free and open to trade and to every other legitimate form of economic activity for the nationals of all countries without distinction, and the two Governments agree on their part to uphold the same for all Chinese territory so far as they can exercise influence.

"II. Her Britannic Majesty's Government and the Imperial German Government will not on their part make use of the present complication to obtain for themselves any territorial advantages in Chinese dominions and will direct their policy toward maintaining undiminished the territorial conditions of the Chinese Empire.

"III. In case of another power making use of the complications in China in order to obtain under any form whatever such territorial advantages, the two contracting parties reserve to themselves to come to a preliminary understanding as to the eventual steps to be taken for the protection of their own interests in China.

"IV. The two Governments will communicate this agreement to the other powers interested, and especially to Austro-Hungary, France, Italy, Japan, Russia, and the United States of America, and will invite them to accept the principles recorded in the agreement."

For. Rel. 1900, 354.

"The United States have heretofore made known their adoption of both these principles [I. and II.]. During the last year this government invited the powers interested in China to join in an expression of views and purposes in the direction of impartial trade with that country and received satisfactory assurances to that effect from all of them. When the recent troubles were at their height

this government, on the 3d of July, once more made an announcement of its policy regarding impartial trade and the integrity of the Chinese Empire and had the gratification of learning that all the powers held similar views. And since that time the most gratifying harmony has existed among all the nations concerned as to the ends to be pursued, and there has been little divergence of opinion as to the details of the course to be followed.

"It is therefore with much satisfaction that the President directs me to inform you of the full sympathy of this government with those of her Britannic Majesty and the German Emperor in the principles set forth in the clauses of theagreement above cited. . . .

"As this clause [III.] refers to a reciprocal arrangement between the two high contracting powers the government of the United States does not regard itself as called upon to express an opinion in respect to it."

Mr. Hay, Sec. of State, to the British ambass., Oct. 29, 1900, For. Rel. 1900, 355. A similar note, mutatis mutandis, was, on the same day, sent to the German embassy. (Id. 343.)

The Austro-Hungarian foreign office, as reported by the United States embassy, expressed unreserved adhesion to the principles recorded in the Anglo-German agreement, and therefore approved the prior American proposition. (For. Rel. 1900, 308.)

See, also, French chargé to Sec. of State, Oct. 17, 1900; Sec. of State to French chargé, Oct. 19, 1900; French chargé to Sec. of State, Oct. 26, 1900; Sec. of State to French chargé, Oct. 29, 1900. (For. Rel. 1900, 323, 324, 325.)

In a circular telegram of Oct. 22, 1900, to the diplomatic representatives of the United States at Berlin, London, Paris, Rome, and St. Petersburg, Mr. Hay stated that, in answering the last French communiqué touching the demands to be made on China, the United States had expressed the belief "that the happy influence upon determinations of Chinese Emperor and Government, which France expects to result from the course she urges, would be enhanced if powers included in their initial declaration a collective manifestation of their determination to preserve territorial integrity and administrative entirety of China and secure for Chinese nation and themselves the benefits of open and equal commercial intercourse between China and the world." (For. Rel. 1900, 307.)

Replying, Nov. 16, 1900, to a telegram of Mr. Conger, United States minister at Peking, of Nov. 14, Mr. Hay said: "This Government favors securing foreign rights at treaty ports by adequate foreign concession, either as an international settlement or separate for the interested nations; but forcible appropriation, under claim of conquest, conflicts with the declared purposes of the powers and disturbs their harmonious action. Mr. Conger's protest is approved. We think the matter should be conventionally adjusted as part of the general arrangement, in which the rights of the United States of America should be reserved to an impartial share." (For. Rel. 1900, 227.)

March 1, 1901, Mr. Hay sent Mr. Rockhill the following telegraphic instruction: "The following memorandum, which was handed to the Chinese minister on February 19, is transmitted to you for

your information and guidance. It has been communicated to the Governments of the powers that preservation of the territorial integrity of China having been recognized by all the powers now engaged in joint negotiations concerning the injuries recently inflicted upon their ministers and nationals by certain officials of the Chinese Empire, it is evidently advantageous to China to continue the present international understanding upon this subject. It would therefore be unwise and dangerous in the extreme for China to make any arrangement or to consider any proposition of a private nature involving the surrender of territory or financial obligations by convention with any particular power, and the Government of the United States, aiming solely at the preservation of China from the danger indicated and the conservation of the largest and most beneficial relations between the Empire and other countries, in accordance with the principle set forth in its circular note of July 3, 1900, and in a purely friendly spirit toward the Chinese Empire and all the powers now interested in the negotiations, desires to impress its sense of the impropriety, inexpediency, and even extreme danger to the interests of China of considering any private territorial or financial arrangement, at least without the full knowledge and approval of all the powers now engaged in negotiations." (For. Rel. 1901, App., 363.)

"In the Reichstag on Monday the debate was begun on the second reading of the estimates for the German force in China. Count von Bülow said that German aims and interests in China and Corea were not territorial, but economic. The Anglo-Japanese agreement, so far as they knew, would only maintain the *status quo*, and therefore it neither prejudiced German interests nor affected the Anglo-German Yang-tsze treaty. Germany only desired the 'open door.' The telegram in *The Times* from Peking declaring that she sought special concessions was a *canard*. She had secured in 1899 railway and mining concessions in Shan-tung, and had no wish to acquire more than she could digest. Count von Bülow proceeded to define the view taken by the German Government of the meaning and obligations of the phrase 'world policy,' and to explain its attitude in regard to the continued occupation of Tientsin. The German garrisons in China, he said, would be further reduced as soon as such a step was thought prudent." (*The London Times Weekly*, March 7, 1902, p. 148.)

"Regarding the German garrison in Shanghai Count von Bülow said that Germany had followed the English precedent in order to support in the most important Chinese emporium of trade the exertions of other powers for maintaining tranquillity and order in the Yang-tsze Valley in the interests of the foreign trading settlements. Another object of these exertions was to afford support to the friendly sentiments of the Yang-tsze viceroys. He wished particularly to state that the German action was not directed against any other power and he might mention that England had declared at the time that she entirely agreed to the German action. The effect of the foreign garrisons in Shanghai was indisputably good and it would be hazardous to withdraw them prematurely. The other powers were manifestly actuated by the same considerations. Incidentally he would observe that Japan had not, as Herr Richter had stated, withdrawn all her troops from Chi-li, but according to the latest

advices had still 1,570 men there. His concluding remark would be, 'What was legitimate for others in order to secure their commercial interests was legitimate for Germany, too, in East Asia, and particularly at Shanghai.'" (*The London Times Weekly*, March 7, 1902, p. 148.)

14. TERRITORIAL INTEGRITY; NEUTRALITY.

§ 813.

"I have the honor to acknowledge the receipt on yesterday afternoon of your note of the 24th instant, in which you state that the ambassador of Germany in Italy has informed the cabinet at Rome of the action taken by this country, Germany and Great Britain to afford joint protection to the interests of neutrals in China in case of war between France and that country; that your government has sent two vessels to China, pending whose arrival Germany has promised to afford temporary protection to Italian subjects residing in the Celestial Kingdom, and that the government of the King would now be glad to take joint action with the other three powers, and to adopt such arrangements as may be mutually agreed upon on this subject.

"In reply, I have the honor to inform you that instructions similar to those already sent in regard to joint action in the protection of neutrals, with the fleets of Great Britain and Germany, will now be sent by telegraph to the admiral in command of the Asiatic Squadron of the United States to cooperate with the commander of the Italian fleet."

Mr. Frelinghuysen, Sec. of State, to Baron Fava, Italian min., Dec. 29, 1883, MS. Notes to Italy, VIII. 63.

During the war between France and China, in 1884, the United States, "having thrice offered our [good] offices, which France did of right, and in a manner not subject to criticism, decline," could do no more than this, to wit: If France should intimate that the good offices of the United States would be acceptable, and would state her minimum demand, the United States would ascertain whether China would agree to it or what modification of it would be acceptable.

Mr. Frelinghuysen, Sec. of State, to Mr. Morton, min. to France, confidential telegram, Sept. 6, 1884, MS. Inst. France, XXI. 104.

Mr. Morton was told that he might unofficially communicate the contents of this instruction, according to his judgment, "perhaps to those who introduced the subject" to him. (Ibid.)

See, also, Mr. Frelinghuysen to Mr. Morton, tel., Sept. 17, 1884, MS. Inst. France, XXI. 107; Mr. Frelinghuysen, Sec. of State, to Mr. Wilson, Oct. 20, 1884, 153 MS. Dom. Let. 13.

When, in 1894, war between China and Japan seemed to be imminent, the United States endeavored, but without success, to use its good offices for the purpose of averting hostilities. During the war the diplomatic and consular representatives of the United States exercised their good offices in behalf of Chinese subjects in Japan and of Japanese subjects in China.

For. Rel. 1894, App. I. 5–106; Mr. Gresham, Sec. of State, to Mr. Dun, min. to Japan, tel., July 7, 1894, MS. Inst. Japan, IV. 177.

For the war decree of China, see For. Rel. 1894, App. I. 53–54.

As to the use of good offices during the war by diplomatic and consular officers of the United States in behalf of Chinese and Japanese subjects, respectively, see supra, § 655.

For the full text of the treaty of peace between China and Japan, concluded at Shimonoseki, see For. Rel. 1895, I. 200–203.

"After several days of conversation and correspondence with the representatives of the powers interested in Chinese affairs, the following note was sent, February 10, to the governments of Russia, Japan, and China, and a copy of it was transmitted to all the powers signatory of the protocol of Peking, requesting each of them to make similar representations to Russia and Japan:

"'You will express to the minister of foreign affairs the earnest desire of the government of the United States that in the course of the military operations which have begun between Russia and Japan the neutrality of China and in all practicable ways her administrative entity shall be respected by both parties, and that the area of hostilities shall be localized and limited as much as possible, so that undue excitement and disturbance of the Chinese people may be prevented and the least possible loss to the commerce and peaceful intercourse of the world may be occasioned.'

"On the 13th of February the following answer was received from the Japanese government, addressed to the American minister in Tokyo:

"'In response to your note of the 12th instant on the subject of the neutrality of China during the existing war, I beg to say that the imperial government, sharing with the government of the United States in the fullest measure the desire to avoid, as far as possible, any disturbance of the orderly condition of affairs now prevailing in China, are prepared to respect the neutrality and administrative entity of China outside the regions occupied by Russia, as long as Russia, making a similar engagement, fulfills in good faith the terms and conditions of such engagement.'

"On the 19th of February the following answer was received from the Russian government:

"'The imperial government shares completely the desire to insure tranquillity of China; is ready to adhere to an understanding with

other powers for the purpose of safeguarding the neutrality of that Empire on the following conditions:

"'Firstly, China must herself strictly observe all the clauses of neutrality.

"'Secondly, the Japanese government must loyally observe the engagements entered into with the powers, as well as the principles generally recognized by the law of nations.

"'Thirdly, that it is well understood that neutralization in no case can be extended to Manchuria, the territory of which, by the force of events, will serve as the field of military operations.'

"On the same day the Department of State sent the following telegram to the governments of Russia and Japan, communicating its purport to the other powers interested:

"'The answer of the Russian government is viewed as responsive to the proposal made by the United States as well as by the other powers, and this government will have pleasure in communicating it forthwith to the governments of China and Japan, each of which has already informed us of its adherence to the principles set forth in our circular proposal.'"

Mr. Hay, Sec. of State, to United States diplomatic representatives, circular, Feb. 20, 1904, For. Rel. 1904, 2.

Correspondence with Austria-Hungary with regard to the foregoing circular is printed in For. Rel. 1904, 42.

For correspondence with Belgium on the same subject, see For. Rel. 1904, 95.

For correspondence with China, and incidents affecting her neutrality, see For. Rel. 1904, 118–146.

As to correspondence with Denmark, see For. Rel. 1904, 258.

For correspondence with France, see For. Rel. 1904, 301.

For correspondence with Germany, see For. Rel. 1904, 309.

For correspondence with Great Britain, see For. Rel. 1904, 327.

For correspondence with Italy, see For. Rel. 1904, 405.

For correspondence with Japan, see For. Rel. 1904, 418.

For correspondence with the Netherlands, see For. Rel. 1904, 521.

For correspondence with Portugal, see For. Rel. 1904, 700.

For correspondence with Russia, see For. Rel. 1904, 722.

"It has come to our knowledge that apprehension exists on the part of some of the powers that in the eventual negotiations for peace between Russia and Japan claim may be made for the concession of Chinese territory to neutral powers. The President would be loath to share this apprehension, believing that the introduction of extraneous interests would seriously embarrass and postpone the settlement of the issues involved in the present contest in the Far East, thus making more remote the attainment of that peace which is so earnestly to be desired. For its part, the United States has repeatedly made its position well known, and has been gratified at the cordial

welcome accorded to its efforts to strengthen and perpetuate the broad policy of maintaining the integrity of China and the 'open door' in the Orient, whereby equality of commercial opportunity and access shall be enjoyed by all nations. Holding these views the United States disclaims any thought of reserved territorial rights or control in the Chinese Empire, and it is deemed fitting to make this purpose frankly known and to remove all apprehension on this score so far as concerns the policy of this nation, which maintains so considerable a share of the Pacific commerce of China and which holds such important possessions in the western Pacific, almost at the gateway of China.

"You will bring this matter to the notice of the government to which you are accredited, and you will invite the expression of its views thereon."

Mr. Hay, Sec. of State, American ambassadors to Germany, Austria, Belgium, France, Great Britain, Italy, and Portugal, Jan. 13, 1905, MS. Inst. Austria, V. 114.

"NOTE.—Replies to this circular telegram have, so far, been received from the Governments of Germany, Austria-Hungary, France, Great Britain, and Italy, entirely agreeing with the position taken by the Government of the United States and declaring their constant adhesion to the policy of the integrity of China and the 'open door' in the Orient.

"January 23, 1905."

January 13, 1905, Count Cassini, Russian ambassador at Washington, presented to Mr. Hay, Secretary of State, a memorandum, in which it was represented, as the result of eleven months' experience, that "China was neither capable nor desirous of living up to her pledges" to observe neutrality in the war between Russia and Japan. As examples, the memorandum alleged the following:

1. The case of the torpedo boat *Ryeshitelni*.

2. Bands of hoonhoozes [Hunghutes] were operating in neutral territory under command of Japanese officers, while whole detachments of them had been enrolled in the Japanese army and were in the pay of Japan.

3. Japanese instructors were employed among the Chinese troops along the northern border of the province of Chi-li.

4. The Japanese had been using the Miao-Dao Islands as a base of naval operations.

5. The Japanese were freely importing into Dalny quantities of contraband of war from Chinese ports.

6. The Chinese government shops, Hanyang, furnished cast iron to the Japanese army.

7. China was making serious preparations apparently with a view to take part in military operations.

The memorandum concluded with the statement that if the situation thus described should continue Russia would be obliged to consider Chinese neutrality "from the standpoint of her own interests."

Replying, on January 17, 1905, to this memorandum, Mr. Hay stated that he had communicated the complaint of the Russian government to the American minister at Peking with instructions to express the hope that China would scrupulously observe her neutral obligations, any departure from which would seriously embarrass not only China, but also the powers interested in limiting the area of hostilities. Mr. Hay added that the Chinese government declared with great earnestness that it had observed strict neutrality during the pending war, while Japan insisted that she had kept and intended to keep inviolate the pledges made by her to respect China's neutrality within the limits agreed on. Mr. Hay, in conclusion, expressed the hope and confidence that no power, whether belligerent or neutral, might violate the neutrality which the whole civilized world had agreed to respect, the violation of which could only be disastrous to all the powers concerned.

Count Cassini replied, on January 18, 1905, that China's denial was met by a series of facts, for the most part of public knowledge, which the foreign representatives at Peking, or at any rate those who wished "to reach a conscientious appreciation of the true condition of things," could not fail to note and report to their governments. There was, he declared, on the one hand, a series of acts contrary to Chinese neutraliy, and incited by Japan; on the other hand, denials unsupported by any evidence. He specially emphasized the case of the *Ryeshitelni*.

In a note to Count Cassini of January 23, 1905, Mr. Hay observed that it did not seem to be incumbent upon him to take up the question touching the asserted inaction of the United States and Europe with regard to the case of the *Ryeshitelni*, or the consequences of what Count Cassini termed the leniency evinced both to China and Japan. The correspondence exchanged at the time showed, said Mr. Hay, that the seizure of the refugee torpedo boat in the port of a neutral by one of the belligerents found no encouragement whatever from the United States, while the attitude of the United States, when the *Askold* and her companion vessels subsequently took refuge at Shanghai, was in full encouragement of the efforts and eventual success of China in enforcing neutrality. Mr. Hay concluded with the statment that the general solicitude of all the interested states would make it expedient and proper that the matters concerning which the Russian government had raised an international issue should be considered in a conference of the powers.

On January 23, 1905, the Chinese minister at Washington handed to Mr. Hay a translation of a telegram from Peking, dated the 21st

of January, and containing a detailed reply to the Russian charges. This reply was as follows:

1. That the seizure of the *Ryeshitelni* was entirely unexpected and without any connivance on the part of the Chinese authorities; that the Chinese government had already instituted an inquiry and demanded from the Japanese minister the restitution of the torpedo boat; and that, although the incident was not yet closed, everything that could be done had been done.

2. That Hunghutse bandits were first called into service by Russian officers, and were employed against the Japanese army; that whenever any such bandits were known to have crossed into neutral territory the local authorities repeatedly effected their capture and punishment; and that the law of nations did not hold a neutral government responsible for the acts of individuals who might take part in the conflict.

3. That no Japanese officers were employed with the foreign-drilled troops in the north; that Japanese were employed at the provincial college at Pauting as translators, just as Russian subjects held positions in various educational institutions in the maritime customs service; and that the law of nations did not prohibit a neutral government from employing the citizens of a belligerent power.

4. That no permission had been given to the Japanese to use the Miao-Dao Islands; and that, although a watch had been kept, no attempt on the part of the Japanese to land had been reported.

5. That strict orders had been given prohibiting the shipment of contraband to the seat of war, and that the customs authorities had absolutely refused clearance papers for such purposes.

6. That shipments of iron ore, which had been complained of, were made by a private company; and that, besides, pig iron was not to be considered as a contraband article.

7. That China was not to be suspected of a desire to take part in the conflict, because she sought to maintain her military establishment in the interest of peace and tranquillity.

The telegram went further and charged that Russia had committed violations of neutral rights (1) by building bridges and quartering troops west of the Liao River, (2) by using force in Chinese territory to compel the sale to them of cattle and provisions and by secretly carrying off supplies, (3) by smuggling rifles, guns, and ammunition concealed in merchandise, (4) by the act of the captain of a Russian vessel, sent under escort from Chefoo to Shanghai, in secretly making his escape at Wusung.

On January 28, 1905, the Japanese minister handed to Mr. Hay a telegram from Baron Komura, in reply to the Russian charges. In this telegram the following statements were made:

1. That the capture of the *Ryeshitelni* involved no violation of Chinese neutrality by Japan, the capture being a measure of self-defense made necessary by the prior disregard of Chinese neutrality by Russia.

2. That no Hunghutses were employed by the Japanese, and that no Japanese military instructors were with the Chinese soldiers on the northern boundary of Chi-li.

3. That the Miao-Dao Islands had not been used as a naval base by Japan, but had been constantly so used by Russia till the fall of Port Arthur.

4. That the Japanese had obtained from Chinese ports, through private persons, articles which were contraband of war, but that this constituted no breach of China's neutrality on the part of either China or Japan, and that Russia, during the siege of Port Arthur, in fact drew a large part of her military supplies for that place from China.

5. That the pig iron obtained from Hanyang was purchased by a private firm in Japan under a contract made four years previously; that the Japanese Government was not a party to the contract nor had anything to do with the transaction.

6. That the allegation that the Chinese were making preparations with a view to take part with Japan in hostilities was entirely destitute of foundation.

The Japanese telegram concluded with a narration of eight of the "more conspicuous instances" in which Russia had violated the neutrality of China, and declared that Japan was anxious to do nothing inconsistent with a loyal adhesion to her engagement concerning that neutrality.

Count Cassini, Russian amb., to Mr. Hay, Sec. of State, Jan. 13, 1905, MS. Notes from Russia; Mr. Hay, Sec. of State, to Mr. Coolidge, chargé at Peking, Jan. 14, 1905, MS. Inst. China, VII. 21; Mr. Hay to Count Cassini, No. 253, Jan. 17, 1905, MS. Notes to Russia, VIII. 454; Count Cassini to Mr. Hay, Jan. 18, 1905, MS. Notes from Russia; Mr. Hay to Count Cassini, No. 254, Jan. 23, 1905, MS. Notes to Russiia, VIII. 456; translation of telegram from the Waiwu Pu, Peking, to Chinese Minister Liang, Jan. 21, 1905, handed by Minister Liang to Mr. Hay, Jan. 23, 1905, MS. Notes from China; telegram from Baron Komura to Mr. Takahira, handed by the latter to Mr. Hay, Jan. 28, 1905, MS. Notes from Japan.

By the treaty of peace, signed at Portsmouth, Aug. 23/Sept. 5, 1905, Japan and Russia mutually engage (Art. II.) "to evacuate completely and simultaneously Manchuria, except the territory affected by the lease of the Liao-tung Peninsula," the evacuation to begin immediately after the treaty becomes operative and to be completed within 18 months; but they reserve the right to maintain guards, not

to exceed fifteen per kilometer, to protect their respective railway lines. They also engage to restore to China the exclusive administration of the places to be evacuated, and disavow the possession in Manchuria of "any territorial advantages or preferential or exclusive concessions to the impairment of Chinese sovereignty or inconsistent with the principle of equal opportunity;" and promise "not to obstruct any general measures common to all countries which China may take for the development of the commerce or industry of Manchuria." Russia transfers (Art. V.) to Japan the lease of Port Arthur and the Liao-tung Peninsula, and also (Art. VI.) the railway between Chang-chun-fu and Kuan-chang-tsu and Port Arthur, and the appurtenant coal mines. Apart from this railway, Russia and Japan engage (Art. VII.) to use their railways in Manchuria exclusively for commercial and industrial and not for strategic purposes.

Hishida, The International Position of Japan as a Great Power, 275–277. See Paix Japonaise, par M. Louis Aubert, Paris, 1906.

X. *COLOMBIA.*

§ 814.

As to the Isthmus of Panama, see supra, §§ 337–350.

By a "fundamental law" of July 12, 1821, or, as some say, by an act of December 17, 1819, a union was formed between New Granada and Venezuela under the name of the Republic of Colombia. In 1829–1831 this republic was dismembered, and from it arose the three republics of New Granada, Venezuela, and Ecuador. By a treaty of December 23, 1834, the respective liabilities of these republics upon the obligations of the former Republic of Colombia was determined. In 1862 New Granada became the United States of Colombia, and later, by the constitution of August 4, 1886, the Republic of Colombia.

Moore, Int. Arbitrations, IV. 3494, 3526–3527; 19 Br. & For. State Pap. 1350–1357; For. Rel. 1886, 176; Mr. Marcy, Sec. of State, to Mr. Green, Feb. 3, 1854, MS. Inst. Columbia. As to the Republic of Panama, see supra, § 344.

As to the treaty between the United States and New Granada of 1846 and the Isthmus of Panama, see supra, §§ 337–350.

For a history of the diplomatic relations between the United States and Colombia, see report of Mr. Livingston, Sec. of State, to President Jackson, March 15, 1832, 4 MS. Report Book, 341.

Concerning trade on the San Blas coast, see For. Rel. 1890, 239, 241, 245, 249, 253, 254.

As to the Weckbecker claim and its settlement, see For. Rel. 1894, 193, 195.

Concerning the condition and maintenance of the foreign cemetery at Panama, see Mr. Moore, Act. Sec. of State, to Mr. Lincoln, min. to England, No. 314, July 22, 1890, MS. Inst. Great Britain, XXIX. 300.

The board of commissioners, under the treaty between the three States formerly composing the Republic of Colombia, denied that that treaty authorized them to consider the claims of citizens of the United States. This decision was altogether unexpected to the United States, since it was understood that certain articles of the treaty, which were inserted at the instance of Mr. McAfee, the diplomatic representative of the United States in Colombia, were expressly designed to confer such power. With reference to this condition of things, the Department of State said: "This government never deemed itself bound to wait for the completion of such arrangements as those States proposed to make among themselves for the adjustment of the debts of Colombia. Upon the dissolution of that confederacy, its members became and have been informed that we held them jointly and severally liable for our claims, but rather than urge them upon the individual States in a way that might be inconvenient to them, it was thought best to suspend further diplomatic recourse in regard to them and to direct the chargé d'affaires at Bogotá to present them as an informal agent to the board of commissioners, as you have done. Strictly speaking, it was the duty of the individual claimants to have appointed private agents to advocate their interests before the board of commissioners. With this view, upon the receipt at this Department of a copy of the convention, a notice, embracing a summary of its contents, was published in the *Globe*. If that board should have failed to make a just disposition of the claims, it would then have been the duty as it was the intention of this government to seek satisfaction from the individual States through the ordinary diplomatic channel. Consequently, as the time for the presentation of claims to the board may have expired before this letter can reach you, we must proceed to make a demand on the separate states. You will therefore avail yourself of the first convenient opportunity to inform the government of New Granada of this determination. You will state that in consideration of the forbearance of this government and especially of the patience with which it waited for the ratification of the convention between those states and that the just claims of our citizens have not been acknowledged by the board of commissioners, it has good reason to expect that the several states of which the Colombian Confederacy was composed will use all practicable diligence towards examining those claims and deciding upon their merits. That for whatever sums may be allowed to be due, the United States will be willing to exonerate those governments from all further accountability in any particular case, upon the payment of their proportions, according to the convention adverted to. An informal agreement with the minister of foreign affairs like that concluded by Mr. Moore in the cases of the *Josephine* and *Ranger* would be sufficient for us, but in case the

Granadian government should desire a treaty on the subject according to the forms prescribed by the constitutions of the two countries, a full power, authorizing you to negotiate and conclude one, is herewith transmitted."

Mr. Forsyth, Sec. of State, to Mr. Semple, chargé d'affaires to Colombia, No. 7, Feb. 12, 1839, MS. Inst. Colombia, XV. 58.

For the adjustment of claims, see the following treaties: With Colombia Sept. 10, 1857; with Ecuador, Nov. 25, 1862; with Venezuela, April 25, 1866, Dec. 5, 1888, March 15, 1888, and Oct. 5, 1888. As to the execution of these treaties, see Moore, Int. Arbitrations, II. 1361, 1569, 1659.

"Although this government has always maintained that the three States of which the Republic of Colombia was composed are jointly and severally liable for the claims of our citizens against that Republic, yet from consideration for the condition of those States it was deemed advisable to reserve the application of this principle and to await the result of such arrangements as they might make among themselves for the adjustment of these claims. This was effected by the treaty between New Granada and Venezuela of the 23d of December, 1834, which was subsequently acceded to by Ecuador. Pursuant to that treaty New Granada became responsible for fifty, Venezuela for twenty-eight and a half, and Ecuador for twenty-one and a half per cent of the debts of the Republic of Colombia. Upon this basis New Granada and Venezuela have both paid their proportion of the claims in the cases of the *Josephine* and *Ranger*."

Mr. Buchanan, Sec. of State, to Mr. Livingston, min. to Ecuador, May 13, 1848, MS. Inst. Ecuador, I. 3.

The convention with Colombia of October 3, 1824, was "the first of a long series of treaties of amity and commerce with the several American States, of Spanish or Portugese origin." It contained, besides liberal provisions for the abolition of discriminating duties, "an agreement, which has since been incorporated into many other treaties, that infractions of the treaty by citizens of either party should not interrupt the harmony and good correspondence between the two nations."

Davis, Notes, Treaty Volume (1776–1887), 1224, 1273.

For the convention of 1824 and correspondence, see President Monroe's message, Feb. 22, 1825; Am. State Papers, For. Rel. V. 696.

Colombian vessels are entitled, under the treaty with the United States, to make repairs in our ports when forced into them by stress of weather, but they can not enlist recruits there, either from among our citizens or foreigners, except such as may be transiently within the United States. (Wirt, At. Gen., 1825, 2 Op. 4.)

The convention of 1824 was terminated in 1836.

The consular convention between the United States and New Granada of 1850, Art. III., sec. 10, as to the administration of estates is discussed in the case of Suzannah Smith, For. Rel. 1891, 469–486; supra, § 722.

As to the postal convention of 1844, see supra, § 346.

Article IV. of the treaty between the United States and New Granada [Colombia] of December 12, 1846, which prohibits the laying of discriminating duties, does not require the admission of vessels of the one country to the coasting trade of the other.

Mr. Fish, Sec. of State, to Mr. Perez, Colombian min., May 27, 1871, For. Rel. 1871, 247. See, also, id. 242–246.

The United States refused to admit, under Article V. of the treaty with New Granada [Colombia] of December 12, 1846, Peruvian bark as a product of Colombia.

Mr. Marcy, Sec. of State, to Mr. Paredes, March 25, 1853, MS. Notes to Colombia, VI. 29; Mr. Mann, Act. Sec. of State, to Mr. Paredes, Aug. 1, 1853, id. 39.

By Article XIII. of the treaty between the United States and New Granada of 1846, the contracting parties engaged to give "special protection" to the persons and property of each other's citizens, and in furtherance of this object they agreed that such citizens might appear in person or by attorney "in all their trials at law and be present *at the taking* of all examinations and evidence which may be exhibited in such trials." This stipulation expressly guarantees the right not merely to be present at the trial, but also at the taking of all examinations which may be used in evidence at the trial. It also applies to criminal as well as to civil proceedings. The equivalent in the Spanish text of the phrase "trials at law" is "litigios." By the uniform usage of all English-speaking lands the phrase "trials at law" embraces criminal as well as civil proceedings, and, in order that the declared object of the treaty may be obtained, the word "litigios" should receive the same reasonable construction, which is also consistent with a liberal interpretation of the Spanish word in the light of the whole text of the treaty.

Mr. Hay, Sec. of State, to Mr. Beaupré, No. 331, Nov. 16, 1900, MS. Inst. Colombia, XIX. 123.

The right guaranteed by the treaty as thus interpreted "was already guaranteed by the Federal Constitution to all aliens within the United States." (Ibid.)

The claims convention of 1864 with the United States of Colombia confers on the commission thereby created authority to decide the cases which had been presented within the time specified, and which had not been decided by the commission appointed under the con-

vention with New Granada of 1857, and therefore conferred jurisdiction to determine what cases had been presented to, but not decided by, the old commission.

Speed, At. Gen., 1865, 11 Op. 402.
See, as to claims conventions with Colombia, Moore, Int. Arbitrations, II. 1361–1447.

XI. *CONGO.*

§ 815.

With reference to a letter of Mr. Henry S. Sanford, in which the hope was expressed that Commodore Shufeldt would be instructed not to admit in any form, in any action he might take with regard to American commerce through or at the mouth of the Congo River, the doctrine, which might be insisted upon by Portugal and perhaps by other powers, of a right of exclusive control in that neighborhood inhering in the fact of first discovery, Mr. Evarts said:

"A rigid insistence upon the exclusive control referred to, as based on the fact of first discovery, might, without great difficulty, be shown to contain the element of impracticability as applied to the case of African territory in particular. Setting aside for the present the rights of the natives of that continent as not here under special consideration, it is only necessary to advert to the circumstance that the recent original discoveries there of travellers representing various nations are of such a nature and related to each other in so complicated a manner, to show that the application of the doctrine of control inhering in the fact of first discovery would be demonstrably inadmissible by the general commercial world.

"It appears to me, indeed, that the representatives of the world's commerce could admit the existence of no asserted title (of any foreign country at least) to territory in Africa, which should be made offensive to the general and peaceful pursuits of that commerce, without the closest scrutiny and investigation as to its fundamental merits."

Mr. Evarts, Sec. of State, to Mr. Thompson, Sec. of Navy, Feb. 3, 1879, 126 MS. Dom. Let. 329.

"The rich and populous valley of the Congo is being opened to commerce by a society called the International African Association, of which the King of the Belgians is the president and a citizen of the United States the chief executive officer. Large tracts of territory have been ceded to the association by native chiefs, roads have been opened, steamboats placed on the river, and the *nuclei* of states established at twenty-two stations under one flag, which offers freedom to commerce and prohibits the slave trade. The objects of the

society are philanthropic. It does not aim at permanent political control, but seeks the neutrality of the valley. The United States can not be indifferent to this work, nor to the interests of their citizens involved in it. It may become advisable for us to co-operate with other commercial powers in promoting the rights of trade and residence in the Congo Valley free from the interference or political control of any one nation."

President Arthur, annual message, Dec. 4, 1883, For. Rel. 1883, IX.

The citizen of the United States who was referred to as the chief executive officer of the International African Association, was Mr. Henry S. Sanford.

See supra, § 42.

By a note of October 10, 1884, the German minister at Washington, in behalf of his Government, which was acting in concert with that of France, invited the United States to send a representative to a conference to meet in Berlin, with a view to form an agreement as to (1) the freedom of commerce in the basin and the mouths of the Congo, (2) the application to the Congo and the Niger of the principles of the Vienna Congress touching the free navigation of international rivers, and (3) the definition of the formalities to be observed in order to render the occupation of territory on the African continent effective. In response to this invitation, Mr. Kasson, then American minister at Berlin, was authorized to represent the United States at the conference. His course was practically left to his discretion, with a caution that it was not the policy of the United States "to intervene in the affairs of foreign nations to decide territorial questions between them." Mr. Henry S. Sanford was afterwards associated with Mr. Kasson. The fullest liberty of action upon the conclusions of the conference was reserved to the United States. The general act of February 26, 1885, was signed on the part of the United States by Mr. Kasson and Mr. Sanford. President Cleveland deemed it inexpedient to submit the treaty to the Senate.

Mr. von Alvensleben, German min., to Mr. Frelinghuysen, Sec. of State, Oct. 10, 1884, S. Ex. Doc. 196, 49 Cong. 1 sess. 7; Mr. Frelinghuysen to Mr. Kasson, min. to Germany, No. 37, Oct. 17, 1884, id. 13; general act of the Berlin conference, id. 297; President Cleveland's annual message, Dec. 8, 1885, supra, § 42.

As the President had deemed it inexpedient to submit the general act to the Senate and had announced in his annual message of December 8, 1885, views adverse to its ratification, the Department of State declined to ask that the term for the exchange of ratifications be kept open in favor of the United States, or to make such an announcement "as might be construed to be a formal and final rejection of the general act by the United States." (Mr. Bayard, Sec. of State, to Mr von Alvensleben, German min., Apr. 16, 1886, S. Ex. Doc. 196, 49 Cong. 1 sess. 321.)

Mr. Bayard, Sec. of State, to Mr. Tree, min. to Belgium, No. 5, Sept. 11, 1885, For. Rel. 1885, 60.

The United States, however, recognized the Independent State of the Congo, as founded on the general act of Berlin. (Supra, § 42.)

For the reports of Mr. W. P. Tisdel, special agent of the United States to the Congo, see S. Ex. Doc. 196, 49 Cong. 1 sess. 349–387.

For extracts from the instructions of Mr. Frelinghuysen, Sec. of State, to Mr. Tisdel, Sept. 8, 1884, see S. Ex. Doc. 196, 49 Cong. 1 sess. 346.

"The fact that the discoveries of an American citizen first revealed the importance of the Congo country seems to justify this government in claiming a special influence upon the determination of the questions touching all foreign arrangements for the administration of that region, especially as to its commerce." It was suggested that one or more naval vessels be sent "to linger, while making soundings and surveys, in the lower Congo;" and that they should ascertain whether a healthier point, well situated for a commercial resort, not already lawfully appropriated by another power, could be found there, and whether a concession from the native authorities for the exclusive use of a limited district for a "depot and factorial establishment" could be obtained for the use and benefit of American citizens in that region. (Mr. Frelinghuysen, Sec. of State, to Mr. Chandler, Sec. of Navy, Nov. 22, 1884, 153 MS. Dom. Let. 267.)

As to the protection of missionary enterprises in the Congo, see Mr. Frelinghuysen, Sec. of State, to Mr. Smith, Feb. 10, 1885, 154 MS. Dom. Let. 207.

July 2, 1890, a general act was signed at Brussels for the repression of the African slave trade and the restriction of the importation and sale of firearms, ammunition, and spirituous liquors in a certain defined zone of the African continent. This act was signed on the part of the United States by Mr. E. H. Terrell, American minister at Brussels, and Mr. H. S. Sanford, who together represented the United States in the conference. They were originally authorized to assent to the conclusions of the conference only ad referendum, but they were afterwards specifically instructed to sign. The treaty was approved by the Senate of the United States January 11, 1892, with the declaration that the United States disclaimed any interest in the possessions or protectorates established or claimed on the African continent by the other powers.

January 24, 1891, a treaty of amity, commerce, and navigation was concluded at Brussels between the United States and the Independent State of the Congo. The ratifications were exchanged February 2, 1892.

Mr. Adee, Act. Sec. of State, to Mr. Terrell, min. to Belgium, No. 18, Sept 24, 1889, MS. Inst. Belgium, II. 557.

See further, as to the conference, Mr. Blaine, Sec. of State, to Mr. Terrell, No. 44, Jan. 14, 1890, MS. Inst. Belgium, II. 576; Mr. Blaine to Mr. Sanford, March 15, 1890, id. 580; same to same, April 18, 1890, id. 585; same to same, April 25, 1890, id. 588; Mr. Blaine to Mr. Terrell,

tel., June 2, 1890, id. 594; same to same, tel., June 16, 1890, id. 596; same to same, tel., June 17, 1890, id. 597.

June 24, 1890, Messrs. Terrell and Sanford were specifically authorized to sign the general slave-trade act and also to sign the general tariff act if all references to the Berlin treaty were eliminated, with the express understanding that a separate treaty of amity, commerce, and navigation was to be immediately negotiated between the United States and the Congo State. If it should be found to be impossible to sign the general tariff act, they were authorized provisionally to sign a separate tariff arrangement with the Congo State, to have effect until a commercial treaty should be concluded. (Mr. Blaine, Sec. of State, to Messrs. Terrell and Sanford, tel., June 24, 1890, MS. Inst. Belgium, II. 599.)

As it was found to be impracticable to sign a separate general act with the Berlin signatories, under the conditions specified, the American delegates, upon the assumption that the general tariff act did not discriminate against the United States in the Congo basin, were authorized to sign a separate act of the same tenor provisionally with the Congo State. (Mr. Blaine, Sec. of State, to Mr. Terrell, tel., June 28, 1890, MS. Inst. Belgium, III. 1.)

The declaration of the Senate of Jan. 11, 1892, in relation to the exchange of the ratifications of the general act of Brussels of July 2, 1890, though it was not recited in the President's proclamation, "was communicated to all the signatory powers, was taken cognizance of and accepted by them, and was with their consent included in the protocol" of exchange. (Mr. Hay, Sec. of State, to Mr. Chandler, U. S. S., March 14, 1899, 235 MS. Dom. Let. 431.)

"The adjournment of the Senate without action on the pending acts for the suppression of the slave traffic in Africa and for the reform of the revenue tariff of the Independent State of the Congo left this government unable to exchange those acts on the date fixed, July 2, 1891. A modus vivendi has been concluded by which the power of the Congo State to levy duties on imports is left unimpaired, and, by agreement of all the signatories to the general slave-trade act, the time for the exchange of ratifications on the part of the United States has been extended to February 2, 1892."

President Harrison, annual message, Dec. 1891, For. Rel. 1891, x.

See, also, President Harrison's annual message of Dec. 1, 1890.

See, further, Mr. Blaine, Sec. of State, to Mr. de Weckherlin, Dutch min., Dec. 16, 1890, MS. Notes to Netherlands, VIII. 268; Mr. Blaine, Sec. of State, to Mr. Terrell, No. 108, Dec. 16, 1890, and No. 132, May 2, 1891, MS. Inst. Belgium, III. 28, 40, the last instruction enclosing copies of correspondence concerning the levying of duties in the Congo State, as follows: (1) Mr. Le Ghait, Belgium min., to Mr. Blaine, Sec. of State, April 28, 1891; (2) Mr. Blaine to Mr. Le Ghait, April 28, 1891; (3) original draft of agreement, with unofficial note to Mr. Le Ghait of April 9, 1891.

January 22, 1895, Mr. Ewing, American minister at Brussels, referring to a previous despatch in which he had communicated the request of the King of Belgians that the President of the United

States would consent to act as mediator in the settlement of certain questions of boundary affecting the Independent State of the Congo, reported that those questions were amicably settled between the King and the French Republic by an arrangement concluded August 14, 1894. Mr. Ewing enclosed a paper in which the boundary was fully described.

For. Rel. 1895, I. 37–40.

As to a loan by Belgium to the Independent State of the Congo, with an option of annexation by the former for a certain term, see supra, § 42; For. Rel. 1887, 33, 38.

A conference charged with the revision provided for by article 92 of the general act of July 2, 1890, of the duties on spirituous liquors in Africa, met at Brussels April 20, 1899, and closed its labors by signing a convention on the 8th of the following June. The government of the United States, since it possessed no territorial interests in the zone to which the conference related, did not send a representative, but reserved the right to adhere to the results, and the minister of the United States at Brussels was instructed on suitable occasions to express to any of the members of the conference whom he might meet the desire of the United States that action might be taken to repress, so far as possible, the traffic in liquors among the African tribes, thus accentuating the declarations made by the delegate of the United States to the conference which framed the general act of 1890. The new conference greatly increased the duty on spirits, and the Department of State expressed the cordial acquiescence of the United States in the result, and stated that the new convention would be laid before the Senate with the President's recommendation that it be approved. The United States adhered to the convention February 1, 1901.

Mr. Hill, Act. Sec. of State, to Mr. Joostens, Belgian chargé, Jan. 6, 1899, For. Rel. 1899, 81; Mr. Hay, Sec. of State, to Mr. Storer, min. to Belgium, No. 216, Jan. 9, 1899, MS. Inst. Belgium III. 461; Mr. Hay to Count Lichtervelde, Belgian min., July 23, 1899, For. Rel. 1899, 82.

As to the submission of the convention to the Senate, Dec. 11, 1899, and the subsequent adhesion of the United States, see For. Rel. 1900, 35, 38–40, 41.

XII. *COREA.*

§ 816.

First attempts to negotiate.

The destruction of the American merchant schooner *General Sherman* in the waters of Corea, and the reported massacre of some or all of her passengers and crew, led the United States to consider the question of establishing relations with that country. The then recent failure of a French naval expedition to obtain satisfaction for a similar outrage dis-

couraged the adoption of that mode of procedure. On the other hand, it was suggested by certain Corean agents at Shanghai that possibly that government might send an embassy to the United States and Europe to explain the occurrences in question and to enter into treaties of amity and commerce. But, in case no such steps should be taken, Mr. George F. Seward, consul-general of the United States at Shanghai, was authorized to request the admiral of the North Pacific Squadron to give him passage and a suitable convoy, in order that he might endeavor to obtain from Corea a release of the surviving seamen, if any, of the *General Sherman*, an official explanation of the outrage, and treaty stipulations for the opening of Corean ports and the security of the life and property of foreigners in that country.

Mr. Seward, Sec. of State, to Mr. G. F. Seward, consul-general at Shanghai, No. 171, June 27, 1868, 49 MS. Desp. to Consuls, 267.

See, also, supra, § 42; and Foster's American Diplomacy in the Orient.

The foregoing instructions were given to Mr. G. F. Seward in consequence of reports sent by him from Shanghai, conveying information as to the case of the *General Sherman* and other matters in Corea. In a dispatch of April 24, 1868, he reported that there were then at Shanghai four Coreans and a Roman Catholic bishop for Corea, all of whom had been sent thither by the Corean government to make inquiries concerning the state of feeling toward Corea, with a view to determine whether it would be wise for the Corean government to send an embassy to America and Europe. (For. Rel. 1870, 336–339.)

The first report concerning the *General Sherman* was that the vessel was burned and that all on board were murdered. It was afterwards reported that some of the company were killed and others held captive. The U. S. S. *Wachusett* visited Corea in 1867, but learned nothing. The U. S. S. *Shenandoah* paid a similar visit in 1868, but could learn little. It was eventually ascertained that all the company were killed. (Dip. Cor. 1867, I. 415, 416, 426–428, 459; Dip. Cor. 1868, I. 544; For. Rel. 1870, 333; For. Rel. 1871, 125, 143.)

As to the execution of a number of French missionaries and native converts in Corea in 1866, and the French punitive expedition, see Dip. Cor. 1866, I. 536, 563; Dip. Cor. 1867, I. 415, 416, 417, 420–426.

When Mr. G. F. Seward received the instruction of June 27, 1868, the conditions were not favorable to the success of a mission to Corea. On April 20, 1870, Mr. Frederick F. Low, minister to China, was authorized to enter into negotiations with the Corean authorities. He was to have the aid of Admiral John Rogers, and was to secure, if possible, the presence and cooperation of Mr. Seward. Mr. Low was directed to exercise prudence and discretion and, while firmly maintaining the right of the United States to have their seamen protected, to avoid a conflict by force unless it could not be avoided without dishonor, and to seek in all proper ways the harmonious

and friendly assistance of the Chinese Government. Mr. Low sailed from Shanghai on Admiral Rogers's flagship May 8, 1871, but was not accompanied by Mr. Seward. The admiral proceeded to Nagasaki, Japan, where his squadron was reenforced, and he then sailed for Corea with six vessels. He duly arrived off the Corean coast. Communication was established with persons on shore, and no untoward incident occurred till the 1st of June, when some of the vessels, while exploring the passage between the mainland and the island of Kanghoa, were fired upon by two Corean batteries, which, it seems, were visited by the French admiral in 1866. The ships shelled the forts, which were abandoned by their occupants. Correspondence ensued with the Corean authorities, but, as it was not deemed satisfactory, a punitive expedition was sent out by the admiral on the 10th of June. By this expedition five forts were destroyed and 250 Coreans killed, while others were wounded and a few taken prisoners. The American loss was three killed and nine wounded. The fleet then returned to China. Mr. Low's "general course" was approved, with some criticism of his communications to the Corean authorities.

Mr. Fish, Sec. of State, to Mr. Low, min. to China, No. 9, April 20, 1870, For. Rel. 1870, 334; Mr. Low to Mr. Fish, No. 15, July 16, 1870, For. Rel. 1870, 362; same to same, No. 37, Nov. 22, 1870, For. Rel. 1871, 73; same to same, No. 61, April 3, 1871, id. 111; same to same, No. 69, May 13, 1871, and No. 70, May 31, 1871, id. 115, 116; same to same, No. 74, June 20, 1871, id. 126–142; same to same, No. 75, July 6, 1871, id. 142; Mr. Fish to Mr. Low, No. 54, Sept. 20, 1871, id. 153; Mr. Low to Mr. Fish, No. 123, Jan. 13, 1872, For. Rel. 1872, 127.

Shufeldt treaty, 1882.

In 1880 an attempt to negotiate with the Corean government was made by Commodore Shufeldt, U. S. Navy. On his first visit to the ports of the kingdom he failed to obtain an interview with the proper authorities or to establish any communication with them. His letter to them was returned unopened, although he sought to procure its delivery through the good offices of the Japanese envoy at the Corean capital. The effort to negotiate was not, however, abandoned. The interposition of Li Hung Chang was invoked and his influence was exercised with the Corean authorities to induce them to treat. November 14, 1881, Commodore Shufeldt was instructed to renew his efforts, if he should be satisfied that he would not meet with another repulse. He was to put forward as the prominent purpose of his visit a treaty for the relief of American vessels which might be shipwrecked on the Corean coast, and he was to secure the right of trade at such port or ports as might be open. He was to obtain a stipulation for most-favored-nation treatment rather than a conventional tariff, and, if possible, an express prohibition of transit duties. Freedom to travel in the

interior of Corea for purposes of trade was desired, as well as such privileges of extraterritorial jurisdiction as were conceded by China and Japan. He was also desired to secure for consuls the right of direct communication with the government till diplomatic representation should be regulated.

Mr. Hay, Act. Sec. of State, to Mr. Bingham, min. to Japan, No. 543, Nov. 11, 1880, MS. Inst. Japan, III. 11; Mr. Blaine, Sec. of State, to Commodore Shufeldt, U. S. Navy, May 9, 1881, MS. Inst. China, III. 228; Mr. Blaine to Mr. Angell, min. to China, No. 92 and No. 94 (confid.), May 9, 1881, MS. Inst. China, III. 230, 232; Mr. Blaine to Commodore Shufeldt, Nov. 14, 1881, MS. Inst. China, III. 271.

As to the desire of the Chinese authorities to employ Commodore Shufeldt in the organization of their naval service, see Mr. Blaine, Sec. of State, to Mr. Holcomb, chargé at Peking, No. 132, Nov. 14, 1881, MS. Inst. China, III. 278. For a history of the relations between Japan and Corea, see Hishida, The International Position of Japan as a Great Power.

A treaty was concluded by Commodore Shufeldt May 22, 1882. A question was afterwards raised as to the dependency of Corea on China. No such relation was recognized in the treaty itself, but a letter from the King of Corea to the President declared that Corea was a dependency of China, although "the management of its government affairs, domestic and foreign, has always been vested in the sovereign." The Chinese government, however, had not admitted in the past that it was responsible for or that it internationally represented Corea; and when the United States formerly had employed force against Corea, China did not remonstrate. In view of these circumstances the United States regarded the administrative independence of Corea as a preestablished fact.

The Senate consented to the ratification of the treaty on January 9, 1883. The resolution of the Senate expressed the understanding that the clause "nor are they permitted to transport native produce from one open port to another open port," in Article VI., did not prohibit American ships from going from one port to another in Corea to receive Corean cargo for exportation or to discharge foreign cargo, and the President was requested to indicate this interpretation to the Corean government in exchanging the ratifications of the treaty.

Mr. Frelinghuysen, Sec. of State, to Mr. Young, min. to China, No. 30, Aug. 4, 1882, MS. Inst. China, III. 336; Mr. Frelinghuysen, Sec. of State, to Mr. Bingham, min. to Japan, No. 686, Sept. 20, 1882, MS. Inst. Japan, III. 139; same to same, No. 708, Jan. 16, 1883, id. 154; Mr. Frelinghuysen to Mr. Foote, min. to Corea, No. 3, March 17, 1883, MS. Inst. Corea, I. 5.

"The existence of international relations between the two countries, as equal contracting parties, is to be viewed simply as an accepted fact." (Mr. Frelinghuysen to Mr. Young, June 9, 1883, MS. Inst. China, III. 441.)

As to the desire of the Corean government to negotiate a treaty with Russia, see Mr. Frelinghuysen, Sec. of State, to Mr. Hunt, min. to Russia, No. 75, Dec. 28, 1883, MS. Inst. Russia, XVI. 373.

As to the desire of the Corean government to obtain American military officers to instruct and drill its troops, see Mr. Frelinghuysen, Sec. of State, to Mr. Lincoln, Sec. of War, Nov. 6, 1884, 153 MS. Dom. Let. 152; Mr. Bayard, Sec. of State, to Ensign Foulk, U. S. Navy, No. 63 (confid.), Aug. 19, 1885, MS. Inst. Corea, I. 111; Mr. Porter, Act. Sec. of State, to Mr. Pickering, Feb. 3, 1886, 158 MS. Dom. Let. 633, enclosing a copy of H. Ex. Doc. 163, 48 Cong. 2 sess.

As to the desire for American school-teachers, see Mr. Frelinghuysen, Sec. of State, to Mr. Teller, Sec. of Int., Dec. 9, 1884, 153 MS. Dom. Let. 384.

See, also, the following references:

Establishment of a government hospital at Seoul in charge of an American physician, For. Rel. 1885, 347.

Discovery of coal fields, worked by an American and Chinese company, For. Rel. 1885, 349.

Establishment of an "American farm" near Seoul, For. Rel. 1885, 353.

"The United States, as you are aware, were the first western power to conclude a treaty with Corea. By reason of this fact, and perhaps to give greater emphasis to the friendship so happily initiated, the Corean government sought the introduction into the treaty of the provision on which this application rests. It was admitted by us as evidence of our impartial desire to see the independence and peace of Corea well established. The second clause of Article I. of the treaty of May 22, 1882, between the United States and Corea, reads thus:

"'If other powers deal unjustly or oppressively with either government, the other will exert their good offices, on being informed of the case, to bring about an amicable arrangement, thus showing their friendly feelings.'

"Except that the provision is made reciprocal, it follows the phraseology of Article I. of our treaty of 1858 with China.

"This government could not, of course, construe the engagement thus entered into as empowering or requiring us to decide and maintain that the acts in respect to which good offices are desired are, in fact, *unjust* and *oppressive*. Such a construction would naturally render nugatory any attempt to derive good results from the engagement."

Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, Aug. 19, 1885, MS. Inst. Great Britain, XXVII. 548.

A series of interesting dispatches from Ensign Foulk, U. S. Navy, chargé d'affaires ad interim at Seoul, is published in For. Rel. 1885.

In 1887, the Chinese government sought to prevent the departure of a Corean envoy to the United States on the ground of the dependent relation of Corea toward China. The American minister at Peking was instructed to express surprise and regret at this action on

the part of the Chinese government. The envoy finally set out on his journey, but when he arrived in the United States the Chinese minister at Washington wrote to the Department of State to the effect that the Corean envoy would, on his arrival there, report to the Chinese legation, and would be presented through it to the Department of State, after which he might apply for an opportunity to deliver his credentials to the President. The Corean envoy, on the day after his arrival in Washington, addressed a note to Mr. Bayard, as Secretary of State, asking for an interview to arrange for the presentation of his credentials to the President. Such an arrangement was duly made, and the envoy was presented without the intervention of the Chinese minister. "As the United States," said Mr. Bayard, "have no privity with the interrelations of China and Corea, we shall treat both as separate governments customarily represented here by their respective and independent agents."

Mr. Bayard, Sec. of State, to Mr. Denby, tel., Oct. 6, 1887, For. Rel. 1888, I. 220; same to same, No. 247, Nov. 4, 1887, id. 225; Mr. Denby to Mr. Bayard, No. 521, Dec. 9, 1887, id. 236; same to same, No. 551, Jan. 21, 1888, id. 248; Mr. Bayard to Mr. Denby, No. 285, Feb. 9, 1888, id. 255; Mr. Chang Yen Hoon, Chinese min., to Mr. Bayard, Jan. 9, 1888, id. 380; Mr. Bayard to Mr. Chang Yen Hoon, Jan. 10, 1888, id. 381; Mr. Bayard to Mr. Dinsmore, min. to Corea, No. 38, Oct. 7, 1888, id. 436; same to same, No. 63, Jan. 26, 1888, id. 443.

See, also, Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, No. 15, Nov. 16, 1885, MS. Inst. China, IV. 83; same to same, No. 19 (confid.), Dec. 9, 1885, id. 86; Mr. Bayard to Mr. Dinsmore, No. 27, Dip. Series, July 27, 1887, MS. Inst. Corea, I. 224.

"A diplomatic mission from Corea has been received, and the formal intercourse between the two countries contemplated by the treaty of 1882 is now established." (President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, XIV.)

As to the recall of Ensign Foulk, U. S. Navy, and his transfer to the U. S. S. *Marian*, see Mr. Bayard, Sec. of State, to Mr. Dinsmore, No. 27, Dip. Series, July 27, 1887, MS. Inst. Corea, I. 224.

Corea has no colonial possessions in the usual sense of the term. As to islands adjacent to the coast, see Mr. Bayard, Sec. of State, to Mr. Manning, Sec. of Treasury, April 28, 1886, 160 MS. Dom. Let. 58.

As to Quelpaert Island, see Mr. Blaine, Sec. of State, to Mr. Long, No. 101, Dip. Series, March 15, 1889, MS. Inst. Corea, I. 275.

As to the diplomatic status of the Chinese resident in Corea, see Mr. Blaine, Sec. of State, to Mr. Denby, min. to China, No. 424, May 8, 1889, MS. Inst. China, IV. 446, enclosing copies of Mr. Dinsmore, min. to Corea, to Mr. Bayard, Sec. of State, No. 169, Feb. 28, 1889, and Mr. Blaine, Sec. of State, to Mr. Dinsmore, No. 112, May 7, 1889.

As to Corea and the Chinese-Japanese war, see Mr. Gresham, Sec. of State, to Mr. Sill, min. to Corea, tel., July 9, 1894, MS. Inst. Corea, I. 492; Mr. Gresham, Sec. of State, to Mr. Bayard, ambass. to England, No. 453 (confid.), July 20, 1894, MS. Inst. Great Britain, XXX. 627; Mr. Gresham, Sec. of State, to Mr. Dun, min. to Japan, tel., Sept. 21, 1894, MS. Inst. Corea, I. 501; Mr. Uhl, Act. Sec. of State, to Mr. Sill, No. 58, Dip. Series, Feb. 25, 1895, MS. Inst. Corea, I. 519.

Treaty rights of Americans.

By Article XIV. of the treaty of May 22, 1882, the United States, its public officers, merchants, and citizens are entitled to most-favored-nation treatment in Corea. By the treaty between Great Britain and Corea November 26, 1883, certain ports, including Seoul, were "opened to British commerce," and British subjects were to have there the right to rent or to purchase land or grounds, and to erect buildings, warehouses, and factories, and they were also to enjoy the free exercise of their religion. By a protocol to the British treaty it was agreed that if the Chinese government should thereafter surrender the right of opening commercial establishments at Seoul, it should not be claimed for British subjects if it was not granted to those of any other power. Similar stipulations were embodied in the treaties of Corea with Germany and Russia. The United States is entitled to the privileges embraced in them under the most-favored-nation clause.

Mr. Bayard, Sec. of State, to Mr. Dinsmore, min. to Corea, No. 3, March 14, 1887, For. Rel. 1887, 261.

As to the abrogation of the regulations for sea trade for Chung Kiang and the land trade of Kiran, see For. Rel. 1894, App. I. 56; also For Rel. 1883, 173–176.

With reference to certain American citizens engaged in benevolent and charitable work, who comprised all the citizens of the United States in Seoul outside of the American legation, the Department of State observed that they did not reside there by virtue of a treaty right to open commercial establishments, but under the special permission and encouragement of the Corean government, and it was supposed that that government would not regard the extinguishment of the right of foreigners to open commercial establishments at Seoul as affecting those Americans who, having gone thither on a mission of mercy and humanity, had enjoyed the active encouragement and assistance of the Corean government. It was added that any interference with the enlightened and charitable enterprises of such Americans would be deeply regretted, and that the United States could not view without grave concern any invasion of their property or other rights.

Mr. Bayard, Sec. of State, to Mr. Dinsmore, min. to Corea, No. 3, March 14, 1887, For. Rel. 1887, 261.

As to the rights of missionaries in Corea, see For. Rel. 1888, I. 447.

As to antimissionary and antiforeign demonstrations, see For. Rel. 1894, App. I. 5–24.

"I have to acknowledge the receipt of your dispatch No. 318, of the 5th ultimo, reporting the violation of the domicile of Messrs. Adams and Johnson, American missionaries, at Taiku, Korea, by

Korean policemen acting under the orders of the governor of North Kyung Sang Do, in order to arrest a Corean writer of the missionaries.

"The facts of the case as stated in your dispatch and its inclosures are as follows:

"Messrs. Adams and Johnson desiring to stop temporarily at Taiku, Corea, and not being able to rent suitable quarters, lent money to a Corean with which to erect a building for their accommodation. In buying some tiles to cover the house, and in trying to enforce a contract which they had made (through their native employee) with a Corean tile burner, the matter came to the ears of the governor. The tile burner persuaded the governor that he (the tile burner) was the aggrieved party, and the governor, without interrogating the Americans or their servant on the subject, sent his police, who forcibly entered the domicile of the Americans and arrested their Corean employee, who was taken before the governor and inhumanly beaten. The Americans went to the governor's yamen to inquire into the case, but the governor refused to see them, pronounced their official Corean passports valueless and treated them with indignity, compelling them to stand in the courtyard with the coolies and runners, and refusing to hear their explanations.

"The Americans having reported the case to you, you saw the Corean foreign minister and obtained an order for the release of the Corean employee of the Americans. It seems that at the trial of the case before the governor, the justice of the complaint of the Americans against the tile burner was so evident that the governor ordered him to pay back to them $120 out of $210 of an advance remaining in his hands. The governor also admitted that he had arrested and inhumanly beaten their servant for no cause whatever.

"In presenting the matter to the foreign minister you contended that there had been violation of treaty in the following particulars:

"1. Article IV., section 6, of the British treaty with Corea (which by virtue of the most-favored-nation clause of the treaty between Corea and the United States is applicable to Americans) expressly provides that British subjects may freely travel in the interior of Corea on passports, for purposes of pleasure, trade, or the transport and purchase of goods. You contended that if Americans are thus able to travel and reside temporarily in the interior on passports, they are at liberty to secure food and lodging while so sojourning in the country. You admitted that they are not at liberty, without special permission, to own real estate in the interior, but stated that whenever it became necessary to secure a dwelling house, owing to the absence of a system of rentals in Corea, they have secured dwelling houses in the name of a Corean, so as not to violate the treaty pro-

visions. You asserted that you had personal knowledge that persons of other nationalities do not put themselves to this inconvenience, but actually acquire such property outright, with the sanction of the local Corean authorities; that this being well known to be the case, you could not forbid Americans from following the harmless custom referred to above.

"2. Section 1 of Article IX. of the British treaty says: 'The British (American) authorities and British (American) subjects in Corea shall be allowed to employ Corean subjects as teachers, interpreters, servants, or in any other lawful capacity, without any restriction on the part of the Corean authorities.' You contended that in beating this servant of a foreigner for doing the latter's bidding in perfectly legal matters, and in forcing him, at what was practically the point of death, to promise not to repeat the 'offense,' the governor most flagrantly violated the above treaty provisions.

"3. You also contended that by forcibly entering the quarters of the Americans without permission the governor violated section 9 of Article III. of the same treaty, which says: 'But without the consent of the proper British (American) consular authority, no Corean officer shall enter the premises of any British (American) subject without his consent.'

"4. Section 8 of Article III. of the same treaty says: 'In all cases, whether civil or criminal, tried either in Corean or British (American) courts in Corea, a properly authorized official of the plaintiff or prosecutor shall be allowed to attend the hearing, and he shall be treated with the courtesy due his position. He shall be allowed, whenever he thinks it necessary, to call, examine, and cross-examine witnesses, and to protest against the proceedings or decision.' You stated that you were not communicated with, nor were the Americans allowed to be present at the trial, and when they secured an entrance to the courtyard they were treated with gross indignity.

"You presented the matter in writing to the Corean foreign minister, and asked for an early reply, 'with a statement as to what sort of punishment shall be meted out to this official who has grossly violated solemn treaty rights, and what steps will be taken to show to the natives of that region that the governor acted without the sanction of the central government.'

"The foreign minister replied, stating that the Americans were not treated courteously and that the former governor had violated the treaty through ignorance, and not with intent; that he (the foreign minister) had instructed the officials at Taiku, quoting the clauses of the treaty violated, rebuking them for their wrongdoing and warning them that they must thereafter, in dealing with foreigners, avoid a recurrence of such conduct and do what is exactly right and proper toward them.

"This being unsatisfactory to you, as it did not include a copy of the instruction of the foreign minister, and said nothing in regard to the examination and punishment of the guilty official, you accordingly returned the communication of the foreign minister with a verbal statement as to these omissions, and upon the same day you received a satisfactory reply, together with a copy of the foreign minister's instructions to the governor. This reply of the foreign minister yields fully all the points made by you.

"You conclude your dispatch with the statement that the actual money loss to the Americans was made good by the local officials; that the Americans themselves were not harmed, and that for the violation of their treaty rights their presence in Taiku is now officially recognized and sanctioned, and that you think they will experience no further difficulty.

"I may say, in passing, that the British treaty does not appear to allow missionaries to travel or reside in the interior of Corea (for the purpose of preaching or teaching), but Minister Heard, in his dispatch No. 141, of April 2, 1891, in the Robert case, states that the French treaty with Corea omits the words (contained in the English treaty) 'for purposes of pleasure, trade,' etc., and he asserts that this was done with a view of covering the action of their missionaries. This view was acquiesced in by Corea in the Robert case.

"The Department approves your treatment of the case, which is characterized by firmness and good sense."

Mr. Hay, Sec. of State, to Mr. Allen, United States leg. at Seoul, April 18, 1901, For. Rel. 1901, 396.

See, also, Mr. Allen to Mr. Hay, June 7, 1901, For. Rel. 1901, 398.

Replying to this dispatch, Mr. Hill, Acting Sec. of State, July 24, 1901, said: "The Department shares your views that it is inexpedient to encourage American citizens to reside in the remote interior, and that each individual case should be dealt with according to its facts as it arises." (For. Rel. 1901, 404.)

In a dispatch of Aug. 20, 1901, Mr. Allen reported that the governor at Taiku had "upbraided the official who had been chiefly instrumental in causing trouble to the Americans, dismissed him from his office, and ordered him to personally reimburse the Americans for their money loss. The man, with his accomplice, fled to escape arrest, and they have not yet been captured. This action on the part of the governor will have a most salutary effect, and I anticipate no more trouble to the Americans in that locality." (For. Rel. 1901, p. 404.)

Foreign settlements.

June 3, 1898, the United States legation at Seoul reported that an allotment of 900,000 square meters of land had been made on Deer Island, in the harbor of Fusan, including the proposed site of a Russian coaling station, for a general foreign settlement. In a subsequent report the legation stated that the setting aside of ground for separate settlements for

treaty powers at Corean ports was not then the custom. In the case of the settlement at Chemulpo, both China and Japan received special tracts for their citizens, but such a course had since been discouraged, and both Chinese and Japanese had become owners of land in the general foreign settlement at Chemulpo, their own tracts having become too small.

"By reference to the regulations for the foreign settlements at Chinnampo and Mokpo, copies of which I forwarded to you in my No. 35, diplomatic, November 13, 1897, and in my No. 3, consular, it will be seen by that article 10, 'The government of any treaty power may acquire a suitable lot or lots for a consulate on paying the upset price only; but such lot or lots shall be subject to the same regulations as regards payment of rent, taxes, and the like, as are other lots of the same class.' The advantage in this is that the ground may be selected and acquired without being put up at auction, as is the case with other lots. It was by virtue of this clause that the former Russian representative, Mr. de Speyer, bought up about one-half of the available land at each of these new ports. His government did not sustain him in this, however, and the Russian holding within the treaty limits of Mokpo and Chinnampo has been reduced to about 10,000 square meters, which is considered to be entirely reasonable. I did not suggest to the Department the purchase of consular sites at either of these two places, as we voluntarily surrendered the fine site reserved for us at Chemulpo, where we need a consul much more than at any of the new ports.

"Article III. of the above-named regulations stipulates that: 'None but the governments, subjects, or citizens of the States whose representatives have signified their acceptance of these regulations shall be allowed to purchase or hold land in the foreign settlement, or be granted title deeds for lots within the said limits.' By this provision Americans can acquire land freely at any of the new ports.

"The settlement on Deer Island at Fusan has not yet been surveyed and laid out, but when this is done, these same regulations will probably be accepted for it.

"The regulations allow of the purchase of land within 3½ miles of the limits of the settlement, and in accordance with this provision some Americans have purchased land so situated at Fusan, while the Russian government has made extensive purchases of such outside land at Mokpo and Chinnampo. They were not allowed, however, to acquire an island in the harbor of Mokpo under this provision."

Mr. Allen, chargé d'affaires ad interim, to Mr. Day, Sec. of State, Aug. 26, 1898, For. Rel. 1898, 483.

As to the foreign settlement at Chemulpo, see For. Rel. 1886, 207, 219; For. Rel. 1887, 260, 265.

In a despatch of March 7, 1898, Mr. Allen made a report on the new settlements at Mokpo and Chinnampo. He stated that the entire area of land reserved for the general foreign settlement at the latter place was about 975,000 meters, but of this only 460,000 meters were dry land, the remainder consisting of mud flats which were covered with water at high tide. Of the dry land Russia had reserved, under the regulations, 280,000 meters for a consulate, a hospital, a coaling station, and other governmental purposes not arranged for in the regulations; and she had staked off an even larger tract at Mokpo. It seems, however, that the Russian minister, at the request of Japan, reduced his demand for land at the settlements, but that at Chinnampo the Russian government bought an additional tract, outside of but adjoining the settlement, somewhat greater in area than the settlement itself, while it was understood that the same government had purchased or was about to purchase an island in the harbor of Mokpo. (For. Rel. 1898, 489.)

The Japanese in Corea, besides enjoying equal rights with other aliens in the general foreign settlements, have their own exclusive settlements, which usually occupy the best sites for business, and in which other foreigners are not allowed to hold land. (For. Rel. 1900, 769.)

As to the notice given by the foreign representatives at Seoul that they would consider the whole city of Peng Yang open to foreign trade and residence, pursuant to the imperial decree opening the place to trade, unless a satisfactory site was allowed for the foreign settlement there, see For. Rel. 1899, 488–491.

Japanese intervention.

August 26, 1894, a treaty was ratified between Japan and Corea. By Article I. the object of the treaty was declared to be "to expel the Chinese forces from the Corean kingdom, and to strongly establish the independence of Corea, as well as to fulfill the privileges and immunities which are enjoyed by both countries."

For. Rel. 1894, App. I. 93.

This treaty was not understood to affect the external relations of Corea or the neutral position of the United States. (Mr. Olney, Sec. of State, to Mr. Sill, min. to Corea, No. 83, June 21, 1895, MS. Inst. Corea, I. 534.)

October 9, 1895, the chargé d'affaires ad interim of the United States at Seoul reported that the King's father, with the assistance of some Japanese, had forcibly entered the royal palace; that the Queen and three ladies were murdered by Japanese in civilian dress; that the King's father was making many changes in the administration, and that the royal palace was in charge of Japanese troops. He subsequently reported that the King's life was in imminent peril; that the King was "compelled to act abhorrently," and that there was evidence implicating the Japanese minister in what had been done; that a detachment of marines had been landed at the American legation and a similar force at the Russian legation, and that

the English consul had sent for a man-of-war. A few days later Mr. Sill, the American minister at Seoul, confirmed what had been reported, and stated that the representatives of England, Russia, and France and himself were urging the Japanese to protect the King and restore the previous status by necessary temporary force. He afterwards stated that Japan would do this if it were approved by the foreign governments; that Russia had telegraphed approval, and that an answer was expected from the other powers. He expressed the hope that the United States would signify its approval, and requested a telegraphic answer. November 11, 1895, Mr. Olney cabled: "Intervention in political concerns of Corea is not among your functions, and is forbidden by diplomatic instruction 64."

Again, on November 20th, Mr. Olney cabled: "Confine yourself strictly [to] protection of American citizens and interests. You have no concern in internal affairs. Your actions to be taken independently of other representatives unless otherwise instructed."

For. Rel. 1895, II. 971–973. See, further, Mr. Olney, Sec. of State, to Mr. Sill, Nov. 21 and Dec. 31, 1895, id. 973–974; Mr. Sill to Mr. Olney, Dec. 1, 1895, id. 974; Mr. Olney to Mr. Sill, Jan. 10, 1896, id 975; Mr. Olney to Mr. Sill, Jan. 11, 1896, id. 975; Mr. Sill to Mr. Olney, Jan 13 and 20, 1896, id. 976, 977.

See, also, Mr. Olney, Sec. of State, to Mr. Dun, min. to Japan, Nos. 274 and 275, Dec. 7 and 13, 1895, MS Inst. Japan, IV. 313, 314.

See, also, the following references to Corea:

Rules for the council of state, For. Rel. 1898, 473.

Convention between Japan and Russia, April 25, 1898, concerning Corea, For. Rel. 1898, 473.

Concession of whaling privileges to a Russian subject, For. Rel. 1899, 484–488.

Treaty between China and Corea, Sept. 11, 1899, For. Rel. 1899, 491–496.

Protection of the interests of American citizens in the Seoul electric railway against Japanese interference, by agreement between the American and Japanese ministers, For. Rel. 1900, 771.

The Emperor of Japan, in his declaration of war, February 10, 1904, declared that the integrity of Corea was a matter of constant concern to his empire, not only because of Japan's traditional relations with that country, but because the separate existence of Corea was essential to the safety of his realm, and that the absorption of Manchuria by Russia would render it impossible to maintain the integrity of Corea and preserve the peace in the Far East.

February 26, 1904, the Japanese minister at Washington communicated to the Department of State a copy of a protocol concluded by his government with that of Corea on the 23d of the same month. By this protocol the Corean government agreed to place full confidence in that of Japan and adopt its advice with regard to improvement and administration, while Japan agreed to insure the safety

and repose of the imperial house of Corea and to "definitely guarantee the independence and territorial integrity of the Corean Empire." By a later agreement, concluded on the 19th of August, the Corean government undertook to employ a Japanese subject recommended by Japan as financial adviser and to employ a foreigner recommended by Japan as diplomatic adviser, to the foreign office. For the former function the Japanese government designated Mr. Megata, a Japanese, educated in America and a graduate of Harvard University, and for the latter function Mr. D. W. Stevens, an American.

For. Rel. 1904, 414, 437–440.

March 28, 1904, Count Cassini, Russian ambassador at Washington, left with Mr. Hay a memorandum, in which it was stated that, as Japan had "openly violated the neutrality of Corea and usurped the power in that country," the Russian government was obliged to consider it as being within the area of hostilities. (For. Rel. 1904, 727.)

By the treaty of peace between Japan and Russia, signed at Portsmouth, Aug. 23/Sept. 5, 1905, Russia (Art. II.), "acknowledging that Japan possesses in Corea paramount political, military, and economic interests, engages neither to obstruct nor interfere with measures for the guidance, protection, and control which the Imperial Government of Japan may find it necessary to take in Corea." Russian subjects are placed on the same footing as citizens of the most favored nation. It is also agreed that the contracting parties "will abstain on the Russian-Corean frontier from taking any military measures which may menace the security of Russian or Corean territory."

Hishida, The International Position of Japan as a Great Power, 275.

In the work here cited an interesting exposition is given of the relations between Japan and Corea, ancient as well as modern.

A similar acknowledgment may be seen in the treaty of alliance between Great Britain and Japan of August 12, 1905, which (Art. III.) reads: "Japan possessing paramount political, military, and economic interests in Corea, Great Britain recognizes the right of Japan to take such measures of guidance, control, and protection in Corea as she may deem proper and necessary to safeguard and advance those interests, provided always that such measures are not contrary to the principle of equal opportunities for the commerce and industry of all nations."

For the instruction of Lord Lansdowne to the British ambassador at St. Petersburg, transmitting a copy of the alliance, see Parl. Papers, Japan, No. 2 (1905).

XIII. *DENMARK.*

§ 817.

The relations of Denmark to the United States prior to the treaty of 1826 are discussed in 1 Lyman's Diplomacy of the United States, chap. xii.

"Quasi relations were opened with Denmark during the war of the Revolution by Dr. Franklin, who, on the 22d of December, 1779, in a letter to M. Bernstorff, minister for foreign affairs at Copenhagen, remonstrated against the seizure of American prizes within the territorial jurisdiction of the King of Denmark. This question lingered into the middle of the present century.

"On the 27th of February, 1783, the Danish minister for foreign affairs wrote a letter to Mr. de Walterstorf, one of his countrymen, in which he said: 'As I know you are on the point of making a tour to France, I cannot omit recommending to you to endeavor, during your stay at Paris, to gain as much as possible the confidence and esteem of Mr. Franklin. . . . You have witnessed the satisfaction with which we have learned the glorious issue of this war for the United States of America, and how fully we are persuaded that it will be for the general interests of the two states to form, as soon as possible, reciprocal connections of friendship and commerce. Nothing certainly would be more agreeable to us than to learn by your letters that you find the same dispositions in Mr. Franklin.'

"De Walterstorf went to Paris and made the acquaintance of Franklin, and assured him that the King had a strong desire to have a treaty of friendship and commerce with the United States. Franklin informed Robert Livingston of the advances, and suggested that Congress should send the necessary powers for entering into the negotiations, but nothing came of it. Franklin would not go on without a special power, and no special power came.

"It was not until 1826 that a commercial convention was concluded at Washington with Denmark. This was transmitted to Congress with President Adams's message at the beginning of the second session of the 19th Congress."

Davis, Notes, Treaty Vol. (1776–1887), 1285.

See, as to the Danish spoliations and indemnity, Moore, Int. Arbitrations, V. 4549 et seq.

For attempts to acquire the Danish West Indies, see supra, § 123.

XIV. *DOMINICAN REPUBLIC.*

§ 818.

President John Adams, by a proclamation of June 26, 1799, remitted and discontinued as to Santo Domingo the restraints and prohibitions on trade between the United States and France under the

act of February 9, 1799. The proclamation announced that "arrangements" had been made at Santo Domingo for the safety of the commerce of the United States and for the admission of American vessels into certain ports of the island, so that after August 1, 1799, such vessels might enter Cape François and Port Republicain, formerly called Port au Prince, and after entering those ports depart for any port in the island between Monte Christi on the north and Petit Goave on the west, "provided it be done with the consent of the government of St. Domingo, and pursuant to certificates or passports expressing such consent, signed by the consul-general of the United States, or consul residing at the port of departure."

Am. State Papers, For. Rel. II. 240.

In a note to the case of the United States *v.* Schooner Peggy, 1 Cranch, 103, decided at the December term, 1801, it is stated that in April, 1800, Toussaint was "on terms of amity, commerce, and friendship with the United States duly entered and ratified by treaty." Mr. Justice Cushing, in the circuit court, said that there were "some friendly arrangements respecting commerce" between Toussaint and the United States, and he spoke of "the regulations between General Toussaint and the American consul." (1 Cranch, 105.)

For negotiations for the annexation of Santo Domingo to the United States and the lease of Samana Bay as a naval station, see supra, § 121.

In 1896 Mr. Olney, as Secretary of State, recommended that the missions to Hayti and Santo Domingo be put on a plenipotentiary footing.[1] He declared that the existing scheme, by which the minister-resident and consul-general at Port au Prince was accredited to Santo Domingo as chargé d'affaires, was "not only inconsistent with our national interests in those states," but also stood in the way of carrying out the design of the act of March 1, 1893, which authorized the President to give to the representative of the United States in a foreign country the same designation as that of the representative sent by such country to the United States.

Report of Mr. Olney, Sec. of State, to the President, December 7, 1896, For. Rel. 1896, lxxiv. In 1904 the missions to Hayti and Santo Domingo were separated.

As to the recognition of the independence of the Dominican Republic, see supra, § 39.

As to proposals for the annexation of Santo Domingo and Samana Bay, see supra, § 121.

As to the assassination of President Heureaux, in July, 1899, see For. Rel. 1899, 242.

As to a treaty between Hayti and the Dominican Republic of 1874, against accepting foreign sovereignty or control, see infra, § 843.

October 26, 1894, the Dominican chargé d'affaires at Washington stated that this government acquiesced in the rescission of the com-

mercial arrangements of June 4, 1891, which had "been effected in virtue of one of the alternatives of termination contained in a clause of the said arrangement."

For. Rel. 1895, I. 235.

January 12, 1897, the Dominican minister at Washington communicated to the Department of State a notice signed by the Dominican minister of foreign affairs on November 5, 1896, of the denunciation of the treaty with the United States of February 8, 1867, in accordance with the provisions of Article XXXI. The Department of State acknowledged the receipt of the notice, saying that it accepted the denunciation of the treaty, which would terminate, in virtue of the article in question, on January 13, 1898.

For. Rel. 1897, 125.

February 7, 1905, a protocol of agreement was signed at Santo Domingo City, between the United States and the Dominican Republic, by which the former power was to undertake the adjustment of all the obligations of the Dominican Government, foreign and domestic, and to this end to take over for the time being the administration of the Dominican customs. The protocol was submitted to the Senate of the United States on February 15, 1905.

Message of the President to the Senate, Feb. 15, 1905, Confid. Exec. V, 58 Cong. 3 sess. See infra, § 962.

As to the award in the case of the San Domingo Improvement Company and its allied companies, see Confid. Exec. V, 58 Cong. 3 sess. 13–31; also, For. Rel. 1904, 270–286.

XV. *ECUADOR.*

§ 819.

A treaty of amity, commerce, and navigation was concluded between the United States and Ecuador June 13, 1839.

H. Ex. Doc. 2, 27 Cong. 3 sess. 156.

November 25, 1862, a convention was concluded for the adjustment of claims.

Moore, Int. Arbitrations, II. 1569.

As to the convention of February 28, 1893, for the settlement of the Santos case, see Moore, Int. Arbitrations, II. 1579. See, also, H. Ex. Doc. 361, 49 Cong. 1 sess.; H. Ex. Doc. 86, 53 Cong. 3 sess.; For. Rel. 1896, 103–110.

October 25, 1900, the President of Ecuador approved a bill of the Ecuadorian Congress granting civil registry of marriages, births, and deaths.

October 18, 1900, he also approved a bill forbidding priests or monks to teach anything but religion in any school under government control, and also a bill forbidding any school under the control of priests or monks from conferring any but an ecclesiastical degree.

October 5, 1900, he approved a law enabling the government to expropriate the cemeteries of the country in order that anyone might be buried there.

For. Rel. 1901, 144.

As to United States citizens in Ecuador, see For. Rel. 1897, 127.

XVI. *EGYPT.*

§ 820.

"Your dispatch No. 69, of the 5th of August last, in relation to Egyptian finances, and particularly to the question of the adhesion of the powers, other than the signatories, to the decree of the Khedive of Egypt of the 27th of July, 1885, has been received.

"The attitude of this government with reference to the settlement of the Egyptian debt question has been one of friendly neutrality. At the time of the organization of the commission of liquidation in 1880, the United States maintained for a time an attitude of reserve, owing to the fact that acquiescence in the scheme pledged, or appeared to pledge, the government to accept as binding upon any of the citizens of the United States whose interests might be involved, the action to be thereafter taken by a commission in the composition or control of which the United States had no part. It appearing, however, that no interests of American citizens were then in fact to be submitted to the decisions of the commission, and animated simply by the desire that no action on our part should embarrass the Egyptian government in making with the actual creditors such arrangements as might be acceptable to them, this government, at the urgent wish of the Khedive's government, instructed its representative at Cairo, on the 17th of July, 1880, to adhere to the plan of liquidation, if the Egyptian government regarded such action as material to the success of the scheme. The government of the United States thus concurred in the plan, without being positively interested therein, and simply to avoid embarrassing the friendly government of the Khedive.

"So, with regard to the subject of your dispatch, this government is disposed to preserve the same attitude that it has heretofore maintained towards the management of the Egyptian finances, and would not embarrass the government of the Khedive by withholding its adherence to the decree of the 27th of July, should it appear that such a course would be in opposition to the Khedive's wishes and an

obstacle to the accomplishment of his plans for the liquidation of the Egyptian debt."

Mr. Porter, Act. Sec. of State, to Mr. Phelps, min. to England, No. 113, Sept. 16, 1885, MS. Inst. Gr. Br. XXVII. 569. See, also, Mr. Bayard, Sec. of State, to Mr. Comanos, vice consul-general at Cairo, No. 138, Oct. 27, 1885, MS. Inst. Egypt, XVI. 422.

As to the adhesion of the United States in 1880, see Mr. Evarts, Sec. of State, to Mr. Drummond, British chargé, July 30, 1880, For. Rel. 1880, 521.

For the Khedival decree of March 31, 1880, establishing the commission to liquidate the Egyptian debt, see 71 Br. & For. State Papers, 549, 551.

For the Khedival decree of July 27, 1885, see 76 id. 352, 358.

"On November 2, 1883, the British minister here addressed to my predecessor a note, accompanied by a memorandum, in regard to the levying of a house tax on foreigners in Egypt by the Khedive's government under the Turkish law of 1867, and expressed the hope that the United States would find no objection thereto.

"Mr. Frelinghuysen replied to Mr. West, November 10, 1883, that as the proposed tax had not yet been formerly presented to the United States by the Khedive's government, we could not, in advance of the presentation of the measure and without a full knowledge of its terms, commit ourselves to its acceptance.

"A copy of this correspondence is herewith transmitted for your information.

"However, by a despatch from your predecessor of February 28, 1884, No. 84, Mr. Pomeroy advised the Department of the proposed action of the Egyptian government, and enclosed a copy of a note from the minister for foreign affairs upon the subject.

"Mr. Frelinghuysen in his reply, No. 53, of March 28, 1884, stated that this government had no objection to such taxes being charged to United States citizens if they shall also be impartially levied upon foreigners in Egypt as well as upon the inhabitants who owe it allegiance.

"With this explanation I now enclose to you a copy of a further note from Mr. West of the 19th ultimo, stating that the decree of the Egyptian government for the house tax on foreigners has been modified in accordance with the financial declaration signed at London, March 17 last, and been submitted to the several powers represented at Cairo. The assent of this government is therefore invoked.

"You will accordingly examine the decree in question and if it should appear to be the wish of the Khedive's government that we should assent, and if on such examination the proposed measure should be found unobjectionable and involve no discrimination

against American citizens, you may notify the minister for foreign affairs that, to avoid embarrassing his government, the United States will not withhold their consent. This qualified assent being given in writing will doubtless serve every purpose."

Mr. Bayard, Sec. of State, to Mr. Cardwell, agent and cons. gen. at Cairo, Jan. 7, 1886, MS. Inst. Egypt, XVI. 433.

"I have received your No. 15 of the 29th of January, 1886, accepting, on behalf of the United States, the decree of the Egyptian Government taxing real property belonging to foreigners, and have to approve your action." (Mr. Bayard, Sec. of State, to Mr. Cardwell, March 3, 1886, MS. Inst. Egypt, XVI. 440.)

A similar adhesion was given to a proposed Khedival decree for the partial suppression of the corvée. (Mr. Bayard, Sec. of State, to Mr. Cardwell, No. 127, Feb. 4, 1888, For. Rel. 1888, II. 1630–1631.)

The agreement between the United States and Egypt, signed by Nubar Pasha, Egyptian minister of foreign affairs, and Mr. Comanos, United States vice-consul at Cairo, November 16, 1884, is divisible into two distinct parts. By the first, the United States consented to the application of the provisions of the Helleno-Egyptian convention of March 3, 1884, to the citizens, vessels, commerce, and navigation of the United States; by the second, it was stipulated that "every right, privilege, or immunity that the Egyptian Government now grants, or that it may grant in future, to the subjects or citizens, vessels, commerce, and navigation of whatsoever other foreign power, shall be granted to citizens of the United States, vessels, commerce, and navigation, who shall have the right to enjoy the same." The Helleno-Egyptian convention came to an end on March 20, 1891; but there was nothing in that circumstance that could imply the cessation of the stipulation for most-favored-nation treatment. The agreement of 1884 contains no provision for termination on notice, and is indeterminate as to duration. It is in reality in the nature of a modus vivendi, which was designed to be operative pending the negotiation and conclusion of a commercial convention.

Mr. Wharton, Assist. Sec. of State, to Mr. Anderson, No. 20, Jan. 9, 1892, 138 MS. Inst. Consuls, 308.

XVII. *FRANCE.*

1. Treaty Relations.

§ 821.

A treaty of amity and commerce was concluded between France and the United States February 6, 1778. Immediately afterwards, on the same day, a treaty of alliance was signed. The stipulations of these treaties will be more fully examined hereafter.

January 25, 1782, the Continental Congress passed an act approving a plan for a consular convention with France. This plan was sent to Franklin, with instructions to make it the basis of a formal treaty. He signed a convention July 29, 1784, but it departed in important particulars, especially in relation to jurisdiction, from the Congressional plan, and proved to be unacceptable. The objections to it were fully set forth in a report made by Mr. Jay, as Secretary for Foreign Affairs.[a]

Mr. Jefferson, who succeeded Franklin at the Court of Versailles, signed a new convention November 14, 1788. It was laid before the Senate by President Washington June 11, 1789, and on the 21st of the following month Mr. Jay was ordered to attend the Senate and bring with him such papers as were requested and to give full information on the subject. He appeared and gave the necessary explanations, and although he expressed the apprehension that the convention would prove more inconvenient than beneficial to the United States, he advised that it be ratified, since it adhered to the plan to which the Government was already committed.[b] The Senate unanimously gave its consent, and a statute to carry the convention into effect was passed April 14, 1792.[c]

Before the close of the year 1790 a controversy arose between the United States and France in regard to matters of commerce. In spite of the favors granted in France by royal decrees of December 29, 1787, and December 7, 1788, the commerce of the United States tended to revert to its former channels, so that the trade with France languished and failed, while that with England increased.[d] The development of this tendency produced in France a feeling of dissatisfaction, which was intensified by the disposition of Congress to subject commerce with France to the same regulations as that with Great Britain. France maintained, besides, that certain legislation of Congress in regard to duties constituted an infraction of Article V. of the treaty of amity and commerce of 1778. Mr. Jefferson, who was then Secretary of State, denied that this was so, but advised that the claim of the French Government should be allowed. The legislation of the United States, however, was not modified, and the National Assembly of France proceeded to the adoption of measures of retaliation.[e]

In 1792 Mr. Jefferson endeavored to bring about a new commercial convention, and to that end gave instructions to Gouverneur Morris, who had been appointed by Washington as minister pleni-

[a] March 9, 1786, Dip. Cor. 1783–1789, I. 218.

[b] Dip. Cor. 1783–1789, I. 232; Am. State Papers, For. Rel. I. 89.

[c] 1 Stat. 254.

[d] Am. State Papers, For. Rel. I. 116, 120.

[e] As to the particulars of this controversy, see Moore, Int. Arbitrations, V. 4400–4401.

potentiary to France on the 12th of January in that year. July 9, 1792, Morris proposed to the French Government the conclusion of such a convention; and he was soon afterwards advised that his proposal would be communicated to the King and to the National Assembly. On the 10th of August, however, the King was deposed. He was beheaded in the following February. The revolution radically changed the course of negotiations.[a]

In consequence of the wars in which France became involved with England, as well as with the powers of the Continent, the United States and France, instead of making new treaties, became involved in violent controversies as to the construction and enforcement of the old ones. The following stipulations were particularly involved:

Treaties of 1778; question of prizes.

By Article XVII. of the treaty of amity and commerce of February 6, 1778, it was provided that the ships of war and privateers of either party might in time of war freely carry their prizes into the ports of the other party; that such prizes should not, when so brought in, "be arrested or seized;" that they should not be subject to "search," or to "examination" as to their "lawfulness;" but that they might be taken away at any time to the places expressed in the commissions of their captors, which commissions the captors should be obliged to show. On the other hand, it was provided that "no shelter or refuge" should be given by either party to vessels which had "made prize of the subjects, people, or property" of the other party; but that such vessels, if forced in by "stress of weather, or the danger of the sea," should be required to depart "as soon as possible."

Foreign privateers.

By Article XXII. of the same treaty it was provided that neither party should permit privateers having commissions from any prince or state in enmity with the other party to fit out in its ports, or to sell their prizes, or even to purchase victuals, except such as should be necessary for a voyage to the next home port.

Free ships, free goods.

By Article XXIII. it was provided that free ships should make free goods.

The alliance.

By Article XI. of the treaty of alliance, which was described (Article II.) as a "defensive alliance," the "essential and direct end" of which was "to maintain effectually the liberty, sovereignty, and independence" of the United States, "as well in matters of government as in commerce," the United States, in return for the guaranty of "their liberty, sovereignty, and independence . . . and also their possessions," guaranteed "to His Most Christian Majesty the present possessions of the Crown of

[a] As to Morris's proposal of a new commercial treaty, see Jefferson's Works, ed. by Washington, III. 338, 356, 449; Am. State Papers For. Rel. I. 332, 333, 334; Moore, Int. Arbitrations, V. 4402–4403.

France in America, as well as those which it may acquire by the future treaty of peace." And in order "to fix more precisely the sense and application" of this article, it was declared (Article XII.) "that in case of a rupture between France and England the reciprocal guaranty declared in the said article shall have its full force and effect the moment such war shall break out."

Convention of 1788; consular powers.

By Article VIII. of the consular convention of 1788, it was provided that consular officers should "exercise police over all the vessels of their respective nations," and should "have on board the said vessels all power and jurisdiction in civil matters, in all the disputes which may there arise;" and that they should "have an entire inspection over the said vessels, their crew, and the changes and substitutions there to be made." It was, however, provided that these functions should be "confined to the interior of the vessels," and that they should not be permitted to interfere "with the police of the ports" in which the vessels might happen to be.

By Article XII. of the same convention it was provided that "all differences and suits" between Frenchmen in the United States and Americans in France, and particularly all disputes between the masters and crews of vessels, should be exclusively determined by the respective consular officers, whose sentences were to be carried into effect by the local tribunals.

In the latter part of 1792 the French Government appointed as minister to the United States M. Edmond C. Genet. His departure was attended with some parade, and Morris reported that he bore with him 300 blank commissions for privateers to be distributed among such persons as might be willing to fit out vessels in the United States to prey on British commerce.[a]

Question as to Genet's reception.

On the 18th of April, 1793, before Morris's dispatch was received, Washington submitted to the various members of his Cabinet a series of questions touching the relations between the United States and France.[b] The first of these questions was whether a proclamation of neutrality should issue; the second, whether a minister from the Republic of France should be received; the third, whether, if received, it should be absolutely or with qualifications, and the fourth, whether the United States were obliged to consider the treaties previously made with France as still in force. It seems that the question whether Genet should be received was suggested by Hamilton at a meeting of the Cabinet on the 25th of February, and that the President, the Secretary of State, and the Attorney-General at that time were all disposed

[a] Am. State Papers, For. Rel. I. 354, 396; Moore, Int. Arbitrations, V. 4404–4405.

[b] Writings of Washington, by Sparks, X. 533.

to give an affirmative answer.[a] At a meeting of the cabinet on the 19th of April it was determined, with the concurrence of all the members, that a proclamation of neutrality should issue. It was also unanimously agreed that the minister from the French Republic should be received. On the third question, whether he should be received absolutely or with qualifications, Hamilton was supported by Knox in the opinion that the reception should be qualified. The President, Jefferson, and Randolph inclined to the opposite opinion; but the third and fourth questions were postponed for further consideration. In a subsequent written opinion Hamilton argued that the reception of Genet should be qualified by a previous declaration to the effect that the United States reserved the question whether the treaties, by which the relations between the two countries were formed, were not to be deemed temporarily and provisionally suspended. He maintained that the United States had an option so to consider them, and would eventually have a right to renounce them, if such changes should take place as could bona fide be pronounced to make a continuance of the connections which resulted from them disadvantageous and dangerous.[b] He also thought the war plainly offensive on the part of France, while the alliance was defensive.[c] On the other hand, Jefferson maintained that the treaties were not "between the U. S. & Louis Capet, but between the two nations of America and France," and that "the nations remaining in existence, tho' both of them have since changed their forms of government, the treaties are not annulled by these changes." He also contended that the reception of a minister had nothing to do with this question.[d]

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[a] Jefferson's Works, by Washington, IX. 140.

[b] Hamilton's Works, ed. by Lodge, IV. 74–79.

[c] Id. 101.

[d] Jefferson's Works, by Ford, VI. 219, 220. See, to the same effect, Mr. Madison, who says that "a nation, by exercising the right of changing the organ of its will, can neither disengage itself from the obligations, nor forfeit the benefit of its treaties. This is a truth of vast importance, and happily rests with sufficient firmness on its own authority. To silence or prevent cavil I insert, however, the following extract: 'Since, then, such a treaty (a treaty not personal to the sovereign) directly relates to the body of the state, it subsists though the form of the republic happens to be changed, and though it should be even transformed into a monarchy; for the state and the nation are always the same, whatever changes are made in the form of government, and the treaty concluded with the nation remains in force as long as the nation exists.' (Vattel, B. II. § 85.) 'It follows that as a treaty, notwithstanding the change of a democratic government into a monarchy, continues in force with the new king, in a like manner if a *monarchy* becomes a republic, the treaty made with the king does not expire on that account, 'unless it was manifestly personal.' (Burlam. Part IV., chap. ix., § 16.) As a change of government, then, makes no change in the obligations or rights of the party to a treaty, it is clear that the Executive (of the United States) can have no more right to suspend or prevent the operation of a treaty on account of the change than to suspend or prevent

April 22, 1793, Washington published his well-known proclamation of neutrality.[a] On the 8th of April, just two weeks previously, Genet arrived at Charleston, S. C.; and, after fitting out and commissioning a number of privateers, he set out by land for Philadelphia. On the way he incited the people to hostility against Great Britain and received such demonstrations of sympathy as to strengthen his confidence in the course on which he had entered. On his arrival in Philadelphia he was accorded an unqualified reception.

French position as to the alliance.

In presenting on the 18th of May his letters of credence, Genet stated that his government knew that "under the present circumstances" they had a right to call upon the United States for the guaranty of their islands, but declared that they did not desire it. On the contrary, he proposed on the 23rd of May a new alliance on a broader basis than that of 1778.[b]

Recall of Genet and Morris.

Meanwhile the Administration took measures to vindicate its proclamation of neutrality, which was constantly violated by the fitting out of privateers, the condemnation of prize by French consuls sitting as courts of admiralty, and even by the capture of vessels within the limits of the United States. These proceedings, in which he was himself directly implicated, Genet defended as being in conformity not only with the treaties between the two countries, but also with the principles of neutrality. He claimed the right to fit out and arm vessels in the ports of the United States under the twenty-second article of the treaty of amity and commerce, maintaining that the contracting parties, in declaring that it should not be lawful for persons, having commissions from any other prince or state in enmity with either nation, "to fit their ships in the ports of either the one or the other of the aforesaid parties," by implication conceded the right to do so to the citizens and subjects of each other. On the other hand, the United States denied that the contracting parties, in agreeing to observe the duties of neutrality toward each other, incurred an obligation to violate them with respect to other powers. Genet maintained that, by the seventeenth article of the treaty of

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the operation where no such change has happened. Nor can it have any more right to suspend the operation of a treaty in force as a law than to suspend the operation of any other law." (Works, I. 635. See, also, 1 Tucker's Life of Jefferson, 414, 421.)

[a] Am. State Papers, For. Rel. I. 140.

[b] For a full discussion of the position of France as to the guaranties of the alliance and her reasons for not desiring to have them enforced, see Moore, Int. Arbitrations, V. 4406–4409; Lawrence's Wheaton (1863), 71; 3 Phillimore Int. Law (3d ed.), 228; 1 Lyman's Dip. of U. S. 38; 1 Randall's Jefferson, chap. xiv.; 2 id. 140; Gray, adm. *v.* United States 21 Ct. Cl. 340.

amity and commerce, the executive and judicial authorities were precluded from interfering in any manner with the prizes brought into the ports of the United States by the French privateers. The United States, on the other hand, while disclaiming any pretension "to try the validity of captures made on the high seas by France, or any other nation, over its enemies," denied that the contracting parties, in agreeing that each other's prizes should not be subject to arrest or search, or to examination as to their lawfulness, deprived themselves of the right to interfere to prevent the capture and condemnation of prizes in violation of their own neutrality and sovereignty. Genet maintained that the cognizance of all questions relating to the lawfulness of the French captures pertained to the French consuls, who had been invested by the National Assembly with the powers of courts of admiralty. The United States replied that every nation possessed exclusive jurisdiction within its own territory, except so far as it might have yielded it by treaty; that the United States and France had, by their consular convention, conceded to each other's consuls jurisdiction in certain enumerated cases, but that they had not conceded to them the right to determine questions of prize. The United States, therefore, insisted that the fitting out and arming of vessels and the enlistment of citizens of the United States should cease; that privateers that had been unlawfully fitted out and armed in the United States should depart from and not reenter their jurisdiction; that captures made in the waters of the United States, or by vessels unlawfully armed and equipped therein, should, when brought within the United States, be restored; and that the exercise of prize jurisdiction by the French consuls should be discontinued.

Genet's refusal to heed these demands and the undiplomatic terms in which he asserted them led the United States to request his recall, which was granted; the United States complying with a reciprocal request for the recall of Morris.[a]

Decrees and orders in council.

The violations of the neutrality of the United States, however, continued; and the issuance by France and Great Britain of a series of retaliatory decrees and orders in council, designed to make neutral trade tributary to the uses of the belligerents, raised controversies as to various treaty questions, among which was the stipulation in the treaty of amity and commerce of 1778 that free ships should make free goods. France at length declined to observe this stipulation, excusing herself on the ground that, as the United States was unwilling to compel Great Britain to observe the same rule, France was, under the circumstances, unable to abide by it. On the 4th of January, 1795, however, the committee of public safety passed a decree by which

[a] See supra, §639, and Moore's American Diplomacy, 38–41, 43, 44, 48.

previous decrees were so modified as to permit American vessels to transport enemy's merchandise, thus reestablishing as to American vessels the rule of free ships, free goods, in accordance with Article XXIII. of the treaty of amity and commerce. This new decree was prompted by the measures which the United States had taken to check the seizure of American vessels under the British orders in council of June 8, 1793, and subsequent dates. But, after the proclamation by the United States of the Jay treaty in February, 1796, the French authorities proceeded to take measures more extreme than any which they had previously adopted.

France's complaints.

March 9, 1796, M. de la Croix laid before James Monroe, who had been appointed to succeed Morris in the French mission,[a] a formal statement of France's complaints against the United States. They were classified under three heads: First, the inexecution of the treaties; second, the failure to punish an outrage committed on M. Fauchet, the French minister to the United States, and third, the treaty with Great Britain.

The complaint of failure to execute the treaties was substantiated by four distinct allegations:

1. That the courts of justice of the United States asserted cognizance of prizes made by the French privateers, notwithstanding the express clause in the treaty against it.

To this charge Monroe made the same answer as was given by Jefferson to Genet.[b]

2. That English ships of war had, in violation of the seventeenth article of the treaty of amity and commerce, been admitted into the ports of the United States when they had made prizes of the French.

Monroe replied that the article in question forbade, not the entrance of enemies' ships of war, but only their entrance with their prizes, and that even in the latter case it merely required that they should be compelled to depart as soon as possible.

3. That the consular convention was ineffective because proper laws were not adopted to enable consuls to execute their decisions in disputes between Frenchmen or to reclaim deserting seamen.

As to the execution of the judgments of the consuls, Monroe said that, as no definite objection was stated, he could not give a specific answer. As to the reclaiming of seamen, he referred to the act of Congress of April 14, 1792, as having provided suitable legal provisions for the execution of the convention.

4. That in August, 1795, the captain of the corvette *Cassius* was, in violation of the nineteenth article of the treaty of amity and com-

[a] See Trescot's Am. Dip. Hist. 147–155. [b] Supra, pp. 591–592.

merce, arrested and detained at Philadelphia, and that after his liberation the corvette itself was arrested on the pretext that it was eight months previously armed in that port.

Monroe answered that the article in question was not intended to secure personal immunity from punishment for crime, and that it appeared that the proceeding against the captain was a judicial one; and that, if the corvette was armed at Philadelphia, it was the duty of the Government to seize it.

As to the outrage on M. Fauchet, which was committed by a British frigate in concert with a British consul, in boarding the packet on which the minister was embarked, opening his trunks, and seizing his papers in the waters of the United States, Monroe answered that the exequatur of the consul was revoked, that supplies were ordered to be withheld from the frigate, that the frigate itself was ordered to depart from the waters of the United States, and that the minister of the United States in London had been directed to demand redress.

The third general complaint, that the United States had "knowingly and evidently sacrificed their connections with the Republic and the most essential and least contested prerogatives of neutrality" by the treaty with England, was substantiated by two specific allegations:

1. That the United States had departed from the principles of the armed neutrality, and, to the detriment of their first allies, abandoned the limits of contraband by including in it articles for the construction and equipment of vessels.

Monroe answered that even in the former war, when the combination against England was most formidable, she refused to admit the principles of the armed neutrality; that it was impossible to obtain from her such a recognition now when many of the powers then opposing her were enlisted on her side and supporting her principles, and that the limits of contraband were not settled.

2. That the United States had by the eighteenth article of the treaty with England "consented to extend the denomination of contraband even to provisions."

By this article it was provided that, in view of the "difficulty of agreeing on the precise cases in which alone provisions and other articles not generally contraband may be regarded as such," such articles, whenever "so becoming contraband, according to the existing laws of nations," should not, if for that reason seized, be confiscated, but that they should be paid for at their full value, with a reasonable mercantile profit, together with the freight, and also the demurrage incident to the detention.

Monroe answered that this article left the law of nations on the subject precisely as it was before, and, according to the construction of the United States, required compensation to be paid even in cases

in which provisions might be considered contraband by the law of nations.[a]

The discussion of the complaints of France was continued in the United States by M. Adet, the French minister, and Mr. Pickering, Secretary of State. In addition to the complaints that have been noticed, M. Adet charged:

1. That the Government of the United States made it a question "whether it should exécute the treaties, or receive the agents of the rebel and proscribed princes."

Mr. Pickering, as Secretary of State, answered: "In 1791 the constitution formed by the constituent assembly was accepted by Louis XVI.; it was notified to the United States in March 1792. Congress desired the President to communicate to the King of the French their congratulations on the occasion. In August 1792 the King was suspended. In September royalty was abolished, and in January 1793 Louis XVI., tried and condemned by the convention, suffered death. Was it easy to keep pace with the rapid succession of revolutionary events? And was it unlawful for our government, under such circumstances, even to *deliberate?*"

2. That the President had issued "an insidious proclamation of neutrality."

Pickering replied that the proclamation was designed to prevent citizens of the United States from violating the law of nations, was approved by Congress, and by "the great body of the citizens of the United States. And what was the general object of this proclamation? To preserve us in a state of *peace*. And have not the ministers of France declared that their Government did not desire us to enter into the war? And how was peace to be observed? By an impartial neutrality. And was it not then the duty of the Chief Executive to proclaim this to our citizens, and to inform them what acts would be deemed departures from their neutral duties? This was done by the proclamation. To what in all this can the epithet *insidious* be applied? On the contrary is not the whole transaction stamped with *candor* and *good faith?*"

3. That the Secretary of the Treasury on the 4th of August, 1793, by direction of the President, sent to the collectors of customs certain regulations which had been adopted for the purpose of preventing the arming of vessels by either belligerent in the United States.[b]

Answer was made that these regulations were framed for the purpose of insuring an impartial neutrality, and that the letter of the Secretary of the Treasury, which accompanied them, called particular attention to the seventeenth and twenty-second articles of the treaty

[a] Am. State Papers, For. Rel. I. 658, 659.

[b] Id. I. 140.

of amity and commerce with France, lest any injury might result to her from inattention to them.

4. That the President submitted certain measures to Congress, with a view to have the courts invested with jurisdiction to punish offenses against the law of nations, and that Congress, on the 5th of June, 1794, passed an act "for the punishment of certain crimes against the United States," under which French privateers and their prizes had been arrested.

In answer to this complaint, Mr. Pickering reviewed the cases in question, in order to show that they had been properly dealt with by the judicial tribunals.

5. That the Government of the United States had, by its "chicaneries, abandoned French privateers to its courts of justice."

Reply was made that the judges needed no defense against such an insinuation; that they might challenge the world for proof of the charge that they had not administered justice impartially.

6. That the United States had eluded the advances of France for renewing the treaty of commerce on a footing more favorable to both countries.

To this charge answer was made that it was impossible to negotiate with Genet; that the powers of his successor, Fauchet, if he possessed any to negotiate such a treaty, were not communicated to the United States; and that while the United States had exhibited every disposition to expedite the negotiation, Adet had held back.

7. That Jay's mission was "enveloped from its origin in the shadow of mystery, and covered with the veil of dissimulation."

Pickering answered that the United States had, ever since the peace, been endeavoring to negotiate a commercial treaty with Great Britain; that there were various questions at issue between the two countries on which it was proper to negotiate; and that there was no obligation to "unveil" the mission to anyone.

8. That the English had been permitted to arm privateers in the ports of the United States, and to bring in and repair their prizes.

To this charge the reply was made that the United States had used every effort to prevent violations of neutrality by the English, while French privateers illegally armed in the United States continued on the coast, using the harbors to cruise from.

9. That the United States had permitted England to violate their neutrality by taking enemies' goods out of their ships.

Answer was made that it was not a violation of neutral rights to seize enemies' goods, the rule of free ship free goods resting on treaty.

10. That the United States allowed the French colonies to be declared in a state of blockade, and its citizens to be interdicted the right of trading with them.

Reply was made that the blockade was proclaimed as an actual one, and that it applied equally to all neutrals.

11. That the United States had permitted England to impress their seamen.

Answer was made that the United States had not assented to such impressment, but had resisted it, and that this resistance had been continued.

12. That the United States had ceased to permit the sale of French prizes in their ports.

Answer was made that such permission was originally granted as a favor, and that the indulgence was withdrawn when it came in conflict with a new and positive stipulation in the treaty with Great Britain, similar to that which France herself contracted with the British Government eight years after her treaty with the United States.

13. That the Government of the United States "suffered England, by insulting its neutrality, to interrupt its commerce with France."

Answer: "That our commerce has been interrupted by the armed vessels of England, and sometimes with circumstances of insult, we certainly shall not attempt to deny. . . . It was because of those aggressions that preparations for war were commenced; and to demand satisfaction for them was the leading object of Mr. Jay's mission to London. Satisfaction was demanded; and the arrangements agreed on for rendering it are now in execution at London."

14. That the United States had exhibited "ingratitude" to France, and had failed to render the "succors" that might have been given without compromising the Government.

Answer was made that while the United States were not disposed to question the importance of the aid actually derived from France, the exertions of France were made for the purpose of advancing her own interests and securing her own safety. But was it true that the United States had rendered no succors to France? In a letter to Mr. Morris, of August 16, 1793, the Secretary of State had said: "We recollect with satisfaction that in the course of two years, by unceasing exertions, we paid up seven years' arrearages and installments of our debt to France, which the inefficacy of our first form of government had suffered to be accumulating; that, pressing on still to the entire fulfillment of our engagements, we have facilitated to Mr. Genet the effect of the installments of the present year, to enable him to send relief to his fellow-citizens in France, threatened with famine; that, in the first moment of the insurrection which threatened the colony of St. Domingo, we stepped forward to their relief with arms and money, taking freely on ourselves the risk of unauthorized aid, and when delay would have been denial; . . . that we have given the exclusive admission to sell here the prizes made by France

on her enemies in the present war, though unstipulated in our treaties and unfounded in her own practice, or in that of other nations, as we believe." "To this detail," said Pickering, "I have to add, that, of all the loans and supplies received from France in the American war, amounting to nearly fifty-three millions of livres, the United States under their late government had been enabled to pay not two millions and a half of livres; that the present Government, after paying up the arrearages and installments mentioned by Mr. Jefferson, has been continually anticipating the subsequent installments, until, in the year 1795, the whole of our debt to France was discharged, by anticipating the payment of eleven millions and a half of livres; no part of which would have become due until the second of September, 1796, and then only one million and a half; the residue at subsequent periods; the last not until the year 1802."

While these discussions were progressing the French Government adopted certain measures which prefigured the Berlin and Milan decrees of Napoleon.[a] Against the new decrees the United States protested in vain. Monroe was recalled, and in his place was sent Charles Cotesworth Pinckney, of South Carolina, a brother of Thomas Pinckney, who was then minister to England. He arrived in Paris early in December, 1796, but, just as the arrangements for his reception seemed to be complete, the minister of foreign affairs informed Monroe that the Executive Directory had decided "that it will no longer recognize nor receive a minister plenipotentiary from the United States until after the redress of the grievances demanded of the American Government, and which the French Republic has a right to expect."[b] The Directory refused to give Pinckney a permit to sojourn in Paris as a private foreigner, and afterwards sent him a notice to quit the territories of the Republic. He then retired to Amsterdam to await developments.[c]

Decree of March 2, 1797.

On the 2d of March, 1797, the Directory promulgated a new decree by which it was ordered that neutral ships laden in whole or in part with enemy's property should be captured, and that all such property found on board should be deemed good prize. By a singular process of reasoning it further declared that by the operation of the most-favored-nation clause the treaty of amity and commerce of 1778 was to be considered as modified by the provisions of the Jay treaty in the following particulars:

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[a] For a review of the French decrees of Jan. 4, 1795, July 2, 1796, and various other decrees, see Moore, Int. Arbitrations, V. 4414, 4419–4420. As to British orders in council, see Moore, Int. Arbitrations, I., chap. 10.

[b] Am. State Papers, For. Rel. I. 746.

[c] Am. State Papers, For. Rel. II. 10.

1. That all enemy's property and all property "not sufficiently ascertained to be neutral, conveyed under American flags, shall be confiscated."

2. That to the list of contraband in the treaty of 1778 should be added articles used in arming and equipping vessels.

3. That Americans accepting commissions from the enemies of France, or serving as seamen in enemies' vessels, should be treated as pirates.

4. That every American ship should be deemed good prize which should not have on board a crew list (*rôle d'équipage*) in the form prescribed by the model annexed to the treaty of amity and commerce of 1778, the observance of which was required by the twenty-fifth and twenty-seventh articles.[a]

The part of the foregoing decree that bore most hardly on American ships was that in regard to the documentation of vessels. By the twenty-fifth article of the treaty of amity and commerce of 1778, in order to avoid disputes, it was agreed that in case either of the contracting parties should be engaged in war the vessels of the other should be furnished with sea letters or passports expressing the name, property, and bulk of the ship, and the name and residence of the master, according to the form annexed to the treaty, and also with certificates showing the character of the cargo and the places of its origin and destination. By the twenty-seventh article it was provided that in case a ship should be visited she should, on exhibition by the master of his passport concerning the property of the ship, made out according to the form annexed to the treaty, be at liberty to pursue her voyage free from molestation or search. By that form the oath concerning the property of the ship was required to be annexed to the passport, but no other paper was required to be so annexed. By various acts of Congress provision was made for the documentation of vessels, including the matters referred to in the treaty of 1778.[b] Particular rules were established as to registry, ownership, tonnage, and crew list. When the decree of March 2, 1797, was issued, American vessels had for years been carrying the documents prescribed by the acts of Congress, and though the war had been in progress for four years no others had been required.[c] The decree, therefore, amounted to a declaration of general and summary confiscation of American vessels. Moreover, the old marine ordinances of France were revived and enforced with severity both in Europe and the West Indies. Informalities in bills of lading, crew lists, or other papers were made a ground of condemnation, though the proofs of property were indubitable. And in many cases in the

[a] Am. State Papers, For. Rel. III. 12, 30, 180.

[b] 1 Stat. 31, 53, 288, 289, 290.

[c] Am. State Papers, For. Rel. II. 180, 302.

West Indies when vessels were brought to trial they and their cargoes were condemned without admitting the owners or their agents to make defense.[a] In a report of February 28, 1798, Pickering summarized the depredations on American commerce as follows: (1) Spoliation and maltreatment of their vessels at sea by French ships of war and privateers. (2) A distressing and long-continued embargo on their vessels at Bordeaux in the years 1793–1794. (3) The nonpayment of bills and other evidences of debts due drawn by the colonial administrations in the West Indies. (4) The seizure or forced sales of the cargoes of vessels, and the appropriation of them to public use without paying for them, or paying inadequately, or delaying payment for a great length of time. (5) The nonperformance of contracts made by the agents of the government for supplies. (6) The condemnation of vessels and cargoes under such of the marine ordinances of France as were incompatible with the treaties subsisting between the two countries. (7) Captures, detentions, and condemnations under various decrees which have been described.[b]

Mission of Pinckney, Marshall, and Gerry.

At the opening of the first session of the Fifth Congress, on May 16, 1797, President Adams referred to the state of the relations with France, and recommended the consideration of effectual measures of defense. In particular he adverted to the depredations on American commerce, in violation of the treaty of amity and commerce of 1778, and to the speech made by Barras, the president of the Directory, when Monroe, on the 30th of December, 1796, took his formal leave.[c]

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[a] Am. State Papers, For. Rel. II. 28–29.

[b] Am. State Papers, For. Rel. I. 748.

[c] Barras said: "By presenting to-day your letters of recall to the Executive Directory, you give to Europe a very strange spectacle. France, rich in her liberty, surrounded by a train of victories, and strong in the esteem of her allies, will not abase herself by calculating the consequences of the condescension of the American Government to the suggestions of her former tyrants. Moreover, the French Republic hopes that the successors of Columbus, Raleigh, and Penn, always proud of their liberty, will never forget that they owe it to France. They will weigh, in their wisdom, the magnanimous benevolence of the French people with the crafty caresses of certain perfidious persons who meditate bringing them back to their former slavery. Assure the good American people, sir, that, like them, we adore liberty; that they will always have our esteem; and that they will find in the French people republican generosity, which knows how to grant peace, as it does to cause its sovereignty to be respected. As to you, Mr. Minister Plenipotentiary, you have combated for principles; you have known the true interests of your country: depart with our regret. In you we give up a representative to America, and retain the remembrance of the citizen whose personal qualities did honor to that title." (Am. State Papers, For. Rel. II. 12.) "The moment this speech was concluded the Directory, accompanied by the diplomatic corps, passed into the audience hall to receive from an aid-de-camp of Bonaparte the four Austrian colors taken at the battle of Arcola. The diplomatic corps may, therefore, be presumed to have witnessed this indignity." (Davis' Notes, Treaty Volume, 1776–1887, p. 1302.)

Desirous, however, of trying all possible means of conciliation, President Adams, on the 31st of May, 1797, nominated to the Senate Charles Cotesworth Pinckney, Francis Dana, and John Marshall as envoys extraordinary and ministers plenipotentiary to the French Republic.[a] Dana having declined the appointment, Elbridge Gerry was nominated in his place, and on the 13th of July the three commissioners were invested with full power to treat on all the differences between the two countries.[b] They arrived in Paris on the evening of the 4th of October. On the 8th they were unofficially received by Talleyrand, the minister of foreign affairs, to whom they gave a copy of their letter of credence. Talleyrand directed cards to be sent them in order that they might remain in Paris, but informed them that it would be necessary for him to consult further with the Directory before formally receiving them. It was subsequently intimated, through his private secretary, that they could not have a public audience of the Directory until their negotiations were concluded.

The X, Y, Z episode.

Meanwhile they were waited upon by three men who came sometimes singly and sometimes together, and who professed to represent Talleyrand and the Directory. These persons are known in the correspondence as X, Y, and Z. The first approach was made by W, who called on Pinckney and informed him that X was a gentleman of credit and reputation, in whom great reliance might be placed. On the evening of the same day X called, and professing to speak for Talleyrand, whom he represented as desirous of effecting a conciliation with America, suggested confidentially a plan for that purpose. It was represented that two members of the Directory were exceedingly irritated at some passages in the President's speech of May 16, 1797, and that these passages would need to be softened: that a sum of money, to be at the disposal of Talleyrand, would be required as a *douceur* for the ministry, except Merlin, the minister of justice, who was already making enough from the condemnation of vessels; and that a loan to the government would also be insisted on. As the amount of the *douceur*, X mentioned the sum of 1,200,000 livres, or about 50,000 pounds sterling. Pinckney answered that he and his colleagues had been treated with great slight and disrespect; that they earnestly wished for peace and reconciliation with France, and had been intrusted with very great powers to obtain those ends on honorable terms; but that, with regard to the propositions which had been made to him, he could not even consider them before communicating with his colleagues. It was subsequently arranged that X should be presented to all the American plenipotentiaries, and

[a] Am. State Papers, For. Rel. II. 19.

[b] Id. 153.

that he should reduce his propositions to writing. This X agreed to do, saying that his communication was not immediately with Talleyrand, but through another gentleman, in whom Talleyrand had great confidence. This gentleman proved to be Y. On the evening of the 19th of October, X called upon the plenipotentiaries and presented in writing the propositions which he had already made orally. On the evening of the 20th X and Y called together, the latter being introduced as a confidential friend of Talleyrand. Y dilated on the resentment produced by the President's speech, and said he would not disguise the fact that after they had afforded satisfaction on that point, they must pay money, "a great deal of money." In so saying he referred to the subject of a loan. Concerning the 1,200,000 livres little was said, it being understood that this sum was required for the officers of the government, and therefore needed no further explanation. In an interview on the following day, Y, who represented that he had spent the morning with Talleyrand, intimated as a "private individual" the opinion that the determination of the Directory in regard to the President's speech might be changed by a loan. He said there were 32,000,000 florins of Dutch inscription, worth 10 shillings in the pound, which might be assigned to the United States at 20 shillings in the pound; that, after peace was concluded, the Dutch Government would repay the money; and that the practical effect of the measure would be an advance of 32,000,000 to France, on the credit of Holland. The plenipotentiaries inquired whether the *douceur* to the Directory must be in addition to this sum. Y answered in the affirmative. After consultation the plenipotentiaries replied that the proposition of a loan was not within the limits of their instructions, but that one of their number would forthwith embark for America to consult the Government on the subject, provided the Directory would suspend proceedings in respect of captured American vessels. At this reply Y exhibited disappointment. He said the plenipotentiaries had treated the money part of the proposition as if it had proceeded from the Directory, whereas in fact it was only a suggestion from himself, as a means of avoiding "the painful acknowledgment" which the Directory had determined to demand of them. The plenipotentiaries answered that they understood the matter perfectly; that they knew the proposition was in form to be theirs, but that it came substantially from the minister; that it was for the Directory to determine what course its own honor and the interest of France required it to pursue, and for them to guard the interest and honor of their own country. Y declared that they certainly would not be received, and "seemed to shudder at the consequences."[a]

[a] Am. State Papers, For. Rel. II. 158–160.

After further conference with the French intermediaries, the American plenipotentiaries informed them that they considered it degrading to their country to carry on further indirect intercourse, and that they had determined to receive no further propositions unless the persons who bore them had authority to treat.[a] On the 11th of November they addressed to Talleyrand a formal letter, in which they reminded him of their unofficial interview of the 6th of October, and asked to be informed of the decision of the Directory with regard to their reception. To this letter they received no answer, and about the middle of December X and Y sought to renew their intercourse. "On the 20th of December," says Pinckney, "a lady, who is well acquainted with M. Talleyrand, expressed to me her concern that we were still in so unsettled a situation; 'but,' adds she, 'why will you not lend us money?'" She assured Pinckney that if they remained six months longer they would not advance a single step in their negotiation without a loan. Pinckney replied that if such was the case they might as well go away at once.[b]

Decree of January 17, 1798.

On the 18th of January, 1798, the Directory issued a new decree, by which it was declared that every vessel found at sea loaded in whole or in part with merchandise the production of England or her possessions should be good prize, whoever the owner of the goods or merchandise might be; and that every foreign vessel which in the course of her voyage should have entered an English port should not be admitted into the ports of France except in cases of necessity.[c] On the 28th of January the American plenipotentiaries, though still unrecognized, addressed an elaborate communication to Talleyrand, in which they reviewed the questions in controversy between the two governments, and drew particular attention to the spoliations of American commerce.[d]

[a] Am. State Papers, For. Rel. II. 164.

[b] Am. State Papers, For. Rel. II. 166, 167. After the envoys' reports of these transactions were made public in the United States, they were republished in the *London Gazette*. Talleyrand, having seen a copy, on the 30th of May, 1798, wrote to Gerry, declaring that intriguers had profited by the "insulated position" in which the envoys had kept themselves to make propositions the object of which evidently was to deceive them. He demanded to know the names of X, Y, and Z, and of the woman who was described as holding conversations with Pinckney. Gerry gave him the names of X, Y, and Z. The name of the lady he said he could not give, as she had not made any political communications to him. Y was a Mr. Bellamy; Z, a Mr. Hauteval. The name of X was given, but was not published. It is preserved in the Department of State. Z avowed himself. (Am. State Papers, For. Rel. II. 210, 211, 229.)

[c] Am. State Papers, For. Rel. II. 182.

[d] Id. 169–182.

Diplomatic rupture.

On the 2d of March, having intimated that it would be improper for them to remain longer in France under existing conditions, they were admitted by Talleyrand to an interview. Talleyrand soon introduced the kindred subjects of the speech of the President and the negotiation of a loan. His observations led Pinckney to remark that the propositions which he suggested appeared to be substantially the same as those made by X and Y. The plenipotentiaries declared that they had no power to agree to a loan; and on the 18th of March Talleyrand made a formal reply to their note. In this reply he repeated the complaints concerning the interference with French prizes in the United States and the admission of enemies' vessels to American ports after they had captured property or ships belonging to French citizens; but he laid most stress on the questions raised by the Jay treaty. After reviewing these matters at length, he declared that the Executive Directory was "disposed to treat with that one of the three [plenipotentiaries] whose opinions, presumed to be more impartial, promise, in the course of the explanations, more of that reciprocal confidence which is indispensable.[a] The plenipotentiary thus referred to was Gerry. On the 3d of April the three envoys, replying to Talleyrand's communications, stated that none of them was authorized to take unto himself alone a negotiation.[b] But, although Pinckney and Marshall left Paris without further delay, Gerry remained behind, alleging in justification of his course that the Directory wished him to stay, and that his departure against its wishes might bring on an immediate rupture.[c] He continued in Paris till the end of July, 1798. His conferences with Talleyrand produced no result, and he was rebuked by his government and directed to consider himself as positively recalled.[d]

Measures of hostility.

As the reports of the envoys were from time to time received, President Adams promptly communicated them to Congress. On the 14th of June, 1798, the correspondence with Talleyrand was received, and on the 18th of the month it was communicated to Congress without comment. On the 23d of the preceding March the envoys had been instructed to demand their passports and return to the United States if, on the receipt of the instructions, persons with full and equal powers should not have been authorized to treat with them. The arrival of Marshall in the United States conveyed the intelligence that the envoys had been compelled to anticipate their instructions. On the 21st of June the President congratulated Congress on Marshall's arrival, and declared, "I will never send another minister to France without assur-

[a] Am. State Papers, For. Rel. II. 188, 191.
[b] Id. 191–199.
[c] Id. 199.
[d] Id. 204.

ances that he will be received, respected, and honored as the representative of a great, free, powerful, and independent nation."[a] The news of the manner in which the envoys had been treated and of the character of the proposals with which they had been received created a feeling of great indignation. Measures to put the country in a condition for war were immediately adopted. On June 13, 1798, before the reception of the correspondence between Talleyrand and the envoys the President approved an act to suspend commercial intercourse between the United States and France and her dependencies.[b] On the 22d of June acts were passed to increase the naval armament of the United States and to amend an act of the 28th of May, authorizing the President to raise a provisional army.[c] In quick succession other acts were passed to authorize the arrest and expulsion of aliens;[d] to authorize the defense of merchant vessels of the United States against French depredations;[e] to protect the commerce and coasts of the United States;[f] to augment the Army of the United States;[g] and to enable the President to borrow money.[h] On the 7th of July the President approved an act by which it was declared that, as the treaties between the two countries had been repeatedly violated by France, the just claims of the United States for reparation refused, and their attempts to negotiate an amicable adjustment repelled with indignity; and as there was still being pursued against the United States, under the authority of the French Government, a system of predatory violence, in conflict with the treaties and hostile to the rights of a free and independent nation, the United States were "of right freed and exonerated from the stipulations of the treaties, and of the consular convention," and that these compacts should "not henceforth be regarded as legally obligatory on the Government or citizens of the United States." At the next session of Congress the commercial intercourse between the United States and France was further suspended;[i] authority was given to the President to exchange or send away French citizens who had been or might be captured and brought into the United States;[j] provision was made for augmenting the Army; and various other acts were adopted in relation to the hostilities which Congress had authorized. The command in chief of the Army was offered to Washington and accepted by him. On the 21st of August, 1798, the Attorney-General of the United States advised the Secretary of State that, taking into consideration the acts of the French Republic toward the United States, and the legislation

[a] Am. State Papers, For. Rel. II. 199.
[b] 1 Stat. 565.
[c] Id. 558, 569.
[d] Id. 570, 577.
[e] Id. 572.
[f] 1 Stat. 574.
[g] Id. 604.
[h] Id. 607.
[i] Id. 613.
[j] Id. 624.

adopted by Congress at its preceding session, he was of opinion that there not only existed an actual maritime war between France and the United States, but a maritime war authorized by both nations.[a]

Talleyrand's overtures.

The storm which the treatment of the envoys raised in America doubtless was more violent than Talleyrand had anticipated, and when he heard of the declaration of President Adams and of the measures adopted by Congress he sought to restore diplomatic relations. To that end he instructed the French secretary of legation at The Hague to inform Mr. Vans Murray, then minister of the United States at that capital, in the words of President Adams, that "whatever plenipotentiary the Government of the United States might send to France, in order to terminate the existing differences between the two countries, he would undoubtedly be received with the respect due to the representative of a free, independent, and powerful nation."[b]

Mission of Ellsworth, Davie, and Murray.

On receiving this overture President Adams, on the 25th of February, 1799, nominated to the Senate Chief Justice Ellsworth, Patrick Henry, and Mr. Murray as envoys extraordinary and ministers plenipotentiary to the French Republic, with full power to discuss and settle all controversies between the two Governments. Mr. Henry being unable to accept the position by reason of advancing age, Governor William R. Davie, of North Carolina, was substituted in his place.

Instructions.

The instructions of these plenipotentiaries were signed by Timothy Pickering, as Secretary of State, and bore date of the 22d of October, 1799.[c] They required, as the indispensable condition of a new treaty, a stipulation for compensation for "all captures and condemnations" contrary to the law of nations and to the treaty of amity and commerce of 1778, while the latter "remained in force," and especially for such as were "made and pronounced—

"1. Because the vessel's lading, or any part thereof, consisted of provisions or merchandise coming from England or her possessions.

"2. Because the vessels were not provided with the *rôles d'équipage* prescribed by the laws of France; and which, it has been pretended, were also required by treaty.

"3. Because sea letters or other papers were wanting, or said to be wanting, when the property shall have been, or shall be, admitted or proved to be American. . . .

"4. When the owners, masters, or supercargoes shall have been refused a hearing, or placed in situations rendering their presence at the trial impracticable.

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[a] Opinions of the Attorneys-General, I. 84.

[b] Am. State Papers, For. Rel. II. 242.

[c] Id. 306.

"5. When the vessels or other property captured shall have been sold, or otherwise disposed of, without a regular trial and condemnation."

If a preliminary acknowledgement of these claims should be secured, the envoys were instructed that it would be necessary, for the purpose of examining and adjusting "all the claims" of citizens of the United States, to provide for the appointment of a board of commissioners, who, besides determining claims for captures and condemnations, should also take cognizance of the following claims:

I. Of citizens of the United States—

1. For "merchandise, or other property, seized by the French in their own ports or elsewhere, and not comprehended under the head of captures; and for their vessels arbitrarily and unreasonably detained in French ports."

2. For "sums due . . . by contracts with the French Government or its agents."

II. Of citizens of France, for injuries occasioned by "infringements of the treaty of amity and commerce by the United States, or their citizens."

III. National claims—

1. Of "the United States, as distinguished from those of their citizens, for injuries received from the French Republic, or its citizens."

2. Of France, for injuries occasioned by infringements of the treaty of amity and commerce.

"If, however," said the instructions, "the French Government should desire to waive its national claims, you may do the like on the part of the United States. Doubtless the claims of the latter would exceed those of the former; but, to avoid multiplying subjects of dispute, and because *national* claims may probably be less definite than those of *individuals*, and consequently more difficult to adjust, *national* claims may, on both sides, be relinquished."

Minute directions were given as to matters of commerce and navigation, and in conclusion the envoys were instructed that the following points were "to be considered as ultimated:"

1. That a board of commissioners be established to hear and determine the claims of citizens of the United States arising from the causes previously specified, and that France be bound to pay the sums awarded.

2. That the treaties of 1778 and the consular convention of 1788 be not revived in whole or in part, but that all the engagements to which the United States were to become parties be specified in a new treaty.

3. That no guaranty of any part of the French dominions be stipulated, nor any engagement made in the nature of an alliance.

4. That no aid or loan be promised in any form whatever.

5. That no engagement be made inconsistent with the obligations of any prior treaty, and that, if cogent reasons should appear for renewing in substance the seventeenth and twenty-second articles of the treaty of amity and commerce of 1778, it must be done with the explicit declaration that they should not be construed so as to derogate from the twenty-fourth and twenty-fifth articles of the Jay treaty.

6. That no powers be granted to consuls or others incompatible with the complete sovereignty of the United States in matters of policy, commerce, and government.

7. That the duration of the proposed treaty be limited to twelve years from the exchange of ratifications.

Bonaparte as First Consul.

Messrs. Ellsworth and Davie sailed from Newport, Rhode Island, on the 3d of November, 1799, agreeing to touch at Lisbon before making any port in France. When, on the 27th of November, they arrived at the Portuguese capital, news had just been received there of the revolution at Paris of the 18th Brumarie (10th November), by which the Directory was overthrown. They reached Paris on the 2d of March, 1800, the day after the arrival of Mr. Murray from The Hague. They found Bonaparte reigning as First Consul. He promptly granted the envoys an audience, and appointed MM. Joseph Bonaparte, Fleurieu, and Roederer as plenipotentiaries to negotiate with them.[a]

Negotiations.

The commencement of the negotiations was delayed by the indisposition of Joseph Bonaparte. On the 2d of April, however, the plenipotentiaries met and exchanged their powers; but as those of the French plenipotentiaries were not considered by their American colleagues sufficiently full and explicit, the French Government furnished its representatives with new ones.[b] This preliminary adjusted, the American plenipotentiaries proposed first "to ascertain and discharge the equitable claims of the citizens of either nation upon the other, whether founded on contract, treaty, or law of nations," and then to take up questions of commercial intercourse. The French plenipotentiaries expressed the opinion that "the first object should be to determine the rules, and the mode of procedure, for the valuation of those injuries for which the two nations, respectively, may have demands against each other, whether these demands are founded on national injuries or individual claims;" and that the "second object" was "to insure the execution of the treaties of friendship and commerce, now existing between the two nations, and the accomplishment of those views of reciprocal advantage which first dictated them."

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[a] Am. State Papers, For. Rel. II. 307–311. [b] Id. 312–314.

Difference as to the treaties of 1778.

The American plenipotentiaries, while suggesting the expediency of a mutual relinquishment of national claims, intimated that the discussion of such claims might conveniently follow the arrangement of the individual claims; and, in accordance with this view, they presented on the 17th of April a draft of articles for the adjustment of the claims of individuals. In this draft it was provided that, in determining questions of capture or condemnation, the commissioners should "decide the claims in question according to the original merits of the several cases, and to justice, equity, and the law of nations: and in all cases of complaint existing prior to the 7th of July, 1798, according to the treaties and consular convention then existing between France and the United States."[a] The French plenipotentiaries on the 6th of May replied that the proposal of their American colleagues had "a tendency to remove the obstacles" which lay in the way of the accomplishment of what both nations desired, and that they would have seized the present moment to develop their views respecting the "various interpretations" which had been "given to the treaties," had they "not been struck with an interpretation of which they can conceive neither the cause nor the object, and which therefore seems to require explanation." "The ministers plenipotentiary of France are not aware," they declared, "of any reason which can authorize a distinction between the time prior to the 7th of July, 1798, and the time subsequent to that date, in order to apply the stipulations of the treaties to the damages which have arisen during the first period, and only the principles of the laws of nations to those which have occurred during the second."[b] The American plenipotentiaries answered that the distinction was based on the fact that it "was not till after the treaty of amity and commerce of February, 1778, had been violated to a great extent on the part of the French Republic, nor till after explanations and an amicable adjustment sought by the United States had been refused, that they did, on the 7th of July, 1798, by a solemn public act, declare that they were free and exonerated from the treaties and consular convention which had been entered into between them and France."[c]

French propositions.

The issue thus made as to the treaties was the subject of numerous fruitless conferences. At length, on the 26th of August, the French plenipotentiaries formally defined the position of their Government thus:

1. That it could not admit that the treaties had been annulled,

[a] Am. State Papers, For. Rel. II, 317.

[b] Id. 319.

[c] Id. 320. Trescot says: "It must be admitted that the American positions were untenable." See his discussion of the subject, in his Diplomatic History of the Administrations of Washington and Adams (Boston, 1857), 212 et seq.

either by the single act of abrogation on the part of the United States or by "the misunderstanding" which had for some time existed between the two countries, but which had "not constituted a state of war, at least on the part of France." On this basis France was ready "to stipulate a full and entire recognition of the treaties, and a reciprocal promise of indemnities for the damages resulting, on the part of either, from their infraction." But—

2. If the American plenipotentiaries were unable to recognize the validity of the treaties, France would acquiesce in their nullity, with the understanding that the act of the United States, by which their abrogation was declared, was "an unequivocal provocation to war;" that the "hostile acts" by which the provocation was followed "were nothing less than war;" and that the new treaty between the two countries should be "preceded by a treaty of peace." "If," said the French plenipotentiaries in conclusion, "the correctness of these observations is admitted, it would seem that the two Governments ought to be occupied no longer with their respective losses; the rights of war acknowledge no obligation to repair its ravages."[a]

Treaties and indemnities postponed.

Various propositions were made on either side with a view to an accommodation; but, as the French plenipotentiaries refused to separate the question of indemnities for captures and condemnations from that of the treaties, and the American plenipotentiaries had no authority either to recognize the treaties or to abandon the claims, an agreement was impossible. It thus became necessary to postpone the subject, or else to abandon the negotiations, which virtually meant war. The American plenipotentiaries assumed the responsibility of choosing the former alternative, and on the 30th of September, 1800, signed a convention.

Convention of September 30, 1800; Article II.

By the second article of this convention it was declared that the ministers plenipotentiary of the contracting parties, being unable to agree respecting the treaty of alliance and of amity and commerce of 1778, and the consular convention of 1788, or "upon the indemnities mutually due or claimed, the parties will negotiate on these subjects at a convenient time, and until they may have agreed upon these points the said treaties and conventions shall have no operation."

Debts and captured property.

Besides this article in relation to the treaties and indemnities, the following provisions of the convention may be noticed:

1. That all public ships taken by either party from the other should be restored (Article III.).

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[a] Am. State Papers, For. Rel. II. 332.

2. That property captured, but not definitively condemned, or which might be captured before the exchange of ratifications, should be mutually restored on certain proofs of ownership (Article IV.).

3. That "debts contracted by one of the two nations with individuals of the other, or by the individuals of the one with the individuals of the other, shall be paid, or the payment may be prosecuted in the same manner as if there had been no misunderstanding between the two states," but that this clause should "not extend to indemnities claimed on account of captures or confiscations" (Article V.).

Other stipulations.

The convention also provided that free ships should make free goods, but that the enemy's flag should render the goods of a neutral liable to confiscation, and that prizes should be adjudicated only by the established prize courts of the country. Article XVIII. of the treaty of amity and commerce of 1778 was renewed, with the proviso that its stipulations should not extend beyond the privileges of the most-favored nation. No limit was set to the operation of the convention. With this exception, and that of compensation for captures and condemnations, it substantially conformed to Pickering's ultimata.[a]

Expunction of Article II.

The Senate approved the convention with the proviso that Article II. should be "expunged," and the duration of the convention limited to eight years from the exchange of ratifications. The convention as thus amended was returned to Paris with a view to the exchange of ratifications.[b] The French ministers refused to agree to an unconditional suppression of the second article, but insisted that, if it was stricken out, "the reciprocal pretensions" to which it related "should not be brought forward at any future period."[c] Murray, being without authority to enter into an engagement to this effect, Bonaparte, as First Consul, ratifying the convention in the name of the French people, inserted in his act of ratification the proviso that by the expunction of the second article "the two states renounce the respective pretensions, which are the object of the said article." The ratifications were exchanged at Paris on the 31st of July, 1801. When the convention was sent back to the United States the President, in view of the form of the French ratification, deemed it "most safe, as a precedent, to ask anew the sanction of the Senate to the instru-

[a] "Davie is here with the convention, as it is called: but it is a real treaty, and without limitation of time. It has some disagreeable features, and will endanger the compromising us with Great Britain. I am not at liberty to mention its contents, but I believe it will meet with opposition from both sides of the House. It has been a bungling negotiation." (2 Randall's Jefferson, 577.)

[b] Am. State Papers, For. Rel. VI. 148.

[c] Id. VI. 144–145.

ment, with that ingredient," though he did not regard "the declaratory clause as more than a legitimate inference from the rejection by the Senate of the second article."[a] The Senate, on the 19th of December, declared that it considered the convention "as fully ratified," and returned it to the President for promulgation.[b] It was proclaimed on the 21st of December.[c]

Execution of the convention.

In returning the convention as amended by the Senate to the envoys in Paris the Acting Secretary of State, in March, 1801, said: "We are carrying the convention into execution in all its parts. All hostilities on the sea have been forbidden; our vessels are returning into port; the prisoners in our possession are in course of delivery to M. Letombe, former consul of France; he is notified that all those officers may resume their functions; commercial intercourse is restored; a number of our vessels actually cleared out and departed for France, and orders given for the restitution of vessels under the third article of the convention."[d] On the 3d of January, however, Talleyrand had instructed the Council of Prizes "to adjourn to an indefinite period all decisions upon every kind of property seized under the flag of the United States," though he promised, as soon as the convention should be ratified on both sides, "to urge forward a decree of the consuls which shall replevy for the Americans all the prizes restitution of which has been engaged for."[e]

Nonexecution by France.

The restitutions claimed by the United States, as defined by Madison, embraced (1) cases of capture in which there had been no judicial proceedings; (2) cases carried before the French tribunals, but not definitively decided on the 30th of September, 1800, and (3) captures made subsequently to that day.[f] On the 10th of December, 1801, Chancellor Robert R. Livingston, who had become minister plenipotentiary to France, reported that "the Council of Prizes were still condemning in the very face of the treaty," and that the debts due to American citizens remained unpaid. In communications subsequently made to the French Government he complained (1) that the Government had omitted to take proper measures for the payment of debts; (2) that it refused to make compensation for vessels detained in French ports under general embargoes, or under other

[a] Am. State Papers, For. Rel. VI. 155.

[b] Am. State Papers, For. Rel. II. 345.

[c] Am. State Papers, For. Rel. VI. 149.

[d] Id. 151.

[e] Am. State Papers, For. Rel. VI. 149; Lawrence's Wheaton (1863), 712; 3 Phillimore's Int. Law (3d ed.), 228; 1 Lyman's Am. Dip. 38; 1 Randall's Jefferson, chap. xiv.

[f] Am. State Papers, For. Rel. VI. 154.

measures looking to the application of the cargo for the Government's advantage; (3) that it refused to restore property directly, without the intervention of the Council of Prizes, whose dilatory proceedings were ruinous to claimants; (4) that the Council of Prizes condemned property on grounds incompatible with the provisions of the fourth article of the convention; (5) that, even where a vessel was acquitted, the Council of Prizes, instead of awarding costs and damages, or even restoring the thing captured in the same condition as when taken, directed it to be restored as it was at the date of restitution, and charged the costs of detention, storage, and other expenditures to the captured, and (6) that the Government refused to restore captures made prior to September 30, 1800, even where they had not been finally decided on, on the ground that they fell under the second article of the convention. The last complaint Livingston afterward withdrew, saying that it could not be supported by the convention.[a]

Retrocession of Louisiana to France.

The negotiations in relation to claims soon underwent a great change. On the 1st of October, 1800, the day after the signature of the convention between the United States and France, a treaty was concluded between France and Spain at St. Ildefonso, by which Louisiana was retroceded to the former power. Though this treaty was kept secret and its existence persistently denied, within a year after its conclusion rumors of the transaction reached the United States. When Livingston arrived in France in November, 1801, he was privately assured that both Louisiana and the Floridas had been purchased by France. Talleyrand explicitly denied that anything had been concluded.[b] On the 20th of November, however, Rufus King sent to Madison from London a copy of a treaty between France and Spain, signed at Madrid on the 21st of the preceding March, by which the retrocession of Louisiana was explicitly declared, and the details of the transaction fully set forth.[c]

Claims and New Orleans.

When Livingston became convinced that the retrocession had been made, he was not slow to perceive its possible effects on the relations between France and the United States, and he set himself to work to obtain the cession of New Orleans to the United States. As an argument for this purpose he pressed the American claims. Tested either by the advantages received by the debtor, or by the loss sustained by the creditor, no claims could, he declared, stand on stronger ground than those of American citizens against France. They were "chiefly

[a] Am. State Papers, For. Rel. VI. 156, 157, 159, 161, 164.

[b] Adams' History of the United States, I. 409.

[c] Am. State Papers, For. Rel. II. 511.

founded upon contracts, for articles of the first necessity, furnished . . . when the want of them would have plunged France in the utmost distress." Moreover, it was, he said, to be remembered that while Great Britain was "of late, very amply compensating by full payment of principal, interest, and damages, for any illegal capture made during the war; while compensation for those which fell under that description in France have in a great measure, been given up by the late convention; and that due for the remaining few, which ought to have been satisfied by that treaty, have been eluded by some very extraordinary decisions of the Council of Prizes, or by that delay which all the claims of American citizens have hitherto met with." [a]

Louisiana cession.

In January, 1803, Monroe was joined with Livingston in the mission to France.[b] Before he reached Paris Bonaparte, who desired funds for the approaching war with Great Britain, had determined to sell not only New Orleans, but the whole of Louisiana. Monroe arrived in time to participate in the final negotiations, which were protracted by discussions as to the price to be paid for the cession.[c] On the 30th of April, 1803, a "treaty" and two "conventions" were signed. The treaty ceded Louisiana to the United States. One of the conventions provided for the payment by the United States to France of the sum of 60,000,000 francs; the other, for the payment by the United States of "debts" due by France to citizens of the United States, to an amount not to exceed the sum of 20,000,000 francs.

" The report to which it refers, that the British Government had cautioned ours not to pay the money for Louisiana, for that they meant to take possession of it, is utterly destitute of foundation. The British Government has, on the contrary, expressed its satisfaction with the cession, and, although the terms of it might not at the time be particularly known, yet as a price was to be presumed, and as the bargain was made bona fide, and even communicated prior to the commencement of hostilities, there can be no pretext whatever for complaint, nor is there the least ground for supposing that it will take place."

Mr. Madison, Sec. of State, to Mr. Paine (unofficial), Aug. 20, 1803, 2 Madison's Works, 185.

Much unpublished correspondence in August and September, 1803, between Mr. Monroe and Mr. R. R. Livingston, in regard to the negotiations then pending with France, is in the Department of State among the Madison and Monroe papers; and also a series of private letters from Mr. Livingston to Mr. Madison, as to the differences

[a] Am. State Papers, For. Rel. II. 538.

[b] Id. 475.

[c] Adams History of the United States, II. chap. 1.

between Mr. Livingston and Mr. Monroe and other circumstances of the negotiations.

See, as to the acquisition of Louisiana, supra, § 101; Hunt's Life of Livingston, 305.

As to the distribution of the French indemnity, in connection with the Louisiana purchase, see Moore, Int. Arbitrations, V. 4399 et seq.

For the discussion as to the most-favored-nation clause in the Louisiana treaty, see supra, § 765.

A convention of navigation and commerce was concluded between the United States and France June 24, 1822.

Message of President J. Q. Adams, Dec. 10, 1822, Am. State Papers, For. Rel. V. 149.

By the treaty of July 4, 1831, "France was to pay 25,000,000 francs in full satisfaction of the American claims; the United States were to pay 1,500,000 francs in satisfaction of certain French claims; the United States were to reduce the duties on French wines; and France, in consideration of the latter agreement was to relinquish its claims and reclamations respecting the 8th article of the treaty of cession of Louisiana."

Davis, Notes, Treaty Volume (1776–1887), 1310.

For the history of the treaty of 1831, and of the distribution of the indemnity thereunder, see Moore, Int. Arbitrations, V. 4447 et seq.

The following matters in relation to France may be noticed:

The Universal Exposition of 1900, President McKinley, annual messages, Dec. 6, 1897; Dec. 5, 1898; Dec. 3, 1900.

Trade relations with France under the reciprocity arrangement of May 28, 1898, President McKinley, annual message, Dec. 5, 1898; S. Doc. 346, 56 Cong. 1 sess.

Unratified reciprocity convention of July 24, 1899, S. Doc. 225, 56 Cong. 1 sess.

Admission of foreigners into French government schools, For. Rel. 1897, 173.

Burial place of Paul Jones, For. Rel. 1899, 276–279.

Lafayette statue, provided by contributions of American school children and an appropriation by Congress, unveiled at Paris, July 4, 1900, For. Rel. 1900, 456. See, also, id. 468.

Laying of corner stone of monument to Marshal Rochambeau, at Vendôme, France, For. Rel. 1900, 471.

Condolences on the assassination of President Carnot, President Cleveland annual message, Dec. 3, 1894.

2. Treaty Decisions.

§ 822.

Under Article XIX. of the treaty of commerce of 1778, a French privateer has a right to make repairs in our ports, as the replacement of her force is not an augmentation.

Moodie *v.* The Phœbe Anne, 3 Dall. 319.

An American vessel which carried the passport or sea letter prescribed by Article XXV. of the treaty with France of 1778 was entitled to be treated by French cruisers and French courts as enjoying the benefit, under Article XXIII. of the treaty, of the rule of free ships free goods, and could not properly be condemned for want of evidence of neutrality.

The James and William (1902), 37 Ct. Cl. 303.

The treaty between the United States and France of 1778 enabled the subjects of France to purchase and hold lands in the United States.

Chirac *v.* Chirac, 2 Wheat. 259. See Carneal *v.* Banks, 10 Wheat. 181; also, 5 Lodge's Hamilton, 49.

The refusal of a district judge to issue a warrant under the 9th article of the convention between France and the United States, of 1788, can not be interfered with by the Supreme Court; the latter having no control over a district judge exercising legal discretion.

Bradford, At. Gen., 1795, 1 Op. 55.

Marshals are not required by law to execute the sentence of a French consul pronounced under the 12th article of the treaty of 1788, relating to protests of masters, etc.

Bradford, At. Gen., 1794, 1 Op. 43.

A final condemnation in an inferior court of admiralty, where a right of appeal exists and has been claimed, is not a *definitive* condemnation within the meaning of article 4 of the convention with France of September 30, 1800.

United States *v.* Schooner Peggy, 1 Cranch, 103.

Under the provisions of the convention with France of 1800, the United States are not bound to protect demands for freight where individuals have transported articles for the French government or for its citizens, since they are within no provision of the convention.

Lincoln, At. Gen., 1803, 1 Op. 136.

Incomplete Spanish titles were not rendered complete by the treaty by which Louisiana was acquired; the government of the United States succeeded to the powers and duties of the crown of Spain as to confirmation of such titles, and where there were two adverse claimants might select between them and make a perfect title to one and exclude the other.

Chouteau *v.* Eckhart, 2 How. 344. See, also, McDonough *v.* Millaudon, 3 How. 693.

Article III. of the treaty with France ceding Louisiana to the United States has no bearing on the question of title of the State of Iowa to the land beneath its lakes.

Iowa *v.* Rood (1902), 187 U. S. 87.

The 7th article of the treaty with France of Feb. 23, 1853, has relation only to rights of inheritance subsequently acquired.

Provost *v.* Greneaux, 19 How. 1. See, to the same effect, Succession of Dufour, 10 La. An. 391; Succession of Prevost, 12 id. 577.

The United States and France having differed as to whether the reciprocal arrangement of May 28, 1898, which provided that reduced rates of duty should be charged on articles "the product of the soil or industry of France," applied to Algiers, a supplemental arrangement was concluded on August 20, 1902, by which it was stipulated that the arrangement of 1898 should apply "to Algeria and the island of Porto Rico." Held, that by the supplemental arrangement France in effect abandoned the contention that the arrangement of 1898 applied to Algeria, so that the products of Algeria were entitled to the lower rates of duty only after the arrangement of 1902 took effect.

United States *v.* Tartar Chemical Co. (1903), 127 Fed. Rep. 944, 62 C. C. A. 576, reversing 116 Fed. Rep. 726.

The reciprocal commercial agreement between the United States and France of May 30, 1898, includes the cordial known as "Chartreuse," the word "liqueurs" appearing in the French, though not in the English, text of the agreement.

Nicholas *v.* United States (1900), 122 Fed. Rep. 892.

XVIII. *GERMANY.*

§ 823.

"Overtures for a treaty of commerce and navigation were made to John Adams by M. de Thulemeier, Prussian envoy to The Hague, on the 18th of February, 1784. Adams replied that he 'could do nothing but in concurrence with Mr. Franklin and Mr. Jay, who were at Paris, but that he thought he could answer for the good disposition of those gentlemen, as well as of his own.' Franklin and Jay concurred in desiring to negotiate such an instrument, and Adams proposed to Thulemeier that the then recently negotiated treaty with Sweden should be taken as the model of the proposed instrument. Thulemeier adopted the suggestion, and in the following April sent Adams a projét based upon it, which Adams transmitted to the President of Congress.

"On the 7th of the following June Adams transmitted to the President of Congress an account of the negotiations, with his observations upon the Prussian projét. On the 3d of that month, however, Adams, Franklin, and Jefferson had been invested by Congress with a general power to conclude treaties of amity and commerce with various powers in Europe, among others with Prussia; and they notified Thulemeier that they were ready 'to consider and complete the plan of a treaty' which he had already transmitted.

"Thulemeier communicated this to his Government, and received a 'full power to conclude a treaty of commerce and friendship between Prussia and the United States.' The negotiations were conducted with great rapidity, under the circumstances. Franklin left Passy on the 12th of July, 1785, for America. The French text of the treaty at the time of his signature had not reached Paris, and he signed only the English text. The French draft reached Paris several days later, and was copied, by Jefferson's directions, into the instruments which Franklin had signed. Then Jefferson signed the documents, and Short took them to Adams, in London, for his signature. Short then went to The Hague to secure Thulemeier's signature to the treaty, and its exchange.

"On the 11th of July, 1799, when this was about to expire by its own limitation, a new treaty was concluded by John Quincy Adams, at Berlin, which his father, the President, communicated to Congress on the 22d of November, 1800. This also expired in ten years from the exchange of ratifications, in the midst of the wars of Napoleon.

"In 1828 a new treaty of amity and commerce with Prussia was concluded, which is still in force. The fourteenth article makes provision for the disposition and the succession of both personal and real estate in each country by citizens of the other. Attorney-General Cushing said of this, there 'is a stipulation of treaty, constitutional in substance and form; which, as such, is the supreme law of the land; and which abrogates any incompatible law of either of the States. . . . In the circumstances suggested by the Baron von Gerolt, it is an act of mere duty and of simple good faith on our part to assure him that such is the law.'"

Davis, Notes, Treaty Volume (1776–1887), 1377.

"The treaty [of 1845 with Bavaria] was submitted to the Senate, and ratified by it on the 15th of March, 1845, with an amendment striking out from the third article the words 'real and.' The copy for exchange, with this amendment, was sent to Mr. Wheaton, and a copy was transmitted by him to the Bavarian minister at Berlin; and after long deliberation the amendment was accepted by the Bavarian government."

Davis, Notes, Treaty Volume (1776–1887), 1248.

In its No. 152, Oct. 23, 1897, the American embassy at Berlin made a report of a debate in the Bavarian Diet on a resolution to terminate the most-favored-nation clause in the treaty with the United States. (Mr. Day, Assist. Sec. of State, to Sec. of Treas., Nov. 8, 1897, 222 MS. Dom. Let. 287.)

The treaty between the United States and Hanover, of 1847, in providing that the citizens or subjects of each contracting party shall have free access to the tribunals of the other in their litigious affairs on the same terms as native citizens or subjects, refers only to ordinary litigation, and does not prevent the government from giving to its own citizens or subjects exclusive rights of action against itself, such as the right to maintain an action under the act of March 3, 1891, which gives the Court of Claims jurisdiction of certain claims "for property of citizens of the United States" taken or destroyed by Indians belonging to a band, tribe, or nation in amity with the United States.

Valk *v.* United States, 29 Ct. Cl. 62.

The Grand Duchy of Oldenburg, by a treaty of March 10, 1847, acceded to the treaty of June 10, 1846, between the United States and Hanover. The latter treaty was, according to the general view of international law, annulled by the conquest of Hanover and its incorporation into Prussia in 1866, whereby, like Nassau, the state lost its separate existence. Whether the adhesion of Oldenburg to the treaty with Hanover operated to create a separate convention between the United States and Oldenburg, which survived the annulment of the original treaty with Hanover, is a question which has never been authoritatively answered.

Mr. Hill, Assist. Sec. of State, to Mr. Hitt, M. C., Dec. 20, 1900, 249 MS. Dom. Let. 584, enclosing copies of letters to the mayor of Dubuque, Iowa, of Dec. 5 and 20, 1900.

"On the 14th January last the consul-general of Würtemberg at New York presented, in behalf of his government, its complaint of the construction put by the Supreme Court of the United States in Frederickson *v.* The State of Louisiana (23 How. 446), on the 3d article of the treaty of April 10, 1844 (8 Stat. L. 588).

"In the case referred to, a native of Würtemberg having been duly naturalized, and having died in Louisiana, bequeathing legacies to kindred residing in Würtemberg, and subjects of its King, the legacies were subjected to a tax of 10 per cent. This was under a statute of Louisiana which imposed that tax upon successions devolving on any persons not domiciled in that State, and not being a citizen of any other State or Territory of the Union. The Supreme Court held that the decedent being a *citizen of the United States*, his estate was

not within the provisions of the treaty, which was intended to cover only the case of a subject of Würtemberg bequeathing property in this country, or a citizen of the United States dying and leaving property in Würtemberg. . . .

"This government, having no power, as you are aware, to act upon any other construction of the existing treaty than that adopted by the Supreme Court, signified to the consul-general of Würtemberg its readiness to negotiate a new convention in conformity to the interpretation which his government puts upon that now in force, and with a proposition to that effect which he submitted."

Mr. Seward, Sec. of State, to Mr. Bancroft, Aug. 18, 1868, MS. Inst. Prussia, XV. 2.

The treaty of Dec. 11, 1871, between the United States and the German Empire, which provides (Art. XVII.) that, with regard to the marks or labels of goods, or their packages, German subjects shall enjoy in the United States the same protection as native citizens, does not give to a German subject who has acquired the right to a trade-mark in Germany a similar right to the trade-mark in the United States.

Richter *v.* Reynolds (C. C. A.), 59 Fed. Rep. 577.

Questions of citizenship, extradition, and to a certain extent of commerce are regulated by treaties entered into with the North German Union or with the several German States prior to the formation of the German Empire.

As to meat and cattle inspection in Germany and the examination for sanitary reasons of various articles imported into the United States, see For. Rel. 1900, 485–512.

As to trade relations between the United States and Germany, see President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, xxiv. President McKinley, annual mesage, Dec. 5, 1898, For. Rel. 1898, lxxv.; Mr. Jackson, chargé, to Mr. Sherman, Sec. of State, Oct. 28, 1897, For. Rel. 1897, 179.

As to the importation of American pork containing trachina, see For. Rel. 1897, 186–194.

For a discussion as to the use of poisonous paint on German toys, see For. Rel. 1899, 305–310.

For expression of sympathy on the death of Emperor William I., see For. Rel. 1888, I. 637.

"The Ralik group of islands in the Marshall Archipelago" "is understood to be under no foreign flag or protectorate, and to feel no foreign influence other than that of the resident consular officer, a German, and of the distant consular representatives at Samoa and Fiji, within the jurisdiction of which the Ralik Islands seem to fall." Hence this government, in desiring to aid the native government

of those islands in the establishment, in connection with the missionaries, of temperance restrictions, can only do so through the agency of the German government.

Mr. Evarts, Sec. of State, to Mr. White, min. to Germany, Nov. 13, 1880, MS. Inst. Germ. XVII. 21.

"We have no treaty relations with the Gilbert and Marshall islands, or any knowledge of the intention of Germany with respect thereto, except the reports which reach us, with more or less authenticity, that Great Britain and Germany have agreed upon lines of division in the Pacific Ocean, by which determinate areas will be open to the exclusive settlement and control of the respective Governments."

Mr. Bayard, Sec. of State, to Mr. Morrow, M. C., Feb. 26, 1886, 159 MS. Dom. Let. 177.

See, also, Mr. Bayard, Sec. of State, to Mr. Pendleton, Feb. 27, 1886, MS. Inst. Germany, XVII. 602.

As to the subsequent establishment by Great Britain of a protectorate over the Gilbert Islands, see supra, § 99; Mr. Gresham, Sec. of State, to Messrs. Wightman Bros., June 8, 1893, 192 MS. Dom. Let. 283.

XIX. *GREAT BRITAIN.*

1. Treaty of Peace, 1782–83.

(1) negotiations.

§ 824.

"It was not until after the first edition of this work [Wharton's Int. Law Dig.] was printed that I [Dr. Wharton] had the opportunity and leisure to examine the Stevens collection of Franklin papers, purchased by Congress, and now on deposit in the Department of State. As to the extraordinary historical value of those papers, as well as the singular skill with which they have been arranged by Mr. Stevens, I entirely concur with Dr. E. E. Hale in the opinion expressed by him in the preface to the interesting volume published this year by himself and his son (Franklin in France, from original documents, by Edward E. Hale and Edward E. Hale, jr., Boston, 1887). Dr. Hale, in this valuable volume, closes his compilation of the Franklin papers with 1782. My object in the present note is (beginning shortly after Dr. Hale closes) to use the materials afforded by the Stevens collection as a means of construing the treaty of peace as definitely settled on September 3, 1783.

"The questions which the Franklin papers help largely to solve are, it should be recollected, of great interest in reference not merely the history but to international law. If, as the papers now before

us show, the treaty of 1782–3 was a treaty of partition of an empire, then each of the two sovereignties thus separated carried with it all the incidents that it had enjoyed prior to partition so far as this does not conflict with the treaty limitations. The importance of this distinction is manifest. If the United States took by "grant" under the treaty, then the rights of reciprocity, both as to fisheries and as to navigation, which existed previously between the colonies and the parent state, could only, so it might be argued, be claimed under the treaty so far as it created them *de novo*. If, on the other hand, the treaty was one of partition, then these rights remained, except so far as they were limited in the treaty. That the latter view is correct is, I submit, abundantly shown in prior volumes of this work, *supra*, § § 150, 301 *ff*. And it is so fully sustained by the papers contained in the Stevens collection that I have thought it important to introduce into this appendix extracts from such of those papers as bear on this question.

"Before, however, proceeding to this specific task it is important to notice the vividness with which these papers bring before us, with an accuracy heretofore unobtainable, the leading personages who were concerned in the negotiation of the treaty. The more prominent of these personages, whose letters, many of them in the original manuscript, are now in the Department of State, and some of whose private memoranda and journals are also there deposited, are as follows: The Earl of Shelburne, Mr. Charles James Fox, Mr. Richard Oswald, Mr. Thomas Grenville, Count de Vergennes, Dr. Franklin, Mr. Jay, and Mr. John Adams.

"The condition of things, so far as concerned Great Britain, at the time when the peace negotiations began, was as follows:

"On February 27, 1782, Lord North being still minister, the opposition carried a resolution declaring the advisers of further offensive war with America to be enemies of their country. On March 8 a resolution of censure on the ministry came within a few votes of adoption. On March 15 a motion of want of confidence in the ministry was lost by a majority of 9, but notice was given of its renewal on the 20th. On that day Lord North resigned, and George III. called on Lord Shelburne for advice. Lord Shelburne declared it essential that Lord Rockingham should be made minister, one of the conditions being the recognition of the independence of the United States. In the ministry thus constituted, Lord Rockingham, as prime minister, took the treasury; Lord John Cavendish was chancellor of the exchequer; Mr. Fox, secretary for foreign affairs; Lord Shelburne, secretary for home and colonial affairs, while Dunning, a lawyer of great eminence, and a personal friend of Shelburne, entered into the cabinet as Lord Ashburton and chancellor of the Duchy of Lancaster. As noncabinet officers were Burke, pay-master-

general; Thomas Townshend, secretary at war, and Sheridan, under-secretary of state. The Duke of Portland, afterwards prime minister, went to Ireland as lord-lieutenant. Mr. Pitt declined to take any office that did not bring a seat in the cabinet, and no seat in the cabinet was offered to him.

Lord Shelburne.

"The Earl of Shelburne, whose character is one of those as to which historians have had the greatest difficulty in giving an explicit judgment, had, in his early political life, been associated with Henry Fox, the first Lord Holland, and with Lord Bute. Certainly two more unsafe guides could not have been found: The first able, subtle, determined, corrupt, making the amassing of wealth his chief parliamentary object; the other a stupid and pompous egotist, without statesmanlike ability, owing his position to the favor with which he was personally regarded by the Princess of Wales during the minority of George III.; and, by his high tory views of prerogative, coupled with his pretentious manner, acquiring great influence over that monarch during the early years of his reign. Lord Shelburne's letters to both Fox and Bute show characteristics which enable us to understand why, against Shelburne, the charge of duplicity was so frequently made. But it must be remembered that Shelburne was then a young man conscious of great ability, possessing great wealth, and with a natural ambition to take a leading position in English political life. English politics were at that time in a chaotic state. There was no strong liberal party as such; leading Whigs had become, as in the case of George Grenville, advocates of high prerogative. William Pitt, the father, withdrawn from political activity by ill health, was about for a time to be sunk in the obscurity of the House of Lords. Lord Shelburne's flattery of Lord Holland and Lord Bute was no more fulsome, and was probably no less entirely a matter of form, than was Lord Chatham's flattery of most of the leading public men to whom his letters are preserved; and it must be kept in mind that as soon as Lord Chatham reappeared on the political stage, taking, whenever his health enabled him to take, a leading independent part, he was sustained by Lord Shelburne with a resoluteness and energy which can not now be questioned. But however this may be, of two points as to Lord Shelburne we may rest assured. Whatever may have been his early political associations, his personal sympathies, as his life matured, were with the school of liberal political economists, of which Adam Smith was the head, and among whose members were Franklin, Price, and Priestley. He did not, indeed, avow republican sentiments, however much he may have regarded them as in theory sound: in this respect following Halifax, whom he resembled in not a few characteristics. Yet his intimacy with philosophical republicans of the advanced whig school, his impatient disdain of the old-line aristo-

cratic Whigs, his opposition to the British navigation laws, his advocacy of free trade, his views on the French Revolution, taking, as did Jefferson, a wise intermediate position between the terroristic antagonism of Burke and the extravagant Utopian advocacy of Fox, all indicate that his convictions were those of liberals such as Franklin and Jefferson.[a] All this, in the negotiations with America, which were to be conducted by him, would lead him to strive for a peace which would establish free commercial relations between the two countries. But there were other reasons why such a peace should not only be negotiated, but negotiated promptly. Lord Shelburne, like Lord Chatham, had resisted the pressure of the Rockingham Whigs, led by Fox and Burke, for a recognition of American independence as a substantive prerequisite to be followed by whatever treaties Great Britain's superior strength might then enable her to impose. This, of course, would amount practically to Great Britain saying to the colonies, as soon as by acknowledging their independence she had detached them from their European allies, 'Go off by yourselves; I clear my skirts of you; whatever you get from me afterwards must be a matter of favor.' On the other hand, Shelburne, like Chatham, clung to the idea of an imperial confederation, and when this was out of the question, to a treaty of partition, based on reciprocal enjoyment of ancient rights. On this basis, as we will see, were framed the provisional articles which afterwards took the shape of the treaty of peace. And that they were peculiarly liberal to the United States is due not merely to Shelburne's views, as above expressed, but to the necessity of his then political position.

"The struggle between Fox and Shelburne for the control of the negotiations with Franklin, then the sole minister of the United States in Paris, will be noticed presently more fully. It is enough at this point to say that the formal right in this respect was with Shelburne, since the colonies belonged to him, and, until their independence was acknowledged, the United States, to the British eye, were still colonies. Fox, unable to submit to this conclusion, was about to resign, when the death of Lord Rockingham, on July 1, 1782, precipitated the resignation not merely of Fox but of his immediate friends. A new cabinet was framed, with Shelburne at the head of the treasury, Thomas Townshend secretary for the colonies, Lord

[a] Of Shelburne, Lecky (4 Hist. Eng. 226, Am. ed.), while taking in other points a lower view than that given in the text, writes: "He was one of the earliest, ablest, and most earnest of English free traders, and no statesman of his time showed himself so fully imbued with the commercial views of Adam Smith. . . . His private life was eminently respectable. He bore a long exclusion from office with great dignity and calm, and no part of his public career appears to have been influenced by any sordid desire of emolument, title, or place."

Grantham secretary for foreign affairs, and William Pitt chancellor of the exchequer. Of the cabinet, Mr. Bancroft (Formation of the Federal Constitution, Book I., Chapter III.) thus speaks:

"'The restoration of intercourse with America pressed for instant consideration. Burke was of opinion that the navigation act should be completely revised; Shelburne and his colleagues, aware that no paltry regulation would now succeed, were indefatigable in digesting a great and extensive system of trade, and sought, by the emancipation of commerce, to bring about with the Americans a family friendship more beneficial to England than their former dependence. To promote this end, on the evening of the 11th of February [1783], William Pitt, with the permission of the King, repaired to Charles James Fox and invited him to join the ministry of Shelburne. The only good course for Fox was to take the hand the young statesman offered; but he put aside the overture with coldness, if not with disdain, choosing a desperate alliance with those whose conduct he had pretended to detest, and whose principles it was in later years his redeeming glory to have opposed.'

"On April 3, Pitt, still retaining, in the delay incident to the formation of the coalition ministry, the leadership of the House, 'presented,' to follow Mr. Bancroft's narrative, 'a bill framed after the liberal principles of Shelburne. Its preamble, which rightly described the Americans as aliens, declared "it highly expedient that the intercourse between Great Britain and the United States should be established on the most enlarged principles of reciprocal benefit;" and, as a consequence, not only were the ports of Great Britain to be opened to them on the same terms as to other sovereign states, but, alone of the foreign world, their ships and vessels, laden with the produce and manufactures of their own country, might as of old enter all British ports in America, paying no other duties than those imposed on British vessels.' The bill was opposed by Eden (afterwards Lord Auckland), as introducing a 'bold revolution in our commercial system.' Its principle was sustained by Burke, who urged that 'all prohibitory acts be repealed,' and that the Americans should be left 'in every respect as they were before in point of trade.' But before further action had been taken on the bill, Lord Shelburne's ministry went out of office, the coalition having at last succeeded in forming a ministry which commanded a majority in the House of Commons. Pitt going out of office with Shelburne, the bill was dropped. By the coalition cabinet, which succeeded, it was utterly repudiated; Fox, while apparently recognizing the justice of free navigation as a principle, declaring that 'great injury often comes from reducing commercial theories to practice.' Fox's further proceedings in this connection will be noticed when we proceed to

consider his general attitude towards the United States after the overthrow of Lord North.

"Lord Shelburne's high merits as the originator, together with Franklin, of a system of pacification by which the interests of Great Britain and the United States could each have been best subserved, will be illustrated in future paragraphs. At present it may be enough to quote Mr. Bancroft's estimate of him (10 Hist. U. S., 532):

"'It was he who reconciled George III. to the lessons of Adam Smith, and recommended them to the younger Pitt, through whom they passed to Sir Robert Peel; but his habits of study and his want of skill in parliamentary tactics had kept him from political connections as well as from political intrigues. His respect for the monarchical element in the British constitution invited the slander that he was only a counterfeit liberal, at heart devoted to the King; but in truth he was very sincere. His reputation has comparatively suffered with posterity, for no party has taken charge of his fame. Moreover, being more liberal than his age, his speeches sometimes had an air of ambiguity from his attempt to present his views in a form that might clash as little as possible with the prejudices of his hearers.' In one point alone must I dissent from the above. Lord Shelburne when in office undoubtedly did his best to give the King as little pain as possible when his assent to American independence was required, and when a treaty of reciprocity with America was proposed. But I can not see among Shelburne's papers, as given in part in his biography already cited, and in part in the papers in this Department, any evidence of peculiar reverence for 'the monarchical element.' He did not hesitate to defy George III., first as to the American war, and then as to the French Revolution. 'According to Lord Holland,' says Sir G. C. Lewis (Administrations of Great Britain, 50), 'Bentham always said that "Lord Shelburne was the only minister he ever heard of that did not *fear* the people;"' and it is clear from his course that he looked to the people as the ultimate arbiter of his policy. And it is a singularly strong tribute to Shelburne's capacity as a statesman that the provisional treaty with America, agreed to by him in 1782, the censure of which by the House of Commons, under the lead of Fox and North, was the cause of his overthrow, was in 1783 adopted as a final treaty by Fox and North as a measure required by the popular will.

Fox.

"In no part of Fox's stormy career did faction and passion more entirely overcome his natural love of liberty and justice than in his proceedings in reference to the negotiations with the United States for peace. His vehement and powerful denunciations of the war had been among the principal blows under

which the North administration had tottered and fallen. He had made it one of the primary conditions of the acceptance of power by the Rockingham party, of which he was the leader, that the independence of the colonies should be promptly and universally acknowledged. When, however, he entered into the new ministry, of which Lord Rockingham was the titular head, he found himself, as secretary for foreign affairs, at once brought into antagonism with Lord Shelburne, who was secretary for home and colonial affairs. Lord Shelburne, as has been noticed, shared Lord Chatham's repugnance to a unilateral recognition of independence, and was unwilling to concede independence except as a basis of a system, if not of federation, at least of business reciprocity. Had Fox had exclusive control of the question of peace, he could have settled matters at once by committing the ministry to an immediate recognition of independence. But the difficulty was that Fox had no such exclusive control. Negotiations with the colonies, as long as they were colonies, fell under Shelburne's control; and Shelburne, while conceding the necessity of acknowledging independence, determined to make this acknowledgment part of a treaty for the adjustment of all questions in dispute between the parties, as well as for the establishment of liberal business relations between them. Shelburne, unable to see how negotiations with the colonies could fall under the department of foreign affairs, sent to Paris Richard Oswald (of whom more hereafter) to negotiate with Franklin not merely as to peace but as to the future relations of the two countries whom peace was to separate. Fox, assuming independence, and regarding the United States as a foreign power, sent to Paris, also on a mission to Franklin, Thomas Grenville, son of George Grenville, the author of the stamp act, and the brother of Lord Temple and of William Grenville, afterwards Lord Grenville. Thomas Grenville, who lived to be the survivor of that remarkable family of brothers, was in his earlier years a devoted friend of Fox; and the letter of Fox, introducing him to Franklin, is, taken in connection with Lord Shelburne's flattering letters introducing Oswald, an illustration of the vast importance then attached in England to Franklin's influence. Fox, in this introduction, referred to George Grenville's action as not in any way to be regarded as indicating a continuance of the same views in the son; and to this Franklin replied, with his usual tact, saying how much pleasure it gave him to meet any diplomatic agent of Fox. Franklin thus found himself for awhile with two distinct British negotiators seeking from him a settlement; and from the correspondence now on deposit in the State Department it is plain that he was fully aware of the two distinct policies represented by these negotiators, and was determined to wait until it should appear which one of these

policies would be adopted by the cabinet. He did not, however, have to wait long. On July 1, 1782, as has been already noticed, on Lord Rockingham's death, Fox resigned, followed by the Rockingham Whigs, and went at once into an opposition as thorough and as bitter as that he had previously maintained against Lord North.

"Sir G. C. Lewis, a Whig chancellor of the exchequer, disposed by party traditions to sustain Fox, finds himself unable to accept the position that Shelburne, in sending Oswald to Paris, had encroached on the province of Fox. 'It is quite clear,' he says (Administrations of Great Britain, 38), 'from our narrative of facts, and from the testimonies which we have cited, that Oswald's first visit to Paris arose out of a letter accidentally addressed by Franklin to Lord Shelburne before the change of ministry was made known to him; that Oswald returned to Paris with the full knowledge of the cabinet, and as bearer of a message that he would be speedily followed by Mr. Grenville, as minister plenipotentiary, to treat with the French agent; that he communicated with Mr. Fox when he was in London, and that Mr. Grenville knew he was at Paris, and communicated with him almost daily when he was there. Mr. Oswald's mission had nothing *clandestine* in the ordinary sense of the term. It was open and avowed on both sides of the water. It was known to Fox and the cabinet, and it was recognized in the communications of Mr. Grenville with Franklin and M. de Vergennes. Neither can it be said, with Horace Walpole, that Oswald was sent to thwart Mr. Grenville, for Oswald's mission preceded Mr. Grenville's.' But Sir G. C. Lewis then proceeds to argue Grenville had no real cause for complaint, even when Shelburne determined to appoint Oswald as commissioner to treat with Franklin, since if 'Grenville found by experience that a separate negotiator for America was likely to interfere with the rest of the negotiation, he could have represented this conclusion to his own Government, and the cabinet would have then decided the question with the advantage of his opinion.' Oswald had not been formally commissioned, and the appointment might still be arrested, notwithstanding Lord Shelburne's announcement, if the cabinet thought fit to commit the entire negotiation to one person; but that there was no practical inconvenience in the separation of the two functions, is shown, so Sir G. C. Lewis proceeds to state, by the retention of the same separation in the subsequent ministry of Shelburne, Oswald continuing to treat with the American commissioners, Fitzherbert (afterwards Lord St. Helens) appointed to treat with France, Spain, and Holland. And even when the coalition ministry came into power, while the Duke of Manchester took Fitzherbert's place,

Hartley was sent to negotiate with the American commssioners, and in this capacity signed the definitive treaty of 1783. 'There is no evidence,' Sir G. C. Lewis concludes, 'of any *intrigue* on Lord Shelburne's part,' and so far from it appearing that Lord Shelburne in sending Oswald was influenced by a desire to propitiate the King, 'Franklin's anxiety to secure Oswald's appointment is a decisive proof that "Shelburne's man" was not desirous of promoting the views which the King so fondly cherished; but, on the contrary, that he was desirous of promoting the views which the King had quite recently held in the utmost abhorrence.' It is clear, also, from Franklin's own papers, 'that Lord Shelburne did not use Oswald as the instrument of any royal intrigue, or for the purpose of inculcating any peculiar views of his own;' and Sir G. C. Lewis further asserts that there was nothing in 'the Canadian paper,' given by Franklin to Oswald, at which Fox had any right to take umbrage. Sir G. C. Lewis insists that Fox's reason for resignation was simply an unjustifiable personal dislike of Lord Shelburne, and he sums up the question as follows: 'When Lord Rockingham died, and the King made Lord Shelburne, and not the Duke of Portland, prime minister, there were three courses open to Fox: (1) To remain in Lord Shelburne's government; (2) to resign with his friends and to form a separate independent party; (3) to coalesce with Lord North and the Tories. Of these three courses the last was, in our judgment, incomparably the worst, and this was the one Fox selected.' Still more strongly writes Mr. Bancroft (10 Hist. U. S., 551):

"'To gratify the violence of his headstrong pride and self-will he (Fox) threw away the glorious opportunity of endearing himself to mankind by granting independence to the United States and restoring peace to the world, and struck a blow at liberal government in his own country from which she did not recover in his lifetime.'

"Earl Russell, while seeking as far as possible to palliate Fox's course, says, speaking of the treaties of peace with France and Spain, as well as with the United States (1 Life of Fox, 344):

"'It must be owned that these (the treaty settlements) were immense concessions. But they all sank into insignificance in comparison with that article which was the basis of the whole, that upon which Mr. Fox, Mr. Burke, Lord Shelburne, General Conway, and Mr. Pitt were agreed, namely, the independence of the thirteen colonies of North America. To have acknowledged that independence, and to have continued the war with France and Spain, seems to have been the favorite idea of Mr. Fox. . . . Upon the whole, however, it seems to me, that with the independence of America as a starting point, with the want of allies still unsupplied, with our debt still increasing, Great Britain was more likely to rise buoyant from an

inglorious peace than from the continuance of a war hitherto disastrous, and sure to be costly. The opinion of Mr. Fox was different, and his dislike of the terms of peace led him to a junction with a statesman whose errors he had often chastised and whose want of foresight and firmness he had ever been ready to censure.' . . . Hence followed 'that coalition which in the first place overthrew Lord Shelburne's administration; next destroyed that large and extensive popularity which Mr. Fox at that time enjoyed, and finally ruined the Whig party.'

"But Lord Russell is in error in holding that Fox's objection to the treaty with America was simply its connection with the treaties with France and Spain. His opposition was far more radical and far more antagonistic to liberal principles. This will appear from the following sketch of his parliamentary proceedings in relation to the American treaty:

"The announcement in the King's speech on the opening of Parliament on December 5, 1782, of the provisional treaty of peace, was followed by an attack, though on different grounds, from both wings of the opposition. By Stormont, the recognition of independence was attacked because it was irrevocable; by Fox, because it was made part of a treaty virtually of partition. But to Fox and his friends the treaty was none the less odious because it embraced the independence they had so long striven for. The King's speech Fox declared he 'detested,' while Burke pronounced it to be 'a farrago of hypocrisies and nonsense.' It was plain that if the two lines of opposition, Lord North's friends and the old Whigs, led by Fox, should unite, they could, by condemning the peace, overthrow the administration. But could they form an administration to take its place? In the way of such a juncture was Fox's own declaration that 'when I shall make terms with one of them, I will be satisfied to be called the most infamous of mankind. I would not for an instant think of a coalition with men who, in every public and private transaction as ministers, have shown themselves void of every principle of honor and honesty. In the hands of such men I would not trust my honor even for a minute.' On February 17 an amendment to the address, so drawn as to pledge a confirmation of the peace, but at the same time asking time to consider it, was carried in the Commons against the ministry by a vote of 224 to 208. A motion of censure was subsequently made, and Shelburne authorized Pitt, in case the ministry were defeated on this motion, at once to declare their common resignation. On this motion, as has been already stated, the vote, on February 22, for the ministry was 190; for the opposition, 207. On the same day Shelburne announced to the cabinet his resignation, and recommended the King to send for Pitt. This the King at once agreed to do, but Pitt finding himself unable to form a ministry of

strength enough to stand, an interval followed which lasted until April 1, when the coalition ministry entered into office.

"In Fox's speech of July 9, 1782, explaining his resignation, he said that he resigned because 'he found the majority of them (his associates in the cabinet) averse to the idea of unconditional independence in America, which he conceived it to be necessary to the salvation of the country to have granted. If, since he quitted his employment, his late colleagues had changed their opinion he rejoiced at the event.' (23 Parl. Hist., 171.)

"Parliament shortly afterwards was prorogued for the long vacation. In the meantime the preliminaries of peace with America had been signed, and this fact was announced by the King on the opening of Parliament when it reconvened.

"On the debate on the address, December 5, 1782, Fox went so far as to say that, 'as to himself, he believed he really was of more service out of office, and debating in the House, then he could possibly have been if he remained in the cabinet, for he found that those measures which, while in office, he recommended in vain to the council, were readily adopted when he laid down his employments.' (23 Parl. Hist., 242–3.)

"'You call for peace,' so Mr. Fox in his speech on February 17, 1783, supposed Lord Shelburne to have said, 'and I will give you peace that shall make you repent the longest day you live that you ever breathed a wish for peace. I will give you a peace which will make you and all men wish that the war had been continued; a peace more calamitous, more dreadful, more ruinous than war could possibly be; and the effects of which neither the strength, the credit, nor the commerce of the nation shall be able to support. If this was the intention of this noble person, he has succeeded to a miracle.' (23 Parl. Hist., 486.)

"On April 9, 1783, the coalition ministry being finally seated, 'Mr. Secretary Fox' vigorously opposed on principle any statutory relaxation of the British commercial system in favor of the United States. (23 Parl. Hist., 726.) On May 8 a bill passed the House, on motion of Mr. Fox, giving the King in council the power on or before December 20 to make any regulation deemed necessary in respect to commercial intercourse with the United States. This was adopted as a substitute for Mr. Pitt's bill, and subsequently passed the House of Lords. (*Id.*, 895.)

"By the 'King in council,' under Fox's auspices, an order was issued which 'confined the trade between the American States and the British West India islands to British-built ships, owned and navigated by British subjects.' (See Bancroft's Hist. Fed. Const., 44 *ff.*)

"Inexcusable as was Fox's coalition with North, as a matter of personal honor, far more inexcusable was his course on the peace question,

as a matter of political principle. He had taken the position, with characteristic enthusiasm, of the vindicator of colonial liberties. He had declared that if the colonies allowed themselves to be subjugated they would be fit for nothing else than to be the subjugators of the liberties of Great Britain. He insisted that the only true course was to acknowledge, by an act of full and absolute grace, their independence and sovereignty; and because Lord Shelburne made this acknowledgment part of a treaty by which the boundaries of the United States were settled on a liberal scale, their fishery rights recognized, their claim to the Mississippi secured, and prosecutions and confiscations of loyalists stopped, he succeeded, in coalition with Lord North, in overthrowing Lord Shelburne's ministry. Yet, while by the vote of censure he forced through the House he brought about this overthrow, he did not attempt to modify the provisional articles of peace, but readopted them as the definitive treaty of 1783, formally executed under his administration. The fact is that he must on reflection have been convinced that the censure which he had carried in the House, while efficient enough in getting rid of a hated rival, would have been fatal, had it been made the basis of a new system, to the interest of peace.

"For, what would have been the result of acknowledging the independence of the thirteen colonies and then casting them adrift, to have their boundaries, their relation to the fisheries, to the Indians, and to the loyalists, settled by a new treaty, to be negotiated after a general European pacification, when the States, whose sovereignty was then recognized, would have stood alone, Great Britain holding the ocean, the ports of New York and Charleston, and the Indian tribes as serfs, wherever they might roam? Judging from Fox's subsequent course on the navigation question, judging from his readiness to crush the maritime rights of the Union as far as he could even under the wise and liberal articles of 1782, it is more than probable that, had he been at liberty to impose a new treaty on the United States, after having acknowledged their independence, he would have insisted on conditions which would have necessitated a renewal of the war. In fact, in denouncing as monstrous the concessions of the articles of 1782, in his speech censuring these articles, he pledged himself, should he himself undertake a new treaty, that at least such treaty should contain no such concessions; but that if the United States were to be permitted to enjoy the independence so ostentatiously flung at them, they were to enjoy it shorn of the valley of the Mississippi, shorn of the fisheries, burdened with the support of the loyalists, with a lien on their territory for the benefit of Indian hordes owing allegiance to the British crown. Such a treaty as this, if it had been extorted, would have been the precursor of a war which, however injurious it would have been to the

United States, would have exhausted British resources and have ultimately ended in British defeats far more humiliating to Great Britain than those which preceded the negotiation of 1782.

"But, although Fox did not attempt, after he had overthrown the Shelburne ministry, to change the terms of the settlement of 1782, he did his best, as far as within him lay, to make that settlement not merely burdensome to the United States, but, by the very fact that it was thus made burdensome, proportionally mischievous to Great Britain.

"At the time when Pitt's bill, suspending as to America the navigation laws, was introduced, the United States had adopted no navigation laws of their own, though these afterwards were passed by way of retaliation. But while there was at this time a free interchange of shipping between Great Britain and the United States, it was in the United States that the swiftest and staunchest ships then afloat were built. On this state of facts Pitt argued that it would be impolitic and unbusinesslike for Great Britain to say, 'No, we will not let your vessels enter our service, though by keeping you out we lose our best ships.' Yet, in the teeth of this position and in defiance of his own prior utterances as to unrestricted intercourse with America, Fox, as we have seen, blocked the passage of the bill until the coalition ministry came in, and then procured the passage of an act leaving the navigation question to be disposed of by an order of council, which, in a few weeks, shut United States built vessels out of British ports.

"It is true that this was a blow to the United States shipbuilding interests, but it was a still greater blow to Great Britain, as it was soon found that British merchant vessels, built in Great Britain, were outsailed by United States vessels built in the United States: so that when a choice was open to other nations between the two, the latter were taken. And to these very navigation laws by which Great Britain confined herself almost exclusively to her own shipyards and to her own materials for shipbuilding, may be attributed the fact that in the war of 1812 her merchant vessels were almost driven from the seas by American privateers, while her cruisers were outsailed by American cruisers. The British navigation act did not take away from United States shipbuilders their superior skill; but by giving British shipbuilders a monopoly of the business it removed from them all fear of competition and kept them in their old position of inferiority to the shipbuilders of the United States. And the British West Indies, by cutting off their supplies from the United States, received an almost fatal shock. (Lecky, Hist. Eng. VI. 285.)

"But a still heavier stigma rests on the order of council thus issued under Fox's auspices. It was the precursor of a series of orders which forced America into the war of 1812; which, by their inso-

lence and wanton oppressiveness, twice drove the Northern European powers into Napoleon's arms, and in this way tended to protract his military ascendency, and to vastly swell the amount of blood and treasure required to overthrow that ascendency, and which, by the consent of all publicists, among whom the English are not the least conspicuous, are now held to be in gross violation of important sanctions of international law.

Oswald.

"Richard Oswald, who was selected by Lord Shelburne to open negotiations with Franklin in April, 1782, and whose name appears as one of the signers of the article of 1782, was a Scotch merchant of London, who had acted as commissary-general of the Duke of Brunswick in the Seven Years' war. By marriage, as well as purchase, he possessed considerable estates in America, and from his familiarity with American affairs he was frequently appealed to for information by Lord North. He was introduced and recommended to Lord Shelburne by Adam Smith, of whom he was a disciple; and his selection as a negotiator at Paris was due, not merely to his knowledge of and interest in American affairs, but to his prior acquaintance with Franklin, with whose liberal commercial views he fully sympathized. Shelburne's letter of credence to Franklin was one singularly flattering to both Franklin and Oswald. 'I find myself,' so wrote Shelburne, April 6, 1782, 'returned to nearly the same situation which you remember me to have occupied nineteen years ago, and should be very glad to talk to you as I did then, and afterwards in 1767, upon the means of promoting the happiness of mankind; a subject more agreeable to my nature than the best concerted plans for spreading misery and devastation. I have had a high opinion of the compass of your mind and of your foresight. I have often been beholden to both, and shall be glad to be again, so far as is compatible with your situation. Your letter discovering the same disposition made me send you to Mr. Oswald. I have had a longer acquaintance with him than even I have had the pleasure to have with you. I believe him to be an honest man, and after consulting with our common friends I have thought him the fittest for the purpose. . . . He is fully apprised of my mind, and you may give full credit to everything he assures you of. At the same time, if any other channel occurs to you, I am ready to embrace it. I wish to retain the same simplicity and good faith which subsisted between us in transactions of less importance.' On Oswald's arrival at Paris he was informed by Franklin that in the absence of Jay, Adams, and Laurens, cocommissioners, no definite action could be taken in negotiation. But on April 18 Franklin urged on Oswald the importance of the cession of Canada to the United States, and he placed a memorandum of his views in Oswald's hands, suggesting, also, that so much of the waste lands of Canada should be sold as

would 'pay for the houses burnt by the British troops and their Indians, and also to indemnify the royalists for the confiscation of their estates.' 'This,' it was added, 'is mere conversation matter between Mr. O. and Mr. F., as the former is not empowered to make propositions and the latter can not make any without the concurrence of his colleagues.' On April 23 this memorandum—the important character of which will be hereafter discussed more fully—having been seen only by Lord Shelburne and Lord Ashburton (Dunning), the cabinet adopted a minute that Mr. Oswald 'shall return to Paris with authority to name Paris as the place of their future conferences,' and 'to settle with Dr. Franklin the most convenient time for setting on foot a negotiation for a general peace, and to represent to him that the principal points in contemplation are the allowance of independence to America upon Great Britain being restored to the situation which she was placed in by the treaty of 1763, and that Mr. Fox shall submit to the consideration of the King a proper person to make a similar communication to M. de Vergennes.' (3 Shelburne's Life, 183.)

"Oswald was then directed by Shelburne to return to Paris, and to inform Franklin that Shelburne had reluctantly come into the concession of absolute independence; that he would have preferred federal union, but that such a measure being now impracticable he would accept independence, coupled with free trade, the payment of debts, and the relief of the loyalists. Oswald remained but a short time in Paris, referring both Franklin and Vergennes to Thomas Grenville, who had then arrived in Paris as Fox's representative in all matters which involved a general peace. On May 14 he returned to London, and on May 18 Grenville was instructed by the cabinet 'to make propositions of peace to the belligerent powers upon the basis of independence to the thirteen colonies in North America, and of the treaty of Paris.' On May 23 Grenville was further instructed to propose to Vergennes the acknowledgment of the independence of America 'in the first instance.' Shelburne, still holding that negotiation with the colonies remained, until the formal recognition of their independence, in his department, authorized the departure, on May 28, of Oswald for Paris to continue his negotiations with Franklin. But on Oswald's visiting Franklin, on May 31, he found that Grenville was on the spot claiming to lead the negotiations.

"The temper of the Fox section of the Rockingham ministry towards Oswald is illustrated by the following letter from Sheridan to Thomas Grenville, May 21, 1782:

"'Mr. Oswald talks very sanguinely about Franklin, and says he is more open to you than he has been to anyone; but he is a Scotsman and belongs to Lord Shelburne. If the business of the American treaty seemed likely to prosper in your hands I should not think it

improbable that Lord Shelburne would try to thwart it.' (It will be remembered that the negotiations with the colonies fell, not in Fox's department, but in that of Shelburne.) 'Oswald has not yet seen Lord Shelburne, and by his cajoling manner to *our secretary* (Fox) and eagerness to come to him, I do not feel prejudiced in his favor; but probably I judge wrongly whenever the other secretary is concerned, for I grow suspicious of him in every respect the more I see of every transaction of his.' (Buckingham Correspondence, I. 28.)

"On June 4, 1782, Grenville writes to Fox as follows:

"'Mr. Oswald told me that Lord Shelburne had proposed to him when last in England to take a commission to treat with American ministers; that upon his mentioning it to Franklin now it seemed perfectly agreeable to him, and even to be what he had very much wished; Mr. Oswald adding that he wished only to assist the business, and had no other view; he mixed with this a few regrets that there should be any difference between the two offices; and when I asked upon what subject, he said, owing to the Rockingham party being too ready to give up everything. You will observe though, for it is on this account that I give you this narrative, that this intended appointment has effectually stopped Franklin's mouth to me; and that when he is told that Mr. Oswald is to be the commissioner to treat with him, it is but natural that he should reserve his confidence for the quarter so pointed out to him; nor does this secret seem only known to Franklin, as Lafayette said, laughing, yesterday, that he had just left *Lord Shelburne's* ambassador at Passy.' Grenville then proceeds to speak of the 'Canada' conference, hereafter commented on; to express his astonishment at such a cession being thought advisable; and then to throw what proved to be a bomb into the cabinet by saying that while such conferences were going on behind his back he could be of no further use. 'Once more I tell you I can not fight a daily battle with Mr. Oswald and *his secretary* (Shelburne); it would be neither for the advantage of the business, for your interest or your credit or mine; and even if it was, I could not do it . . . Sheridan's letter of suspicion was written, as you see, in a spirit of prophecy.' To this came Fox's reply of June 10, noticed elsewhere, which called for 'further proofs of this duplicity of conduct.' See 4 Lecky, Hist. Eng., 247 et seq., reviewing the relations of Grenville and Oswald.

"Fox, however, not disposed to acquiesce in Grenville's withdrawal from the contest, issued fresh powers to Grenville, received by him on June 15, giving him authority to treat with the King of France 'and any other prince or state.' But Franklin declined to consider this term as including the United States, with whom negotiations would then be in contravention of British legislation. But an act enabling such negotiation to take place having subsequently passed, Fox at once demanded that the negotiation should pass into his hands. In

this, however, he was overruled by a majority of the cabinet, on the ground that, until there was an express acknowledgment of independence, the colonies remained in Shelburne's department. On Fox's resignation, which, as has been already noticed, was made public on the death of Lord Rockingham, on July 1, 1782, followed by the accession of Shelburne as prime minister, Oswald was sent again to Paris as representing the colonial department, the headship of which passed to Thomas Townshend. Alleyn Fitzherbert, English minister at Brussels, was appointed to succeed Grenville, Oswald thus remaining the sole representative of the ministry so far as concerned America. On July 6 Franklin proposed to him the following 'necessary' conditions on which peace with America could be secured:

"1. Acknowledgment of entire independence.

"2. Settlement of boundaries.

"3. Freedom of fishing.

"Among the 'advisable' articles were the following:

"—Free commercial intercourse.

"—Cession of Canada to the United States, partly in payment of war spoliation, partly to raise a fund to settle refugee claims.

"Heretofore the negotiations had been purely informal. On July 25, 1782, an enabling act having in the mean time passed Parliament, Oswald received a commission giving him full authority to 'treat, consult, and conclude with any commissioner or commissioners named or to be named by the said colonies or plantations, . . . a peace with said colonies or plantations, or any part or parts thereof.' With this came instructions from Shelburne, saying that 'in case you find the American commissioners are not at liberty to treat on any terms short of independence, you are to declare to them that you have an authority to make that concession, an earnest wish for peace disposing us to purchase it at the price of acceding to the complete independence of the thirteen States;' and he was further instructed to claim, as a matter of justice, the settlement of debts due to British subjects prior to 1775, and the restitution of the estates of the loyalists. But, as will be hereafter more fully noticed, the acceptance of Oswald's commission was objected to by Jay, then, in Franklin's sickness and Adams's absence, acting as sole commissioner, on the ground that the thirteen United States were spoken of as 'colonies or plantations,' their sovereignty as independent States not being in these terms implied. It was in vain that Franklin, when appealed to, said, that as the object of the commission was to invest the 'colonies or plantations' with sovereignty, it was not unsuitable that they should be referred to by their prior title to designate the objects of the settlement. It was in vain that Vergennes urged the delay and irritation consequent upon an application for a merely formal change of this character, saying that, after all, mere titles amounted to nothing, as the King of Eng-

land was permitted without protest from the French court to speak of himself as King of France. Jay, however, insisted, though the effect of his application, if it was logically pursued, would have been, by the antecedent implied acknowledgment of the independence of the colonies, to overthrow the whole policy of Shelburne, which was to make the recognition of independence not a gratuity, to leave the United States the victim, when in future they might be left without allies, of whatever conditions Great Britain might impose, but a part of a system of partition involving free interchange of reciprocal rights.

"But Shelburne was not disposed to break on a mere question of form, and a new commission was issued to Oswald, in which the colonies were spoken of as 'The United States of North America,' while at the same time Shelburne remained firm in the position that independence was to be recognized, not unilaterally, as a matter of grace, but bilaterally by treaty. Oswald, however, was instructed by Townshend, under Shelburne's direction, on September 1, 1782, to accept the 'necessary articles' of Franklin, as a basis, waiving an express treaty stipulation as to debts and refugee claims, which Franklin declared he had no power to give. On September 11, 1782, Oswald, in order, perhaps, to stimulate Shelburne to take more decisive action, wrote to Townshend saying (on what now appears to be erroneous information) that the French court was endeavoring to keep the American commissioners from coming to a settlement, and that Lafayette was acting as agent of the court to effect this object. That Lafayette was desirous of making the best terms possible for the United States and of inflicting the greatest possible humiliation on Great Britain, can not be questioned. But not only was Vergennes, as we will presently see, desirous of lowering the American ultimatum as far as was necessary to secure peace, but neither he nor the 'court' would have been likely at that time to have selected Lafayette, whom they regarded as a rash enthusiast absorbed in American interests, for any political mission of this critical type.

"Influenced, however, in part by Oswald's statement as to the position of France, in part by intimations from Rayneval, who visited Shelburne as a confidential agent of Vergennes, that if peace was not at once concluded between Great Britain and America, America would continue the war under the wing of France, the British cabinet determined to advance a step further, and on September 20, 1782, to give Oswald unlimited powers. 'Having said and done everything which has been desired,' so Shelburne, on September 23, wrote to Oswald, 'there is nothing for me to trouble you with, except to add that we have put the greatest confidence, I believe, ever placed in man in the American commissioners. It is now to be seen how far they or America are to be depended upon. I will not detain you with

enumerating the difficulties which have been incurred. *There never was a greater risk run. I hope the public will be the gainer, else our heads must answer for it, and deservedly.*'

"On October 5, Jay handed to Oswald a draft treaty which embraced the main points previously submitted by Franklin, omitting, however, the clause for the cession of Canada, which, as will be hereafter more fully seen, Franklin regarded as essential to any permanent pacification between Great Britain and the United States. On only one point in the programme as thus modified by Jay was there any difficulty, viz, the northeastern boundary; but as to this Oswald ultimately accepted Franklin's proposition that the question should be settled by a future commission. The draft treaty, as thus made up, was then forwarded by Oswald to Townshend, Oswald defending it on the ground that its object was to reduce as far as possible the points of difference between the two countries, and to establish between them a reciprocity of rights.

"But the repulse of the allied attack on Gibraltar led the ministry to think that terms more favorable would be obtained from the American commissioners than those conceded by Oswald. In order, however, not to put on Oswald the ungracious office of withdrawing his own concession, an additional envoy was sent to Paris, Henry Strachey, who had been secretary of the treasury under Rockingham, and assistant secretary of state under Shelburne. Strachey was authorized, as a last resort, to accept all the American propositions except that which gave the right to dry fish in Newfoundland and the provisions as to the navigation act, as to which it was added the executive had no power to act. In a confidential letter of October 20, 1782, Shelburne wrote to Oswald in the following words, which are none the less remarkable from the fact that they refer to concessions which Shelburne afterwards adopted: 'As you desire to be assisted by my advice, I should act with great insincerity if I did not convey to you that I find it difficult, if not impossible, to enter into the policy of all that you recommend upon the subject, both of the fishery and the boundaries, and of the principle which you seem to have adopted of going before the commissioners in every point of favor and confidence. The maxim is not only new in all negotiations, but I consider it as no way adapted to our present circumstances, but as diametrically opposite to our interest in the present moment.' He then recurred to his view that the peace to be solemnized was a 'separation,' to be followed, if not by 'reunion,' at least by 'commerce and friendship.'

"Immediately after Strachey's arrival at Paris, on October 30, 31, and on November 1, 1782, meetings were held of the commissioners on both sides, Franklin and Jay being reenforced by John Adams. It was settled by Adams and Jay, Franklin being overruled, but

acquiescing, as the least mischievous alternative, that there should be no communication of their proceedings to Vergennes, a conclusion the bearings of which will be presently more fully discussed.

"In the conference of November 1 both sides agreed to a modification of the northeastern boundary, while the American commissioners receded from their demand of the right to dry fish on the coast of Newfoundland, accepting as an equivalent the use for the same purpose of the unsettled parts of Nova Scotia, and the right of fishing in the Gulf of Saint Lawrence. The American commissioners, however, refused to make any provision whatever for the refugees. (See, as to this position, comments hereafter given in sketch of Franklin.)

"Notwithstanding the fact that Strachey united with Oswald in recommending the adoption of the draft treaty as thus amended (see Oswald to Townshend, November 8, 1782, Strachey to Townshend of the same date), it was received in London with much disfavor. George III., when brought face to face with 'separation,' bolted, and could hardly be brought to look on it as an established fact. 'With a full appreciation of the difficulties that arose from the attitude of the King, Shelburne met the cabinet. Richmond and Keppel were very bitter against Oswald, who they declared was only an additional American negotiator, and they proposed to recall him. This Shelburne and Townshend refused to do, as they especially desired that Oswald should be in Paris to negotiate a commercial treaty as soon as the necessary acts of Parliament had been passed.' (3 Shelburne's Life, 298.) Shelburne, however, insisted on further efforts being made on behalf of the refugees, and Strachey being at the time in London was instructed to proceed again to Paris to make such efforts.

"On November 28 Henry Laurens, the fourth American commissioner, having arrived, there was a full meeting of the commissioners at Mr. Oswald's apartment in Paris. It was then agreed that it should be provided that there should be no further confiscation of loyalist property or persecutions of loyalists, and that Congress should recommend to the State legislatures to issue amnesties and to restore confiscated property. The fourth article was extended to cover debts due during as well as before the war.

"The draft articles as thus settled were signed at once by all the commissioners; but to enable faith to be kept with France it was provided that the treaty 'was not to be concluded until terms of peace shall be agreed upon between Great Britain and France.' Strachey agreed with Oswald in vindicating the settlement. 'If,' he wrote to Nepean, 'this is not as good a peace as was expected, I am confident it is the best that could have been made. Now, are we to be hanged or applauded for thus rescuing England from the American war?'

"This terminates Oswald's connection with the negotiations of 1782–'83, and, in fact, his political life, as he died in retirement a few months after the fall of the Shelburne ministry. The treaty, as is

noticed above, was vehemently assailed by Fox, by Burke, and by North; and though it was regarded as final, was nevertheless censured by a majority of the House of Commons, thereby wrecking the Shelburne ministry. It has been frequently said that of all treaties executed by Great Britain it is the one in which she gave most and took least; and in view of the fact that Great Britain at the time held New York, Charleston, and Penobscot, and had almost unchecked control of American waters, her surrender, not merely of the entire territory claimed by the colonies, but of the Indians in that territory whom she had held under her allegiance, of the rights of the refugees she had pledged herself to protect, and of the fisheries in which she thus conceded to the United States a joint ownership, presents an instance of an apparent sacrifice of territory, of authority, of sovereignty, of political prestige, which is unparalleled in the history of diplomacy. So, in fact, was it considered throughout Europe, as is exhibited by a series of vivid statements taken by Mr. Bancroft (Formation of Federal Constitution, Book I., Chap. III.) from manuscripts to which he had access. '"The English buy the peace rather than make it," wrote Vergennes to his subaltern in London, their "concessions as to boundaries, the fisheries, and the loyalists, exceed everything I had thought possible." "The treaty with America," answered Rayneval, "appears to me like a dream." Kaunitz and his Emperor mocked at its articles.' (Citing Joseph II. and Leopold, Briefwechsel von 1781 bis 1790, I. 146.) See also 4 Lecky, Hist. Eng., 284.

"Yet the sacrifice was only apparent. Lord Russell, in a passage elsewhere quoted, declares, notwithstanding his devotion to Fox, that Shelburne's peace was preferable to the continuance of war; and as a matter of fact, as we have already said, the treaty was beneficial as well as honorable to Great Britain. It gave to Great Britain, what she never would have had if the Mississippi Valley had remained under the lethargic control of Spain, a vast and energetic Anglo-American population to supply her people with food, her mills with raw materials, and her producers with customers. It opened wide, hospitable, and sympathetic domains as abodes to myriads of British subjects, who, if they had remained at home, would, in the misery and discontent they would have so greatly augmented, have thrown the body politic into despair. And at that supreme moment, when the Holy Alliance, embracing all continental Europe, declared its determination not merely to restore her revolted provinces to Spain, but to crush England if she resisted this conspiracy, it was the prompt answer of the United States to England's call that made the conspiracy impossible, and enabled England to remain, not merely dominant on the seas, but the vindicator of a liberal foreign policy on which her very existence was staked. We must also remember that

had Fox's scheme succeeded, of an absolute recognition of independence, as a sequence of the surrender of Yorktown, while he would have won a signal triumph over his political adversaries, the recognition, coerced as it would seem to have been by the necessities of war, would have been far more humiliating to Great Britain than was the attitude afterwards assumed and carried out by Shelburne, of making what under the circumstances was a voluntary partition of the empire, basing such partition, at least so far as concerned Shelburne and Pitt, on principles of high statesmanship. It must be noticed, also, that by Fox's scheme the persons and property of loyalists would have been handed over to the absolute control of the separate States of the Union, at a time when the popular animosity against these loyalists was at its highest pitch, while there would have been full sweep given to the confiscation or extinguishment of all debts due the mother country. By the Shelburne settlement, on the other hand, confiscations and prosecutions of loyalists were stopped, loyalist prisoners were released, and a pledge given that there should be no lawful impediments on either side to the recovery of *bona fide* debts.

"But we are bound, also, in construing the treaty, to ascribe it to a higher motive than that of interest. Shelburne not only believed that the United States, if there should be an amicable partition of interests with Great Britain followed by liberal reciprocities, would promote the prosperity of Great Britain far more effectively than could have been done by a colonial dependence, but he held, as a fundamental article of his political creed, that by such a partition followed by such reciprocity the interests of humane civilization would be far better subserved than they would be by independence granted as a gift to be followed by commercial subjugation. On this principle Shelburne staked his political future, and lost. The same principle was avowed at the time by Pitt, like Shelburne and Oswald, a disciple of Adam Smith, but was afterwards dropped by him when he became prime minister on the defeat of the coalition. But though the completion of Shelburne's policy, by a repeal of the navigation acts, was frustrated, and in its place were instituted insolent restrictions of American commerce, which led to the war of 1812, we must keep in mind, in construing the treaty of 1783, that that treaty at least was a treaty of partition, inspired by liberal principles, and to be applied in subordination to such principles. It is on this principle of partition that rests the right of American fishermen to the free enjoyment of the northeastern fisheries.[a]

[a] "A 'supplementary note' giving a sketch of Oswald's history, substantially concurring with the incidents stated above, is appended to Sir G. C. Lewis' article on the Buckingham papers, published in his 'Administration of Great Britain,' 81. Mr. Lecky, in his notice of Oswald, 4 Hist. Eng., 272 *ff.*, unduly, I think, depreciates Oswald's merits.

Vergennes.

"The French alliance with the United States was promoted, on the part of France, by two distinct impulses. The first was enthusiasm for liberty, in part philosophical, under the auspices of the Encyclopedists, in part sentimental, inaugurated by Rousseau. By this enthusiasm not merely young nobles, such as Lafayette, were fired, but even Louis XVI. and his Queen felt its effect, perhaps not uninfluenced by the feeling that it was just as well that the fire which was thus lit should burn itself out across the Atlantic; and to express this royal sympathy pictures of the King and Queen in full robes were sent to the Continental Congress. The other impulse was a desire to humiliate and cripple Great Britain, which object could be effectually promoted by the establishment of the independence of the colonies. The Count de Vergennes, French secretary for foreign affairs, represented more distinctively the second of these impulses, though he was fully aware of the policy, when he had determined on an alliance with the colonies, of availing himself of the assistance of the first. When, however, Yorktown was captured, and the attitude of the British House of Commons made peace inevitable, he felt that as to the conditions of peace France had something to say. If America imposed conditions so hard as to unite Great Britain in a desperate determination to continue the war, France would be more or less involved in such hostilities; yet to France, peace, in the exhausted state of her finances, was then important. Other considerations came in to prompt Vergennes to use his influence to induce the United States to accede to such terms as to lead to a speedy peace. France had claims to exclusive rights in the Newfoundland fisheries, and these claims she did not wish to see imperiled by a treaty partition between Great Britain and the United States. France, also, was closely bound up with Spain, and France had no desire to see a treaty between Great Britain and the United States which might be regarded as guaranteeing to the United States the Floridas and the Mississippi Valley, then claimed by Spain. To this pressure on the part of France, Congress, as the strain of war became more severe, and the need of French aid the more apparent, was disposed to yield, and it dropped its prior instructions to the commissioners at Paris to insist on the claim to the navigation of the Mississippi. Vergennes' advice to the commissioners unquestionably was not to let claims to the fisheries and to the Mississippi stand in the way of peace. But there is not a trace of evidence that he intrigued with the British commissioners at Paris to induce them to limit the concessions they were prepared to make to the United States.

"Vergennes' position, during the negotiations of 1782–'83, was at least as difficult as that of William III. in the negotiations which preceded the peace of Ryswick. Vergennes was the head of an alliance against England which contained members at least as dissonant and

with interests at least as conflicting as those which William III. combined in the alliance against France, of which he was the head. If it was impossible for William III. to conclude any treaty which would satisfy each of the allies whom he led—if, in the peace which he actually concluded, it was a matter of course that he should be accused by some at least of the allies of undue reticence in the communication of peace projects, or of want of fairness in the settlement of such projects, so it was also necessarily the case with Vergennes. In both cases there were the usual pledges of co-operation between the allies; yet it must be remembered that it is for the benefit of all the contracting parties that such pledges are to be liberally construed, since no negotiations on behalf of allies could be conducted if it were understood that such negotiations were to be always by the allies in concert, and that not a word was to be spoken by any one of them in private conference with the common enemy. Such conferences there must be. They were held, and with good results, by Portland and Boufflers prior to the peace of Ryswick; they were held by Vergennes through Rayneval with Shelburne, and by Shelburne through Oswald with Franklin. It was so from the nature of things, and neither ally had the right to complain that each merely tentative and informal conversation was not at once reported to the other.

"The only whispers that ever were uttered reflecting on Vergennes' loyalty in the support of American independence are given by Mr. Jay (1 Jay's Life, 156), but these whispers, the original authors of which concealed their names (if names they had), are too trivial to be considered. But, while Vergennes' entire fidelity to the United States, so far as concerns the establishment of independence was concerned, must be conceded, it must also be conceded that he was not disposed to sustain the pretensions of the United States to Canada or the fisheries or the Mississippi Valley. The treaty of amity of 1778 did not bind France to guarantee to the United States Canada or any specific boundary or any fishery rights. On the other hand, France was bound to Spain by a renewed 'family compact' to maintain the territories of Spain as against England.

"Under these circumstances it was no breach of the treaty of amity for France to say to the United States, 'While I will sacrifice everything to make good your independence, I trust you will not press your claims against Britain to such an extent as to make peace impossible; that you will not embarrass my title to the fisheries and Canada; that you will not hazard the alliance by a conflict on your part with Spain.' No doubt this position was taken by Vergennes early in 1782, and no doubt these cautions were suggested to Congress by Marbois, French chargé d'affaires at Philadelphia, as a cipher letter of his to Vergennes which the British Government intercepted and put in Jay's hands shows. No doubt also Lord Shelburne knew through

Rayneval that Vergennes was not inclined to support the United States in pressing the positions above noticed. And as stated by a late able critic, 'It has now been proved by the publication of the French dispatches which are to be found in M. de Circourt's translation of Bancroft's history that no one was more bitterly opposed than the French ministers to the annexation of Canada to the United States.' (Edin. Rev., April, 1880, 335.)

"This disposition on the part of France, coupled with the dropping of the project by Jay and Franklin, may explain why Canada was lost to us. But, on the other hand, it is clear that Lord Shelburne preferred the United States at the fisheries to France, and the United States in the Mississippi Valley to Spain. Lord Shelburne's view, as we have seen, was to build up the United States into a powerful state in strict alliance with Great Britain, with whom on liberal principles she could control the seas, and he had no particular desire to strengthen either French or Spanish interests in North America. An early peace also was essential to his policy, and hence he promptly sanctioned the preliminaries of 1782, which made the United States tenants in common of the fisheries, which virtually gave the United States the Mississippi Valley, and which surrendered all refugee claims for indemnity.

"From the nature of things Vergennes must have been aware, as soon as Jay and Adams arrived in Paris and Rayneval arrived in London, what were the terms that the American commissioners would offer as an ultimatum, and which as a necessity Shelburne would yield. It is not necessary for this purpose to accept the following extraordinary statement made in the Life of Mr. Jay (Vol. I. 155): 'Mr. Jay was one evening in conference with Mr. Oswald, when the latter, wishing to consult his instructions, unlocked an escritoire, when, to his astonishment and alarm, he discovered that the paper was missing. Mr. Jay smiled and told him to give himself no concern about the document, as he would certainly find it in its place as soon as the minister had done with it. In a few days the prediction was verified. So fully apprised was Mr. Jay of the artifices of the Government that while secrecy was important he made it a rule to carry his confidential papers about his person.' This statement, it is observed, is not alleged to have been made by Mr. Jay himself, and on its face it is open to serious criticism. Not only would Mr. Jay's 'confidential papers,' if we are to judge from the papers of the same import in the Franklin collection, have been far too bulky for him 'to carry about his person;' not only, supposing the French court to have been as unscrupulous as he supposed, would it have been as easy for the emissaries of the court to snatch them from his person as it would have been for them to have broken into his lodgings and extracted them from his escritoire, but Jay's communications to Oswald, as given at

large in the Shelburne papers, of which copies are in the Department of State, are inconsistent with any such assumption as that he and Oswald were at the time living under this extraordinary police surveillance. Jay began his mission, as we will see when his agency in the peace is considered, filled with defiant antagonism to Great Britain and a desire to unite in any step by which she could be humiliated. This, however, soon gave way to distrust of France, and a determination, while still defying Great Britain, to do so keeping France at arm's length. But there is not one word in his copious conversations with Oswald—conversations of which, as reported by Oswald, his biographer was not aware—not one word hinting such a charge against Vergennes as that given above; while, on the contrary, in Jay's official letters there are constant references to the courtesy and magnanimity with which he had been received in France.

"It was not, in fact, necessary for Vergennes to set his secret service to work to discover the conclusions of Jay and Adams. Adams appears to have freely talked of them in Paris as soon as they were adopted; Jay 'unreservedly explained to Mr. Oswald the views and policy of the French court,' being 'no longer restrained by delicacy towards France from taking the course required by the occasion.' (1 Jay's Life, 144.) Oswald, who was at least equally communicative to Rayneval, no doubt enlightened Rayneval as to Jay's views; and even Jay himself, on October 24, informed Rayneval that 'we met with difficulties,' and that 'we (Oswald, Jay, and Adams) could not agree about all our boundaries,' and that 'we expected' as to the fisheries, 'the same rights we had formerly enjoyed' (Id. 144). All this, of course, went to Vergennes, whose avowed agent Rayneval was; and from this, as well as from Adams' want of reticence, Vergennes must have been fully aware, at a time when if he chose he could have effectively intervened, of the claims on which the American commissioners rested. But even if he was not so aware, he was officially advised of the preliminary articles as soon as they were signed; and this was time enough for France, if she chose, to break up the settlement by saying that the concessions to the United States were greater than she regarded as consistent either with her own interests or her obligations to Spain. She did not do so. On the contrary, after a not unnatural complaint, as will be hereafter seen, of the want of consideration with which she had been treated, she continued to make to the United States gifts and loans of money which were not only generous in themselves but of immense importance to the new government, then sorely in want of funds.

"Mr. Sparks makes the following statement:

"'I have read in the office of foreign affairs, in London, the confidential correspondence of the British ministers with their commissioners for negotiating peace in Paris. I have also read in the French office of foreign affairs the entire correspondence of the Count de Vergennes, during the whole war, with the French ministers in this country, developing the policy and designs of the French court in regard to the war and the objects to be obtained by the peace. I have, moreover, read the instructions of the Count de Vergennes, when Rayneval went to London, and the correspondence which passed between them while he remained there, containing notes of conversations with Lord Shelburne, on the one part, and Count de Vergennes' opinions on the other. After examining the subject with all the care and accuracy which this means of information has enabled me to give to it, I am prepared to express my opinion that Mr. Jay was mistaken both in regard to the aims of the French court and the plans pursued by them to gain their supposed ends.' (8 Dip. Corr. Am. Rev. 209.)

"It is true, as Mr. Bigelow (3 Life of Franklin, 210) says, that by a secret compact of April 12, 1779 (not 1799, as printed), between France and Spain, France engaged not to conclude peace until Gibraltar was surrendered to Spain. It is true, also, that Vergennes, during the negotiations of 1782–'83 between the United States and Great Britain, instructed both Luzerne, at Philadelphia, and Rayneval, at London, that France was not prepared to sustain the claim of the United States to the Mississippi Valley, to the fisheries as exclusive of France, or to Canada. But, as has been maintained above, this was when the question was whether France would permit peace to be sacrificed for these objects. When the first two of them were conceded by Great Britain there was not a word of objection by France. And, as has been seen, France continued, after the provisional articles were signed, as unflinching in support of the United States, as recognized by those articles, as she had been during the war of independence. And so far from there being any 'intrigue' on the part of Vergennes to secretly thwart the American policy of territorial extension north and south, he avowedly directed his representatives in Philadelphia to represent to Congress (1) that France herself would look forward, if the war continued, to regain her old control of Canada and the fisheries, and that she was unwilling to see Spain disturbed on the Mississippi, and (2) that the United States, by asking so much, might drive Great Britain to desperation, and, by awakening again the war fever in England, wantonly protract the war. (See Hale's Franklin in France, 278.) France had a perfect right to give this advice, and she gave it openly and unreservedly; and it is greatly to her credit that when her advice was rejected, and when the pro-

visional treaty with Great Britain recognized the right of the United States to the fisheries and the Mississippi Valley, Vergennes gave an assent without which the treaty would have failed.[a]

Franklin.

"Of Franklin's relations to the peace it is practicable at present to notice only a few of the more prominent incidents.

"It was natural that Franklin should have opened himself more freely to Oswald than to Grenville. Oswald came first, sent by Shelburne, within whose department the negotiation lay, and with Shelburne Franklin had been in old times intimate, sharing his distinctive views of political economy. Grenville came from Fox, to whom the negotiation did not belong, whose course had been erratic, whose views on political economy were at least not those of Franklin, and with whom Franklin had no personal acquaintance. Oswald was an elderly man, a business man, a man, like Franklin, 'of the people.' Grenville was but twenty-seven years of age, a son of George Grenville, the author of the stamp act, and himself an inheritor of the aristocratic pride by which his family was distinguished. But Franklin preferred Oswald, not because he was (according to Mr. Allen in a statement adopted by Sir G. C. Lewis) 'a simple-minded, well-meaning man, on whom he could make the impression he chose' (Lewis, Administrations of Great Britain, 33), but because Oswald represented the policy of partition of the Empire on terms of reciprocity under which both sections would have prospered as equals, whereas Grenville represented the policy of flinging independence at once on the colonies, and then, when the war was over, and the colonies stripped of their allies, imposing on them any humiliations which the then overwhelming maritime strength of Great Britain might enforce.

"To Franklin Grenville appeared as an ambitious young diplomatist, quite ready to make a sensational stroke which might be considered consistent with the reckless and rollicking politics of the school of young statesmen of which Fox (the 'dear Charles' of the Grenville correspondence) was the leader. It was natural that Franklin, aside from the question of two conflicting systems, should have preferred to negotiate with Oswald, an old man, with no desire to distinguish himself by political surprises, representing a mature statesman such as Shelburne, whom Franklin thoroughly knew, and on whose constancy he could rely. And to Franklin, between the two systems—the system of setting the United States adrift, to be afterwards seized and maltreated as it might suit British caprice, and the system of settling not merely independence but all questions of difference in a comprehensive treaty executed at a time when the United States was backed by a powerful European

[a] "In this view of Vergennes' course Mr. Lecky (4 His. Eng., 278) concurs.

coalition, when peace was a necessity to Great Britain—between two such systems, the first that of Fox and Grenville, the second that of Shelburne and Oswald, there was really no choice.

"Had Franklin been left to manage in his own way the negotiation with Shelburne, the probability is that Canada would have passed to the United States as one of the conditions of peace. To Great Britain, at least, the cession would have been of benefit. She had won Canada, in a large measure by the aid of the New England States, at an enormous expense, with no benefit whatever to herself, and with no prospect of future benefit. To her, viewing the question in the statesmanlike way in which it was viewed by Shelburne and Pitt, it was far more important to unite in establishing a powerful friendly state in America, with whom she would be on terms of permanent alliance, than, by keeping Canada, to be exposed, without profit, to constant collision with the United States. As Shelburne was never tired of insisting, Great Britain could find no fixed allies in the northern European powers, and, great as was his desire for a permanent alliance with France, he admitted that such an alliance, as Pitt subsequently found, was hopeless.

"What ally, then, remained? Who else than the United States, with whom Great Britain had the same language, the same literature, the same religion, the same proud and free political traditions, the same aptitude for shipbuilding and commerce, which would make her at war the most desperate enemy Great Britain could challenge, in peace the most efficient friend? And then it was impossible for Shelburne, Chatham's devoted aid, and for Pitt, Chatham's son, to forget that in one of Chatham's last speeches he had declared that America was destined to exercise on England an influence malign or benignant, as the case might be. If America should be subjugated this would be the subjugation of England. If she would assert and maintain her freedom this would add fresh vigor to the freedom of the parent state. If America was to be thus free, and thus the auxiliary of the enlarging freedom of England; if England was thus, not merely from other conditions, but from this very freedom, left without other allies, what more natural than that she should enter into a permanent alliance, based on liberal terms of reciprocity, with America; and, if so, how important that all causes of irritation should be removed, and that America should be made a powerful state. Such, at least, we may conceive to have been the reasoning of Shelburne and Pitt as they listened without dissent to Oswald's arguments for the cession of Canada. That to Franklin, who was equally with Shelburne and Pitt a holder of Adam Smith's distinctive views, this project of the cession of Canada appeared to be of supreme importance, his papers show. But under Fox's assaults Shelburne lost, at the critical moment, the power of acceding to

such a cession, and in pressing it Franklin was hampered in his own councils. Jay gave him no aid; Adams, while insisting on the fisheries as a *sine qua non*, was silent as to Canada, which would have carried with it the control of the fishery coast and excluded all future territorial conflict with Great Britain.[a] And Vergennes, who looked forward to the recovery of Canada, and to exclusive rights to the fisheries, naturally set himself against Franklin's claim to Canada.

"From what we can learn from Franklin's notes we may conceive him to have argued that Canada as a British colony, invested with that power of self-government which, after the experience of the American Revolution, could not be refused, would be a constant menace to the peace of the world and a constant drag on British prosperity. Contributing nothing to British income, she would be able to exercise the function of excluding British produce from her ports. She could free herself, therefore, from the expenses of the Empire while she would impose on the Empire the burden of largely increasing its military and naval expenditure for her defense. She would be able, at any time, by acts of aggression, such as she would not attempt if she were an independent and responsible power, to involve the Empire in war; and yet the Empire would have no power to restrain her from committing such acts or from taxing exports from the sovereign who was thus made responsible for her caprices. In this way Canada, as thus reconstituted, could not be otherwise than a constant peril and discomfort even to Great Britain. Place her in the American Union, so we may conceive Franklin to continue to argue, and not only will her own grandeur be vastly increased by being introduced into a system of sovereignties bound together in absolute reciprocity of trade, and removed by this union from all the burdens and dangers incident to a close connection with European politics, but as part of a great North American confederacy subjected in foreign affairs to a Federal head, with no possibilities of territorial collision with Great Britain, she would contribute to build up on this side of the Atlantic an empire, in its main points of constitutional liberalism sympathizing with Great Britain, with which Great Britain would be forever at peace. It is worthy of notice that John Adams, when in Holland, took in substance the same position, holding that between the United States and Great Britain it was essential to a permanent pacification that Canada should be ceded to the United States. But in the hurry of the final negotiations in Paris in 1782, embarrassed as he was by the strained relations which he had worked himself into with both France and England, and absorbed by

[a] It should be observed that the province of Canada, which was in question, did not comprise the maritime provinces, and therefore did not involve the fisheries. "Canada," as a short name for the Dominion of Canada, and embracing the maritime provinces, dates only from 1867.—J. B. M.

his provincial interest in the fisheries, it is not surprising that he should have forgotten Canada.

"Sir G. C. Lewis, in maintaining that Lord Shelburne never assented to the cession of Canada as recommended by both Franklin and Oswald, relies on a certain memorandum found among the Shelburne papers, in which the objections to the cession of Canada are given. But it does not appear that this memorandum is anything more than a mere jotting down of points to be used in a contingency that did not occur. It is certain that Shelburne informed Franklin that Oswald represented his (Shelburne's) entire mind; that Oswald received from Franklin a specific proposal for the cession of Canada, and that this proposal, on the eve of Oswald's return to Paris for the purpose of communicating to Franklin Shelburne's views, was received by Shelburne without dissent. Now, in view of Shelburne's position that it was important that the United States should become a leading power, in constant alliance based on common interests with Great Britain, was it strange that he should have been not insensible to Oswald's arguments that Canada, as a British dependency, would be a constant source of difficulty with the United States, without adding anything whatever to British strength? Reasoning as Shelburne would have done under the circumstances, the probability is that if the cession of Canada had been pressed, and in part as a basis for refugee relief, he would, with his usual fearlessness, have agreed to such cession. Nor is it likely that this settlement would have been resisted by George III., who then cared nothing for Canada, but whose heart was set on indemnity to the refugees.

"Franklin's sympathies, as between England and France, were much discussed by his colleagues, and have been much discussed subsequently. Adams and Jay, as we will see, at first thought he was ready to speak too deferentially to England, and then that he was disposed too much to smooth over matters with France. The truth was that while his colleagues were ready to say rough things to both France and England, he was ready to say rough things to neither. And so far as concerns his personal relations, his past is to be considered. He undoubtedly had been much flattered in France, and pleasantly accepted the courtesies which were part of this flattery. But this flattery, it must be remembered, came not from the Government but rather from philosophical *illuminati* who had nothing in common with the Government, or from political enthusiasts, like Lafayette, who took up the American cause, not, as did Vergennes, as a means of redress for injuries inflicted on France by England, but from a love of liberty and of revolution which Vergennes abhorred. There is nothing, in fact, in the way of extraordinary personal compliment from the French Government to Franklin to be found among his papers, generous as was the aid they con-

tributed through him to his country. On the other hand, it is questionable whether there is an instance in history of homage paid to the emissary of revolted and still belligerent subjects such as that paid by three successive British administrations to Franklin. Fox, secretary of foreign affairs, sent to him Grenville with a letter of introduction couched in terms of singular conciliation. Shelburne sent to him Oswald, on the ground that Oswald had large American interests, and held the same views on political economy as Franklin; while Franklin was informed that the cabinet was agreed that if another negotiator would be more acceptable to Franklin, such negotiator should be sent. When Shelburne succeeded Rockingham, Oswald was continued at his post, with letters from Shelburne and from Thomas Townshend (who followed Shelburne in charge of the colonies) expressive, with constantly increasing earnestness, of the hope that Oswald would succeed in winning Franklin's confidence. And when the coalition ministry came in, instead, as might have been expected from the fact that they mounted into power by repudiating the peace, of upsetting it, they sent to Paris David Hartley, an intimate friend of Franklin, to say that they accepted the preliminaries as the terms of a definite peace, intimating that, in order to assure Franklin of their sincerity, they had given plenipotentiary powers for the purpose to one with whom he was known to have been associated by the tenderest ties. If Franklin retained bitter animosities towards England in consequence of the insults heaped on him by Wedderburn in the privy council, or of the vituperation which had afterwards been poured on him by the British press, certainly time, old age, and a temper on his part naturally benignant, coupled with such extraordinary attentions from ministries representing the British King, would have soothed such animosities.

"But it can not be said, after an inspection of his papers, that these animosities swayed his course. He undoubtedly remembered that, not many months before, Lord Stormont, British minister at Paris, had said, in reply to a respectful communication from the American commissioners, that he would receive from rebels no communication unless in terms of surrender. He undoubtedly also remembered the cruelties by which the British arms in America had been stained; the employment of Hessians in a mere mercenary warfare; the instigation of atrocious Indian onslaughts. He could not have forgotten that the war had been protracted by the false information and the inflammatory appeals with which the refugees in England had filled the ears of those in power. He could not have forgotten any of these conditions, yet they appear to have receded from his eyes with the single exception of the conduct of the refugees, as a class—conduct which he thought disbarred them from any claim for indemnity from the United States. And on this topic he expressed himself with far

more tenderness than did Jay, who declared that some at least of the refugees 'have far outstripped savages in perfidy and cruelty' (1 Jay's Life, 162), and who in such cases justified confiscation, if not more condign punishment. But Franklin, while thus looking on the refugees as among the main causes of the obstinacy with which the war was persisted in, and as continual industrious fomenters in England of animosity to the United States, found nevertheless in England friends not only the most cherished but most sympathetic with him in those views of political economy he held to so tenaciously. And with all his just gratitude to France, there is no doubt that in 1782 he looked forward to a permanent alliance between the United States and Great Britain as affording, when based on sound economical principles, the prospects of greater benefit to the United States and to mankind in general than would be such an alliance with any other power. If, in Franklin's letters subsequent to the final determination of the peace, he speaks bitterly of probable British agression, it must be remembered that these letters were written after the defeat of Pitt's reciprocity bill, and after the issue by Fox and North of the order in council, whose noxious and insolent injustice to the United States has been already dilated on.

"Franklin's relations to Vergennes, in respect to the separation of the two lines of peace negotiations in Paris in 1782, have been already partially noticed when considering the position of Vergennes. It is now to be observed that Franklin, though dissenting from his colleagues on the question of official conference with Vergennes as to the negotiations with Great Britain, and though conscious that such want of conference was in violation of their common instructions, nevertheless kept silence, ceasing to inform Vergennes as to the progress of the negotiations. It must, however, have been with no little pain that he received the following note, of December 15, 1782, from Vergennes:

"'I am at a loss, sir, to explain your conduct and that of your colleagues on this occasion. You have conducted your preliminary articles without any communication between us, although the instructions from Congress prescribe that nothing shall be done without the participation of the King. You are about to hold out a certain hope of peace in America without even informing yourself on the state of the negotiations on our part. You are wise and discreet, sir; you perfectly understand what is due to propriety; you have all your life performed your duties. I pray you to consider how you propose to fulfill those which are due to the King. I am not desirous of enlarging these reflections. I commit them to your own integrity. When you shall be pleased to relieve my uncertainty I will entreat the King to enable me to answer your demands.'

"It is due to Franklin to say that, so far from throwing the discourtesy on his colleagues, he generously took the whole burden on himself. 'I received,' he said, 'the letter your excellency did me the honor of writing to me on the 15th instant. . . . Nothing has been agreed in the preliminaries contrary to the interests of France; and no peace is to take place between us and England till you have concluded yours. Your observation, however, is apparently just; that in not consulting you before they were signed we have been guilty of neglecting a point of *bienséance*. But as this was not from want of respect to the King, whom we all love and honor, we hope it will be excused, and that the great work which has hitherto been so happily conducted, is so nearly brought to perfection, and is so glorious to his reign, will not be ruined by a single indiscretion of ours. And certainly the whole edifice sinks to the ground immediately if you refuse on that account to give us any further assistance.' (Franklin to Vergennes, December 19, 1782.)

"The attitude of Vergennes, after this correspondence, is exhibited in detail in a very interesting letter from him to Luzerne, French minister in the United States, as given by Mr. Bigelow in full in his Life of Franklin, III. 207. In this letter Vergennes, after saying 'you will surely be gratified, as well as myself, with the very extensive advantages which our allies, the Americans, are to receive from the peace,' goes on to express his grief at the discourtesy shown him by the American commissioners: 'I have informed you that the King did not seek to influence the negotiation any further than his offices might be necessary to his friends. The American commissioners will not say I have interfered, and much less that I have wearied them with my curiosity. They have cautiously kept themselves at a distance from me. Mr. Adams, one of them, coming from Holland, *where he had been received and served by our ambassador*, had been in Paris nearly three weeks without imagining that he owed me any mark of attention; and probably I should not have seen him till this time if I had not caused him to be reminded of it. . . . There is no essential difficulty at present between France and England; but the King has been resolved that all his allies should be satisfied, being determined to continue the war, whatever advantage may be offered to him, if England is disposed to wrong any one of them. . . . I accuse no person; I blame no one, not even Dr. Franklin. He has yielded too easily to the bias of his colleagues, who do not pretend to recognize the rules of courtesy in regard to us.'

"But Vergennes's dissatisfaction did not operate, as we have seen, to suspend the kind offices of France to the United States. On December 23 Franklin writes to Robert Morris, as follows:

"'When I wrote to you on the 14th I expected to have dispatched the *Washington* immediately, though without any money. A little

misunderstanding prevented it. That was, after some time, got over, and on Friday last an order was given to furnish me 600,000 livres immediately to send in that ship; and I was answered by the Count de Vergennes that the rest of the 6,000,000 should be paid us quarterly in the course of the year 1783.'

"In Franklin's letter of July 22, 1783, to Robert R. Livingston, Secretary for Foreign Affairs, the question is thus reviewed:

"'I will not now take it upon me to justify the apparent reserve respecting this court (of France) at the signature, *which you disapprove.* We have touched upon it in our general letter. I do not see, however, that they have much reason to complain of that transaction. Nothing was stipulated to their prejudice, and none of the stipulations were to have force but by a subsequent act of their own. I suppose, indeed, that they have not complained of it, or you would have sent us a copy of the complaint that we might have answered it. I long since satisfied the Count de Vergennes about it here.'

"It was a final movement of Franklin, also, in the same line, that on Friday, November 28, brought the British commissioners to signature of the preliminaries. They were still urging compensation to the refugees when Franklin said: 'If another messenger is to be sent to London he ought to carry something more respecting a compensation to the sufferers in America.' He then drew the following 'draft article' from his pocket: 'It is agreed that His Britannic Majesty will earnestly recommend it to his Parliament to provide for and to make compensation to the merchants and shopkeepers of Boston whose goods and merchandise were seized and taken out of their stores, warehouses, and shops by order of General Gage and of his commanders and officers there: and also to the inhabitants of Philadelphia for the goods taken away by his army there: and to make compensation, also, for the tobacco, rice, indigo, and negroes, etc., seized and carried off by his armies under Generals Arnold, Cornwallis, and others, from the States of Virginia, North and South Carolina, and Georgia, and also for all vessels and cargoes belonging to the inhabitants of the said United States which were stopped, seized, or taken, either in the ports or on the seas, by his Government, or by his ships of war, before the declaration of war against the said States. And it is further agreed that His Britannic Majesty will also earnestly recommend it to his Parliament to make compensation for all the towns, villages, and farms burnt and destroyed by his troops or adherents in the said United States.' This was the last stroke which concluded the treaty, and it was so from the necessity of the case, since the only answer would have been a revival of the suggestion of ceding Canada to the United States as a fund from which spoliations in America could be made good and refugees in England could be pensioned. For this, however, it seemed to be then

too late; and, after retiring for a short time, Oswald stated that he was advised by Fitzherbert and Strachey to sign the preliminaries. They were accordingly signed by him.[a]

"How little Franklin was swayed by French influence is shown by the fact that, though he was aware that France desired to reconquer Canada and the fisheries for herself and was opposed to encroachments by the United States on Spanish America, and although he was aware, also, that the French envoys in Philadelphia were, under Vergennes's instructions, endeavoring to induce Congress to take ground at least not antagonistic to their views, he did his best to obtain, in his negotiations with England, not merely the Mississippi Valley, but Canada. This course he followed with Vergennes's full knowledge; nor, as far as we can learn from the papers, was there caused by this conflict of purpose the least check to their friendly relations. If Franklin's zeal for the fisheries was less conspicuous than that of Adams, it was because Franklin was of the opinion that the fisheries, without Canada, would cost, in the protection required for them, almost as much as they were worth, and would, as has been said, be the constant source of embroilment with Great Britain.

"When Franklin's character as a diplomatist is considered, it must be remembered that to him we owe two treaties, that with France of 1778, and with Great Britain of 1782–'83, which are at once the most beneficial and the most widely and continuously effective of any which are recorded in history; and that these treaties were negotiated by him with colleagues at his side who at least gave him no help, and with no powerful sovereign to back him; himself a plain man, with no diplomatic training, adopting neither in conversation nor in correspondence the formulas of diplomatic science. Yet nowhere in the annals of diplomacy do we find documents so admirably adapted to their object, in simplicity and power of style, in political skill, in dexterity and force of argument, as those which during his Paris service sprung from his pen; nowhere such extraordinary results. The ablest of our older negotiators, next to Franklin, was Gallatin; yet it is impossible to examine Gallatin's dispatches during the negotiations of 1814–'15 and of 1818 without seeing how far he falls behind Franklin, at least in result, if not in style. Conspicuous diplomatists were at the congress of Vienna—Talleyrand, Metternich,

[a] "The memoirs of Governor Hutchinson show how pernicious was the personal influence brought to bear by him and other refugees on George III. The following note from George III. to Lord North, dated 1 July, 1774, is one of the illustrations of the way in which this influence worked: 'Just seen Mr. Hutchinson, late governor of Massachusetts, *and am now well convinced they will submit.* He owns the Boston port bill to have been the only wise and effectual method.' (Brougham's Statesmen, &c., I. 85.) For Hutchinson's report of this conversation, see 1 Diary, &c., of Th. Hutchinson, 157.

Castlereagh, Nesselrode. Yet the treaties they drew were in a few years torn to tatters, and, when they were still in force, were conspicuous chiefly for their perfidious denial to the peoples of Europe of liberties their sovereigns had previously pledged. Canning had great abilities as a secretary of foreign affairs, yet, in his boast that he called a new world into existence to restore the equipoise of the old, he claimed what belonged to Franklin, for it was Franklin, who, in obtaining from all the legitimate sovereigns of Europe the recognition of a Republic in the New World which had revolted from one of them, made it possible for this equipoise to be restored. But Franklin did more than this. By the treaties he negotiated with France and England not only was a liberal revolutionary government in the New World, for the first time sanctioned by the legitimate sovereigns of Europe, but the United States, with boundaries sufficient to make a first-class power, was able, before her national spirit and love of liberty had been subjected to the strain which would have been imposed by a further continuance of war, to establish a government both free and constitutional. And of all treaties that have ever been negotiated that of 1782–'83 is the one, as we have seen, which has produced the greatest blessings to both contracting parties, has been of the greatest benefit to civilization as a whole, and has been least affected by the flow of time.[a]

"What were the qualities which enabled Franklin to effect these great diplomatic triumphs?

"These qualities may be summed up as follows:

"Determination to make the United States not only an independent but a leading power;

"Unrivaled knowledge of the political, social, and physical condition not only of the United States but of England and France;

"A mind fully conversant with modern political economy;

"Great sagacity in devising means to effect ends;

"So keen a perception of those with whom he had to deal as to be able to say what he had to say so as best to win their assent;[b]

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[a] "Mr. Lecky goes further: 'It is impossible not to be struck with the skill, hardihood, and good fortune that marked the American negotiations. Everything the United States could with any shade of plausibility demand from England they obtained, and much of what they obtained was granted them in opposition to the two great powers by whose assistance they had triumphed.'—4 Lecky, Hist. Eng., 284 (Am. ed.).

[b] "To the homely grace and skillful persuasiveness of his style the greatest critics have paid tribute. Jeffrey, in an elaborate review devoted to him, places him foremost among the masters of political and social reasoning. By Matthew Arnold he is spoken of, in at least a literary sense, as 'the most considerable man that America has hitherto produced.' And a late dispassionate and acute critic declares that 'in France he accomplished as much against England as did Washington with all his victories.'—Edinb. Rev., April, 1880, 328.

"A knowledge of human nature which enabled him to judge with comparative accuracy of the probable action of men in masses;

"A scientific, literary, and political reputation which made him the object of great attention wherever he went, particularly in Paris, where, unspoilt by adulation, he was the object of almost universal homage;[a]

"Singular pointedness and felicity of illustration, an unrivaled power of terse political and economical expression, and a style, in his native tongue, of rare felicity, purity, and force;

"Great patience and courtesy; never permitting himself to be hurried; if unable to effect at once the impressions he desired, waiting calmly till time came to his aid.[b]

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[a] "'Franklin continued to keep the American cause steadily before the public eye. His venerable aspect, his homely sayings, his republican simplicity of dress and manner, combined with the French tact and politeness of his deportment, his anecdotes and his *bons mots*, gained him among all classes admirers, disciples, and friends. Poetasters wrote rhymes in his honor; noble ladies celebrated his greatness in indifferent verses; his portrait was seen in every printshop; his bust was placed in the Royal Library. One day he was the observed of all observers at the famous Madame de Lessé's; on another Madame d'Houdetot had him plant a tree of freedom in her garden; on a third ladies crowned his snow-white head with flowers. "No man in Paris," says Madame Vigée Lebrun, "was more *à la mode*, more sought after, than was Dr. Franklin. The crowd used to run after him in the walks and in the public resorts; hats, canes, snuffboxes, everything was *à la Franklin*. Men and women considered it a piece of good fortune to be invited to a dinner at which this celebrated man was to be present." The Abbé Morellet wrote a chanson to celebrate his virtues:

"'"Notre Benjamin:
"'"En politique il est grand;
"'"A table est joyeux et franc."'

"Rosenthal, America and France, pp. 70–73.

[b] "Franklin's colleagues objected to his negligence both in diplomacy and in business. He spent his evenings, they said, at dinner parties; a large part of his work was done in informal conversations; his letters, while unquestionably skillful and effective, were not written in diplomatic form; while they were marked by defferential pursuasiveness, they were destitute of that proud defiance which should distinguish the utterances of the representative of a sovereign state. As to Franklin's dinner parties, about which so much was said, it may be remarked that, when in his own house, they were admitted to be simple though liberal; and, while he dined out frequently among public men, it was by this kind of intercourse that his mission was effectively served. The style and success of his letters are the best proof of their merit. Had he indulged in such defiance as Jay hurled at Oswald at their first interview, and Adams at Vergennes in the letter which suspended their intercourse, the United States might have been then left without any diplomatic relations whatsoever. And as to Franklin's management of the complicated business duties thrown on him by Congress, it is enough to say that while raising and forwarding immense sums of money for the Revolutionary cause, he accounted for all that he received; and, with every opportunity of speculating in the funds, no suspicion of speculation ever rested on him, and he went back home poorer than when he went abroad.

"It was objected to Franklin in his earlier days that he was given to sharp practice to effect his ends; and the obtaining the Hutchinson papers has been often cited as an illustration of this sharp practice. Yet that he was concerned in any surreptitious procuring of these papers has never been shown; and to forward them, when handed to him, to his Massachusetts constituents, so far from being wrong in him, was his duty. But whatever may have been his early reputation for 'slyness,' it was not chargeable to him in his mission to France. Whether it was that he had learned how much more effective in diplomacy are simplicity and straightforwardness than chicanery, or whether it was in obedience to the law, so prevalent with men of large capacity as they grow older, that—

"'The old man clogs the earlier years,
And simple childhood comes the last.'

certain it is that there is no trace of finesse or double dealing on his part in his voluminous Paris papers. It is true that in arguments with his colleagues he was silent when he found that for him to speak would be useless; but his great strength in his dealings with Vergennes and with Shelburne arose from the fact that what he said could be relied on as true.

"The charge of opportunism also has been made against Franklin, it being alleged that he was a statesman of policy and not of principle. Undoubtedly one of his most famous maxims, if read in one way, would seem to make honesty a duty because it is politic; but it must be remembered that it is also susceptible of the same meaning as are the claims so frequently put forth by moralists, that morality is divinely imposed because, in the long run, such is its adaptation to human nature, it succeeds. But be this as it may, Franklin was not an opportunist, if by opportunism is meant subjection of principle to immediate local interest. In several matters he maintained what he held to be the right principle against the immediate policy of the United States. He strenously objected to privateering, and this against not merely the prevalent sentiment, but the unquestionable policy of the United States. He opposed a navigation law, at a time when the temper of the people of the United States was roused to bitter retaliation by the order of council issued by the coalition ministry. He resisted the Fox scheme of recognition of independence as an insulated act, popular as that scheme was in the United States. And against the tenor of home advices, and in antagonism to France, by whose political atmosphere he was surrounded, he insisted on the title of the United States to the Mississippi.

"It may not be out of place, in view of the correspondence in reference to diplomatic costume noticed in a former volume (vol. i, § 107 b), to touch, for a moment, on the moot question of Franklin's

treaty coat. In Wilberforce's diary, edited by his sons, is the following: 'Friday Lord St. Helens' (formerly Mr. Fitzherbert) 'dined with me *tête-à-tête;* pleasant day; free conversation, much politics, and information. Franklin signed the peace of Paris in his old spotted velvet coat (it being the time of a court mourning, which rendered it more particular). "What," said Lord St. Helens, "is the meaning of that coat?" "It is that in which he was abused by Wedderburn."' The same story was related to Lord Holland by Lord St. Helens, who 'could not speak without indignation of the triumphant air with which Franklin told them he had laid by and preserved his coat for such an occasion;' and a similar account is given by Lord Mahon (5 Hist. of Eng., 495, note), though the coat is there said to be of 'figured Manchester velvet.' Mr. Sparks (Life of Franklin, 488), noticing the version of the story as given by Lord Brougham, in his sketch of Wedderburn, says that the 'coat' was not so worn and displayed; and he cites Mr. Whiteford, who was present, as secretary of the British side, at the signing of the treaty of peace, and who says (Gentleman's Mag. for July, 1785, 561) that 'this absurd story has no foundation but in the imagination of the inventor. He supposes that the act of signing the peace took place at the house of Dr. Franklin. The fact is otherwise; the conferences were held, and the treaty signed, at the hotel of the British commissioner, where Dr. Franklin and the other American commissioners gave their attendance for the purpose. The court of Versailles having at that time gone in mourning for the death of some German prince, the doctor, of course, was dressed in a suit of *black cloth*, and it is the recollection of the writer of this, and also he believes of many other people, that when the memorable phillippic was pronounced against Dr. Franklin in the privy council he was dressed in a suit of *figured Manchester velvet.*'

"Sir G. C. Lewis disposes of the matter, so far as concerns the shape given to it by Lord Holland and Mr. Wilberforce, by showing that Lord St. Helens was not present at Franklin's signature of the articles of 1782 or of 1783. Not only is there no support for the story in the Franklin papers, but in itself it is highly incredible. Franklin was marked for his urbanity and tact, and one of the complaints made against him by his more impetuous colleagues was that he was disposed to go too far to conciliate England in matters of form. That such an insult should have been offered to the British plenipotentiaries is as inconsistent with his natural temper as it was with his policy, which was, by the continuance of his friendly relations with these envoys, to make the treaty of peace the precursor for a treaty of reciprocity.

"If it be alleged that Lord St. Helens' report of what he saw refers to the treaty of 1778 with France, the answer is twofold: (1) Lord

St. Helens could not have been present at the signature of that treaty, which was virtually a declaration of war against Great Britain; (2) all the traditions as to Franklin's dress at the time negative such a display as is suggested by the Wilberforce anecdote. These traditions are thus summed up in Mr. Rosenthal's recent work on America and France:

"'The American envoys, plain in dress, dignified in bearing, were received by Louis XVI. in March, at Versailles, and the palace of the "Grand Monarque" rung with the plaudits of the court that greeted the representatives of the new Republic. The venerable, white-haired Franklin, in his dark Quaker dress, with his gray hat under his arm, his white woolen stockings, his shoes unadorned by silver buckles, appeared to the courtiers in that splendid hall the embodiment of republican simplicity, a Lycurgus or a Solon of the eighteenth century.

"'The Marquise du Deffand wrote to Horace Walpole on 22 March, 1778, as follows (tome iv., p. 33): "M. Franklin a été présenté au roi. Il était accompagné d'une vingtaine d'insurgents dont trois ou quatre avaient l'uniforme. Le Franklin avait un habit de velours mordoré, des bas blancs, ses cheveux étalés, ses lunettes sur le nez, et un chapeau blanc sous le bras. Ce chapeau blanc est-il le symbole de la liberté?"' (Rosenthal, America and France, pp. 51, 52.)

"It is not likely that if Madame du Deffand thought it worth while to dilate in detail on Franklin's dress at his court presentation in 1778, she would have omitted to notice an item which would have appeared so entertaining both to herself and to Walpole as Franklin bringing out for the occasion the old 'Manchester velvet' suit of such conspicuous antecedents.

"In Arthur Lee's Journal (Life by R. H. Lee, i., 403) there is also a detailed account of the presentation of the American commissioners to the King and court on the signature of the treaty, but no notice is taken of dress, which would probably have been the case if Franklin's 'coat' bore so sensational relation to the ceremonies.

Jay.

"Mr. Jay, who was associated with Dr. Franklin, Mr. Adams, and Mr. Laurens in the commission to treat with Great Britain for peace, was, at the time of his appointment, minister to Spain. He was then thirty-seven years of age, and, with the energy and resolution of the Huguenot race from which he sprang, had during the Revolutionary war zealously espoused the American cause. His feeling of indignation against Great Britain, which had been aroused to a high pitch by atrocities he had witnessed in New York, was not lessened during his stay in Spain, where he industriously devoted himself to the formation of a league between Spain, France, Holland, and the United States, not merely to achieve American independence, but to at least for a time paralyze British

power. England was to be invaded; her navy swept from the seas; her colonial dependencies in America torn from her, and the United States and Spain were to divide America on terms acceptable to themselves.

"Mr. Jay reached Paris on June 23, 1782, and immediately proceeded to visit Franklin at Passy. Shortly afterwards, together with Franklin, he called on the Count d'Aranda, the Spanish ambassador; an event not without significance, since it was the first occasion when the American commissioners had been officially recognized by the diplomatic representatives in Paris of any leading continental power. Shortly after this visit, however, Jay was laid up by sickness, though during this period he had occasional conferences with Franklin, who was at that time almost incapacitated by gout and stone.

"On August 7 occurred a memorable interview between Jay and Oswald, which Oswald reports at great length in minutes taken by him of the same date, deposited with the Lansdowne papers, of which copies are in the Department of State. 'He' (Mr. Jay), says Mr. Oswald, 'is a man of good sense; of frank, easy, and polite manners.' After reading Mr. Oswald's commission, Mr. Jay went on to tell Mr. Oswald that independence 'ought to be no part of a treaty. It ought to have been expressly granted by act of Parliament, and an order for all troops to be withdrawn previous to any proposals for treaty. As that was not done, the King,' he said, 'ought to do it now by proclamation, and order all garrisons to be evacuated, and then close the American war by a treaty.'

"'By the continued enforcement of the same cruel measures,' so Mr. Oswald reports Mr. Jay to have said, 'the minds of the people in general all over that continent were almost entirely alienated from Great Britain, so that they detested the very name of an Englishman. That it was true a number of the older people had not forgot their former connections, and that their inclinations might still lean toward England, but when they were gone and the younger generation came to take their place, who had never felt any of these impressions, those inclinations would be succeeded by a grudge and resentment of every kind upon reflecting on what they had seen and their parents had suffered; that few of them but could recollect the loss of blood of some relation or other, devastation of their estates, and other misfortunes. On which occasion he ran into a detail of particulars as unnecessary as unpleasant here to be repeated.' In reply to some attempted palliation by Mr. Oswald, Mr. Jay admitted 'that some blame was justly to be imputed to the representation of the refugees and other correspondents, who,' he said, 'at least many of them, were in a particular manner concerned, on account of their private interest to have things brought back by any means to their original state.'

Mr. Jay then, according to Mr. Oswald, went on to complain of the injustice of the terms imposed by England on France by the prior treaty of Paris, upon which Mr. Oswald remarked that he thought 'it hard that in America there should be such feelings for the conditions to which the French were bound by a treaty which concluded a war so necessary for its (America's) present and future safety.' 'On this occasion,' comments Mr. Oswald, 'I could not help thinking that Mr. Jay fell below the idea I wished to entertain of his candor and impartiality regarding objects not strictly American.' Mr. Jay further proceeded to insist that the acknowledgment of American independence was not a sufficient equivalent to France for her exertions in the war, and, aside from this, France ought to retain the conquests she had made. 'The United States,' he urged, 'would think themselves obliged to support them (the French Government) in their settlement with us (Great Britain) in general; only, at last, he said, unless unreasonable; then, indeed—and paused, but afterwards went on and said—France had been very kind to them and lent them money very liberally, &c. After enlarging on these obligations and the gratitude they owed to France, he proceeded to Spain and Holland and talked, also, though in a more general way, of their alliances with them, and their great obligations to them for advance of money; and as if, by conditions of treaty, they could not conclude or have peace with Great Britain separately from those two powers. I did not think it right to be over inquisitive as to their intentions regarding them, but it appeared to me as if he (Mr. Jay) considered those two courts as much under their protection as that of France, and as if the commissioners of the colonies would agree or refuse to close with us according as they should consider the terms which those two last powers shall insist on to be reasonable or unreasonable.' Of Mr. Jay, Mr. Oswald proceeds to say: 'We have very little to expect from him in the way of indulgences, and I may venture to say that although he has lived till now as a British subject, though he never had been to England, he may be supposed (by anything I could perceive) as much alienated from any particular regard for England as if he had never heard of it in his life.' He was 'much less liberal' in his terms, so Mr. Oswald declares, than was Dr. Franklin.

"But Jay did not long continue of this mind. On November 5, 1782, John Adams makes this entry in his diary: 'Mr. Jay likes Frenchmen as little as Mr. Lee and Mr. Izard did. He says they are not a moral people; they know not what it is; he don't like any Frenchman; the Marqis de Lafayette is clever, but he is a Frenchman.'

"Jay's sudden reaction from the distrust of and repugnance to England, as exhibited in his first interview with Oswald, to the dis-

trust of and repugnance to France he subsequently displayed may be explained in part by the solution given by Adams, that to Jay French morals and manners, when he became familiar with them, were intolerable. Jay's temper, naturally grave, reserved, and austere, coupled with punctilious conscientiousness in the discharge of duty, and a tendency to reason not from the condition of things about him, but from high principles to which those conditions should be forced to bend, found comparatively little in Spain at which to revolt. There might be crime there, but it was hidden out of sight; there was no frivolity; court life was solemn and decorous; certainly there was no tendency to surrender political traditions to fluctuating fashions. But it was otherwise in Paris. The King was undoubtedly personally pure and conscientious; there was not in the court the vulagrity of dissoluteness that had been dominant under Louis XV.; but still, in the levity of the Queen, in the reckless folly of the King's brothers, in the unconcealed depravity of some of the chief ecclesiastics about the throne, in the ostentatious immorality of fashion, there was as much to distress a pure and sensitive character such as Jay's as there would have been in the time of Louis XV. And there was something more which made this levity and vice the more monstrous. In the time of Louis XV. court favorites played with foreign wars; with the pragmatic sanction; with the conquest of Silesia. But to Jay's eye these dissolute people of fashion were playing with a volcanic revolution seething under their very feet. Then, again, their irreligion, covered over with only a thin veneering of Catholic ritual, was horrible to him. It took him back to the old struggles under the Valois kings between the court and the Huguenots—all that was frivolous and hollow and depraved, with the court; with the Huguenots all that was earnest and pure and devout. As he viewed the more closely the court and the dominant society of the capital he seemed to rise upwards to the level of his Huguenot ancestry, sharing their sombre hatred of their opponents, preferring exile in America and in England to subjection to France where these opponents ruled. Of this exaltation of standpoint on Jay's part we have a remarkable illustration in the following passage from a letter of July 19, 1783, by him to Mr. R. R. Livingston, then Secretary of Foreign Affairs:

"'Our little one is doing well. If people in heaven see what is going on below, my ancestors must derive much pleasure from comparing the circumstances attending the expulsion of some of them from this country with those under which my family has increased in it.'

"It may have been in part from this idealizing himself with that high-toned race who, though French in origin, became, as was the case with the Huguenot captains of William III., among the most

relentless enemies of France, as well as in part from the antagonism of his own stern and stoical morality to the disregard of all morality which he held to be prevalent in Paris, that he lent a willing ear to Oswald's suggestions of French intrigue in London against the United States. But in the character of this intrigue he was greatly mistaken, since Vergennes, while not desirous of seeing the United States take Canada, the Mississippi Valley, and the fisheries, yet nevertheless made the independence of the United States the one essential condition of his policy, and acquiesced without murmur in the provisional treaty giving the United States the Mississippi Valley and the fisheries, though his veto might have killed the settlement in which the concessions were secured. And into one other error Jay was led by the tendency to fall back on his old traditions. As a young man, on the breaking out of the war, he was ardently devoted to the old Whig English historical school. Of that school he and other Whigs in the colonies regarded Fox and Burke as the then orthodox exponents. Nothing could have been more natural than that he should have taken up Fox's cry of independence by grant, and have insisted that the United States should be solemnly recognized as independent by Great Britain before she could be treated with as thus independent. Yet such a position on its face involved a fallacy, since a dissolution of political connection, which is essential to independence, is a bilateral act, and if independence based on treaty was to be rejected, then there could be no acknowledgment of independence at all. And aside from this it was only by a treaty made at the time the United States was sustained on all sides by allies, and when a liberal ministry, acting on wise economical principles, was in power, that a pacification could have been effected that would, from its beneficial relations to both parties, have had any chance of permanency.

"In this temper of disgust and distrust of France it was easy for Jay to convince himself that Vergennes was secretly plotting with Shelburne, if not to divide the colonies between France and England, at least to reduce them to the level of a group of petty seaboard provinces. And Jay claimed that he was justified in this suspicion by the fact that Oswald's commission was addressed to the American 'colonies and plantations,' and that Vergennes advised them that this was a mere matter of form.

"The very sending by Vergennes to London of Rayneval as a confidential agent strengthened Jay's distrust; for the mission of Rayneval, so he argued, must have for its object the prejudicing Lord Shelburne against America. To counteract this supposed pernicious intrigue, Jay, without any notice whatever to Franklin, sent Benjamin Vaughan on a special errand of elucidation to Shelburne. A more extraordinary step could scarcely have been taken by a diplo-

matist so distinguished for integrity and capacity as Jay. Jay and Franklin were the sole members of the commission in Paris, Adams not having yet arrived. Franklin, as Jay well knew, was resolute in maintaining Vergennes' loyalty to the United States, so far as concerned the question of independence; and Franklin had heretofore conducted with singular skill all the negotiations with Shelburne. Yet Jay, himself unacquainted with Shelburne, sent to Shelburne, as a special envoy, Benjamin Vaughan, a gentleman to say the least not distinguished for prudence or diplomatic skill, to counteract with Shelburne the supposed anti-American intrigues of Rayneval, one of the most subtle and seductive diplomatists in the French service. It must have required on Shelburne's part great determination to perfect the peace, and great faith in Franklin's capacity to right matters at last, to have enabled him to disregard this singular side action of Jay.

"Yet near as were these proceedings of Jay's to imperiling the relations of the United States to both France and Great Britain, in one important respect he brought into prominence a truth which Franklin, while cognizant of it, did not consider it necessary to proclaim. Vergennes, determined as he was to have the independence of the United States established, had, as we have seen, made known that he had no desire to see the United States retain her old rights in the fisheries, or absorb Canada, or push Spain out of the Mississippi Valley. But that Jay was wrong in his doubts of Vergennes' loyalty to the cause of America's independence is shown by the fact that after the United States gained, not, indeed, Canada, but the fisheries and the Mississippi Valley, France continued her support as generously and efficiently as she had done before these causes of difference had arisen.[a] And if Franklin appears in his correspondence to attach comparatively little consequence to Jay's representations in this respect, we must remember that Franklin, while knowing the desire of France not to offend Spain, or to impair her own claims to the fisheries, was also aware that she would not permit her preferences in this respect to stand in the way of the recognition by Great Britain of the independence of the United States.

[a] "Mr. Lecky (4 Hist. Eng., 282) says: 'Two of the commissioners had conceived a profound distrust of the French minister. They believed that Rayneval had been sent to England to retard or prevent the recognition of American independence, that the French minister desired to keep America in a state of ferment and humiliating dependence, and that they were acting falsely and treacherously towards her. For this suspicion there does not appear to have been the smallest real ground. The independence of the Americans had been the great aim which France had steadily pursued, and she was not in the least disposed to abandon it; nor does Vergennes ever appear to have opposed American interests on any point on which he had promised to support them.'

John Adams.

"Mr. Adams was marked by a singular combination of apparently inconsistent characteristics which were displayed in peculiar prominence during the peace negotiations in which he took part. His patriotism was ardent and even fierce; attempts to corrupt or intimidate him would only have intensified its fires. He was capable of bold, sudden action; and he could defend such action by oratory singularly thrilling, exhibiting like lightning the path and the perils ahead, and in doing so dazzling as well as guiding. But with these great qualities were associated great defects. He could recognize no one as in any respect superior to himself. He paid but a grudging obeisance to Washington even when he was Washington's associate in office; and when in Congress he gave a ready ear, if not a sympathetic assent, to the expressions of discontent with which Washington's war policy was sometimes received. It is questionable whether he was ever truly conscious of the supreme grandeur of Washington's character; at least there is nothing in his diary or his confidential letters, from which his true views can be best collected, from which such a consciousness can be inferred. Of Franklin's extraordinary capacity and signal successes as a diplomatist he was equally unconscious; and towards Franklin he showed, when in Congress, a dislike which, in Paris, ripened into a blind jealousy. His vanity was so great as to make all flattery, no matter how delicate, odious to him when offered to others, and no flattery appeared to him too gross when offered to himself. In council he could direct and inspire, but he could not consult; a peculiarity afterwards illustrated during his Presidency, when for long periods he would let his cabinet officers, all of them representing a line of politics distinct from his own, carry out their views without their conferring with him, when suddenly, as in the case with the French mission of February 25, 1799, he would proclaim a new and bold policy without his conferring with them. His enthusiasm for public affairs in fact, splendid as were its occasional manifestations, was not continuous, and was broken in upon, from time to time, by parentheses of torpid seclusion, or, what was stranger, by social displays for which he had no tact, and which consorted but illy with the abruptness, the self-consciousness, and the want of consideration for others, by which he was often marked.

"Of these peculiarities of Mr. Adams we have ample illustration in the diary left by him in 1782–'83, during his French negotiations, as published in 1851, by his grandson, the late Mr. C. F. Adams (Works of John Adams, vol. iii., pp. 298 *ff*). Adams, after a mission to Holland, in which, by singular energy and zeal, he had succeeded in negotiating a treaty recognizing the independence of the United States, arrived in Paris about noon on Saturday, October 26, 1782.

"The period was one of extreme anxiety, requiring grave and prompt action by the American commissioners. Adams' name was the first in the list of these commissioners, and his immediate presence in Paris had been earnestly solicited by Franklin and Jay.

"Of his action on his first day in Paris, his journal narrates the following:

"'The first thing to be done in Paris is always to send for a tailor, peruke-maker, and shoemaker, for this nation has established such a domination over the fashions that neither clothes, wigs, nor shoes made in any other place will do in Paris. This is one of the ways in which France taxes all Europe, and will tax America. It is a great branch of the policy of the court to preserve and increase this national influence over the *mode*, because it occasions an immense commerce between France and all other parts of Europe. Paris furnishes the materials and the manners, both to men and women, everywhere else.'

"On the next day he meets with 'Ridley,' apparently one of the outside agitators by whom the commissioners were beset, who informed him that Jay 'refused to treat with Oswald until he had a commission to treat with the commissioners of the United States of America. Franklin was afraid to insist upon it.' 'Ridley,' in a subsequent conversation, 'was full of Jay's firmness and independence; [Jay] has taken upon himself to act without asking advice, or even communicating with the Count de Vergennes, and this even in opposition to an instruction.' On the same day is the entry, 'Then to Mr. Jay and Mrs. Izard; but none at home.' The following ends the day's comments: 'Between two as subtle spirits as any in this world (Franklin and Jay), the one malicious, the other, I think, honest, I shall have a delicate, a nice, a critical part to act. Franklin's cunning will be to divide us; to this end he will provoke, he will insinuate, he will intrigue, he will manoeuver. My curiosity will at least be employed in observing his invention and his artifice. Jay declares roundly that he will never set his hand to a bad peace. Congress may appoint another, but he will make a good peace or none.'

"Yet, in his journal for June 20, 1779, after speaking of Gouverneur Morris as 'of a character *très léger*,' he says, and with much injustice, so far as concerns Jay, 'the character and cause of America has not been sustained by such characters as that of Gouverneur Morris or his colleague, Mr. Jay.'

"It was not until Tuesday, October 29, in the evening, that he paid his first visit to Franklin. At this visit, and in the interviews immediately succeeding, Franklin was informed by Adams that he entirely concurred with Jay in the points as to which Franklin and Jay differed—as to Jay's hasty and ill-judged avowal of preference for Fox's scheme of peace to that of Shelburne; as to Jay's demand on

Shelburne to amend Oswald's commission so as to call the thirteen States 'the United States' before the signature of a treaty in which Oswald was to be authorized to confer this title; as to Jay's singular personal confidential mission to Shelburne without Franklin's knowledge and against Jay's instructions; as to Jay's determination to ostentatiously impress on Vergennes the refusal of the commissioners to formally acquaint him with the character of the negotiations with Shelburne. And Adams, when Franklin took the ground that it was not within the power of Congress to comply with Oswald's 'demand of the payment of debts and compensation to the tories,' replied that 'I had no notion of cheating anybody;' that 'the question of paying debts and of compensating tories were two;' and he adds, 'I made the same observation that forenoon to Mr. Oswald and Mr. Strachey, in company with Mr. Jay, at his house. I saw it struck Mr. Strachey with peculiar pleasure. I saw it instantly smiling in every line of his face. Mr. Oswald was apparently pleased with it too.' Franklin, when thus overruled by his colleagues, simply 'listened with patience.' He could do nothing else. His colleagues had not only taken their positions resolutely, but declared it openly. It is true that by their course Canada was lost, and the great scheme of partition and reciprocity which he had woven in conference with Oswald imperiled; it is true, also, that the friendly relations of France and the United States were put to a strain which it would require great skill to enable them to bear without rupture: but his dissent would only have made this rupture inevitable, while it could not have made the negotiations with the English ministers any the more auspicious to the United States. So he acquiesced; and by thus moving with his colleagues, at least so far swayed the subsequent correspondence as to prevent, as we have seen, a rupture with France, to save the United States from any burden of indemnity to the refugees, and to retain in the preliminary articles most of those features which make them, of all pacifications known to history, at once the most liberal in temper and the most reciprocally beneficial in result.

"On Adams's action, on his arival at Paris, as above narrated, we have a marked illustration of the tendency, common to Lord Chatham as well as to himself, to alternate periods of intense and heroic action with periods of histrionic seclusion not without preparation for histrionic display. Adams, prior to his arrival, had been, as we have seen, actively and efficiently engaged in the settlement of a treaty with Holland. He was summoned to Paris to take part, as the first on the list of commissioners, in negotiations on which depended the independence of America and the peace of the world. Time was of vital importance. Any delay, as afterwards was shown, might bring into play events by which the interests of America and her allies would be seriously imperilled. Franklin alone was possessed of the

threads of the pending negotiations, and, whatever Adams may have thought of him, Franklin was a man advanced in years, who was confined at that period to his chamber by an excruciating disease. Vergennes may have been the peculiar object of Adams's dislike; but Adams was instructed to take no step without consulting Vergennes, and on Vergennes depended the question whether any treaty at all with Great Britain could be negotiated. It was Adams's duty to at once visit both Franklin and Vergennes. So far from performing this duty, he delayed visiting Vergennes for nearly three weeks,[a] and would have delayed longer if Vergennes had not gone out of the way of diplomatic routine to good-naturedly invite the visit; while the visit to Franklin was delayed three days, until, in the meantime, the peruque-makers and tailors' help had been secured by way of preparation. And then, when the visit to Franklin was at last paid, it was not to obtain information or take counsel, but brusquely to announce conclusions, of which it is only necessary at this point to say that if they had been withheld until the views of Franklin had been heard and duly respected, it would have been far better for the United States.

"In addition to the citations already given from Adams's diary, may be noticed the following extracts:

"'The compliment of "Monsieur, vous êtes le Washington de la négociation," was repeated to me by more than one person. I answered, "Monsieur, vous me faites le plus grand honneur, et le compliment le plus sublime possible." "Et, Monsieur, en vérité vous l'avez bien mérité." A few of these compliments would kill Franklin if they should come to his ears.' (3 John Adams's Works, 309.)

"But as to the last point, Adams was mistaken. Franklin, in his public course, was singularly uninfluenced by either slight or adulation. On the one hand, through the impression noticed above, that he was unduly swayed by French preferences, he had provoked the jealousy of Adams, of Izard, and Arthur Lee, and this, with other causes, had led to charges, striking him at the most vital points, being preferred against him in Congress. Yet, on the other hand, while he was overwhelmed in Paris, both by men of science and men and women of fashion, with an adulation which, for its permanency and its ardor, has no parallel, he received from the British ministry the extraordinary honor of being told that the negotiators sent to confer with him were selected because it was supposed they would be acceptable to himself, and that other channels would be selected if he would designate them. But it does not appear that he ever sought to impress his

[a] "As to Adams's overbearing treatment of Vergennes, see 4 Lecky Hist. Eng., 190 (Am. ed.).

colleagues either with the slights or the honors which had been tendered to him, nor has he even noticed them in his diary. We now hear of them in detail from letters to him, deposited in the Department of State; and from that same correspondence we learn that, without regard either to censure or flattery, he pursued the course which was imposed on him by the great responsibilities under which he was placed.

"It would be as unjust as it would be vain to disparage John Adams's splendid services in the Revolutionary cause. He was, as Jefferson well said, the 'Colossus' on whom depended, so far as oratorical effect was concerned, the contest for independence. But the history of the treaty of peace of 1782–'83 would not be complete without noticing the way in which his character as a negotiator was affected by the weaknesses which have been noticed above. It was not that his ardent devotion to his own country ever dimmed. It is not that he was unduly partial to either of the great powers with whom he had to deal. '"You are afraid," so he represents Oswald as saying to him, "of being made the tool of the powers of Europe." "Indeed, I am," says I. "What powers?" said he. "All of them," said I.' (3 John Adams' Works, 316.) Hence it was that distrust of England led him to do all he could to drive off Shelburne by his unwillingness to understand, or at least to accept, Shelburne's liberal system of pacification, and distrust of France led him to do all he could to break up the French alliance. He undoubtedly meant to be just; but his jealousy of Franklin led him to blindly reject Franklin's conclusions whenever they conflicted with those of Jay, or whenever, as in respect to refugee claims, Franklin could be humiliated by their rejection. He was capable of intense labor, yet, in one of those strange fits of lassitude by which he was sometimes overtaken, he permitted himself, on his arrival in Paris, on October 26, 1782, at the most critical period of his country's history as well as of his own life, instead of seizing at once on whatever would enable him to possess himself of the information necessary to judicious action, to lose himself in matters of mere personal decoration, and then, when he sought information, to seek it first from questionable outsiders, and then from Jay, contenting himself, when at last he visited Franklin, with roughly telling Franklin at the very outset, before Franklin had any chance for explanation, that in all matters in contest he sided with Jay. It is true that in the main he had to fall back on Franklin's outlines of peace, for there were none others to fall back upon. Yet even here the concentrated and localized character of his patriotism led him astray. He fought zealously, vigorously, and successfully for the fisheries and for the northeast boundaries. Yet, in the absorption of his vision in the fisheries and on the boundaries, he lost

sight of Canada, without which no boundary questions could be definitely settled and no fisheries could be securely enjoyed."

Notes by Dr. Francis Wharton, Int. Law Dig. 2d ed., Appendix.

Annexed to the notes there is the following collection of correspondence:

Dr. Franklin to Lord Shelburne, April 18, 1782, 2 Sparks's Dip. Cor. Am. Rev. 278; 9 Franklin's Works, by Sparks, 245. Lord Shelburne to Dr. Franklin, April 28, 1782, 2 Sparks' Dip. Cor. Am. Rev. 293; 9 Franklin's Works, by Sparks, 265. Oswald to Lord Shelburne, July 11, 1782, 9 id. 303, note.

In a draft of a note to Oswald, July 12, 1782, (9 Franklin's Works, by Sparks, 365; 2 Dip. Cor. 351), Dr. Franklin states that he had received a note from Mr. Grenville stating that Lord Shelburne's opposition to an immediate acknowledgment of "American independency" was the cause of Mr. Fox's resignation; and that this would "be fatal to the present negotiation." But Dr. Franklin evidently did not think that this would follow, and, though he says that an acknowledgment of independence is essential, yet he implies that this can be done as a preliminary to a treaty.

"PASSY, *July 18, 1782.*

"Earl of SHELBURNE:

"MY LORD: Mr. Oswald informing me that he is about to dispatch a courier, I embrace the opportunity of congratulating your lordship on your appointment to the treasury. It is an extension of your power to do good, and in that view, if in no other, it must increase your happiness, which I heartily wish, being with great and sincere respect,

"My Lord, your Lordship's most obedient and humble servant,

"B. FRANKLIN."

Franklin MSS., Dept. of State.

"I expected to have had the honor to transmit you herewith the King's commission authorizing you to treat and conclude a peace with the American commissioners at Paris, as well as His Majesty's instructions consequent to it. But from the length of time necessary to pass the commission, I have thought it necessary to forward this to you without waiting for it. From the opinion which I have had very good reason to conceive of your ability I have no doubt but that you will acquit yourself, both as to spirit and form, to the satisfaction of His Majesty in this important business.

"As my intention is, and ever will be, in the high office which I have the honor to hold, to conduct my correspondence with the utmost precision and perspicuity, I desire you will without reserve communicate to me any doubts that may arise upon your instructions or any difficulty that may occur in the course of your negotiation. Be assured you will ever find me ready to pay due attention to your opinions upon the arduous undertaking in which you are engaged, and to communicate to you His Majesty's pleasure thereupon.

"I think it necessary to acquaint you that Mr. Fitzherbert, now at Brussels, has orders to join you at Paris and to replace Mr. Grenville. I have great pleasure in recommending him to your confidence, as he is a person of whose talents and discretion I have the highest opinion founded in a long acquaintance. Of those with whom you are to treat I have no knowledge of any except Dr. Franklin. My knowledge of him is of long standing, though of no great degree of intimacy.

I am not vain enough to suppose that any public conduct or principles of mine should have attracted much of his notice. But I believe he knows enough of them to be persuaded that no one has been more averse to the carrying on this unhappy contest or a more sincere friend to peace and reconciliation than myself. If he does me the justice to believe the sentiments to be sincere he will be convinced that I shall show myself in the transaction of this business an unequivocal and zealous friend to pacification upon the fairest and most liberal terms. Though I have not the pleasure of a personal acquaintance with you, sir, your character is not unknown to me, and from that I derive great satisfaction in seeing this very important negotiation in your hands.

"When the commission is made out you will hear from me again, and receive at the same time His Majesty's instructions for the execution of it." (Thomas Townshend to Richard Oswald, July 26, 1782, Franklin MSS. Dept. of State; printed in part in 9 Franklin's Works, by Sparks, 368, note, and 8 Bigelow's Works of Franklin, 133, note.)

"In regard to the question of any national substitution for the dependent connection with Great Britain, you must, in the first place, seek to discover the dispositions and intentions of the colonies by the intimations and propositions of the commissioners; and if it shall appear to you to be impossible to form with them any political league of union or amity to the exclusion of other European powers, you will be particularly earnest in your attention and arguments to prevent their binding themselves under any engagement inconsistent with the plan of *absolute and universal independence*, which is the indispensable condition of our acknowledging their independence on our Crown and kingdoms." (Orders and instructions to Richard Oswald, July 31, 1782, Franklin MSS. Dept. of State.)

"I went out this forenoon to Dr. Franklin to know whether he was inclined to enter upon business. He told me he had carried the copy of the commission I gave him to Versailles the day before, and had some conversation on the subject with Monsr. de Vergennes, who was of opinion with him that it would be better to wait until a real commission arrived, this being neither signed nor sealed, and could be supposed as only a draft or order in which there might be alterations, as in the preamble it said only 'to the effect following, &c.' To this objection I had nothing to say, as I did not incline to show them the instructions, though signed and sealed.

"Finding no alteration in the Doctor's manner, from the usual good-natured friendly way in which he had formerly behaved to me (as I had reason to apprehend from what had lately passed with his colleague), and having a quiet and convenient opportunity, I was anxious to learn whether the Doctor entertained those ideas which, in the preceding papers, I suspected Mr. Jay had in view regarding the *means* of preventing future wars, by settling the peace in such a manner as it should not be the interest of the parties to break it.

"With that intent I told the Doctor I had had a long conversation with Mr. Jay, of which no doubt he had been informed, and in which he had not spared us in his reflections on what had passed in the American war; and that I could not but be sorry he had just reason for the severity of some of them. At [the] same time I was pleased to find he was equally well disposed to peace, and to bring it quickly to

a conclusion as we were, and also that it should be a lasting one, as he, the Doctor, had always proposed, and that I was only at a loss as to how that could be ascertained other ways than by treaty, which Mr. Jay declared he paid no regard to, and said it could be only depended upon as lasting by its being settled so as it should not be the interest of any of the parties to break it. I told the Doctor this was certainly the best security, if one could tell how to accommodate the terms so justly to the mutual interests of the parties as to obviate every temptation to encroachment or trespass.

"The Doctor replied the method was very plain and easy, which was to settle the terms in the first projection on an equal, just, and reasonable footing, and so as neither party should have cause to complain; being the plan which Monsr. de Vergennes had in view, and had always recommended in his conversations with him on the subject of peace; and the Doctor said it was a good plan, and the only one that could make the peace lasting; and which also put him in mind of a story in the Roman history in the early times of the Republic. When being at war with the state of Tarentum, and the Tarentians having the worst of it they sent to the Senate to ask for peace. The ambassador being called in, the Senate told him they agreed to give them peace, and then asked him how long he thought it would last, to which he answered that would be according to the conditions; if they were reasonable the peace would be lasting; if not, it would be short. The Senate seemed to resent this freedom of expression. But a member got up and applauded it as fair and manly, and as justly challenging a due regard to moderation on their part.

"It is not easy for me to say how happy I felt myself at the conclusion of this quotation. The terms and conditions, it's true, remained undecided, and comprehend, no doubt, a very serious question, although not material to what I aimed at. Nor did I conceive them to lie so much in my way as in that of another department, by the concern which the French minister took in settling the principle. Nor did I trouble myself about the possible inefficacy of it as still depending in some degree on the obligations of treaty, however cautiously adjusted. And therefore I did not think it proper to touch upon that point nor to say anything on the subject of terms and conditions.

"I thought myself sufficiently satisfied in getting clear of my apprehensions of those ill-founded suspicions of a supposed American *guarantee* being intended, as mentioned in the papers of the 9th instant, and at the same time asking pardon of those to whom that design was unjustly imputed, and which, upon my return from this visit, I should have certainly struck out of those papers if I did not with all submission incline to think that by remaining under the eye of Government they might help to show that the question of the possibility of such guarantee taking place on some future occasion may still not be undeserving of attention. As to the consequences of such measure whenever it happens (as pointed out in the said papers of the 9th) there can be no doubt, nor do I think it requires much ingenuity in the Americans quickly to discover the expediency and benefit of resorting to it on a variety of occasions, particularly in case of our insisting on terms in the present treaty, or acting a part in our future correspondence with them; which we can not support in such manner as to make it appear to them to be their

interest (and consistent with their engagements and the character they have adopted) quietly and contentedly to submit to.

"I am the more ready to hazard the freedom of these observations and the danger of exciting into action the least experiment of this kind of combined interposition of the American provinces upon reflecting on Dr. Franklin's hint of caution, as reported in one of my letters of last month, 'not to force them into the hands of other people,' which I hope will never happen, but on the contrary, after laying the foundation of peace, in the best manner that can be done on the bottom on which the Congress wish it to stand, by an amicable and final agreement with their commissioners here, every possible measure may thereafter be taken to promote a temper of reconciliation and amity over the whole of that country, as yet there has been nothing done in a separate way, however unjustly suspected, to interfere with the plan of such preliminary and regular settlement. And I hope the same will be followed out in such a manner as to show to the Americans that all such concessions as are required and can be reasonably granted do actually flow from a desire of His Majesty and his ministers of laying this foundation on the most just and equitable principles, and in a mutual relation to the benefit of one party as well as the other.

"After that is done and consequently every pretense and occasion of jealousy is obviated, and constitutionally out of the question, I must take the liberty to say that it will concern the interest of Great Britain in the most sensible degree, as well in the hopes of returning benefit as in that of avoiding contingencies of critical danger, to concert from this time every possible method of facilitating and perpetuating a friendly correspondence with those countries.

"The second thing the Doctor touched upon was independence. He said by the quotations of acts of Parliament he saw it was included in the commission, but that Mr. Grenville had orders to grant it in the first instance. I replied it was true, and that though supposed to be granted under this commission and in the course of the treaty I hoped it would make no difference with gentlemen who were so well disposed to put an end to this unhappy business as I knew him to be.

"He then askt if I had instructions. I said I had, and that [they] were under His Majesty's hand and seal, and that by them it appeared independence, unconditional in every sense, would be granted, and that I saw no reason why it should not make the first article of the settlement or treaty. That I was sorry that Mr. Jay should have hesitated so much on that head, as if it ought to have been done separately and by act of Parliament, and now, Parliament being up, that the grant should be made by proclamation. That I did not pretend to judge whether the right and authority of a grant of that kind, so conveyed, would be proper and effectual. There seemed, however, to be one inconveniency in it that a proclamation became an address to the Congress and to every part of their provinces jointly and separately, and might in so far interfere with the progress of the present commission under which we hoped that all pretensions would be properly and expeditiously settled. That in this matter he was a better judge than I could pretend to be. I was only sure of one thing, that the affair might be as effectually done as in the way proposed by Mr. Jay.

"The Doctor replied that Mr. Jay was a lawyer, and might think of things that did not occur to those who were not lawyers. And at last spoke as if he did not see much or any difference. But still such mode of expression as I could not positively say would preclude him from insisting on Mr. Jay's proposition, or some previous or separate acknowledgment. I was glad to get clear of the subject without pushing for further explanation or discussion; or yielding further, as I have mentioned, than to a preliminary acknowledgment in the course of the treaty.

"I then said after that was done I hoped there would not be many things to settle. And that the articles called necessary, which he specified on the 10th of July, would pretty nearly end the business. And that those called adviseable, which, as a friend to Britain and to reconciliation, he had then recommended, would be dropt or modified in a proper manner. That I had fairly stated the case at home, and could not but confess that I had this answer from one of his friends. To this I cannot say I had any reply.

"I then told the Doctor there was a particular circumstance which, of myself, I wished to submit to his consideration, as a friend to returning peace.

"England had ceased all hostilities against America by land. At sea it was otherwise, and however disposed we might be to stop these proceedings there also, I could not see how it could be done until the people of America adopted the same plan. At the same time I was sensible that by the strict letter of their treaty with France the Americans could not well alter their conduct before we came to a final settlement with that nation. That this was an unfortunate dilemma for both of us; that we should be taking each other's ships when perhaps we might, in other respects, be at perfect peace; and that notwithstanding thereof, we must continue in this course; waiting for a conclusion with France and other nations, perhaps at a distant period. That although I had no orders on this head, yet as a continuance in this species of hostility seemed to be so repugnant to the motives and principles which had determined a cessation on the part of England by land, and was certainly a bar to that cordial reconciliation which he so much wished for, I could not avoid submitting the case to his consideration, to see whether he could find some remedy for it. The Doctor replied he could not see how it could be done. It would be a difficult thing. However, at last he said he would think of it.

"I next touched upon the subject of the loyalists, but could not flatter myself with the hopes of its answering any good purpose; the Doctor having from the beginning assured me they could take no part in that business, as it was exclusively retained under the jurisdiction of the respective States upon whom the several claimants had any demands; and there having been no power delegated to the Congress on that head, they, as commissioners, could do nothing in it. I only said that I was sorry that no method could be suggested for a reasonable accommodation in a matter which I could not but suppose he would admit had a natural claim to the consideration of Government. I thought it to no purpose to go any further upon the present occasion. If afterwards things of a more immediate concern and importance should get into a smooth train of proceeding, and be established, and I could venture freely to appeal to their unprejudiced

humanity and good sense I would try it, although without hopes of their taking any other part than in suggesting of means and expedients; and perhaps favouring the proposals in the way of private recommendation to their countrymen. As to the ungranted or unappropriated lands, although they were undoubtedly the reserved property of His Majesty in all the States, I am afraid when I come to state that claim as a fund towards indemnification the commissioners will pretend these lands fell with the States as much as the King's court-houses, &c.

"Upon the whole of this matter the Doctor said nothing, but that he was advised that the board of loyalists at New York was dissolved by General Carleton, which he was glad of.

"The Doctor at last touched upon Canada, as he generally does upon the like occasions, and said there could be no dependence on peace and good neighbourhood; while that country continued under a different government, as it touched their States in so great a stretch of frontier. I told him I was sensible of that inconveniency. But having no orders, the consideration of that matter might possibly be taken up at some future time. At my coming away the Doctor said that although the proper commission was not come over, yet he said Mr. Jay would call on me with a copy of their credentials. This being Sunday, he said the copy would be made out on Monday. On Tuesday he must go to Versailles, being the levee day, but on Wednesday they would call with their papers. So that to-morrow I shall probably have the honor of seeing those gentlemen, and of course may have something still to add to these tedious writings." (Richard Oswald to Thomas Townshend, August 11 and 13, 1782, Franklin Papers, Dept. of State; printed in part in 9 Franklin's Works, by Sparks, 386–389, notes, and in 8 Franklin's Works, by Bigelow, 149.)

"In the conclusion of the papers of the 13th instant, I said that Dr. Franklin and Mr. Jay were to call on me as yesterday to exchange credentials, but they did not call. I went out, therefore, this morning to the Doctor to inform him that the commission had come to hand: of which I told him I would have informed him sooner if I had not expected him yesterday. He excused himself on account of company coming in, which made it too late for coming into Paris that forenoon, but that to-morrow he and Mr. Jay would certainly call. He said he was glad the sealed commission was come. There was nothing material said on the subject of business. I returned to Paris and called on Mr. Jay to inform him in like manner of the commission being arrived. At meeting with this gentleman I own I was under some concern on account of our former conversation. But I was agreeably disappointed, having found him in the best humour, and disposed to enter into friendly discussion on the business I came about.

"He did not seem desirous of going back upon past transactions, as on the former occasion; and chiefly pointed at the object of a present settlement. He said we had it now in our power to put a final period to the misfortunes we complained of by carrying into execution what had been solemnly intimated to them, and which Sir Guy Carleton had orders to communicate to the Congress in America; a copy of whose instructions they were in possession of. One article of which says, that His Majesty was to grant unconditional independence to the thirteen States of North America. But that the

way proposed of making the same rest upon the events and termination of a treaty did not come up to that description, and was a mode of performance which would not give satisfaction to the Congress, or people of America, and could not be considered by them as absolute and unconditional, if only standing as an article of a depending treaty. And upon the whole that they could not treat at all until their independence was so acknowledged so that they should be on an equal footing with us, and take rank as parties to an agreement.

"That in this they had a fair precedent in the settlement of the Dutch with the Spaniards, who refused to enter into any treaty until they were declared free states. That if we wished for peace, that was the only way to obtain it; and if done with a becoming confidence and magnanimity, we should not only get a peace in the result, but by the concurrence of better management, hereafter, he also hoped that a happy conciliation and friendship would be restored and perpetuated between both countries, notwithstanding all that has happened, which he said would give him great pleasure. But that if we neglected this opportunity, and continue in our hesitation on that head as we had done, we should then convince them of the justice of their suspicions of designs which he would not name, and should force them into measures which he supposed I had discernment enough to guess at, without coming to farther explanation. That he should be extremely sorry to see things run into that strain, and therefore, as the method proposed was indispensable he could not but seriously advise and recommend it. A good deal more this gentleman said to the same purpose without any appearance of resentment or disgust. On the contrary, he delivered his sentiments in a manner the most expressive of a sincere and friendly intention towards Great Britain. I should not do him justice if I said less. And I am the more inclined to be particular in this part of the report that I was so free in my remarks on his former conversation; especially in my suspicions of an actual, or premeditated connection with foreign states, on account of his particular idea of guarding against the violation of treaties, as mentioned in the preceding papers; but which although I could perceive was present to his mind on this occasion also, yet I am now convinced had gone no farther than speculation; and as he said himself; and which I really believe he would be heartily sorry they should have recourse to.

"At proper times I said what occurred to me as necessary to bring this question to some sort of desirable period; and in particular wished to have Mr. Jay's idea of such way of declaring this unconnected ascertainment of independence as would satisfy them.

"His former proposal of doing it by proclamation he gave up, as liable to sundry objections needless to be here repeated. He then proposed that it should be done by a particular and separate deed, or patent under the great seal, in which my commission for a treaty might also be narrated: and that such patent should be put into the possession of the commissioners, to be by them sent over to Congress; and accordingly Mr. Jay brought me a draft of the patent. As I could see no other way of satisfying those gentlemen, and it appearing highly necessary that some beginning should be made with them, since until that was done the foreign treaty could not proceed in its course, I agreed to send the draft over to His Majesty's secretary of

state by a courier express for that purpose, with my own opinion rather in favor of the proposal than otherwise. And so it was settled with the commissioners. However afterwards in casting my eye over the preamble of the draft, where it is stated, *as if Sir Guy Carleton had orders to propose treaties of peace, &c., to the Congress;* and believing this to be a mistaken quotation of memory from the copy of Sir Guy's instructions, in the possession of the commissioners, and as such inferring an unjust imputation on the consistency of the conduct of administration, and apprehending also that the commissioners entertained a doubt of this nature might have been the reason why they wished to be guarded with all this caution, in requiring this special acknowledgment under the great seal, besides keeping their minds in suspense in all future proceedings where confidence in good faith ought to smooth the path in many occasions to a happy termination.—

I say, in reflecting on these things I thought it my duty, and I confess I was, on my own particular account, a little anxious to have an explanation of this matter. And therefore after it had been agreed in the presence of Dr. Franklin and Mr. Jay that I should send off the draft, I took the liberty to point out to them the said preamble, telling him that there might be a possibility of mistake or misquotation in the last part of the paragraph. Mr. Jay said he had not the copy of Sir Guy's instructions, and acknowledged he had inserted those words from a general impression that remained on his memory, and could not positively say but there might be some mistake. Dr. Franklin said he had a copy of the instructions and would send a duplicate to Mr. Jay in a few hours. He did so, and I waited on Mr. Jay to see the papers; upon the perusal, he owned he had been mistaken, and that Sir Guy's instructions went no further than an order of communication to inform the Congress and General Washington, that His Majesty intended (or had given directions) to grant free and unconditional independence to the thirteen States, &c. Finding this prejudice entirely removed and that Mr. Jay was perfectly satisfied that the whole course of proceeding in this matter was fair and consistent, I askt him what occasion there was then for this extraordinary caution of insisting on the solemnity of such separate deed under the great seal &c., since a preliminary clause or article in the treaty, as always intended, might do the whole business, by making it absolute, and not depending in [*sic*] the view of ascertainment, on the event of other or subsequent articles; and which might be expressed [*sic*] as to remove every doubt as to the independence being as free and unconditional as they desired it to be. In confirmation of the greater expediency and dispatch of this method, and that it was the sincere intention of His Majesty to make this grant in the precise way they desired, I thought myself warranted in telling him that I had a full power in my instructions to give them entire satisfaction on this head, and made no scruple in shewing it him, as it stood in the fourth article thereof. Upon the perusal Mr. Jay said that was enough, and he was fully satisfied; and there was no occasion for any other writing on the subject. That resting upon this would save time. And he was happy also, that this discovery of this mistake prevented their asking of His Majesty any farther proof of his good intentions towards them than what were actually meant and conveyed in those my instructions. Upon this I promised imme-

diately to send off this representation and also to desire leave and permission to make an absolute acknowledgement of the Independence of the States to stand invariably as the first of the proposed treaty with those gentlemen. Meantime I think it proper to send inclosed, the intended draft (tho' now of no use here) to shew by the words scor'd in the preamble, the ground of those gentlemen's hesitation and what gave occasion to their insisting on a separate deed under the great seal.

"I have now to add, in relation with my last conversation with Mr. Jay that after having quitted the subject of their particular affairs, and thinking myself at liberty to enter into a greater freedom of conversation, I wished to take the opportunity of saying something relative to foreign affairs, to a man of good sense and temper, who in his present and future situation may have it in his power, here and elsewhere, to exemplify by his good offices, those favorable inclinations respecting Great Britain, which he so freely and warmly expressed on the present occasion.

"Accordingly at proper periods I made no scruple in throwing out the following observations. That after settling with them which I hoped would end to the satisfaction of both parties, our next concern regarded a settlement with France and other foreign nations. That as yet I understood we could make no guess at what France aimed at. They kept themselves on the reserve perhaps partly with a view of being in some measure governed in their proposals by the manner in which our settlement of American affairs may proceed.

"That in the course of the American war, they had taken the opportunity of making separate conquests for themselves; and encouraged by this late alteration in our system, it may be supposed they were projecting some hard terms of settlement for us; by their delay in coming to particulars. Excepting only their declaration of having no interest, or concern in the article of American independence; and consequently that in every view of equivalent it is to have no place in abatement of their claims of retention or farther requisition.

"That having taken the Spanish and Dutch concerns also under their cover, and so as not to treat but jointly, or in concurrence with them, the prospect of a speedy and favorable settlement for Great Britain because still the more unpromising; unless they, the commissioners of the colonies should interfere to check the exorbitancy of the terms which thus might be expected to be insisted on by such combination of foreign states.

"And this prospect I said was still the worst that I understood he himself (Mr. Jay) had concluded, or was about to conclude a treaty with Spain, on the same footing with that which the Congress had settled with France. That the restraining clause in those treaties, regarding truce or final peace between England and America, until there was also a final settlement with those foreign states, was a most unlucky circumstance; and therefore the more of those treaties the commissioners entered into, so much the worse for England.

"A great deal more I said, but being chiefly of a speculative kind, regarding future times, and the different situation we should be in from what had formerly been, and the need we should feel of a friendly intention on the part of the colonies, with other things of so general a nature, not necessary to be repeated here.

"In answer Mr. Jay, replied to the following purpose. That we had only to cut this knot of independence to get rid of many of those apprehensions. That if we lookt better to our conduct in future we might be sure of recovering and preserving a solid and beneficial friendship with the Americans. That for the last twenty years he could not say much for us yet he said more particularly regarding the fairness and sincerity of our professions than I chuse to repeat. He continued by saying that England under a wise administration was capable of great things. Such a country, such a people, and blessed with such a constitution had nothing to fear; and in thirty years would forget all her present difficulties, &c.

"That as to the Spanish treaty he had not proceeded far in it. And unless we forced them into those engagements, he did not see that the people of America had any business to fetter themselves with them. And in the meantime he assured me, he would stop as to this of Spain. Which I was very glad to hear of.

"He said he supposed the terms of France would be moderate. And in that case he would give his advice that when they came to light, that the court of England would consider them with temper; and after making a deliberate estimate of the price they can afford to give for peace, to strike at once without hagling about it. That if their independence was once settled, he hoped that next winter would put an end to the war in general. That it was true there was a look here towards another campaign, and what might be the possible consequences of the operations in the interim, and touched upon the East Indies, as if great expectations from thence were entertained at this court, &c. Amongst other things I omitted when we were talking of independence, that I mentioned by the by, as if it was understood, that when America was independent of England, they would be so, also of all other nations. Mr. Jay smiled, and said they would take care of that, and seemed in his countenance to express such disapprobation of any question being put on that head, as would make one cautious as to the manner in which any stipulations on that subject should be proposed to those gentlemen." (Richard Oswald to Thomas Townshend, August 15 and 17, 1782, Franklin Papers, Dept. of State; printed in part in 9 Franklin's Works, by Sparks, 389–391, note.)

"By the packet of this date you'l please to observe that the American business is now brought to that point, that independence must be absolutely and unconditionally granted, otherwise all farther correspondence with the commissioners must cease, as well as Mr. Fitzherbert's negotiation in the foreign treaties. I was so well convinced of that being the event of a delay, and the disagreeable consequence thereof, that I have promised to the commissioners that I would dispatch this courier express on that subject, with my opinion of the necessity of complying with their demand, having [*sic*] them at same time such assurance as I can venture upon that they will not meet with either delay or refusal.

"By the third page of the packet of this date you will please to observe that the commissioners have given up their demand of a certification of the grant by a separate deed, or patent under the great seal, and will be satisfied with its being included in the treaty, and standing as an article thereof. Only that it must upon being inserted there, be ratified or declared as absolutely and irrevocably acknowledged,

and as not depending upon the event of other or subsequent articles. It will be easily settled in that manner, to the satisfaction of those gentlemen, for which I shall only want your permission to make the declaration. If the commissioners should desire an extract of that article, I can certify it, and they will be satisfied, as Mr. Jay assures me. If it is His Majesty's pleasure that the grant should be made, the sooner I have a return to this the better; there having been of late an anxiety and appearance of diffidence in those gentlemen as to this matter, which I presume to think it would be proper to put an end to, if only to have the chance of proceeding more agreeably and advantageously through the rest of the treaty." (Richard Oswald to T. Townshend, August 17, 1782, Franklin MSS. Dept. of State.)

"The commissioners here insist on their independence, and consequently on a cession of the whole territory. And the misfortune is that their demand must be complied with, in order to avoid the worst consequences, either respecting them in particular, or the object of general pacification with the foreign States, as to which nothing can be done until the American independence is settled. Allow me then, sir, to suppose that you give me permission to declare this independence, as the first article of the treaty, and to certify the same as so much absolutely finished in the process; and which thereby becomes a ratified act, let what will happen afterwards in the subsequent demands of either side in the course of the treaty. Which is, I believe, what the commissioners will insist on or will not treat at all." (Richard Oswald to T. Townshend, August 18, 1782, Franklin MSS. Dept. of State.)

"By the courier Ranspach who arrived here on the 3d I had the honor of your letter of the 1st instant. Upon receipt of it I went out to Dr. Franklin; he askt me if I had any directions relative to the point upon which the last courier had been dispatched to England, regarding a previous declaration of their independence before a commencement of treaty. I told him I had got instructions upon that head, which although they empowered me only to make such declaration as in the first article of the treaty, yet I hoped upon a due consideration of the matter they would appear to be fully satisfying. He said if there was no particular objection he could wish to have a copy of that instruction. I told him it should be sent to him. He was ill at the time; and as he could not come to town, he gave me a letter to Mr. Jay, desiring him to come out to him in the evening. I called on that gentleman, when, informing him of the manner in which I was authorized to treat, he said he could not proceed unless their independence was previously so acknowledged, as to be entirely distinct and unconnected with treaty. In the course of this conversation, and the day thereafter, a good deal was said of the same nature with what had passed on former occasions relative to this subject, as advised in my letters of last month.

"Two days ago Dr. Franklin sent to me, desiring a copy of the instruction which I had promised as above mentioned. I copied out the first part of your letter of the 1st instant leaving out some immaterial words, and sent it inclosed in a letter from myself, of both of which papers there is a duplicate under this cover.

"Since then I have seen Mr. Jay frequently, and have used every argument in my power to get him over his objections to treating without a separate and absolute acknowledgment of independence. And for

that purpose I found it necessary (although unwillingly) yet as of my own private opinion, to tell him that there might be a doubt whether the powers in the act of Parliament went so far as to allow of making that grant otherwise than as in the course of a treaty for peace; which as you are pleased to observe, was the sole object of the act.

"I said moreover, that if they persisted in this demand, there could be nothing done until the meeting of Parliament, and perhaps for some considerable time thereafter. That certain articles had been already agreed upon, and if we went on and settled the treaty on that footing, with independence standing as the first article of it, we might give opportunity to the foreign treaties to be going on at the same time; so as, for a conclusion of a general peace, there might be nothing wanting, at the meeting of Parliament, but a confirmation of the first article, in case it should be then thought necessary; which I imagined would not be the case.

"In answer to this Mr. Jay said there could be no judgment formed as to when the foreign treaties would end, and that until that with France was concluded, they of the colonies could not give us either peace or truce nor could they presume so much as to give an opinion of the demands of France, whatever they might be; since until their independence was acknowledged, absolute and unconnected with treaty they were as nobody; and as no people. And France could tell them so if they were to pretend to interfere; having failed to acquire that character, for which they had jointly contended. And therefore they must go on with France until England gave them satisfaction on the point in question. That to this they were bound by treaty; which their constituents were determined honestly and faithfully to fullfil. That being the case it could not be expected that they as servants could take it upon them to dispense with the said acknowledgement.

"That by looking over the sundry resolves of their Congress I might see that that assembly did not mean to seek for their character in any article of any treaty; and for that purpose Mr. Jay recommended to me the perusal of sundry parts of their proceedings as they stood in the journals of the Congress which he would mark out for me; and if I would extract and send them to England, they would serve at least as an excuse for them as commissioners, in thinking themselves bound to abide by their demand. Mr. Jay accordingly gave me four volumes of their journals, with sundry passages markt out as above. Mr. Whiteford has been so good [*sic*]to copy them out and they are inclosed.

"Mr. Jay was kind enough also to read to me an article of their instructions to the same purpose, and likewise containing paragraphs of two late letters from his colleague, Mr. John Adams in Holland, expressly declaring that they ought not to proceed in a treaty with England, until their independence is acknowledged.

"In the course of these conversations it may be supposed this gentleman took frequent opportunities to refer to the offer by Mr. Grenville to acknowledge their independence in the first instance. Which they always considered to be absolute, and unconnected in every shape with a treaty; and could not conceive the reason why that which we were willing to give them in May should be refused in August. If it proceeded from there being less confidence on our side, on this occasion, the change ought to make them still more cautious than usual

on their part. Mr. Jay also insisted on that offer of Mr. Grenville, as a proof, that the same thing being denied now could, not proceed from any supposition of restraint in the enabling act.

"To avoid being tedious I forbear repeating a great many more things to the same purpose which passed in those conversations with Mr. Jay. Mr. Franklin being so much out of order, I could not think of disturbing him by frequent visits to Passy, and therefore continued taking proper opportunities of talking to Mr. Jay; and the more readily that by any judgment I could form of his real intentions, I could not possibly doubt of their pointing directly at a speedy conclusion of the war; and also leaning as favourably to the side of England, as might be consistent with the duties of the trust he has undertaken.

"To convince me that nothing less than this stood in the way of agreeing to my request of accommodating this difficulty in some shape or other, he told me at last if Dr. Franklin would consent, he was willing in place of an express and previous acknowledgment of independence to accept of a constructive denomination of character, to be introduced in the preamble of the treaty, by only describing their constitutents as the thirteen United States of America. Upon my appearing to listen to this, and to consent to the substitution, he said, but you have no authority in your commission to treat with us under that denomination. For the sundry descriptions of the parties to be treated with, as they stand in that commission, will not bear such application to the character we are directed to claim and abide by as to support and authenticate any act of your subscription to that purpose and particularly to the substitution now proposed. There are such a variety of denominations in that commission, that it may be applied to the people you see walking in the streets as well as to us.

"When, in reply, I imputed that variety to the official style of such like papers, Mr. Jay said it might be so, but they must not rest a question of that importance upon any such explanation. And since they were willing to accept of this, in place of an express declaration of independence, the least they could expect was, that it should appear to be warranted by an explicit authority in that commission.

"I then asked if, instead of States, it would not do to say provinces; or States or provinces. Mr. Jay said neither of these would answer.

"I then begged the favor of him to give me in writing, some sketch of the alteration he would have to be made in the commission. He readily did so in a minute which is inclosed; to be more largely explained, if necessary, when the commission comes to be made out. He also said that this new commission must be under the great seal as the other was.

"Before I quitted this subject I tried one other expedient for saving time and avoiding the necessity of a new commission; by reading to Mr. Jay the second article of my instructions, which empowers me to treat with them, as commissioned by constituents of any denomination whatever. And told him that altho' this power meant only to apply to character as assumed by them, and not to an admission by me without exception; yet in the present described character of States, I would not only admit their assuming that appellation, in the preamble of the treaty, but I would venture to repeat it, so as it should appear to be an acknowledgment on my part. In doing so I could not suppose any hazard of objection at home, considering what had passed on a former occasion above mentioned, together with the said power in my instruc-

tions. But Mr. Jay said they could admit of no authority but what was explicitly conveyed to me by a commission in the usual form. And therefore to put an end to this difficulty, there was an absolute necessity for a new commission.

"He at the same time told me that to satisfy His Majesty's ministers of the propriety of their conduct, as persons under trust, he had sketched out a letter to me, which I might send home if I pleased. He read the scroll of it to me, and promised to write it out fair, and give it to me before the departure of a courier.

"So the affair rested yesterday the 9th when I received a letter from Dr. Franklin, desiring a copy of the fourth article of my instructions, which I had shewn to Mr. Jay, as formerly advised. Inclosed there is a copy of the Doctor's letter.

"Doubting as to the propriety of giving such things in writing I thought it best to go out to the Doctor, carrying the instructions along with me, to see whether a reading of that article would satisfy him; but after reading it, as he still expressed a desire of having a copy, I told him, that although I had no orders to that purpose, yet at any hazard whatsoever, since he desired it, I would not scruple to trust it in his hands. And then sat down and wrote out a copy and signed it which after comparing with the original, he laid by, saying very kindly, that the only use he proposed to make of it, was, that in case they took any liberties for the sake of removing difficulties, not expressly specified in their instructions, he might have this paper in his hands to show in justification of their confidence. Or some words to that purpose; for I can not exactly quote them. The Doctor then desired, I would tell Mr. Jay he wished to see him in the evening. He did go out, that night, and again this morning: no doubt with a view of agreeing upon an expedient, for removing those obstacles to their proceeding, as hinted at in the Doctor's letter to me.

"At noon, and since writing the above, Mr. Jay called and told me, that upon farther consultation and consideration of the matter, it was thought advisable not to press upon His Majesty's ministers those arguments which he proposed to make use of in the letter he intended to write me (and which it was understood I might send home), as considering it somewhat more than indelicate for them to pretend to see more clearly than the King's ministers might do, the expediency, if not the necessity at this critical time, to decide with precision and dispatch upon every measure that can be reasonably taken for extricating Great Britain from out of the present embarrassing situation in which her affairs must continue to be involved, while there remains any hesitation in coming to an agreement with the States of America.

"I liked the scroll of the letter so much when it was read to me yesterday, that I was sorry it was withheld. I even pressed to be intrusted with it, in gratification of my own private wish that the writer of it might receive from good men, that share of applause that is due to those who wish well to the peace of mankind in general, and who seem not to be desirous of expunging altogether from their breast the impressions which had been fixed there, by those habits and natural feelings by which individuals are tied in attachment to particular combinations of society and country. But I could not prevail, and was obliged to be contented with a recommendation to say what I thought proper in my own way. Finding it so, there re-

mained for me only to ask a single and final question of Mr. Jay, whether in this his last conference with Doctor this morning (for he was just then come in from him) it was settled between them, that upon my receiving from His Majesty a new commission under the great seal such as the last, with an alteration only as before mentioned, of my being empowered to treat with them as commissioners of the thirteen United States of America, naming the said States by their several provincial distinctions, as usual, I said whether in that case they would be satisfied to go on with the treaty, and without any other declaration of independence, than as standing as an article of that treaty.

"Mr. Jay's answer was, that with this they would be satisfied, and that immediately upon such commission coming over, they would proceed in the treaty. And more than that, said, they would not be long about it; and perhaps would not be over hard upon us in the conditions.

"Having stated those conversations and other circumstances as they actually passed to the best of my remembrance, it would not become me to go farther by giving any opinion as to the measures proper to be taken in consequence thereof. Yet, sir, I hope you will excuse, and I think it my duty to say this much that, by what I have been able to learn of the sentiments of the American commissioners, in case the compromise now proposed (which with great difficulty they have been persuaded to agree to) is refused, there will be an end to all further confidence and communication with them. The consequences of which I will not presume to touch upon, either as regarding America or foreign affairs. On the other hand if the expedient of a new commission is adopted, I beg leave to say that no time ought to be lost in dispatching it. There being now four couriers here and as they may be wanted at home, it is thought proper that one of them, as extra, may go along with the courier Lawzun, who goes from Mr. Fitzherbert's office." (Richard Oswald to Thomas Townshend, Sept. 10, 1782, Franklin papers, Dept. of State; printed in part in 9 Sparks' Franklin, 405–407, notes, and in 8 Bigelow's Works of Franklin, 165, note.)

"As Lord Shelbourne had excited expectations of his being able to put a speedy termination to the war it became necessary for him either to realize those expectations or to quit his place. The Parliament having met while his negociations with us were pending, he found it expedient to adjourn it for a short term, in hopes of then meeting it with all the advantage which he might naturally expect from a favorable issue of the negociations. Hence it was his interest to draw it to a close before that adjournment expired, and to obtain that end, both he and his commissioner prevailed upon themselves to yield certain points upon which they would probably have been otherwise more tenacious, nay we have and then had good reason to believe that the latitude allowed by the British cabinet for the exercise of discretion, was exceeded on that occasion."—Draft of Mr. Jay to Mr. Livingston, 18th July, 1783, "concluded to be left out." (Franklin MSS. Dept. of State.)

"The clamor against the peace in your Parliament would alarm me for its duration, if I were not of opinion with you, that the attack is rather against the minister. I am confident, none of the opposition would have made a better peace for England, if they had been in his place; at least I am sure that Lord Stormont, who seems loudest in

railing at it, is not the man that could have mended it." (Dr. Franklin to the Bishop of St. Asaph (Dr. Shipley), Mar. 17, 1783, Franklin MSS. Dept. of State; 9 Spark's Franklin, 498.)

In a letter from Mr. Oswald to Mr. T. Townshend, dated Paris, November 30, 1782, it said: "If we had not given way in the article of the fishery, we should have had no treaty at all, Mr. Adams having declared that he would never put his hand to any treaty, if the restraints regarding the 3 leagues and 15 leagues were not dispensed with, as well as that denying his countrymen the privilege of drying fish on the unsettled parts of Nova Scotia." (Franklin MSS. Dept. of State.)

In a letter from Mr. Strachey, of the British legation, to Mr. T. Townshend, Paris, November 29, 1782, "eleven at night," it is said, "a very few hours ago we thought it impossible that any treaty could be made. We have at last, however, brought matters so near to a conclusion that we have agreed upon articles, and are to meet to-morrow for the purpose of signing. Inclosed are such of the articles as are altered, and an additional one which we mean, as a security in case it be true that Bermuda is taken. The article of the fishery has been difficult to settle, as we thought the instructions were rather limited. It is however beyond a doubt, that there could have been no treaty at all, if we had not adopted the article as it now stands." (Franklin MSS. Dept. of State.)

In the orginal draft of Dr. Franklin's letter of July 22, 1783, to Mr. R. R. Livingston, as on file in the Franklin papers in the Department of State, is the following: "I will only add that, with respect to myself, neither the Letter to Mr. Marbois, handed to us thro' the British Negotiators (a suspicious Channel), nor the Conversations respecting the Fishery, the Boundaries, the Royalists, &c. (recommending moderation in our demands, *interlined*) are of weight sufficient in my Mind to fix an Opinion that this court [of France] wished to restrain us in obtaining any Degree of Advantage we could prevail on our enemies to accord; since those discourses are fairly resolvable by supposing a (very natural, *interlined*) apprehension that we, relying too much on the ability of France to continue the war in our favour (or supply us constantly with money, *interlined*) might insist on more advantages than the English would be willing to grant, and thereby lose the opportunity of making peace, so necessary to all our friends.

"I ought not however to conceal from you that one of my colleagues is of a very different opinion from me in these matters. He thinks the French minister one of the greatest enemies of our country, that he would have straightened our boundaries to prevent the growth of our people, contracted our fishery to obstruct the increase of our seamen, and retained the royalists among us to keep us divided; that he privately opposes all our negotiations with foreign courts, and afforded us during the war the assistances we received only to keep it alive that we might be so much the more weakened by it; that to think of gratitude to France is the greatest of follies, and that to be influenced by it would ruin us. He makes no secret of his having these opinions, expresses them publicly sometimes in presence of the English ministers; and speaks of hundreds of instances which he could produce in proof of them, none of which, however, have yet appeared to me, unless the conversation and letter above mentioned are reckoned such. If I were not convinced of the real inability of

this Court to furnish the farther supplies we asked, I should suspect these discourses of a person in his station might have influenced the refusal; but I think they have gone no farther than to occasion a suspicion that we have a considerable party of Antigallicans in America who are not Tories, and consequently to produce some doubts of the continuance of our friendship. As such doubts may hereafter have a bad effect, I think we can not take too much care to remove them; and it is therefore I write this to put you on your guard (believing it my duty, though I know that I hazard by it a mortal enmity; and to caution you respecting the insinuations of that gentleman against this Court, and the instances he supposes of their ill-will to us, which I take to be as imaginary as I know his fancies to be, that Count de V. and myself are continually (plotting against him and, *interlined*) employing the newswriters of Europe to depreciate his character, &c., but, as Shakespeare says, 'Trifles light as air,' &c. I am persuaded however that he means well for his country, is always an honest man, often a wise one, but sometimes and in some things, absolutely out of his senses.

"When the commercial article, mentioned in yours of the 26th, was struck out of our proposed preliminaries by the then British ministry, the reason given was that sundry acts of Parliament still in force were against it, and must be first repealed, which I believe was really their intention; and sundry bills were accordingly brought in for that purpose. But new ministers with different principles succeeding, a commercial proclamation totally different from those bills, has lately appeared. I send enclosed a copy of it. We shall try what can be done in the definitive treaty towards setting aside that proclamation: But if it should be persisted in, it will then be a matter worthy the attentive discussion of Congress whether it will be now prudent to retort with a similar regulation in order to force its repeal (which may possibly tend to bring on another quarrel; *interlined*), or to let it pass without notice, and leave it to its own inconvenience (or rather impracticability, *interlined*) in the execution, and to the complaints of the West India planters, who must all pay much dearer for our produce under those restrictions. I am not enough master of the course of our commerce to give an opinion on this particular question, and it does not behoove me to do it; yet I have seen so much embarrassment and so little advantage in all the restraining and compulsive systems, that I feel myself strongly inclined to believe that a state which leaves all her ports open to all the world upon equal terms, will by that means have foreign commodities cheaper, and sell its own productions dearer, and be on the whole the most prosperous. I have heard some merchants say, that there is 10 per cent difference between *Will you buy?* and *Will you sell?* When foreigners bring us their goods, they want to part with them speedily, that they may purchase their cargoes and dispatch their ships which are at constant charges in our ports; we have then the advantage of their *Will you buy?*—and when they demand our produce we have the advantage of their *Will you sell?* and the concurring demands of a number also contribute to raise our prices. Thus both these questions are in our favor at home, against us abroad. The employing however of our own ships and raising a breed of seamen among us, though it should not be a matter of so much private profit as some imagine, is nevertheless of political importance and must have weight in considering this subject."

This letter, as received by Mr. Livingston, is published in 2 Dip. Cor., 462.

In the draft I give above are noted some of the more important changes made by Dr. Franklin before giving the letter to be copied.

In the original draft of Dr. Franklin's letter to Mr. Morris, of July 27, 1783, after speaking of the financial difficulties which the legation was under, and the generous conduct of the French "Farmers General" in withholding all pressure for payment during the war, the following is entered on the margin: "I ought and do as warmly recommend to you the doing them justice as speedily as may be, and favoring them where it is practicable, for we are really under great obligations to them." (Franklin MSS., Dept. of State.)

"Inclosed is my letter to Mr. Fox. I beg you would assure him that my expressions of esteem for him are not mere professions. I really think him a *great* man, and I could not think so, if I did not believe he was at bottom and would prove himself a good *one*. Guard him against mistaken notions of the American people. You have deceived yourselves too long with vain expectations of reaping advantage from our little discontents. We are more thoroughly an enlightened people with respect to our political interests than perhaps any other under Heaven. Every man among us reads, and is so easy in his circumstances as to have leisure for conversations of improvement, and for acquiring information. Our domestic misunderstandings, when we have them are of small extent, tho' monstrously magnified by your microscopic newspapers. He who judges from them that we are on the point of falling into anarchy, or returning to the obedience of Britain, is like one who being shown some spots on the sun, should fancy that the whole disk would soon be overspread with them and that there would be an end of daylight. The great body of intelligence among our people, surrounds and overpowers our petty dissensions, as the sun's great mass of fire diminishes and destroys his spots. Do not therefore any longer delay the evacuation of New York in the vain hope of a new revolution in your favor, if such a hope has indeed had any part in occasioning that delay. It is now nine months since the evacuations were promised. You expect with reason that the people of New York should do your merchants justice in the payment of their old debts; consider the injustice you do them in keeping them so long out of their habitations and out of their business by which they might have been enabled to make payment.

"There is no truth more clear to me than this that the great interest of our two countries is a thorough reconciliation. Restraints on the freedom of commerce and intercourse between us can afford no advantage equivalent to the mischief they will do by keeping up ill humor and promoting a total alienation. Let you and I, my dear friend, do our best towards advancing and securing that reconciliation. We can do nothing that will in a dying hour afford us more solid satisfaction." (Dr. Franklin to David Hartley, Sept. 6, 1783, Franklin MSS. Dept. of State; 10 Sparks' Franklin, 1.)

The letter to the Mr. Fox, above alluded to, is dated September 5, 1783, and is in the following words:

"I received in its time the letter you did me the honour of writing to me by Mr. Hartley; and I can not let him depart without expressing my

satisfaction in his conduct towards us and applauding the prudence of that choice which sent us a man possessed of such a spirit of conciliation, and of all that frankness sincerity and candour which naturally produce confidence, and thereby facilitate the most difficult negociations. Our countries are now happily at peace, on which I congratulate with you most cordially; and I beg you to be assured that as long as I have any concern in publick affairs, I shall readily and heartily concur with you, in promoting every measure that may tend to prŏmote the common felicity."

In the draft of Dr. Franklin's letter of September 13, 1783, to Mr. Boudinot, President of Congress (10 Sparks' Franklin, 15; 2 Dip. Corr., 484), is the following:

"This court [of France] continues favorable to us. Count de Vergennes was resolute in refusing to sign the definitive treaty with England before ours was signed. The English ministers were offended, but complied. I am convinced that court [of Great Britain] will never cease endeavoring to disunite us. We shall, I hope, be constantly on our guard against those machinations; for our safety consists in a steady adherence to our friends, and our reputation in a faithful regard to treaties, and in grateful conduct towards our benefactors. [The malignity of the refugees in England is outrageous. They fill the papers with falsehoods to exasperate that nation against us and depreciate us in the eyes of all Europe. They may do us some present mischief, but time and prudence will draw their teeth, pare their claws, and heal the scratches they are making on our national character.]"

The passage in brackets is marked out in the draft and does not appear in the letter as actually sent. But its statement as to the efforts of the refugees to prevent peace and to embitter the relations between Great Britain and the United States is abundantly verified by the subsequently published letters and memoirs of Curwen and Hutchinson.

"The affairs of Ireland are still unsettled. The Parliament and volunteers are at variance; the latter are uneasy that in the late negotiations for a treaty of commerce between England and America the British minister had made no mention of Ireland, and they seem to desire a separate treaty of commerce between America and that Kingdom.

"It was certainly disagreeable to the English ministers, that all their treaties for peace were carried on under the eye of the French court. This began to appear towards the conclusion, when Mr. Hartley refused going to Versailles to sign there with the other powers our definitive treaty, and insisted on its being done at Paris, which we in good humor complied with, but at an earlier hour, that we might have time to acquaint le Comte de Vergennes before he was to sign with the Duke of Manchester. The Dutch definitive was not then ready, and the British Court now insists on finishing it at London or the Hague. If therefore the Commission to us, which has been so long delayed, is still intended, perhaps it will be well to instruct us to treat either here or at London, as we may find most convenient. The treaty may be conducted even there in concert and in the confidence of communication with the ministers of our friends, whose advice may be of use to us.

"With respect to the British Court, we should I think be constantly upon our guard, and impress strongly upon our minds that though it has made peace with us, it is not in truth reconciled either to us or to its loss of us, but still flatters itself with hopes that some change in the affairs of Europe, or some disunion among ourselves, may afford them an opportunity of recovering their dominion, punishing those who have most offended, and securing our future dependance. It is easy to see by the general turn of the ministerial newspapers (light things, indeed as straws and feathers, but like them they show which way the wind blows) and by the malignant improvement their ministers make, in all the foreign courts, of every little accident or dissension among us, the riot of a few soldiers at Philadelphia, the resolves of some town meetings, the reluctance to pay taxes, &c., &c., all which are exaggerated, to represent our Governments as so many anarchies, of which the people themselves are weary, and the Congress as having lost its influence, being no longer respected: I say it is easy to see from this conduct, that they bear us no good will, and that they wish the reality of what they are pleased to imagine. They have too a numerous royal progeny to provide for, some of whom are educated in the military line. In these circumstances we can not be too careful to preserve the friendships we have acquired abroad, and the union we have established at home, to secure our credit by a punctual discharge of our obligations of every kind, and our reputation by the wisdom of councils: Since we know not how soon we may have a fresh occasion for friends, for credit, and for reputation.

"The extravagant misrepresentations of our political state, in foreign countries, made it appear necessary to give them better information, which I thought could not be more effectually and authentically done than by publishing a translation into French, now the most general language in Europe, of the Book of Constitutions, which had been printed by order of Congress. This I accordingly got well done, and presented two copies handsomely bound to every foreign minister here, one for himself, the other more elegant, for his Sovereign. It has been well taken and has afforded matter of surprise to many, who had conceived mean ideas of the state of civilization in America, and could not have expected so much political knowledge and sagacity had existed in our wildernesses. And from all parts I have the satisfaction to hear that our Constitutions in general are much admired. I am persuaded that this step will not only tend to promote the emigration to our country of substantial people from all parts of Europe, by the numerous copies I shall disperse, but will facilitate our future treaties with foreign courts who could not before know what kind of Government and people they had to treat with. As in doing this, I have endeavored to further the apparent views of Congress in the first publication, I hope it may be approved and the expense allowed. I send herewith one of the copies." (Dr. Franklin to Thomas Mifflin, President of Congress, Dec. 25, 1783, Franklin MSS., Dept. of State; 10 Sparks' Franklin, 37 et seq.)

"I have received your favor of the 30th of September, for which I thank you. My apprehension that the union between France and our States might be diminished by accounts from hence, was occasioned by the extravagant and violent language held here by a public person in public company, which had that tendency; and it was natural for me to think his letters might hold the same language; in which I was

right; for I have since had letters from Boston informing me of it. Luckily here, and I hope there, it is imputed to the true cause, a disorder in the brain; which though not constant has its fits too frequent. I will not fill my letter with an account of those discourses; Mr. Laurens, when you see him, can give it to you; I mean of such as he heard in company with other persons; for I would not desire him to relate private conversations. They distressed me much at the time, being then at your earnest instances soliciting for more aids of money, the success of which solicitation such ungrateful and provoking language might I feared have had a tendency to prevent. Enough of this at present." (Dr. Franklin to Robert Morris, Dec. 25, 1783, Franklin MSS., Dept. of State; 10 Sparks's Franklin, 43.)

"I have received and laid before the King your letters of the 17th 18th and 21st instant together with the three packets of papers containing conversations with Dr. Franklin and Mr. Jay, and your observations thereupon enclosed in your letter of the 17th. And I am commanded to signify to you His Majesty's approbation of your conduct in communicating to the American commissioners the fourth article of your instructions, which could not but convince them, that the negotiations for peace, and the cession of independence to the thirteen united colonies, were intended to be carried on and concluded with the commissioners in Europe. Those gentlemen having expressed their satisfaction concerning that article it is hoped they will not entertain a doubt of His Majesty's determination to exercise in the fullest extent the powers with which the act of Parliament hath invested him; by granting to America full, compleat and unconditional independence, in the most explicit manner as an article of treaty. But you are at the same time to represent to them, if necessary, that the King is not enabled by that act to cede independence, unconnected with a truce or treaty of peace; and that therefore the cession of independence cannot stand as a single, separate article, to be ratified by itself; but may be (and His Majesty is willing shall be) the first article of the treaty, unconditionally of any compensation, or equivalent to be thereafter required in the said treaty. You will observe, that the very article of your instructions referred to, is conformable to this idea, as it is expressly mentioned to be offered by His Majesty as the price of peace; and that independence, declared and ratified absolutely and irrevocably, and not depending upon the event of concluding an entire treaty, might in the end prove a treaty, for the purpose of independence alone, and not for a peace or truce; to which objects all the powers of the act refer.

"I should think it unnecessary here to advert to the treaty of 1607 between the court of Spain and the United Provinces, were it not that you represent Mr. Jay as having quoted the conduct of the Dutch on that occasion by way of precedent. If you look into the Corps Diplomatique, and the other books upon the subject, you will see this gentleman is mistaken in his opinion. It appears, that the Spaniards did indeed declare previous to the truce in 1607 that they would treat with the states, *en qualité et comme les tenans pour etre provinces et pais libres sur les quels ils ne pretendent rien*, but it is to be observed, that this declaration is itself conceived in very qualified terms and though (as appears from Jeannin's account of the subsequent negotiation) the states endeavored to insert the words *pour toujours* and to omit the word *comme* so as to make the declaration absolute and

final; it remained in the original shape. The declaration was itself inserted *as the first article* in the body of the truce, and *no ratification* of this declaration was received from the King of Spain *till after the truce was agreed upon*, and what is still stronger the ratification, when it came actually *restricted* by express terms, the acknowledgment of independence *to last no longer than the time of the truce*. The same declaration was again inserted as the *first article* of the twelve years' truce in 1607 and afterwards a final and complete acknowledgment of the independence of the states was inserted as the *first article* in the preliminaries of peace settled in 1646 and afterwards in the same manner as the *first article* in the peace of Munster in 1648 which put the *last completion to the business*.

"If the American commissioners are, as His Majesty is sincerely disposed to a speedy termination of the calamities of war, it is not to be conceived, that they will be inclined to delay, and to embarrass the negotiation by refusing to accept the independence as an article of the treaty, which by that means may be to them secured finally and completely, so as to leave no possible ground of jealousy or suspicion. But in order to give the most unequivocal proof the King's earnest wish to remove every impediment, I am commanded to signify to you His Majesty's disposition to agree to the plan of pacification proposed by Dr. Franklin himself, including as it does, the great point in question as part of the first article.

"The articles as specified by Dr. Franklin to you, and recited in your letter to the Earl of Shelburne of the 10th July last are as follows viz:

"(1) Of the first class *necessary* to be granted independence full and complete in every sense to the thirteen States, and all the troops to be withdrawn from thence.

"(2) A settlement of the boundaries of *their* colonies, and the loyal colonies.

"(3) A confinement of the boundaries of Canada, at least to what they were before the last act of Parliament, you think in 1774 if not to a still more contracted state, on an ancient footing.

"(4) A freedom of fishing on the banks of Newfoundland, and elsewhere, as well for fish as whales.

"These articles were stated by you as all that Dr. Franklin thought necessary; and His Majesty trusting that they were suggested with perfect sincerity and good faith, has authorized you to go to the full extent of them. The third article, however must be understood and expressed to be confined to the limits of Canada as before the act of 1774. As to the fourth *the liberty of fishing* the privilege of drying not being included in Dr. Franklin's demand, it is taken for granted that it is not meant to be inserted in the treaty. His Majesty is also pleased for the salutary purposes of precluding all future delay, and embarrassment of negotiation, to wave any stipulation by the treaty for the undoubted rights of the merchants whose debts accrued before the year 1775 and also for the claims of the refugees for compensation for their losses as Dr. Franklin declares himself unauthorized to conclude upon that subject; yet His Majesty is well founded, it is hoped, in his expectation, that the several colonies will unite in an equitable determination of points upon which the future opinion of the world, with respect to their justice and humanity, will so obviously depend. But, if after having pressed this plan of treaty to the

utmost, you should find the American commissioners determined not to proceed unless the independence be irrevocably acknowledged, without reference to the final settlement of the rest of the treaty, you are to endeavor to obtain from them a declaration, that if this point of independence were settled they would be satisfied as far as relates to America with such farther concessions as are contained in the four articles as above stated. You are then, but in the very last resort, to inform them, in manifestation of the King's most earnest desire to remove every impediment to peace, that His Majesty is willing, without waiting for the other branches of the negotiation, to recommend to his Parliament to enable him forthwith to acknowledge the independence of the thirteen united colonies, absolutely and irrevocably, and not depending upon the event of any other part of the treaty.

"But upon the whole, it is His Majesty's express command, that you do exert your greatest address to the purpose of prevailing upon the American commissioners to proceed in the treaty, and to admit the article of independence as a part, or as one only of the other articles which you are hereby empowered to conclude." (T. Townshend to Richard Oswald, Sept. 1, 1782, Franklin MSS., Dept. of State Printed in part in 9 Sparks's Franklin, 403, 404, note.)

A memorandum is attached to Mr. Oswald's letter to Mr. Townshend of September 11, 1782, entitled, "Minutes regarding the intended treaty with the commissioners of the colonies, and what is required of me by His Majesty's instructions on that head 29 August, 1782."

In this memorandum occurs the following:

"Article 4. A freedom of fishery on the banks of Newfoundland and elsewhere said to be another indispensable article.

"This was proposed and read out of the minute by Dr. Franklin on the 10th July under this general description. I did not then think it proper to ask for an explanation; nor whether he included a privilege of drying fish on the island of Newfoundland.

"As to fishing on the Great Bank or any other bank, I did not think it material to ask any questions, as I supposed the privilege would not be denied them: or if denied, I doubted whether their exclusion could be maintained but by continuing in a state of perpetual quarrel with the people of the New England governments. An explanation was still the less necessary, that a question on the same subject would come under consideration in our treaty with France. In the determination of this last point, perhaps it may be no loss to Great Britain that the Americans are (with respect to the fishing part) admitted to an equal privilege with the French. These four articles were to the best of my remembrance all that were said by the Doctor on the 10th July as indispensable in a settlement of any kind." (Franklin MSS., Dept. of State.)

Mr. Laurens, on February 28, 1784, in a heretofore unpublished letter to Dr. Franklin (Franklin MSS., Dept. of State), writes from London:

"A large meeting of merchants and West India proprietors are at this moment assembled, to deliberate on the trade between the British islands and the United States. You will perceive from the contents of Mr. Edward's pamphlet that the West India planters and plantation holders are not a little alarmed. I am promised the result of the meeting some time this evening. If it reaches me in time you

shall be informed in a P. S., but 'tis boldly asserted here by certain persons, instructed as I apprehend by the late ministry and encouraged perhaps by the impolitic droppings of a friend, that there is no power at present subsisting on the part of America to treat for commerce with Great Britain. I can only reply that I believe 'tis a mistake, and hope to be soon fully informed. Meantime the United States seem to have at length felt the effect of the proclamation of 2d July 1783. No doubt that of December will be a provoking aggravation. Let our people determine to act wisely and these conjurers [*sic*] will soon be compelled to act with more wisdom and with a little more sincerity than we have experienced from them in the last eleven months, or as many years."

To this Franklin replied in a letter from Passy, of March 12, 1784. In this letter occurs the following passages (see 10 Sparks' Franklin, 73):

"I thank you much for your information of the proceedings of the West India people. It seems to me that we cannot be much hurt by any selfish regulations the English may make respecting our trade with their islands. Those who at present wish to kick the hedgehog, will grow tired of that sport when they find their own toes bleed."

In a letter from Mr. Laurens, London, April 18, 1784, to Dr. Franklin (heretofore unpublished) is the following:

"Nothing further done by administration respecting American intercourse and commerce. * * * A judicious intelligent friend who has been much consulted called upon me last night, and assured me 'nothing liberal or to good effect would be done, or he very much feared so, that he was tired and would be done with them. Mr. Pitt is well disposed having been well advised but the weight of the council is against him.' I feel no regret on this account difficulties will have an excellent effect on our side. I think my countrymen appear to most advantage when they have a rub to encounter and they seem to be at this moment taking measures which should have been adopted upon the first appearance of the proclamation of 2d July, 1783. The West India merchants and planters, every sensible man in trade with whom I converse, every unemployed manufacturer and many who dread loss of future orders are uneasy, and all will come right when we determine to act right." (Franklin MSS., Dept. of State.)

(2) EFFECT OF STIPULATIONS.

§ 825.

Acknowledgment of independence.

The several States which compose the Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign States, and did not derive them from concessions of the British King. The treaty of peace was a recognition, not a grant, of the independence of those States. Hence the laws of the several State governments passed after the Declaration of Independence were the

laws of sovereign States, and as such obligatory upon the people of each State.

McIlvaine *v.* Coxe's Lessee, 4 Cranch, 209; Harcourt *v.* Gaillard, 12 Wheat. 523.

"The astute and resolute representatives of the United States have on every occasion shown a marked superiority over ours in framing and interpreting treaties, and in the assertion or infringement of rights in which British interests were concerned; but in no instance have they given a more signal proof of their skill in this regard than they did in that portion of the treaty of 1783 which purported to define the territorial boundary between the mother country and her emancipated colonists." (*Diplomatic Review*, Oct. 1872, vol. 20, p. 231.)

As to the treaty of peace of 1782–3, see 1 John Adams's Works, 294, 355, 359; 3 id. 74, 78, 259, 281, 290, 299; 7 id. 119, 143, 165, 177, 238, 306, 431, 554, 562, 570, 606, 610, 639, 645, 649.

As to its signature and ratification, see 3 John Adams's Works, 348, 363–383; 8 id. 50, 54, 57, 72–92, 115, 134, 137, 143, 154, 165, 177, 180, 196, 204, 358; 9 id. 521.

For the application to the northeastern fisheries of the position that the treaty of peace was a recognition, not a grant, of independence, see supra, §§ 163, 164.

For a review of the stipulations relating to the boundary, see Moore, Int. Arbitrations, I. 97–119.

All British grants of land in the United States made subsequent to the Declaration of Independence are inoperative under the treaty of 1783.

Harcourt *v.* Gaillard, 12 Wheat. 523.

The United States, by the treaty of 1783 with Great Britain, acquired the sovereignty of Michigan, which was part of the French domain prior to the conquest by Great Britain in 1750, and as an incident of such sovereignty succeeded to the prerogatives of the King of France in dealing with seignioral estates for a forfeiture for non-fulfillment of the conditions of the fief.

United States *v.* Repentigny, 5 Wall. 211.

Article IV.

During the Revolutionary war various States, among which was Virginia, passed acts of sequestration and confiscation, by which it was provided that, if the American debtor should pay into the State treasury the debt due to his British creditor, such payment should constitute an effectual plea in bar to a subsequent action for the recovery of the debt. When the representatives of the United States and Great Britain met at Paris to negotiate for peace the question of the confiscated debts became a subject of controversy, especially in connection with that of the claims of the loyalists for the confiscation of their estates. Franklin and Jay,

though they did not advocate the policy of confiscating debts, hesitated, chiefly on the ground of a want of authority in the existing national government, to override the acts of the States. But when John Adams arrived on the scene he delivered one of those dramatic strokes of which he was a master, and ended the discussion by suddenly declaring, in the presence of the British plenipotentiaries, that, so far as he was concerned, he "had no notion of cheating anybody;" that the question of paying debts and the question of compensating the loyalists were two; and that, while he was opposed to compensating the loyalists, he would agree to a stipulation to secure the payment of debts. It was therefore provided, in the fourth article of the treaty, that creditors on either side should meet with no lawful impediment to the recovery in full sterling money of bona fide debts contracted prior to the war. This stipulation is remarkable, not only as the embodiment of an enlightened policy, but also as perhaps the strongest assertion to be found in the acts of that time of the power and authority of the National Government. Indeed, when the British creditors, after the establishment of peace, sought to proceed in the State courts they found the treaty unavailing, since those tribunals held themselves still to be bound by the local statutes. In order to remove this difficulty, as well as to provide a rule for the future, there was inserted in the Constitution of the United States the clause declaring that treaties then made, or which should be made, under the authority of the United States, should be the supreme law of the land, binding on the judges in every State, anything in the constitution or laws of any State to the contrary notwithstanding. On the strength of this provision the question of the debts was raised again, and was finally brought before the Supreme Court. On the question of the right of confiscation the judges differed, one holding that such a right existed, while another denied it, two doubted, and the fifth was silent. But as to the operation of the treaty all but one agreed that it restored to the original creditor his right to sue without regard to the validity or the invalidity of the Virginia statute.

See Ware *v.* Hylton, 3 Dallas, 199.

For a similar decision in regard to the Maryland statute, see Clerke *v.* Harwood (1797), 3 Dallas, 342.

As to the failure of Art. IV. of the treaty of peace and the decisions of the Supreme Court thereunder to secure effective redress, and the ultimate settlement of the matter, see 1 Moore's Int. Arbitrations, 271 et seq.

A, a citizen of Connecticut, owed a debt to B, a citizen of the same State. Some time after the beginning of the Revolutionary war B joined the British army, and in consequence the debt in question was confiscated to the State of Connecticut. After the close of the war, however, B sued A, then a citizen of Pennsylvania, for the recovery

of the debt, which, though B's whole estate, personal as well as real, was declared to be forfeited, had not in fact been collected from A. Held, that the principle of international law as to the revival of debts, or of remedies for the recovery of debts, did not apply where a debt had been confiscated for a treasonable act; that the provisions of Article IV. did not apply to such a case, and that B was not entitled to sue.

Camp *v.* Lockwood (Court of Common Pleas of Philadelphia County, 1788), 1 Dallas, 393.

The provisions of Article IV. did not extend to any obligation to pay money growing out of captures made during the war of property in the actual possession of the enemy, whatever might be the means employed in making such captures.

Hannay *v.* Eve (1806), 3 Cranch, 242.

Where a note was given in Virginia to British creditors in 1772 and was not barred by the State statute of limitations prior to the war, it was held that Article IV. of the treaty of peace prevented the operation of the statute after the war, although one of the plaintiffs was in the county in 1784 and remained there.

Hopkirk v. Bell (1806), 3 Cranch, 454; (1807), 4 Cranch, 164.

Articles V. and VI.

Article V., of the treaty of peace with Great Britain of 1783 saved the lien of a mortgage upon confiscated land which at the time remained unsold.

Higginson *v.* Mein (1808), 4 Cranch, 415.

Article V. did not apply to a forfeited mortgage, the right to redeem which had been lost at the time of the treaty.

Owings *v.* Norwood's Lessee (1809), 5 Cranch, 344.

Article VI. of the treaty of peace of 1783 protected from forfeiture, by reason of alienage, lands then held by British subjects.

Orr *v.* Hodgson, 4 Wheat. 453.

This was so even where, though the owner was attainted of treason and his estate confiscated, his estate was not taken possession of by the State before the peace. (Resp. *v.* Gordon, Supreme Court of Pennsylvania, 1788, 1 Dallas, 233.)

Where a claim to real estate depended on the question whether its confiscation under the laws of Maryland was complete at the time of the making of the treaty of peace, by the sixth article of which unconfiscated estates were protected, it was held that a writ of error would lie to the court of appeals of Maryland, on the ground that the con-

struction of the treaty was drawn in question and that the decision of the State court was adverse to the right set up under the treaty, though the question whether the treaty protected the claim depended upon the true construction of the State laws.

Smith *v.* Maryland (1810), 6 Cranch, 286.

The term "prosecutions," in Article VI. of the treaty of 1783, imports a suit against another in a criminal cause, such prosecutions being conducted in the name of the public, the ground of them being distinctly known as soon as they are instituted and being always under the control of the government.

Bradford, At. Gen., 1794, 1 Op. 50.

2. Jay Treaty, 1794.

(1) historical sketch.

§ 826.

By Article VII. of the treaty of peace of 1783 it was agreed that His Brittannic Majesty should, "with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants," withdraw his armies, garrisons, and fleets from the United States. When, on Nov. 25, 1783, the British forces were withdrawn from New York, complaint was made that they took with them, or sent in advance, 3,000 negroes; and in 1794 the British still occupied Detroit, Mackinaw, Fort Erie (Buffalo), Niagara, Oswego, Oswegatchie, Point au Fer, and Dutchmans Point. Washington, soon after he became President, made an effort to restore good relations between the two countries. After the conclusion of peace, John Adams was sent as minister of the United States to London, but no British minister was sent in return to the United States, and in time diplomatic relations fell into suspense. In these circumstances Washington authorized Gouverneur Morris, who was expected soon to be in London, to make unofficial inquiries as to the sentiments of the British ministry concerning the execution of the treaty of peace. Morris arrived in London March 28, 1790, and lost no time in calling on the Duke of Leeds, who was then minister for foreign affairs. Being cordially received, he assured the duke that all obstacles to the recovery of British debts had been removed by the adoption of the Constitution and the organization of the Federal courts. The duke, on the other hand, took the ground that the stipulations of the treaty should be performed in the order in which they stood, and finally declared that Great Britain would retard the evacuation of the posts till redress was granted to British subjects. In this declaration Pitt concurred. Morris's negotiations continued through the summer of 1790, without other result than the

promise of the British government to send a minister to the United States. This promise was fulfilled, but the negotiations which took place from November, 1791, to May, 1792, between Mr. Jefferson, who was then Secretary of State, and Mr. Hammond, the British minister, on the subject of the inexecution of the treaty, produced nothing more tangible than an exchange of certain voluminous diplomatic notes.

April 16, 1794, Washington sent to the Senate the nomination of John Jay, then Chief Justice of the United States, as envoy extraordinary to Great Britain. Washington, in explanation of his action, referred to the "serious aspect" of affairs and expressed the opinion that "peace ought to be pursued with unremitted zeal before the last resort, which has so often been the scourge of nations, is contemplated." The relations between the two countries had by this time been greatly embittered by the attacks made on neutral trade under the orders in council issued by the British government in the long contest with France that had lately begun. Jay's nomination was confirmed by a vote of 18 to 8. His instructions, which were signed by Edmund Randolph, were dated May 6, 1794. He sailed from New York on the 12th of the same month.

Jay had scarcely left the United States when the British governor of Canada, Lord Dorchester, made a speech, unfriendly in its character to the United States, to Indians then aroused against the United States, and three companies of a British regiment went to the foot of the rapids of the Miami, in the southern part of what is now the State of Ohio, to build a fort there. When complaints were made of these hostile acts the British minister at Washington justified both as defensible preparations for an actual state of war about to begin between the two nations, and retorted by complaining of the fitting out of French privateers in American ports, and of the "uniformly unfriendly treatment which His Majesty's ships of war . . . experienced in the American ports." President Washington, in transmitting the correspondence to both Houses of Congress, said: "This new state of things suggests the propriety of placing the United States in a posture of effectual preparation for an event which, notwithstanding the endeavors making to avert it, may, by circumstances beyond our control, be forced upon us."

Jay made his first formal representations to Earl Grenville July 30, 1794, and on the 6th of August submitted a series of articles. Various projects were exchanged, and on the 19th of November a treaty was signed.

For the correspondence between Jefferson and Hammond, concerning the inexecution of the treaty of 1783, see Am. State Papers, For. Rel. I. 188, 189, 190–193, 193–200, 201–237, 238.

See, also, the following documents:

Gouverneur Morris's agency in England, Am. State Papers, For. Rel. I. 121 et seq.

Jay's instructions and negotiations, id. 472, 476, 486, 705. "It is his [the President's] wish, too, that the characteristic of an American minister should be marked, on the one hand, by a firmness against improper compliances, and on the other by sincerity, candor, truth, and prudence, and by a horror of finesse and chicane. These ideas, however, will not oppose those temperate and firm representations which you meditate, should your present plan fail. *For it is fair, and indispensable, in the event of a rupture, to divide the nation from the government.*" (Randolph, Sec. of State, to Jay, Sept. 20, 1794, id. 497.)

"The treaty is printed in Am. State Papers, For. Rel. I. 520.

"That Mr. Jay's treaty was a bad one, few persons even then ventured to dispute." (Adams's Gallatin, 158.)

For Hamilton's vindication of the treaty, see Essays of Camillus, 4 and 5 Lodge's Hamilton, and 8 id. 386, 421, 423. For Hamilton's objections to the treaty when first published, see 1 Gibbs' Administrations of Washington and Adams, 223.

Concerning some of the disputed constructions of the treaty, see 1 John Adams's Works, 471, 477, 481; 9 id. 18, 27, 36, 40, 74, 138.

Pickering's instructions to Pinckney of Jan. 16, 1797, concerning the treaty are published in Am. State Papers For. Rel. I. 561.

For the series of British orders in council and French decrees, under which neutral commerce was subjected to depredations, see Moore, Int. Arbitrations, I. 299–307.

After Washington received the treaty he for some time deliberated upon the question whether to submit it to the Senate. With France, in the struggle in which she was then engaged with the European powers, popular sympathy was general and strong, while the feeling against Great Britain was correspondingly high, and in important particulars the treaty fell short of obtaining what the United States had demanded. Nor could it become effective upon its approval by the President and the Senate. Legislation, in the enactment of which the House must participate, was requisite for the execution of some of its provisions. Washington, however, determined, if possible, to carry it into effect. While it was pending before the Senate its provisions became public through the action of a member of that body. It was received with a storm of denunciation. Hamilton when attempting to speak in public in its defense was mobbed. But the excitement gradually abated. The influence of the mercantile classes was actively exerted in favor of the Administration, and the treaty was duly ratified. When it was sent to the House a motion was adopted, by a vote of 61 ayes to 38 noes, calling for the papers relating to the negotiation, including Jay's instructions. The President declined to comply with this request on the ground that the treaty, having been concluded and ratified in the manner prescribed in the Constitution, had become the supreme law of the

land; that the assent of the House was not necessary to its validity; that the treaty in itself exhibited all the objects requiring legislative provision, and that upon these the papers called for threw no light. In answer to this message the House, after a short debate, resolved by a large majority that in cases where legislation was required to carry a treaty into effect it was the right and duty of the House to act in such manner as might in its judgment "be most conducive to the public good," and that it was "not necessary to the propriety of any application" from the House to the Executive, for information desired by the former, and which might relate to the discharge of its constitutional functions, that the object for which the information might be wanted or applied for should be stated in the application.

About a fortnight later a resolution was introduced into the House to the effect that legislation ought to be adopted to carry the treaty into effect. When this resolution was first brought to a vote in Committee of the Whole there was an equal division. Subsequently, the question was carried in favor of the treaty by a vote of 51 to 48. Madison, who declared that the first impression as to the treaty was "universally and simultaneously against it," and who sided with those who sought to assert the prerogatives of the House, said, after the vote in favor of carrying the treaty into effect was taken: "The progress of this business throughout has been to me the most worrying and vexatious I ever encountered."

Davis's Notes, Treaty Vol. (1776–1887), 1229, citing Annals, 4 Cong. 1 sess. 759, 761–762, 771–772, 940; 2 Madison's Works, 64, 69, 73, 75, 88, 89, 94, 99.

"The objects in view in opening a negotiation with Mr. Jay, as special envoy, were as follows:

"(1) The vacating by the British authorities of the border posts on United States territory, including Fort Erie, Detroit, Oswego, and Michilimackinac, which they still held in defiance of the treaty of peace, and which they used, not merely to retard the progress of United States settlement in those quarters, but to keep the adjacent Indian tribes in subjection to Great Britain and in hostility to the United States.

"(2) The recognition of the maxim 'Free ships make free goods.'

"(3) The establishing of a restricted system of contraband.

"(4) The placing of Great Britain on a position of equality with France so far as concerns belligerent rights, and so far as it could be done consistently with the treaty with France.

"(5) The surrender of impressment.

"(6) The opening of the West India trade.

"(7) The surrender of the rule that no trade could be allowed to a neutral in war which he could not carry on in peace.

" (1) The first of these proposed concessions was the only one which was obtained and it was granted in a way peculiarly ungracious. The treaty of peace required an immediate surrender of these posts. Great Britain refused to surrender them, and made them the basis of unjustifiable encroachments on the United States. Jay's treaty not only condoned this outrage, but permitted the posts to be held by Great Britain until June, 1796.

" (2) So far from 'free ships and free goods' being recognized, it was agreed, in gross contravention of the treaty of alliance with France, that French goods in United States merchant vessels should be subject to seizure by Great Britain.

" (3) So far from the list of contraband being restricted, it was expanded so as to include 'timber for shipbuilding, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted;' and this was followed by the statement that provisions could be confiscated, subject to a right on the part of the owners to claim payment at a rate to be fixed at the British port to which the vessel was taken, a right which, of course, turned out to be illusory.

" (4) So far from Great Britain being raised by the treaty to equal privileges with France, she was, by virtue of her maritime supremacy, given advantages over France which virtually destroyed those to which France was entitled by treaty. Thus, while France, by treaty, was precluded from seizing British goods when in United States vessels, Great Britain, on the other hand, was permitted to seize French goods, or goods going to France, on United States vessels, and even to seize United States provisions going on United States vessels to France or French colonies, as contraband. The stipulation for compensation for such seizures, even if it had been carried out, which it was not, would have been no relief to France, since the result was to advance the British scheme of starving the French population, provisions sent from the United States to France and to French colonies being in this way carried to England. Article XXI., also, precluding citizens of the United States from serving under France, and providing that if a citizen of the United States should take a commission to act as a French privateer he could be treated by Great Britain as a pirate, was as much in conflict with the law of nations as with the treaty of alliance with France. And this, as well as the prior articles, was in conflict with the guarantee given by the United States, for a consideration unquestionably sufficient, of the West India possessions of France.

" (5) Impressment was not surrendered.

"(6) Although Jay's instructions required him to sign no treaty which did not in some measure open the West India trade, the treaty

he signed opened that trade only to United States vessels of 70 tons, whose cargoes had been received in ports of the United States. This concession, however, was more than neutralized by the admission of British vessels of any tonnage to the United States ports for West India commerce; and then it was made useless by the condition that United States vessels should not transport to any foreign country except Great Britain, sugar, cotton, coffee, or molasses. The only excuse offered for this last extraordinary condition was that Mr. Jay was not aware (though Lord Grenville, who negotiated the treaty with him, was) that cotton was, or could be, produced in the United States.

" (7) The rule that there should be no trade by the United States in war with ports with which she could not trade in peace was not surrendered.

" It is true that the treaty provided for a commission to determine the idemnity due for prior British spoliations of United States commerce. But for this a price was paid vastly exceeding the value of any spoliation indemnity that could possibly have been received. Aside from the enormous concessions above stated we bound ourselves to assume in a mass British debts, many of which were incapable of proof. It is true that United States vessels were allowed under the limitation specified above, to trade with the West Indies, but they were shut out from the East India coasting trade, and United States merchants were not permitted to make East Indian settlements. The United States, ' in return for so paltry a favor, opened all the ports she controlled, and surrendered her own commercial advantages in the existing war with scarce a qualification.' (1 Schouler's Hist. U. S., 292.)

" Objectionable, however, as was the treaty, its ratification, if the alternative was war with England, may have been the more prudent course. And it must be remembered President Washington may have had fuller information as to the preparation of the country for war than is possessed by us, and more accurate knowledge, also, of the intentions of the British Government. But the perils of rejecting the treaty do not make its terms less overbearing and unfair."

Dr. Francis Wharton, Note, Wharton's Int. Law Digest, II. 161.

As to the foregoing criticisms upon the treaty, the following observations may be made:

1. The evacuation of the border posts is regulated by Art. II., which should be read in the full text.

2. The failure to require the recognition of the rule of free ships free goods, while it operated to the disadvantage of France, and was in that sense out of harmony with our intimate and exceptional relations with that country, was not a violation of any direct treaty engagement.

3–4. The treaty, instead of stating that provisions " could be confiscated," expressly declared (Art. 18) " the same shall not be confiscated; "

and the promise of compensation, instead of proving to be illusory, yielded upwards of $11,000,000. (Trumbull's Autobiography, 239; Moore, Int. Arbitrations, I. 341–344.)

5. Great Britain continued for fifteen years after the Jay treaty, under successive administrations in the United States, to exercise without forcible resistance the claim of impressment; nor did she renounce the claim in the treaty of Ghent. It is true that the suspension of the war in Europe seemed to deprive the question of its pressing practical importance.
6. Art. XII., relating to the West India trade, certainly was very objectionable, and was suspended by an additional article adopted by the Senate.
7. It was not till 1805 that the "rule of the war of 1756," which seems here to be referred to, was so applied as to prevent the American carrying trade from practically nullifying it by the profitable system of "indirect voyages." (See Adams's History of the United States II. 324 et seq.; III. 43 et seq.) It may be added that by Art. VII. of the treaty, and the proceedings of the commission thereunder, the foundation was laid of the principles on which the United States recovered the award at Geneva in 1872.

"Jay's treaty contained several new features, some of which have since been adopted in other treaties." It "recognized the right of the United States, which had been inserted in the treaties concluded under the old form of government, to authorize aliens to hold and dispose of real estate in the several States. It aimed to establish, as far as the British monopoly of that day would permit, reciprocity in trade on the American continent; and it declared that by reciprocity it was 'intended to render in a great degree the local advantages of each party common to both, and thereby to promote a disposition favorable to friendship and good neighborhood.' It made reciprocal provisions for the equalization of import and export duties. It provided a mode for settling by arbitration differences which had arisen between the two powers, and it also declared that it was 'unjust and impolitic that debts and engagements contracted and made by individuals, having confidence in each other, and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences;' and it, therefore, provided that there should be no confiscation or sequestration of debts, in event of war between the parties. By it the parties agreed that an innocent neutral vessel, approaching a blockaded port, without knowledge of the blockade, should be warned and turned away without detention and without confiscation of the vessel, or of the cargo, unless contraband. It required each party to bring to the notice of the other any causes of complaint it might have before proceeding to the extremities of reprisals or of war: and it made provision, to a limited extent, for the extradition of persons charged with the commission of crimes."

Davis's Notes, Treaty Vol. (1776–1887), 1222–1223. See, also, id. 1321.

"How far they [Jay's instructions] were executed, and why he failed to comply with some of them, will appear by reference to the instructions and correspondence which accompanied the President's message of June 8 [1795], transmitting the treaty to the Senate (1 Am. State Papers, For. Rel. 470–525). The reasons which induced the President and his advisers to assent to it are detailed in a letter from Pickering to Monroe of September 12, 1795 (id. 596). . . . On the 5th of May, 1796, President Washington submitted to the Senate an explanatory article with the reasons which had made it necessary (id. 551); and another explanatory article was added in March, 1798. The appropriations for carrying into effect the treaty . . . were made by Congress on the 6th of May, 1796 (1 Stat., 459); and by Parliament on the 4th of July, 1797 (2 Am. State Papers, For. Rel. 103)." (Davis's Notes, id. 1321–1322.)

Note the following:

Commission under Art. V. of the treaty, to determine what was the true St. Croix River. (Moore, Int. Arbitrations, I. 1–43). Commission under Art. VI., to decide upon claims growing out of the failure to execute the provisions of Art. IV. of the treaty of peace. (Id. 271–298).

Commission under Art. VII., to decide upon claims growing out of the violation of neutral rights and the failure to perform neutral duties. (Id. 299–349.)

(2) PARTICULAR STIPULATIONS.

§ 827.

The provision in the 3d article of the Jay treaty, relating to the duties on goods and merchandise, does not extend to tonnage duties, nor does the treaty extend any dispensation to the subjects of Great Britain from the laws of the United States, which regulate the trade and intercourse of our own citizens with the Indian tribes.

Breckinridge, At. Gen., 1806, 1 Op. 155.

To insure the speedy and due execution of the 6th article of the treaty of 1794, public officers should, when requested, furnish authenticated copies of documents in their custody, and should assist in bringing forward testimony according to the duties of their several stations; and individuals should not refuse to give testimony.

Lee, At. Gen., 1798, 1 Op. 82.

As to the execution of Art. VI., see 1 Moore Int. Arbitrations, 271.

Where an alien enemy took and held lands in Virginia by devise in fee, it was decided that his title was confirmed to him by the treaty between the United States and Great Britain of 1794, Article IX., his possession and seizin having continued up to and after the treaty, though an action to dispossess him in behalf of the State was begun before that time.

Fairfax's Devisee *v.* Hunter's Lessee (1813), 7 Cranch, 603.
Followed in Jackson *v.* Clarke (1818), 3 Wheat. 1; Craig *v.* Radford, (1818), id. 594, 599.
See, also, Blight *v.* Rochester, 7 Wheat. 535; Society for the Propagation of the Gospel *v.* Wheeler, 2 Gall. 105.

Article IX. of the Jay treaty did not apply where the ancestor under whom the heirs claimed had ceased to hold the title to the land when the treaty was made.

Harden *v.* Fisher (1816), 1 Wheat. 300, reversing 1 Paine, 55.

The term "heirs," in Article IX., was not meant to include persons other than such as were British subjects or American citizens at the time of the descent cast.

Orr *v.* Hodgson, 4 Wheat. 453.

The treaties of 1783 and 1794 only protected titles in existence at the time the treaties were proclaimed, and did not operate on titles subsequently acquired. But in the case of titles existing at the proclamation of the treaties actual possession was not necessary.

Blight *v.* Rochester, 7 Wheat. 535. See Shanks *v.* Dupont, 3 Pet. 242.

3. Monroe-Pinkney and Cognate Negotiations.

§ 828.

"Many of the informal confidential documents connected with the negotiations in London in 1806 are among the Monroe Papers deposited in the Department of State. These papers show that Mr. Fox, who took the head of the department of foreign affairs on the accession, after Mr. Pitt's death, of the Fox-Grenville ministry to power, showed a conciliatory disposition towards, and a great desire to effect a permanent peace with, the United States. He stated at the outset that he was embarrassed by the recent adoption by Congress of the importation act. Mr. Monroe replied that this bill had passed while Mr. Pitt was in power, and when measures antagonistic to the United States were passed with increasing rigor, but that he had no doubt that, if a more liberal course was adopted in England, Congress would recede from its position of retaliation. Before, however, negotiations had materially advanced, Mr. Fox's illness increased so far as to make his withdrawal from active business essential: and with this withdrawal departed the hopes of Mr. Monroe and of Mr. Pinkney of that bold conciliatory action by the ministry which required the aid of Mr. Fox's genius and generosity to secure its adoption. Upon Mr. Fox's illness, the negotiation on the British side was placed in the hands of Lord Auckland, whose prior associations involved him in Mr. Pitt's policy, and Lord Howick, afterwards Earl Grey,

who seems to have left the lead in the correspondence to Lord Auckland. The position taken in their conferences by the American envoys was that impressment, being the exercise of a merely municipal power, could not be enforced extraterritorially. Lord Auckland, on the other hand, falling back on the doctrine of indissoluble allegiance, urged that the King had the right at any time and in any place to call on the services of his subjects to aid him in war; and that neutral merchant ships were not to be regarded as neutral territory to such an extent as to preclude their visitation and search by British officers in quest of British subjects. Backed in this position by the Crown law officers, the British commissioners declared that they could not assent to a solemn surrender of this right, but that they would be willing to discuss any compromise by which the matter could be adjusted satisfactorily to both nations. Mr. Monroe suggested that the Government of the United States, as an equivalent, should undertake to return to British ships all sailors who had deserted from such ships. The counter project of the British commissioners was that statutes should be adopted in the United States making it penal for United States officers to give certificates of citizenship to British subjects, and in Great Britain making it penal for British officers to impress citizens of the United States. The objection to this by the American envoys, an objection they held to be insuperable, was that it prejudiced more or less seriously the right of expatriation. The British commissioners then said that while not prepared explicitly to surrender the right of impressment, reserving the question for future discussion, yet that there should be an understanding between the Governments that this prerogative should only be exercised on the most extraordinary contingencies; that instructions should be given to British commanders to act with the extremest caution even when such emergencies should occur; and that prompt redress should be given if any abuse of the prerogative should be shown. Mr. Monroe and Mr. Pinkney being, by this suggestion, left in a position of either disobeying their instructions or of giving up all hopes of a treaty, determined to accept the treaty with this modification, though with a hesitancy and distrust which is abundantly evidenced by the private correspondence among Mr. Monroe's papers. The final reason on their part was that if they erred in thus accepting the treaty, the error could be readily corrected at Washington; if they erred in rejecting the treaty and left London, the error was irremediable. They stated, therefore, to the British commissioners that if they accepted the proposed compromise it was on their own responsibility, the question being reserved for revision at Washington. The British commissioners on their part conceded to American vessels the right, denied to them by recent rulings in the admiralty court, of carrying European goods, not contraband of war, to any belligerent

colony not blockaded by British ships, provided such goods were American property, and had previously been landed in the United States, paying a duty of at least one per cent above what was refunded on reexportation. The produce of such colonies also, by the same proposal, might, if not contraband of war, be brought into the United States, and, if it had paid a duty of two per cent above drawback, be exported to European belligerent nonblockaded ports.

"When the treaty arrived at Washington Mr. Jefferson was for a time in doubt as to the position to take. He had been vehemently attacked for his peace tendencies.[a] His associations, either personal or political, had not been with the shipping interests, and for this very reason he felt himself peculiarly distrustful of any measures which might sanction a claim so odious to those interests as was that of impressment. Before he received information that the American envoys had agreed to the treaty, while they were supposed at Washington to be still hesitating as to its acceptance, Mr. Madison wrote to them, both officially and confidentially, not to hazard the concession. The concession was made, and Mr. Madison's private correspondence shows how reluctant both he and Mr. Jefferson were to overrule it. Mr. Jefferson, in his subsequent letters to Mr. Monroe, speaks of his final nonacceptance of the treaty as an act peculiarly painful to himself. No one can study Mr. Monroe's unpublished writings without seeing that the scar remained with him through his whole life, and that the remembrance of his action in 1807 in agreeing to what he believed to be the dropping of impressment by ignoring it, was vivid in his memory when he submitted to the same method of disposing of the question by the commissioners at Ghent in 1814. But there in this distinction: In 1807 impressment was impliedly recognized in the British proposals by the very restrictions placed on it. In 1814 it was dropped out of sight.

"The apparent acquiescence in impressment was the controlling reason—aside from the fact that the treaty was in conflict with instructions—in Mr. Jefferson's mind for its rejection. It was said at the time that the treaty was killed by Mr. Madison from his jealousy of Mr. Monroe. The correspondence, unpublished as well as published, of Mr. Jefferson, Mr. Madison, and Mr. Monroe gives no trace of such jealousy. Mr. Madison's letters show throughout the greatest anxiety that Mr. Monroe's mission should succeed. Mr.

[a] "'I have been for a long time,' said Mr. Quincy, then the leading representative of New England federalism, in a speech on January 19, 1809, 'a close observer of what has been done and said by the majority of this House; and, for one, I am satisfied that no insult, however gross, offered to us by either France or Great Britain, could force this majority into the declaration of war. To use a strong but common expression, it could not be kicked into such a declaration by either nation.' (Quincy's Speeches, 143.)

Jefferson, in withholding the treaty from the Senate, followed, as the papers show, his own counsels, and it is impossible, on reading the correspondence, not to see that, so far from desiring to injure Mr. Monroe being one of his motives, his peculiar affection for Mr. Monroe was one of the chief grounds for his hesitancy.

"Mr. Jefferson, in his annual message in October, 1807, gave the following reasons for nonacceptance of the treaty: 'Some of the articles might have been admitted on a principle of compromise, but others were too highly disadvantageous; and no sufficient provision was made against the principal source of the contentions and collisions which were constantly endangering the peace of the two nations.'"

Note by Dr. Francis Wharton, Wharton's Int. Law Digest, § 150b, II. 163.

For correspondence relating to the Monroe-Pinkney negotiations, see 3 Am. State Papers, For. Rel. 119, 133 et seq. At pp. 142, 160, 173 of the same volume may be found Monroe and Pinkney's explanations and Mr. Madison's replies.

The question is discussed in 2 Lyman's Dip. of the United States, chap. I.

As to impressment and the Monroe-Pinkney negotiations, see supra, § 317.

That the treaty was rejected, not because it failed to provide that free ships should make free goods, but because it contained provisions that seemed to sanction the claim of impressment, see President Madison to Mr. Joy (unofficial), Jan. 17, 1810, 2 Madison's Works, 467, and President Jefferson to Mr. Bowdoin, April 2, 1807, 5 Jefferson's Works, 63. Among the MS. Monroe Papers there is a letter from Mr. Bowdoin to Mr. Monroe of Feb. 27, 1807, expressing a general but qualified approval of the treaty.

As to the negotiations of Messrs. Erskine and Jackson, see supra, § 640; 3 Am. State Pap. For. Rel. 300 et seq.

For correspondence between Mr. Foster, British minister at Washington, and Mr. Monroe, Secretary of State, in 1811–1812, see 3 Am. State Papers, For. Rel. 435 et seq.

In a private letter from Mr. Jefferson to Mr. Monroe, May 29, 1807, Mr. Jefferson, commenting on the conduct of the press in reference to the Monroe-Pinkney treaty, speaks of party efforts "to sow tares between you and me, as if I were lending a hand to measures unfriendly to any views which our country might entertain respecting you. But I have not done it [written to you on the subject], because I have before assured you that a sense of duty, as well as of delicacy, would prevent me from ever expressing a sentiment on the subject, and that I think you know me well enough to be assured I shall conscientiously observe the line of conduct I profess. I shall receive you on your return with the warm affection I have ever entertained for you, and be gratified if I can in any way avail the public of your services." (5 Jefferson's Works, 82.) In a private letter from Mr. Jefferson to Mr. Monroe, April 11, 1808, Mr. Jefferson's explanation of his course as to the treaty, and as to his relations to Mr. Monroe, are given in greater detail. (MS. Monroe Papers.)

"The treaty was communicated to us by Mr. Erskine on the day Congress was to rise. Two of the Senators inquired of me in the evening,

whether it was my purpose to detain them on account of the treaty. My answer was, 'that it was not: that the treaty containing no provision against the impressment of our seamen, and being accompanied by a kind of protestation of the British ministers, which would leave that Government free to consider it as a treaty or no treaty, according to their own convenience, I should not give them the trouble of deliberating on it.' This was substantially, and almost verbally, what I said whenever spoken to about it, and I never failed, when the occasion would admit of it, to justify yourself and Mr. Pinkney, by expressing my conviction, that it was all that could be obtained from the British Government; that you had told their commissioners that your Government could not be pledged to ratify, because it was contrary to their instructions; of course, that it should be considered but as a project; and in this light I stated it publicly in my message to Congress on the opening of the session." (President Jefferson to Mr. Monroe, Mar. 10, 1808, 5 Jefferson's Works, 254.)

"It has been sometimes assumed that the President's rejection of the treaty formed by Monroe and Pinkney was the origin of all the hostile feeling in England against us, and the foundation of the war of 1812. Canning did afterwards complain that the President had no right to approve what he pleased and condemn what he pleased in the treaty, and instruct the American ministers to attempt to procure amendments in the latter points and consider the former settled. He required that the whole subject be reopened from the beginning, if any part of it was reopened. But in glancing through Monroe's correspondence until he asked his audience of leave, we do not observe an intimation that the rejection of the treaty was complained of or treated as an offensive and much less a hostile act."

3 Randall's Life of Jefferson, 235.

4. Treaty of Ghent.

§ 829.

June 1, 1812, President Madison sent to Congress a confidential message concerning relations with Great Britain. While it did not in terms recommend a declaration of war against Great Britain, it directly pointed to the adoption by Congress of such a measure. The principal grounds of complaint which it specified were the practice of impressment, the violation by British cruisers of the peace of the American coasts, and the enforcement of fictitious blockades under the guise of the orders in council. In concluding his review, President Madison exclaimed: "We behold, in fine, on the side of Great Britain, a state of war against the United States; and on the side of the United States, a state of peace towards Great Britain." With regard to France, he abstained, as he said, from recommending definitive measures, in the expectation that the result of pending discussions with that country would speedily enable Congress to decide with

greater advantage on the course demanded by the rights, interests, and honor of the United States. The message was received and considered in both Houses of Congress with closed doors. On the 3d of June Mr. Calhoun, from the Committee on Foreign Relations, presented to the House of Representatives a report recommending "an immediate appeal to arms." The House adopted a declaration of war, and on the 5th of June communicated it to the Senate, with a request that it be considered confidentially. The Senate passed it, with amendments, on the 17th of June. On the 18th of June the House informed the Senate that the amendments were concurred in, and on the same day the act was signed by the President and became a law. On the 26th of June Mr. Monroe, as Secretary of State, instructed Jonathan Russell, chargé d'affaires ad interim in London, that, although there were "many just and weighty causes of complaint against Great Britain," the orders in council and other illegal measures of blockade and the impressment of American seamen were "considered to be of the highest importance;" that if the orders in council were repealed and no illegal blockade substituted for them, and the practice of impressment discontinued, with the restoration of persons already impressed, there was "no reason why hostilities should not immediately cease," and that he might stipulate for an armistice on that basis. Subsequently the Emperor of Russia offered to mediate between the two countries, and on April 15, 1813, Messrs. James A. Bayard, Albert Gallatin, and John Quincy Adams were authorized and instructed as plenipotentiaries on the part of the United States to enter into negotiations at St. Petersburg, for the purpose of arranging a peace. The Russian mediation was declined by Great Britain, but Lord Castlereagh suggested to the Department of State a direct negotiation. Henry Clay and Jonathan Russell were added to the commission, and arrangements were made for a negotiation at Göttenburg. It was afterwards suggested on behalf of the British Government that the conferences should be held at Ghent. This proposal was accepted. The first conference at Ghent took place on August 8, 1814. The British commissioners brought forward the subjects of (1) impressment, (2) the pacification and definite territorial location of the Indians, and (3) the revision of the boundary line between the United States and Great Britain, including the control of the Great Lakes by the latter power. The American commissioners presented the subjects of (1) blockade, (2) indemnity for illegal captures and seizures, and (3) various other points. On the 4th of October Mr. Monroe, as Secretary of State, sent his last instructions to the American commissioners. By these instructions they were authorized, if they could not make any better arrangement, to agree to the status quo ante bellum as the basis of negotiation. The great change in the European situation, the pros-

pect of a more durable peace between Great Britain and the continental powers, and the consequent greater security for maritime rights were given as the justification for "this change of our ultimatum." It was added that the right of the United States to the fisheries, as defined in the treaty of 1783, and the right to trade with all other independent nations were not to be relinquished, nor was anything to be done which would sanction the claim of impressment or that of paper blockades. With these explanations, the American commissioners were authorized to make such a treaty as their own judgments should approve, subject to the usual requisite of ratification. A treaty was signed at Ghent on December 24, 1814. The plenipotentiaries on the part of Great Britain were Admiral Lord Gambier, Henry Goulburn, and William Adams.

The treaty of Ghent was based upon the status quo ante bellum. All places taken by the one country from the other during the war were to be restored, and provision was made for determining, as far as possible, the international boundary. It was also stipulated that Indian hostilities should cease. The high contracting parties were to use their best endeavors to put an end to the slave trade. Of the subjects of illegal blockades and impressment the treaty made no mention. Neither was the question of the fisheries nor that of the navigation of the Mississippi referred to in that instrument. Indeed, the plenipotentiaries, having failed to reach a decision as to the latter two questions, agreed to postpone them for the further consideration of their governments.

In connection with the foregoing, the following references may be noted:

President Madison's war message of June 1, 1812, Am. State Papers, For. Rel. III. 405.

Calhoun's report from the Committee on Foreign Relations of the House of Representatives, June 3, 1812, Am. State Papers, For. Rel. III. 567.

Declarations of war, June 18, 1812, 2 Stat. 755.

Mr. Monroe, Sec. of State, to Mr. Russell, chargé, June 26, 1812, Am. State Papers, For. Rel. III. 585.

Mr. Monroe, Sec. of State, to Messrs. Bayard, Gallatin, and Adams, April 15, 1813, Am. State Papers, For. Rel. III. 695.

Davis's Notes, Treaty Volume (1776–1887), 1325–1328.

Proceedings of the commission under Art. IV. of the treaty of Ghent to determine the ownership of the island of Grand Menan and other islands in the Bay of Fundy, 1 Moore, Int. Arbitrations, 45–64. Under the award of the commission the small island called Pope's Folly, in Passamaquoddy Bay, belongs to the United States. (An Open Boat and Cargo, 1 Ware, 26.)

Proceedings of the commissioners under Art. V. of the treaty of Ghent, relating to the northeastern boundary, 1 Moore, Int. Arbitrations, 65–83.

Proceedings of the commissioners under Art. VI. of the treaty of Ghent, relating to the boundary through the river St. Lawrence and lakes Ontario, Erie, and Huron, 1 Moore, Int. Arbitrations, 162–170.

Proceedings of commissioners under Art. VII. of the treaty of Ghent, in relation to the boundary from Lake Huron to the most northwestern point of the Lake of the Woods, 1 Moore, Int. Arbitrations, 171–195.

"In a letter marked 'private,' from Mr. Clay to Mr. Monroe, Secretary of State, dated December 25, 1814, are the following passages:

"'According to opinions which I have before communicated to you, our negotiation has terminated in a treaty of peace, which was signed yesterday. The terms of this instrument are undoubtedly not such as our country expected at the commencement of the war. Judged of, however, by the actual condition of things, so far as it is known to us, they cannot be pronounced very unfavorable. We lose no territory, I think no honor. If we lose a particular liberty in fisheries, on the one hand (which may be doubted), we gain, on the other, the exemption of the navigation of the Mississippi from British claims. We gain, also, the right of exemption from the British practice of treating with the Indians.'

"An exposition by Mr. Gallatin of his views prior to assenting to the treaty of Ghent will be found in a letter to Mr. Monroe, dated at Ghent, October 26, 1814, to be found in the Monroe papers, with pencil notes by Mr. Monroe.

"Mr. J. Q. Adams's diary of the period of the Ghent negotiations gives a narrative of those negotiations, which, though of deep interest, is affected by his then strong antagonism to Mr. Clay and to Mr. Russell, two of his colleagues (Wharton, Int. Law Digest, II. 167.)

See, also, The Duplicate Letters, by J. Q. Adams: Washington, 1822.

"You ask me what I think of the correspondence of our ministers at Ghent. I think well, very well of it. The language, though sometimes heavy, is on the whole as good at least as that of their opponents. Their arguments are better than their language. . . . In argument their superiority is manifest. . . . The British commissioners must be heavy dull men. Their introduction of Pitt's letter to Stanley, and their reliance on it, constituted a terrible *faux pas*, of which our ministers have properly availed themselves. In the whole correspondence our ministers seem to have been entirely collected and on their guard, and what is equally satisfactory and important, they have firmly maintained the honor and dignity of the country." (Mr. G. W. Hay to Mr. Monroe, Jan. 6, 1815, MS. Monroe Papers, inaccurately quoted in Wharton, Int. Law Digest, II. 167.)

"I have no doubt that the British commissioners signed the treaty (if it be signed) under an expectation that Pakenham was in possession of New Orleans, and I am equally confident, from the tenor of the diplomatic correspondence, that New Orleans never would have been restored under the treaty." (Mr. G. W. Hay to Mr. Monroe, Feb. 15, 1815, MS. Monroe Papers, ibid.)

As to the negotiation of the treaty the following authorities may be consulted: Adams's Life of Gallatin, 519; 10 John Adams's Works, 97, 106, 129, 131; 3 Am. St. Papers, For. Rel. 695, 730; 4 id. 310; 9 Brit. For. State Papers, 369, 530, 565, 752, 823.

For correspondence between Mr. Clay and his colleagues, in respect to the negotiations at Ghent, see Colton's Correspondence of Clay, 28.

English criticisms of the treaty are quoted in 2 Ingersoll's Historical Sketch of the Second War between the United States and Great Britain (1st series), 312, chap. xiii.

In 37 London Quarterly Review, 286, as noticed in a letter of Mr. Gallatin to Mr. E. Everett, of August 6, 1828 (2 Gallatin's Writings, 400), the treaty of Ghent is spoken of as "That precious treaty of Ghent, which gave to them [the United States] all that they asked, and much more than they had any right to expect."

5. Treaty of 1815.

§ 830.

July 3, 1815, a convention to regulate commerce and navigation was concluded between the United States and Great Britain at London. The negotiators on the part of the United States were John Quincy Adams, Henry Clay, and Albert Gallatin; on the part of Great Britain, Frederick John Robinson, Henry Goulburn, and William Adams. In this treaty it was for the first time agreed that no higher or other duties or charges should be imposed in any of the ports of the United States on vessels of another power than were payable in the same ports by vessels of the United States, and that the same duties should be paid and the same drawbacks allowed on foreign importations, whether such importations were made in vessels of the United States or of the other contracting party. The convention, however, on the part of Great Britain, applied, with certain exceptions, only to the territories of his Britannic Majesty in Europe. It was to remain in force for four years from the date of its signature. By the convention of October 20, 1818, the term was extended for ten years. By the convention of August 6, 1827, it was extended indefinitely, subject to termination on twelve months' notice.

Davis's Notes, Treaty Volume (1776–1887), 1224, 1331; Am. State Papers, For. Rel. IV. 869; V. 1, 12, 23, 224, 510; VI. 207, 294, 295, 382, 639.

In 1821 the British minister complained of an "extra charge" for pilotage required of British vessels, as foreign vessels, at Norfolk, Virginia, under an act of the Virginia legislature. The complaint was sent to the governor of Virginia, with the statement that it had been "the invariable understanding of both parties that by the conventions of 3rd July, 1815, and 20th October, 1818, between the United States and Great Britain, the charge of pilotage is included in the equalization of duties stipulated by that instrument upon the vessels of either party in the ports of the other. It is not doubted," added the Department of State, "that the operation of the law of Virginia will by the proper authority be made conformable to this engagement in the conventions; and that measures will be taken for refunding any such sum of extra pilotage duty which may have been levied since the period of those conventions, as well as for guarding against its being again levied in future."

Mr. Adams, Sec. of State, to Gov. Randolph, July 2, 1821, 19 MS. Dom. Let. 66.

Article I. of the treaty of 1815, in providing for mutual freedom and liberty of commerce, can not be construed to imply an obligation to protect the rights of foreign owners of slaves brought to our shores as seamen.

Taney, At. Gen., 1831, 2 Op. 475.

6. Naval Forces on Great Lakes.

§ 831.

On April 28–29, 1817, an arrangement was made by exchange of notes for the limitation of the naval forces to be respectively maintained by Great Britain and the United States on the Great Lakes. The provisions of this convention and its history are fully given elsewhere.

Supra, § 143. See H. Doc. 471, 56 Cong. 1 sess.

7. Fisheries Convention, 1818.

§ 832.

October 20, 1818, a convention was concluded between the United States and Great Britain respecting various matters, including the northeastern fisheries. The negotiators on the part of the United States were Albert Gallatin and Richard Rush; on the part of Great Britain, Frederick John Robinson and Henry Goulburn. The history of the convention, so far as it related to the fisheries, is elsewhere given.

See the Northeastern Fisheries, supra, § § 163–168; 1 Moore, Int. Arbitrations, 703 et seq.

8. Indemnity for Slaves, 1822.

§ 833.

Article I. of the treaty of Ghent, in providing for the restoration of all places taken by the one country from the other during the war, stipulated that this should be done without any destruction or carrying away of any public property or of "any slaves or other private property." It was subsequently alleged that the British forces had carried away slaves in violation of this stipulation. As we have seen, the United States had complained of the violation of a similar stipulation in the treaty of peace of 1783, but the question was merged in the Jay treaty of 1794. For the violation of the stipulation in the treaty of Ghent claims for indemnity were presented by the United States. By Article V. of the convention of October 20, 1818, it was agreed that the question whether the claims were well

founded and a proper subject for indemnity should be referred to some friendly sovereign or state for decision. The Emperor of Russia was selected as arbitrator, and rendered his award April 22, 1822. The point of difference was decided in favor of the United States. The Emperor, besides rendering his decision, offered to use his good offices as mediator in the negotiations which must be undertaken to carry it into effect. His offer was accepted, and on June 30–July 12, 1822, a convention was concluded under his mediation. By this convention the adjustment of the claims for indemnity was left to certain mixed commissions. This was followed by long and complicated proceedings, which resulted, however, in the final disposition of the controversy.

1 Moore, Int. Arbitrations, chap. xi. 350–390.

9. Webster-Ashburton Treaty.

§ 834.

August 9, 1842, Daniel Webster and Lord Ashburton signed at Washington a treaty for the settlement and definition of boundaries, for the suppression of the African slave trade, and for the giving up of fugitives from justice. The boundaries to which it related were the unsettled parts of the northern and eastern boundary of the United States under the treaty of peace of 1783, embracing sections of the line all the way from the eastern boundary of the State of Maine to the most northwestern point of the Lake of the Woods. The most difficult part to adjust was what was known as the "northeastern boundary," which so largely affected the limits and the interests of the State of Maine. An effort to settle this controversy was made in the convention concluded by Rufus King and Lord Hawkesbury at London, May 12, 1803, but this convention was never ratified. A similar attempt to effect a settlement was made by Messrs. Monroe and Pinkney in 1807, but their treaty failed by reason of other causes. When the American and British commissioners met at Ghent in 1814 to conclude a second treaty of peace between the countries, no progress had been made toward the determination of the northeastern boundary. The British commissioners proposed a "revision" of the line. The American commissioners replied that they had no authority to "cede" any territory, and would subscribe to no stipulation to that effect, but they submitted a draft of five articles to provide for the marking of the whole line from the river St. Croix to the most northwestern point of the Lake of the Woods. These articles the British commissioners, with unimportant modifications, accepted. They appear as Articles IV., V., VI., VII., and VIII., in the treaty of Ghent. Article IV. related to the ownership of islands in the Bay of Fundy, and its execution has

already been referred to. Article V. related to the northeastern boundary. It provided for the appointment of commissioners to determine and mark the line and in the event of their disagreeing for the reference of the matter to a friendly sovereign or state. The commissioners disagreed, and by a convention signed September 29, 1827, the controversy was referred to the King of the Netherlands. His award, which bore date January 10, 1831, was recommendatory rather than decisive. It in fact declared the line of 1783 to be incapable of exact definition, and recommended to the governments concerned the adoption of a certain compromise. This recommendation was not accepted, and the dispute continued. It was brought to a close by the Webster-Ashburton treaty.

The Northeastern Boundary, 1 Moore, Int. Arbitrations, chap. iii., pp. 65–83, chap. iv., pp. 85–161.

The award of the King of the Netherlands is given in the volume cited, pp. 119–136.

The origin and terms of the compromise adopted by Mr. Webster and Lord Ashburton are fully given in 1 Moore, Int. Arbitrations, 148–157.

As to the subsequent settlement of the boundary between Canada and New Brunswick, see 1 Moore, Int. Arbitrations, 157–161.

The "Red Line" Map.

Any history of the settlement of the northeastern boundary dispute would be incomplete which omitted to mention the question that arose as to maps. The map used by the negotiators of 1782–83 was Mitchell's, but no copy with the lines marked on it was annexed to the treaty. When the conclusion of the provisional articles of peace became known, Count Vergennes, the French minister for foreign affairs, sent to Franklin a copy of a map, with the request that he would mark the boundaries of the United States upon it. By whom the map was made does not appear, nor whether the maker was of English, French, or other nationality. On the 6th of December, 1782, Franklin returned the map after having, as he said, marked the limits of the United States "with a strong red line." Early in 1842 Jared Sparks, while pursuing his researches among the papers relating to the American Revolution in the archives of the French department of foreign affairs, discovered Franklin's letter to Vergennes. Immediately instituting a search, he found among the 60,000 maps in the archives a small map of North America by D'Anville, dated 1746, with a red line upon it apparently drawn with a hair pencil or a pen with a blunt point, and apparently intended to indicate the boundaries of the United States. Besides this line there was nothing whatever to identify the map with the map marked by Franklin. In reality, it made the northeastern boundary run even below the line claimed by Great Britain westward from Mars Hill. Sparks, however,

at once sent a copy of the map to Mr. Webster, who, after inspecting it, instructed Mr. Everett to "forbear to press the search after maps in England or elsewhere." Mr. Webster retained the copy in his possession, but exhibited it only to the Maine commissioners and later to the Senate. That it bore any relation to the negotiations of 1782 and 1783 is more than doubtful. This was strongly intimated by Benton in the debates on the treaty. But when, through the publication of the debates in the Senate, the use made by Mr. Webster of the map became known he was vigorously assailed for not having exhibited it to Lord Ashburton, whom he was charged with having overreached. Mr. Webster very appropriately replied that he did not think it a very urgent duty on his part to go to Lord Ashburton and say that a doubtful bit of evidence had been found in Paris, out of which he might perhaps make something to the prejudice of the United States, or from which he might set up higher claims for himself, or obscure the whole matter still further. But it must have been known, at least to some of Mr. Webster's and Lord Ashburton's detractors in England, that there then existed in the foreign office, to which it had been removed from the British Museum, the veritable copy of Mitchell's map used in the negotiations of 1782 with Oswald's line, and also the line finally agreed on marked upon it. This map was exhibited by Lord Aberdeen to Mr. Everett at the foreign office in March, 1843. It was subsequently restored to the British Museum, where it is now preserved. A copy of Mitchell's map, with Oswald's first line marked upon it, was found in 1843 among the papers of Mr. Jay. This line runs along the St. John from its mouth and follows the north branch to the head of Lake Medousa, where it turns westward, and on its course to the head of Connecticut River skirts the sources of the streams that empty themselves into the River St. Lawrence.

Franklin to Vergennes, Dec. 6, 1782, Wharton's Dip. Cor. Am. Rev. VI. 120; Jared Sparks, in North Am. Rev. (1843), LVI. 470–471; Curtis's Life of Webster, II. 103; Winsor's Narrative and Critical History of America, VII. 180; Benton's Thirty Years' View, II. 422; Curtis's Life of Webster, II. 132, 134, 149, 154, 155, 159–162, 167; Proceedings of the New York Hist. Society, April 15, 1843, p. 67, Webster's Works, II. 145; Fitzmaurice's Life of Shelburne, III. 205, 324, note; Greville's Memoirs, 2d part, I., Sept. 11, 1842, Sept. 17, 1842, Nov. 30, 1842, Feb. 9, 1843, pp. 101, 104, 126, 145; Croker Papers, 1841–42, vol. 2, pp. 393, 398, 400, 402; 71 London Quart. Rev. 560, 582; 4 Everett's Orations, 213; Abdy's Kent (1878), 152.

Mr. Everett, in a dispatch of March 31, 1843, describes the map thus: "It is a copy of Mitchell in fine preservation. The boundaries between the British and French possessions in America, 'as fixed by the treaty of Utrecht,' are marked upon it in a very full distinct line, at least a tenth of an inch broad, and those words written in several places. In like manner the line giving our boundary, as we have always

claimed it—that is, carrying the northwestern angle of Nova Scotia far to the north of the St. Johns—is drawn very carefully in a bold red line, full a tenth of an inch broad; and in four different places along the line distinctly written 'the boundary described by Mr. Oswald.' What is very noticeable is, that a line narrower, but drawn with care with an instrument, from the lower end of Lake Nipissing to the source of the Mississippi, as far as the map permits such a line to run, had once been drawn on the map, and has since been partially erased, though still distinctly visible." (Benton's Thirty Years' View, II. 671.)

10. Oregon Treaty.

§ 835.

June 15, 1846, a treaty was signed at Washington by James Buchanan, Secretary of State, and Richard Pakenham, British minister, for the settlement of what was commonly known as the Oregon question. The territory in dispute embraced what is now comprised in British Columbia and the States of Washington, Oregon, and Idaho. It was bounded, according to the claim of the United States, by the 42nd parallel of north latitude on the south, by the line of 54° 40′ on the north, and by the Rocky or Stony Mountains on the east. It embraced, roughly speaking, an area of 600,000 square miles. Over all this territory the United States claimed to be the rightful sovereign. This claim was disputed by Great Britain. The treaty of June 15, 1846, was intended to terminate the dispute by a nearly equal division of the territory. The 49th parallel of north latitude was agreed upon as the boundary, westward as far as "the middle of the channel which separates the continent from Vancouver's Island." The boundary was to proceed thence southerly through the middle of that channel and of Fuca's Straits to the Pacific Ocean. But it was expressly provided that the navigation of the whole of the channel and straits, south of the 49th parallel of north latitude, should remain free and open to both parties.

The claim of the United States to the whole of Oregon was founded upon (1) the entrance and exploration of the River of the West, which he named from his ship the Columbia River, by Captain Robert Gray, of the American ship *Columbia*, in 1792; (2) the exploration and descent of the main branch of the Columbia River by Lewis and Clark in their memorable expedition; (3) the establishment by John Jacob Astor in 1811 of the fur-trading settlement at Astoria, which was occupied by the British during the war of 1812, but restored to the United States on the conclusion of peace; (4) the acquisition by the United States by the treaty of February 22, 1819, of all the rights of Spain to territory on the Pacific north of the 42nd parallel of north latitude. The British claim was based upon (1) the explora-

tions of Captain Cook in his third voyage to the Pacific; (2) the establishment of a fur-trading settlement at Nootka Sound by British merchants in 1788, and the Nootka Sound convention between Great Britain and Spain of October 28, 1790; (3) the subsequent explorations of Vancouver and Mackenzie and the settlements of the Hudson's Bay Company.

The question of the northern boundary of the United States, and of the extent to which it was to be carried westward of the Lake of the Woods, was suggested in connection with the Hawkesbury-King convention of 1803, and also in the convention concluded by Messrs. Monroe and Pinkney in 1807; but neither of these conventions was ratified. The next attempt to settle the question was made in the negotiations that resulted in the conclusion of the convention between the United States and Great Britain of October 20, 1818. The negotiators, however, failed to agree, and by Article III. a joint occupation for ten years was agreed upon. The question was discussed at London by Messrs. Rush and Canning in the negotiations growing out of the famous Russian ukase of 1821 in relation to the northwest coast. The negotiations were resumed in 1826 on the suggestion of the British Government. They were conducted on the part of the United States by Albert Gallatin. No agreement was reached, and on August 6, 1827, a convention was concluded by which the joint occupation was extended indefinitely, subject to its termination by either party on twelve months' notice. The Webster-Ashburton treaty of August 9, 1842, did not provide for the adjustment of the dispute, and a proposal made by the British minister at Washington later in the year for the renewal of the negotiations remained without result, though President Tyler at one time thought of sending a special mission to England for the purpose of effecting a settlement. In 1844, Mr. Richard Pakenham arrived in the United States as minister of Great Britain and renewed, in behalf of his Government, the proposition to resume negotiations. The Democratic convention that assembled in Baltimore in May, 1844, declared that the title of the United States to the "whole of Oregon" was "clear and unquestionable." This declaration was popularly interpreted as meaning "Fifty-four forty or fight." On April 27, 1846, the President approved a joint resolution of Congress, which authorized him, in his discretion, to give notice of the termination of the joint occupation of the territory; and such notice was duly given. The subsequent settlement by a division of the territory doubtless was facilitated by the outbreak of the war with Mexico.

As has been seen, the treaty of June 15, 1846, provided that the boundary should follow the 49th parallel of north latitude to "the middle of the channel which separates the continent from Vancou-

ver's Island," and should thence proceed southerly "through the middle of said channel." A controversy afterwards arose as to what was the channel thus referred to. The United States maintained that it was a channel to the westward, called Canal de Haro; the British Government contended for a channel to the eastward, called Rosario Strait. Between these two channels certain islands, one of which in particular, San Juan Island, was considered to be of strategic importance. From this circumstance the question came to be known as that of "the San Juan water boundary." By Articles XXXIV.–XLII. of the treaty of Washington of May 8, 1871, the dispute was referred to the German Emperor, as arbitrator, to determine through which of the two channels mentioned the line should run. He decided in favor of the claim of the United States.

For a full history of this boundary question, see 1 Moore, Int. Arbitrations, chap. vii., pp. 196–236.

As to the arbitration of the claims of the Hudson's Bay Company and the Puget's Sound Agricultural Company, under the treaty of July 1, 1863, see 1 Moore, Int. Arbitrations, chap. viii., pp. 237–270.

11. Clayton-Bulwer Treaty.

§ 836.

April 19, 1850, a convention was signed at Washington for the purpose of setting forth the views and intentions of the governments of the United States and Great Britain concerning an interoceanic canal and the political independence of Central America. This convention formed the subject of long and varied controversies, which are detailed elsewhere. It was at length superseded by the Hay-Pauncefote treaty of Nov. 18, 1901.

See supra, § § 351–367.

As to the London commission, under the convention of 1853, see Moore, Int. Arbitrations, I. 391.

12. Reciprocity Treaty of 1854.

§ 837.

June 5, 1854, William L. Marcy, Secretary of State, and Lord Elgin, special plenipotentiary of Great Britain, signed at Washington a treaty for the temporary adjustment of the question of the northeastern fisheries by means of a reciprocal arrangement embracing commerce and navigation as well as the fisheries. In consequence of this arrangement, the American fishermen were readmitted, so long as the treaty lasted, to the inshore fisheries, their right to which the convention of 1818 had renounced, while the British fishermen were admitted to the inshore fisheries on the eastern coasts of the United

States north of the 36th parallel of north latitude. But in each case it was expressly declared that the "liberty" thus granted applied solely to the sea fisheries, and that the salmon and shad fisheries, and all fisheries in rivers and mouths of rivers, were reserved by each country exclusively for its own fishermen. Provision was made for the marking of the reserved fisheries by means of a mixed commission.

1 Moore, Int. Arbitrations, chap. xiii., pp. 426–494.

As to a subsequent temporary arrangement of the northeastern fisheries question under the treaty of Washington of May 8, 1871, see the Halifax Commission, 1 Moore, Int. Arbitrations, chap. xvi., pp. 703–753.

For the history of the northeastern fisheries, see supra, § § 163–168.

Mr. D. L. Seymour's report of Feb. 11, 1853, on reciprocal trade with British North America, is in H. Report 4, 32 Cong. 2 sess. See also H. Ex. Doc. 96, 36 Cong. 1 sess.; H. Report 22, 37 Cong. 2 sess.; H. Ex. Doc. 32, 38 Cong. 1 sess.

Under the reciprocity treaty between the United States and Great Britain of 1854, the President can not issue his proclamation giving effect to the treaty as to Canada alone in anticipation of the action of New Brunswick, Nova Scotia, and Prince Edwards Island, nor until he shall have received evidence not only of the action of these provinces, but also of the Imperial Parliament.

Cushing, At. Gen., 1854, 6 Op. 748.

The convention of 1854 for mutual reciprocity of trade with Canada, terminated by notice, did not operate to release a forfeiture previously incurred.

Pine lumber, 4 Blatch. 182.

13. Treaty of Washington, 1871.

§ 838.

By a treaty between the United States and Great Britain, signed at Washington May 8, 1871, provision was made for the settlement, by an arbitration to be held at Geneva, of what were generically known as the "Alabama claims," growing out of the acts of the *Alabama* and other Confederate cruisers during the civil war in the United States. The treaty settlement also included the claims of citizens of the United States (other than the *Alabama* claims) and of subjects of Great Britain growing out of the civil war in the United States (Articles XII.–XVII.); the North Atlantic fisheries (Articles XVIII.–XXV., XXXII., XXXIII.); the navigation of certain rivers and canals and of Lake Michigan (Articles XXVI.–XXVIII.); the system of bonded transit (Articles XXIX., XXX., XXXIII.); certain features of the coasting trade (Articles XXX., XXXIII.);

the exemption from duty of lumber cut on American territory watered by the St. John and floated down that river to the United States (Article XXXI.), and the San Juan boundary (Articles XXXIV.–XLII.). The forty-third article related to the exchange of ratifications.

The Geneva Arbitration, Moore, Int. Arbitrations, I. chap. xiv. 495–628.
As to the claims under Arts. XII.–XVII., see id. chap. xv. 683–702.
As to the fisheries settlement, see id. chap. xvi. 703–753.
As to the San Juan water boundary, see id. chap. vii. 196–236.

Before the Geneva tribunal "the United States demanded compensation for the following classes of losses and expenditures, so far as they grew out of the acts of the cruisers, viz: 1. 'Direct losses growing out of the destruction of vessels and their cargoes.' 2. 'The national expenditures in the pursuit of those cruisers.' 3. 'The loss in the transfer of the American commercial marine to the British flag.' 4. 'The enhanced payments of insurance.' 5. 'The prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the rebellion.' It was denied by Great Britain that a submission of all the claims to arbitration carried with it the right of the arbitrators to take into consideration all the elements of loss, and it was insisted that the tribunal had no right, under the terms of the treaty, to take classes three, four, and five into consideration in its estimate of damages. The United States denied this proposition, and contended that the tribunal was invested with power to decide the question of the extent of its jurisdiction. The tribunal, without deciding that question, held that 'these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal, in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon.' And in regard to the second of the above items of loss, the tribunal, in its award, decided thus: 'Whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the Confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States: The tribunal is therefore of opinion, by a majority of three to two voices, that there is no ground for awarding to the United States any sum by way of indemnity under this head.' The tribunal awarded to the United States the sum of fifteen and one-half millions of dollars in full satisfaction of the claims referred to it."

Davis' Notes, Treaty Volume (1776–1887), 1334.

As to the so-called "indirect claims," the controversy concerning them, and their exclusion from the consideration of the tribunal, see Moore, Int. Arbitrations, I. 623–647.

Under article 30 of the treaty of 1871 a British vessel may, in the course of a single voyage, ship goods at two or more successive United States ports on the Lakes, for delivery partly through Canada by land in bond, at other United States ports; and then, after completing her cargo, sail to the Canada port where the land carriage is to begin.

Williams, At. Gen., 1873, 14 Op. 310.

Under article 30 of the treaty of Washington, of 1871, and article 19 of the regulations made under the first-mentioned article to carry its provisions into execution, it is lawful to transport goods by means of British or American vessels from the ports of Chicago or Milwaukee to points in Canada, thence through Canadian territory by rail, and from the termini of the lines of railway by either British or American vessels to the ports of Oswego and Ogdensburgh, all the above-named ports being "ports on the northern frontier of the United States," within the meaning of said regulations.

Devens, At. Gen., 1878, 16 Op. 42.

14. Real Estate Convention, 1899.

§ 839.

By Article III. of the convention between the United States and Great Britain, relating to the tenure and disposition of real and personal property, signed March 2, 1899, it is stipulated that in case any citizen or subject of the one country dies in the other without having in the country of his decease any known heirs or testamentary executors, the competent local authorities shall at once "inform the nearest consular officer" of the nation to which the deceased person belonged, in order that the interested persons may be duly notified. A similar provision is contained in the treaties of the United States with Austria-Hungary, Belgium, Germany, Roumania, and Servia. As a part of the supreme law of the land, it debars State and Territorial, as well as Federal officials from asserting a claim of escheat without the notification provided for.

Mr. Hay, Sec. of State, to Mr. Wolcott, M. C., Feb. 3, 1900, 242 MS. Dom. Let. 522.

As to the negotiation of the convention of March 2, 1899, see Mr. Hay, Sec. of State, to Sir Julian Pauncefote, No. 1363, Feb. 27, 1899, MS. Notes to British Leg. XXIV. 458.

By the last clause of the article above referred to, it is provided that "the said consular officer shall have the right to appear personally or by delegate in all proceedings in behalf of the absent heirs or creditors, until they are duly represented." This does not imply that consular officers have the status of attorneys or are to perform the duties of a public administrator.

Mr. Hay, Sec. of State, to Mr. Wolcott, U. S. S., Feb. 3, 1900, 242 MS. Dom. Let. 522.

15. Canadian Relations.

§ 840.

"In consequence of questions submitted by merchants and others, asking, in consideration of the recent alteration of the British navigation laws, on what footing the commercial relations between the United States and Great Britain will be placed on and after the first day of January next, the day on which the recent act of the British Parliament goes into operation, the Department deems it expedient, at this time, to issue the following general instructions, for the information of the officers of the customs and others interested.

"*First.* In consequence of the alterations of the British navigation laws above referred to, British vessels, from British or other foreign ports, will (under our existing laws), after the first of January next, be allowed to enter in our ports with cargoes of the growth, manufacture, or production of any part of the world.

"*Second.* Such vessels and their cargoes will be admitted, from and after the date before mentioned, on the same terms, as to duties, imposts, and charges as vessels of the United States and their cargoes."

Mr. W. M. Meredith, Sec. of Treas., to collectors of customs, Treasury Circular, New Series, No. 24, Oct. 15, 1849, MSS. Treasury Department.

This circular was kindly brought to my notice by Joseph Nimmo, jr., esq.

"During the past year a suggestion was received through the British minister that the Canadian government would like to confer as to the possibility of enlarging, upon terms of mutual advantage, the commercial exchanges of Canada and of the United States, and a conference was held at Washington, with Mr. Blaine acting for this government, and the British minister at this capital and three members of the Dominion cabinet acting as commissioners on the part of Great Britain. The conference developed the fact that the Canadian government was only prepared to offer to the United States, in exchange for the concessions asked, the admission of natural products. The statement was frankly made that favored

rates could not be given to the United States as against the mother country. This admission, which was foreseen, necessarily terminated the conference upon this question. The benefits of an exchange of natural products would be almost wholly with the people of Canada. Some other topics of interest were considered in the conference, and have resulted in the making of a convention for examining the Alaskan boundary and the waters of Passamaquoddy Bay adjacent to Eastport, Me., and in the initiation of an arrangement for the protection of fish life in the coterminous and neighboring waters of our northern border."

President Harrison, annual message, Dec. 6, 1892, For. Rel. 1892, xi.

As to the adoption of a regulation allowing merchandise in transit between United States ports through Canadian territory, when not in sufficient quantity to fill an entire car, to be forwarded, corded, and sealed, in an unsealed car, see Mr. Hill, Act. Sec. of State, to Lord Pauncefote, British ambass., No. 2085, Feb. 19, 1901, MS. Notes to Brit. Leg. 462.

"The papers touching the matters before the Anglo-American Commission [which met at Quebec in the summer of 1898 and sat at Washington in the following winter] have not been published as its labors have not been concluded, and I am therefore unable to send you any printed document on the subject. The twelve questions under the consideration of the commission are as follows:

"1. Questions in respect to the fur seals:

"2. The fisheries off the Atlantic and Pacific coasts and in the inland waters of the frontier:

"3. The delimitation and establishment of the Alaskan boundary:

"4 and 5. Transit of merchandise to and from either country and across intermediate territory:

"6. The question of the alien labor laws:

"7. Mining rights of the citizens or subjects of each country within the territory of the other:

"8. Commercial reciprocity:

"9. A revision of the agreement of 1817 respecting naval vessels on the lakes:

"10. More complete definition and marking of the frontier lines:

"11. Conveyance of prisoners in custody of officers of one country through the territory of the other:

"12. The question of reciprocity in wrecking and salvage."

Mr. Hill, Act. Sec. of State, to Mr. Brown, February 12, 1901, 250 MS. Dom. Let. 638.

As to the death of Lord Herschell, the chief British commissioner, at Washington, and the resolution of sympathy adopted by the Senate March 1, 1899, see For. Rel. 1899, 340–341.

By a treaty signed January 24, 1903, the Alaskan boundary question was submitted to a joint commission of six members, three on each side. The tribunal met in London Sept. 3, 1903, under the presidency of Lord Alverstone, chief justice of England, who was one of the three British members, and on the 20th of October, by a majority consisting of the three American members and Lord Alverstone, rendered a decision confirming to the United States the control of a continuous strip of the mainland shore.

President Roosevelt, annual message, Dec. 7, 1903, For. Rel. 1903, xvii. See, supra, § 107.

16. The Queen's Jubilee.

§ 841.

At the Queen's jubilee (on the sixtieth anniversary of the accession of Queen Victoria), in 1897, the United States was represented by His Excellency Whitelaw Reid, as ambassador extraordinary on special mission; by Major-General Nelson A. Miles, representing the War Department, and by Rear-Admiral Joseph N. Miller, representing the Navy. There were also the usual attachés and aides.

For. Rel. 1897, 249–252.

On the death of Queen Victoria Jan. 22, 1901, besides the exchange of condolences, resolutions were passed by the Senate and the House of Representatives on the same day. (For. Rel. 1901, 208, 209, 211, 212–213.)

XX. *GREECE.*

§ 842.

Article I. of the treaty between the United States and Greece of December 22, 1837, guarantees to the "citizens and subjects" of the contracting parties rights of commerce and various rights incidental thereto. The Greek minister for foreign affairs having expressed a doubt whether the stipulation was applicable to joint stock companies and other business associations, a protocol was signed at Athens, January 30–February 10, 1890, by the minister of foreign affairs and the American minister, by which it was mutually declared that corporations were entitled to the benefits of the article. The American minister was authorized to join in the declaration, on the strength of opinion of Attorney-General Miller, of May 10, 1889, to the effect that corporations and business associations, if duly authorized under the laws of Greece, were entitled to pursue lawful rights and remedies in the United States, subject to the appropriate laws of the United States and the several States.

For. Rel. 1889, 480–483; For. Rel. 1890, 509–511.

The opinion of Attorney-General Miller may be found in For. Rel. 1889, 482. See supra, § 745.

XXI. *HAYTI.*

§ 843.

As is elsewhere shown, the independence of Hayti was not formally recognized by the United States till 1862.

Supra, § 39.

See, in this relation, Moore, Int. Arbitrations, V. 4476–4477; act of Feb. 28, 1806, 2 Stat. 351; act of Feb. 24, 1807, 2 Stat. 421.

With reference to the correspondence of Commodore Elliot with the government of Hayti, and the desire of the United States to procure the abolition of the discriminating duties which operated against American commerce, see Mr. Livingston, Sec. of State, to Mr. Woodbury, Sec. of Navy, Feb. 8, 1832, 25 MS. Dom. Let. 11.

As to arbitrations between the United States and Hayti, see Moore, Int. Arbitrations, II. 1749, 1807, 1859.

By Article III. of a treaty between Hayti and the Dominican Republic, concluded in 1874, the contracting parties agree not to alienate in favor of any third power the whole or any part of their territories nor to solicit or accept any foreign annexation or control. These stipulations are declared to be perpetual.

Mr. Léger, Haytian min., to Mr. Hay, Sec. of State, March 5, 1904, For. Rel. 1904, 371.

In 1894 the United States made representations to the Haytian government concerning a discrimination in Haytian ports in favor of sailing vessels by levying duties on their registered tonnage, which was only half or less than half their carrying capacity, while duties were levied on every ton of cargo landed by a steamer. The Haytian government, in reply, gave reasons why the law should not be modified.

For. Rel. 1894, 355; For. Rel. 1895, II. 810.

For an explanation of the practice of detaining sailing vessels till duties on their cargoes are paid, see For. Rel. 1894, 351–355.

The "rights of residence and business [of citizens of the United States in Hayti] are defined by the treaty of 1864, and they are expressly guaranteed by the sixth article thereof, 'to enter, sojourn, settle, and reside in all parts of' Hayti; there to 'engage in business, hire and occupy warehouses, provided they submit to the laws, as well general as special, relative to the rights of traveling, residing, or trading.' The fifth and seventh articles of the treaty are also pertinent, and these provisions taken together constitute a solemn guaranty of unmolested residence of our citizens in Hayti, so long as they shall obey the laws."

Mr. Uhl, Acting Sec. of State, to Mr. Smythe, min. to Hayti, March 27, 1894, For. Rel. 1894, 345, replying to an inquiry whether, if an Ameri-

can citizen should be expelled without any statement of reasons, a demand would be justified for "proof of such citizen's connection with treasonable practices, which would justify the virtual confiscation of his property (through the ruin of his business)." The inquiry was prompted by a decree of the Haytian government expelling six citizens of France, and reciting as the ground therefor that "international law confers on each independent state the right to expel from its territory foreigners whose actions are dangerous to public tranquillity and order," and that the presence of the persons named was considered "dangerous to public safety." The French government demanded that the evidence on which the act was based be submitted to it. The matter seems to have been amicably arranged. (For. Rel. 1894, 343, 344, 345–346.)

By Article V. of the treaty between the United States and Hayti of November 3, 1864, it is provided that the citizens of one of the contracting parties residing in the territory of the other shall not be compelled to pay "any contributions whatever higher or other than those that are or may be paid by native citizens." Held, that the Haytian Government was bound to make reparation for the seizure and sale of the goods of an American firm doing business in that country in order to enforce the payment by certain American employees of license taxes under article 9 of the Haytian law of October 24, 1876, which provided that foreigners who should be permitted to carry on any industry other than commerce should "pay a tax double the amount exacted of Haytians exercising the same industry."

Award of the Honorable William R. Day, arbitrator, in the matter of the claims of John D. Metzger & Co. *v.* The Republic of Hayti, protocol of Oct. 18, 1899, For. Rel. 1901, 262, 267–276.

The arbitrator in his award said: "This law [Oct. 24, 1876], so far as it affects American citizens, is in direct violation of the stipulations of the treaty. In practice it is shown that these license taxes were seldom enforced against workmen in Hayti. By direct enactment of law the solemn obligations of the treaty are ignored and discriminating burdens imposed upon foreigners without exception. When this condition of affairs was diplomatically called to the attention of the authorities of the Republic of Hayti, it is to the credit of that government that it promptly conceded that American citizens had rights under the treaty which deserve protection and which the government of Hayti undertook to see were duly guarded, leaving Metzger & Co. to pursue their remedy of the infraction of their rights already sustained." (For. Rel. 1901, 274–275.)

By a law enacted October 1, 1897, the Haytian government was authorized to levy taxes on foreign merchants and clerks many times greater than those imposed upon natives in similar occupations. The minister of the United States at Port au Prince was instructed that if any attempt should be made to enforce the law against citizens of the United States he should protest against it as a violation of article

5 of the treaty between the United States and Hayti of November 3, 1864, which expressly declares that citizens of the United States in Hayti shall not be compelled "to pay any contributions whatever higher or other than those that are or may be paid by native citizens."

Mr. Sherman, Sec. of State, to Mr. Powell, min. to Hayti, Oct. 11, 1897, For. Rel. 1898, 389, 390, citing Mr. Fish, Sec. of State, to Mr. Bassett, min. to Hayti, No. 261, March 13, 1876, and Mr. Gresham, Sec. of State, to Mr. Smythe, min. to Hayti, No. 7, Nov. 27, 1893.

See, also, Mr. Adee, Acting Sec. of State, to Mr. Powell, min. to Hayti, Nov. 2, 1897, For. Rel. 1898, 392, and Mr. Day, Acting Sec. of State, to Mr. Powell, min. to Hayti, Dec. 2, 1897, For. Rel. 1898, 395.

In a dispatch to Mr. Sherman, Sec. of State, of May 5, 1898, Mr. Powell, min. to Hayti, reported that the question had been "definitely and satisfactorily adjusted" in favor of the contention of the United States. (For. Rel. 1898, 399–402. See, also, id. 387 et seq.)

The Haytian government having adopted a new license law, which provided that foreigners should apply to the President of Hayti for licenses on stamped paper costing four gourdes, and that the licenses should be delivered on stamped paper costing fifteen gourdes, the American minister at Port au Prince protested against the law as contravening Article V. of the treaty of 1864. His action was approved, and he was instructed to renew his protest. The law clearly involved, said the Department of State, "a discrimination in matters of trade against American citizens in favor of Haytian citizens, and is therefore in violation of the stipulations of Article V."

Mr. Hay, Sec. of State, to Mr. Powell, No. 276, Dec. 5, 1898, MS. Inst. Hayti, IV. 94.

The purpose and extent of Art. V. were explained by Mr. Fish, Secretary of State, in an instruction to the American minister at Port au Prince, No. 261, March 13, 1876. See, also, Mr. Gresham, Sec. of State, to Mr. Smythe, min. to Hayti, Nov. 27, 1893, For. Rel. 1894, 349.

XXII. *ITALY.*

§ 844.

The question of immigration, including the padroni system and the protection of Italian immigrants against it, and the consular inspection of emigrants at Naples, is discussed in For. Rel. 1894, 367–369; For. Rel. 1898, 406–409, 411–418.

"You say, 'My government supposes you would like to continue a common reciprocity in Italian ports not mentioned in the convention [of Feb. 8, 1868], which is, that your consuls be notified by the Italian authorities of certain visits they are sometimes compelled to make on board American merchant vessels. Hoping you will give the Federal authorities instructions to grant these reciprocal favors to Italian consuls, my government will not fail to issue similar in-

structions to the proper authorities in Italy. In health visits to an arriving ship and in many other customary visits, where the consul's presence could be of no use such notice is not necessary.'

"In regard to this point, the visits which I understand you to mean are such visits as are made where the search of a merchant vessel, for fiscal purposes, is instituted by the local authorities in the ports of either party.

"It is in regard to these visits that you suggest that the consul of the nation whose flag the vessel bears shall be notified of the intended visit.

"I have the honor to say that the suggestion seems a very suitable one, and that the proper instructions will be given to the collectors of customs in the ports of the United States to comply with the request of the Italian government, with the understanding that reciprocal proceedings will be adopted by that government.

"With what may seem to you extreme caution I am to inform you that the assurances given in this letter are only assurances which this Department makes for itself, and cannot be taken as constituting a part of a consular treaty for modifying its provisions."

Mr. Seward, Sec. of State, to Mr. Cerruti, Sept. 15, 1868, MS. Notes to Italy, VII. 27.

The consular convention of Feb. 8, 1868, above referred to, was terminated Sept. 17, 1878. (Treaty Vol. (1776–1878), 1234.)

The word "officers" in Art. XIII., line 2, of the convention of Feb. 8, 1868, relating to the recovery of deserters, includes the captain of a ship. This view is concurred in by both governments.

Mr. Seward, Sec. of State, to Mr. Cerruti, Sept. 15, 1868, MS. Notes to Ital. Leg. VII. 27.

This treaty was terminated Sept. 17, 1878. (Treaty Volume (1776–1887), 1234.)

The words "infamous punishment" (*peines infamantes*), in par. 8, Art. II. of the extradition convention of March 23, 1868, "are to be understood as applying to the reciprocal description of punishment for crimes prevailing in Italy just as it is expressed in the text of the Italian code. This opinion of the Department, however, must not be understood as legally modifying the language of the convention."

Mr. Seward, Sec. of State, to Mr. Cerruti, Sept. 15, 1868, MS. Notes to Italy, VII. 29.

Jan. 21, 1869, a convention was concluded, amending the paragraph in question by adding to the words "subject to infamous punishment" the words "according to the laws of the United States, and criminal punishment according to the laws of Italy."

The treaty between the United States and Italy of Feb. 26, 1871, secures (Art. I.) to American vessels the same rights and exemptions as are enjoyed by Italian vessels, as well as (Art. XXIV.) most-favored-nation treatment.

Mr. Bayard, Sec. of State, to Sec. of Treasury, Dec. 6, 1887, 166 MS. Dom. Let. 281, transmitting copy of a dispatch from the American minister at Rome, No. 167, Oct. 15, 1887, with enclosures.

Art. III. of the treaty between the United States and Italy of February 26, 1871, requires merely equality of treatment, and that the same rights and privileges be accorded to a citizen of Italy that are given to the United States under like circumstances. This requirement applies to criminal procedure.

Storti *v.* Mass. (1901), 183 U. S. 138.

The question of the Holy See is elsewhere discussed.

Supra, §§ 18, 45.

As to the question of the withdrawal of the exequatur of the pontifical consul at New York, see Mr. Fish, Sec. of State, to Baron Blanc, Italian min., June 24, 1876, MS. Notes to Italy, VII. 301; same to same, July 18, 1876, id. 306; Mr. Evarts, Sec. of State, to Mr. Osborn, circular, April 3, 1877, MS. Inst. Argentine Republic, XVI. 117.

As to the Propaganda and the American College at Rome, see H. Ex. Doc. 143, 48 Cong. 1 sess.; Mr. Frelinghuysen, Sec. of State, to Baron Fava, Ital. min., June 28, 1884, MS. Notes to Italy, VIII. 85.

XXIV. *JAPAN.*

1. Early Attempts to Negotiate.

§ 845.

"Edmund Roberts, a sea captain of Portsmouth, N. H., was named by President Jackson his 'agent for the purpose of examining in the Indian Ocean the means of extending the commerce of the United States by commercial arrangements with the powers whose dominions border on those seas.' He was ordered on the 27th of January, 1832, to 'embark on board of the United States sloop-of-war the *Peacock*,' in which he was to 'be rated as captain's clerk.' On the 23d of the following July he was told to 'be very careful in obtaining information respecting Japan, the means of opening a communication with it, and the . . . value of its trade with the Dutch and Chinese,' and that when he should arrive at Canton he would probably receive further instructions. He had with him blank letters of credence, and on the 28th of October, 1832, Edward Livingston, Secretary of State, instructed him that the United States had 'it in contemplation to institute a separate mission to Japan,' but that if he should find the prospect favorable he might fill up one

of his letters and present himself to the Emperor for the purpose of opening trade."

Davis' Notes, Treaty Vol. (1776–1887), 1346. See, also, H. Doc. 138, 28 Cong. 2 sess., proposing a mission to Japan in the interest of American commerce.

In case Roberts went to Japan he was directed not to go in a national vessel, which could not submit to the indignity of being disarmed, as foreign vessels were required to do in Japanese ports, a "degrading custom" with which a Russian frigate, it was said, had "condescended to comply." He might charter a coasting vessel, which the *Peacock* might convoy. (S. Ex. Doc. 59, 32 Cong. 1 sess. 63.)

Roberts in March, 1833, concluded a treaty of amity and commerce with Siam, and in the following September a similar treaty with the Sultan of Muscat. His mission was prematurely ended by his death.

See, generally, Foster's American Diplomacy in the Orient, a work of great interest and merit. See, also, Early American Visitors to Japan, by Charles W. Stewart, in Proceedings of the United States Naval Institute, XXXI. 945; Moore, American Diplomacy, 120 et seq.

In 1845 Alexander Everett, when he went as commissioner to China, took with him a full power to negotiate with Japan. At this time only the Chinese and the Dutch were allowed to trade with that country. The Dutch had a factory at Nagasaki, and were allowed to fit out one ship a year from Batavia for that port. Every third year they were permitted to dispatch an embassy from Nagasaki to Yeddo.

Mr. Everett proceeded to Macao in the U. S. S. *Columbus*, Commodore James Biddle commanding. Commodore Biddle was instructed to ascertain whether the ports of Japan were accessible, and, if Mr. Everett should incline to endeavor to gain access to them, to hold the squadron at his disposition for that purpose. Should he decline to do so, Commodore Biddle was authorized to "persevere in the design, yet not in such a manner as to excite hostile feeling, or a distrust of the Government of the United States." Mr. Everett did not go to Japan, but transferred his full power to the Commodore. The latter, on the *Columbus*, accompanied by the *Vincennes*, anchored in the Bay of Yeddo July 20, 1846. The Japanese surrounded the ships during the whole of their stay. Biddle gave a Japanese officer who came on board, accompanied by a Dutch interpreter, a written statement of the object of his visit. This letter was sent to Yeddo, and an answer was sent refusing access for trade and ordering Biddle away. Biddle consented to go on board a Japanese junk to receive the Emperor's reply, which proved to have no address or signature and to be rude in terms. And when he first attempted to step on board a Japanese gave him a blow or push which threw him back into his boat. Biddle demanded, through the interpreter, that the man be seized, and he then returned to his ship. He was followed on board by the interpreter and some Japanese officers, who declared

that they were not expecting his visit and therefore were not on deck and that they would have the man severely punished. It has been said that this affair produced a very bad effect, as the Japanese spread the report that they had not only refused to treat, but had inflicted an indignity on the American officer.

S. Ex. Doc. 59, 32 Cong. 1 sess. 64, 66 et seq.

An interesting and instructive account of Commodore Biddle's expedition has lately been given by Rear-Admiral S. B. Luce, who was a midshipman on Commodore Biddle's flagship, the *Columbus*. Admiral Luce repels the report that soon afterwards became current, largely through its publication by the United States government, that the expedition produced an unfavorable impression. He calls attention to the injunction laid upon Commodore Biddle not to excite "a hostile feeling, or a distrust of the government of the United States," and says: "Commodore Biddle was careful to carry out the spirit of his instructions, and from his report to his government it may be readily seen that by his courtesy and conciliatory bearing toward the Japanese officials a most favorable impression was made and one which could not fail of predisposing them to look with favor on those Americans who might subsequently visit Japan." Admiral Luce also speaks of the "able and tactful manner" in which Commodore Biddle's negotiations were conducted. (Commodore Biddle's Visit to Japan in 1846, by Rear-Admiral S. B. Luce, U. S. Navy, Proceedings of the United States Naval Institute, XXXI. 555.) See, also, Early American Visitors to Japan, by Charles W. Stewart, id. 945.

A French squadron, under Admiral Cécile, made an unsuccessful attempt, about the same time as Commodore Biddle, to open negotiations with the Japanese, but had a displeasing reception. It was surrounded from the time of its arrival at Nagasaki by armed boats, and was not allowed to communicate with the shore. It remained only twenty-four hours. The erroneous report was spread that the French were fired upon and subjected to other violence. (S. Ex. Doc. 59, 32 Cong. 1 sess. 67.)

January 27, 1849, Commodore David Geisinger reported from the U. S. S. *Plymouth*, then at Whampoa, that he had instructed Commander Glynn to proceed in the *Preble* to Nagasaki and inquire into the case of the wreck of the American whaler *Lagoda* on the Japanese coast, and demand the release of the survivors of the crew, who were detained by the Japanese authorities. Commander Glynn found that the men were deserters, but he obtained their release. Besides, as the result of his visit, he took an active interest in urging another effort to open intercourse with Japan. He reported that the time was favorable for entering upon a negotiation. He arrived at New York January 3, 1851, in the *Preble*, and there seems to be no reason to doubt that to his representations the sending out soon afterwards of the expedition under Commodore Aulick is largely to be ascribed. In a letter to the President on June 10, 1851, the day on which Au-

lick's instructions are dated, he refers to a previous conversation with the President on the project of opening an intercourse between the United States and Japan, and the importance of having the use of a port in Japan for the accommodation of a line of steamers then expected to be established between California and China. "These arrangements," said Glynn, "must be effected soon or late, and if not peaceably, then by force."

S. Ex. Doc. 59, 32 Cong. 1 sess. 74; H. Ex. Doc. 84, 31 Cong. 1 sess.

June 10, 1851, Mr. Webster, as Secretary of State, instructed Commodore Aulick to proceed with a letter from the President to the Emperor of Japan to Yeddo in his flagship, accompanied by as many vessels of his squadron as might be conveniently employed, and to deliver the letter to such high officers of the Emperor as might be appointed to receive it. The instructions referred to the probable establishment of a line of steamers between California and China and the need of obtaining supplies of coal from Japan. Commodore Aulick was to impress it upon the Japanese that the United States possessed no power over the religion of its citizens, and would not interfere with the religion of other countries. In his letter to the Emperor, President Fillmore said: "I send you this letter by an envoy of my own appointment, an officer of high rank in his country, who is no missionary of religion. He goes by my command to bear to you my greeting and good wishes, and to promote friendship and commerce between the two countries."

Commodore Aulick was furnished with a full power to negotiate. His instructions declared that it was important to secure the opening of one or more ports which vessels might enter to dispose of their cargoes by sale or by barter, but that it was even more important to provide for the protection of American sailors and property wrecked on the Japanese shores.

S. Ex. Doc. 59, 32 Cong. 1 sess. 80.

2. Perry's Successful Mission.

§ 846.

Commodore Aulick was unable to carry out his instructions. Soon after he was ordered to Japan his health became impaired, and the mission was entrusted to Commodore M. C. Perry.

In a letter to the Secretary of the Navy, November 5, 1852, Mr. Conrad, Acting Secretary of State, explained the objects of the expedition. The United States desired, he said, specifically (1) a permanent arrangement for stress of weather upon the Japanese coast; (2) permission for American vessels to obtain supplies and refit in one

or more Japanese ports; (3) permission for American ships to enter one or more Japanese ports to dispose of their cargoes by sale or barter. As persuasion had failed to attain these objects, Perry was to take an imposing force—his whole force—and he was to refer particularly to the subject of the ill treatment of wrecked ships and crews. And, as it was understood that the deep-seated aversion of the Japanese to intercourse with Christian nations was due chiefly to the indiscreet zeal with which the early missionaries, particularly those of Portugal, endeavored to propagate their religion, he was to say that the government of the United States, "unlike those of every other Christian country, does not interfere with the religion of its own people, much less with that of other nations." If argument and persuasion should fail to obtain "any relaxation of their system of exclusion, or even any assurance of humane treatment of our shipwrecked seamen," Perry was to change his tone, and say that the United States would insist upon kind treatment of American citizens and vessels wrecked or driven upon the Japanese coasts, and that for any cruelty in such cases in the future the Japanese would be "severely chastised."

The instructions of Mr. Kennedy, Secretary of the Navy, to Commodore Perry, bear date November 13, 1852. The instructions and orders given to Commodore Aulick were transferred to him, and he was informed that to the force of the United States in the East India and China seas, which had consisted of a steam frigate, two sloops, and a store ship, there were to be added a ship of the line, a steam frigate, a corvette, two steamers, a sloop, and a store ship. He was furnished with a letter from the President to the Emperor of Japan, in which he was described as "an officer of the highest rank in the Navy of the United States and commander of the squadron now visiting your Imperial Majesty's dominions." It was stated that the object in sending him out was to propose that the United States and Japan "should live in friendship and have commercial intercourse with each other." "The Constitution and laws of the United States," declared the latter, "forbid all interference with the religious or political concerns of other nations."

S. Ex. Doc. 34, 33 Cong. 2 sess.

Mr. Conrad, in the letter to the Secretary of the Navy, Nov. 5, 1852, above mentioned, said: "He [Perry] will bear in mind that, as the President has no power to declare war, his mission is necessarily of a pacific character, and will not resort to force unless in self-defense in the protection of the vessels and crews under his command, or to resent an act of personal violence offered to himself, or to one of his officers." Mr. Conrad also said that Perry would be furnished with powers authorizing him to negotiate treaties of amity and navigation with any and all established and independent sovereignties in the regions to be visited by him.

Perry, on his way out, suggested the temporary occupation of certain ports in the Loochoo Islands for shelter and supplies. Mr. Everett, Secretary of State, instructed him to do so, but added that, if it could not be done "without resort to force," it would be necessary to seek them elsewhere. (S. Ex. Doc. 34, 33 Cong. 2 sess.)

Mr. Robert M. McLane, commissioner to China, was to take Commodore Perry's place, in case anything should prevent him from fulfilling his mission. (Mr. Marcy, Sec. of State, to Mr. McLane, Nov. 9, 1853, S. Ex. Doc. 39, 36 Cong. 1 sess.)

Perry arrived in the *Mississippi* at Hongkong April 7, 1853. On the afternoon of Friday, July 8, 1853, with the steamers *Susquehanna* (flagship) and *Mississippi* and the sloops *Plymouth* and *Saratoga* he anchored in the Bay of Yeddo, off the city of Uraga, 27 miles from Yeddo. In reporting his proceedings he had, he said, decided on a course different from that of others who had visited Japan, viz, "to demand as a right, and not to solicit as a favor, those acts of courtesy which are due from one civilized nation to another; to allow of none of those petty annoyances which have been unsparingly visited upon those who had preceded me, and to disregard the acts as well as the threats of the authorities, if they in the least conflicted with my own sense of what was due to the dignity of the American flag. The question of landing by force was left to be decided by the development of succeeding events."

Perry refused to meet, or deliver the President's letter to, any but an officer of the highest rank. He declined to go to Nagasaki. July 14, 1853, he was received by the Prince of Idzu, first counselor of the Emperor, and his coadjutor, the Prince of Iwami. To the former he delivered the President's letter, his letter of credence, and other documents. They gave a receipt, saying that they violated the law in receiving the papers there instead of at Nagasaki, but did it because the admiral, in his quality of ambassador of the President, had declared that he would be insulted by a refusal. They ordered Perry, in conclusion, to leave. Instead, he went higher up the bay, ten miles above where any foreign vessel had previously ascended and twenty above the usual anchorage. Perry said that the nearer he approached the imperial city "the more polite and friendly they became."

July 14 he wrote the Emperor that he would return in the next spring for a reply to the propositions of the United States.

Mr. Dobbin, Secretary of the Navy, in acknowledging the receipt of Perry's reports of these transactions, said:

"These communications have all been submitted to the President, who, while he would be happy to see your interesting mission crowned with success, and would aid you as far as he can legitimately, desires to impress you with his conviction that the great end should be attained, not only with credit to the United States, but without wrong

to Japan. I need not remind you that your mission is one of peaceful negotiation, and that, although in consideration of the peculiar character of the Japanese much importance may well be attached to the exhibition of impressive evidences of the greatness and power of our country, no violence should be resorted to except for defense. It is very desirable to make our Navy an efficient branch of the government, both in extending and protecting commerce and trade; but as Congress alone has power to declare war, too much prudence can not be exercised, even in the great work in which you are engaged.

S. Ex. Doc. 34, 33 Cong. 2 sess. 45, 50, 54.
The letter of Mr. Dobbins is at p. 57 of this document.

February 13, 1854, Perry returned to Uraga with the *Susquehanna*, *Powhatan*, and *Mississippi*, towing, respectively, the *Lexington*, *Vandalia*, and *Macedonian*. The *Southampton* had arrived in advance. He then moved up nearer to Yeddo. The Emperor, as Perry supposed, but in reality the Shogun, had appointed commissioners to treat with him. They desired him to return to Uraga and treat there. He declined to do so, and moved up to within 8 miles of Yeddo. They then consented to treat at a place opposite the ships. Here the Japanese erected a pavilion, as they had previously done at Uraga. Of the five commissioners, four were princes of the empire. On March 8, 1854, Commodore Perry landed and met the commissioners, his escort consisting of 500 officers, seamen, and marines, fully armed, embarked in 27 barges. "With people of forms," said Perry, "it is necessary either to set all ceremony aside, or to out-Herod Herod in assumed personal consequence and ostentation. I have adopted the two extremes." On meeting the commissioners, Perry submitted a draft of a treaty. The commissioners later presented counterproprositions. Pending the negotiations, Perry established a telegraph line a mile long on shore, and laid down a railway and put into operation upon it a locomotive and cars, "carrying around the circle many of the astonished natives."

A treaty was concluded March 31, 1854. It was signed at the pavilion on shore by Perry and by the four commissioners specially delegated by the Shogun. The commissioners gave Perry three copies of the treaty, signed by them, in Japanese, and he gave them in return three copies, signed by himself, in English, with translations into Dutch and Chinese, certified by the Dutch and Chinese interpreters, Messrs. Portman and Williams, for the United States. The usual course of both sides signing the same instrument was departed from, on the assurance of the Japanese that their laws forbade subjects of the Emperor to put their names to a document written in a foreign language. Additional regulations were entered into by Perry at Simoda June 17, 1854.

S. Ex. Doc. 34, 33 Cong. 2 sess. 118, 120, 128, 133, 161.

An account of Commodore Perry's expedition, from his journals and those of the officers under his command, was compiled by the Rev. Francis L. Hawks, D. D., and printed in quarto form by order of the House of Representatives.

Similar treaties to that of Perry were made with Japan by Great Britain, the Netherlands, and Russia. After the treaty with the United States was concluded, Lieut. Rodgers, commanding the United States surveying ship *Vincennes*, visited Simoda and Hakodate. He ascribed the success attending the negotiation of the treaties, "and especially that of Commodore Perry, to the imposing naval force which accompanied that officer." (Mr. Marcy, Sec. of State, to Mr. Harris, No. 6, Oct. 4, 1855, MS. Inst. Japan I. 9.)

By Article VII. of the Perry treaty as published by the United States, it was agreed that American vessels resorting to Simoda and Hakodate should be permitted to exchange gold and silver coin and articles of goods "for other articles of goods, under such regulations" as the Japanese government should establish. Lieut. Rodgers stated that the Japanese version of the article read, "for other articles of goods, *such as may be necessary for them*, under such regulations," etc. (Ibid.)

July 17, 1901, there was unveiled at Kurihama, Japan, a monument erected by the Japanese "American Association of Japan," in commemoration of the advent of Commodore Perry, in July 1853. (For. Rel. 1901, 378–384.)

As to the judicial powers of consuls in Japan, see S. Ex. Doc. 20, 40 Cong. 3 sess.; and, for consular-court regulations, S. Ex. Doc. 25, 41 Cong. 3 sess.

See, also, as to consular jurisdiction in Japan, as it once existed, Mr. Eli T. Sheppard's pamphlet on "Extraterritoriality; and Mr. F. E. Hinckley's American Consular Jurisdiction in the Orient."

A memorial of American residents in Japan, asking for legislation, March 22, 1882, is printed in S. Mis. Doc. 70, 47 Cong. 1 sess.

Perry, whose negotiations were conducted with the Shogunate, supposed that he was holding relations with the Emperor of Japan, and died without knowing his error. See Foster, American Diplomacy in the Orient, 190–197.

The government of the United States had, in 1852, the right to insist upon Japan entering upon such treaty relations as would protect travellers and sailors from the United States visiting or cast ashore on that island from spoliation or maltreatment, and also to procure entrance of United States vessels into Japanese ports.

Mr. Conrad, Asst. Sec. of State, to Mr. Kennedy, Nov. 5, 1852, MS. Notes, Special Missions, III. 1.

3. Harris Treaties and Japanese Embassy.

§ 847.

By the treaty concluded by Commodore Perry, American ships were allowed to obtain supplies of provisions and coal and other articles of necessity, by purchase and by barter, in the ports of Simoda and Hakodate; aid and protection in case of shipwreck were promised, and the privilege of appointing a consul to reside at Simoda was obtained. Immediately after the publication of the treaty a party of American citizens, some of them accompanied by their wives and children, embarked for Hakodate for the purpose of settling there and supplying the wants of whale ships which were expected to touch at that port. They proceeded, however, first to Simoda, where they were allowed to land, and were lodged in one of the temples; but they were afterwards notified that they would not be permitted to reside either at Simoda or at Hakodate, since they apparently intended to stay in Japan permanently, and not, as the treaty stipulated, only temporarily.

September 8, 1855, Townsend Harris was appointed consul-general of the United States to reside at Simoda. He was chosen in the hope that by reason of his "knowledge of Eastern character" and his "general intelligence and experience in business" he might be able to induce the Japanese to enter into a treaty of commerce. He was furnished with a full power to negotiate and conclude such a treaty. His instructions stated that the intolerance of the Japanese in regard to the Christian religion precluded the hope that they would consent to a stipulation by which missionaries would be allowed to enter the Empire or by which Christian worship would be permitted. With regard to the treaty of 1854, he was informed that the United States would insist upon a fair and liberal construction of it, and, if such a construction could not be obtained, would demand and require, by such means as might be necessary, the conclusion of a new treaty, by which the privileges to which the United States was entitled would be assured.

Mr. Marcy, Sec. of State, to Mr. Harris, No. 2, Sept. 13, 1855, and No. 6, Oct. 4, 1855, MS. Inst. Japan, I. 4, 9.

For instructions to Mr. Harris to pay a debt of $2,000 incurred by an American citizen who went to Japan with a view to establish a mercantile house, and purchased certain articles at Simoda, giving in payment therefor a promissory note to the governor of the place, see Mr. Marcy, Sec. of State, to Mr. Harris, No. 7, Aug. 19, 1856, MS. Inst. Japan, I. 15.

June 17, 1857, Mr. Harris concluded with the Japanese a treaty regulating the intercourse of American citizens with Japan and the value of coins therein, and giving the American consul jurisdiction

and privileges in certain cases. By this treaty it was provided that, with a view to supplying the wants of American ships, American citizens might permanently reside at Simoda and Hakodate, and that the government of the United States might appoint a vice-consul to reside at Hakodate.

On July 29, 1858, Mr. Harris concluded with Japan a treaty of amity and commerce. This treaty provided for diplomatic representation at Yeddo, secured rights of residence and of trade at certain ports, regulated duties, granted the privilege of extraterritoriality to American citizens in Japan, and stipulated for religious freedom in that country. He achieved his success by a firm, tactful, honest diplomacy, and without the aid of a fleet, though it is no doubt true that he invoked the then recent humiliation of China by the allied fleets as an argument with the Shogun's ministers. Before the end of the year the fleets of the allies appeared, and treaties similar to that of the United States were obtained by France and Great Britain. Treaties between Japan and other powers followed in due time.

The treaty of July 29, 1858, provided that the ratifications should be exchanged at Washington. The Japanese having no vessel suitable for the conveyance of their mission to America suggested to Harris that he ask his government to lend a man-of-war for the purpose. Harris advised that this be done. "We were," said he, "the first nation to make a treaty of amity with the Japanese. This we have followed up by making the first commercial treaty with them, and to have the *éclat* to receive the first embassy from this singular people can not but redound to our national honor." Lord Elgin, said Harris, had requested the Japanese to send an ambassador to England and had offered them any conveyance they might require, but they had evaded the request, not having decided to send an ambassador to any nation. The departure of the mission to the United States was at first postponed, owing, as was understood, to the effort of some of the daimios to induce the Mikado to preserve the ancient law, which inflicted the death penalty on any Japanese who might leave the country. The Japanese, said Harris, looked upon the treaties as "unavoidable evils." They at length determined, however, to send an embassy to the United States. In the mission there were 20 gentlemen and 51 servants—71 in all. Commodore Tatnall conveyed them in the *Powhatan* to Panama, and the steam frigate *Roanoke* was sent to convey them from Colon to New York. By a joint resolution of April 19, 1860, Congress appropriated the sum of $50,000 to defray the expenses of the embassy.

S. Ex. Doc. 25, 36 Cong. 1 sess.; joint resolution of April 19, 1860, 12 Stat. 115. See, as to Harris's negotiations, Griffis, Townsend Harris, First American Envoy in Japan (Boston, 1896); Nitobe, The Inter-

course between the United States and Japan (Baltimore, 1891). See, also, an appreciative estimate of Harris's work, in Hishida, The International Position of Japan as a Great Power (New York, 1905), 111–117.

Mr. Harris, in consideration of the important services which he had rendered, was appointed minister resident of the United States in Japan. (Mr. Cass, Sec. of State, to Mr. Harris, min. to Japan, No. 1, Jan. 17, 1859, and No. 3, April 30, 1857, MS. Inst. Japan, I. 21, 24.)

"I am happy to announce that, through the energetic yet conciliatory efforts of our consul-general in Japan, a new treaty has been concluded with that Empire, which may be expected materially to augment our trade and intercourse in that quarter, and remove from our countrymen the disabilities which have heretofore been imposed upon the exercise of their religion. The treaty shall be submitted to the Senate for approval without delay." (President Buchanan, annual message, Dec. 6, 1858; Richardson's Messages, V. 506.)

Captain, afterwards Admiral, S. F. Du Pont was designated to receive and take charge of the embassy on its arrival in the United States. Commander Lee, Lieut. David D. Porter, and a purser, to act as disbursing agent, were detailed to assist him. The envoys, on their arrival in the United States, were conducted immediately to Washington. They reached that capital on the 14th of May, 1860, and on the 17th of May were received by the President, to whom they presented their letters of credence from the Tycoon. The ratifications of the treaty were exchanged on the 22d of May, and the members of the embassy were afterwards conducted to some of the principal cities of the country. They were sent back to Japan on the U. S. S. *Niagara*, which sailed from New York on the 29th of June.

Mr. Cass, Sec. of State, to Mr. Harris, min. to Japan, No. 9, April 27, 1860, MS. Inst. Japan, I. 29; Mr. Cass, Sec. of State, to the Japanese envoys, May 15, 1860, MS. Notes to Japan, I. 156; Mr. Cass to Mr. Harris, No. 10, May 18, 1860, MS. Inst. Japan, I. 30.

Mr. Cass, Sec. of State, to Capt. Du Pont, April 26, 1860, 52 MS. Dom. Let. 180; same to same, April 28, 1860, id. 190; Mr. Trescot, Act. Sec. of State, to Mr. Toucey, Sec. of Navy, July 9, 1860, id. 427.

Mr. A. L. A. Portman, who was then in the United States, was chosen to act as interpreter to the embassy, and provision was made for the continuance of his connection therewith till its arrival in Japan. (Mr. Trescot, Act. Sec. of State, to Capt. Du Pont, June 26, 1860, 52 MS. Dom. Let. 387.)

Presents were placed by the envoys in the hands of Captain Du Pont for the President and General Cass. Being forbidden to accept the presents for themselves without the consent of Congress, they received "these splendid specimens of Japanese skill" for the nation. (Mr. Cass, Sec. of State, to Capt. Du Pont, May 22, 1860, 52 MS. Dom. Let. 261.)

Various presents, including some arms and munitions of war, which the envoys had expressed a desire to take to their government, were made on the part of the United States. Some medals were also struck off in commemoration of the embassy's visit, one of the medals bear-

ing on its obverse a head of the President, and on the other side an appropriate inscription. (Mr. Cass, Sec. of State, to Capt. Du Pont, May 22, 1860, 52 MS. Dom. Let. 261; Mr. Cass to Mr. Floyd, Sec. of War, June 22, 1860, id. 370; Mr. Trescot, Act. Sec. of State, to Mr. Harris, No. 12, June 26, 1860, MS. Inst. Japan, I. 33.)

The embassy proposed to give to Captain Du Pont $20,000, to be distributed among the police of Washington, Baltimore, Philadelphia, and New York and certain other persons. The Department of State replied: "The President is reluctant to interfere with the wishes of the embassy upon a matter not requiring his official intervention, but he is decidedly of opinion that the proposition, although very honorable to the envoys, is not of a character to meet the approbation of this government, and this opinion you will communicate to the embassy." (Mr. Trescot, Act. Sec. of State, to Capt. Du Pont, June 26, 1860, 52 MS. Dom. Let. 387.)

During the stay of the envoys in Baltimore two swords were purloined from them. One of the swords was afterwards recovered and sent back to Japan. (Mr. Seward, Sec. of State, to Mr. Pruyn, Dec. 9. 1861, MS. Inst. Japan, I. 57; Dip. Cor. 1863, 963.)

The Japanese, when suggesting in 1863 that they might send another embassy to the United States, "begged most earnestly that no such expensive reception should be given to it as on the occasion of the former one." (Mr. Pruyn, min. to Japan, to Mr. Seward, Sec. of State, Dec. 1, 1863, Dip. Cor. 1864, III. 463, 464.)

In 1889 Japanese retail merchants dealing in "Scott's Emulsion," an American medicinal preparation, were informed by their government that they must obtain a special license for its sale. They complied, but the American legation at Tokio sought to have the exaction removed. Subsequently, in addition to the license tax, they were required to pay an excise duty of 10 per cent in the form of a revenue stamp on each bottle. The Japanese merchants were thus in some cases obliged to return their stock to the American importers, who invoked the interposition of the legation. The Japanese government defended its action on the twofold ground, first, that "Scott's Emulsion," being in the nature of a medicinal preparation, fell within the Japanese regulations for the sale of licensed medicines, which required a special license to be taken out for the vending of such articles; and, second, that under the treaties the Japanese government had the right to levy internal taxes on all goods or articles of merchandise imported into the Empire. It was stated, however, that the imperial authorities would not have it understood that they would inflexibly adhere to their opinion or hesitate to abolish the internal taxes upon the imported article if it could be conclusively shown that they are not altogether correct in their position; and they invited an expression of the views of the United States upon the subject.

The United States took the ground that the exactions violated Articles III. and IV. of the treaty of 1858. Article III. provided that "Americans may freely buy from Japanese and sell to them any

articles that either may have for sale, without the intervention of any Japanese officers in such purchase or sale, or in making or receiving payment for the same;" and that "all classes of Japanese may purchase, sell, keep, or use any articles sold to them by the Americans." Article IV. provided that "duties" should be "paid to the government of Japan on all goods landed in the country, . . . according to the tariff hereunto appended;" and that "all goods imported into Japan, and which have paid the duty fixed by this treaty, may be transported by the Japanese into any part of the Empire without the payment of any tax, excise, or transit duty whatever."

The Japanese government laid special stress on the words "may be transported," as defining and limiting the scope of the stipulation. The United States replied that, while it might be true that the American negotiator had particularly in mind the "likin" tax, or transit duty, imposed on goods in China, yet the language of the treaty made it clear that it was intended, while doing away with the transit duty, to prevent the imposition of equally onerous and distinctive taxes in other forms, and to preclude the assessment of duties, in addition to those provided in the treaty, by reason of the passage of the goods from American into Japanese hands. This construction, the United States maintained, was confirmed by the practice of thirty years, under which the Japanese government had abstained from imposing internal taxes on goods imported under the conventional tariffs.

Mr. Sato, Japanese chargé, to Mr. Blaine, Sec. of State, March 7, 1890, For. Rel. 1890, 611; Mr. Blaine to Mr. Swift, min. to Japan, No. 59, March 18, 1890, id. 594.

In his No. 120, May 20, 1890, Mr. Swift reported that he had communicated a copy of Mr. Blaine's No. 59 to the Japanese Government. Mr. Blaine, in acknowledging the receipt of the dispatch, said: "There is no occasion to renew representations unless the Japanese government should continue to tax the article and without submitting a reply to the views of the Department. In that case, which is not anticipated, you will be justified in pressing the protest further." (Mr. Blaine, Sec. of State, to Mr. Swift, No. 81, June 12, 1890, For. Rel. 1890, 603.)

4. Domestic Disturbances.

§ 848.

Treaties with Japan, similar to that of the United States, were made by France, Great Britain, the Netherlands, Prussia, and Russia. The opening of the country to foreign trade was followed by marked antiforeign disturbances. These were ascribed in large measure to the sudden enhancement of the cost of various articles by reason of the foreign demand. This enhancement was said in some instances to amount to as much as 300 per cent. Exportations increased, while

little was imported, and loud complaints were heard, especially on the part of the official classes, with fixed and limited incomes, as to the effect of the treaties. In these circumstances the Japanese government sought the postponement for a year of the exercise by the citizens and subjects of the treaty powers of the right, which they were to possess after January 1, 1862, to reside in Yeddo for purposes of trade, lest it might be impossible to protect them in the enjoyment of the privilege. Mr. Harris seconded, with the concurrence of the English and French ministers, the Japanese government's wishes. No decision had been reached by the government of the United States when news was received of the assassination on the night of January 15, 1861, of Mr. Heusken, secretary to the American legation, without other cause than the fact of his being a foreigner. The Japanese government appeared to be unable to bring the offenders to punishment. Apprehensive lest any concession might encourage the party opposed to the execution of the treaties and render the position of foreigners in Japan still more insecure, the government of the United States not only announced the opinion that no postponement of the opening of Yeddo ought to be granted, but also proposed to the governments of the treaty powers a plan of cooperation which was to be embodied in an informal convention. Under this plan the diplomatic or consular representatives of the treaty powers were to address to the Japanese government a joint note expressive of the determination of their governments to require the fulfilment of all the stipulations of the treaties, and, if the reply of Japan should be unfavorable or evasive, the powers were then to employ such force as might be necessary. Attention was at the same time called to the circumstance that the assent of Congress was requisite to the commencement of hostilities against a foreign power by the United States. But before any definite action was taken on these proposals a despatch was received from Mr. Harris, under date of May 8, 1861, enclosing communications from the Tycoon of Japan to the President of the United States and from the Japanese ministers for foreign affairs to the Secretary of State. The communications of the Tycoon and his ministers strongly urged the postponement of the opening of the cities of Yeddo and Osaka and the harbors of Hiogo and Nee-e-gata; and Mr. Harris suggested that discretionary power should be given to himself to act, in concert with his colleagues, in such manner as he might deem most advisable. The government of the United States reconsidered its plan for a naval demonstration, chiefly out of deference to Mr. Harris's judgment, and conferred upon him the discretion which he solicited, at the same time insisting that he should not, except in the extremest necessity, consent to any postponement of any covenant in the treaty without first receiving satisfaction of some marked kind for the assassination of Mr. Heusken. The form

and mode of that satisfaction were left to Mr. Harris's discretion. When Mr. Harris received these instructions he advised the Japanese government of their purport, and effected a settlement of the case of Mr. Heusken. The Japanese government promised to use every effort to bring the assassins to justice, and paid the sum of $10,000 for the use of the victim's widowed mother, who was dependent upon him for support. It was expressly understood that the payment of this sum should not in any way release the Japanese government from its obligation to bring the murderers of Mr. Heusken to punishment.

Mr. Harris, min. to Japan, to Mr. Cass, Sec. of State, No. 26, Aug. 1, 1860, Dip. Cor. 1862, 793; Mr. Harris to the Secretary of State, No. 20, May 8, 1861, id. 794; Mr. Seward, Sec. of State, to Mr. Harris, No. 17, July 23, 1861, id. 813; same to same, No. 18, Aug. 1, 1861, id. 814; same to same, No. 20, Oct. 7, 1861, id. 816; Mr. Harris to Mr. Seward, No. 50, Nov. 27, 1861, id. 806.

For Mr. Seward's proposal of a joint naval demonstration, see his note to Baron Gerolt, Prussian min., May 14, 1861, Dip. Cor. 1862, 547. A similar note was sent to the other representatives at Washington of the treaty powers.

For the form of the proposed convention or joint note relative to a joint naval demonstration, see Mr. Seward, Sec. of State, to Mr. Stoeckle, Russian min., May 20, 1861, MS. Notes to Russian Leg. VI. 102.

On July 10, 1861, Mr. Harris asked, on grounds of impaired health, to be relieved from public employment. His resignation called forth expressions of regret from the Japanese government as well as from his own. In a communication of October 21, 1861, informing him of the President's acceptance of his resignation, Mr. Seward said: "Your appointment as the first commissioner to Japan was made by President Pierce upon the joint recommendation of Commodore Perry and myself." Mr. Seward declared that he regarded Mr. Harris's retirement from the post that he had filled with such distinguished ability and success as a subject of grave anxiety not only for the United States, but for all the western nations. (Dip. Cor. 1862, 799, 812, 816, 822, 823.)

For the Japanese record of Harris's reception, see For. Rel. 1879, 620.

On the night of July 5, 1861, an attack was made on the British legation at Yeddo. Mr. Alcock, the British minister, escaped uninjured, but Mr. Oliphant, secretary of legation, and Mr. Morrison, consul for Nagasaki, were wounded. The attack seems to have been in some measure due to a feeling of dislike to the English, and in particular to the British minister; but Mr. Harris, in reporting the incident, said that it was not to be concealed that he himself, in common with his colleague, was "subject to the same unpopularity that attaches to the presence of all foreigners in Japan." Mr. Harris's successor, Mr. Pruyn, was instructed to "seek no exclusive advantages," but to consult freely with his colleagues on all subjects, with a view to maintain the prestige of Western civilization in Yeddo.

The antiforeign feeling continued, and in June, 1862, another attack was made on the guards of the British legation. The British chargé d'affaires withdrew from Yeddo to Yokohama, and, with the return of the Dutch consul-general to Nagasaki, Mr. Pruyn was the only minister resident left in Yeddo. The antiforeign agitation continued; all the foreign legations were threatened with attack, and individual foreigners were subjected to personal violence sometimes resulting in their death. On the morning of May 24, 1863, the American legation was burned. Mr. Pruyn stated that he desired to believe that the fire was purely accidental, although for months attempts had been made to induce him to leave Yeddo. On the 31st of June, he retired to Yokohama. Before this incident occurred, Mr. Pruyn was instructed on June 18, 1863, to "cooperate with the representatives of the other treaty powers" in any difficulties that might arise, and was informed that the U. S. S. *Wyoming* would obey his orders. The situation was fully reviewed by Mr. Seward in instructions to Mr. Pruyn of July 7 and 10, and September 1, 1863. These instructions enjoined the importance of "concert and unity among the treaty powers," in "the common interests of civilization and humanity," "unobstructed by jealousy or suspicion, or unkind debate of any sort." It appeared that the British legation had demanded indemnities before a certain date on pain of hostilities, and that the French naval forces were prepared to act in concert with the English. It was apprehended, however, that, if the government should conclude to grant the indemnities, a civil war was likely to break out under the auspices of the Mikado and a combination of daimios hostile to the foreign policy of the Tycoon. In these circumstances, Mr. Pruyn was directed to exert his "whole moral influence" to preserve peace between the other treaty powers and Japan, on the basis if necessary of a compliance by the latter with the terms prescribed by the powers, since it was not doubted that those terms would be formulated simply with a view to the necessary security of foreigners of all nations. As to the injuries suffered by Americans, if the Japanese should grant adequate indemnities and guarantee the safety of American residents, the *Wyoming* was not to commit any hostile act against the Japanese government or power. But if, on the contrary, it should seem to Mr. Pruyn to be necessary "for the *Wyoming* to use her guns, for the safety of the legation or of Americans residing in Japan, then her commander will employ all necessary force for that purpose." The prime objects of the United States were declared to be: "First, to deserve and win the confidence of the Japanese government and people, if possible, with a view to the common interest of all the treaty powers; secondly, to sustain and cooperate with the legations of those powers, in good faith, so as to render their efforts to the same end effective." When news was received at Washington

of the burning of the American legation, Mr. Pruyn was instructed to demand of the government of the Tycoon the prompt payment of an indemnity, the exertion of diligence to discover and punish the incendiaries, the permanent reestablishment and guaranteed safety of the legation at Yeddo, and the full observance of the treaties between the two countries. He was to employ the naval forces at his command for the protection of the legation and of American citizens under all circumstances, and to inform the government of the Tycoon that additional forces would be sent, as occasion should arise, to maintain the demands of the United States.

Mr. Harris, min. to Japan, to Mr. Seward, Sec. of State, No. 28, July 9, 1861, Dip. Cor. 1861, 421; Mr. Seward, Sec. of State, to Mr. Pruyn, No. 2, Nov. 15, 1861, Dip. Cor. 1862, 817; same to same, No. 42, June 29, 1863, Dip. Cor. 1863, II. 1033; same to same, No. 43, July 7, 1863, id. 1037; same to same, No. 45, July 10, 1863, id. 1039; same to same, No. 46, Sept. 1, 1863, id. 1057; same to same, No. 47, Sept. 9, 1863, id. 1059.

See, also, Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, July 14, 1863, 61 MS. Dom. Let. 204.

As to the attack on the American merchant ship *Pembroke* by the Prince of Nagato, see Mr. Seward, Sec. of State, to Mr. Pruyn, No. 50, Oct. 3, 1863, Dip. Cor. 1863, II. 1060, acknowledging the receipt of Mr. Pruyn's despatches Nos. 48 and 49, of July 24, and No. 50, of July 25, 1863, printed in the same volume. In this instruction Mr. Seward said: "You will, in all cases, hold the claims of this government and of citizens of the United States distinct and separate from those of other governments and subjects of other powers. But this separation will not be expected to restrain you from acting with your colleagues, and giving them your moral support; and when there is need, with reference to common defence, or to save a common right, or secure a common object, just and lawful in itself, the naval forces of the United States will be expected to cooperate with those of the other Western powers." See further, as to the case of the *Pembroke*, supra, § 1093.

As to building ships of war for Japan, see S. Ex. Doc. 33, 37 Cong. 3 sess.

5. Affair of Shimonoseki.

§ 849.

As the treaties were made by the Tycoon's government, they were not recognized by the partisans of the Mikado. Chief among these was the Prince of Chosu, ruler of the provinces of Suecoo and Nagato. He had possession of the fortifications commanding the straits of Shimonoseki, and also had with him the person of the Mikado, and, refusing to recognize the validity of the treaties concluded by the Tycoon, he closed the passage to the inland sea. At the request of the Tycoon's government, naval forces of the United States, Great Britain, France, and the Netherlands jointly proceeded to open the straits by force. On the 4th to the 8th of September, inclusive, 1864,

they destroyed the batteries commanding the straits, blew up the magazines, threw the shot and shell into the sea, carried away seventy cannon, and obtained the unconditional surrender of the prince, with an agreement on his part to pay the expenses of the expedition. The ratification of the treaties by the Mikado and the firm establishment of the foreign policy of the Tycoon speedily followed. The government of the Tycoon, preferring to assume the expenses of the expedition, entered into a convention October 22, 1864, and agreed to pay to the governments of the United States, Great Britain, France, and Holland the sum of $3,000,000. It so happened that no vessel in the naval service of the United States then in Japanese waters was in a condition to take part in the expedition, and the steamer *Takiang* was chartered for the service and was manned with a crew of eighteen persons from the U. S. S. *Jamestown*, who, with her own crew of forty, made a crew of fifty-eight in all. The mode of dividing the indemnity between the four participating powers was discussed at Paris in 1865, and it was finally decided that, to mark the high estimate placed upon the united action of all the powers then represented in Japan, the indemnity should be divided among the four governments in equal shares, without regard to the actual material force contributed by each to the expedition. The proceedings of the treaty powers in this instance were not intended nor considered as an act of interference in the political affairs of Japan. Their object was the enforcement of treaty rights, with the approval of the government that granted them; and the effect which the expedition may have had on the fortunes of parties in Japan was purely incidental. In the subsequent revolution which led to the fall of the Shogunate and the restoration of the imperial authority under the Mikado, the foreign powers declared their neutrality. The only wish of the United States was for the establishment and maintenance of a strong central government by which the treaties might be enforced and the native autonomy preserved.

S. Ex. Doc. 58, 41 Cong. 2 sess.; Dip. Cor. 1864, III. 553, 579, 581, 584.

The several installments received by the United States from Japan under the convention of October 22, 1864, amounted to $785,000. The money as received was invested in United States bonds, and the interest on the bonds as they fell due was likewise invested. By the act of February 22, 1883, 22 Stat. 421, the President was directed to pay to the Government of Japan the sum of $785,000.87. This sum was duly returned to the Japanese government. The act also directed the Secretary of the Treasury to pay the sum of $140,000 to the officers and crew of the U. S. S *Wyoming* for the destruction of hostile vessels in the straits of Shimonoseki on July 16, 1863, and to the officers and crew of the *Takiang* for services rendered on September 4–8, 1864. (Notes to United States Treaty Volume (1776–1887), 1348–1350.)

The following documents relate to the Japanese indemnity: H. Ex. Docs. 51, 69, 77, 41 Cong. 2 sess.; H. Mis. Doc. 151, 42 Cong. 2 sess.; S. Rep. 169, 44 Cong. 1 sess.; H. Mis. Doc. 24, 44 Cong. 1 sess.; S. Mis. Doc. 80, 44 Cong. 1 sess.; H. Report 913, 45 Cong. 2 sess.; H. Report 669, 46 Cong. 2 sess.; S. Rep. 752, 46 Cong. 3 sess.; H. Report 138, 47 Cong. 1 sess.; S. Rep. 120, 47 Cong. 1 sess.; S. Mis. Doc. 20, 47 Cong. 2 sess.

As to the abolition of the office of Tycoon by the Mikado, see Dip. Cor. 1868, I. 618, 634, 679, 838, 844.

As to the neutrality of the foreign powers in the war between the Tycoon and the Mikado, see Dip. Cor. 1868, I. 635, 671, 677, 730, 733, 763.

The Mikado, on assuming the exercise of power at Yedo, changed the name of the city to Tokio. (Dip. Cor. 1868, I. 823–825.)

As to the case of the *Pembroke*, see Reprisals, infra, § 1093.

As to the *Monitor* claim, and the refusal of the United States further to press it, see For. Rel. 1888, II. 1068, 1069.

As to claims against Japan, see S. Mis. Doc. 52, 40 Cong. 2 sess.

As to recent events in Japan, 1868, see S. Ex. Doc. 65, 40 Cong. 2 sess.

As to the exclusion of Americans from the island of Amakusa, see Mr. Fish, Sec. of State, to Mr. De Long, min. to Japan, Sept. 15, 1870, MS. Inst. Japan, I. 357.

The diplomatic representative of the United States in Japan was instructed to confer with the representatives of the other powers, and, while treating the Japanese government with perfect respect and conciliation, to press upon it, with the concurrence of his colleagues, an application for the abrogation of the law which prohibited Christianity throughout the empire.

Mr. Seward, Sec. of State, to Mr. Van Valkenburgh, No. 32, Oct. 7, 1867, Dip. Cor. 1867, II. 63.

See, also, same to same, No. 83, Oct. 5, 1868, Dip. Cor. 1868, I. 827.

See, further, For. Rel. 1870, 453–486, as to persecution of native Christians.

6. Convention of 1866, and Treaty Revision.

§ 850.

On June 25, 1866, the representatives of the United States, France, Great Britain, and Holland signed with the Japanese government a convention for the modification of the tariff of import and export duties contained in the trade regulations annexed to the treaties of 1858. The new convention, which went into operation July 1, 1866, substituted specific for ad valorem duties. The plenipotentiaries acted on the assumption that the treaty, before going into effect, need not be ratified by their respective governments, but it was afterwards laid before the United States Senate, which advised its ratification June 17, 1868.

On February 29, 1872, an embassy from Japan arrived in Washington. Arrangements were made for its reception by the President at noon on Monday the 4th of March. The embassy afterwards

visited Europe. Its principal object was to secure the revision of existing treaties. In this it was unsuccessful. September 2, 1874, Mr. Fish wrote: "The President is impressed with the importance of continued concert between the treaty powers in Japan, at least until after the revision of the treaties, and until the government of Japan shall have exhibited a degree of power and capacity to adopt and to enforce a system of jurisprudence, and of judicial administration, in harmony with that of the Christian powers, equal to their evident desire to be relieved from the enforced duties of exterritoriality."

Mr. Fish, Sec. of State, to Mr. Nicholas Fish, chargé at Berlin, No. 703, Sept. 2, 1874, For. Rel. 1874, 460.

A similar instruction was sent to the American minister at St. Petersburg.

As to the reception of the Japanese embassy by the President in 1872, see Mr. Fish, Sec. of State, to Mr. Mori, March 2, 1872, MS. Notes to Japan, I. 13.

The efforts of Japan to secure the revision of the treaties continued. According to the despatches of Mr. Bingham, American minister at Tokio, the chief desire of Japan from 1874 to 1878 was to regain control of her revenues. To that end Mr. Bingham always urged independent action on the part of the United States, and in proof of his contention that the United States should not deem itself precluded by the joint agreement of 1866 from so acting, he transmitted to the Department of State, in his No. 276 of October 8, 1875, a copy of a protocol entered into by the British and German governments with that of Japan in 1874 to settle the meaning of the term "iron, manufactured," in the agreement of 1866. Mr. Fish, who was then Secretary of State, took, however, a different view of the matter. In an instruction to Mr. Bingham, of March 9, 1876, he said: "It has been the inviolable policy of the United States to act in all oriental affairs in concert with the European powers. Nothing in the present case appears to call for an abandonment of that policy. On the contrary, in a matter so grave and important as the revision of all existing treaties with Japan, it would seem to be of the utmost importance that there should be earnest and hearty cooperation of all the treaty powers." He also thought that the English-German protocol did not alter the meaning of the agreement of 1866, and consequently was not relevant to the pending question.

Mr. Evarts, Mr. Fish's successor, took a somewhat different view, both of the effect of the protocol and of the question of cooperation, and suggested independent negotiations with the Japanese minister at Washington. Subsequently, under instructions of the Department of State, Mr. Bingham signed on July 25, 1878, a commercial convention with Japan. By this convention, the ratifications of which were duly exchanged, the convention of June 25, 1866, was to be annulled

and the stipulations of the treaty of 1858 pertaining to customs and trade were to cease to operate. It was provided, however, that the new convention should take effect only when Japan had concluded with all the other treaty powers new agreements of similar purport. As such agreements were not concluded, the convention of July 25, 1878, though designed to secure the recognition of Japan's autonomy in matters of trade and commerce, remained inoperative.

Mr. Fish, Sec. of State, to Mr. Bingham, min. to Japan, No. 228, May 15, 1876, MS. Inst. Japan, II. 341; Mr. Fish, Sec. of State, to Japanese min., Feb. 10, 1877, MS. Notes to Japan, I. 127; Mr. Evarts, Sec. of State, to Mr. Bingham, No. 299, June 21, 1877, id. II. 395; same to same, July 17 and July 19, 1879, id. II. 519, 521.

See the following despatches from Mr. Bingham: No. 276, Oct. 8, 1875; No. 603, Aug. 1, 1877; No. 681, Dec. 1, 1877; No. 758, March 29, 1878, No. 973, Sept. 20, 1879; No. 1030, Dec. 10, 1879; No. 1227, Dec. 22, 1880, MSS. Dept. of State.

In his No. 973, Sept. 20, 1879, Mr. Bingham transmitted a confidential statement handed to him at the Japanese foreign office of a conversation at the British foreign office between Sir Julian Pauncefote and Mr. Stuart Lane, of the Japanese legation in London, in relation to the convention of July 25, 1878. Sir Julian spoke of it as "contrary to all usage" for the United States to act secretly and independently in such a matter.

As to the exchange of the ratifications of the convention of May 17, 1880, for the reimbursement of certain shipwreck expenses, see Mr. Hay, Act. Sec. of State, to the Japanese min., July 17, 1880, MS. Notes to Japan, I. 200.

A conference for the revision of the treaties met at Tokio in March, 1882. It was called to order by Sir Harry S. Parkes, British minister, who, in his opening speech, said that he begged to "welcome the minister of the United States and to assure him of the pleasure it afforded them to see him join their meeting, not only on account of the high regard they entertain for him personally, but also because his presence denoted, as they believed, the friendly desire of his government to act *in concert* with the powers." Mr. Bingham replied that he had been authorized to "participate in the deliberations of the conference, but in no wise to thereby commit the government of the United States to any action that may be taken." The Japanese government proposed to the conference not only the subject of tariff autonomy, but also that of judicial autonomy. The proposals on the latter subject embraced the idea of a probationary period. The conference reached no decisive result. One of its most striking aspects was the change in the situation that had occurred since the formation of the joint tariff convention of 1866. As has been seen, the signatories of that convention were the United States, France, Great Britain, and the Netherlands. Since that time,

Russia had assumed an influential position in Japan; and Belgium, Germany, Spain, and Switzerland had also established relations with that country.

Mr. Frelinghuysen, Sec. of State, to Mr. Bingham, min. to Japan, tel., Feb. 9, 1882, saying: "If the Japanese government makes specific request, you may attend conference, but without committing United States."

See despatches of Mr. Bingham, No. 1461, March 30, 1882; No. 1485, May 9, 1882; No. 1494, May 23, 1882; No. 1503, June 2, 1882; No. 1519, June 22, 1882.

May 20, 1881, Mr. Bingham was instructed, with reference to a report that the European powers were disposed to insist on a revision of the treaties with Japan by a joint conference to be held in Europe, that the United States "would not take part in any such conference." (Mr. Blaine, Sec. of State, to Mr. Bingham, min. to Japan, No. 591, May 20, 1881, MS. Inst. Japan, III. 50.)

"The intimacy between our own country and Japan, the most advanced of the Eastern nations, continues to be cordial. I am advised that the Emperor contemplates the establishment of full constitutional government and that he has already summoned a parliamentary congress for the purpose of effecting the change. Such a remarkable step toward a complete assimilation with the Western system can not fail to bring Japan into closer and more beneficial relations with ourselves as the chief Pacific power." (President Arthur, annual message, Dec. 6, 1881, For. Rel. 1881, viii.)

"I do not see that I need at present repeat or add to the previous instructions of the Department of State with which you are familiar, or to qualify the belief this government entertains that Japan is in a position to assert her independent national right to fix her own taxation and import dues, within just and usual limits, as an incident of national sovereignty." (Mr. Frelinghuysen, Sec. of State, to Mr. Bingham, min. to Japan, No. 635, Jan. 3, 1882, MS. Inst. Japan, III. 96.)

See, also, Mr. Frelinghuysen, to Mr. Bingham, No. 649, Feb. 28, 1882, MS. Inst. Japan, III. 105.)

Mr. Hubbard, minister to Japan, in his No. 100, Jan. 21, 1886, stated, upon "authoritative information," that "Japan has neither colonies nor dependencies," and that the Loochoo Islands, properly speaking, were considered a part of Japan itself and formed part of the district of Okinawa. (Mr. Bayard, Sec. of State, to Mr. Manning, Feb. 23, 1886, 159 MS. Dom. Let. 143.)

As to the absorption of the Loochoo (Lew Chew) Islands by Japan, see 5 Moore, Int. Arbitrations, 5046–5048; Mr. F. W. Seward, Act. Sec. of State, to Mr. Bingham, min. to Japan, No. 380, Oct. 9, 1878, 11. 455.

See, as to American interests in Japan, S. Ex. Docs. 52 and 58, 41 Cong. 2 sess.

After the final adjournment in September, 1882, of the treaty conference of that year, Mr. Bingham suggested that the United States forthwith conclude a separate revised treaty with Japan on a basis proposed by that government. In view of the fact that the convention of July 25, 1878, still remained inoperative, owing to the refusal

of the other powers to conclude similar arrangements, Mr. Bingham's suggestion was not adopted; but the President in his annual message of 1883 announced that the United States was disposed to concede the requests of Japan to determine her own tariff rates, to provide such judicial tribunals as might commend themselves to the Western powers for the trial of causes to which foreigners were parties, and to assimilate the terms and duration of her treaties to those of other civilized states. The United States, as Mr. Frelinghuysen afterwards explained, was "not yet prepared to accept unreservedly the Japanese claim to exclusive jurisdiction," but preferred "an intermediate period of mixed jurisdiction," although it was considered possible that Japan might offer such positive and effective guarantees of impartial judicial administration as to overcome this preference.

Mr. Frelinghuysen, Sec. of State, to Mr. Bingham, min. to Japan, No. 707, Jan. 16, 1883, MS. Inst. Japan, III. 153; Mr. Frelinghuysen to Mr. von Eisendecher, Jan. 10, 1884, MS. Notes to Germany, X. 269; Mr. Frelinghuysen to Mr. Bingham, No. 808 (confid.), March 5, 1884, MS. Inst. Japan, III. 238; same to same, tel., May 10, 1884, id. 247; same to same, No. 859, Sept 16, 1884, id. 283.

October 31, 1885, Mr. Hubbard, then American minister at Tokio, was instructed to attend another conference for the revision of the treaties. He was to support Japan's claim to make separate terminable treaties covering both the tariff and judicial administration, but was to accept an equitable compromise, so as not to obstruct Japan's agreeing with the other powers. In instructions to Mr. Hubbard of July 14, 1886, Mr. Bayard said: "The chief object of the United States is to secure to Japan, as far as practicable, complete autonomy. The speediest and most effectual way of accomplishing this end appears to be by cooperating with the other treaty powers, at the same time taking care not to depart from our settled policy of avoiding entangling alliances. . . . The object, as understood by this government, of the past and present conferences of revision is to seek and frame a common basis for independent treaties. . . . The most important and essential object to Japan is to obtain control of her own revenues. The arrangement of 1866 has the disadvantage of being made jointly with other powers and of not being terminable on notice given. . . . The United States are indisposed to accept any result of the pending revision which does not embrace the terminability of the treaties within a reasonable period. The objective point to be kept in view in the discussion is the recognition of Japan's autonomy. This being established and conceded on all sides, the regulation by Japan of her foreign commerce and of her domestic affairs follows as an attribute of sovereignty, to be restrained only so far as she may deem it expedient by independent treaties. Every

step, therefore, that tends to establish the unquestionable autonomy of Japan is a progression towards our position. If the work of revision should fail to secure to Japan, now or within the near future, the measure of autonomy to which we think she is entitled, it will remain for this government to determine its course, and consider whether the desired result may be otherwise reached by independent negotiation between the United States and Japan, on more practical and more immediately applicable bases than are found in the separate treaty of 1878."

Mr. Bayard, Sec. of State, to Mr. Hubbard, min. to Japan, tel., Oct. 31, 1885, MS. Inst. Japan, III. 358; same to same, No. 80, July 14, 1886, id. 419.

As to the most-favored-nation clause, see Mr. Bayard, Sec. of State, to Mr. Hubbard, No. 56, April 5, 1886, and No. 82, July 17, 1886, MS. Inst. Japan, III. 395, 425.

"As the first to open relations with that Empire [Japan], and as the nation in most direct commercial relation with Japan, the United States have lost no opportunity to testify their consistent freindship by supporting the just claims of Japan to autonomy and independence among nations.

"A treaty of extradition between the United States and Japan, the first concluded by that empire, has been lately proclaimed." (President Cleveland, annual message, Dec. 6, 1886, For. Rel. 1886, vi.)

The extradition treaty was concluded April 29, 1886; the ratifications were exchanged at Tokio Sept. 27, 1886, and it was proclaimed Nov. 3, 1886. It was recognized as a step in the direction of yielding to Japan's desire for judicial autonomy.

The United States, while deprecating the discrimination shown by the Japanese government against citizens of the United States and in favor of German subjects in the letting of contracts for the construction of public works, did not permit its attitude to be affected by that circumstance. (Mr. Bayard, Sec. of State, to Mr. Hubbard, min. to Japan, No. 183, Jan. 31, 1888, MS. Inst. Japan, III. 506.)

In the renewed conference Count Inouye proposed a plan of revision embracing (1) the opening of Japan to foreigners, who were to be subject to exclusive Japanese jurisdiction outside of the existing foreign settlements; (2) the enforcement by the consular courts of Japanese laws and regulations; (3) the withholdment from foreigners of the right to acquire real estate outside the foreign settlements, except on temporary leases, till extraterritorial jurisdiction should have been abolished; (4) the concession to Japan of autonomy in tariff matters, and, this principle granted, the putting into effect for a term of years of the commercial treaty drawn up by the last conference; (5) the abolition of consular jurisdiction. In 1886, a compromise, known as "the Anglo-German project," was considered, by which mixed tribunals, after the manner of those of Egypt, were to be established to deal with foreign interests. The publication of this project greatly roused popular feeling against Count Inouye,

who was forced to resign. August 9, 1887, the Japanese minister at Washington gave notice of the adjournment of the treaty-revision conference, owing to the objection of his Government to the provision of the draft jurisdictional convention which required the submission of the criminal code of the Empire to the powers in advance of its becoming operative.

Mr. Bayard, Sec. of State, to Mr. Hubbard, min. to Japan, No. 234 (confid.), Aug. 13, 1888, MS. Inst. Japan, II. 543.

See also Hishida, The International Position of Japan as a Great Power, 140–141, citing Siebold, Japan and the Comity of Nations, 83–84; For. Rel. 1887, 665.

Count Inouye was succeeded by Count Okuma. In February, 1887, Count Okuma, who had reverted to the policy of negotiating with each nation separately, concluded a treaty of amity and commerce with Mexico, by which Japan's fiscal and judicial autonomy were completely acknowledged. The great problem, however, was that of forming new relations with the old treaty powers, to whom Japan's engagements were of a different character. The United States was disposed to approve Count Inouye's original plan, except as to the proposal that the consular courts should enforce Japanese laws. Mr. Bayard, who was then Secretary of State, thought that it would be more logical to fix a term after which consular jurisdiction should, under certain conditions, be entirely abolished, or, in lieu of this, to have a mixed tribunal for a term of years. President Cleveland, in his annual message of December 3, 1888, expressed the hope "that improvements may soon be secured in the jurisdictional system as respects foreigners in Japan, and relief afforded to that country from the present undue and oppressive foreign control in matters of commerce." On February 20, 1889, Mr. Richard B. Hubbard, American minister at Tokio, acting under instructions, signed with Count Okuma a new treaty of amity and commerce. By this treaty Japan was to be thrown open to the residence and travel of citizens of the United States, but they were not to be permitted to acquire fee titles to land till after the term of five years from the date at which the treaty should become operative. Meanwhile, they were to be subject to the jurisdiction of the Japanese courts outside of the ports of Hakodate, Tokio, Osaka, Yokohama, Kobe, and Nagasaki, where, for the term above mentioned, consular jurisdiction was to continue. After that term it was to cease altogether. By a separate declaration, however, it was promised that a certain number of foreign judges should be appointed to sit as associates in the Japanese supreme court in foreign matters, so that a majority of the tribunal would in cases of appeal by American citizens be composed of foreign jurists. The tariff was still to be partly conventional. The treaty was transmitted

by Mr. Hubbard to this Government in his No. 551, of February 20, 1889, the receipt of which was acknowledged by Mr. Blaine on March 18, 1889. On December 6, 1889, Mr. Hubbard's successor, Mr. Swift, who had since his arrival at Tokio written despatches strongly adverse to the acceptance of the treaty, was advised that it would "not be approved nor submitted to the Senate by the President, without serious modifications." No particular modifications were then suggested, but in an instruction to Mr. Swift, of October 2, 1890, it was intimated that the opposition to the provisions of the treaty was "radical," and certain objections were specified, embracing among others the stipulation in favor of alien ownership of land, the engagement for the eventual recognition, without experiment or further negotiation, of Japan's exclusive jurisdiction, and comparative inequalities in tariff duties, such as, for instance, the duties to be levied, respectively, on American kerosene and British cotton stuffs.

Nor was the treaty acceptable, on the other hand, to the Japanese people. An outline of a similar treaty, proposed by Count Okuma to Great Britain, having been published in the London *Times* on April 29, 1889, an outcry of disapproval was raised in Japan, especially on account of the provisions as to the appointment of foreign associates in the supreme court and the ownership of real estate. The popular agitation "became so intense that on October 19, 1889, a fanatic threw a bomb at Minister Okuma."

Mr. Bayard, Sec. of State, to Mr. Hubbard, min. to Japan, No. 234 (confid.), August 13, 1888, MS. Inst. Japan, III. 543; Mr. Hubbard to Mr. Bayard, tel., Dec. 20, 1888, MS. Desp. from Japan.

Mr. Blaine, Sec. of State, to Mr. Hubbard, min. to Japan, No. 293, March 18, 1889, MS. Inst. Japan, III. 599; Mr. Blaine to Mr. Swift, min. to China, No. 40, Dec. 6, 1889, id. 633; same to same, No. 104, Oct. 2, 1890, id. 698; same to same, No. 131, Jan. 29, 1891, MS. Inst. Japan, IV. 8.

See the following dispatches from Mr. Swift: No. 17 (confid.), June 14, 1889; No. 25, July 16, 1889; No. 37, Aug. 16, 1889; No. 42, Sept. 6, 1889; No. 148, Aug. 28, 1890; Nos. 190, 191, 192, and 193, of Dec. 23 and 24, 1890: MS. Desp. from Japan.

See, also, Hishida, The International Position of Japan as a Great Power, 141–143.

7. Emancipation of Japan.

§ 851.

A separate treaty acknowledging Japan's fiscal and judicial autonomy was concluded by Great Britain July 16, 1894. A similar treaty was signed by the United States November 22, 1894. Like action was taken by the other treaty powers. The results are elsewhere detailed.

Supra, § 281. See Hishida, The International Position of Japan as a Great Power: New York, 1905.

President Cleveland, in his annual message of Dec. 2, 1895, referring apparently to the treaty of 1878, said: "We have reason for congratulation in the fact that the government of the United States, by the exchange of liberal treaty stipulations with the new Japan, was the first to recognize her wonderful advance and to extend to her the consideration and confidence due to her national enlightenment and progressive character." (For. Rel. 1895, I. xxx.)

In his preceding annual message of Dec. 3, 1894, he declared that "our relations with this progressive nation [Japan] should not be less broad and liberal than those with other powers." (For. Rel. 1894, xi.)

As to the Chinese-Japanese war, see For. Rel. 1894, App. I. 5–106; supra, §§ 655.

Concerning commercial and industrial conditions in Japan, see S. Rep. 450, 56 Cong. 1 sess.; H. Report 484, 56 Cong. 1 sess.; H. Report 878, 56 Cong. 1 sess.

As to export of silk from Japan, see For. Rel. 1898, 438–450; and, as to tax on land, id. 433.

As to the killing at Nagasaki, Sept. 2, 1897, of Frank Eppes, a sailor of the U. S. S. *Olympia*, and William Montgomery, a landsman attached to the U. S. S. *Yorktown*, see S. Ex. Doc. 93, 55 Cong. 2 sess., parts 1, 2, 3, and 4.

An account of the assistance rendered at Kobe to the disabled U. S. transport *Morgan City* is given in For. Rel. 1899, 480.

"The valuable aid and kindly courtesies extended by the Japanese government and naval officers to the battle ship *Oregon* are gratefully appreciated." (President McKinley, annual message, Dec. 3, 1900.)

Concerning the registration of titles to perpetual leases in Japan, in connection with various provisions of the treaties of 1894, see For. Rel. 1901, 313–366.

By an imperial ordinance of July 12, 1899, it was declared that, besides the open ports theretofore designated, the following were also to be open ports:

Shimizu, Suruga Province.
Taketoyo, Owari Province.
Yokkaichi, Ise Province.
Shimonoseki, Nagato Province.
Moji, Buzen Province.
Hakata, Chikuzen Province.
Karatsu, Hizen Province.
Kuchinotsu, Hizen Province.
Misumi, Higo Province.
Izuhara, Tsushima Province.
Sasuna, Tsushima Province.
Shishimi, Tsushima Province.
Nawa, Ryukyu Province.
Hamada, Iwami Province.
Sakai, Hoki Province.
Miyazu, Tango Province.
Tsuruga, Echizen Province.
Nanawo (South Bay), Noto Province.
Fushiki, Etchu Province.
Otaru, Shiribeshi Province.
Kushiro, Kushiro Province.
Muroran, Iburi Province.

It was declared that at the port Muroran only mugi (barley, wheat, rye, oats, etc.), sulphur, coal, and other commodities designated by the minister of finance could be exported, and that, if at any of the ports specified in the foregoing list the total amount of imports and exports fell short of 50,000 yen, the port would be closed on three months' notice.

For. Rel. 1899, 477.

"In the treatment of the difficult Chinese problems Japan has acted in harmonious concert with the other powers, and her generous cooperation materially aided in the joint relief of the beleaguered legations in Peking and in bringing about an understanding preliminary to a settlement of the issues between the powers and China. Japan's declarations in favor of the integrity of the Chinese Empire and the conservation of open world trade therewith have been frank and positive. As a factor for promoting the general interests of peace, order, and fair commerce in the Far East the influence of Japan can hardly be overestimated."

President McKinley, annual message, Dec. 3, 1900, For. Rel. 1900, xxiii.

The deficiency appropriation act of February 26, 1896, provided for the purchase of the building and site occupied by the United States legation in Tokio. The purchase was speedily accomplished.

Mr. Olney, Sec. of State, to Mr. Dun, min. to Japan, No. 294, March 3, 1896, and No. 314, May 12, 1896, MS. Inst. Japan, IV. 326, 341.

The price paid was $16,462.50. (Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxiii.)

See, as to land for the legation, H. Ex. Doc. 187, 48 Cong. 2 sess.

The treaty of commerce and navigation between the United States and Japan, concluded November 22, 1894, on going into effect (July 17, 1899), "supersedes [art. 18] all existing treaties between this country and Japan," including Art. II. of the treaty of July 29, 1858.

Mr. Cridler, Third Assist. Sec. of State, to Mr. Grout, consul at Malta, No. 34, June 20, 1899, 167 MS. Inst. Consuls, 662.

Protests against the new treaties with Japan were made by Americans residing in that country in regard to land tenure, criminal procedure, the condition of Japanese prisons, and certain other matters. The position of the United States on these protests was summed up in the phrase: "Give the treaty a trial."

For. Rel. 1898, 450–464.

By an act of the Imperial Diet of Japan, passed March 24, 1897, it was provided that, for a period of seven years after April 1, 1898, Japanese subjects, or commercial companies of which the shareholders were all Japanese, engaged in the direct export of raw silk produced in Japan and stamped with a registered trade-mark, should receive a bounty, the amount of the bounty and the classification of the silk to be determined by imperial ordinance.

The United States objected to the law, not only as a discrimination against American exporters of Japanese silk, but also as a violation of Article VI. of the treaty of November 22, 1894, which provides that "the citizens or subjects of each of the high contracting parties

shall enjoy in the territories of the other exemption from all transit duties, and a perfect equality of treatment with native citizens or subjects in all that relates to warehousing, bounties, facilities, and drawbacks." It was also declared to be "distinctly antagonistic to the spirit if not the letter" of Article II. of the same treaty, in that it impaired "reciprocal freedom of commerce and navigation between the territories of the two . . . parties," and prevented citizens of the United States from enjoying the same treatment in matters of commerce as citizens or subjects of Japan. The United States adverted to the fact that the treaty of November 22, 1894, was not to go into effect till July 17, 1899, but intimated that, although the precise rights under it might not be invoked before that date, an injury might in the mean time be done which would render some of its most important provisions nugatory and which might be considered a "repudiatory act."[a]

The Japanese government, while suggesting that the bounty would be limited to the highest grades of silk, and consequently to a comparatively small quantity, and that, as "penalties must necessarily form a part of the law," it was necessary to limit its operation to Japanese subjects, so long as consular jurisdiction lasted; nevertheless admitted that it would, after July 17, 1899, when the new treaties should come into effect and consular jurisdiction end, be necessary to apply it to the citizens and subjects of treaty powers and to Japanese subjects alike.[b]

The United States considered this reply as an admission that the law would establish till July 17, 1899, "a differential treatment adverse to foreigners;" and, as to the obstacle of consular jurisdiction to the extension of the law to foreigners, observed that, as the bounty was to be paid only upon a governmental examination of the origin, weight, and fineness of the silk, the whole matter appeared to be within the effective control of the government.[c]

The law went into effect according to its terms; but immediately afterwards, on the assembling of the Diet, a bill was introduced for its repeal. This bill was passed May 23, 1898. It received the imperial sanction on May 25, and was thereupon promulgated, to take effect immediately.[d]

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[a] Mr. Sherman, Sec. of State, to Mr. Hoshi, Japanese min., June 2, 1897; Mr. Sherman, Sec. of State, to Mr. Buck, min. to Japan, June 2, 1897: For. Rel. 1898, 441–444.

[b] Mr. Hoshi, Japanese min., to Mr. Sherman, Sec. of State, June 4, 1897, For. Rel. 1898, 444.

[c] Mr. Day, Act. Sec. of State, to Mr. Buck, min. to Japan, June 10, 1897, For. Rel. 1898, 446.

[d] For. Rel. 1898, 447–449.

The provisions in Japan's new treaties conferring upon aliens the right to purchase land in that country are held by the Japanese government to be inapplicable to the exclusive Japanese settlements in Corea.

For. Rel. 1900, 769.

"I have to acknowledge the receipt of your letter of the 15th instant, inquiring whether there is a treaty between the United States and Japan whereby the United States is to control the immigration of Japanese into Hawaii after 1899.

"In reply I have to inform you that there is no such treaty. The convention you have in mind is probably that between the United States and Japan signed at Washington on November 22, 1894, which takes effect on July 17, 1899. By Article I. of that convention the subjects of Japan are given full liberty to enter, travel or reside in any part of the territories of the United States."

Mr. Day, Assist. Sec. of State, to Mr. Sasse, April 21, 1898, 227 MS. Dom. Let. 499.

XXIV. *LIBERIA.*

1. Declarations of American Policy.

§ 852.

Early in the nineteenth century a society, called the American Colonization Society, was organized by benevolent individuals from various parts of the United States for the purpose of promoting and executing a plan for colonizing, with their consent, the free people of color, residing in the United States, in Africa or such other place as Congress should deem expedient; and to this end the society was to cooperate with the general government and with such of the States as might adopt regulations on the subject. The society was later incorporated by an act of the legislature of Maryland. The first purchase of land in Africa was made by the society's agent, Dr. Ely Ayres, aided by Captain Robert F. Stockton, of the U. S. S. *Alligator*, in December, 1821, and a colony, formed of a few colored emigrants from the United States, was founded at Cape Mountserado, in July 1822. The government of the United States also sent thither recaptured Africans, under the provisions of the act of Congress of March 3, 1819. At the beginning of 1824, disaffection and insubordination in the colony had attained such a growth that the managers of the American Colonization Society solicited from the government of the United States the sending out of an armed vessel, with some individual duly commissioned by the government and the society to examine the conditions then existing and make arrangements for the

establishment of order. This request was complied with, and as a result a form of government for the colony was established.

January 5, 1843, Mr. Webster instructed Mr. Everett, who was then minister to England, to make "an informal representation," in conversation with Lord Aberdeen, concerning certain complaints of officers of the American Colonization Society relative to difficulties which had arisen between British traders and the Liberian authorities. On the 24th of March, Mr. Webster communicated to Mr. Everett further notes from the American Colonization Society, which showed that the territorial limits of the settlement were claimed to extend southeasterly from Cape Mount to Cape Palmas, a distance of about 300 miles. With regard to the relations between Liberia and the United States, Mr. Webster said: "Founded principally with a view to the melioration of the condition of an interesting portion of the great human family, this colony has conciliated more and more the good-will, and has from time to time received the aid and support of this government. Without having passed any laws for their regulation, the American government takes a deep interest in the welfare of the people of Liberia, and is disposed to extend to them a just degree of countenance and protection."

In a note of August 9, 1843, Mr. Fox, British minister at Washington, inquired how far, if at all, the United States recognized the "colony of Liberia" as a "national establishment," and also how far, if at all, it held itself responsible toward foreign countries for the acts of the Liberian authorities. Mr. Fox also requested precise information as to the limits of the settlement and the title by which the territory had been acquired, for the reason, as he stated, that the Liberian authorities had shown a disposition to enlarge the limits of their territory and to monopolize a trade with the native inhabitants along a considerable line of coast where trade had previously been free.

To these inquiries reply was made by Mr. Upshur, Secretary of State, September 25, 1843. After describing the origin of the colony, Mr. Upshur said: "To the United States it is an object of peculiar interest. It was established by our people, and has gone on under the countenance and good offices of our government. It is identified with the success of a great object, which has enlisted the feelings, and called into action the enlarged benevolence, of a large proportion of our people. It is natural, therefore, that we should regard it with greater sympathy and solicitude than would attach to it under other circumstances. . . . For several years it was compelled to defend itself by arms, and unaided, against the native tribes; and succeeded in sustaining itself, only at a melancholy sacrifice of comfort, and a lamentable loss of human lives. No nation has ever complained that it has acquired territory in Africa; but, on the contrary, for twenty-

two years it has been allowed, with the full knowledge of *all* nations, to enlarge its borders from time to time, as its safety or its necessities required. . . . It is not perceived that any nation can have just reason to complain that this settlement does not confine itself to the limits of its original territory. . . . This government does not, of course, undertake to settle and adjust differences which have arisen between British subjects and the authorities of Liberia. Those authorities are responsible for their own acts; and they certainly would not expect the support or countenance of this government in any act of injustice towards individuals or nations. But, as they are themselves nearly powerless, they must rely, for the protection of their own rights, on the justice and sympathy of other powers. Although no apprehension is entertained that the British government meditates any wrong to this interesting settlement, yet the occasion is deemed a fit one for making known, beyond a simple answer to your inquiries, in what light it is regarded by the government and people of the United States. It is due to Her Majesty's government that I should inform you that this government regards it as occupying a peculiar position, and as possessing peculiar claims to the friendly consideration of all Christian powers; that this government will be, at all times, prepared to interpose its good offices to prevent any encroachment by the colony upon any just right of any nation; and that it would be very unwilling to see it despoiled of its territory rightfully acquired, or improperly restrained in the exercise of its necessary rights and powers as an independent settlement."

Mr. Webster, Sec. of State, to Mr. Everett, min. to England, Jan. 5 and March 24, 1843; Mr. Fox, British min., to Mr. Upshur, Sec. of State, Aug. 9, 1843; Mr. Upshur to Mr. Fox, Sept. 25, 1843: H. Ex. Doc. 162, 28 Cong. 1 sess. 2, 7, 8.

Mr. Upshur's note to Mr. Fox of September 25, 1843, is recorded in MS. Notes to British Leg. VI. 302.

The Republic of Liberia was formed under a constitution of July 26, 1847, which was recognized in the following year by certain European powers which concluded treaties with it. It was not recognized by the United States, however, till 1862. See supra, § 42.

For the constitution of July 26, 1847, see 35 Brit. & For. State Papers, 1301.

For a history of the origin and promotion of the settlement at Liberia, see report of Mr. Kennedy, from the Committee on Commerce, Feb. 28, 1843, H. Report 283, 27 Cong. 3 sess.

A letter of Mr. J. Y. Mason, Sec. of Navy, to Mr. Jones, Speaker of the House of Representatives, April 30, 1844, enclosing copies of communications from Commodore Perry, concerning the condition of colonial settlements on the western coast of Africa, may be found in H. Ex. Doc. 244, 28 Cong. 1 sess.

February 3, 1845, the Senate adopted a resolution requesting the President to communicate to that body information relative to the operations of the American squadron on the West coast of Africa; the growth, condition, and influence of the American colonies there; and

the nature, extent, and progress of the commerce of the United States with them. February 26, 1845, President Tyler transmitted, in compliance with this resolution, a report of Mr. Mason, Secretary of the Navy, of February 10, 1845, enclosing several communications on the subject from Commodore Perry. The report and accompanying papers occupy 414 printed pages, including an index, and a map of Liberia compiled from data on file at the office of the American Colonization Society. (S. Ex. Doc. 150, 28 Cong. 2 sess.)

A communication of Mr. Webster, Sec. of State, to the United States Senate, Sept. 14, 1850, with a report of the Rev. R. R. Gurley, who had lately been sent out by the government of the United States to obtain information in respect to Liberia, is printed in S. Ex. Doc. 75, 31 Cong. 1 sess.

For a copy of a contract entered into by the Department of the Interior with the American Colonization Society, May 13, 1860, for the transportation to Liberia of certain Africans recaptured by vessels of the United States Navy, and a contract with the same society of July 20, 1860, for their support for one year from the date of their landing in Liberia, see Mr. Smith, Sec. of Interior, to Mr. Grow, Speaker of the House, Dec. 17, 1861, H. Ex. Doc. 12, 37 Cong. 2 sess.

October 21, 1862, a treaty between the United States and Liberia was concluded at London. March 11, 1863, John J. Henry, of Delaware, was appointed commissioner and consul-general to the Republic. He resigned the mission on May 19, 1863, only eleven days after he received his instructions. In these instructions it was stated that, while the Republic of Liberia owed its origin to the American people, it had been "reserved for the present moment" to give definite and solemn proof of their sympathy by accrediting a political agent "as a distinct and responsible recognition of the national independence and sovereign of that Republic." Abraham Hanson, of Wisconsin, was appointed commissioner and consul-general in place of Mr. Henry June 8, 1863. He died at his post July 20, 1866.

Mr. Seward, Sec. of State, to Mr. Henry, No. 2, May 8, 1863, MS. Inst. Liberia, I. 3.

See, as to the recognition of Liberia, supra, § 42.

By an act of April 17, 1866, Congress authorized the transfer to Liberia of a gunboat. The Navy Department offered to the Liberian minister in the United States the choice of one of several ships, but none of them was found to be suitable for the purpose. An American vessel of war was, however, directed to visit the coast. (Dip. Cor. 1867, II. 325, 328, 330, 331, 332.)

The inhabitants of the republic had frequent collisions with the surrounding native tribes. In 1869 the War Department of the United States sold to the Liberian government arms and military stores valued at $45,647.29. (Mr. Fish, Sec. of State, to Mr. Turner, min. to Liberia, No. 39, Feb. 10, 1873, MS. Inst. Liberia, I. 117; Mr. Davis, Act. Sec. of State, to Mr. Turner, No. 47, July 24, 1873, id. 123; resolution of the legislature of Liberia, For. Rel. 1880, 706.)

For the adhesion by Liberia to the Brussels convention of June 8, 1899, governing the importation of spirituous liquors into certain regions of Africa, see For. Rel. 1900, 35, 778.

"Your despatch No. 68 is received. In it you inform the Department that a dispute had grown up between Great Britain and the Republic of Liberia relative to the boundary of the republic, and that the government of Liberia had requested the interposition of the United States, and if necessary its protection.

"You will inform the minister of foreign affairs, in reply to his request, that the President regards the progress of the Republic of Liberia, which has been so much identified with the United States, with deep solicitude, and would see with deep regret any collision between it and any foreign power. And if the good offices of the United States can do anything towards the just settlement of the existing controversy, you are at liberty to tender them. But to go beyond that, and to offer protection, would be a violation of all the traditions and policies of the United States since they first entered the family of nations.

"Should you think it necessary to tender the good offices of this government, you will before doing so report to this Department what is the precise point at issue upon which our mediation is desired, in order that further instructions may be given before you communicate officially with the government of Liberia."

Mr. Fish, Sec. of State, to Mr. Seys, min. to Liberia, No. 34, June 16, 1869, MS. Inst. Liberia, I. 65.

As to a complaint of the Dutch government on account of the opposition of the local authorities at certain places to the fulfillment of the stipulations of the treaty of amity and commerce between Liberia and the Netherlands of Dec. 20, 1862, see Mr. Fish, Sec of State, to Mr. Turner, No. 140, Jan. 12, 1877, MS. Inst. Liberia, II. 25; Mr. F. W. Seward, Act. Sec. of State, to Mr. Turner, No. 141, April 9, 1877, id. 26; Mr. Evarts, Sec. of State, to Mr. Turner, No. 165, May 15, 1878, id. 47.

In 1879 it was reported that the French consul-general at Monrovia had offered to place the Liberian government under the protection of France. Mr. Noyes, the American minister at Paris, was instructed by Mr. Hunter, Acting Secretary of State, "to make such judicious and confidential inquiries as shall, without communicating undue importance to the matter, put you in possession of the facts." It was at the same time observed that the United States "must feel a peculiar interest in any apparent movement to divert the independent political life of Liberia for the aggrandizement of a great continental power." Mr. Noyes reported that the French government had no diplomatic or consular representative in Liberia, and that it had, instead of proposing a protectorate, declined to entertain a suggestion to that effect which, it was understood, had originated with the Liberian consul-general at Bordeaux and perhaps been

seconded by the Liberian consul at Paris, both of whom were Frenchmen.

Mr. Smyth, min. to Liberia, to Mr. Evarts, Sec. of State, No. 30, May 30, 1879, For. Rel. 1879, 718; Mr. Hunter, Act. Sec. of State, to Mr. Noyes, min. to France, No. 163, July 17, 1879, id. 341; Mr. Noyes to Mr. Evarts, No. 256, Aug. 20, 1879, id. 341; same to same, No. 322, March 26, 1880, For. Rel. 1880, 358; same to same, No. 350, May 13, 1880, id. 362.

See Mr. Smyth, min. to Liberia, to Mr. Evarts, Sec. of State, No. 52, Nov. 18, 1879, and No. 69, Feb. 12, 1880, For. Rel. 1880, 692, 701.

The volume of Foreign Relations for 1879 "devoted to the affairs of Liberia a much larger space than would seem to be warranted by the relative importance of that country. The reason for this is plain, and grows out of the peculiar relations which this country holds towards Liberia; and which are likely to become of increased importance. It is therefore quite suitable that the great powers should know that the United States publicly recognizes those relations, and is prepared to take every proper step to maintain them. In this view the publication of this correspondence seems not inopportune." (Mr. Evarts, Sec. of State, to Mr. Noyes, min. to France, No. 222, April 7, 1880, MS. Inst. France, XX. 130.)

"Liberia is regarded by us with peculiar interest. Already the home of many of those who were once of our nation, she is the predestined home of many who now enjoy citizenship in this republic. This going out to a greater or less extent of our citizens of African descent is but a question of time, and if Liberia be in proper condition to receive and care for such emigrants from the United States, her territory will be chosen by them in preference to that of any other country. A large and valuable commerce between Liberia and the United States may be developed if the two countries can be brought to see their true relations toward each other."

Mr. Evarts, Sec. of State, to Mr. Smyth, No. 43, Feb. 2, 1880, MS. Inst. Liberia, II. 94.

For other correspondence in relation to Liberia, see For. Rel. 1880, 691–707.

"The peculiar relations which this country holds to Liberia, and upon which the well-being of its republican government in a great measure rests, are likely in the not distant future to be of increased politico-economic importance. Hence the attitude of the European powers which have established themselves in the vicinity of Liberia becomes of interest to the United States whenever it may assume a tendency to disparage the asserted rights of the native self-control. . . . The United States are not averse to having the great powers know that they publicly recognize the peculiar relations between them and Liberia, and that they are prepared to take every proper step to maintain them." To this end the ministers of the

United States at London and Paris were instructed that it was not inexpedient that they "should evince a lively interest in the movements of both Great Britain and France in the neighborhood of Liberia, without, however, showing any undue anxiety or offensive curiosity in the matter."

Mr. Evarts, Sec. of State, to Mr. Hoppin, chargé, No. 446, April 21, 1880, MS. Inst. Great Britain, XXV. 627, enclosing a copy of a despatch from Mr. Smyth, min. to Liberia, No. 70, Feb. 12, 1880.

The minister of the United States to Liberia should not interfere with the government thereof by obtruding political advice.

Mr. Evarts, Sec. of State, to Mr. Smyth, min. to Liberia, No. 41, Jan. 7, 1880, MS. Inst. Liberia, II. 91.

See, however, Mr. Blaine, Sec. of State, to Mr. Smyth, No. 67, June 27, 1881, id. 116.

For a report, March 5, 1878, adverse to providing means for making surveys for a railroad in Liberia, see H. Report 349, 45 Cong. 2 sess. See, on the same subject, a memorial of Feb. 12, 1879, S. Mis. Doc. 67, 45 Cong. 3 sess.

As to the general condition of Liberia in 1887, see Mr. Bayard, Sec. of State, to Mr. Taylor, No. 8, dip. series, July 29, 1887, MS. Inst. Liberia, II. 216, acknowledging the receipt of Mr. Taylor's despatches Nos. 4 to 16, inclusive.

"Our position in reference to the citizens of Liberia is such that we could not be justified in regarding with indifference any attempt to oppress them or deprive them of their independence."

Mr. Hay, Sec. of State, to Mr. Porter, amb. to France, No. 640, June 28, 1899, MS. Inst. France, XXIV. 199, referring to the apprehension of the Liberian government of some action by France in the direction of an effective occupation of the Liberian hinterland.

"The United States could not view without grave concern any procedure from any quarter which would threaten its [Liberia's] liberty of action or the extinction of its independent existence." (Mr. Hay, Sec. of State, to Mr. Jackson, chargé, No. 641, Nov. 18, 1898, MS. Inst. Germany, XX. 572.)

As to a plan, favorably considered, for the administration and collection of the customs revenues of Liberia by a company organized with British and American capital, the inspectors to be appointed by the British and American governments, and an assurance to be given by Liberia of the nonalienation of the territory of the Republic, see Mr. Hay, Sec. of State, to Mr. Towner, British chargé, May 4, 1899, MS. Notes to Brit. Leg. XXIV. 517.

As to a protest by the American minister at Monrovia against the granting to an English syndicate of the exclusive privilege of mining within Liberian territory for 50 years, see Mr. Hay, Sec. of State, to Mr. Choate, ambass. to England, No. 417, July 13, 1900, MS. Inst. Gr. Br. XXXIII. 440.

2. Treaty of 1862, Article VIII.

§ 853.

Article VIII. of the treaty between the United States and Liberia of 1862 provides: "The United States government engages never to interfere, unless solicited by the government of Liberia, in the affairs between the aboriginal inhabitants and the government of the Republic of Liberia, in the jurisdiction and territories of the republic. Should any United States citizen suffer loss, in person or property, from violence by the aboriginal inhabitants, and the government of the Republic of Liberia should not be able to bring the aggressor to justice, the United States government engages, a requisition having been first made therefor by the Liberian government, to lend such aid as may be required. Citizens of the United States residing in the territories of the Republic of Liberia are desired to abstain from all such intercourse with the aboriginal inhabitants as will tend to the violation of law and a disturbance of the peace of the country."

In February, 1879, the Liberian secretary of state complained to Mr. Smyth, the American minister at Monrovia, that one Julio, an American citizen, residing in the Taboo district, had, together with his partner in business, a German subject, named Lehmann, been carrying on trade with the aboriginal inhabitants at Taboo, and other places below Cape Palmas, without complying with the revenue laws. The secretary of state expressed the hope that Mr. Smyth and the acting German consul would cause the offenders to desist from their unlawful acts. Mr. Smyth, invoking Article VIII. of the treaty of 1862, requested Commodore Shufeldt, of the U. S. S. *Ticonderoga*, who was then on the coast, to interpose; and the commodore, coinciding with Mr. Smyth in his view of the treaty, took on board a Liberina official and sailed for the Taboo River. The Department of State, without awaiting the result, held that the treaty had been misconstrued, and quoted an opinion of its law officer to the effect that Article VIII. "was not intended to authorize, and certainly not to bind, the United States to interfere with their naval forces for the purpose of enforcing or aiding in the enforcement of the municipal law of the Liberian Republic."

Mr. Smyth, in his letter to Commodore Shufeldt, referred to "the Alexander case" as a precedent. In that case the President of Liberia requested the assistance of Lieut. Commander Schley, of the U. S. S. *Essex*, against the king and natives of the Taboo district, who were protecting one Alexander, a citizen of Liberia, in violations of law similar to those afterwards committed by Julio and Lehmann, who were then in his employ. Lieut. Commander Schley, taking on

board a Liberian official, repaired to the Taboo River and obtained from the king and chiefs the surrender of their artillery and ammunition to the Liberian official, as well as a promise that they would not permit Alexander, who had fled, again to live in that region. Lieut. Commander Schley, when requested by the Liberian official to arrest Julio and Lehmann, refused to do so, on the ground that the interference authorized by the treaty extended only to matters between the government of Liberia and the natives, and not to the use of force to arrest a citizen of the United States for a breach of the municipal laws of Liberia and still less to the arrest of a citizen or subject of a third power. The Department of State observed that, "whatever" might be its "opinion" "as to the soundness of Lieutenant-Commander Schley's view of the law," the Alexander case was "clearly inapplicable," as a precedent, to the case in 1879.

Mr. Evarts, Sec. of State, to Mr. Smyth, min. to Liberia, No. 32, July 12, 1879, MS. Inst. Liberia, II. 79.

See, also, Mr. Evarts to Mr. Smyth, No. 2, June 19, 1878, id. 52.

The German steamer *Carlos* having fallen into distress on the Liberian coast, the natives of the "Kronbah" tribe plundered the greater part of her cargo, besides robbing and maltreating the crew. The Liberian government exhibited a desire to punish the offenders, but declared itself unable to exert the necessary authority over the lawless Kronbahs. The German government thereupon ordered a naval vessel to the Liberian coast to assist the government of the republic in the pursuit and punishment of the offenders in the general interest of all commercial nations. When the facts were communicated to the Department of State by the German minister at Washington, Mr. Evarts instructed the American minister at Monrovia that, as the offenders in question appeared to be not pirates in the common international acceptance of the terms, but simply lawless wreckers outside of the prompt and efficacious control of the central government, it was "presumed that the Liberian government would gladly avail itself of any proper and friendly aid from without in making its own laws and power felt within its own jurisdiction," and, if consulted by the Liberian minister of state, he was authorized to express this view and to add "that had the case affected an American vessel and crew this government would not have failed to consider in a proper spirit any request made to it by that of Liberia for aid such as Germany is now prepared to render."

The instruction makes no reference to Article VIII. of the treaty of 1862.

Mr. Evarts, Sec. of State, to Mr. Smyth, min. to Liberia, No. 63, Feb. 28, 1881, For. Rel. 1881, 734.

In December, 1887, some American missionaries, while ascending the Cavalla River in order to open up mission stations in the interior, were made prisoners and plundered by the natives and obliged to return to their point of departure, Cape Palmas. The President of Liberia, representing that the Half Cavalla tribe, by whom these acts were committed, had for some time been in rebellion against the Liberian government, asked the United States to lend its aid, under Article VIII. of the treaty, in order that the offenders might be punished for their misdeeds. The Department of State replied that the article did not invest the Liberian government with the right to "originate its claim to call upon the United States for such aid 'as might be required' to overawe the hostile force of the aboriginal inhabitants;" that "the right and sole discretion to decide" whether a case under the article existed, belonged to the United States; that therefore, when a citizen of the United States should present a proper case to his own government, it would then decide whether it would present the case to the government of Liberia; and that, if it should then be informed that Liberia was powerless to execute the demand so made, the Liberian government might in such event "make requisition" upon the United States "to lend such aid as may be required" to effect the object of the demand. The Department of State also added that " the locality of the outrage " was a " matter of controlling importance," since the article could apply only to the aboriginal inhabitants dwelling within the bounds of the republic.

Mr. Bayard, Sec. of State, to Mr. Barclay, June 4, 1888, For. Rel. 1888, II. 1082–1083.

3. Relations with Great Britain.

§ 854.

For many years a dispute existed as to the boundary between the northwestern part of Liberia and the adjacent British possessions. As early as 1871 the United States was asked to appoint an arbitrator in the matter. In 1878 Commodore R. W. Shufeldt was named. He arrived at Sierra Leone January 19, 1879. " I anticipate," he said, " a long and somewhat tedious discussion and examination of this boundary question, as it will involve the testimony not only of the witnesses, citizens, or subjects of both parties, but apparently necessitate the examination of the chiefs and head men of the various tribes now occupying the disputed territory." The investigation was begun, but the commissioners were unable to reach an agreement as to the submission of the matter to the arbitrator, and Commodore Shufeldt, after a lengthened detention in the neighborhood of Sierra Leone, was compelled to depart, leaving his mission unfulfilled.

In 1882 Mr. Frelinghuysen authorized representations to be made both to Great Britain and to Liberia as to "the friendly interest which the United States takes in the welfare of Liberia and their desire that the controversy may be settled in a just, equitable, and friendly spirit," and he also authorized an intimation to be conveyed to Liberia, on the strength of representations made to him by persons interested in its welfare, "that the Solyma River might be a natural boundary satisfactory to both parties." It turned out, however, that the British demanded a settlement on the basis of the Mannah River, offering to set off the so-called Mannah River pecuniary claims against the territorial claims of Liberia westward of that river, and intimated that, if Liberia should reject this arrangement, the claims against her would be enforced. In these circumstances Mr. Frelinghuysen instructed Mr. Lowell, then American minister in London, to ask the British government to consider the Solyma River as a compromise, and directed Mr. Smyth, the American minister at Monrovia, to say to the Liberian government that, if it should reject both the proposed boundaries, it was felt that the government of the United States could not "usefully exert itself further." The dispute was settled in 1885.

5 Moore, International Arbitrations, 4948; Mr. Evarts, Sec. of State, to Mr. Smyth, No. 13, Nov. 12, 1878, MS. Inst. Liberia, II. 60; same to same, No. 21, Feb. 20, 1879, id. 68; same to same, No. 29, June 17, 1879, id. 77; Mr. Davis, Act. Sec. of State, to Mr. Lowell, No. 460, Sept. 15, 1882, MS. Inst. Gr. Br. XXVI. 488; Mr. Frelinghuysen, Sec. of State, to Mr. Smyth, No. 9, Dec. 21, 1882, MS. Inst. Liberia, II. 143; same to same, No. 14, April 8, 1883, id. 148; Mr. Frelinghuysen to Mr. Lowell, No. 567, April 9, 1883, MS. Inst. Gr. Br. XXVI. 625; Mr. Frelinghuysen, Sec. of State, to Mr. Smyth, No. 17, June 19, 1883, MS. Inst. Liberia, II. 153; Mr. Bayard, Sec. of State, to Mr. Smyth, No. 62, March 12, 1885, id. 187; Mr. Porter, Act. Sec. of State, to Mr. Hopkins, No. 3, Jan. 4, 1886, id. 198.

For a review of the relations between the United States and Liberia, see Mr. Frelinghuysen, Sec. of State, to Mr. Chandler, Sec. of Navy, Feb. 2, 1883 (confid.), 145 MS. Dom. Let. 424.

The treaty between Great Britain and Liberia of Nov. 11, 1885, concerning boundaries and claims, is printed in 76 Br. & For. State Papers, 88.

4. Relations with France.

§ 855.

In 1870 the French government intimated its desire to join with Great Britain in determining the boundaries of Liberia. This intimation did not result in any action. At that time only the northwestern boundary was in dispute and this dispute was with Great Britain alone. In 1884, while negotiations between Great Britain and Liberia were in progress, for a settlement on the basis of the

Mannah River, it was reported that Kent's Island, in that river, had been occupied by the French. In bringing this report confidentially to the attention of the French minister at Washington, Mr. Frelinghuysen, who was then Secretary of State, adverted to the fact that Liberia "was founded by negro settlers from the United States," and that, "although at no time a colony of this government, it began its career among the family of independent states as an offshoot of this country, and as such entitled to the sympathy and, when practicable, the protection and encouragement of the United States." On the occasion of recent diplomatic disputes between Liberia and Great Britain, "this relationship of quasi-parentage" had, said Mr. Frelinghuysen, been recognized. It was not thought possible that France could seriously intend to assert a claim to territory so notoriously in dispute between those two powers, where no French right of possession had before been recognized by either; but it was thought proper, said Mr. Frelinghuysen, to state, provisionally, that the United States would consider a French claim to territory in the Mannah River as threatening the integrity and tranquillity of Liberia, and also to intimate "the firm conviction and expectation" of the United States that, in view of its "intimate relationship" to Liberia, "any assertion of claim to any part of Liberia, as defined by conventional limits, and any enforcement of a settlement of alleged grievance, which might take place without the United States being allowed an opportunity to interpose their good offices to arrange the matter, could not but produce an unfavorable impression in the minds of the government and people of the United States."

Mr. Frelinghuysen, Sec. of State, to Mr. Roustan, French min., Aug. 22, 1884, MS. Notes to France, X. 15.

See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, No. 955, Aug. 22, 1884, MS. Inst. Gr. Br. XXVII. 289; Mr. Evarts, Sec. of State, to Mr. Noyes, min. to France, No. 227, April 21, 1880, MS. Inst. France, XX. 137.

It appears that the French government, in reply to a complaint of the Liberian government, stated that the alleged occupation of Kent's Island was merely an act of lease by a French citizen, which was not authorized and would not be countenanced by France. (Mr. Smyth, min. to Liberia, to Mr. Bayard, Sec. of State, No. 149, Dec. 7, 1885, For. Rel. 1886, 298–299.)

"The weakness of Liberia and the difficulty of maintaining effective sovereignty over its outlying districts have exposed that republic to encroachment. It cannot be forgotten that this distant community is an offshoot of our own system, owing its origin to the associated benevolence of American citizens, whose praiseworthy efforts to create a nucleus of civilization in the dark continent have commanded respect and sympathy everywhere, especially in this coun-

try. Although a formal protectorate over Liberia is contrary to our traditional policy, the moral right and duty of the United States to assist in all proper ways in the maintenance of its integrity is obvious, and has been consistently announced during nearly half a century. I recommend that, in the reorganization of our Navy, a small vessel, no longer found adequate to our needs, be presented to Liberia, to be employed by it in the protection of its coastwise revenues."

President Cleveland, annual message, Dec. 6, 1886, For. Rel. 1886, vii.

See Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, No. 67, Jan. 13, and No. 142, July 12, 1886, For. Rel. 1886, 298, 304; Mr. Vignaud, chargé, to Mr. Bayard, No. 267, Aug. 23, 1886, id. 305, and note of M. de Freycinet to Mr. Vignaud, Aug. 18, 1886, id. 307; Mr. Bayard to Mr. Barclay, Dec. 9, 1887, For. Rel. 1888, II. 1086.

For a treaty between France and Mané, King of Little-Bériby; Rika, King of Basha, and Damba-Gué, King of Great Bériby, Feb. 4, 1868, see For. Rel. 1887, 271.

"As mentioned in your note of February 3, 1886, to Mr. de Freycinet, Mr. Waddington in 1879, and Mr. Jules Ferry in 1884, disclaimed that France had any design upon any territory which Liberia could claim.

"It is not, therefore, apparent how, in view of these declarations, the French government has been able to ratify in 1883 the treaty of 1868, nor to decree in 1885 the annexation of the villages which were recognized in 1883 as part of Liberia.

"The relations of the United States government with Liberia have not changed. It still feels justified in using its good offices in her behalf. These have been repeatedly exercised and its moral right to their exercise admitted by Great Britain in 1843 (see House Ex. Doc. No. 162, first session Twenty-eighth Congress, vol. 4, 1843–44), and again in 1882, 1883, 1884, in the controversy concerning the northwestern boundary of Liberia, and by France in the answers of Mr. Waddington in 1879, and of M. Ferry in 1884, above referred to. We are unwilling to believe that it is now the intention of the French government to act inconsistently with the spirit of these declarations.

"You are requested to lay the facts proving the validity of the Liberian title to the territory in question before the French government, accompanied by such observations as may seem, in your discretion, best calculated to promote the end in view, namely, the recognition of Liberia's right. If it be impossible to obtain this, a definite declaration in regard to the line dividing French and Liberian territory may be made, which will fix a boundary such as France and all the powers can recognize and respect." (Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, No. 209, March 22, 1887, For. Rel. 1887, 289, 291.)

November 3, 1891, and January 26, 1892, the French legation at Washington notified the Department of State, conformably to Article XXXIV. of the general act of Berlin, of the conclusion of various treaties with chiefs of the Ivory coast between the San

Pedro and Cavally rivers, for the purpose of establishing French protectorates over their dominions. Mr. Blaine instructed the American minister at Paris to say that the United States did not accept as valid or acquiesce in these protectorates, so far as they might relate to territory pertaining to Liberia westward of the San Pedro River, unless it should appear that she was a consenting party to the transaction. Mr. Blaine added that the President was "so firmly convinced that the just rights of independent Liberia will be duly respected by all, that he is indisposed to consider the possible contingency of such expansion of the territorial claims of other powers in Africa as might call for a more positive assertion of the duty of the United States."

Mr. Blaine, Sec. of State, to Mr. Coolidge, min. to France, No. 2, June 4, 1892, For. Rel. 1892, 165, 167.

These views were duly communicated to the French government July 13, 1892. (Mr. Coolidge, min. to France, to Mr. Foster, Sec. of State, No. 26, July 22, 1892, For. Rel. 1892, 168. See For. Rel. 1893, 299, for the French reply, stating that the boundary had been adjusted.)

A copy of the instruction to Mr. Coolidge was sent to Mr. Lincoln, American minister in London. (Mr. Foster, Sec. of State, to Mr. Lincoln, No. 806, July 12, 1892, For. Rel. 1892, 229. In the printing of this instruction a paragraph at the end is omitted.)

It seems that the Liberian "hinterland" was in 1892 under the sway of a powerful Mohammedan native ruler, called Almamy Samadu (called Samory by the French), with whom the Liberians were on friendly terms and with whom they had old treaties giving them an outlet for settlement, but that the French claimed a protectorate over his territory by virtue of treaties of 1887 and 1889. Samadu disputed the validity of these treaties, and in consequence a war between him and France was in progress. The British appear to have acquiesced in the French claim to Samadu's territory. (Mr. Lincoln, min. to England, to Mr. Foster, Sec. of State, No. 735, Aug. 5, 1892, For. Rel. 1892, 231, citing and enclosing copy of Blue Book, Africa, No. 7 (1892).)

"In consequence of the action of the French government in proclaiming a protectorate over certain tribal districts of the west coast of Africa, eastward of the San Pedro River, which has long been regarded as the southeastern boundary of Liberia, I have felt constrained to make protest against this encroachment upon the territory of a republic which was founded by citizens of the United States and toward which this country has for many years held the intimate relation of a friendly counselor."

President Harrison, annual message, Dec. 6, 1892, For. Rel. 1892, xiv.

"More recently, negotiations between the Liberian representative and the French government resulted in the signature at Paris of a treaty whereby as an adjustment, certain Liberian territory is ceded

to France. This convention at last advices had not been ratified by the Liberian legislature and executive.

"Feeling a sympathetic interest in the fortunes of the little commonwealth, the establishment and development of which were largely aided by the benevolence of our countrymen, and which constitutes the only independently sovereign state on the West Coast of Africa, this government has suggested to the French government its earnest concern lest territorial impairment in Liberia should take place without her unconstrained consent."

President Cleveland, annual message, Dec. 4, 1893, For. Rel. 1893, vii.

December 9, 1892, Mr. Coolidge, American minister at Paris, transmitted to the Department of State a copy of the convention signed on the preceding day between France and Liberia for the settlement of the boundary question. (For. Rel. 1893, 296–298.)

"By the terms of this act, the boundary line of the respective possessions of the two countries shall be established by the thalweg of the Cavally River. France gives up the rights acquired by her from old treaties concluded on various points of the grain coast and recognizes the sovereignty of the Republic of Liberia over the coast to the west of the Cavally River; the Republic of Liberia abandons on its side all pretentions which it could put forward to the territories of the Ivory coast situated east of said river." (M. Develle, min. of for. aff. to Mr. Coolidge, American min., Feb. 21, 1893, For. Rel. 1893, 299.)

See Mr. Foster, Sec. of State, to Mr. Coolidge, No. 145 (confid.), Jan. 16, 1893, MS. Inst. France, XXII. 450; Mr. Gresham, Sec. of State, to Mr. McCoy, No. 26, March 20, 1893, MS. Inst. Liberia, II. 273; Mr. Gresham, Sec. of State, to Mr. Langford, June 23, 1893, 192, MS. Dom. Let. 431; Mr. Gresham, Sec. of State, to Mr. Payne, No. 43, Sept. 9, 1893, MS. Inst. Liberia, II. 280.

Mr. Coolidge, minister to France, with his No. 112, Jan. 13, 1893, transmitted to the Department of State a map relating to the boundary. (MS. Desp. from France.)

The convention of Dec. 8, 1892, was ratified by the Senate of Liberia, Jan 12, 1894, with certain objections and suggested amendments. (Mr. Uhl, Act. Sec. of State, to Mr. Eustis, amb. to France, No. 183 (confid.), March 6, 1894, MS. Inst. France, XXII. 621.)

It was approved by the French Chamber of Deputies without discussion July 10, 1894. (For. Rel. 1894, 225.) As to the exchange of ratifications, see Mr. Olney, Sec. of State, to Mr. Heard, No. 37 (confid.), Feb. 23, 1897, MS. Inst. Liberia, II. 317; Mr. Sherman, Sec. of State, to Mr. Heard, No. 39, May 17, 1897, id. 319 (enclosing copies of promemorias expressive of interest in Liberian independence, exchanged by the British embassy and the Department of State, March 8 and March 13, 1897); same to same (confid.), May 17, 1897, id. 319; same to same, No. 10, May 25, 1897, id. 320, acknowledging the receipt of Mr. Heard's No. 52 B of April 15, 1897.

Mr. Sherman, May 21, 1897, acknowledged the receipt of a note of Sir Julian Pauncefote, British ambassador, of the same day, conveying information as to a law passed by the legislature of Liberia, during the session of 1896–1897, directing the executive to form as soon as practicable a commission, in concert with France, to delimit the frontier between Liberia and the contiguous French possessions. (MS. Notes to Great Britain, XXIII. 626.)

XXV. *MADAGASCAR.*

§ 856.

As to the treaty between the United States and Madagascar of 1881 and the treaty between France and Madagascar of December 17, 1885, see Mr. Bayard, Sec. of State, to Mr. Robinson, consul at Tamatave, May 12, 1886, 117 MS. Desp. to Consuls, 571.

The treaty between the United States and Madagascar of 1881 gave the former power no right or ground of intervention in disputes between Madagascar and France; and, so long as no discrimination was made against the commerce of the United States, there appeared to be no ground to complain of the action of France in converting Madagascar into a French colony and treating the treaties between Madagascar and other powers as nullified.

Mr. Gresham, Sec. of State, to Mr. Morgan, Jan. 16, 1895, 200 MS. Dom. Let. 274; Mr. Olney, Sec. of State, to Mr. Hill, April 24, 1896, 209 MS. Dom. Let. 528; Mr. Adee, Second Assist. Sec. of State, to Mr. Beramji, Dec. 21, 1897, 223 MS. Dom. Let. 540.

As to the eventual annexation of Madagascar by France, with the acquiescence of the United States, see For. Rel. 1896, 117–119, 121, 122, 124–127, 129, 132–135; For. Rel. 1897, 152–157.

XXVI. *MEXICO.*

1. Relations, 1825–1848.

§ 857.

President J. Q. Adams's message of February 8, 1827, transmitting the Mexican treaty of July 10, 1826, with the accompanying documents, is printed in 6 Am. State Papers, For. Rel. 578.

President J. Q. Adams's message of April 25, 1828, containing "a treaty of amity, commerce, and navigation between the United States of America and the United Mexican States," signed February 14, 1828, is in 6 Am. State Papers, For. Rel. 952.

"In 1825 Mr. Poinsett was dispatched as minister to Mexico. He was instructed to 'bring to the notice of the Mexican government the message of the late President of the United States to their Congress, on the 2d of December, 1823, asserting certain important principles of intercontinental law in the relations of Europe and America. The first principle asserted in that message is, that the American continents are not henceforth to be considered as subjects for future colonization by any European powers. . . . The other principle asserted in the message is, that whilst we do not desire to interfere in

Europe with the political system of the allied powers, we should regard as dangerous to our peace and safety any attempt on their part to extend their system to any portion of this hemisphere.'

"Poinsett was further instructed to secure, if possible, a treaty of limits and a treaty of amity and commerce, on the basis of the recently concluded convention with Colombia. The treaty which he signed, and the account of the negotiations which preceded it, will be found in the 6th volume of the folio edition of the Foreign Relations, pages 578–613. This treaty did not receive the assent of the Senate, except upon conditions which caused it to fail. The treaty of limits of 1828 was then concluded, and in 1831 a treaty of amity and commerce was signed, which is still in force.

"The war between Texas and Mexico affected the relations between Mexico and the United States, and was the cause of frequent communications from the Executive to Congress, and of frequent discussions and reports in that body. At one time, in the early stage of the discussion, the Mexican minister withdrew himself from Washington, but relations were soon restored.

"Claims began to arise and to be pressed against Mexico as early as 1836. In 1837 they were made the subject of Presidential messages. A convention was concluded for the adjustment of these claims in 1838, which was not ratified by the Mexican government; and another convention was concluded and ratified by both parties, for the same purpose, in April, 1839. The acts of Congress to carry this into effect were approved on the 12th of June, 1840, and on the 1st of September, 1841.

"When the commissioners on each side met together [William L. Marcy was one of the United States commissioners], a radical difference of opinion on important subjects was found to exist. (1) The American commissioners regarded the joint body as a judicial tribunal. The Mexican commissioners regarded it as a diplomatic body. (2) The Americans asserted that the claimants had a right to appear personally or by counsel before the commissioners. The Mexicans denied this, and insisted that the proof must come through the government. Much time was lost in these and kindred discussions; so that, when the last day for action had passed, several claims had not been acted on. This was the cause of much subsequent correspondence. Mexico did not keep its engagements under this treaty, and in 1843 a new convention respecting the payments was made, in which it was agreed that another claims convention should be entered into; but this had not been done when war broke out between the parties, in 1846.

"A treaty was concluded with Texas for its annexation to the United States, but it failed to receive the assent of the Senate. Congress then, by joint resolution, declared that it 'doth consent that the

territory properly included within, and rightfully belonging to, the Republic of Texas, may be erected into a new State, to be called the State of Texas,' and on the 29th of December, 1845, it was jointly resolved 'that the State of Texas shall be one . . . of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.'

Davis's Notes, Treaty Vol. (1776–1887), 1354.

As to the treaty of 1839, and subsequent conventions and negotiations on the subject of claims, see Moore, Int. Arbitrations, II. 1209 et seq.

"By a clause of the instrument [organizing the colony of the island of Ciare], citizens of the United States were expressly excluded from being members of that colony. . . . This exclusion is regarded here as invidious and as directly at variance with the third article of the treaty of 1831, which stipulates for perfect equality between citizens of the United States and other foreigners who may visit or reside in Mexico. . . .

"The Mexican law forbidding United States citizens from holding real estate in that country, while that privilege is open to other aliens, may also be regarded as incompatible, if not with the letter, certainly with the spirit, of the treaty, the obvious purpose of which was to provide for equality generally between our citizens and other foreigners in that republic."

Mr. Evarts, Sec. of State, to Mr. Foster, min. to Mexico, Mar. 26, 1879, MS. Inst. Mex. XIX. 547.

May 11, 1846, President Polk sent to Congress a message declaring that American blood had been shed on American soil, and that war existed by the act of Mexico. He discussed the various causes of irritation that had existed between the two countries, and communicated to Congress certain correspondence relating to the rupture between them. By an act of May 13, 1846, 9 Stat. 9, the President was authorized to prosecute the war.

Message of President Polk, May 11, 1846, S. Ex. Doc. 337, 29 Cong. 1 sess.

See President Polk's Administration, by James Schouler, Atlantic Monthly (1895), LXXVI. 371.

For complaints of Mexico that the United States had failed to enforce its neutrality during the revolution in Texas, and the reply of Mr. Webster, as Secretary of State, see special message of President Tyler, July 14, 1842, H. Ex. Doc. 266, 27 Cong. 2 sess.; 6 Webster's Works, 440–459. Accompanying the message are instructions from Mr. Webster to Mr. Thompson, min. to Mexico, of July 8 and July 13, 1842.

As to the Santa Fé expedition and American citizens captured therein, see 6 Webster's Works, 422–440.

As to the seizure of Monterey by Commodore Jones, and the disavowal of the act by the United States, see Mr. Webster, Sec. of State, to Gen. Almonte, Mexican min. Jan. 30, 1843, 6 Webster's Works, 461.

As to claims against Mexico, see message of President Jackson, Jan. 5, 1835, H. Ex. Doc. 61, 23 Cong. 2 sess.; message of President Jackson, Feb. 6, 1837, S. Ex. Doc. 160, 24 Cong. 2 sess.; H. Ex. Doc. 139, 24 Cong. 2 sess.; report of Mr. Howard, Feb. 24, 1837, H. Report 281, 24 Cong. 2 sess.; minority report of Mr. Cushing, H. Report 1056, 25 Cong. 2 sess.; message of President Van Buren, April 26, 1838, H. Ex. Doc. 351, 25 Cong. 2 sess.

See, also, 2 Moore, Int. Arbitrations, 1209 et seq.

See, also, the following correspondence: Independence of Mexico (April, 1821), 9 Br. & For. State Papers, 369.

Commercial Relations (1825), 13 Br. & For. State Papers, 415.

The Panama Congress (1825–1826), 13 Br. & For. State Papers, 394, 398, 415, 428, 485, 493, 497, 978.

Question of Cuba and Porto Rico (1826), 13 Br. & For. State Papers, 426, 428.

Interference of foreign powers with Spanish America (1825–1826), 13 Br. & For. State Papers, 483, 995.

Independence of Texas (1836), 25 Br. & For. State Papers, 1132.

Boundaries and limits of Texas, 25 Br. & For. State Papers, 1075; 26 id. 8828.

Political relations with Mexico (1836–1837), 26 Br. & For. State Papers, 1378.

The attitude of the United States towards Texan independence (1842), 31 Br. & For. State Papers, 801.

The annexation of Texas to the United States, 33 Br. & For. State Papers, 246.

For instructions to Mr. Slidell, min. to Mexico, No. 1, Nov. 10, 1845, see MS. Inst. Mexico, XVI. 1; S. Ex. Doc. 52, 30 Cong. 1 sess. 71.

2. Treaty of Guadalupe Hidalgo.

§ 858.

"Since the glorious victory of Buena Vista, and the capture of Vera Cruz and the castle of San Juan d'Ulloa by the American arms, it is deemed probable that the Mexican government may be willing to conclude a treaty of peace with the United States. Without any certain information, however, as to its disposition the President would not feel justified in appointing public commissioners for this purpose, and inviting it to do the same. After so many overtures rejected by Mexico, this course might not only subject the United States to the indignity of another refusal, but might, in the end, prove prejudicial to the cause of peace. The Mexican government might thus be encouraged in the mistaken opinion, which it probably already entertains, respecting the motives which have actuated the President in his repeated efforts to terminate the war.

"He deems it proper, notwithstanding, to send to the headquarters of the army a confidential agent, fully acquainted with the views of this government, and clothed with full powers to conclude a treaty of peace with the Mexican government, should it be so inclined. In

this manner he will be enabled to take advantage, at the propitious moment, of any favorable circumstances which might dispose that government to peace.

"The President, therefore, having full confidence in your ability, patriotism, and integrity, has selected you as a commissioner to the United Mexican States, to discharge the duties of this important mission."

Mr. Buchanan, Sec. of State, to Mr. Trist, April 15, 1847, S. Ex. Doc. 52, 30 Cong. 1 sess.

The rest of the text of the instructions, together with an annexed project of a treaty, may be found at the place cited.

Mr. Trist left Washington, where he was chief clerk of the Department of State, April 16, 1847. He reached Vera Cruz on May 6.

November 16, 1847, Mr. Trist received instructions by which he was directed to return to the United States by the first safe opportunity. In these instructions it was stated that, after a series of brilliant victories, when the American troops were at the gates of the capital and it was completely in their power, the Mexican government had not only rejected the liberal offers of the United States but had "insulted our country by proposing terms the acceptance of which would degrade us in the eyes of the world, and be justly condemned by the whole American people." They must, said the instructions, "attribute our liberality to fear, or they must take courage from our supposed political divisions." In this state of affairs, the President, it was said, believed that Mr. Trist's continued presence with the army could be productive of no good, but might do much harm by encouraging delusive hopes and false impressions. The President had determined not to make another offer to treat with the Mexican government, though he would always be ready to receive and consider its proposals. Mexico must now first sue for peace.

Mr. Buchanan, Sec. of State, to Mr. Trist, No. 5, Oct. 6, 1847, S. Ex. Doc. 52, 30 Cong. 1 sess. 91.

Mr. Trist's recall was, by direction of the President, reiterated on October 25, 1847. (Mr. Buchanan to Mr. Trist, No. 6, Oct. 25, 1847, id. 94.)

When Mr. Trist received his first order of recall, it was expected that an army train for Vera Cruz would leave the City of Mexico about the end of November. Owing, however, to unexpected detentions, its departure was postponed first to the 4th of December and then to the 10th. On the latter day it started, but Mr. Trist did not go with it. On the contrary, he had determined to remain in Mexico and endeavor to conclude a peace. He understood that, under the circumstances, any action which he might take might, and probably

would, be disavowed by his government, but he decided to assume the responsibility. His proposal of negotiation was accepted by the Mexican government, and plenipotentiaries were duly commissioned to negotiate with him. In about six weeks after their first conference their task was brought to an end by the signing of a treaty of peace at Guadalupe Hidalgo, February 2, 1848. Every possible provision was made for its speedy conveyance, and it reached its destination in 16 or 17 days after signature—the quickest time then ever made between the capitals of the two republics—the bearer being James L. Freaner, a native of Maryland, who is said to have been the only man in any way instrumental in determining Mr. Trist to make the attempt of which the treaty was the result. The treaty was communicated by the President to the Senate on February 23, 1848, with a message bearing date of the preceding day. In another message to the Senate, on the 29th of the same month, the President said: "I considered it to be my solemn duty to the country, uninfluenced by the exceptionable conduct of Mr. Trist, to submit the treaty to the Senate with a recommendation that it be ratified with the modifications suggested."

S. Report 261, 41 Cong. 2 sess. 8–9.

The treaty, as amended by the Senate of the United States, was officially communicated by the Secretary of State, March 18, 1848, to the Mexican minister of relations. On its receipt by the latter it was communicated, with the amendments, to the Mexican Congress, both houses of which were required to concur in its ratification. It was first taken up in the Chamber of Deputies, where it was adopted by a large majority, and then in the Senate, where it was passed by a vote of 33 to 5. (Id. 11.)

In a despatch to Mr. Buchanan, of December 6, 1847, Mr. Trist referred to the "able and indefatigable cooperation" in the discharge of his trust which he had received from "a friend at Queretaro." This "friend" was Mr. Edward Thornton, who, in the absence of the British minister on account of ill health, was then in charge of the British legation in Mexico. He was afterwards British minister at Washington, and while holding that office acted as umpire under the claims convention between the United States and Mexico of July 4, 1868.

As to the graves of American soldiers near Saltillo, see S. Doc. 180, 55 Cong. 1 sess.

"I deem it to be my duty to state that the recall of Mr. Trist as commissioner of the United States, of which Congress was informed in my annual message, was dictated by a belief that his continued presence with the Army could be productive of no good, but might do much harm by encouraging the delusive hopes and false impressions of the Mexicans, and that his recall would satisfy Mexico that the United States had no terms of peace more favorable to offer. Directions were given that any propositions for peace which Mexico

might make should be received and transmitted by the commanding general of our forces to the United States.

"It was not expected that Mr. Trist would remain in Mexico or continue in the exercise of the functions of the office of commissioner after he received his letter of recall. He has, however, done so, and the plenipotentiaries of the government of Mexico, with a knowledge of the fact, have concluded with him this treaty. I have examined it with a full sense of the extraneous circumstances attending its conclusion and signature, which might be objected to, but conforming as it does substantially on the main questions of boundary and indemnity to the terms which our commissioner, when he left the United States in April last, was authorized to offer, and animated as I am by the spirit which has governed all my official conduct toward Mexico, I have felt it to be my duty to submit it to the Senate for their consideration, with a view to its ratification."

President Polk, Mexican treaty message, Feb. 22, 1848, Richardson's Messages, IV. 573.

The antecedents and effect of the treaty of Guadalupe Hidalgo are discussed in 2 Lawrence's Com. sur Droit Int. 338.

The proceedings of the Senate on the Guadalupe-Hidalgo treaty, from which the injunction of secrecy has been removed, are in S. Ex. Doc. 52, 30 Cong. 1 sess. Other papers relative thereto are in H. Ex. Docs. 40, 56, 60, 69, 70, 30 Cong. 1 sess. For communications of the Secretary of State, Mr. Buchanan, and of President Polk, of February 8, 1849, as to the negotiation of this treaty, see H. Ex. Doc. 50, 30 Cong. 2 sess.

Mr. Sumner, on July 14, 1870, from the Committee on Foreign Relations, to whom was referred a petition of Mr. Trist for compensation for his services, made a report from which the following passages are taken:

"The services of Mr. Trist constitute an interesting chapter in the history of our country. As negotiator of the treaty of Guadalupe-Hidalgo, he exercised a decisive influence in terminating the war with Mexico, by which we were secured in the blessings of peace and in the possession also of an undisputed title to Texas, and an addition to the national domain equal in area to the present territory of Mexico, and including in its expanse the great and prosperous State of California.

"Mr. Trist, while chief clerk of the State Department, and in confidential relations with Mr. Buchanan, the Secretary of State, was selected as 'commissioner to negotiate and conclude a settlement of existing differences and a lasting treaty of peace' with Mexico. On the 16th April, 1847, he left Washington and proceeded to the headquarters of the Army of the United States in Mexico, where for several months he labored anxiously to accomplish the object of his

important mission. Not until November, 1847, was the first great point reached. This was the appointment of a commission on the part of the Mexican government authorized to negotiate.

"Meanwhile at Washington there was a spirit hostile to negotiation; Mexico was not sufficiently humiliated. In the midst of his negotiation, when a treaty of peace was almost within his grasp, on the 16th November, 1847, Mr. Trist suddenly received a letter of recall, with the order to return home by the first safe opportunity. After careful deliberation, and with the sure conviction that if his efforts were thus abruptly terminated the war would be much prolonged, while the difficulties of obtaining another Mexican commission would be increased, he concluded to proceed, and do what he could for the sake of peace. The Mexicans to whom he communicated the actual condition of affairs united with him, and a treaty was signed on the 2d February, 1848, at Guadalupe-Hidalgo. Mr. Trist remained in Mexico until the 8th of April, 1848, in order to protect the interests of the United States, and would have remained longer had not an order for his arrest, sent from Washington to our military authorities, compelled him to leave.

"It is understood that the President, on the arrival of the treaty, proposed to suppress it; but, unwilling to encounter public opinion, which was favorable to peace, he communicated it to the Senate, when, with certain amendments, it was ratified by a vote of 38 yeas to 14 nays. And thus the war with Mexico was closed.

"The commissioner who had taken such great responsibility reached Washington on his return in June, 1848, only to encounter the enmity of the administration then in power. His mission had been crowned with success, but he was disgraced. By the order of President Polk his pay was stopped at November 16, 1847, so that the service, as peacemaker, rendered after that date was left without compensation as without honor. Mr. Trist was proud and sensitive. He determined to make no application at that time for the compensation he had earned, and to await the spontaneous offer of it, unless compelled by actual want."

S. Report 261, 41 Cong. 2 sess.

It was decided in McKinney *v.* Saviego, 18 Howard, 240, that the treaty of Guadalupe-Hidalgo had no relation to property within the State of Texas.

Basse *v.* Brownsville (1875), 154 U. S. 610.

"Article VII. of the treaty of Guadalupe-Hidalgo, while it was declared to have been rendered nugatory for the most part by the first clause of Article IV. of the treaty concluded December 30, 1853, and proclaimed June 30, 1854, was, by the second clause thereof, re-

affirmed as to the Rio Grande (nom. Rio Bravo del Norte) below the point where, by the lines as fixed by the latter treaty, that river became the boundary between the two countries. Said Article VII. is recognized as still in force by Article V. of the convention concluded November 12, 1884, and proclaimed September 14, 1886."

Harmon, At. Gen., Dec. 12, 1895, 21 Op. 274, 275.

The Texas act, Feb. 8, 1850, which provides for the investigation by commissioners of land titles with a view to their confirmation by the legislature, since it makes no discrimination between citizens of the United States and citizens of Mexico, does not violate Art. VIII. of the treaty of Guadalupe-Hidalgo, which simply guarantees to Mexicans, in respect of their rights of property, the same protection as is extended to citizens of the United States.

Baldwin *v.* Goldfrank (Tex. Sup.), 31 S. W. 1064, affirming 26 S. W. 155.

"The judges of the Court of Private Land Claims, provided for by the act of March 3, 1891 [to settle titles in Arizona and New Mexico], have been appointed and the court organized. It is now possible to give early relief to communities long repressed in their development by unsettled land titles and to establish the possession and right of settlers whose lands have been rendered valueless by adverse and unfounded claims."

President Harrison, annual message, Dec. 9, 1891, For. Rel. 1891, xxii; and For. Rel. 1888, II. 1294, 1303.

See, also, annual message, Dec. 6, 1892.

For decisions relating to cases under the act of March 3, 1891, see United States *v.* Conway, 175 U. S. 60; Ainsa *v.* New Mexico & Arizona R. R., 175 U. S. 76; Real de Dolores del Oro *v.* United States, 175 U. S. 71; Hays *v.* United States, 175 U. S. 248; United States *v.* Pena, 175 U. S. 500; United States *v.* Chavez, 175 U. S. 509; Peabody *v.* United States, 175 U. S. 546; Chavez *v.* United States, 175 U. S. 552.

A petition for the rehearing of this case, which was decided May 23, 1898, and is reported in 170 U. S., 681, is denied, on the ground that, after a careful reexamination of the record, the court adhered to the judgment heretofore rendered, remaining of the opinion that from and after the adoption of the Mexican constitution of 1836, no power existed in the separate States to make such a grant as the one in this case.

United States *v.* Coe (1899), 174 U. S. 578.

The title to an imperfect Spanish or Mexican grant in New Mexico was, at the time of the treaty of Guadalupe Hidalgo, in the United States, and did not pass out of the United States till the confirmation by the Court of Private Land Claims of the survey.

Territory *v.* Persons (1904), 76 Pac. Rep. 316.

3. Mesilla, and Later, Treaties.

§ 859.

Under the treaty of December 30, 1853, by which the Mesilla valley was secured to the United States, seven million dollars were to be paid by the United States on the exchange of ratifications, and three millions when the new boundary line was established.

Cushing, At. Gen., 1855, 7 Op. 582.

The question whether the United States will pay, acording to their original tenor, drafts drawn by the Mexican government, under the Mesilla convention, or suspend the payment at the subsequent request of that government, is matter of political, not of legal, determination.

Cushing, At. Gen., 1855, 7 Op. 599.

"In 1861 an extradition treaty was concluded with Mexico, and in 1868 a naturalization convention, and a convention for the establishment of a claims commission. The commission under the claims convention was duly organized in Washington, July 31, 1869. Its powers were extended by a convention, concluded April 19, 1871, and a further extension was authorized by a convention concluded November 27, 1872."

Davis, Notes, Treaty Vol. (1776–1887), 1357.
See, further, as to the claims convention of July 4, 1868, Moore, Int. Arbitrations, II. 1287 et seq.
See, also, as to prior claims treaties between the two countries, id. 1209–1286.
As to boundary treaties between the two countries, see id. 1358–1359.

4. Domestic Disturbances; Intervention.

§ 860.

After the close of the war between the United States and Mexico, the political condition of the latter country continued to be disturbed. Complaints were made by citizens of the United States of injuries of various kinds, and claims to a large amount accumulated in the Department of State. In 1856 Mr. Forsyth, then American minister to Mexico, declared that "nothing but a manifestation of the power of the government of the United States" would avail "to punish these wrongs." In 1857 a favorable change in the affairs of Mexico seemed to take place. A constituent congress adopted a republican constitution, and a popular election was held at which General Comonfort was chosen as President. He took the oath of office and was inaugurated December 1, 1857. A month later, however, he was driven from the capital by a revolution headed by General Zuloaga. The entire dip-

lomatic corps, including the minister of the United States, made haste to recognize Zuloaga's authority without awaiting instructions from their governments. But Zuloaga was soon expelled from power, and his place was taken by General Miramon, a favorite of the so-called Church party. The reappearance of Zuloaga was secured for the purpose of appointing Miramon as "President substitute," and in the latter character the diplomatic corps transferred to him the recognition which they had given to Zuloaga. Meanwhile, Benito Juarez, who, as chief justice of the Republic and ex-officio Vice-President, claimed to have become President on the deposition of Comonfort, came forward as leader of the Liberal party. He established his government first at Queretaro, then at Guanajuato, and then at Guadalajara, but was eventually compelled to leave the country. In 1858, however, he returned to Vera Cruz and established a government. In June, 1858, Mr. Forsyth, the American minister, suspended diplomatic relations with the Miramon government till he should ascertain the decision of the President. President Buchanan approved the step which Mr. Forsyth had taken, and, because of complaints of ill treatment of American citizens, broke off diplomatic relations with Mexico altogether. Subsequently, when the final triumph of Juarez seemed to be probable, President Buchanan sent a confidential agent to Mexico to report upon conditions and the prospects of the belligerents. In consequence of this agent's report, he appointed Mr. Robert M. McLane, of Maryland, as minister to the Mexican Republic. Mr. McLane proceeded on his mission on March 8, 1859, invested with discretionary power to recognize the government of President Juarez, if he should find it entitled to such recognition according to the established practice of the United States. April 7, 1859, Mr. McLane presented his credentials to President Juarez, and recognized the latter's government as the only existing government of the republic. But the government of Juarez was unable to expel Miramon from the capital; and in his annual message of December 3, 1859, President Buchanan recommended to Congress the employment of a sufficient military force to penetrate into the interior of Mexico, where the government of Miramon was to be found, and seek redress from it for the injuries to American citizens. In his message of December 3, 1860, he declared his belief in the "justice as well as wisdom of such a policy," but stated that, having discovered that his recommendation would not be sustained by Congress, he had sought to accomplish the same objects in some degree by treaty stipulations with the constitutional government.

Mr. Buchanan's Administration on the Eve of the Rebellion, 267–276; 2 Curtis's Buchanan, 215; 2 Moore, Int. Arbitrations, 1288–1289.

In instructions given to Mr. Corwin, minister to Mexico, April 6, 1861, Mr. Seward stated that the actual condition of affairs in Mexico was so imperfectly understood in Washington that the President found it difficult to give him particular and practical directions. Information had been received that President Juarez had overthrown his adversaries and established his government at the capital, and that he had been chosen as President at an election lately held, but there were other rumors to the effect that his government was unable to maintain order, that robberies were frequent on the highroads, and that even a member of the American legation had been murdered on his way from the City of Mexico to Vera Cruz. If the last-mentioned occurrence should prove to be true, Mr. Corwin was informed that it would be regarded as a high offense against the dignity and honor of the United States, and would prove a severe shock to the sensibilities of the American people. As to claims, he was not to put them forward for the present, but he was to keep the Mexican government in mind of the fact that such of them as should be found to be just would in due time be presented and urged upon its consideration. The performance by the United States of its duty to "reason" with the government of Mexico was, said Mr. Seward, embarrassed by the occurrence of civil commotions in our own country, by which Mexico, in consequence of her proximity, is not unlikely to be affected." Both governments must "address themselves to this new and annoying condition of things, with common dispositions to mitigate its evils and abridge its duration as much as possible." Mr. Corwin was, however, advised that the President would not suffer the representatives of the United States to engage in any discussion of the merits of its domestic difficulties in the presence of foreign powers, but he was to assure the government of Mexico that those difficulties had not arisen out of any deep and permanent popular discontent, and that the President believed that the people of the United States would speedily and in a constitutional way adopt all necessary remedies for the restoration of the public peace and the preservation of the Federal Union. Peace, order, and constitutional authority, in each and all of the American republics were, said Mr. Seward, "not exclusively an interest of any one or more of them, but a common and indispensable interest of them all." The President was, moreover, satisfied that the safety, welfare, and happiness of the United States would be more effectually promoted if Mexico should retain its complete integrity and independence, than if any part of its territory should be transferred to another power, even though that power should be the United States itself. It was understood, said Mr. Seward, that the ability of the government and people of Mexico to preserve and maintain the integrity and the sovereignty of the republic might be much impaired, under

existing circumstances, by hostile or unfriendly action on the part of the United States. The President would therefore use all proper influence to favor the restoration of order and authority in Mexico, and, so far as might be in his power, prevent incursions or any other form of aggression by citizens of the United States against Mexico. The Mexican government had lately complained of an apprehended attempt to invade the State of Sonora by citizens of the United States. Mr. Corwin was to assure the Mexican government that effective means would be adopted to put the neutrality laws of the United States into activity, and that due attention would be given to the preservation and safety of the peaceable inhabitants residing along the border. It was hoped that equal attention would be given to this subject by the authorities in Mexico.

Mr. Seward, Sec. of State, to Mr. Corwin, min. to Mexico, No. 2, April 6, 1861, Dip. Cor. 1861, 49.

October 31, 1861, France, Great Britain, and Spain entered into a convention with reference to combined operations against Mexico for the enforcement of claims. They agreed that they would not, in the employment of measures of coercion, make any acquisition of territory, or take any particular advantage, or exercise in the domestic affairs of Mexico any influence incompatible with its political independence; and, in order that their proceedings might not seem to have an exclusive character, they also agreed to communicate a copy of the convention of the United States and invite that government to accede to it. Hostile operations were begun in May, 1862, but before that time things took an unfavorable turn in consequence of the French having extended protection to General Almonte and other leading men of the Reactionary party who had been banished from the country. On this question of the intervention of the French in the domestic affairs of Mexico the concert of the powers was destroyed. The United States had declined to join them in coercive measures; and as Great Britain and Spain refused to accede to the policy of intervention, France was left to pursue alone the way that led to the attempt and disastrous failure to establish an alien monarchy in Mexico.

Moore, Int. Arbitrations, II. 1289–1291, where the details of the intervention are given; Maximilian in Mexico, by Sara Yorke Stevenson; British & For. State Papers, vols. 51, 52, 53, and 54, and pages indicated in the indexes to the various volumes.

Certain Mexican bonds, issued on Sept. 1, 1865, known as the Woodhouse issue, were declared by the Mexican government at the time of their issue to be fraudulent and unauthorized. A full report on the subject is in For. Rel. 1878, 624 et seq. (Mr. Hill, Assist. Sec. of State, to Mr. Moss, Jan. 11, 1900, 242 MS. Dom. Let. 217.)

5. Later Relations.

§ 861.

For some years after the withdrawal of the French from Mexico the peace of the latter country continued to be interrupted by domestic contentions. These were attended with serious border troubles, which at times impaired the good relations between Mexico and the United States and gave rise to troublesome questions. The acute stage of the difficulties was passed in 1877.

Supra, §§ 222, 223.

See the following documents:

Relations with Mexico: Texas border troubles and extradition, report of Com. on For. Aff., April 25, 1878, H. Report 701, 45 Cong. 2 sess.

Resolutions concerning relations with Mexico, S. Mis. Doc. 63, 45 Cong. 2 sess.

Protection of the Rio Grande frontier: reports of Committees on Military Affairs, favoring the erection of suitable posts, S. Report 40, 46 Cong. 2 sess.; H. Report 88, 46 Cong. 2 sess.

"The record of the last fifteen years must have removed from the minds of the enlightened statesmen of Mexico any possible lingering doubt touching the policy of the United States toward her sister republic. That policy is one of faithful and impartial recognition of the independence and the integrity of the Mexican nation. At this late day it needs no disclaimer on our part of the existence of even the faintest desire in the United States for territorial extension south of the Rio Grande. The boundaries of the two republics have been long settled in conformity with the best jurisdictional interests of both. The line of demarkation is not conventional merely. It is more than that. It separates a Spanish-American people from a Saxon-American people. It divides one great nation from another with distinct and natural finality. The increasing prosperity of both Commonwealths can only draw into closer union the friendly feeling, the political sympathy, and the correlated interests which their history and neighborhood have created and encouraged. In all your intercourse with the Mexican government and people it must be your chiefest endeavor correctly to reflect this firm conviction of your government."

Mr. Blaine, Sec. of State, to Mr. Morgan, min. to Mexico, June 1, 1881, For. Rel. 1881, 761.

"It is a source of profound gratification to the government of the United States that the political condition of Mexico is so apparently and assuredly in the path of stability, and the administration of its constitutional government so regular, that it can offer to foreign capital that just and certain protection without which the prospect even of extravagant profit will fail to tempt the extension of safe and enduring commercial and industrial enterprise. It is still more gratifying

that with a full comprehension of the great political and social advantages of such a mode of developing the material resources of the country, the government of Mexico cordially lends its influence to the spirit of welcome and encouragement with which the Mexican people seem disposed to greet the importation of wealth and enterprise in their midst. The progress now making in this direction by the national government of Mexico is but an earnest of the great good which may be accomplished when the intimate and necessary relations of the two countries and peoples are better understood than now. To conduce to this better understanding must be your constant labor." (Ibid.)

As to commercial relations with Mexico, see message of July 19, 1876, H. Ex. Doc. 185, 44 Cong. 1 sess.; message of Jan. 7, 1879, H. Ex. Doc. 15, 45 Cong. 3 sess.; H. Report 108, 45 Cong. 3 sess.

As to reciprocity, see S. Mis. Doc. 45, 47 Cong. 1 sess.; S. Ex. Doc. 75, 47 Cong. 2 sess.; H. Report 1848, 48 Cong. 1 sess.; S. Mis. Doc. 23, 47 Cong. 2 sess.

As to railroads, see S. Ex. Doc. 73, 45 Cong. 3 sess.; S. Ex. Doc. 38, 46 Cong. 1 sess.; H. Ex. Doc. 86, 48 Cong. 1 sess.

"It is with sincere satisfaction that I am enabled to advert to the spirit of good neighborhood and friendly cooperation and conciliation that has marked the correspondence and action of the Mexican authorities in their share of the task of maintaining law and order about the line of our common boundary."

President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, I. xv.

"The recent disturbances of the public peace by lawless foreign marauders on the Mexican frontier have afforded this government an opportunity to testify its good will for Mexico and its earnest purpose to fulfill the obligations of international friendship by pursuing and dispersing the evil-doers. The work of relocating the boundary of the treaty of Guadalupe Hidalgo, westward from El Paso, is progressing favorably."

President Harrison, annual message, Dec. 6, 1892, For. Rel. 1892, xv.

See message of May 14, 1884, recommending an appropriation for relocating the boundary monuments, H. Ex. Doc. 158, 48 Cong. 1 sess.

Report of Lieut. T. W. Symons, on a preliminary reconnoissance of the line, S. Mis. Doc. 96, 48 Cong. 1 sess.

"Good will fostered by many interests in common has marked our relations with our nearest southern neighbor. Peace being restored along her northern frontier, Mexico has asked the punishment of the late disturbers of her tranquillity. There ought to be a new treaty of commerce and navigation with that country to take the place of the one which terminated thirteen years ago. The friendliness of the intercourse between the two countries is attested by the fact that during this long period the commerce of each has steadily increased under the rule of mutual consideration, being neither stimulated by

conventional arrangements nor retarded by jealous rivalries or selfish distrust."

President Cleveland, annual message, Dec. 3, 1894, For. Rel. 1894, xi.

In August, 1899, a committee representing the people of Chicago presented to President Diaz an invitation inviting him, his cabinet, and his friends to attend, as the guests of the citizens of Chicago, the ceremonies at the laying of the corner stone of the United States building in that city, October 9, 1899, at which the President of the United States was also to be present. The reception of the committee by President Diaz was arranged for through the regular diplomatic channel, and the American ambassador was directed to say that, in the event of President Diaz accepting the invitation, a representative of the United States would meet him at the frontier and escort him to Chicago. President Diaz informed the committee that his acceptance of the invitation would require the consent of the Mexican Congress. It appears that on September 20, 1899, the two houses in joint session granted him a leave of absence of twenty days with permission to visit Chicago, and appropriated $100,000 for his expenses, should he accept the invitation. In consequence, however, of the pressure of public business and illness of his wife President Diaz was unable to make the journey, but he sent as his personal representative Mr. Mariscal, minister for foreign affairs.

For. Rel. 1899, 504–510.

For an account of the honors paid by the Mexican government to Mr. Gray, minister of the United States, who died at the City of Mexico, February 14, 1895, see For. Rel. 1895, II. 994–996. A concurrent resolution expressing appreciation of the action of the Mexican government was adopted by the Senate of the United States, February 21, 1895, and by the House of Representatives the next day. By the terms of the resolution the Secretary of State was requested to transmit an engrossed copy of it to the Mexican government, which was done. (For. Rel. 1895, II. 996.)

The Mexican Congress appropriated $30,000 for the relief of the sufferers by the Galveston disaster. (For. Rel. 1900, 784.)

For many years a dispute existed between Mexico and Guatemala as to their common boundary. The United States used its good offices on various occasions. A convention for the settlement of the dispute was concluded in 1895.

Message of Feb. 17, 1882, S. Ex. Doc. 156, 47 Cong. 1 sess.; message of May 6, 1884, H. Ex. Doc. 154, 48 Cong. 1 sess.

See Mr. Lazo Arriaga, Guatemalan min., to Mr. Gresham, Sec. of State, Nov. 28, 1894, For. Rel. 1895, II. 766; also, 769–771.

See, also, instructions of Mr. Mariscal, Mexican secretary of state, to the Mexican chargé d'affaires in Guatemala, November 30, 1894, a copy of which was handed to the Secretary of State of the United States

by the Mexican minister January 24, 1895. (For. Rel. 1895, II. 979–987.) The United States expressed a strong desire that the question might be arbitrated. (Mr. Gresham, Sec. of State, to Mr. Gray, min. to Mexico, tel., Jan. 21, 1895, For. Rel. 1895, II. 987.) April 1, 1895, a convention between Mexico and Guatemala was signed at the City of Mexico for the settlement of the dispute. (For. Rel. 1895, II. 989.) By Article II. the government of Guatemala agreed to make indemnity for property occupied or destroyed by its agents, and it was agreed that an arbitrator should be mutually selected to fix the amount. Mr. Ransom, minister of the United States to Mexico, was chosen as arbitrator, and his government gave him the permission so to act. (For. Rel. 1895, II. 993.)

May 17, 1898, a new convention was signed by Mexico and Guatemala, extending the time for the completion of the labors of the boundary commission. (For. Rel. 1899, 501.)

6. Zona Libre, or Free Zone.

§ 862.

"The problem of the Mexican Free Zone has been often discussed with regard to its inconvenience as a provocative of smuggling into the United States along an extensive and thinly guarded land border. The effort made by the joint resolution of March 1, 1895, to remedy the abuse charged by suspending the privilege of free transportation in bond across the territory of the United States to Mexico failed of good result, as is stated in Report No. 702 of the House of Representatives, submitted in the last session, March 11, 1898. As the question is one to be conveniently met by wise concurrent legislation of the two countries looking to the protection of the revenues by harmonious measures operating equally on either side of the boundary, rather than by conventional arrangements, I suggest that Congress consider the advisability of authorizing and inviting a conference of representatives of the Treasury Departments of the United States and Mexico to consider the subject in all its complex bearings, and make report with pertinent recommendations to the respective governments for the information and consideration of their Congresses."

President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, LXXIX.

As to the Mexican Zona Libre, or Free Zone, and its effects on trade between the United States and Mexico, see Dip. Cor. 1867, II. 412; Dip. Cor. 1868, II. 594, 626; For. Rel. 1870, 486, 497; For. Rel. 1871, 608; For. Rel. 1872, 381, 388, 401; For. Rel. 1878, 654, 660; For. Rel. 1880, 724; For. Rel. 1881, 778, 782, 797, 803, 805; For. Rel. 1888, II. 1266, 1282–1284.

See, also, message of June 12, 1884, S. Ex. Doc. 185, 48 Cong. 1 sess., relating to the law creating or modifying the Zona Libre.

7. CROSSING OF BORDER BY CATTLE.

§ 863.

Congress, by a joint resolution of January 15, 1894, authorized the Secretary of the Treasury to permit owners of cattle and horses in the United States to pass over into Mexico for the purpose of pasturing them and afterwards to reimport them into the United States free of duty within twelve months from the date of the resolution. The Mexican government declined to concur in the carrying out of the resolution on the ground that a convention between the United States and Mexico, signed July 11, 1888, for the reciprocal crossing of cattle from one country to the other was still pending before the Mexican Senate, and that, in view of the opposition to the convention among the inhabitants of the frontier States, the President of Mexico did not consider it opportune to take any action in the matter.

For. Rel. 1894, 415, 417, 418.
See For. Rel. 1888, II. 1252, 1286, 1289, 1291, 1296, 1298, 1299.

XXVII. *MUSCAT.*

§ 864.

See Zanzibar, infra, § 895; supra, 267.

A treaty with Muscat was negotiated by Edmund Roberts. It was signed Sept. 21, 1833, and was proclaimed June 24, 1837.

See Davis, Notes, Treaty Vol. (1776–1887), 1360. As to Edmund Roberts, see Japan, supra, § 845; Foster, American Diplomacy in the Orient, 52–55; Moore, American Diplomacy, 120, 121, 125.

XXVIII. *NETHERLANDS.*

§ 865.

The history of the negotiations with the Netherlands prior to the adoption of the Constitution of the United States is given in Mr. J. C. B. Davis's Treaty Notes, Treaty Volume (1776–1887), 1360.

As to the award of the King of the Netherlands in the northeastern boundary dispute, see Moore, Int. Arbitrations, I. 90, 119, 136–137.

As to claims against the Netherlands, growing out of the seizure and sequestration, or confiscation, of American vessels in Dutch ports in 1809 and 1810, see Moore, Int. Arbitrations, V. 4473.

As to salt and sugar duties, see For. Rel. 1895, II. 1019.

For corespondence relating to the inauguration of Her Majesty Queen Wilhelmina, see For. Rel. 1898, 512–517.

For the establishment of diplomatic relations with Luxemburg, the mission being added to that to the Netherlands, see For. Rel. 1903, 643.

XXIX. *OTTOMAN PORTE.*

1. Treaty of 1830.

§ 866.

As to the treaty of commerce and navigation of May 7, 1830, see supra, § § 284, 285.

As to Art. VII. of this treaty, see Mr. Livingston, Sec. of State, to Mr. Porter, No. 5, April 3, 1832, MS. Inst. Turkey, I. 243; Mr. Day, Sec. of State, to Mr. Straus, min. to Turkey, Sept. 13, 1898, MS. Inst. Turkey, VII. 274.

For the establishment of direct diplomatic relations between the United States and Bulgaria, see For. Rel. 1903, 21–23.

2. Treaty of 1862.

§ 867.

February 25, 1862, a new treaty of commerce and navigation was concluded.

"This treaty, by its 20th article, was to continue for 28 years, counting from the day of the exchange of ratifications, subject however to one year's notice of termination to be given by either party at the end of the 14th or 21st year. By the 22d article, a tariff was stipulated for the Ottoman Empire, subject to revision at the end of the seventh, fourteenth, twenty-first, twenty-eighth or any subsequent septennial period, counting from the date of exchange of ratifications, on notice duly given by either party of desire for such revision one year before the close of the current seven years.

"Aristarchi Bey, the Turkish minister, under date of January 15, 1874, informed the Secretary of State of the desire of his government to terminate the treaty, and that the Sublime Porte had resolved to invite the United States to examine the question of a new treaty. The note stated that, although the time fixed for giving notice to terminate the treaty has not yet arrived, the imperial government had thought proper to give such notice, with a view to giving time to the high contracting parties to come to an early understanding. Under date of January 21, 1874, Aristarchi Bey was informed that no objection existed to receiving the notice in advance of the period fixed by the treaty, but called attention to the fact that by the twenty-second article the second term of the seven years prescribed for its existence would only expire upon the 5th day of June, 1876. Timely

notice of termination was not in fact given by Turkey before that date, and thus the treaty, and the tariff thereunder, entered upon their third septennial periods.

"On March 12, 1883, Aarifi Pasha gave notice to the United States minister, Lewis Wallace, of the desire of Turkey to terminate the treaty one year from that date. Under the terms of the 20th article, the treaty, its ratification having been exchanged June 5, 1862, would not end its twenty-first year until June 5, 1884, and the United States government declined to accept notice of an earlier termination, and suggested a new notice to be given before June 5, 1883. Such notice was not in fact tendered until after that date, and the treaty entered upon a fourth septennial period. This was contested by the Turkish government, which claimed that its announced intent to terminate the treaty, simultaneously with the acceptance by the United States of its proposal for a tariff revision, operated as a sufficient notification.

"Throughout this discussion, the government of the Porte appears to have confounded the dates at which tariff revision became practicable under article twenty-two of the treaty, and the dates when the treaty itself might be terminable under article twenty. The acceptances (ratifications) of the tariff were exchanged March 12, 1862, and the tariff was therefore subject to revision at the end of each seventh year thereafter on one year's prior notice. The treaty was terminable at the end of the fifteenth, twenty-second and twenty-ninth years from date of exchange of ratifications (June 5, 1862) on one year's notice given at the expiration of the fourteenth, twenty-first and twenty-eighth years of its life. The tariff and treaty periods therefore differed by about fifteen months."

Notes, Treaty Vol. (1776–1887), 1371.

"The Sublime Porte, in the exercise of its incontestable and uncontested right, gave notice, at the prescribed time and in due form, of its desire for the cessation of the effects of the treaty concluded between the imperial Ottoman government and the United States in 1862. As a consequence, the treaty in question has ceased to exist as far as the Sublime Porte is concerned.

"It is true that the Washington Cabinet, endeavoring to base its action upon certain matters of form, has sought to maintain that this notice was null and void. The Sublime Porte, however, strong in the justice of its cause, has energetically and unceasingly opposed this view, and has always insisted that the treaty was definitively abrogated.

"The Department of State, after many negotiations, finally consented to acknowledge the validity of the notice, on condition that

the Ottoman government would agree to grant to American citizens trading in Turkey the same privileges and immunities that are granted to the subjects or citizens of nations whose treaties of commerce with the Ottoman Empire have not yet expired, and provided that the said American citizens might enjoy the same until the expiration of the treaty of commerce that had the longest time to run.

"The Sublime Porte, while recognizing the spirit of conciliation shown by the Washington Cabinet in this matter, has found it impossible to accept this proposition. To do so would have been to admit that the notice given by it was an empty formality, since, according to the new convention proposed by the United States, the consequences of the said notice were to be null and void, and American citizens trading in Turkey were, in a word, to be placed in the same position in which they were before the notice was given.

"The Sublime Porte has therefore been compelled to declare to the chargé d'affaires of the United States at Constantinople that, considering the treaty as no longer having any legal force, it will levy an *ad valorem* duty upon American goods introduced into Turkey. Still, out of regard for the United States, with which it so much desires to maintain friendly relations, and with a view to avoiding even the shadow of a complication, it has repeatedly solicited the American legation at Constantinople to be pleased to appoint delegates for the purpose of negotiating a new treaty and a new tariff. Mr. Heap, however, has as yet taken no such step. He has confined himself to informing the imperial government that he has referred the matter to his government.

"The Sublime Porte trusts that the honorable Secretary of State, being convinced that it is in the right, will be pleased to instruct the representative of the United States at Constantinople to negotiate a new treaty and a new tariff with the Ottoman delegates; for, once more, it is impossible for the imperial government to recede from the position which it has taken in relation to this question."

Tevfik Pasha, Turkish min., to Mr. Davis, Aug. 30, 1884. For. Rel. 1885, 895.

"I have had the honor to examine the *note verbale* dated the 30th August last, and handed by you to the Acting Secretary of State, Mr. Davis, on that date. . . . I have noted especially the concluding words of your *note verbale*, that 'it is impossible for the imperial government to recede from the position which it has taken in relation to this question.'

"I regret to see in this communication an apparent departure from assurances repeatedly made by the government of the Porte, both at Constantinople and through its representatives in this capital, that

the goods and citizens of the United States should receive in any contingency the treatment of the most-favored nation. The proposals heretofore made by us to continue such treatment while negotiating a new treaty were based on these assurances of Turkey.

"As relates to these assurances, I need scarcely do more than refer you to the words of your own note of May 22d last, wherein, while stating the inability of Turkey to accept the letter of the proposal made by the United States, you make the following declaration:

"'As to the fear which you express that the commerce of the United States will be placed on a lower footing in consequence of the abrogation of the treaty of 1862, while other powers have treaties of longer duration, and that American commerce will thereby be subjected to a disadvantageous régime, I can assure you, in the name of my government, that the Sublime Porte entertains no such idea. The esteem and regard which it has always manifested for the United States are a sure guarantee that it will maintain their rights as it has done in the past.'

"Many such declarations might be cited from the notes of yourself and your predecessors and of the ministers of foreign affairs of the Porte to the same effect, but in more unequivocal language even than yours.

"Besides these assurances, the United States are, in virtue of a treaty whose existing validity is beyond a doubt, entitled to the treatment of the most-favored nation.

"The proposals heretofore made by this government, and which have been declined by that of the Porte, were based on these assurances, and looked simply to the continuance of the most-favored-nation treatment so long as other nations should be more favored than our own, and no longer. In this respect our proposals are not at variance with the drafts submitted by your own Government to the United States minister at Constantinople. The principle sought to be confirmed in both is the same.

"This government stands ready to negotiate a new treaty with Turkey, whereby the commerce of the United States may be subject to the same increase of taxes as the commerce of other nations with which Turkey has concluded or may conclude treaties, such treaty to take effect with the general enforcement of the new tariff.

"I can not but view the present notification, whereby the government of the Porte ignores its assurance of and agreement for favored treatment, and seeks to place the commerce of the United States on the basis of a higher taxation, while other powers are, for the time being, entitled to a lower rate, as unfavorable to that good feeling which should mark the negotiations for a reformed tariff and a new treaty. . . .

"The representative of the United States at Constantinople has been instructed to protest against any instance which may come to his knowledge of the levying of ad valorem duties against the products of the United States to which the products of other nations may not be at the time liable, as a violation of the treaty of 1830."

Mr. Frelinghuysen, Sec. of State, to Tevfik Pasha, Turkish min., Oct. 24, 1884, For. Rel. 1885, 896.

See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Wallace, min. to Turkey, No. 77, May 1, 1883, MS. Inst. Turkey, IV. 18; same to same, No. 163, March 25, 1884, id. 97, enclosing copies of Tevfik Pasha, Turkish min., to Mr. Frelinghuysen, Oct. 26, 1883, and Mr. Frelinghuysen to Tevfik Pasha, March 21, 1884; Mr. Frelinghuysen to Mr. Wallace, No. 171, March 29, 1884, id. 108; same to same, No. 184, April 26, 1884, id. 129; No. 191, May 20, 1884, id. 135; No. 243, Nov. 25, 1884, id. 192.

Mr. Frelinghuysen's note to Tevfik Pasha, March 21, 1884, encloses a draft of a declaration for the establishment of a modus vivendi. (MS. Notes to Turkey, I. 412.)

"I have had the honor to receive the note which you were pleased to address to me, under date of the 24th ultimo, in relation to the treaty of commerce between Turkey and the United States.

"In reply I can but renew to you the assurances which the imperial government has repeatedly given to that of the United States, that American merchants will receive, in the dominions of his Imperial Majesty the Sultan, the same usage as those of other nations, as is stipulated in Article I. of the treaty of 1830, which is the only treaty that is now in force.

"The Sublime Porte, in an arrangement to be concluded between the two countries to take the place of the treaty of 1862, which has ceased to exist, would be perfectly willing to place American merchandise on the same footing as that of the most-favored nation. It would have to be well understood, however, that this stipulation should be reciprocal, and interpreted as it has been hitherto understood in the law of nations. That is to say, that just as American goods imported into Turkey would receive the benefit of any advantage granted to a third power, so Ottoman goods would enjoy in the United States all advantages that, for any reason, should be accorded by the Washington government to the goods of any other country.

"As to the transient question what usage will be accorded to American goods in the Ottoman Empire, so long as no new treaty shall be concluded, I have every reason to believe that such goods will be subjected to the same usage as those of other nations, with the exception of imports from Austria-Hungary, upon which, for the present, specific duties continue to be levied; goods from all other countries pay *ad valorem* duties. The Sublime Porte was therefore very much surprised when it learned that the representative of the United States at

Constantinople had been instructed to protest every time that *ad valorem* duties should be levied upon American goods, unless the same duties should be levied upon the productions of other nations.

"This decision can not fail to complicate the situation, and to give rise to new difficulties, without doing any good. The United States legation, moreover, will not have occasion to protest, notwithstanding the instructions of its government, since *ad valorem* duties are levied upon the goods of all in general.

"I have been instructed by my government to beg you earnestly, Mr. Secretary of State, to be pleased to instruct the United States delegate to take part, without delay, not only in the preparation of the new tariff, but also in the negotiations for the conclusion of a new treaty to take the place of that which the Sublime Porte has regularly denounced."

Tevfik Pasha, Turkish min., to Mr. Frelinghuysen, Sec. of State, Nov. 30, 1884, For. Rel. 1885, 901.

"The termination of the commercial treaty of 1862 between the United States and Turkey has been sought by that government. While there is question as to the sufficiency of the notice of termination given, yet as the commercial rights of our citizens in Turkey come under the favored-nation guarantees of the prior treaty of 1830, and as equal treatment is admitted by the Porte, no inconvenience can result from the assent of this government to the revision of the Ottoman tariffs, in which the treaty powers have been invited to join."

President Cleveland, first annual message, 1885, For. Rel. 1885, xiv.

Since June 5, 1884, the Ottoman government has treated the convention of 1862 as no longer operative.

No result has yet attended the standing invitation of the Turkish government to negotiate a new commercial treaty. Meanwhile, the commerce of the United States enjoys in the Ottoman dominion the most-favored treatment.

The Supreme Court has held that the treaties concluded between the United States and the Ottoman Empire concede to the United States the same privileges and rights as to extraterritorial jurisdiction enjoyed by other Christian nations. (Dainese *v.* Hale, 91 U. S. 13.)

"Your dispatch No. 26, of the 13th instant, in regard to the resumption of tariff conferences with the Porte is received.

"In view of the friendly disposition in the premises on the part of the Turkish minister of foreign affairs and the grand vizier, as described in Mr. Wallace's No. 466 of the 25th January last, and as the accession of a new and, as you say, liberal-minded minister of foreign affairs seems to afford a favorable opportunity for a renewal of the negotiations relative to a new tariff on the part of Turkey, and eventually, if possible, a commercial treaty, Mr. Heap is hereby

authorized to take part in any conferences for that purpose under your general supervision.

"This Department, though not fully admitting that the Turkish government gave due notice of the abrogation of the treaty of 1862, nevertheless is disposed to waive that point and to participate with the other treaty powers in the conferences on the tariff revision on the basis of the most-favored nation privileges being granted to the United States in any new agreements, as were in fact conceded by the treaty of 1830.

"If new instructions for Mr. Heap should be necessary, as seems to be implied by his dispatch to you of the 10th instant, they should, as he suggests, correspond with those given to the delegates of the other nations, making no allusion to the treaty of 1862 as to a *revision* of tariff. By Mr. Wallace's No. 476 it appears that 'the Austrian commercial treaty is now the only one with an undisputed future expiration,' and that the Sublime Porte has declined to accede to the request of the Austrian ambassador that the rates applied to other nations may be extended to his. This circumstance will not probably, however, stand in the way of tariff negotiations with other nations, or in the drawing up of identical commercial treaties, as is reported by Mr. Wallace in his No. 466 to be the desire of the Turkish Government."

Mr. Bayard, Sec. of State, to Mr. Cox, min. to Turkey, Oct. 28, 1885, For. Rel. 1885, 877.

3. Real Estate Protocol, 1874.

§ 868.

The Ottoman government having passed a law conceding to foreigners the right to hold real estate under certain conditions, Congress, by act of March 23, 1874, authorized the President to accept such law for citizens of the United States; and a protocol was thereupon signed to that effect. A proclamation was issued by the President October 29, 1874.

Act of March 23, 1874, 18 Stat. 23; protocol of Aug. 11, 1874, id. 850.

The English translation of the protocol is printed in For. Rel. 1874, XXII.; 65 Br. & For. State Papers, 370.

As to the interpretation of the protocol, see Mr. Hay, Sec. of State, to Mr. Griscom, chargé, No. 214, Feb. 23, 1900, MS. Inst. Turkey, VII. 413.

In a case where the decision of the Turkish courts was adverse to a citizen of the United States in respect of a claim to the title of certain real property, the Department of State advised that the claimant should vacate the premises as desired by the Turkish government, and present his claim to that government for the purchase money which

had been delivered to it and also for any sums necessarily expended in the prosecution of his rights.

Mr. Bayard, Sec. of State, to Mr. Wallace, min. to Turkey, March 13, 1885, For. Rel. 1885, 843.

4. Extradition Treaty.

§ 869.

As to nationality and naturalization, see supra, §§ 459–464; Mr. Day, Sec. of State, to Mr. Straus, min. to Turkey, Sept. 13, 1898, MS. Inst. Turkey, VII. 274.

August 11, 1874, an extradition treaty was concluded between the United States and Turkey. Ratifications were exchanged at Constantinople April 22, 1875, and the treaty was proclaimed by the United States May 26, 1875. March 29, 1886, Mr. Cox, American minister at Constantinople, reported that the Ottoman authorities did not regard the treaty as effective. The Department of State, April 16, 1886, expressed surprise at this statement. December 28, 1888, Mr. Straus, Mr. Cox's successor, wrote: "There is a disposition on the part of the Porte to claim that it is not in force, in that they couple its ratification with the treaty of naturalization which is still in negotiation. I fail to see what the one treaty has to do with the other, and know of no valid reason why the former treaty should not be binding."

1 Moore on Extradition, 102, 815–816.

As to the unratified naturalization treaty with Turkey, signed in 1874, see supra, § 464.

5. Educational, Eleemosynary, and Religious Institutions.

§ 870.

"Permit me to attract your attention to the relations of citizens of the United States as a nationality to the Ottoman Porte, in connection with which two important questions present themselves for consideration, the first being the position of citizens of the United States residing continuously in Turkey for business or other purposes; the second, the position in respect to the Porte, of educational, eleemosynary, and religious institutions established and carried on by citizens of the United States on Turkish soil.

"So far as concerns missionary status, the question now immediately presented is one which does not exclusively concern the schools of the American Board of Commissioners of Foreign Missions. Excellent as is their work, and entitled to the highest respect, I have simply to say that the efforts the Department is now making, and has

heretofore steadily made, in support of those schools is wholly divested of sectarian preferences, and would be exerted with equal earnestness in support of the schools in Turkey of any other and all other American charitable or religious associations.

"And, further, in view of the general question of the rights of citizens of the United States in Turkey, it is important to maintain that the rights of extraterritoriality, claimed to a greater or less extent for these schools, are part of the same system by which rights of extraterritoriality are claimed by this government in Turkey (1) for our citizens in certain juridical relations, and (2) for our diplomatic and consular establishments, so as to enable them to extend protection to the extent to which such protection is enjoyed by other Christian embassies, legations, and consulates in Turkey. The basis of this jurisdiction may be thus stated:

"Constantinople and the domain of which it is the capital have, from a very early period down to the present day, been populated by distinct and diverse nationalities, to which rights of government by their own especial laws have always been conceded. We have this thus conceded (during the Greek empire) by Cassiodorus, the secretary of Theodoric the Great: '*Romanis, Romanus judex erit; Gothis, Gothus; et sub diversitate judicum una justitia complectabatur.*'

"When the Ottoman Porte was established by conquest in Turkey the same system of recognition and assignment of self-government to each distinct nationality was not only adopted but extended. Not only were Armenians and other nationalities whom the Turks, after the conquest, found in their domains, recognized as entitled to a large measure of local self-government, but similar privileges were from time to time accorded to foreign Christian nations. For this course on the part of the Porte—a course which has led to the nonapplication to Turkey of the principles of territorial sovereignty generally recognized elsewhere—the following reasons may be given:

"When the Porte took possession of Turkey its population was largely made up of Christian nationalities to which local self-government had been previously more or less assigned. These nationalities could not be expelled from Turkey without expelling the population by which its fields were tilled and its business exchanges conducted. On the other hand, the Porte could not undertake the municipal control of such nationalities, nor the settlement of their business differences, nor the supervision of their religious functions. . . . Those who rejected Mohammed were, to the Turk, not merely enemies, but Giaours—unclean persons—persons with whom the Turk could have no business or even social relations. Hence they were to be excluded from Turkish armies. While they might be taxed for imperial purposes, they were, so far as concerns their own particular interests, to determine themselves the taxes which they were to bear. In Turkish

schools their children could not be received; and, therefore, they were entitled to have schools of their own, in which the teaching was to be distinctively Christian, and which were regarded as part of the system of diverse nationality recognized by ancient usage and essential to the existence of the Empire. And so it was with regard to the settlement of business disputes. As the Porte, or its courts, whatever they might have been, could not, without abandoning its fundamental doctrine of creed isolation, take cognizance of business disputes between unbelievers, these disputes must be settled by courts of the nationalities to which these unbelievers respectively belonged. And if questions of religion were involved, such disputes must be referred for determination to the head of the church to which the disputants belonged.

"This demarcation of jurisdictions will not appear strange when it is recollected that a similar policy and practice are adopted in this country by the dominant race toward the North American Indians. We can scarcely rate the incapacity of these Indians to adopt and apply our institutions as greater than the Ottoman conquerors regarded the incapacity of the Christian nationalities in Turkey at the conquest to adopt and apply Ottoman institutions, nor regard the political capacity of these Indians as of a less grade than the Ottoman conquerors regarded that of their new Christian subjects. And we continue to do for the Indians what the Ottoman conquerors of Turkey did for the Christian races who at the conquest were found there. Just as the Ottomans professed themselves unable to understand the laws of those Christian races, or to establish over them Moslem law, therefore leaving them to their own courts, so we, declining to absorb Indian law into our own, or even to apply to Indians our own municipal jurisprudence, leave the adjudication of questions arising in Indian tribes to the determination of their tribal law.

"This renunciation by the Porte of legislative and judicial control over Christian nationalities, which was worked into the traditions of the Empire, acquired not only greater municipal force but more fully recognized international validity, when the great European powers sent to Turkey not only diplomatic and consular agents, but merchants, to conduct business with the Christian subjects of the Porte, and missionaries to minister not only to persons of their own nationality but to whomsoever might apply. These visitors could not be repelled. Turkey could not afford to quarrel with the leading sovereigns of civilization, nor could she preclude that civilization from pouring, through its agents, into her domains. Those agents came and remained in great numbers; not merely merchants and capitalists, but religionists, devoted to the work of maintaining worship, according to their views, with hospitals and schools. To these energetic and influential settlers Turkish law, for the following reasons,

was even less applicable than to the native Christians. The newcomers were protected by foreign powers whom Turkey was unwilling to offend; and they belonged to Western races who, from their idiosyncrasies, can not be fused with the Orientals. There are, to adopt Lord Stowell's language, frequently cited with approval in the United States (The Indian Chief, 3 C. Rob. Adm. Rep. 29), 'immiscible,' so that by no comity of international law can the institutions of the one be applied to the other. No foreigner with ordinary business capacity or ordinary self-respect would live in a country where he could not be heard in the local courts of justice, or, if he were heard, it would be as degraded by the disabilities of an inferior and abject race. Yet, on the other hand, the presence in Turkey of foreigners of business capacity and of self-respect is essential to the maintenance of the Empire. By them its monetary affairs are conducted, its soldiers drilled, its schools taught in all that concerns liberal civilization, and its relations with the outside world regulated. Turkey could not, and can not now, be expected to surrender the policy which, nominally at least, treats the Ottomans as the dominant race on her soil; and the only alternative open to her has been, therefore, to permit foreigners of the classes so necessary to her political prosperity to enjoy, as far as practicable when living within her borders, their own distinctive institutions. The Porte could not exist if it were to surrender the political exclusivism of Islamism. It could not exist, also, if it were deserted by those foreigners to whom its progress in civilization is due. Hence the local self-government conceded to foreign communities in Turkey, evidenced in the old capitulations and gradually extending to meet the exigencies of the times, is a necessary emanation of the political and social conditions of that Empire as they now exist. It is for the legation of the United States at Constantinople to see that American citizens in Turkey enjoy in their various relations the rights of extraterritoriality which, under the system I have outlined, are among the essential conditions of the continuous political existence of Turkey under its present dynasty.

"The most important of the prerogatives growing out of these conditions is that of the distinctive jurisdiction assigned to our ministers in Turkey under treaty, and as applied by Revised Statutes, section 4125, which gives these officers such jurisdiction as 'is permitted by the laws of Turkey *or* [in the alternative] its usages in its intercourse with the Franks or other Christian nations.' By the same standard of usage, as evolved by the processes above stated, are to be determined the territorial rights exercised by our legations and consulates in the East, and the prerogatives of American missionaries, under the limitations above mentioned.

"The effect of the treaty of 1830 on this extraterritoriality is thus stated by Mr. Cushing (7 Op. 567, 568): 'Commerce, in the treaty,

means *any subject or object of residence or intercourse whatsoever; . . . as to all civil affairs to which no subject of Turkey is a party. Americans are wholly exempt from the local jurisdiction; and, . . . in civil matters as well as in criminal, Americans in Turkey are entitled to the benefit* of "the usage observed towards other Franks."

"'I think the "causes" spoken of in the second sentence of the fourth article are of the same nature as to parties as the "litigations and disputes" mentioned in the first sentence—that is, between citizens of the United States and subjects of the Porte; the meaning of which is, that causes between such parties under five hundred piasters in amount are to be decided by the ordinary local magistrates, assisted by the dragoman, and causes above that amount by the Porte itself—that is, the Sultan or his appropriate minister, with intervention of the minister or consul of the United States.

"'My conclusions in this respect are founded, first, on the phrase in the second article which engages that citizens of the United States in Turkey shall not be "treated *in any way* contrary to established usages." What are the "established usages?" Undoubtedly the absolute exemption of all Franks, in controversies among themselves, from the local jurisdiction of the Porte.

"'I will not repeat here what has been said in previous communications as to the ground or principle of the right of extraterritoriality asserted by, and fully conceded to, Franks generally—that is, Western Christians in Turkey.

"One of the distinctive incidents of this extraterritoriality is thus noticed by Mr. Marcy in his note of September 26, 1853 (Dig. Int Law, § 198 [see supra, § 287, II. 728]):

"'By the laws of Turkey and other Eastern nations the consulates therein may receive under their protection strangers and sojourners whose religion and social manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulate. These consulates and other European establishments in the East are in the constant habit of opening their doors for the reception of such inmates, who are received irrespective of the country of their birth or allegiance. It is not uncommon for them to have a very large number of such *protégés*. International law recognizes and sanctions the rights acquiesced [*sic* acquired?] by this connection.

"'In the law of nations, as to Europe, the rule is that men take their national character from the general character of the country in which they reside; and this rule applies equally to America. But in Asia and Africa an immiscible character is kept up, and Europeans trading under the protection of a factory take their national character from the establishment under which they live and trade. This rule applies to those parts of the world from obvious reasons of policy,

because foreigners are not admitted there as in Europe and the Western parts of the world, into the general body and mass of the society of the nation, but they continue strangers and sojourners, not acquiring any national character under the general sovereignty of the country. (1 Kent Comm. 78, 79.)'

" In a report to the Institute of International Law on this subject, by M. F. de Martens (Annuaire, 1882–'83, p. 225), is found the following statement:

" ' D'autre part, les gouvernements musulmans eux-mêmes n'ont jamais insisté sur leur pouvoir territorial pour juger les procès mixtes entre sujets des États chrétiens. Les contestations entre giaours étaient trop impures aux yeux des musulmans pour qu'une intervention de leur part fût permise.'

" And in the same volume, page 231, M. J. Hornung says:

" ' Cette exterritorialité des colonies européennes et américaines trouve sa justification dans les défauts de la justice et de la police locale et dans le déplorable état des prisons. Souvent, en outre, les pays de l'Orient sont encore, au point de vue religieux, dans leur droit et leur justice, ce qui—soit dit pour leur défense—était encore le cas, dans les pays chrétiens, il y a cent ans ou même moins. Ainsi, devant les tribunaux ottomans de l'empire turc, le témoignage des chrétiens n'est pas, en fait, admis sur le même pied que celui des musulmans, le cheikulislam n'ayant pas encore donné son autorisation aux cadis. (Voir le rapport de Sir Travers Twiss dans le tome V de l'Annuaire.)'

" Concessions by the sovereigns of Constantinople and the region which it dominates of extraterritorial privileges were issued by the Christian Emperors to Venice early in the eleventh century; to the Amalfians in 1056; to the Genoese in 1098; to Pisa in 1110. The charters granting these privileges were called ' capitulations,' from the fact that they were divided into chapters; and this title they continued to hold after the Moslem conquest. When the Turks took possession of Constantinople, after the conquest of 1453, they found the Genoese in possession, under a specific capitulation, of the town of Galata, which was surrounded by an intrenched camp. This capitulation was confirmed by Mahomet when master of Constantinople. Capitulations to Venice, dated October 2, 1540, granted to Venetians the right of having all differences between Venetians in Turkey decided by judges to be appointed by Venice, while to the trial before Turkish courts of differences between Venetians and Turks, the presence of a Venetian interpreter was an essential condition. In the same capitulations was given to Venice the right of having permanently at Constantinople a magistrate, as a sort of Venetian viceroy, by whom general supervision over Venetians was

to be exercised. Venetians, by the same instrument, were exempted not merely from military service, but from the tax to which other Christians were subjected.

"The law in this respect is thus summed up by M. F. Laurent, in his Droit Civil International, vol. 1, page 239, as translated in this Department:

"'The conquerors left to the conquered their law and a sort of autonomy; the Greeks, Armenians, Slavs retained their religious and civil establishment as it existed at the epoch of the conquest; the Turks confine themselves to ruling, and this rule consists merely in levying the tribute imposed on conquered populations; they do not interfere with the administration of justice. As is the case with the Turks, the civil law is closely interwoven with the religious law, the conquerors left to the vanquished, together with their religion, a quite extensive civil autonomy, clothing the heads of the various religious communities with an authority analogous to the Sultan's. This system was extended to the Europeans who settled in the ports of the Levant for commercial purposes. In them the settlers are governed by their own laws; this autonomy is guaranteed them by the capitulations, a kind of convention made between the Sultan and the foreigners represented by their government. The capitulations can not be altered without the consent of the contracting parties. Hence this peculiar consequence, that the laws respecting foreigners and the rights assured to them only bind them when their respective sovereign states have accepted them. It can scarcely be said that the state is sovereign, for it does not proceed by the course of ordering and commanding; the relations between the government and the foreigners are governed by international and not by municipal law. It will certainly not be asserted that this peculiar establishment is due to a liberal disposition of mind or even to the tolerance of the conqueror, for the latter may easily leave to the conquered and to foreigners entire religious liberty without granting them an autonomy which destroys the very conception of the state. It is simply incapacity, oriental barbarism. It has been said of the Turks that they have camped in Europe; they rule over peoples who dwell side by side, among whom there is no bond of connection, and between the conquerors and the conquered there is no connecting link save that of force.' To the same effect writes Mr. W. B. Lawrence, Commentaire sur Wheaton, vol. 4, pp. 106 et seq.

"To French subjects specific extraterritorial rights were given in the capitulations issued in February, 1535, or, according to Von Hammer, in February, 1536. (See De Testa's Traités de la Porte Ottamane, vol. 1, pp. 15 et seq.) These capitulations were from time to time renewed and amplified, until they took the shape of the

capitulations, or 'Lettres Patentes' of May 30, 1740. (De Testa, vol. 1, pp. 186, 187.) . . .

"I have referred in detail to these capitulations, because they have sometimes been put forward as the basis on which rests the right of our missionaries in Turkey to the protection they claim. But, accepting the view of Mr. Pendleton King, by whom the mission at Constantinople has been recently ably conducted, I doubt the expediency of relying solely on the capitulations for this purpose, since I think it may be questioned whether under the text the 'religieux,' to whom privileges are given, are not to be limited to persons of French nationality. It is not necessary, however, to thus limit ourselves. In the eighteenth article of the 'capitulations and articles of peace between Great Britain and the Ottoman Empire, as agreed upon, augmented, and altered at different periods [beginning in 1675], and finally confirmed by the treaty of peace concluded at the Dardanelles in 1809,' as published by the Levant Company, 1816 (1 Br. and For. St. Pap., 750), we have the following:

"'XVIII. That all the capitulations, privileges, and articles granted to the French, Venetian, and other princes, who are in amity with the Sublime Porte, having been in like manner, through favor, granted to the English, by virtue of our special command, the same shall be always observed according to the form and tenor thereof, so that no one in the future do presume to violate the same or act in contravention thereof.'

"As illustrating the nature of the rights subsequently recognized as residing not merely in Protestant missionaries in Turkey but in their converts, I inclose several important documents, marked Exhibit B.

"I also inclose a protocol of the conference which preceded the treaty of Paris of March 30, 1856, bearing on the same questions. This protocol is marked Exhibit C.

"In the treaty of Paris referred to is the following article:

"'ART. IX. His Imperial Majesty the Sultan having, in his constant solicitude for the welfare of his subjects, issued a firman, which, while ameliorating their condition without distinction of religion or race, records his generous intentions towards the Christian populations of his Empire, and wishing to give a further proof of his sentiments in that respect has resolved to communicate to the contracting parties the said firman emanating spontaneously from his sovereign will.

"'The contracting powers recognize the high value of this communication. It is clearly understood that it can not, in any case, give to the said powers the right to interfere, either collectively or separately, in the relations of His Majesty the Sultan with his subjects,

nor in the internal administration of his Empire.' (Holland's Eastern Question, 246.)

"The firman to which the ninth article, as given above, refers is the Hatti-Humayoun of February 18, 1856 (Ibid., 329, *ff.*), which virtually makes general the concessions of extraterritoriality given in the capitulations above cited. . . .

"Among the articles of the treaty of Berlin, July 13, 1878, are the following:

"'ART. LXI. The Sublime Porte undertakes to carry out, without further delay, the improvements and reforms demanded by local requirements in the provinces inhabited by the Armenians, and to guarantee their security against the Circassians and Kurds.

"'It will periodically make known the steps taken to this effect to the powers, who will superintend their application.

"'ART. LXXII. The Sublime Porte, having expressed the intention to maintain the principle of religious liberty, and give it the widest scope, the contracting parties take notice of this spontaneous declaration.

"'In no part of the Ottoman Empire shall difference of religion be alleged against any person as a ground for exclusion or incapacity as regards the discharge of civil and political rights, admission to the public employments, functions, and honors, or the exercise of the various professions and industries.

"'All persons shall be admitted, without distinction of religion, to give evidence before the tribunals.

"'The freedom and outward exercise of all forms of worship are assured to all, and no hindrance shall be offered either to the hierarchical organizations of the various communions or to their relations with their spiritual chiefs.

"'Ecclesiastics, pilgrims, and monks of all nationalities traveling in Turkey in Europe, or in Turkey in Asia, shall enjoy the same rights, advantages, and privileges.

"'The right of official protection by the diplomatic and consular agents of the powers in Turkey is recognized both as regards the above-mentioned persons and their religious, charitable, and other establishments in the holy places and elsewhere.' (Holland's Eastern Question, 306.)

"As an exposition of the effect of the articles above cited, I inclose, marked Exhibit E, a translation made in this Department of a passage from an article by Mr. Ed. Engelhardt in the Revue de droit international et législation comparée, vol. xii, p. 373.

"This passage shows the construction assigned by the British Government, and accepted by Turkey, to the Treaty of Berlin, so far as concerns the religious liberty of Protestants.

"I have inclosed the above documents in this instruction because (1) they indicate the basis on which rests the extraterritoriality in Turkey of our citizens both as to religious liberty and as to distinctive judicial organizations, and (2) these documents may not be readily accessible in Constantinople. From them you will see that there is no necessity of basing the claim of American missionaries in Turkey on the French capitulations. They are maintained far more effectively under the treaties of Paris and of Berlin, under the Turkish decrees which preceded these treaties, and under the settled customs of the Porte.

"The construction given by Turkey to these treaties, and especially to the capitulations to Great Britain quoted above, is evidenced by her continued protection of the American missions in Turkey, with their hospitals and schools, in which Turkish patients are received and Turkish children instructed. These missions have been in existence for many years. They have now connected with them six colleges, forty-three seminaries and high schools, attended by two thousand pupils, and five hundred primary and secondary schools with over ten thousand pupils. Of these schools Mr. Hyde Clarke, in the Journal of the British Statistical Society for December, 1867, page 526, thus speaks:

"'By the assistance of American funds and the devoted exertions of the American missionaries, men and women, a great influence has been exerted in the Armenian body generally; their services have not been so much devoted to theological propagandism as to rendering service as physicians, teachers, and social reformers.' In these institutions a million of dollars, sent from the United States, has been invested, and from the United States their pecuniary support as well as most of their teachers are obtained. For more than half a century Turkey has seen these funds flow in, these schools built, these hospitals in beneficent operation, these children in process of instruction. 'During the sixty years that American schools have existed in Turkey,' so it is stated in an official communication from the American Board of Commissioners of Foreign Missions, which has these missions in charge, 'it (Turkey) has not only not interfered with or objected to them, but it has repeatedly protected them against unlawful aggression on the part of ill-disposed persons.'

"The protection by Turkey of the schools established by other religious communions on Turkish soil, a protection which has existed from a time coincident with the establishment of such schools, shows that Turkey regarded them as among the incidents of the territorial rights assigned by the capitulations to those religious communions. We have, therefore, in this protection not merely a contemporaneous construction of the Turkish capitulations, treaties, and edicts, but a

construction so continuous that it has the force of settled law. And this construction is strengthened by the fact that the Porte has ordered that no duties should be charged on goods coming to the American missions or schools. There could be no stronger proof that these missions and schools are regarded by Turkey as having not merely a protected but a favored existence on her soil.

"It has been argued by high authority that the right on the part of American missionaries in Turkey to the continued maintenance of their churches, hospitals, and schools may be rested on the 'favored-nation' clause of our treaty of 1862 with Turkey, applying to us privileges granted to other sovereignties. Turkey has claimed that this treaty has terminated by notice; and though there is little strength in this contention, it is not necessary that the question should now be raised. The rights of the missionaries above noticed find abundant support in ancient usage and in the Turkish legislation prior and consequent to the treaties of Paris and Berlin, applied, as this legislation has been, in such a way as to grant what are virtually charters to the missions in question for their hospitals and schools.

"From what has been said it will be seen, therefore, that the right of Protestant citizens of the United States to conduct their missions, chapels, hospitals, and schools in Turkey in the way they have been heretofore conducted, rests on the privileges of extraterritoriality granted to Christian foreigners in Turkey, as expanded in the present case by usage established by Turkey, so as to enable persons of Turkish nationality to be received in such hospitals and schools.

"So far as concerns the right of Americans, whatever may be their religious faith, to protection in the exercise of that faith, the right rests on the concessions of extraterritoriality above stated. So far as it concerns their right to receive in their hospitals and schools (otherwise than as servants) persons of Turkish nationality, it rests on usage, amounting, from duration and the incidents assigned to it by law, to a charter. It is not, however, claimed that as to such persons of Turkish nationality extraterritorial rights in American missions can be acquired. They must remain subject to the sovereignty of the Porte, which is entitled to prescribe the terms on which they can be permitted to attend such missions. It is, therefore, with peculiar satisfaction that the Department learns that, in part through the instrumentality of Mr. Pendleton King, as chargé d'affaires, an arrangement has been effected with the Turkish authorities by which the missions are enabled to pursue, as heretofore, their meritorious, unselfish, and beneficent work among Turks in Turkey.

"I inclose herewith, as a matter of information, an opinion by Mr. Edwin Pears, lately forwarded to this Department by American citizens residing in Constantinople, as to their legal rights. Mr. Pears

is well known as president of the European bar at Constantinople, and as an accomplished lawyer and historian."

Mr. Bayard, Sec. of State, to Mr. Straus, min. to Turkey, Apr. 20, 1887, For. Rel. 1887, 1094.

EXHIBIT E.

(The other exhibits attached to the above instructions are sufficiently noted in the text, and they may also be seen in For. Rel. 1887, 1101 et seq.)

The following is a translation in the Department of State of a passage from an article by Mr. Ed. Engelhardt in the Revue de droit international et législation comparée, vol. xii, p. 373:

"It remained for the Congress of Berlin to strike the most effective blow at the Porte's autonomy respecting religious government. By article 62 of the treaty of July 13, 1878, the Turkish Government not only recognized the existence in the foreign diplomatic and consular officers of a right of official protection over the ecclesiastics, pilgrims, and monks of their nationality, and over their establishments; it bound itself *generally* to maintain the principle of religious liberty, thus rendering itself liable to a control from which its own Mahometan establishment could not escape.

"The sequence of the steps is clear; foreign intervention was first limited to the holy places, to the priests officiating in them, and to foreign visitors. It afterwards extends to the other foreign persons in holy orders, both of the Frankish or Catholic religion, and of the Greek faith; next comes the Ottoman Christians, the patronage of whom, unjustly contended for by Russia,[a] has devolved upon the great powers; lastly, the Mussulman religion itself is threatened in its ancient and jealous independence.

"The autonomy of Islam, regarded solely from the religious point of view, had already been impaired at the time of the discussion of the fourth paragraph of the preliminaries of peace in 1856. The four deliberating powers, England particularly, had indicated the interest they felt in the suppression of the Mahometan law which punished apostasy and public blasphemy by death, representing that inasmuch as Turkey was about to form part of the European concert it was impossible to acquiesce in the maintenance of a rule which was of the character of an *insult* to every civilized nation.[b]

"Moreover, during the years 1856 and 1857 the British Embassy had more than once officially interceded in behalf of Mussulmans who had been converted, or were about to be converted, and whom the local authorities were prosecuting as criminals, and long diplomatic cor-

[a] "According to an interpretation based upon contemporary facts the clause of the treaty of Kutchuk-Kainaidji, by which the Porte promised to protect the Christian religion, only applied to the Christian provinces of the Danube and of the archipelago which Russia had occupied and which she restored to the Sultan." (Wharton, Int. Law Digest, 2d ed., III, 865.)

[b] Despatches from the British embassy, 4th, 18th, and 26th Feb., 5th Mar., 25th Apr., 30th May, 1856.

respondence had been exchanged on this delicate point of foreign intervention.[a]

"After the treaty of Berlin, so delicate a treatment was not deemed necessary, and Europe was the spectator of an incident which in certain respects recalled the adventure of which Prince Mentchikoff was the hero in 1853. Towards the close of the year 1879 the Turkish police arrested a mollah who had assisted an Anglican missionary in translating Christian works hostile to the Mahometan faith. In the eyes of the followers of Islam a more culpable act could not be conceived or one more odious than that of a priest of the national religion lending his personal assistance to a work of propagandism directed against that religion.

"Ahmet Tewfik Effendi was therefore condemned as proven guilty of a crime defined by the law of the land.

"The English embassador, whose intervention in this case had been asked by the agent of the London Church Missionary Society, did not content himself with intervening in behalf of his fellow-subject, who had himself been put under examination and arrest; he demanded of the Porte the immediate release of the *ulema* as well as his immunity from all punishment, alleging the liberty of conscience which the Sultans had promised their subjects, and the religious liberty embodied in article 62 of the treaty of Berlin." (Note of Sir H. Layard to the Porte, dated December 24, 1879.)

"The ultimatum of Sir H. Layard was successfully supported by the representatives of Germany, Austria-Hungary, and Italy.

"It would scarcely be possible to show more clearly that to the abdication of judicial functions, a result of the first capitulations, there had succeeded in Turkey a second and not less grave abdication, that of absolute autonomy in religious matters."

For citations of the instruction of April 20, 1887, see, particularly, Mr. Blaine, Sec. of State, to Mr. Hirsch, min. to Turkey, No. 263, Dec. 14, 1891, For. Rel. 1891, 765; Mr. Foster, Sec. of State, to Mr. Thompson, min. to Turkey, No. 3, Nov. 29, 1892, For. Rel. 1892, 609.

6. Schools.

§ 871.

"I thank you for the note which you addressed to me on the 12th instant, by which I am informed that the Sublime Porte, in its extreme desire to be agreeable to the government of the United States, and to give to it a fresh proof of the liberal spirit which guides the Turkish government in its relations with the United States, has just decided the question of the Robert College to the satisfaction of the United States citizens interested therein, and that His Majesty the Sultan has made a decree which authorizes Dr. Hamlin to build a college on the ground which was first selected by him.

"Mr. Morris, at Constantinople, will be instructed to assure the

[a] Despatches from the British embassy, 23 Sept., 1856, 26 Nov., 1857, 14 Aug., 1860.

Sultan's government that the United States highly appreciate the comity as well as the justice which mark this proceeding."

Mr. Seward, Sec. of State, to Blacque Bey, Turkish min., Jan. 20, 1869, MS. Notes to Turkey, I. 31.

In July, 1888, the president of Robert College, under instructions from the trustees in New York, applied to the Ottoman government for permission to erect an additional school building as well as a dwelling house for the president. On examination of the original iradé for the erection of the college and the Ottoman laws regulating the construction of buildings, it was found necessary to apply for an iradé for the additional buildings and to file plans and specifications. The Sultan's iradé was issued May 6, 1889.

Mr. Straus, min. to Turkey, to Mr. Blaine, Sec. of State, No. 194, May 10, 1889, For. Rel. 1889, 717.

An error which was afterwards discovered in the iradé was duly corrected by the Ottoman Government. (For. Rel. 1890, 769.)

In the school law promulgated in 1869 there are only articles 129 and 130 which relate to schools conducted by foreigners, of which the following is a translation:

"*Second category—Free schools.*

"Article 129. The free schools are those founded by the communities or by private Ottoman or foreign subjects. The instruction is either gratuitous or by tuition, and their expenses are covered by their founders or by the vacaufs (a trust foundation in mortmain for a charitable or pious purpose) to which they are attached.

"The foundation of free schools shall be authorized in the provinces by the governor-general or by the academical council, and at Constantinople by the ministry of public instruction.

"This authorization will not be given but under the following conditions:

"(1) The teachers and professors must be furnished with a certificate of capacity, or diploma issued by the ministry of public instruction or by the academical council of the locality.

"(2) There shall be no teaching against politics and morals. To that effect the program of teaching and the text-books in the free schools must bear the approbation of the ministry of public instruction or of the academical council of the locality.

"Any school opened without these formalities will be closed.

"The principals of the said establishments will be bound to get the certificates or diplomas. Their professors may be provided, legalized by the ministry of public instruction or by the academical council.

"ARTICLE 130. It is formally forbidden to ill-treat the stubborn or lazy pupils, and to use injurious expressions towards them, either in the public schools or in the free institutions. The different degrees of punishment to be inflicted to children of bad conduct will be set forth by special instructions. Any offender will be punished in accordance with the law."

Mr. Newberry, chargé d'affaires, to Mr. Foster, Sec. of State, July 21, 1892, For. Rel. 1892, 580, citing Wistarky, Legislation Ottomane, III. 299.

The text of article 29 of the law of 1869 was communicated to the Department of State by Mr. King, chargé d'affaires, in his No. 276, Jan. 11, 1887, MS. Desp. from Turkey.

"Your No. 240, of the 30th ultimo, covering your application to the Turkish government in favor of the Rev. Mr. Bartlett, of Cesarea, for permission to build a residence and schoolhouse at Taln, has been received. Under the circumstances as you present them, your note to the Turkish minister upon the subject is approved. It must, however, be understood as merely calling attention to a delay in attending to a regular petition of an American citizen, and can not be permitted to be regarded as a precedent for requiring that original applications of this character are to be made through your legation, since it is no part of your diplomatic functions to apply for municipal-building permits."

Mr. Frelinghuysen, Sec. of State, to Mr. Wallace, min. to Turkey, No. 105, July 20, 1883, MS. Inst. Turkey, IV. 43.

"The minister of public instruction has apparently done better than I expected or requested. He has agreed to forward a general order to all the places where such schools are in existence, directing the governors to refrain from closing American schools where a request for the regular permit has been made by the principal of these institutions. He also promises to take the necessary steps to furnish the permit to them as soon as possible. If this promise be kept, it will be a great gain in this direction, for it assures not only the continued existence of the schools now open, but a permit for the establishment of new schools."

Mr. Cox, min. to Turkey, to Mr. Bayard, Sec. of State, No. 55, Nov. 14, 1885, For. Rel. 1885, 879, 881, replying to Mr. Bayard's No. 9, of Aug. 17, 1885, id. 855.

In Mr. Cox's despatch here cited will be found some matter concerning attacks upon missionaries and the case of Messrs. Knapp, Reynolds, and Pflaum.

As to an order for the reopening of certain schools which had been closed in the vilayet of Van, see Mr. Straus, min. to Turkey, to Mr. Blaine, Sec. of State, No. 178, March 15, 1889, For. Rel. 1889, 713; same to same, No. 201, June 13, 1889, id. 722.

"Your vigilance and your intelligent and energetic action in behalf of American educational establishments and interests . . . is highly appreciated by this Department and will cause additional and widespread satisfaction throughout the United States." (Mr. Bayard, Sec. of State, to Mr. Straus, min. to Turkey, No. 70, Feb. 3, 1888, For. Rel. 1888, II. 1561.)

Early in 1886 the Turkish government issued a new school law, and proceeded to close a number of schools because they had no official permits. After much discussion an agreement was reached, and the minister of public instruction issued the following circular:

"A number of schools within the imperial provinces having been established without permission, general instructions were issued some time ago, with the object that three months' time should be given them, and if within that time they did not comply with the requisite rule action should be taken against them in accordance with the law. Now, according to the information which reaches us, some of these schools have for some reasons been closed, but several of them have now given assurances of their readiness to conform to the terms of the law, consequently you will see fit to allow the reopening of such schools that will conform to article 129 of the law of the public instruction, the closed schools of the Jesuits to be excepted until further instructions."

This order seems not to have been enforced in Syria.

Mr. Blaine, Sec. of State, to Mr. Hirsch, min. to Turkey, April 22, 1892, For. Rel. 1892, 562–564.

"The legation of the United States has made a complaint to the Porte, stating that whenever American schools are established, that while the authorities proceed to the examination of their programme (of studies) as well as the certificates of the teachers, yet no official permission in writing is granted, and the above-mentioned certificates are withheld by the authorities, and after a lapse of eight or ten years, when proceedings for the investigation for the condition of said schools are made, the said schools are closed, not because of any irregularity as regards the schools, but because the above-mentioned official permissions and the certificates of the teachers are not in their possession, and in consequence many inconveniences and difficulties are encountered in the effort to reopen the said schools.

"Although it is known that some of these schools are closed for legal reasons, it can not be admitted that long-established schools should be closed as long as their status and the manner in which they are conducted are not such as to render their closing necessary for being contrary to the established regulations. Consequently, you are instructed that whenever a new school is to be established, the formalities required by the special law having been complied with, the gov-

ernor-general shall grant to the directors of the schools the official permission, and the certificates of the teachers, after being examined, shall be returned to the latter and left in their possession. As regards the old existing schools, whenever any reason for their closing exists, the fact should be reported to the ministry of the public instruction, and, in accordance with the answer thus given, action shall be taken.

"The same rule shall apply to the other foreign schools."

Vizierial circular to the governors-general of Turkey, May 16, 1889, enclosed with and explained in Mr. Straus, min. to Turkey, to Mr. Blaine, Sec. of State, No. 196, May 27, 1889, For. Rel. 1889, 720.

See, also, Mr. Straus to Mr. Blaine, No. 187, March 28, 1889, For. Rel. 1889, 715.

"I desire to offer the Department's congratulations on the success which has so far crowned your efforts in dealing with this troublesome and vexatious question" of schools. (Mr. Blaine to Mr. Straus, No. 217, June 14, 1889, For. Rel. 1889, 723.)

Of thirty schools which were mentioned as closed in January 11, 1887, it was stated in December, 1889, that all which the missionaries had desired to reopen had been reopened. Two of them were, however, afterwards reclosed. (For. Rel. 1890, 738.)

As to the application for an iradé for the foundation of St. Paul's Institute at Tarsus under an American charter, see For. Rel. 1890, 772; MS. Inst. Turkey, V. 149.

As to the reopening of schools by the authorities of Damascus, see For. Rel. 1890, 773.

As to the closing and reopening of the school at Agantz, see For. Rel. 1891, 749.

January 6, 1892, the following vizierial circular was issued by the Sublime Porte:

"The prohibition against founding or opening in the Ottoman Empire schools or places of worship, without obtaining official permission, is reiterated.

"Moreover, peremptory instructions will be given to those concerned that in respect to schools or places of worship that have been opened without official permission it will be necessary for them, within a period fixed according to the locality, to obtain by the usual method permits for these also; and, further, that those schools and places of worship which do not obtain permits within the specified time shall be closed. It must be made known to them also that those who found schools or places of worship without permission will be treated according to the provisions of article 129 of the law of public instruction and to the present edict. The decision of the high council of ministers upon these points having received by iradé the sanction of His Imperial Majesty the Sultan, the orders necessary for its execution have been delivered to the ministry of the interior, the min-

istry of foreign affairs, and communicated to the ministry of public instruction."

Mr. Hirsch, min. to Turkey, to Mr. Blaine, Sec. of State, Jan. 22, 1892, For. Rel. 1892, 532.

The Turkish date of the order is Dec. 28, 1307 (1891, O. S.).

Mr. Hirsch, in a protest to the Porte against this order, Jan. 21, 1892, 532, said: "Since immemorial time, schools have been free, and I am unaware of any restrictions governing them prior to the *hatti houmayoum* of 1856, which may be considered to have the force of an international agreement, and which, in its fifteenth article, says: 'Moreover, every community is authorized to establish schools of science, arts, and industry; only the method of instruction and the choice of professors in schools of this class shall be under the control of a mixed council, whose members shall be named by my sovereign will.'

"These conditions, and the conditions of control demanded by the one hundred and twenty-ninth article of the law of public instruction, based upon the *hatti houmayoum*, have been long since fulfilled by all the American schools; *i. e.*, the books in use, the system of instruction, and the diplomas of the teachers, have always been freely offered for the approval of the local authorities.

"But while the local authorities should, upon such compliance with the law, have then registered all these schools, the only result of these efforts on the part of the American school boards to conform to the imperial order, was the official approval by the censorship of the books used, the local authorities saying that they had no instructions or powers qualifying them to certify to the programme of studies or the teachers' diplomas, as the law commanded, unless, indeed, I except that most frequently the American diplomas thus presented were lost by the officials or mislaid and never returned. Under these above-indicated conditions, therefore, we claim and have exercised the right of opening schools throughout the Empire, which are and have been always under the protection of the United States legation.

"I find nothing in the law requiring a formal application for a permit, and such permit, if held to be convenient by the local authorities, should be at once issued by them, upon the lawful conditions being fulfilled.

"I may here invite your excellency's attention to the circular letter of the minister of public instruction, dated December 16, 1302, and to the vizierial circular that followed shortly afterwards, and by which the local authorities were unequivocally instructed to permit these schools to continue their work unmolested." (For. Rel. 1892, 532.)

See, also, Mr. Hirsch to Mr. Blaine, March 2, 1892, For. Rel. 1892, 537, reporting negotiations with the Grand Vizier. Also, p. 573.

Mr. Henry O. Dwight, in a letter to Mr. Hirsch, Feb. 24, 1892, For. Rel. 1892, 539, 540, said: "The school law of 1869 has never been observed in the practice of the provincial officials save as a means to close schools. I have never known a case where a permit for a school was granted . . . on any conditions, in the manner prescribed by the law, namely, by the provincial authorities, without reference of the question to the overburdened departments at the capital."

See, as to the closing of schools in Syria, Id. 542, 558–561, 562; at Agantz, province of Van, 607.

The minister of public instruction issued, December 25, 1892, the following circular order:

"It is categorically forbidden to build hereafter, to found and open without official authorization schools or to transform dwelling houses into schools, either in Constantinople or in the provinces of the empire. In the contrary case, the competent authorities will impede the transformation of a dwelling into a school or the opening of an establishment of instruction, and inform the Sublime Porte.

"All the schools previously opened without authorization must be provided with it in a period to be determined *ad hoc*. It will be proceeded to the closing of those which would have not, at the expiration of that period, obtained that authorization, and the prescriptions of article 129 of the regulation on public instruction will be applied with regard to persons who would act against the law.

"These measures, sanctioned by an imperial iradé, have just been communicated by the ministry of the interior to the provincial authorities—the ministry of public instruction brought them to the knowledge of the directors of public instruction.

"It is therefore evident that the foundation, the opening of the schools, and the transformation of a dwelling into a school, shall not be made except with an official authorization, as it is above stated.

"The directors, founders, and competent authorities of all the schools, without exception, previously opened at Constantinople and its suburbs, which have not yet obtained the official authorization of the ministry of public instruction must, in a period of a month and a half from the date of the present notice, address to the said ministry and request the necessary authorization.

"In default, at the expiration of this period, those schools shall be closed in conformity with the imperial iradé which sanctions these measures, and article 129 of the regulation on public instruction."

Mr. Hirsch, min. to Turkey, to Mr. Foster, Sec. of State, Jan. 29, 1892. For. Rel. 1892, 535.

The Turkish date of the order is Dec. 16, 1302.

May 15, 1892, the Porte issued to the provincial authorities the following circular:

"*To all the vilayets and independent sanjaks:*

"The decision of the council of ministers, concerning the extension of three months of the term of one month and a half set for schools and places of worship opened without official permission by foreigners in the Ottoman Empire, has been communicated to every point in general orders identical in form; but it is reported that the times fixed have been different, some long and some short in proportion to others, and that in some places useless difficulties have been created by refusing permission for small and needful repairs, like those of roofs

and walls of schools opened in this way, or that the owners are being threatened by declarations that the schools are to be closed. Certain embassies, also, are making continuous complaints to this effect. Hence vizierial orders have been issued directing that it be made known to the vilayets and independent sanjaks that, until the framing of a decision by the government in explanation of the former instructions, the present condition of schools and places of worship is not to be interfered with. General orders have been promulgated to those provinces. You will do what is required."

Mr. Hirsch, min. to Turkey, to Mr. Blaine, Sec. of State, May 28, 1892, For. Rel. 1892, 577. The Turkish date of the circular is May 3, 1308. Mr. Hirsch, in his despatch, said: "While it [the circular] does not in terms withdraw the 'school order' of January, yet it does so virtually. While the question is not closed (and none are ever closed here), the incident may be considered as closed." In a circular to American missionaries throughout the Ottoman Empire, June 1, 1892, Mr. Henry O. Dwight said:

"The American schools in various parts of the country, although they have generally been conducted for several years in conformity to the requirements of article 129 of the school law, have been notified that they must obtain official permits within three months or close their doors.

"These schools already possess what is equivalent to an official permit under the arrangement concluded between the United States legation and the Sublime Porte, and set forth in the dispatches of the United States legation Nos. 137 and 144 of December 1886, and in the order issued by the ministry of public instruction December 16, 1302. This arrangement and its official recognition of the schools was confirmed by the vizierial order of 16 Ramazan, 1306 (May 16, 1889). These documents, which were printed and sent out at the time, constitute a sufficient official authorization for all American schools which have submitted their books, course of study, and the diplomas of their teachers to the approval of the local authorities, as provided for in article 129 of the school law. . . .

"The expectation of the United States legation is that all managers of existing American schools will see that the course of study and the books used in the classes are approved by the officials of the department of public instruction, and that no teacher is employed whose diploma lacks the certificate of approval of that department. In whatever American schools these requirements of the law are carefully observed there will be no ground for complaint, and no new requirements will be enforced upon the schools except by the intermediation and assent of the legation.

"In case it is desired to erect new buildings or to open new schools, application should be made to the local authorities with a declaration that this is in conformity with article 129 of the school law, and with offer of facilities for inspection of the school by the proper authorities. The legation considers that conformity to article 129 of the school law should remove all difficulty in the way of granting authorizations which are requested." (For. Rel. 1892, 578.)

In certain cases in 1891 and 1892, the Turkish authorities refused to permit American missionaries to purchase lands and buildings, or to erect houses on land which they had purchased, unless they would give bond neither to hold religious worship nor to instruct children on the premises. Against this measure the United States protested, as a violation of treaty rights.

In one case a house in course of erection was burned down. The United States demanded (1) effective protection of the owner, (2) sufficient pecuniary indemnity, (3) punishment of the guilty, and (4) the reprimand of officials if proved remiss. The Turkish government complied with the demands, and paid £350 for the house and £250 indemnity. Attacks of a similar nature, however, continued to be made.

For the protest of the United States against the refusal of the Ottoman authorities to permit the erection of buildings, see For. Rel. 1892, 527, 530, 535, 547, 550, 553, 558, 561; For. Rel. 1893, 702.

As to the burning of the house in course of erection, and the indemnity, see For. Rel. 1892, 582, 583, 584, 587, 588, 591, 593, 594, 596, 600, 606, 608, 612–613.

As to the further attacks, see For. Rel. 1892, 603, 607.

"Perhaps the most important [pending question] is the alleged conversion of private dwellings into churches or schools. This has not only been the subject of complaint by the Turkish government, but in the remoter parts of the Empire has led to violations of domicile and personal aggressions against missionaries, teachers, and pupils. Freedom of worship for Americans in Turkey is one of the most definitely established rights, not only under the capitulations and treaties—the provisions of which extend to Americans by virtue of the most-favored-nation treatment—but by constant usage and the continued protection of American missions in Turkey, with their hospitals and schools, in which Turkish patients are received and Turkish children instructed.

"The only difficulty which can possibly arise, therefore, is the alleged conversion of private dwellings into churches and schools, and this scarcely seems a tangible one. The right of Americans in Turkey to hold religious services or classes of instruction in their private dwellings, to which their family and friends may be invited and to which such subjects of Turkey as desire may come, is undeniable; and the right of public worship, or teaching, in churches or schoolhouses, for which licenses or permits have been obtained from the Turkish authorities, is equally so. These rights are so distinct, that in the exercise of them the line of demarcation ought readily to be drawn. Any attempt on the part of the Porte to establish an arbitrary criterion, such as that the exercise of the indefeasible right of worship in a private dwelling converts it into a church or temple, can not be

admitted by this Government. Nor can the prohibition to use property, legitimately purchased by an American, for school purposes be acquiesced in. . . . In a recent instance, the local authorities at Alexandretta stopped for a time the building of storage sheds for exported product, demanding a bond with Turkish sureties that the premises should never be used for a church or school—a demand which was promptly contested and did not prevail. To yield the point of right, even in so extreme a case as this where the nature and use of the proposed structure afforded a self-evident assurance which could hardly have been fortified by any contractual pledge, would have established a precedent to be widened in its application as the disposition of the authorities might prompt fresh encroachments."

Mr. Foster, Sec. of State, to Mr. Thompson, min. to Turkey, Nov. 29, 1892, For. Rel. 1892, 609, 611–612. The correspondence in the case of the Stamford Manfacturing Company, at Alexandretta, may be found in the same volume, pp. 565, 570, 571, 574, 575, 578, 579.

"The treatment of the religious and educational establishments of American citizens in Turkey has of late called for a more than usual share of attention. A tendency to curtail the toleration which has so beneficially prevailed is discernible and has called forth the earnest remonstrances of this government. Harassing regulations in regard to schools and churches have been attempted in certain localities, but not without due protest and the assertion of the inherent and conventional rights of our countrymen. Violations of domicile and search of the persons and effects of citizens of the United States by apparently irresponsible officials in the Asiatic *vilayets* have from time to time been reported. An aggravated instance of injury to the property of an American missionary at Bourdour, in the province of Konia, called forth an urgent claim for reparation, which I am pleased to say was promptly heeded by the government of the Porte. Interference with the trading ventures of our citizens in Asia Minor is also reported, and the lack of consular representation in that region is a serious drawback to instant and effective protection. I can not believe that these incidents represent a settled policy, and shall not cease to urge the adoption of proper remedies."

President Harrison, annual message, Dec. 6, 1892, For. Rel. 1892, xv.

As to the seizure of mission property and the closing of schools, see Mr. Foster, Sec. of State, to Mr. Thompson, min. to Turkey, No. 11, Dec. 9, 1892, For. Rel. 1893, 589. See, also, same to same, No. 30, Feb. 6, 1893, id. 594.

As to indignities offered to the Rev. Mr. Richardson at Erzeram, see For. Rel. 1891, 753, 756, 760, 762, 764. Concerning the arrest of Mr. Crawford at Erdek, see For. Rel. 1892, 548.

With reference to complaints that letters addressed to American missionaries were opened, the Grand Vizier disclaimed any censorship over private correspondence, though one was maintained over printed

matter; and orders were issued by the Porte to postal officials not to permit the detention of letters addressed to Americans. (For. Rel. 1892, 537, 556, 590.)

As to interference with American missionaries in Syrla, see For. Rel. 1893, 635.

Early in February, 1893, two native teachers in the Anatolian College, an American institution, at Marsovan, were arrested, and a new building which was in course of erection was destroyed by fire. The Turkish minister of foreign affairs immediately promised that steps would be taken at once to bring the guilty parties to justice and that protection would be given to the college against any outbreak.[a] The incident was regarded by the United States as so grave as to warrant earnest representations to the Turkish government, and cooperative action with the representatives of Germany and Great Britain at Constantinople in order to secure the repression of disorders, the punishment of offenders, and the protection of life and property.[b] The United States consul at Sivas, who was sent to investigate the case, reported that there existed at Marsovan "a state closely resembling that of siege;" that hundreds of Armenians had been arrested; that the streets were patrolled, the shops closed, and houses searched; that communication by letter and telegraph was largely prohibited; and that Hosref Pasha, chief of the gendarmerie of the province of Sivas, who was charged by the vali to investigate affairs and protect American interests, seemed to be acting in a contrary sense, there being plenty "of testimony reported that he has expressed great animosity toward the college and has expressed also his determination to destroy it." The building that was burned was, as it appeared, "owned for the college in the name of Dr. Melcom (the college physician, or member of the faculty, and one of the local board of directors) because he could get the land at a more reasonable price than the Americans could and because he could obtain a building permit more readily," although there was "reason to believe that the purposes and real ownership of the building were well known to the authorities."[c] The United States insisted upon prompt reparation "for the burning of the American buildings," and the punishment of the offenders,[d] as well as upon a license and full protection

[a] For. Rel. 1893, 593, 596, 597, 598.

[b] For. Rel. 1893, 331, 603, 604.

[c] Mr. Jewett, consul at Sivas, to Mr. Hess, U. S. consul-general, Feb. 1893, For. Rel. 1893, 605. See, also, the full report of Mr. Jewett to Mr. Thompson, min. to Turkey, Feb. 21, 1893, id. 609, and the report of Mr. Newberry, April 12, 1893, id. 628. See, also, p. 633, where it appears that all the real estate connected with the college, except the lot on which the burned building stood, was recorded in the name of American citizens.

[d] Mr. Gresham, Sec. of State, to Mr. Thompson, min. to Turkey, tel., April 1, 1893, For. Rel. 1893, 624.

for the school and a permit immediately to rebuild.[a] Full satisfaction was promised by the minister of foreign affairs without formal demand;[b] and it was made by the payment of 500 Turkish pounds for the destruction of the unfinished building, the issuance of an iradé granting full permission to rebuild, the removal of Hosref Pasha, and the imprisonment of the chief of police of Marsovan, and the promise of a further iradé guaranteeing protection to the college and exemption from taxation.[c] As to the two native teachers who were imprisoned, the minister of the United States was instructed that it would be proper for him "to endeavor by all suitable means to secure for them a fair trial, with every possible recourse for their defense, and to enlist, through the British ambassador, the kindly offices of Mr. Newton, the British vice-consul at Angora, to this end."[d]

When the missionaries prepared to rebuild, they were advised by the local governor, as well as from Constantinople, to have the land transferred to one of themselves; but, when the papers were made out, they were asked to give a written promise that they would not set up a church, a school, or a hospital on it; and the Turkish government asked for a delay in issuing the firman for the college on account of the unsettled condition of affairs among the Armenians.[e] Orders were issued from Constantinople, however, to have the land transferred and a permit for the building given.[f]

A notice having been published that the Porte intended to require all conveyances of land to foreigners to contain a clause prohibiting the use of the property for schools or religious worship, and the minister of foreign affairs having stated that such an order had been under consideration, the American minister sent a written notice to the Porte, reserving the right to protest against the order. The missionaries felt apprehensive as to measures against Euphrates College, which had about 550 students, equally divided between the two sexes. They also stated (December 26, 1893) that they awaited tidings of the granting of a firman for Anatolia College, which the Turkish government had promised during the spring. The government exhibited a disposition to repress places of worship which had no

[a] For. Rel. 1893, 625.

[b] Id. 1893, 626, 627.

[c] Mr. Thompson, min. to Turkey, to Mr. Gresham, Sec. of State, April 27, 1893, For. Rel. 1893, 631, 632, 635.

[d] Mr. Gresham, Sec. of State, to Mr. Newberry, chargé d'affaires ad int., May 15, 1893, 632.

[e] For. Rel. 1893, 669, 672, 677, 679, 694.

[f] For. Rel. 1893, 678–679, 700. "This Government thinks it has a right to expect full compliance with promise to issue iradé to Marsovan College. Delay incomprehensible." (Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, tel., Aug. 31, 1894, For. Rel. 1894, 740.) In April, 1895, a demand was made for the iradé, and it was issued. (For. Rel. 1895, II. 1236.)

firman, and the missionaries complained that restrictions upon printed matter became more and more severe.

For. Rel. 1894, 702, 706, 707.

For an acknowledgment by Turkey that the rights acquired by foreigners under the protocol of 1874, in the acquisition of real estate in the empire, extended not only to the purchase of land, but also to its use and enjoyment by the owner, see For. Rel. 1891, 750–751.

The imperial law of 7 Sepher, 1284 (Jan. 18, 1867), granted to foreigners equal rights with Turkish subjects as regards the holding of real estate. The protocol of August 11, 1874, which was proclaimed by the President of the United States on the 29th of the following October, recognized those rights and gave to them a conventional sanction. The practice of American missionaries in holding the grounds and buildings of their educational establishments in the name of Ottoman subjects, under some form of indirect and unrecorded interest, has on several occasions hampered the action of the United States for their protection. This question is discussed in instructions of the Department of State to the American legation at Constantinople, No. 77, April 29, 1893, and No. 1175, March 5, 1897. (Mr. Sherman, Sec. of State, to Mr. Terrell, min. to Turkey, March 27, 1897, MS. Inst. Turkey, VII. 58.)

January 16, 1895, the American legation at Constantinople reported that an iradé, forever exempting the American college for girls at Scutari from payment of taxes, had been issued in recognition of "good work done in educating His Majesty's Christian subjects."

For. Rel. 1895, II. 1232. This incident is mentioned in President Cleveland's annual message of Dec. 2, 1895, For. Rel. 1895, I. xxxv.

It seems that the delivery of the iradé in this case, there being no new buildings to be constructed, was equivalent to a firman. (For. Rel. 1895, II. 1235.)

In 1896, Mr. Terrell, American minister at Constantinople, sent out a circular to persons in charge of American schools in Turkey, in which he made certain inquiries concerning such schools and their treatment during the Armenian troubles. The general substance of the responses, as stated by Mr. Terrell, was that no schools taught by American citizens had for several years been closed, and that Mohammedans were rarely if ever found in such schools. The difficulty had, he said, arisen with regard to the establishment of schools with native Armenians as teachers, and such schools had very generally been closed before 1893.

For. Rel. 1897, 570–582.

In one of his dispatches Mr. Terrell, referring to a letter which he had received from the Rev. L. O. Lee, of Marash, said: "If the continuance of American missionaries in Turkey depends upon their being protected in the right to establish and control schools when and where they please, which are not to be taught by American citizens, and which yet shall be free from the authority of the Turkish gov-

ernment to permit or close them at will, then the stay of missionaries here will not be long. Mr. Lee's letter makes a plain statement of the missionary claim. It ignores the sovereign right of the government to control at will the education of its own children by its own subjects. The American missionary alone among foreigners asserts this claim of right. It is one for which I have never contended. My failure in this respect has provoked resentment." (Mr. Terrell, min. to Turkey, to Mr. Olney, Sec. of State, No. 1193, March 1, 1897, For. Rel. 1897, 578, 579.)

See Mr. Gresham, Sec. of State, to Mr. Dodds, Jan. 30, 1895, 200 MS. Dom. Let. 419; Mr. Sherman, Sec. of State, to Mr. Terrell, min. to Turkey, March 27, 1897, MS. Inst. Turkey, VII. 58.

In 1896, special telegraphic orders were repeated by the Porte to the governors-general in Asia Minor to use the greatest vigilance in protecting the lives and property of American missionaries and other foreigners. Special guards were provided for the residences and property of American missionaries in Asia Minor. (For. Rel. 1896, 851, 852.)

For a protest against the efforts of local officials to destroy the patronage of American schools, and an intimation that, whether such schools were broken up by destroying their building or by intimidating their patrons, in either case values were destroyed where investments had been made under the protection of treaties, see Mr. Terrell, min. to Turkey, to Mr. Gresham, Sec. of State, No. 52, Sept. 4, 1893, For. Rel. 1893, 678.

The conviction of a native teacher in an American school in Turkey on the charge of having in his possession a copy of Shelley's poems containing the "Revolt of Islam" was considered a "frivolous and vexatious interference," justifying an appeal for justice for the teacher and for his release from the penalty imposed upon him. It seemed that the teacher's father had suffered a year's imprisonment for possessing a hymn book containing the Sunday-school hymn "Onward Christian Soldiers." It was thought that this might be used in supporting an appeal for justice toward the son, but that no direct intervention in behalf of the father was practicable, since he was neither an American citizen nor apparently employed in an American school.

Mr. Adee, Act. Sec. of State, to Mr. Terrell, min. to Turkey, Sept. 6, 1895, For. Rel. 1895, II. 1281–1282.

February 2, 1903, Mr. Hay, as Secretary of State, in a telegram to Mr. Leishman, American minister at Constantinople, stated that the attention of the President had lately been called by a numerous delegation of prominent citizens to the embarrassments of American educational and religious institutions in the Turkish Empire. Mr. Leishman was instructed to ask an audience of the Sultan, and in the President's name to bring these embarrassments to his Majesty's attention. What the President desired and expected, said Mr. Hay,

was, first, that the Sultan would grant to American citizens and institutions the same guarantees and privileges given to France in November, 1901, which had since been conceded to Russia, Germany, and Italy; and, secondly, that the same treatment would be extended to the Protestant Medical College at Beirut, respecting examinations and the right of graduates to exercise their profession, as was extended to the French Medical School at Beirut. The President, said Mr. Hay, was deeply in earnest in the matter, and, while Mr. Leishman was to approach the Sultan in the utmost spirit of friendship and good will, he was to impress upon him the fixed desire and expectation of the President that the United States and its citizens would be treated on the same terms as the most-favored nation, and especially that the two objects noted would be promptly secured. After a long negotiation, characterized by many and varied incidents, the Turkish minister of foreign affairs, in a note to Mr. Leishman, of August 12, 1904, declared that it had never been the intention of the imperial government "to treat on a different basis the schools, the institutions, and the citizens of the United States in the empire;" and that, with regard to establishments whose legal existence was not recognized, the competent department would, as soon as it was asked to do so, accomplish the necessary formalities in conformity with the conditions and provisions of the regulations in force. Mr. Leishman, on the same day, inquired whether this declaration was to be understood as meaning that the terms and conditions granted to France in November, 1901, applied in their entirety to American institutions. If so, said Mr. Leishman, all the American institutions mentioned in a list which he had transmitted to the Ottoman government in February, 1903, would come in the category of institutions of which the legal existence was recognized and would enjoy the same rights, privileges, and immunities as those embraced in the French settlement. On the 15th of August the minister of foreign affairs repeated to Mr. Leishman the contents of the note of the 12th of the same month, and stated that the imperial government had no intention of deviating from the decision therein embraced. A direct answer to Mr. Leishman's inquiry with regard to the institutions embraced in his list of February, 1903, was thus withheld; but, in view of the fact that no exception had been taken to any of the institutions therein mentioned, he decided to assume the position that all those institutions must be considered as having been officially recognized; and this decision was approved by the Department of State.

For. Rel. 1903, 735–761; For. Rel. 1904, 818–833.

As to disorders at Beirut and the reported attempt to assassinate the American vice-consul, which the Turkish authorities denied, see For. Rel. 1903, 769, 787.

7. Sale of Books.

§ 872.

In March, 1884, a joint commission in Turkey prepared regulations with regard to the sale of books printed in the American Bible House, and the United States assented to them. "This, then, constitutes an international understanding and one not to be set aside by either party unless for good and sufficient reasons."

Mr. Frelinghuysen, Sec. of State, to Mr. Heap, chargé at Constantinople, No. 251, Jan. 10, 1885, For. Rel. 1885, 826.

As to the work of the American Bible Society in Turkey, and its investments at Constantinople and Beirut, see For. Rel. 1885, 856–857, 880–881, 884–885.

It seems that the understanding relative to regulations for colporteurs engaged in selling the publications of the American Bible Society, which was arrived at in March, 1884, was ignored by the local authorities. Subsequently, at the instance of the American legation and British embassy, another commission was established by the Porte for the purpose of formulating regulations to govern the sale of books in general, and of thus putting an end to particular grievances. This commission made a draft of regulations, but amendments were submitted by the representatives of the American Bible Society, and it was understood that meanwhile the authorities would cease to interfere with colporteurs who were peaceably and quietly pursuing their vocation. A practical difficulty in dealing with the matter grew out of the fact that the colporteurs were all Turkish subjects over whom the Ottoman authorities claimed exclusive jurisdiction. This being an internal matter, the American legation had made suggestions as to the form of the regulations only unofficially, reserving to itself, however, the right to object to them in case they should, when promulgated, interfere with any rights claimed for citizens of the United States by usage, capitulation, or duty.

Mr. Straus, min. to Turkey, to Mr. Bayard, Sec. of State, No. 14, July 18, 1887, For. Rel. 1887, 1118.

See, also, Mr. King, chargé, to Mr. Bayard, No. 277, Jan. 15, 1887, For. Rel. 1887, 1089; Mr. Bayard to Mr. Straus, No. 25, June 18, 1887, id. 1115.

The officials of the American Bible Society at New York, in a letter to the President of the United States, April 7, 1887, complained that its agents in Turkey, while engaged in the sale of Bibles and Testaments whose publication had been approved by the ministry of public instruction, and of copies of the Holy Scriptures which had passed through the custom-house after examination and payment of duties, were constantly interrupted in their work and "subjected to imprisonment and other indignities." (For. Rel. 1887, 1116.)

For the Porte's "project of the law of colporteurs" and amendments suggested by the American legation on consultation with the agents

of the American Bible Society, see Mr. Straus to Mr. Bayard, No. 24, Sept. 6, 1887, For. Rel. 1887, 1126–1131.

"You appear to have acted in this matter very discreetly. There is no objection to your associating the British ambassador with you in your efforts to secure satisfactory amendments to a law which in its operations affects the interests of British societies as much as our own." (Mr. Bayard to Mr. Straus, No. 46, Sept. 22, 1887, For. Rel. 1887, 1131.)

Early in 1887 the minister of police at Constantinople expressed a desire to send an official from the board of public instruction, accompanied by a police agent, to search the *bookstore* opening on the street and forming a part of the American Bible House. The legation sent its dragoman to be present at the search, with instructions not to allow the official of the board of public instruction to search the whole Bible House accompanied by a policeman. The official declined to make the search on these terms, though he expressed a desire to go through the entire building. The Porte subsequently alleged that the agents of the Society had begun to spread tracts which were "injurious and calumnious to the Musselman religion," and that, as to the colporteurs themselves who were Ottoman subjects, the imperial authorities would take such measures as should be considered "useful and necessary." The Porte also maintained that the Bible House was to be treated not as a private abode, but as a public place, where the imperial authorities might have free access, and assert, if need be, a direct supervision. The legation replied that the missionaries offered for sale no book or pamphlet which had not been sanctioned by the ministry of public instructions or been censored at the custom-house, nor anything against the Mussulman religion or public order. The legation suggested that the impression of the Porte in that regard might have been derived from the fact that some years previously there had been offered for sale some copies of a Greek book which, although it passed the censorship and paid duties, later proved to be objectionable. This book, when found to be objectionable, was immediately withdrawn. The legation added that the Bible House was free to be visited at any time by officials in an unofficial manner and without police, but that the claim to search it officially without the assistance of the legation could not be granted. (Mr. King, chargé, to Mr. Bayard, Sec. of State, No. 307, April 12, 1887, enclosing correspondence with the Porte, For. Rel. 1887, 1091.)

In his No. 151 of December 22, 1888, Mr. Straus reported that he had obtained permission from the grand vizier for the American Bible House to print in Turkish 35,000 Bible tracts, consisting of the Psalms, Proverbs, the four Gospels, and the Acts. (For. Rel. 1889, 706, 709.)

See, further, as to the regulation and sale of books, the exercise of censorship, and interference with colporteurs, For. Rel. 1890, 722, 739, 752, 760, 763, 765, 770; For. Rel. 1891, 758; For. Rel. 1892, 564, 581, 590, 592, 594, 595, 599, 600; For. Rel. 1893, 599, 601, 627, 632.

8. Freedom of Worship.

§ 873.

In 1886 the American legation at Constantinople complained that the Rev. Dr. Herrick, an American missionary, who had gone to Kastamouni to administer sacrament to Protestants residing there, has been prevented from holding services in a house rented by the American mission. The legation represented this as "a serious violation of the privileges enjoyed by Americans for the last sixty years of holding religious service in their own houses and in having the freedom to receive visitors." The house in question was, it appears, in charge of a Rev. Mr. Filian, who, though partly supported by the mission, was an Ottoman subject. The Turkish government declared that the prevention of Mr. Herrick from holding service merely resulted from the circumstance that Filian had, because of proselyting, been ordered to close his establishment, which had originally been opened without permission, and that the "sojourn of foreigners and the religious services of the various creeds" had "never been hindered in the empire." There appeared to be no dispute as to this general rule, but only a difference of opinion as to whether it had been infringed in the particular case.

Mr. King, chargé ad int., to Mr. Bayard, Sec. of State, No. 257, Oct. 19, 1886, For. Rel. 1887, 1079; Mr. King to Sublime Porte, Oct. 18, 1886, id. 1082; Mr. Bayard to Mr. King, No. 171, Nov. 11, 1886, id. 1082; Said Pasha to Mr. King, Jan. 26, 1887, id. 1091. See, also, id. 1091, 1114, 1115.

"In the latter part of 1886 and the early part of 1887, . . . the subject of the rights of foreigners to teach and worship in the dominions of Turkey without interference or molestation was distinctly asserted and as distinctly recognized. Mr. Bayard's instruction, No. 7, to Mr. Straus, under date of April 20, 1887, ably presents the unimpeachable grounds upon which this government successfully rested its claim that the right of American citizens to receive into their hospitals and schools persons of Turkish nationality rests not alone on the specific stipulations of treaty and the capitulations, but on long usage, amounting, from duration and from the incidents assigned to it by law, to a charter. That correspondence further shows the arrangement affected by Mr. King with the Turkish authorities, by which the natives of the empire were to benefit by the beneficent and educational opportunities afforded by the missionaries of the United States in Turkey. The rights of foreigners in the matter of worship rest on even more unassailable grounds; so much so that, in the course of centuries of constant exercise, they had never been seriously questioned. It is not to be supposed that they can now be called in question; they certainly can not be impaired by introducing a distinction

between public and private worship, or by raising question whether the place of worship is to be regarded as a dwelling or a temple. Its only relation to the subject now under consideration is as regards the circumstances under which those rights may be exercised.

"Any conditions affecting such exercise must necessarily be legitimate, usual, precise, and readily fulfilled. It would be impossible to admit any arbitrary criterion by which the rights and teaching and worship of and by foreigners in Turkey may be circumscribed and rendered null at the whim of the authorities by the imposition of unusual or difficult conditions.

" Neither should the merits of the question be clouded by such hair-splitting issues as that now raised by the contention that the exercise of an assured right in the dwelling house of a foreigner 'converts' the dwelling to some different but equally legitimate use."

Mr. Blaine, Sec. of State, to Mr. Hirsch, min. to Turkey, Dec. 14, 1891, For. Rel. 1892, 527.

For the instruction of Mr. Bayard to Mr. Straus, No. 7, April 20, 1887, above cited, see supra, § 870.

A private dwelling is no more to be regarded as "converted" into a church or school merely by worship or teaching therein than into a public ball-room or hotel by a private entertainment given to friends and acquaintances. On the other hand, a meeting gathered together in a private residence by a general though oral invitation to the neighborhood might under certain circumstances be considered as a public meeting, and the continued repetition of such meetings might justify the description of the house as a place of public worship. (Mr. Wharton, Act. Sec. of State, to Mr. MacNutt, No. 249, Oct. 1, 1891, For. Rel. 1891, 757.)

For the complaint of the Porte, August 17, 1891, that missionaries converted their dwellings into churches and schools without proper authorization, see For. Rel. 1891, 755.

See, further, as to this question, For. Rel. 1892, 527, 530, 534.

For an extended and interesting report upon American schools in Turkey and the difficulties that had arisen concerning them, see Mr. King, chargé, to Mr. Bayard, Sec. of State, No. 276, Jan. 11, 1887, For. Rel. 1887, 1083–1089.

While Great Britain, under the treaty of Berlin, has a conventional right to intercede in behalf of larger religious toleration as regards non-Mohammedan sects in the Ottoman dominions, the treaty rights of the United States are limited to the interests and immunities of American citizens. The right of the United States to press its views in regard to civil and religious liberty upon other governments is necessarily limited not only by treaties but also by its established rule of noninterference in the internal affairs of other nations. The interests of native Christians in Turkey are, however, in one sense associated with the legitimate enterprises of American citizens in the direction of education and worship, and the United States expects

for American teachers and pastors no less latitude in their intercourse with native Christians than is enjoyed by like teachers and pastors of the most-favored nation.

Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, No. 254, Oct. 26, 1894, For. Rel. 1894, 781.

This instruction related to a request of the British ambassador at Constantinople for the cooperation of the American minister to secure greater freedom of worship for native Protestants in Turkey. It was observed in the instruction that the claim of most-favored-nation treatment in all things might indirectly advance the purposes of the British ambassador, but the extent to which this could be "hopefully" done was left to the "wise discretion" of the American minister. (Ibid.)

9. Armenian Difficulties.

§ 874.

"I have received a copy of the following resolution of the Senate, passed on the 3d instant:

"'*Resolved*, That the President be requested, if in his judgment it be not incompatible with the public interest, to communicate to the Senate any information he may have received in regard to alleged cruelties committed upon Armenians in Turkey, and especially whether any such cruelties have been committed upon citizens who have declared their intention to become naturalized in this country, or upon persons because of being Christians.

"'And, further, to inform the Senate whether any expostulations have been addressed by this government to the government of Turkey in regard to such matters, or any proposals made by or to this government to act in concert with other Christian powers regarding the same.'

"In response to said resolution, I beg leave to inform the Senate that I have no information concerning cruelties committed upon Armenians in Turkey or upon persons because of their being Christians, except such information as has been derived from newspaper reports and statements emanating from the Turkish government denying such cruelties and two telegraphic reports from our minister at Constantinople.

"One of these reports, dated November 28, 1894, is in answer to an inquiry by the State Department touching reports in the press alleging the killing of Armenians, and is as follows:

"'Reports in American papers of Turkish atrocities at Sassoun are sensational and exaggerated. The killing was in a conflict between armed Armenians and Turkish soldiers. The grand vizier says it was necessary to suppress insurrection and that about fifty

Turks were killed. Between three and four hundred Armenian guns were picked up after the fight, and reports that about that number of Armenians were killed. I give credit to his statement.'

"The other dispatch referred to is dated December 2, 1894, and is as follows:

"'Information from British ambassador indicates far more loss of lives in Armenia, attended with atrocities, than stated in my telegram of 28th.'

"I have received absolutely no information concerning any cruelties committed 'upon citizens who have declared their intention to become naturalized in this country' or upon any persons who had a right to claim or have claimed for any reason the protection of the United States government.

"In the absence of such authentic detailed knowledge on the subject as would justify our interference, no 'expostulations have been addressed by this government to the government of Turkey in regard to such matters.'

"The last inquiry contained in the resolution of the Senate touching these alleged cruelties seeks information concerning 'any proposals made by or to this Government to act in concert with other Christian powers regarding the same.'

"The first proposal of the kind referred to was made by the Turkish government, through our minister, on the 30th day of November, when the Sultan expressed a desire that a consul of the United States be sent with a Turkish commission to investigate these alleged atrocities on Armenians. This was construed as an invitation on the part of the Turkish government to actually take part with a Turkish commission in an investigation of these affairs and any report to be made thereon, and the proposition came before our minister's second dispatch was received, and at a time when the best information in the possession of our government was derived from its first report, indicating that the statements made in the press were sensational and exaggerated, and that the atrocities alleged really did not exist. This condition very much weakened any motive for an interference based on considerations of humanity, and permitted us, without embarrassment, to pursue a course plainly marked out by other controlling incidents.

"By a treaty entered into at Berlin in the year 1878, between Turkey and various other governments, Turkey undertook to guarantee protection to the Armenians, and agreed that it would 'periodically make known the steps taken to this effect to the powers, who will superintend their application.'

"Our government was not a party to this treaty, and it is entirely obvious that, in the face of the provisions of such treaty above recited, our interference in the proposed investigation, especially without the

invitation of any of the powers which had assumed by treaty obligations to secure the protection of these Armenians, might have been exceedingly embarrassing, if not entirely beyond the limits of justification or propriety.

"The Turkish invitation to join the investigation set on foot by that government was, therefore, on the 2d day of December, declined. On the same day, and after this declination had been sent, our minister at Constantinople forwarded his second dispatch, tending to modify his former report as to the extent and character of Armenian slaughter. At the same time the request of the Sultan for our participation in the investigation was repeated, and Great Britain, one of the powers which joined in the treaty of Berlin, made a like request.

"In view of changed conditions, and upon reconsideration of the subject, it was determined to send Mr. Jewett, our consul at Sivas, to the scene of the alleged outrages, not for the purpose of joining with any other government in an investigation and report, but to the end that he might be able to inform this government as to the exact truth.

"Instructions to this effect were sent to Mr. Jewett, and it is supposed he has already entered upon the duty assigned him."

President Cleveland, message to the Senate, Dec. 11, 1894, S. Ex. Doc. 11, 53 Cong. 3 sess.; For. Rel. 1894, 714.

Art. LXI. of the Treaty of Berlin, referred to in the message, provides:

"The Sublime Porte undertakes to carry out, without further delay, the improvements and reforms demanded by local requirements in the provinces inhabited by the Armenians, and to guarantee their security against the Circassians and Kurds. It will periodically make known the steps taken to this effect to the powers, who will superintend their application." (Hertslet's Map of Europe by Treaty, IV. 2796.)

The Turkish government, when advised of the intention of the United States to send Mr. Jewett as an independent investigator, and not as a member of the Turkish commission, objected on the ground that if this privilege should be granted to the United States it would be claimed by the parties to the treaty of Berlin, and the investigation would thus assume a European character. Permission to Mr. Jewett to go in an independent capacity having been refused, it was decided not to press the matter further.

For. Rel. 1894, 723–725.

December 19, 1895, President Cleveland communicated to the Senate, with a special message, a report of Mr. Olney, Secretary of State, on the condition of affairs in Asiatic Turkey. He referred to the failure, mentioned in his annual message of December 3, 1895, of the proposal of the United States for an independent investigation on its part of the occurrences at Sassoun in August, 1894. The facts

in regard to the recent outbreaks at Constantinople, Sivas, and Trebizond had, he said, been communicated by official representatives of the United States, and the conditions at Harpoot and Marash were expected to be elicited in connection with the American claims for the destruction of property. As to the recent disturbances in other parts of Asia Minor, the Department of State was dependent on hearsay and the statements of individuals not officially dependent upon it. President Cleveland referred to the political aspirations of the Armenians and to the race hatred between them and the Koords.

President Cleveland, special message, Dec. 19, 1895, S. Doc. 33, 54 Cong. 1 sess.; For. Rel. 1895, II. 1255 et seq.

As to the Armenian riot at Constantinople on September 30, 1895, see For. Rel. 1895, II. 1318–1320.

As to the aims and methods of the Huntchaguists, see For. Rel. 1895, II. 1413–1416.

As to the treatment of naturalized citizens of the United States of Armenian origin by Turkish authorities, see special message to the Senate, Jan. 23, 1896, S. Doc. 83, 54 Cong. 1 sess.; supra, § 461–463, 558.

As to American missionary claims for destruction of property at Marash, see Mr. Adee, Second Assist. Sec. of State, to Mr. Barton, Nov. 24, 1897, 222 MS. Dom. Let. 626, enclosing copy of despatch No. 312, Sept. 20, 1897, from the American Legation at Teheran, Persia.

As to the settlement of American missionary claims, see infra, § 1030; Mr. Day, Sec. of State, to Mr. Straus, min. to Turkey, Sept. 13, 1898, MS. Inst. Turkey, VII. 274.

By the diplomatic and consular appropriation act of March 2, 1895, provision was made for new United States consulates at Erzerum and Harpoot. Vice-consular commissions were issued in June to two experienced employees of the Department of State. They reached Constantinople in July, and, after waiting more than two months for exequaturs, which were refused by the Porte on the ground that there was no commerce with either town, were directed Sept. 11, 1895, to proceed to their posts without them. They got as far as Trebizond, the nearest Black Sea port, where, owing to obstacles then existing to the journey to the mountainous interior, they remained from October 5 to November 10, 1895. After the riots at Trebizond, one of them was recalled for other employment, while the other, not having received his teskeré and military escort, returned to Constantinople.

It appears that at Harpoot no foreign consular representation then existed. At Erzerum, consulates were maintained by Great Britain, Persia, and Russia, and vice-consulates by France and Italy.

Reports of Mr. Olney, Sec. of State, to the President, Dec. 19, 1895, and Dec. 28, 1895, S. Doc. 33, 54 Cong. 1 sess., and S. Doc. 49, 54 Cong. 1 sess.; also, For. Rel. 1895, II. 1262–1263, 1470.

See Mr. Terrell, min. to Turkey, to Mr. Olney, Sec. of State, Jan. 20, 1896, For. Rel. 1895, II. 1465.

"Our recently appointed consul to Erzerum is at his post and discharging the duties of his office, though for some unaccountable reason his formal exequatur from the Sultan has not been issued." (President Cleveland, annual message, Dec. 7, 1896, For. Rel. 1896, xxix.)

As to refusal of exequaturs to consuls at Erzerum and Harpoot, see Mr. Day, Sec. of State, to Mr. Straus, min. to Turkey, Sept. 13, 1898, MS. Inst. Turkey, VII. 274.

"Obtained Sultan's iradé granting exequatur for consul at Erzerum." (Mr. Straus, min. to Turkey, to Mr. Hay, Sec. of State, tel., Nov. 7, 1898, For. Rel. 1898, 1113. The granting of this exequatur is mentioned in President McKinley's annual message of Dec. 5, 1898.)

Dec. 4, 1900, Mr. Norton, who had been appointed United States consul at Harpoot, left Constantinople for his post without an exequatur, but with a Turkish traveling permit that described him as "consul of the United States at Harpoot." (Mr. Hill, Act. Sec. of State, to Mr. Griscom, chargé, No. 333, Jan. 12, 1901, MS. Inst. Turkey, VII. 502.

10. Various Topics.

§ 875.

"It is not the desire or intention of this government to assail the sovereignty or seek to weaken the authority of the Porte in any of its recognized dependencies. On the contrary, we concede to that government, as we demand for ourselves, the right to manage its own affairs in its own way, assuming always that such control will conform to the spirit of the age, and shall not interfere with the rights of our own government or people, or conflict with obligations which may have been entered into between the United States and other countries and peoples."

Mr. Fish, Sec. of State, to Mr. Maynard, min. to Turkey, No. 23, Oct. 8, 1875, MS. Inst. Turkey, III. 140.

This instruction related to certain expostulatory statements by officers of the Turkish government to the effect that the United States treated "Tunis and Tripoli as independent states, and not as provinces of the Ottoman Empire." Mr. Fish went on to say that the relations of the United States with Tripoli and Tunis were regulated by treaties, in which the Porte had acquiesced without dissent; that the United States had never been at war with Turkey, but had had a severe war with Tripoli, which was ended by a treaty of peace that was still in force; that Tripoli had at one time even maintained an ambassador at London. In conclusion Mr. Fish expressed the desire of the United States to "recognize the authority of the Porte in the several dependencies of the Ottoman government where it shall not be in conflict with long established usage and solemn treaty obligations."

For Mr. Eugene Schuyler's report on the Bulgarian outrages, see special message of Jan. 23, 1877, S. Ex. Doc. 24, 44 Cong. 2 sess.

With reference to Turkish matters, see the following documents:

Protection of American citizens in the Ottoman dominions, message of May 31, 1876, H. Ex. Doc. 170, 44 Cong. 1 sess. The Ottoman Capitu-

lations, special message, April 6, 1881, S. Ex. Doc. 3, 47 Cong. special sess.; special message, Feb. 2, 1882, S. Ex. Doc. 87, 47 Cong. 1 sess.

The consular service, special message, March 20, 1884, H. Ex. Doc. 121, 48 Cong. 1 sess.

Certain proposals made by the Turkish government in 1888 for the erection and maintenance of lights in the Red Sea, on the south-eastern coast of Arabia, and in the Persian Gulf, the Secretary of the Treasury considered it inexpedient for the United States to accept. The Secretary of the Navy thought that the proposals in the form in which they were presented would be extremely burdensome to navigators, and should not be agreed to, but that the United States might assent to a properly guarded arrangement for the erection of certain specified lights and for the collection of reasonable tolls for their maintenance, with the understanding that the tolls should cease at an early date.

Mr. Bayard, Sec. of State, to Mr. Straus, min. to Turkey, No. 94, April 19, 1888, MS. Inst. Turkey, IV. 657, enclosing copy of a note from Sir L. West, British min., March 19, 1888 (with accompaniments), and a letter from Mr. Fairchild, Sec. of Treasury, April 7, 1888 (with enclosures); Mr. Bayard to Mr. Straus, No. 117, July 10, 1888, MS. Inst. Turkey, IV. 676, enclosing copy of a letter from Mr. Whitney, Sec. of Navy, June 16, 1888, of a note to Mr. Edwardes, British chargé, July 3, 1888, and of a note from Mr. Edwardes, July 6, 1888.

December 3, 1892, the American legation in London was instructed to convey to Her Britanic Majesty's government an offer on the part of the United States "to act concurrently and harmoniously" with Great Britain "in the protection and vindication of the rights of the citizens or subjects of either nation in Turkey," with a reservation of "complete liberty and independence of action when it might be found advisable." The legation reported December 30, 1892, that Lord Rosebery had stated that "it would be the earnest desire of Her Majesty's government to act in perfect cordiality with that of the United States in the matter in question." On January 17, 1893, the United States suggested that the British minister at Constantinople be instructed to cooperate with the American minister as occasion might require. The British government assented to this suggestion.

Mr. Foster, Sec. of State, to Mr. White, chargé, Dec. 3, 1892, For. Rel. 1893, 305; Mr. White to Mr. Foster, Dec. 30, 1892, id. 306, 307; Mr. Foster to Mr. Lincoln, min. to England, No. 1034, Jan. 17, 1893, For. Rel. 1893, 308; Mr. Lincoln to Mr. Foster, No. 935, March 3, 1893, id. 321.

As to the continuance of good offices by the British consul-general at Sofia in behalf of American citizens in Bulgaria, see For. Rel. 1893, 325, 326–327.

As to the status of American citizens in Turkey and the solidarity of the interests of the Franks, see Mr. Foster, Sec. of State, to Mr. Thompson, min. to Turkey, No. 3, Nov. 29, 1892, For. Rel. 1892, 609.

The presence of a United States dispatch boat at Constantinople, if it were welcomed by the Porte, would merely put the United States "on the footing of the other great powers to no possible prejudice of the power or prestige of the Turkish government."

Mr. Olney, Sec. of State, to Mr. Terrell, min. to Turkey, Oct. 15, 1896, For. Rel. 1896, 933, 936.

XXX. *PARAGUAY.*

§ 876.

As to the treaty relations between the United States and Paraguay, see Moore, International Arbitrations, II. 1485 et seq.

XXXI. *PERSIA.*

§ 877.

A treaty of amity and commerce between the United States and Persia was concluded December 13, 1856. It was many years, however, before diplomatic relations between the two countries were established. President Cleveland, in his annual message of December 6, 1886, said: "The establishment, less than four years ago, of a legation at Teheran is bearing fruit in the interest exhibited by the Shah's government in the industrial activity of the United States and the opportunities of beneficial interchanges." In 1888 Persia sent a diplomatic representative to Washington, but his stay was comparatively brief and a permanent legation was not established.

See Mr. Bayard, Sec. of State, to Hadji Hossein Ghooly Khan, Persian min., Dec. 13, 1888, MS. Notes to Persia, I. 4.

As to missionary troubles in Persia, see For. Rel. 1893, 487, 495, 502, 504, 505, 507; For. Rel. 1894, 486–492, 492–506, 507–508; For. Rel. 1896, 466, 467, 470, 475–480, 481.

Concerning the desire of Persia to be represented in the mixed tribunals of Egypt, see For. Rel. 1894, 508–512.

In 1896, on the assassination of the Shah by a revolutionary fanatic disguised as a woman, the following telegram was sent: "President directs appropriate expression of abhorrence and sincere condolence in name of American people." (Mr. Olney, Sec. of State, to Mr. McDonald, min. to Persia, May 1, 1896, For. Rel. 1896, 488.)

As to restrictions upon the importation of books into Persia, see For. Rel. 1897, 427–429.

In 1898 an indemnity of 200 tomans was paid on account of the arrest of the Rev. M. Bagdasarian, a naturalized citizen of the United States, who was charged with being an Armenian revolutionist, but who was released on the interposition of the American legation. (For. Rel. 1898, 518–530.)

XXXII. *PERU.*

§ 878.

As to the distribution of the indemnity paid by Peru, under the convention of March 17, 1841, see Moore, Int. Arbitrations, V. 4591 et seq.

Under the treaty of July 26, 1851, the government of the United States is bound to pay a consul of the Peruvian government the value of property belonging to a deceased Peruvian, on whose estate the consul was entitled to administer, which may have been unjustly detained and administered by a local public administrator.

Black, At. Gen., 9 Op. 383.

December 9, 1862, the Peruvian minister at Washington gave notice of the termination of the treaty of July 26, 1851, the notice to take effect, as provided in the treaty, at the end of a year.

The receipt of the notice was acknowledged Dec. 15, 1862.

Davis, Notes, Treaty Vol. (1776–1887), 1373.

By a convention between the United States and Peru, of December 20, 1862, it was agreed to refer the cases of the *Georgiana* and the *Lizzie Thompson*, American vessels, which had been seized by the Peruvian authorities, to the King of the Belgians, as arbitrator. By identic notes of August 27, 1863, the King was requested to accept the trust. In the following January, however, he declined it; but in a confidential conversation with Mr. Sanford, the American minister, His Majesty stated that he had looked into the case, and that if he had accepted the position of arbitrator he felt that he would have been constrained to decide it against the United States. In view of His Majesty's declination and of the reasons given for it, Mr. Seward wrote to the Peruvian minister that he was directed by the President to announce that there was no intention on the part of the United States to refer the matter to the arbitrament of any other power or to pursue the subject further. In a letter to Mr. H. E. Wilson, of September 18, 1875, Mr. Fish, as Secretary of State, expressed the opinion that the case of the *Lizzie Thompson*, which was on the same footing as that of the *Georgiana*, was barred by Article V. of the convention with Peru of December 4, 1868.

Mr. Hay, Sec. of State, to Mr. Fitzgerald, Jan. 29, 1901, 250 MS. Dom. Let. 440; 2 Moore, Int. Arbitrations, 1593–1614.

An award under the convention with Peru of 1863 "payable in current money of the United States," may legally be paid in Treasury notes or in specie.

Bates, At. Gen., 1864, 11 Op. 52.

For the proceedings under the convention of 1863, see Moore, Int. Arbitrations, II. 1615 et seq.

For the proceedings under the convention of 1868, see id. 1639 et seq.

The opinion of Attorney-General Bates was held to be unsound, and an award was made in favor of the claimant (Montano) for the gold value of the award. (Moore, Int. Arbitrations, II. 1638, 1649.)

By Article XV. of the treaty of August 31, 1887, the citizens of the contracting parties are "not liable to imprisonment without formal commitment under a warrant signed by a legal authority, except in cases flagrantis delicti," and they must in all cases be brought "before a magistrate or other legal authority" for examination within twenty-four hours after arrest. If not so examined they must be discharged from custody. The United States construed this clause as requiring an examination before some "judicial authority as distinguished from a mere police or other legal authority." In reply to a proposal that a protocol be signed, to the effect that the article would be satisfied where the "intendant, or chief of police, of the place" took the prisoner's statement within the twenty-four hours, and turned him over within the same space of time to the judicial authorities, when the case so required, the Department of State said: "If, as is not conceded by this Department, an intendant of police is a legal authority within the spirit and intent of the treaty, the proposed protocol would be unnecessary, while . . . if the effect of the protocol would be to alter the treaty, the Department of State is not competent to make such alteration."

Memorandum, Sept. 2, 1898, MS. Notes to Peruvian Leg. II. 184.

"The government of Peru has given the prescribed notification of its intention to abrogate the treaty of friendship, commerce, and navigation concluded with this country August 31, 1887. As that treaty contains many important provisions necessary to the maintenance of commerce and good relations, which could with difficulty be replaced by the negotiation of renewed provisions within the brief twelve months intervening before the treaty terminates, I have invited suggestions by Peru as to the particular provisions it is desired to annul, in the hope of reaching an arrangement whereby the remaining articles may be provisionally saved."

President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, lxxxi.

"Peru, I regret to say, shows symptoms of domestic disturbance, due probably to the slowness of her recuperation from the distresses of the war of 1881. Weakened in resources, her difficulties in facing international obligations invite our kindly sympathy and justify our forbearance in pressing long pending claims. I have felt constrained

to testify this sympathy in connection with certain demands urgently preferred by other powers."

President Cleveland, annual message, Dec. 2, 1894, For. Rel. 1894, xiii.

XXXIII. *PORTUGAL.*

§ 879.

The second article of the treaty with Portugal of August 26, 1840, did not restrict either party from laying discriminating duties on merchandise not the growth or production of the nation of the vessel carrying the same into the port of the other nation.

Oldfield *v.* Marriott, 10 How. 146.

As to the treaty of February 26, 1851, and the case of the brig *General Armstrong*, see Moore, Int. Arbitrations, II. 1071 et seq.

As to the sovereignty of Portugal over Macao, see Mr. J. Davis, Act. Sec. of State, to Viscount das Nogueiras, August 29, 1882, MS. Notes to Portugal, VII. 54.

XXXIV.—*RUSSIA.*

§ 880.

On the issuance by the Empress of Russia of the circular announcing the principles that formed the basis of the armed neutrality, the Congress of the United States on October 8, 1780, passed a resolution directing the board of admiralty to prepare and report instructions for the commanders of armed vessels of the United States conformably to those principles. In December, 1780, Francis Dana, of Massachusetts, was elected minister plenipotentiary to St. Petersburg, and was authorized to accede to the convention entered into by certain of the neutral powers for the maintenance of the same principles. He was also instructed to propose a treaty of amity and commerce. Mr. Dana passed nearly a year in Russia, but was not received at court, and in August, 1783, seeing no prospect of accomplishing any of the objects of his mission, he left St. Petersburg for the United States.

1 Lyman's Diplomacy of the United States, 424, 431.

The suggestion that the United States would become a party to the league composing the armed neutrality was in fact impracticable, since the league was in its nature as well as by its terms a combination of neutral powers for the enforcement of neutral rights; and the United States was a belligerent. A provisional peace with Great Britain was signed by the United States on November 30, 1782, and, on the 20th of the following January, Great Britain concluded preliminaries of peace with the other belligerent powers, except the Netherlands,

with which power negotiations still continued. In these circumstances it was suggested by the United Provinces that the United States should either accede to the convention of the armed neutrality or else enter into similar engagements with France, Spain, and the United Provinces, or with the United Provinces alone. Congress, holding that the "true interest" of the United States required that they should be "as little as possible entangled in the politics and controversies of European nations," deemed it inexpedient to give such powers to the representatives of the United States in Europe, and instructed the ministers engaged in negotiating a definitive peace with Great Britain, in case they should include in the treaty any stipulations for the recognition of belligerent rights, to avoid any engagements which should oblige the contracting parties to support those stipulations by arms. (See Wharton, Dip. Cor. Am. Rev. VI. 481–483.)

Prince Gortschakoff, in a communication addressed to the Russian envoy in the United States July 10, 1861, to be communicated to the Secretary of State, said: "In spite of the diversity of their Constitutions and of their interests, perhaps even because of their diversity, Providence seems to urge the United States to draw closer the traditional bond, as *the basis* and *very condition* of their political existence. In any event the sacrifices they might impose upon themselves to maintain it [the Union of the United States] are not to be compared with those which dissolution would bring after it. United, they perfect themselves; separated from each other, they are paralyzed."

Note of Prince Gortschakoff, quoted by Mr. Everett, address of June 7, 1864, on the reception to the Russian admiral, 4 Everett's Orations, 696 et seq.

The passage here quoted from Prince Gortschakoff, when standing alone, seems somewhat ambiguous. As appears by the context, it refers not to the relations between the United States and Russia, but solely to the relations between the States of the United States. The full text of the communication may be found in Dip. Cor. 1861, 292.

In 1898 the legation of the United States at St. Petersburg and the Russian legation at Washington were respectively raised to the rank of embassies. (President McKinley, annual message, Dec. 5, 1898.)

The message of President Monroe, communicating to the Senate the convention of December 15, 1824, is contained in 5 Am. State Papers, For. Rel. 432. In this correspondence the respective titles of Russia and of Great Britain to the northwest coast of North America are discussed.

The convention of April 5, 1824 (concluded April 5–17), is given in 5 Am. State Papers, For. Rel. 583.

For the circumstances attending the negotiation of the commercial treaty with Russia in 1832, see 1 Curtis's Buchanan, 171; 1 Benton's Thirty Years, 606.

As to Russia's claim to Northwestern Pacific, see 2 Lyman's Diplomacy of the United States, ch. xi.

As to the treaty of 1832 and its bearing on the question of citizenship, see Kie v. United States, 27 Fed. Rep. 351.

As to the treaty of 1824 and the Fur Seal Arbitration, see Moore, Int. Arbitrations, I. 755 et seq.

"From the commencement of their intercourse with Russia, the United States have specifically and prominently had in view:

"1. The negotiation of a treaty or convention of commerce and navigation upon those principles of liberal reciprocity which we have been so anxious to establish with all other nations; and

"2. The establishment, by similar conventional stipulations, of rules for regulating the rights of the respective parties, in the following relations:

"First, where the one is at war and the other neutral;

"Secondly, where both are at war with the same power;

"Thirdly, where they are unfortunately at war with each other.

"For a considerable time our desire in regard to both of these principal points was frustrated by the Russian Government uniformly declining to treat upon the subjects involved in them.

"The main points here adverted to, however, were not necessarily connected; and in the year 1832, Mr. Buchanan, who arrived at St. Petersburg in the month of June of that year, perceiving the Russian government not unfavorable to the first object of his mission, promptly entered upon the negotiation of a commercial treaty, with a degree of zeal and ability which happily crowned his efforts with success, and finally resulted in the conclusion of a treaty of commerce and navigation between the United States and Russia on the 18th December, 1832. The treaty was ratified by the President, by and with the advice and consent of the Senate, on the 8th April, 1833, the ratifications were exchanged at Washington on the eleventh day of May following, and by this instrument, thus finally concluded, the first principal point I have already adverted to may be considered as entirely disposed of, and as requiring no further attention on your part.

"Mr. Buchanan applied himself with equal promptitude to the second point of his mission; but the imperial government declining at that time to entertain any propositions relative to the conclusion of a treaty upon this subject, he returned with the leave of the President to the United States."

Mr. McLane, Sec. of State, to Mr. Dickerson, June 26, 1834, MS. Inst. Russia, XIV. 15.

"The use of the lands on which stood the buildings, once allowed to the Russian-American Company, was extinguished by the treaty of 1867."

Williams, At. Gen., 1873, 14 Op. 302.

As to permission for curates of the Greek Church to reside on the islands of St. Paul and St. George, under Art. III. of the treaty of 1867, see Mr. J. C. B. Davis, Act. Sec. of State, to Sec. of Treasury, July 14, 1871, 90 MS. Dom. Let. 249.

By the treaty between the United States and Russia, by which Alaska was acquired by the United States, the territory was incorporated into the United States and the Constitution became applicable to it; consequently an act of Congress depriving persons accused of a misdemeanor in Alaska of a right to trial by a common-law jury is unconstitutional and void.

Rassmussen *v.* United States (1905), 197 U. S. 516.

XXXV. *SAMOAN ISLANDS.*

§ 881.

As to treaty relations with and concerning the Samoan Islands, and the final partition of the group, see supra, § 110, I. 536.

XXXVI. *SIAM.*

§ 882.

The first treaty between the United States and Siam, of March 20, 1833, was concluded by Edmund Roberts, who, as we have seen under the head of Japan, was appointed by President Jackson January 27, 1832, as agent for the purpose of examining in the Indian Ocean the means of extending the commerce of the United States by commercial arrangements with the powers whose dominions bordered on those seas. Siam was visited by Commodore Perry in 1853. In a letter to the King, March 14, 1853, he referred to the kindness extended to Mr. Roberts in 1836. The King replied that he held in pleasant remembrance his intercourse with Mr. Roberts and with the officers of the U. S. ships *Peacock* and *Enterprise* during their stay.

Treaty Volume (1776–1887), 1380–1381; H. Ex. Doc. 8, 35 Cong. 2 sess.

September 12, 1855, Townsend Harris, who had been appointed consul-general of the United States at Simoda, Japan, was instructed to deviate from the direct route to Simoda and proceed to Bangkok with a view to obtain amendments to the treaty of 1833. He was furnished with a letter from the President to the King of Siam and with full power to negotiate a treaty. Some of the objects which

he was desired to accomplish were understood to have been obtained by the British in their then recent treaty with Siam. The United States, it was declared, could not allow its trade with Siam to be placed on a footing inferior to that of any nation. "You will be at no loss for arguments," said the instructions to Harris, "to show the difference between the foreign policy, especially in the East, of this country and Great Britain. While the latter is herself an eastern power, and as such by the late Burmese war has since become a near neighbor of Siam, we covet no dominion in that quarter. It is undoubtedly the interest of Siam to be liberal in her commercial policy towards the United States. . . . It is also desirable that the Christian missionaries who may resort to Siam from this country should be exempt from molestation in their sacred calling and should be allowed free scope for their labors. In asking for a stipulation which will in effect confer this privilege, you will, however, cause it to be understood that in this country there is no connection between religion and the government, and that we have no desire or intention to interfere with the Siamese policy on this subject." Mr. Harris concluded a new treaty of amity and commerce on May 29, 1856. Annexed to it were trade regulations. The ratifications of the treaty were exchanged at Bangkok June 15, 1857. It was communicated to Congress by President Buchanan December 10, 1858, with a recommendation that legislation be adopted to carry into effect Article II. in relation to the judicial powers of the United States consul at Bangkok.

Mr. Marcy, Sec. of State, to Mr. Harris, No. 1, Sept. 12, 1855, MS. Inst. Japan, I. 1.

Message of President Buchanan, Dec. 10, 1858, H. Ex. Doc. 8, 35 Cong. 2 sess.

The trade regulations annexed to the treaty were amended in 1867. (Treaty Volume (1776–1887), 995–1003.)

In 1880 Mr. Sickles, United States consul at Bangkok, reported, at the request of the Siamese government, the intention of the King to visit Europe and America. Mr. Evarts, who was then Secretary of State, addressed a note to the Senate and House committees recommending an appropriation for the King's reception and entertainment and for the employment of a naval vessel to bring His Majesty from Europe to America. Before any action was taken in the matter, the King announced the postponement of his voyage to America.

Mr. Sherman, Sec. of State, to Mr. Barrett, min. to Siam, April 15, 1897, MS. Inst. Siam, I. 238.

In 1884, the President recommended to Congress an appropriation to defray the expenses of a special embassy from Siam. (H. Ex. Doc. 137, 48 Cong. 1 sess.)

No appropriation was made, but the embassy, on its arrival in the United States, was duly received and entertained. (For. Rel. 1884, 454–456.)

As to an alleged effort of China to resume her old suzerain power over Siam, see Mr. Frelinghuysen, Sec. of State, to Mr. Halderman, No. 8, March 3, 1883, MS. Inst. Siam. I. 9.

Owing to remoteness of interests, unfamiliarity with the merits of the dispute, and lack of reason to suppose that such action would be acceptable to both parties, the United States declined the request of Siam to tender its good offices to France in the Anam boundary question. (Mr. Adee, Act. Sec. of State, to Mr. Suriya, April 27, 1893, MS. Notes to Siam, I. 2; Mr. Gresham, Sec. of State, to Mr. Nuvatr, May 18 and June 3, 1893, id. 3, 6.)

An Anglo-French agreement as to Siam, signed at London, Jan. 15, 1896, is printed in For. Rel. 1896, 139.

"An envoy from Siam has been accredited to this government and has presented his credentials." (President McKinley, annual message, Dec. 5, 1898.)

In a letter of January 5, 1900, the Secretary of State recommended an appropriation for securing legation premises at Bangkok. (H. Doc. 249, 56 Cong. 1 sess.)

As to repairs to the United States legation premises and grounds at Bangkok, see S. Doc. 251, 56 Cong. 1 sess.

As to the donation of property at Ratburi by the King of Siam to the American Presbyterian mission, for the establishment of a hospital, see For. Rel. 1889, 657.

With a despatch, No. 26, of July 21, 1870, Mr. Partridge, United States consul at Bangkok, enclosed to the Department of State certain correspondence in relation to the execution of two native servants of the Rev. Messrs. Wilson and McGilvary, citizens of the United States. The Department of State declared the proceeding to have been a plain violation not only of Article I. of the treaty of 1856, which stipulates that American citizens in Siam shall receive from the government full protection and assistance to enable them to reside there in security, but also of Article V., which stipulates for the free exercise of religion and for the right of Americans to employ Siamese subjects as servants. It appeared, however, that the Siamese government had ultimately receded from the ground, which it at first assumed, that the stipulations of the treaty were not applicable to the case in question.

Mr. Fish, Sec. of State, to Mr. Partridge, No. 25, Oct. 5, 1870, 60 MS. Desp. to Consuls, 68.

By the treaty of amity and commerce of March 20, 1833, between the United States and Siam, the citizens of the former are forbidden to import or sell in Siam (except to the King) "munitions of war." As to the meaning of this term, "I feel clear that a *nomen generalissimum*, such as 'munitions of war,' is far more comprehensive in its operation than would be any group of specifications, no matter how exhaustive. The rule, as you well know, is that the introduction of specifications operates to limit even general terms which may precede

them, and in this view I can not but think that the terms 'firearms, shot, or gunpowder,' which are quoted as used in the treaty between Siam and Great Britain, cover a much more restricted area than does the term 'munitions of war.' If, for instance, poisoned arrows were called for in Siam as weapons likely to be peculiarly efficacious in Siamese warfare, they would be excluded under the term 'munitions of war,' but not under those of 'firearms, shot, or gunpowder.' The same might be said of preparations of dynamite. I hold, therefore, that the term 'munitions of war' gives all the protection to Siam, as to the question at issue, that could be secured by an enumeration of particulars, no matter how exhaustive."

Mr. Bayard, Sec. of State, to Mr. Phelps, Jan. 7, 1886, MS. Inst. Gr. Brit. XXVII. 640.

Mr. Bayard offered, however, in case Siam should make a formal application to that effect, to adopt a new and additional stipulation declaring the provisions of the treaty of 1833 as to "munitions of war" to be still in force, and adding the words "and weapons" to "munitions," so as to prohibit the importation, without royal assent, of all "munitions and weapons of war."

In 1887 a law was agreed upon, by a committee of representatives of the treaty powers in Siam, for the purpose of regulating the importation and sale of spirituous liquors in that country. By Article I. of the treaty between the United States and Siam of May 14, 1884, regulating the liquor traffic in the latter country, it was provided that beer and wines might be imported and sold by citizens of the United States on payment of the same duty as was levied on similar articles manufactured in Siam, but that in no case should the import duty exceed ten per cent ad valorem, while by Article V. of the same treaty it was stipulated that spirits, beer, wines, and spirituous liquors coming from the United States should enjoy most-favored-nation treatment. By section 4 of the law above referred to it was provided that no spirituous liquors, except "wine and beer actually made in Europe," should be imported or sold unless they had paid the import or excise duty, which was fixed at 5 per cent ad valorem. The United States made representations against the law as proposing a clear violation of the provisions of the treaty of 1884. The Siamese government accordingly altered the law by inserting in section 4, after the word "Europe," the words "or in the United States of America."

For. Rel. 1887, 972–974.

As to the discussion among the foreign diplomatic and consular representatives in Siam of the questions whether the treaties regulating the liquor traffic abrogated the privilege enjoyed by foreign residents under previous treaties of importing, as "provisions," liquors for private consumption, see Mr. Blaine, Sec. of State, to Mr. Boyd, No. 5, March 9, 1891, MS. Inst. Siam, I. 111.

XXXVII. *SPAIN.*

The correspondence of Messrs. Carmichael and Short, United States ministers at Madrid in 1792, in reference to the Florida boundary, to Indian incursions aided by Spain, to commercial restraints, and to the navigation of the Mississippi, is given in 1 Am. State Papers, For. Rel. 260, 304.

The delays of Spain in making treaty with the United States are noticed in 7 John Adams's Works, 145, 385, 389, 485, 496, 517, 520, 565, 582, 644.

The papers in respect to the negotiations by Mr. Pinckney, minister of the United States, with the Spanish ministry in 1795 are given in 1 Am. State Papers, For. Rel. 535, together with the projects and counter projects.

The correspondence as to the ratification of the convention of August 11, 1802, is given in 2 Am. State Papers, For. Rel. 624; that connected with the boundary negotiations of 1805 in 2 Am. St. Pap. For. Rel. 613. The ratification of the treaty of 1795 is noticed in 2 Madison's Works, 73, 75, 86, 94.

1. Treaty of October 27, 1795.

§ 883.

Negotiations.

"From the middle of 1793 to the middle or close of 1794 the problem of preserving peace appeared to be difficult. Great Britain occupied military posts within the United States, on the northern frontier, and had pushed a garrison far south towards Cincinnati. Spain occupied Natchez, and proposed to support the Indians who dwelt within what are now the States of Mississippi, Alabama, and a large part of Georgia, in maintaining their independence. The Indians in the Northwest were in open hostilities. Genet set the administration at defiance in the Atlantic States, and appealed to the nation to support him. Washington solved the difficulty by asking the recall of Genet, by sending Jay to London, and by ordering Thomas Pinckney to Madrid with full power and authority . . . 'for and in the name of the United States to meet, confer, treat, and negotiate with the ministers, commissioners, deputies, or plenipotentiaries of his said Majesty [the King of Spain], being furnished with sufficient authority of and concerning the navigation of the river Mississippi; and such other matters relative to the confines of the territories of the United States and His Catholic Majesty, and the intercourse to be had thereon, as the mutual interests and general harmony of neighboring and friendly nations require to be precisely adjusted and regulated; and of and

concerning the general commerce between the United States and the Kingdoms and dominions of His Catholic Majesty; and to conclude and sign a treaty or treaties, convention or conventions, thereon.' He also had a separate power 'to agree, treat, consult, and negotiate of and concerning all matters and causes of difference subsisting between the United States and his said Majesty, relative to the instructions of his said Majesty, or of any of the tribunals or authorities of his said Majesty, to his ships of war and privateers, of whatsoever date, as well as of and concerning restitution or compensation in the cases of capture or seizure made of the property of the citizens of the United States by the said ships of war and privateers, and retribution for the injuries received therefrom by any citizen of the United States, and to conclude and sign a treaty or treaties, convention or conventions, touching the premises.'

"Pinckney arrived in Madrid on the 28th of June, 1795. Short, who was there as chargé, had written the government that the moment was opportune for concluding a treaty. Pinckney was met at the outset by a proposal for 'a triple' alliance between France, Spain, and ourselves, which he declined. He also declined to guarantee the Spanish possessions in America. By the 10th of August the parties began to put their ideas on paper. The first projét for a treaty came from Spain, and was handed Pinckney by the Prince of Peace before the 23d of September. On the 27th of October the parties signed a treaty, which has formed the basis of the relations between Spain and the United States from that day to this.

"It defined the southern boundary of the United States in accordance with the definitions in the treaty with Great Britain. It conceded the navigation of the Mississippi, and gave us a right of deposit and storage for our produce at New Orleans. It embodied many of the leading commercial provisions of the previous treaties with France or Prussia. And a provision was made for a commission 'to terminate all differences on account of the losses sustained by the citizens of the United States, in consequence of their vessels and cargoes having been taken by the subjects of His Catholic Majesty during the late war between Spain and France.' A copy of this treaty was sent to Congress by President Washington on the 29th of March, 1796, and an act was passed to carry it into effect. Though transmitted in the midst of debate on 'Jay's treaty,' it was considered and acted on without more than a casual allusion to it in that debate, and without discussion on its own merits.

"The provisions of this treaty respecting limits and the withdrawal of garrisons had not been carried out when Louisiana was acquired by the United States, and meanwhile disputes had arisen in consequence of the arbitrary order discontinuing the right to deposit and store American produce at New Orleans, and reclamations were made

upon Spain for losses suffered from this cause, and also for maritime spoliations before the peace of Amiens."

Davis, Notes, Treaty Vol. (1776–1887), 1383.

Article II.

"The United States have never claimed any part of the territory included in the States of Mississippi or Alabama under any treaty with Spain, although she claimed at different periods a considerable portion of the territory in both of those States. By the treaty between the United States and Spain, signed at San Lorenzo el Real, on the 27th of October, 1795, 'the high contracting parties declare and agree, that the line between the United States and East and West Florida, shall be designated by a line, beginning on the River Mississippi, at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the Chatahuchee River,' &c. This treaty declares and agrees, that the line which was described in the treaty of peace between Great Britain and the United States, as their southern boundary, shall be the line which divides their territory from East and West Florida. The article does not import to be a cession of territory, but the adjustment of a controversy between the two nations."

McKinley, J., Pollard's Lessee *v.* Hagan, 3 How. 212, 225. See Hickey's Lessee *v.* Stewart, 3 How. 750, 760.

The treaty between the United States and Spain of 1795 ascertained and established an existing but disputed boundary line, and prior grants made by the authorities of Spain within the territory of Georgia, as ascertained by that treaty, were invalid. (Robinson *v.* Minor, 10 How. 627.)

Article VII.

After the outbreak of the Cuban insurrection of 1868 the Spanish government issued decrees embargoing the property of certain citizens of the United States, and prohibiting the alienation of such property. The government of the United States complained of this and other oppressive actions as violating the 7th article of the treaty of 1795. The result was the reference of the questions involved to a mixed commission.

Senate Ex. Doc. 108, 41 Cong. 2 sess. 243.

For the history of the mixed commission, and a digest of the decisions thereunder, see Moore, Int. Arbitrations, II. 1019 et seq.

Whether or not the first clause of art. 7, wherein it is agreed that the subjects and citizens of each nation, their vessels or effects, shall not be liable to any embargo or detention on the part of the other for any military expedition, or other public or private purpose whatever, "was originally intended to embrace real estate and personal property on land as well as vessels and their cargoes, the same

has been so construed by the United States, and this construction has been concurred in by Spain; and therefore the commission will adhere to such construction in making its decision."

Statement of Spanish Treaty Claims Commission, April 28, 1903, concurred in by all the Commissioners except Mr. Chandler.

The commissioners, except Messrs. Chambers and Maury, also concurred in holding that neither the first clause of art. 7, nor any other clause of the treaty, rendered either nation, while endeavoring to suppress an insurrection that had got beyond its control, "liable for damages done to the persons or property of the citizens of the other nation when found in the track of war, or for damages resulting from military movements unless the same were unnecessarily and wantonly inflicted."

Article IX.

In June, 1839, the schooner *Amistad*, the property of Spanish subjects, cleared from one Cuban port to another, having on board a number of negroes in charge of certain Spanish subjects, who claimed them as their property. When from seven to ten leagues from shore the negroes killed the captain and mate of the schooner and took possession of her. On August 26, 1839, she was discovered within a mile and a half of Montauk Point, Long Island, by the U. S. S. *Washington*, commanded by Lieutenant Gedney, and by him was taken and brought into the port of New London, Connecticut. The Spanish minister demanded the restoration of the vessel and cargo and also of the negroes, under Article IX. of the treaty between the United States and Spain of 1795, which provides that "all ships and merchandise, of what nature soever, which shall be rescued out of the hands of any pirates or robbers on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of, and restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof." Mr. Grundy, who was then Attorney-General, advised that the case fell within the provisions of the treaty, and that the President should order the delivery of the vessel, cargo, and negroes to such persons as might be designated by the Spanish minister to receive them. But, before this opinion was given, the vessel, cargo, and negroes were libelled by Lieutenant Gedney and certain other persons in the United States district court for salvage. Libels were also filed by two of the Spanish claimants, praying for restitution; and an information or libel was also filed by the United States district attorney, setting forth the demand of the Spanish minister and praying the court, on proof of the facts alleged in the demand, to issue such order for the disposal of the vessel, cargo, and slaves as would best enable the United States to comply with their treaty stipulations; but, if it should appear that

the negroes were not lawfully held as slaves, but were transported from Africa in violation of law, to order their removal to the coast of Africa, in conformity with the act of Congress of March 3, 1819, 3 Stat. 532. The negroes, with one exception, filed an answer denying that they were slaves and alleging that they were native-born Africans, unlawfully kidnapped in Africa and brought to Cuba in violation of the Spanish law. January 23, 1840, the district court rendered a decree awarding the vessel and cargo to their lawful owners, subject to claims of salvage of one-third their value, and directing that the negroes, with one exception, be delivered to the President of the United States to be transported to Africa. This decree was affirmed by the circuit court pro forma. On appeal the Supreme Court, whose opinion was delivered by Mr. Justice Story, Mr. Justice Baldwin dissenting, held that, in order to bring the case within Article IX. it must be shown (1) that the negroes fell within the description of merchandise; (2) that there had been a rescue of them on the high seas out of the hands of pirates or robbers, and (3) that the asserted proprietors were the true owners. The court said that negroes lawfully held as slaves under the laws of Spain, on board of a Spanish vessel, might be deemed merchandise, but not so native Africans, unlawfully kidnapped, as in the present case, and imported into a Spanish colony contrary to the laws of Spain. The decree of the circuit court was accordingly affirmed, except that the Supreme Court held that the act of 1819 had not been contravened, and directed the negroes to be set at liberty. It seems, however, that the vessel was sold in 1840 under the decree of the district court, probably to satisfy the claims of the salvors. After the case was decided by the Supreme Court the Spanish minister demanded indemnification for the vessel and cargo, including the negroes found on board. This claim Mr. Webster, then Secretary of State, refused to admit. The minister also demanded the surrender of the negroes as criminals. This claim, too, was refused. February 27, 1843, President Tyler, in a message to the House of Representatives, suggested that the amount allowed as salvage should be refunded, "as a proof of the entire good faith of the Government and of its disposition to fulfill all its treaty stipulations, to their full extent, under a fair and liberal construction." March 19, 1846, Mr. Buchanan, Secretary of State, advised the payment of an indemnity, and President Polk, in his annual message of December 7, 1847, recommended that an appropriation be made for that purpose. President Fillmore, in a message to the Senate and House of Representatives of January 17, 1853, stated that in a letter to the Spanish minister of September 1, 1841, the opinion was confidently maintained by Mr. Webster that the claim was unfounded, but added that "the administration of President Polk took a different view of the matter,"

that "the justice of the claim was recognized in a letter from the Department of State to the Spanish minister, of the 19th of March, 1847," and that "in his annual message of the same year the President recommended its payment." Under the circumstances, the attention of Congress was again invited to the subject. President Pierce, in his annual message of December 5, 1853, expressed the opinion that good faith required the prompt adjustment of the claim, and recommended it to the early and favorable consideration of Congress. A similar recommendation was made by President Buchanan, in his annual messages of December 8, 1857, December 6, 1858, and December 19, 1859. March 5, 1860, a convention was concluded at Madrid, by which the Spanish government agreed to pay what were known as the "Cuban claims," while it was stipulated that the *Amistad* claim should be submitted to arbitration. The Senate, on June 27, 1860, declined to advise and consent to the exchange of the ratifications of the convention. The claim thus remained unsettled.

United States *v.* Amistad, 15 Pet. 518; opinion of Mr. Grundy, At. Gen., 1839, 3 Op. 484; opinions of Mr. Gilpin, At. Gen., April 11, 1840, and Dec. 14, 1840, 3 Op. 510, 606; correspondence of Mr. Webster and the Spanish minister, Webster's Works, VI. 390–405; Memoirs of J. Q. Adams, X. 132, 429, 441; Hastings, American Politics (Franklin Sq. ed.), 1839; Mr. Buchanan's Defense, Curtis's Life of Buchanan, II. 223.

For correspondence and reports, see message of President Van Buren, Feb. 12, 1841, S. Doc. 179, 26 Cong. 2 sess.; message President Tyler, Feb. 27, 1843, H. Doc. 191, 27 Cong. 3 sess.; message of President Fillmore, Feb. 12, 1851, S. Ex. Doc. 29, 31 Cong. 2 sess.; message of President Fillmore, Jan. 17, 1853, H. Ex. Doc. 20, 32 Cong. 2 sess.; report of Mr. J. Q. Adams, Select Committee, Jan. 4, 1841, H. Report 51, 26 Cong. 2 sess.; reports of Mr. C. J. Ingersoll, April 10, 1844, and June 24, 1846, H. Report 426, 28 Cong. 1 sess., and H. Report 753, 29 Cong. 1 sess.; report of Mr. J. M. Mason, Feb. 19, 1851, S. Report 301, 31 Cong. 2 sess.; report of Mr. Mason, March 29, 1852, S. Report 158, 32 Cong. 1 sess.; report of Mr. J. M. Mason, Feb. 2, 1858, S. Report 36, 35 Cong. 1 sess.

Richardson, Messages and Papers of the Presidents, IV. 232, 551; V. 184, 209, 446, 511, 561, 641.

Article XIV.

The treaty of 1795 with Spain prohibited citizens of the United States from taking commissions to cruise in a privateer against the commerce of Spain, but not from serving in a public armed vessel of a belligerent nation.

The Santissima Trinidad, 7 Wheat. 283.

Article XVII.

"The seventeenth article of the treaty with Spain, which provides for certain passports and certificates, as evidence of property on board of the ships of both states, is, in its terms, applicable only to cases where either of the parties is engaged

in a war. This article required a certain form of passport to be agreed upon by the parties, and annexed to the treaty. It never was annexed; and, therefore, in the case of the *Amiable Isabella*, 6 Wheaton, 1, it was held inoperative."

United States *v.* Schooner Amistad, 15 Pet. 518, 595.

"The form of passport referred to in article 17 of the treaty of 1795 is not annexed either to the original treaty signed by the negotiators, or to the copy bearing the ratification of the King of Spain on file in the Department of State. It is remarkable, however, that to the Spanish version, appearing in vol. 2, p. 429, of 'Coleccion de los Tratados de Paz,' &c., published at Madrid in 1800, two forms of passports in Spanish are annexed—one for ships navigating European seas, and the other for those navigating American seas. These forms are found in 6 Wheat. 97. No explanation has been discovered of these facts. It is stated, however, in a letter from Jacob Wagner to Mr. Monroe, dated November 3, 1814, that a form was agreed on." (Cadwalader's Digest (1877), 257.)

Article XX.

The 20th article of the treaty with Spain of 1795 does not extend the jurisdiction of our courts to offenses committed in Spain, nor vice versa, and, according to the common law, the commandant of the island of Amelia is not liable to any public prosecution before any of our courts for his transactions in Florida.

Lee, At. Gen., 1797, 1 Op. 68.

"The XXth article of the treaty of 1795 between the United States and Spain secures to the citizens of each country in the other the same rights and privileges in regard to judicial proceedings that may be held or enjoyed by the citizens of such other country; but, even in civil jurisprudence, neither this stipulation nor any known rule of international law confers on the government of the foreign country any right to interfere in the modes of procedure or administration of the reasonable local municipal laws of the other country."

Mr. Frelinghuysen, Sec. of State, to Mr. Valera, Span. min., March 15, 1884, MS. Notes to Spain, X. 291.

For the history of art. 21 of the treaty of 1795, see Moore, Int. Arbitrations, II. 991 et seq.

2. Treaty of February 22, 1819.

§ 884.

See Moore, Int. Arbitrations, V. 4487–4531.

Articles II., III., IV.

Spain in ceding the Floridas to the United States, by the treaty of February 22, 1819, ceded only so much thereof as belonged to her, and hence did not cede the territory lying between the Mississippi and Perdido rivers, which territory,

though claimed by Spain, was treated by the United States as already ceded by France.

McDonogh *v.* Millaudon, 3 How. 693.

Articles IX., X., XI.

Article IX. contains the following stipulation: "The United States shall cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida." The treaty created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. It rested with Congress to provide one, according to the treaty stipulation. Undoubtedly Congress was bound to provide such a tribunal as the treaty described. But if they failed to fulfill that promise it is a question between the United States and Spain.

United States *v.* Ferreira, 13 How. 45, 46.

Certain slaves were shipped by their Spanish owners from Havana to Pensacola in an American vessel in violation of the laws of the United States. The vessel was captured by the American military force then occupying Fort Barrancas. Afterward, while proceeding to adjudication, the slaves and vessel were seized by a revenue vessel and carried into the port of Mobile. The vessel and cargo were condemned, but restitution of the slaves was awarded, because the original capture was not made by a "commissioned vessel of the United States." The original capture being lawful, and the slaves, though restored, being on board unlawfully, the Spanish owners have no claim as for an "injury" under the treaty with Spain of 1819.

Berrien, At. Gen., 1820, 2 Op. 198.

The United States are bound, by the treaty with Spain of the 22d of February, 1819, to pay the Spanish inhabitants of Florida for slaves carried away or killed by troops of the United States prior to that treaty; and remuneration should be made for the loss of services of such slaves as have been restored.

Grundy, At. Gen., 1838, 3 Op. 391.

The extraordinary expenses of a party, incurred in living at St. Mary's, whither he retired after the destruction of his property in Florida, are matters too remotely consequential to be the proper subject of damages under article 9 of the treaty of 1819.

Cushing, At. Gen., 1854, 6 Op. 530.

The Department of State was made the depository, by stipulation, of the records and papers referred to in article 11 of the treaty with Spain of 1819, and they must not be delivered up to the claimants; and any law of Congress that shall authorize or require their delivery will be a violation of that treaty.

Taney, At. Gen., 1832, 2 Op. 515.

Under the treaty of 1819 the commissioner had power to decide conclusively upon the amount and validity of claims, but not upon the conflicting rights of parties to the sums awarded by them.

Comegys *v.* Vasse, 1 Pet. 193.

The claims of American citizens against Spain, for which by the treaty of 1819 the United States undertook to make satisfaction to an amount not exceeding $5,000,000, were such claims as, at the date of the convention, were unliquidated, and statements of which had been presented to the Department of State or to the minister of the United States. The convention, as signed 22d February, 1819, subject to ratification within six months, though it was not ratified within the time stipulated, was never abandoned, though some expressions in the notification of August 21, 1819, by the United States to Spain (notifying to that government that after the next day, "as the ratifications of the convention will not have been exchanged, all the claims and pretensions of the United States will stand in the same situation as if that convention had never been made"), indicated that the United States might be induced to carry it into effect. The notification did not, by the nonratification within the six months, make revocable the power which citizens of the United States, by filing their claims with it, had given their government to make reclamations against Spain in their behalf.

Meade *v.* United States, 9 Wall. 691.
See Moore, Int. Arbitrations, V. 4502.

3. Convention of February 17, 1834.

§ 885.

A convention was concluded between the United States and Spain February 17, 1834, for the settlement of claims of citizens of the United States against the Spanish government, arising between February 22, 1819, and the date of the conclusion of the convention.

Davis' Notes, Treaty Vol. (1776–1887), 1387; Moore, Int. Arbitrations, V. 4533 et seq.; supra, § 779.

As to the claims convention of February 11–12, 1871, see Moore, Int. Arbitrations, II. 1019 et seq.

As to the protocol of Jan. 12, 1877, concerning judicial procedure, see supra, § 187.

Concerning the suspension of discriminating duties, as to the Antilles, see President Cleveland, annual message, Dec. 6, 1886.

For a modus vivendi as to the commerce of Cuba and Porto Rico, see For. Rel. 1895, II. 1185–1186.

4. Reciprocity Agreement, 1891.

§ 886.

In 1891 a reciprocity agreement with reference to Cuba was concluded between the United States and Spain, under section 3 of the McKinley Act. An error was made in the publication by Spain of the definite repertory in Cuba. This error was afterwards rectified.

For. Rel. 1894, 598, 611.

As to the part taken by Spain in the World's Columbian Exposition at Chicago, see President Harrison's annual message, Dec. 9, 1891; For. Rel. 1892, 496–502; For. Rel. 1893, 565, 573, 575.

5. Treaty of December 10, 1898.

§ 887.

A treaty of peace between the United States and Spain was concluded at Paris, December 10, 1898.

As to the negotiations, see supra, § 109.

See Lebraud (Élie), La Guerre Hispano-Américaine et le Droit des Gens: Paris, 1904.

Articles V., VI.

By Article V. of the treaty of peace between the United States and Spain of December 10, 1898, the United States engaged to send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces. By Article VI. the United States agreed to release all persons made prisoners of war by the American forces, and to undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines; and it was further stipulated that the United States should, at its own cost, return to Spain, and that Spain should, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under the article.

The stipulation that the United States "will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines" was "not an absolute engagement to obtain the release of Spanish prisoners in the hands of the insurgents," but a "pledge" that the United States would "exercise its

best endeavors in this direction." "This government will fulfill its engagement, and is preparing the way to do so by suppressing the insurrection in the Philippines."

Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, July 17, 1899, For. Rel. 1899, 684, 685.

To facilitate the release of the prisoners, communications were permitted to be exchanged between the Spanish government and Aguinaldo through an agent of that government at Manila and through Agoncillo, the agent of Aguinaldo at Paris. (Mr. Hay, Sec. of State, to the Duke of Arcos, Spanish min., July 25, 1899, and July 28, 1899, For. Rel. 1899, 686; Mr. Storer, min. to Spain, to Mr. Hay, Sec. of State, Aug. 4, 1899, For. Rel. 1899, 686–688.) Orders were also cabled to General Otis, commanding the American forces in the Philippines, to give every facility to the Spanish commissioners for the care of released prisoners. (Mr. Adee, Acting Sec. of State, to the Duke of Arcos, Sept. 18, 1899, For. Rel. 1899, 688, 689.) Many prisoners were, however, rescued by the American forces from the insurgents. (For. Rel. 1899, 691–693.)

By a royal order of August 4, 1899, instructions were directed to be given for the immediate release of all Cubans and Filipinos who might remain in Spanish prisons on account of the insurrection in Cuba and the Philippines.

For. Rel. 1899, 702, 705, 708.

As to the release of Cuban prisoners, see Magoon's Reports, 562, 597. See, also, For. Rel. 1898, 1003; Mr. Cridler, Third Assist. Sec. of State, to Mr. Sprague, consul at Gibraltar, No. 379, April 6, 1899, 166 MS. Inst. Consuls, 536.

Articles V. and VI. of the treaty of peace with Spain required the United States to convey from the Philippines to Spain only such Spanish soldiers as were actually made prisoners of war either by the United States or by the insurgents. Troops remaining under arms under the control and direction of Spanish officers were to be removed at the expense of Spain.

Griggs, At. Gen., March 15, 1899, 22 Op. 383.

The treaty required the United States to repatriate all Spanish prisoners captured and held by the American forces, or held and released by the insurgents in Cuba and the Philippines—soldiers and civilians—men, women, and children, whether their detention was originally voluntary or otherwise.

Griggs, At. Gen., Jan. 6, 1900, 23 Op. 9.

Article VII.

Article VII. of the treaty of peace with Spain of December 10, 1898, by which the United States agreed to adjust and settle the claims of its citizens against Spain that had "arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty," "evidently

does not contemplate the settlement of all claims, anterior to that date [the date of the exchange of ratifications], belonging to all the inhabitants of the ceded territories, who might become citizens of the United States in virtue of the treaty."

Mr. Hay, Sec. of State, to the Sec. of War, March 27, 1900, 244 MS. Dom. Let. 41.

This letter related to a claim of the Board of Harbor Works of Ponce, Porto Rico, for reimbursement of moneys deposited Oct. 2, 1897, with the Spanish collector of customs at that port, by order of the lieutenant-governor of the island. The Board of Harbor Works, which was a corporation, had, by the cession of Porto Rico to the United States, lost its Spanish nationality, and the treaty did not bind Spain to pay the preexisting claims of her subjects who might by virtue of the cession acquire the nationality of the United States. Under the circumstances, and as the Spanish officials in Porto Rico had themselves taken the ground that the claim should be adjusted by the two governments, the minister of the United States at Madrid was instructed to represent the facts informally to the Spanish Government, invite its attention to the apparent equity of the case, and inquire what remedy, if any, was provided by Spanish law for the claimant. (Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, March 27, 1900, MS. Inst. Spain, XXIII. 6.)

The proceedings of the peace commissioners contain nothing to fix the date of the beginning of the insurrection in Cuba, and if legislation shall not fix the date, it will be the province of the tribunal to do so, upon the evidence before it.

Mr. Hill, Assist. Sec. of State, to Mr. Sharp, Jan. 18, 1901, 250 MS. Dom. Let. 289.

For correspondence with Spain as to securing assistance in obtaining defensive evidence against the claims under art 7, see For. Rel. 1901, 477.

As to the claims under art. 7, see S. Doc. 79, 54 Cong. 2 sess.; S. Doc. 189, 55 Cong. 1 sess.; S. Doc. 168, 55 Cong. 3 sess.; S. Rep. 13, 56 Cong. 1 sess.; S. Doc. 94, 57 Cong. 1 sess.

Article VIII.

As to the preservation by municipalities in Cuba and Porto Rico, under Article VIII. of the treaty of peace, of their rights, see Magoon's Reports, 374, 463.

As to lands held for ecclesiastical or religious uses in the Philippine Islands, see message of President McKinley, February 25, 1901, S. Doc. 190, 56 Cong. 2 sess.

Article IX.

By Article IX. of the treaty of peace between the United States and Spain concluded December 10, 1898, it was provided that Spaniards residing in territories over which Spain ceded or relinquished her sovereignty should be subject, in matters civil as well as criminal, to the jurisdiction of the courts of the

country wherein they resided, "pursuant to the ordinary laws governing the same." It was advised that under this stipulation Spaniards residing in Cuba were as aliens entitled to the benefit of article 44 of the alien law of that country, under which the consul of an intestate alien was entitled to intervene and administer the estate.

Griggs, At. Gen., April 26, 1900, 23 Op. 93.

Article IX. of the treaty with Spain of December 10, 1898, was intended to secure to Congress, so far as it could constitutionally be done, a free hand in dealing with the territory ceded by the treaty.

Dorr *v.* United States (1904), 195 U. S. 138.

Article XI.

By Article XI. of the treaty of peace between the United States and Spain, signed at Paris December 10, 1898, it was provided that Spaniards residing in the territories over which Spain ceded or relinquished her sovereignty should be subject in matters civil as well as criminal to the jurisdiction of the courts "pursuant to the ordinary laws governing the same," and that they should have the right "to appear before such courts and to pursue the same course as citizens of the country."

Held, that these stipulations, while they secured to Spaniards the right to appear and proceed like citizens, did not make it unlawful to give them additional privileges, and that they were entitled, in respect of the settlement of their estates, to the benefits of the alien law of 1870, this being among the ordinary laws governing the courts.

Griggs, At. Gen., April 26, 1900, 23 Op. 93; For. Rel. 1901, 226.

See, also, Magoon's Reports, 473, 478; Mr. Hay, Sec. of State, to Duke of Arcos, Spanish min., No. 64, Dec. 26, 1899, MS. Notes to Span. Leg. XI. 473.

Article XII.

Article XII. of the treaty provided for the finality of judicial judgments in the territories ceded or relinquished where no right of review existed under Spanish law.

Magoon's Reports 486, 487, 507, 514.

As to appeals pending in Madrid, see id. 646.

See Mr. Hay, Sec. of State, to Duke of Arcos, No. 55, Nov. 29, 1899, MS. Notes to Span. Leg. XI. 466; Mr. Hay to Mr. Storer, min. to Spain, No. 119, Jan. 11, 1900, MS. Inst. Spain, XXII. 662; Mr. Hay to Sec. of War, Nov. 22, 1900, 249 MS. Dom. Let. 212.

Article XIII.

By Article XIII. of the treaty of peace between the United States and Spain of December 10, 1898, it was provided that Spanish scientific, literary, and artistic works, not subversive of public order in the territories ceded to the United States, should continue to be admitted free of duty into such territories for ten years from the date of the exchange of ratifications. It was ad-

vised that under this stipulation the works in question were entitled to continued admission into the Philippines free of import duty, as well as of duties imposed by the Philippine tariff for harbor and commercial improvements.

Griggs, At. Gen., May 8, 1900, 23 Op. 115.

See Mr. Hay, Sec. of State, to Sec. of War, March 28, 1900, 244 MS. Dom. Let. 61; Mr. Hay to Duke of Arcos, Span. min., No. 96, May 23, 1900, MS. Notes to Span. Leg. XI. 504; same to same, No. 102, June 22, 1900, id. 509.

"Referring to your note of May 25 last, relative to duties alleged to have been illegally collected on Spanish literary, scientific, and artistic works imported into the Philippine Islands, I have the honor to quote for your information the following from a report made by the military governor to the Secretary of War:

"'No duties have been collected, since American occupation, upon Spanish scientific, literary and artistic works not subversive of public order, except such as were collected prior to such occupation by the Spanish customs officials, and no duties have been collected upon any such articles since American occupation, except such as accord with the construction placed upon article 13 of the treaty of peace with Spain by the opinion of the Honorable the Attorney-General of the United States.

"'No application for a refund of duty on goods of this class has ever been made and none is now pending.'"

Mr. Hill, Act. Sec. of State, to Duke of Arcos, Span. min., No. 112, September 10, 1900, MS. Notes to Span. Leg. XI. 516.

Article XV.

"Referring to your note of February 1 last, complaining of an abatement of twenty per cent of the pilotage dues at Havana granted to Cuban and American steamers, in violation of Article XV. of the treaty of peace, I have the honor to quote for your information a report from the military governor of Cuba to the Secretary of War, from which it appears that the discrimination has been removed:

"'On October 27, 1899, the then military governor granted a reduction of twenty per cent in pilotage fees to vessels of Cuban and American lines connecting with the port of Havana, for the reason that they carry the Cuban mails, and during the summer and sickly season are not permitted to carry any passengers, except immunes, and only a small quantity of freight, but are obliged to keep up their regular schedules.

"'On December 26th, on account of a complaint of discrimination, the captain of the port of Havana was directed to continue the tariff of pilotage as to Cuban coasters only at eighty per cent, but

that all other shipping in the island, whether from the United States or other countries, must be placed on the same footing, and further directed that the pilotage charge be fixed for each port, and not left to the discretion of each captain of the port.

"'These instructions have been carried out, and there is absolutely no discrimination now, except as to Cuban coasters, who still have the twenty per cent reduction.'"

Mr. Hay, Sec. of State, to Duke of Arcos, Span. min., No. 83, March 21, 1900, MS. Notes to Spanish Leg. XI. 488.

6. Caroline Islands.

§ 888.

President Cleveland, in his annual message of December 8, 1885, referred to the dispute that had arisen between Germany and Spain relative to dominion over the Caroline Islands. He stated that extensive interests of American citizens had grown up in those parts during the preceding thirty years, and that, while the United States held aloof from the proprietary issues raised between the powers in question, it expected that nothing in the contention between them should unfavorably affect American citizens carrying on a peaceful commerce or domiciled there, and that he had so informed the Governments of Spain and Germany. The dispute between Germany and Spain was adjusted under the mediation of the Pope by a protocol signed at Rome December 17, 1885. The sovereignty of Spain over the islands was conceded, while various privileges were granted to Germany. The Spanish government gave the most ample assurances that the interests of American citizens should not be interfered with or injured. Difficulties, however, subsequently arose at Ponape, and the American missionaries were expelled from the islands. The United States demanded an idemnity, and at length obtained the sum of $17,500; but in accepting it the American minister at Madrid was instructed to make it clear that the United States did not waive its demand for the return of the American missionaries. In 1899 the islands were ceded by Spain to Germany.

See President Harrison, annual messages, Dec. 9, 1891, and Dec. 6, 1892; Mr. Foster, Sec. of State, to Mr. Snowden, Feb. 20, 1893, MS. Inst. Spain, XXI. 271.

See, also, For. Rel. 1894, 590–598; Mr. Olney, Sec. of State, to Mr. Taylor, Nov. 7, 1895, MS. Inst. Spain, XXII. 56.

The assurance of Spain as to the protection of the interests of American citizens may be found in For. Rel. 1886, 831–834. The protocol of December 17, 1885, is printed in the same volume, pp. 776–778.

In 1886 the German government renounced its right, under Art. V. of the protocol, to establish a naval station in the islands. (For. Rel. 1887, 1023.)

In instruction No. 381, Aug. 3, 1885, to Mr. Foster, then American minister at Madrid, Mr. Bayard, Secretary of State, referring to a complaint that an American trader had committed crimes against natives in his employ in the Island of Yap, suggested that if, as was reported, orders had been issued at Madrid to establish the effective jurisdiction of Spain over the Caroline Islands, the Spanish authorities, if it should be determined that they had jurisdiction, might cause the offender to be arrested and brought to the nearest court competent to try the case. (MS. Inst. Spain, XX. 79.) A copy of this instruction was enclosed by Mr. Bayard, Sept. 7, 1885, to Mr. Pendleton, then American minister at Berlin. (MS. Inst. Germany, XVI. 547.)

XXXVIII. *SWEDEN AND NORWAY.*

§ 889.

"Sweden is the only power in Europe, that, voluntarily, offered its friendship to the United States. Without being solicited, proposals were made for a treaty before the independence of the colonies was even recognized by Great Britain. A general authority was given to the commissioners abroad, Franklin, Adams, Jay and Laurens to conclude treaties of amity and commerce, but in the early part of the Revolution war, Congress did not direct applications specially to be made to any of the northern powers. And most of the other courts, to whom agents were sent, either refused to receive them, or contrived, under some pretext or other, to avoid all appearance of giving aid or countenance to the American Confederacy. This caution or indifference can not be matter of censure or surprise. Few European courts probably thought, at the commencement of the Revolution, that the colonies could prevail; few chose to take the risk of involving themselves in a maritime war with England. With the name of colonies, weakness and subjection were then naturally associated.

"The conduct of Sweden was marked with frankness, and with a very friendly character. America could not expect much aid from that country, or suppose that her example could have a great deal of influence on other nations. But it was highly gratifying that a State renowned as Sweden always has been, for the bravery and love of independence of her people, should manifest a sympathy in the arduous struggles for liberty of a distant country. The proposal for a treaty was entirely unsought for on the part of Congress. The only account, we possess of the transaction, is in one of the letters of Dr. Franklin. The Swedish minister at Paris, the Count de Creutz, called on him towards the end of June 1782, by the direction of his sovereign, Gustavus II., to enquire if he was furnished with the necessary powers to conclude a treaty with Sweden. In the course of the conversation he remarked, 'that it was a pleasure to him to think, and *he hoped it would be remembered*, that Sweden was the first power in Europe, which had voluntarily offered its friendship to

the United States without being solicited.' Dr. Franklin communicated the application of the Swedish envoy to Congress, and instructions were shortly after sent him to agree on a treaty. The treaty was concluded at Paris on the 3d April 1783, by Dr. Franklin with the Count Gustavus Philip de Creutz, and in its provisions it resembles others made, with the powers of Europe at that time. This is the only treaty we have with that country till 1816, but the most friendly relations have, however, been always maintained."

1 Lyman's Diplomacy of the United States, 447 et seq.
See, also, Davis's Notes, Treaty Vol. (1776–1887), 1398.

It was held by the Attorney-General in 1819 that Article VI. of the treaty between the United States and Sweden of April 3, 1873, in relation to rights of inheritance, applied to personal property only and not to real estate. His opinion was formally transmitted to the Swedish government, and is not known ever to have been questioned.

Wirt, At. Gen., July 30, 1819, 1 Op. 275; Mr. Wharton, Act. Sec. of State, to Mr. Stark, May 13, 1891, 181 MS. Dom. Let. 682.

Article VI. of the treaty of 1783 was revived by Article XII. of the treaty of September 4, 1819, and again by Article XVII. of the treaty of July 4, 1827. (Mr. Wharton, Act. Sec. of State, to Mr. Stark, May 13, 1891, 181 MS. Dom. Let. 682.)

It was also advised by Attorney-General Wirt, in the opinion above cited, that there was no power in the General Government to alter by treaty the laws of the several States with regard to the inheritance of real property, but this view has not been sustained by the courts. (Ibid.)

President J. Q. Adams's message of February 6, 1828, communicating to the Senate a treaty of commerce and navigation between the United States and His Majesty the King of Sweden and Norway, concluded at Stockholm on July 4, 1827, and the ratifications of which were exchanged on January 18, 1828, is given in 6 Am. State Papers For. Rel. 829.

As to the most-favored-nation clauses in this treaty, see supra, § 766.
As to the transportation of the remains of Capt. John Eriesson to Sweden, his native country, see For. Rel. 1890, 706, 707, 708, 714–720.

XXXIX. *SWITZERLAND.*

§ 890.

Article I. of the treaty of 1850, providing that citizens of the United States shall be at liberty to prosecute and defend their rights before courts of justice in Switzerland in the same manner as native citizens, gives the right to maintain an action against the government as such right is given to citizens of Switzerland.

Lobsiger's Case, 5 C. Cls. 687.
As to the right to take title to real estate under this treaty, see Hauenstein *v.* Lynham, 100 U. S. 483, 488; and supra, § 738.

Article II. of the treaty of 1850, which stipulates that "no higher impost" shall be "exacted from the citizens of one of the two countries, residing" in the other, "than shall be levied upon citizens of the country in which they reside, nor any contribution whatsoever to which the latter shall not be liable," applies to taxes on current premiums of insurance companies of the one country doing business in the other.

Mr. Hay, Sec. of State, to governor of Alabama, March 9, 1899, 235 MS. Dom. Let. 349.

XL. *TAHITI.*

§ 891.

By a declaration signed at London, June 19, 1847, France and Great Britain agreed formally to recognize the independence "of the islands of Huahine, Raitea, and Borabora, Leeward Islands of Tahiti, and the lesser islands dependent thereon." By a convention between Great Britain and France of November 16, 1887, as part of the settlement of the New Hebrides question, the declaration of 1847 was to be abrogated upon the withdrawal of the French military posts from the New Hebrides. This condition having been performed, the declaration of 1847 was formally terminated March 15, 1888; and on the 23rd of the same month the governor of Tahiti notified the acting United States consul and requested him to inform his Government that "all the islands composing the archipelago known as the Leeward Islands of Tahiti have now been placed under the full and entire sovereignty of France." The government of the United States did not in any way contest the annexation of the islands by France.

Mr. Foster, Sec. of State, to Mr. Lyons, Nov. 23, 1892, 189 MS. Dom. Let. 248.

The Queen of Tahiti, Pomare IV., by an instrument in writing dated July 26, 1839, gave to the United States certain land of which that Government, except for a short period, has since held undisputed possession, and which was used by the consular representative of the United States. Queen Pomare IV. lived till 1877, and there was nothing to show that after 1848 she had ever disputed the title of the United States to the land or laid any claim to it. (Mr. Cridler, Third Assist. Sec. of State, to Mrs. Salmon, Jan. 31, 1898, 225 MS. Dom. Let. 92.)

XLI. *TONGA.*

§ 892.

A treaty between the United States and the King of Tonga was concluded at Nukualofa, October 2, 1886. The ratifications were exchanged August 1, 1888, and the treaty was proclaimed on the 18th of the following September.

The United States never made provision for the exercise of the extraterritorial rights secured by the treaty.

By the convention between Germany and Great Britain, November 14, 1899, for the settlement of questions pending between them in regard to Samoa and certain other matters, Germany, among other things, "renounces in favor of Great Britain all her rights over the Tonga Islands, including Vivau, and over Savage Island, including the right of establishing a naval station and coaling station, and the right of extraterritoriality in the said islands." (For. Rel. 1899, 665; supra, § 110, I. 552–553.)

In the tripartite treaty between the United States, Germany, and Great Britain, December 2, 1899, by which the Samoan Islands were divided between the United States and Germany, no mention is made of Tonga.

See Mr. Hay, Sec. of State, to Lord Pauncefote, No. 1620, Nov. 29, 1899, MS. Notes to Brit. Leg. XXV. 14.

XLII. *URUGUAY.*

§ 893.

Uruguay is the only independent country in America with which the United States has never had a treaty.

For references to certain incidents in Uruguay see the General Index to the Published Volumes of the Diplomatic Correspondence and Foreign Relations of the United States, 1861–1899. See, also, For. Rel. 1900, 941.

XLIII. *VENEZUELA.*

§ 894.

The treaty of amity and commerce between the United States and Venezuela, concluded January 20, 1836, ceased, pursuant to a notice given by Venezuela, in accordance with its terms, to be effective on and after January 3, 1851.

January 14, 1859, a convention was concluded for the settlement of the Aves Island claims.

A treaty of amity, commerce, and extradition, concluded August 27, 1860, was terminated by Venezuela, by a notice given in conformity with its terms.

Davis' Notes, Treaty Volume (1776–1887), 1402.

As to controversies and claims conventions between the United States and Venezuela, see Moore, Int. Arbitrations, II. 1659–1724.

XLIV. *ZANZIBAR.*

§ 895.

"The existing treaty being the one signed with Muscat in 1833, to which the then Sultan (father of the present Sultan of Zanzibar) was a party, has, since the separation of Zanzibar from Muscat, been accepted, confirmed and announced by the Sultan of Zanzibar as effective and to be observed by him." Should a new treaty be concluded, the opportunity might be taken "to secure for the consular officers of the United States in Zanzibar the rights, immunities, privileges and jurisdiction of the consuls of the most favored nation," although it was not doubted that the Sultan, in consideration of the friendship that had existed between the United States and Zanzibar, would voluntarily accord any and all such rights and privileges to American consular officers.

Mr. Bayard, Sec. of State, to Mr. Cheney, consul at Zanzibar, No. 43, May 6, 1886, 117 MS. Desp. to Consuls, 515.

See, as to the relations of the United States to Zanzibar, Mr. Bayard, Sec. of State, to Mr. von Alvensleben, German min., May 6, 1886, MS. Notes to Germany, X. 435.

July 3, 1886, a treaty was concluded with the Sultan of Zanzibar in conformity with the foregoing instructions. It was approved by the Senate with two amendments. By the first there was stricken out, in the first line, Article II., after the word "consuls," the words "and consular agents." The effect of this was to limit the stipulated privileges to fully commissioned "consuls," by which term, however, was understood to be included a vice-consul, when acting as consul in the absence or incapacity of the consul. By the second amendment there were added, in line 4, Article II., after the word "shall," the words "in addition to the rights, powers, and immunities secured by said article," the purpose of the amendment being to make it clear that the American consuls in Zanzibar possessed specific as well as most-favored-nation rights, powers, and immunities.

Mr. Rives, Assist. Sec. of State, to Mr. Govea, No. 22, April 24, 1888, 125 MS. Inst. Consuls, 103.

"While Zanzibar was a part of the kingdom of Muscat, the probate and other judicial powers of our consul at the city of Zanzibar were determined by the treaty of 1833 between the United States and Muscat. But on the separation of Zanzibar from Muscat this treaty ceased to have any force in the seceded territory, and our relations with Zanzibar as an independent sovereignty have rested upon mutual good will and the general principles of international law and usage. The Sultan of Zanzibar has on several occasions expressed his willingness to adopt and abide by the Muscat treaty, but the Department has uniformly avoided acquiescence in that proposition, and has not been disposed to recognize the Muscat treaty as controlling our relations with Zanzibar, except as amended by the treaty signed July 3, 1886,

which was sent to you on the 24th ultimo for exchange of ratification. If this latter treaty shall be accepted by the Sultan, then by virtue of its express terms the Muscat treaty will be recognized as having been in force and as having controlled the relations of the two countries, from the beginning of the national existence of Zanzibar; but if the Sultan shall reject this treaty, the only recognition of the Muscat treaty which the United States has made will have become null and void and the relations of the two countries will be the same as they were before the negotiation of the pending treaty was begun.

"If, therefore, the new treaty goes into effect, the probate and consular court jurisdiction of our consul at Zanzibar will be determined by the Muscat treaty and the favored-nation clause. If the new treaty fails of adoption, the judicial powers of the said consul will be determinable only by international law and usage." (Mr. Rives, Assist. Sec. of State, to Mr. Govea, No. 23, May 2, 1888, 125 MS. Inst. Consuls, 186.)

The ratifications of the treaty of July 3, 1886, were exchanged June 29, 1888. (Treaty Volume, 1776–1887, p. 1209.)

The most-favored-nation clause in the treaty of July 3, 1886, "refers to the extent of jurisdiction, and does not make the laws of other governments rules of decision for our consular courts." (Mr. Wharton, Act. Sec. of State, to Mr. Moffat, Aug. 4, 1891, 182 MS. Dom. Let. 663.)

The United States acquiesced in the provisions of a draft ordinance framed by the British and German governments for restricting the importation of alcoholic liquors for the use of the native population of Zanzibar.

Mr. Sherman, Sec. of State, to Sir J. Pauncefote, British ambass., April 9, 1897, For. Rel. 1897, 257.

The United States is unable to make any change in the rates of duty and other charges prescribed in the treaty of September 21, 1833, except by a formal supplementary convention.

Mr. Sherman, Sec. of State, confid. promemoria, Nov. 8, 1897, MS. Notes to Br. Leg. XXIV, 58; Mr. Hay, Sec. of State, to Sir J. Pauncefote, No. 1338, Feb. 6, 1899, id. 437.

By a treaty between the United States and Great Britain, concluded May 31, 1902, an arrangement was made in regard to the establishment of import duties in that part of Zanzibar which is under British protection.

By a convention with Great Britain of February 25, 1905, the United States agrees to renounce "in the British protectorate of Zanzibar, and in that part of the mainland dominions of His Highness the Sultan of Zanzibar which lies within the protectorate of British East Africa," the extraterritorial rights secured to the United States by the treaty of September 21, 1833, between the United States and the Sultan of Muscat, and the treaty of July 3, 1886, between the United States and Zanzibar, it being agreed that British courts are to exercise jurisdiction. See supra, §§ 267, 786, 864.

XLV. *MULTIPARTITE TREATIES.*

§ 896.

"The provisions of the concluding paragraphs of the 11th article of the Universal Postal Convention of Paris reserve to the government of each country of the postal union the right to refuse to carry over its territory, or to deliver articles in regard to which the laws, ordinances, or decrees, which regulate the conditions of their publication or of their circulation in that country have not been complied with." Hence a law of the British government, excluding certain classes of publications from Great Britain, is not inconsistent with that convention.

Mr. Blaine, Sec. of State, citing Mr. James, Postmaster-General, to Mr. Ford, June 18, 1881, 138 MS. Dom. Let. 63.

A new Universal Postal Union Convention was signed at Washington June 15, 1897.

See Mr. Hay, Sec. of State, to Mr. Storer, No. 225, Feb. 2, 1899, MS. Inst. Belgium, III. 465; Mr. Hay to Postmaster-General, May 19, 1900, 245 MS. Dom. Let. 177; Mr. Adee, Second Assist. Sec. of State, to Postmaster-General, Oct. 28, 1897, 222 id. 68; same to same, Nov. 24, 1897, id. 643; Mr. Adee, Act. Sec. of State, to Postmaster-General, Sept. 28, 1898, 231 id. 512; Mr. Hay, Sec. of State, to Mr. Assis Brasil, Dec. 30, 1898, No. 5, MS. Notes to Brazilian Leg. VII. 182.

As to the ratifications of the various powers, see For. Rel. 1898, 1177–1181.

The British ratification included all the British colonies belonging to the union, except India, Canada, Cape Colony, Natal, and Australia. (For. Rel. 1898, 385.)

As to conventions for the protection of industrial property, see supra, § 181; Mr. Quincy, Act. Sec. of State, to Sec. of Interior, June 29, 1893, 192 MS. Dom. Let. 486; Mr. Hay, Sec. of State, to Sec. of Treasury, Feb. 2, 1901, 250 MS. Dom. Let. 519.

That the United States did not become a party to the International Sanitary Convention, concluded at Venice, March 19, 1897, which the United States delegate did not sign, see Mr. Day, Assist. Sec. of State, to Sec. of Treasury, Oct. 19, 1897, 221 MS. Dom. Let. 553; Mr. Moore, Assist. Sec. of State, to Sec. of Treasury, May 18, 1898, 228 id. 582.

As to the ratification of the convention for the publication of customs tariffs, see Mr. Wharton, Act. Sec. of State, to Mr. Terrell, No. 82, Aug. 19, 1890, MS. Inst. Belgium, III. 10.

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