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DOCUMENTS, PUBLISHED AND UNPUBLISHED, ISSUED BY PRESIDENTS AND SECRETARIES OF STATE OF THE UNITED STATES, THE OPINIONS OF THE ATTORNEYS-GENERAL, AND THE DECISIONS OF COURTS, FEDERAL AND STATE.

BY

JOHN BASSETT MOORE, LL. D.,

Hamilton Fish Professor of International Law and Diplomacy, Columbia University, New York; Associate of the Institute of International Law; Sometime Third Assistant Secretary of State and Assistant Secretary of State of the United States;

Author of a Treatise on Extradition and Interstate Rendition, of American Notes on the Conflict of Laws, of a History and Digest of International Arbitrations, of an Exposition of the Spirit and Achievements of American Diplomacy, etc.

IN EIGHT VOLUMES
(THE EIGHTH BEING INDEXICAL).

VOLUME IV.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1906.

CONTENTS OF VOLUME IV.

Chapter XIV.

EXTRADITION.

Chapter XV.

INTERCOURSE OF STATES.

CHAPTER XIII.

ALIENS.

I. *RIGHTS AND DUTIES.*

1. Personal Protection.

§ 534.

Aliens coming within our territory are entitled to the same protection in their personal rights as our own citizens and no more.

Butler, At. Gen., 1837, 3 Op. 254.
See Wharton, Confl. of Laws, 2nd ed., § 17 et seq.; People *v.* Warren, 11 N. Y. Cr. R. 433.

The principle of "placing the foreigner in regard to all objects of navigation and commerce upon a footing of equal favor with the native citizen," "is altogether congenial to the spirit of our institutions, and the main obstacle to its adoption consists in this—that the fairness of its operation depends upon its being admitted universally. . . . The United States have nevertheless made considerable advances in their proposals to other nations towards the general establishment of this most liberal of all principles of commercial intercourse."

Mr. Adams, Sec. of State, to Mr. Anderson, May 27, 1823, MS. Inst. Ministers, IX. 274, 290.
See Jurisdiction, supra, § 184.

"The right of citizens of the United States to resort to and transact affairs of business or commerce in another country, without molestation or disfavor of any kind, is set forth in the general treaties of amity and commerce which the United States have concluded with foreign nations, thus declaring what this Government holds to be a necessary feature of the mutual intercourse of civilized nations and confirming the principles of equality, equity, and comity which underlie their relations to one another. This right is not created by

treaties; it is recognized by them as a necessity of national existence, and we apply the precept to other countries, whether it be conventionally declared or not, as fully as we expect its extension to us."

Mr. Hay, Sec. of State, to Mr. Wilson, min. to Roumania, July 17, 1902, For. Rel. 1902, 910, MS. Inst. Roumania, I. 548.

April 14, 1834, Mr. McLane, Secretary of State, transmitted to the district attorney of the United States at New Orleans a certificate from the minister of foreign affairs of the Republic of Central America to the effect that Bernardo Conde, who, it was apprehended, was held in bondage at New Orleans, was a free citizen of that Republic. The district attorney was instructed to endeavor to discover Conde, and if he was found to be held in slavery to afford him such professional and other aid towards the recovery of his freedom as circumstances might justify, the expense, if any, to be charged to the Department of State.

Mr. McLane, Sec. of State, to Mr. Carleton, U. S. district attorney, April 14, 1834, 26 MS. Dom. Let. 227.

A reference to this case is made in a letter of the Secretary of State to the United States district attorney at Philadelphia, January 14, 1835. In this letter it is stated that no success had attended the efforts to find Conde in New Orleans, and, as it was understood that he came to the United States with a person who was supposed to be in Philadelphia, it was desired that inquiry should be made of that person, if he could be found, as to Conde's whereabouts. (Mr. Forsyth, Sec. of State, to Mr. Gilpin, U. S. dist. atty., Jan. 14, 1835, 27 MS. Dom. Let. 181.)

"In the exercise of civil rights exclusive of political capacity, our laws make no distinction between Guatemalans and foreigners."

Circular of the Guatemalan ministry of foreign relations, Sept. 13, 1888, 21, 1894, For. Rel. 1894, 317–331.

This circular refers to a previous circular of June 29, 1886, enjoining upon the authorities of the Republic the giving of telegraphic notice to the Government of any difficulty arising in regard to foreigners.

For a definition of the rights of aliens in Guatemala, see a decree of Feb. 21, 1894, For. Rel. 1894, 217–331.

See Mr. Uhl, Act. Sec. of State, to Mr. Young, No. 102, April 27, 1894, MS. Inst. Cent. Am. XX. 271.

As to the rights of foreigners in Mexico, see Consular Reports, 1883, No. 34, X. 688 et seq.

Referring to a report that the Government of Peru had declined to allow certain American miners to bring into the country their rifles and ammunition, necessary for self-defense in the wild country they intended to explore, the Department of State said: "It would seem that these miners go to Peru to engage in pursuits tending to develop the resources of the country. Their occupation necessarily carries

them to a wild and dangerous country, a fact which the Peruvian Government appears to admit. If under such circumstances Peru denies to such immigrants the right of self-protection, she logically asserts and assumes the right and the responsibility of their protection. It seems pertinent therefore to inquire what effective steps Peru has taken or is taking to protect these American citizens in the enjoyment of their treaty and civil rights."

Mr. Sherman, Sec. of State, to Mr. Neill, No. 244, June 15, 1897, MS. Inst. Peru, XVIII. 33.

During the war between China and Japan proclamations were issued by the Chinese Government and other special measures were adopted by it for the purpose of assuring protection to foreigners.

For. Rel. 1894, 127–134. See, particularly, id. 131–133.

As to a bill to provide for the punishment of violations of the treaty rights of aliens, see report of Mr. Foraker, from the Com. on Foreign Relations, Feb. 14, 1900, S. Rep. 392, 56 Cong. 1 sess.

With regard to a statement that the Spanish law prohibited the landing of foreign negroes in Cuba unless on the deposit of a guaranty of $1,000 as to the lawfulness of their purpose, Mr. Frelinghuysen, while declining to join in a general remonstrance to the Spanish Government in the absence of the application of the measure to a citizen of the United States, said that, if it should be so applied, the United States would "remonstrate against it as imposing a race discrimination not foreseen by treaty or recognizable under the amended Constitution. This Government always holds that its citizens abroad should receive equal treatment, without respect to race or creed."

Mr. Frelinghuysen, Sec. of State, to Mr. Hamlin, min. to Spain, No. 74, June 19, 1882, MS. Inst. Spain, XXIX. 139.

"Some states, few in number be it said, make distinction between different classes of citizens of the foreign state, denying to some [e. g., Hebrews] the rights of innocent intercourse and commerce which by comity and natural right are accorded to the stranger, and doing this without regard to the origin of the persons adversely affected. . . . This Government can lose no opportunity to controvert such a distinction, wherever it may appear. It can admit no such discrimination among its own citizens, and can never assent that a foreign state, of its own volition, can apply a religious test to debar any American citizen from the favor due to all."

Mr. Hay, Sec. of State, to Mr. Wilson, min. to Roumania, July 17, 1902, For. Rel. 1902, 911, MS. Inst. Roumania, I. 548.

2. Property Rights.

§ 535.

"There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to the protection of its sovereign by all the efforts in his power. This common rule of intercourse between all civilized nations has, between the United States and Spain, the further and solemn sanction of an express stipulation by treaty. In violation both of the common usage of nations and of the express promise of Spain in the treaty, nearly two hundred vessels and their cargoes, belonging to citizens of the United States, were seized, many of them within the territorial limits of Spain, and under the cannon of her fortresses, by French cruisers; and all of them were condemned within Spanish jurisdiction."

Mr. Adams, Sec. of State, to Mr. de Onis, Span. min., March 12, 1818, Am. St. Pap. For. Rel. IV. 468, 476.

The treaty stipulation referred to is Art. VI. of the treaty between the United States and Spain of Oct. 27, 1795.

As to the indemnity ultimately obtained, see Moore, Int. Arbitrations, V. 4487–4500.

In 1873, the Department of State, in proposing a revision of the naturalization treaties with the German States, suggested that there should be added such a provision as might be necessary under German laws to enable Germans, who had declared their intention to become citizens of the United States but had not yet become such, to inherit real and personal property in Germany. Mr. Bancroft, who was then minister to Germany, replied that the subject was already "exceedingly well regulated by the laws of Germany for Germans." In support of this he cited the case of Klatt, whose inheritance was held safely for him by the Prussian functionaries, who, when he could not be found and therefore could not appoint an agent, offered to pay the property over to an official of the United States.

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Germany, April 14, 1873; Mr. Bancroft, min. to Germany, to Mr. Fish, Sec. of State, May 8, 1873; For. Rel. 1873, I. 279, 281, 284, 289.

Art. V. of the treaty between the United States and Hayti of Nov. 3, 1864, was intended to protect citizens of the United States from any discriminations in matters of trade to the advantage of Haytian citizens. The Government of the United States consequently cannot acquiesce in the application to its citizens of a Haytian license law or decree that imposes such a discrimination, and will claim compen-

sation for any damages which may be sustained on account of the contribution required.

Mr. Fish, Sec. of State, to Mr. Bassett, No. 261, March 13, 1876, MS. Inst. Hayti, II. 75.

In the case of John Duffield, an American citizen, murdered in the Argentine Republic, July 29, 1877, who was said to have left some $12,000 in money, the American consul at Buenos Ayres reported that, unless the heirs presented their claims within a year from the decease, the money would under the local law be declared to have become the property of the state. On this report, Mr. Evarts instructed the minister of the United States at Buenos Ayres to say that, if the power practically to confiscate the estate could be exercised within so brief a period, the provisions of Article IX. of the treaty of 1853, as to the right of the consuls "to intervene in the possession . . . of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs," must have been agreed to under a very singular misunderstanding on the part of the United States as to the force and scope of Argentine laws, and that any local law, passed before or after the treaty, which should operate or be held to operate to sequester for the state "with such unseemly haste" the effects of American citizens dying or murdered there, "must be looked upon as hostile to the true animus of the provisions of Article IX. of the treaty and to the preservation of harmonious relations between the two countries."

Mr. Evarts, Sec. of State, to Mr. Osborn, No. 101, Feb. 4, 1879, MS. Inst. Argentine Repub. XVI. 154.

The local authorities of the State of New York are vested with exclusive control over property of decedents in that State, and no functionary of the Government of the United States can properly interfere in any such matter. By Article X. of the treaty between the United States and Russia of 1832, Russian subjects may inherit the personal estate of decedents in the United States and may take possession thereof, by themselves or by others; and, if the heirs are absent, the property is to be taken care of till it is claimed by them. The function of taking care of it is not vested in the Department of State, but, judging by the course generally pursued by the United States in such matters, the most proper and effective course with regard to property in New York claimed by Russian heirs would seem to be for the Russian Government to instruct its consul-general at New York in regard to the matter. There is no officer of the Department of State at New York who could be required to attend to it, and no other person of whom it would be expedient to ask such a favor.

Mr. Evarts, Sec. of State, to Mr. Boker, min. to Russia, No. 109, Nov. 9, 1877, MS. Inst. Russia, XVI. 37.

Alienage does not impair one's property in a trade-mark, and may give him a personal right to sue in the circuit court for an infringement.

La Croix *v.* May, 15 Fed. Rep. 236.
See Wharton's Confl. of Laws, 2nd ed., § 17 et seq.

3. Judicial Remedies.

§ 536.

The policy of the United States in all cases of complaints made by foreigners is to extend to them the same means of redress as is enjoyed by our own citizens.

Cushing, At. Gen., 1855, 7 Op. 229.
See Wharton, Confl. of Laws, § 17 et seq.

In the courts of the United States alien friends are entitled to claim the same protection of their rights as citizens.

Taylor *v.* Carpenter, 3 Story, 458.
Especially will such protection be extended in case of fraud. (Rush, At. Gen., 1816, 1 Op. 192.)
See, as to the removal of causes to the circuit court, under the act of Aug. 13, 1888, New Orleans, Ft. J. & G. I. R. Co. *v.* Rabasse, 10 So. 708.
See, also, State *v.* Chue Fan, 42 Fed Rep. 865.

A nonresident British subject may maintain an action for libel against the proprietors of a newspaper in the city of New York.

Crashley *v.* Press Pub. Co. (1904), 179 N. Y. 27, 71 N. E. 258.

The right of aliens in the United States to sue in the Federal courts is not affected by the fact that they reside here.

Breedlove *v.* Nicolet, 7 Pet. 413.

The United States is not responsible for the acts of private trespassers; they must be punished in the tribunals established by law, or be prosecuted for the recovery or value of the goods, either in the State or Federal courts.

Nelson, At. Gen., 1844, 4 Op. 332, holding that an invasion of a custom-house in Texas by citizens of Arkansas, and the violent abstraction therefrom of property, under a claim of title, constituted no ground of claim against the United States.

"While the Government will always regret that any citizens of the United States abroad should misbehave, and especially be charged with crime, the Government to which they owe allegiance is not held legally accountable therefor. The aggressors, however, may be prosecuted for damages in the courts, and made answerable to the extent of their means."

Mr. Fish, Sec. of State, to Mr. Mariscal, Mex. minister, Jan. 3, 1874, MS. Notes to Mexico, VIII. 9.

By Art. XI. of the treaty of peace between the United States and Spain of December 10, 1898, the United States was obliged to see that Spaniards in Cuba had the same rights of appearance and of procedure in Cuban courts as citizens of Cuba; but this did not render it unlawful to allow them as aliens more liberal modes of appearance or of procedure than could be claimed by citizens of the country.

Griggs, At. Gen., April 26, 1900, 23 Op. 93.

The right to a jury *de mediatate*, allowed in England to aliens, is one to be determined by the laws there: and if, by the laws of England, a native-born subject can never throw off his allegiance, it is not a violation of public law for the English courts to refuse this right to such a person, though he has been naturalized in the United States.

Stanbery, At. Gen., 1867, 12 Op. 319.

Alienage of a defendant is not to be presumed from the mere fact that he is the consul in this country of a foreign Government.

Börs *v.* Preston, 111 U. S. 252.

By Art. VI. of the treaty between the United States and Hayti of Nov. 3, 1864, the citizens of the one country are guaranteed free access to the tribunals of justice of the other on the same terms as natives.

By Art. IX. of the same treaty the right is secured to the citizens of each contracting party within the jurisdiction of the other "to dispose of their personal property by sale, donation, testament, or otherwise."

It was maintained by the United States, and was afterwards determined by arbitration, that by these stipulations a citizen of the United States was entitled to damages for the denial to him by the Haytian courts of the right, which belonged to a Haytian citizen, to release himself from imprisonment for debt by an assignment for the benefit of his creditors.

Case of Van Bokkelen, Moore, Int. Arbitrations, II. 1807–1853.

In 1883 the United States declined to consider favorably a proposal for a conventional provision that indigent Italians should have gratuitous defence in criminal and civil proceedings in America in the same manner as indigent aliens in Italy. The proposal was declined on the ground that provision was already made by State laws—certainly in some of the States—for suits by aliens as well as by citizens *in forma pauperis*, and that is was not competent for the Federal Government to impose an obligation of that nature on the several States by treaty stipulation.

Mr. Frelinghuysen, Sec. of State, to Marquis Dalla Valle, March 9, 1883, MS. Notes to Italy, VIII. 27.

"Mr. Coleman's very full and interesting dispatch No. 504, of the 16th ultimo [For. Rel. 1887, 399], relative to the right of American citizens to litigate *in forma pauperis* in Germany and of American plaintiffs in general to sue in Germany without furnishing security for costs, has been read with satisfaction.

"The question whether a foreigner can sue in the United States *in forma pauperis*, and thus be relieved from giving security for costs, can be answered by the Department generally in the affirmative, without applying to the several States for information. The right was given under certain limitations to all poor persons by 11 Hen. VII. c. 12, and 23 Hen. VIII. c. 15; statutes which our colonists brought with them as part of the common law, when not expressly re-enacted. It may be safely asserted that there is no State in which the right does not exist, and in which it is not granted to foreigners. (See Whar. Conf. of Laws, 817.)

"In the Federal admiralty courts any person whatsoever on proof of disability can be relieved from giving security for costs. (Wheatley *v.* Hotchkiss, 1 Sprague, 225; Collins *v.* Hathaway, Olc. 176.)

"It is true that the general practice is to require from aliens security for costs. But this is at the discretion of the court, and is exercised in meritorious cases in subordination to the above principle."

Mr. Bayard, Sec. of State, to Mr. Pendleton, min. to Germany, No. 254, Oct. 15, 1887, For. Rel. 1887, 401.

"It is hardly necessary to say that the question of how far Germans can sue *in forma pauperis* is determined by the *lex fori*, which, under our Constitution, it is not within the province of the Federal Government to settle by any general law." (Mr. Bayard to Mr. Pendleton, No. 249, Aug. 30, 1887, For. Rel. 1888, I. 19.)

As to the provisions made in Austria-Hungary, by law and also by treaty, for suits *in forma pauperis*, and the enjoyment of the privilege by aliens on condition of reciprocity, see For. Rel. 1888, I. 20 et seq.

4. Submission to the Laws.

§ 537.

Foreign officers, not diplomatic agents, are not privileged from arrest or suit in the United States.

Bradford, At. Gen., 1794, 1 Op. 49.

If a foreigner have a defense under a treaty, he must plead it, like any other defense, in the usual course of judicial proceedings, and until the regular course of such proceedings shall have failed to do justice to him there can be no just ground of complaint to the President.

Bradford, At. Gen., 1794, 1 Op. 49.

The judicial power of a nation extends to every person and every thing in its territory, excepting only such foreigners as enjoy the right of extraterritoriality, and who, consequently, are not looked upon as temporary subjects of the state.

Lee, At. Gen., 1799, 1 Op. 87.

The estates of foreigners dying in the United States are settled by the local authorities. The consul of the decedent's country can intervene of right only by way of surveillance, and without jurisdiction.

Cushing, At. Gen., 1856, 8 Op. 98.

Aliens domiciled in the United States owe to the Government a local and temporary allegiance, which continues during the period of their residence, and for the violation of which they may become liable to prosecution for treason, just as a citizen.

Carlisle *v.* United States, 16 Wall. 147.

Cotton owned by a British subject, although he never came to this country, was, if found during the rebellion within the Confederate territory, a legitimate subject of capture by the forces of the United States, and the title thereto was transferred to the Government as soon as the property was reduced to firm possession.

Young *v.* United States, 97 U. S. 39.

Aliens residing in the United States are as much responsible for breach of neutrality laws as are citizens; aliens while within our jurisdiction and enjoying the protection of the laws, being bound to obedience to them, and to avoid disturbances of our peace within, or acts which would compromit it without, equally as citizens are.

Mr. Jefferson, Sec. of State, to Mr. Genet, June 5, 1793, Am. State Pap. For. Rel. I. 150; 1 Wait's St. Pap. 2nd ed. 80.

"Aliens in general, being within our limits and jurisdiction, are bound to respect our laws, and can not exact any other mode of promulgation than that which is marked out for the information of our own citizens."

Mr. Randolph, Sec. of State, to Mr. Hammond, Brit. min., April 13, 1795, 8 MS. Dom. Let. 125.

"This morning the *Aurora* presented to the public the inclosed notification from Mr. Adet to all faithful French citizens to wear the tricoloured cockade. It is recollected that the newspapers lately announced the permission, by the King of Prussia, to French citizens, not become his subjects, but resident in his dominions, to wear their national cockade. Probably the measure may be a general one, pursuant to the orders of the Directory; and a passage in the notification authorizes this idea." (Mr. Pickering, Sec. of State, to Mr. C. C. Pinckney, Nov. 5, 1796, MS. Inst. U. States Ministers, III. 288.)

"The authority which every sovereign has over the conduct of aliens within his territorial jurisdiction, makes him responsible to others for their conduct, as much, and for the same reason, as he is responsible for the conduct of permanent citizens or subjects."

Mr. Madison, Sec. of State, to Mr. Charles Pinckney, Oct. 25, 1802, Am. St. Pap. For. Rel. II. 478.

See, also, same to same, Feb. 6, 1804, Am. St. Pap. For. Rel. II. 615; and Mr. Madison to Mr. Monroe, Oct. 26, 1804, id. 631, 632.

This correspondence related to the question of Spain's liability for condemnations of prizes by French consuls within Spanish jurisdiction. See Moore, Int. Arbitrations, V. 4487–4500, where an account is given of the indemnity obtained by the United States under Art. IX. of the treaty of 1819, in these and other cases.

In connection with the foregoing extract, Dr. Wharton, in his International Law Digest, makes the following comment: "A sovereign who directs a subject to enter a foreign state and there inflict injuries is liable to such foreign state for the injuries. But there is no liability for offenses not so directed." (II. 506.)

"Every foreigner born, residing in a country, owes to that country allegiance and obedience to its laws as long as he remains in it, as a duty imposed upon him by the mere fact of his residence, and the temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country."

Mr. Webster, Sec. of State, report to the President, Dec. 23, 1851, 6 Webster's Works, 521, 526. This report (Thrasher's case) is not on record in the Department of State.

"If a native-born citizen of the United States goes into a foreign country and subjects himself to a prosecution for an offense against the laws of that country, this Government cannot interfere with the proceedings, nor can it claim any right to revise or correct the errors of such proceedings, unless there has been a willful denial of justice, or the tribunals have been corruptly used as instruments for perpetrating wrong or outrage.

"This Government is in the daily practice of trying and punishing the subjects of other states for offenses committed here. Those states have no right nor would they be allowed to interfere with our proceedings against their subjects, upon any other ground than a willful denial of justice, or a corrupt perversion of judicial proceedings for the purpose of wrong or oppression.

"Koszta, it will be recollected, did not return to Austria or any of its dominions, but its officers attempted to seize him in a foreign country without any right to do so. Had Koszta been within the jurisdiction of Austria when he was seized, the whole character of

the case would have been changed, and the forcible taking of him from the legal custody of Austrian officers could not have been defended on any principle of municipal or international law.

"The doctrine laid down in the Koszta case is regarded by this Government to be sound, and will be maintained whenever an occasion for asserting it shall arise."

Mr. Marcy, Sec. of State, to Baron de Kalb, July 20, 1855, 44 MS. Dom. Let. 212.

As to Koszta's case see supra, §§ 490, 491.

If an alien, on going into a country, sees that the former government has been expelled or overturned by revolution and a new one set up in its place, he must submit to the authority thus established. "Nay, he has no choice; the government *de facto* will compel his obedience. . . . Besides, if he resists the authority of the party in possession on the ground that another has the right of possession, he departs from his neutrality, and so violates the duty he owes to both the belligerents as well as to the laws of his own country."

Mr. Cass, Sec. of State, to Mr. Clay, min. to Peru, Nov. 26, 1858, MS. Inst. Peru, XV. 243.

This instruction is quoted more fully, supra, § 64.

"Every independent state has the right to regulate its internal concerns in its own way, taking care to avoid giving just cause of offense to other nations. In almost all the European states there are police and administrative powers exercised by the governments, which enable them to exert a very arbitrary authority over residents, whether natives or foreigners. When our citizens enter those countries, they enter them subject to the operation of the laws, however arbitrary these may be, and responsible for any violation of them. Our treaty with Prussia recognizes this obligation, and provides that the inhabitants of each of the said countries shall be at liberty to reside in the territories of the other party, and shall enjoy the same security and protection as natives, 'on condition of their submitting to the laws and ordinances there prevailing.'"

Mr. Cass, Sec. of State, to Mr. Wright, Dec. 10, 1858, S. Ex. Doc. 38, 36 Cong. 1 sess. 116, 117, where the full text of the instruction is given.

"Arrests, of strangers especially, on mesne process, are more or less oppressive in appearance; but if they are sanctioned by the local law, it must be presumed that they are deemed necessary for the ends of justice, if regularly made. If they are made for malicious purposes, the law usually provides a remedy."

Mr. Seward, Sec. of State, to Mr. Culver, Dec. 2, 1964, MS. Inst. Venez. I. 318.

"The general principle is supposed to be clear that a foreigner who of his own accord settles in a country, accepts the condition and liabilities, in peace and in war, of a native of that country.

"No government can be expected to relinquish its right of jurisdiction over all such persons within its territory, unless that relinquishment shall have been made by special compact, such as the treaties between Christian states and those professing the Mahomedan and other religions."

Mr. Seward, Sec. of State, to Mr. Burton, No. 155, Sept. 27, 1866, MS. Inst. Colombia, XVI. 200.

See also Mr. Seward to Mr. Crosby, July 20, 1863, MS. Inst. Am. States, XVI. 343.

As to the privilege of extraterritoriality in Oriental countries, see supra, § 269 et seq.

"That the fact of American citizenship could, of itself, operate to exempt anyone from the penalties of a law which he had violated, is, of course, an untenable proposition. Conversely, however, the proposition that a retroactive law, suspending at will the simplest operations of justice, could be applied without question to an American citizen, is one to which this government would not give anticipatory assent."

Mr. Blaine, Sec. of State, to Mr. Lowell, min. to Gr. Brit., May 26, 1881, For. Rel. 1881, 530.

"Every person who voluntarily brings himself within the jurisdiction of the country, whether permanently or temporarily, is subject to the operation of its laws, whether he be a citizen or a mere resident, so long as, in the case of the alien resident, no treaty stipulation or principle of international law is contravened."

Mr. Blaine, Sec. of State, to Mr. O'Connor, Nov. 25, 1881, 139 MS. Dom. Let. 663. See also Mr. Blaine, Sec. of State, to Mr. Piatti, Dec. 6, 1881, 140 MS. Dom. Let. 86.

"You are doubtless perfectly familiar with the principles of law governing all civilized nations which subject either an alien or a citizen to the operation of the laws of the country wherein he is sojourning. If an alien, while within the United States, violates a law here in force, he is liable to arrest and punishment according to the local practice, and because of his foreign citizenship he has no privileges or immunities other than those enjoyed by a citizen of this Republic. So a citizen of the United States, having here committed an offense criminal under our statutes, is subject, whenever he shall come within the jurisdiction of the proper court, to the prescribed penalty, notwithstanding any after-acquired citizenship abroad."

Mr. Frelinghuysen, Sec. of State, to Mr. O'Reilly, Dec. 10, 1884, 153 MS. Dom. Let. 394.

With reference to a complaint that the governor-general of Cuba had issued a decree suspending civil proceedings before the courts during one year, so that a mortgage could not be foreclosed, the Department of State said:

"The stay of civil proceedings in courts is not unprecedented in the history of this and foreign countries. Whether such suspension of civil proceedings in the courts of Cuba is lawful or unlawful can not be determined upon the facts now before the Department. When all the facts and circumstances are known, the Department will take such action, if any, as the conditions warrant in behalf of citizens of the United States whose interests may be affected. Our citizens have no greater rights in the Cuban courts than Spanish subjects (see Article XX. of the treaty of 1795 with Spain, copy of which is enclosed)."

Mr. Olney, Sec. of State, to Mr. Lange, June 2, 1896, 210 MS. Dom. Let. 452.

Political offenses.

It is within the prerogative of each sovereign to punish political offenses in his country by aliens, whether such offenses are seditious or violent acts or publications inciting thereto.

Mr. Bayard, Sec. of State, to Mr. Jackson, Aug. 5, 1885, MS. Inst., Mex. XXI. 355. See Mr. Bayard, Sec. of State, to Mr. Carasco, June 16, 1885, 156 MS. Dom. Let. 11.

In this relation Wharton, in his Int. Law Digest, II. 509, says: "Sir R. Phillimore (445), differing in this respect from Heffter (§ 58), holds that, 'as a general proposition, a man can have only one allegiance.' But I must agree with Heffter in holding that a mere resident in a state owes, for the time being, allegiance to such state, and may be guilty of treason to such state if, as a private person, he wages war against it, or renders comfort to its enemies. Cobbett, for instance, when in the United States, was never naturalized, nor did he ever restrain himself from declaring that he was and meant to continue to be a British subject; yet no one would have pretended that Cobbett, while residing in the United States, was not liable to be indicted for all offenses, political or otherwise, made indictable in the place of his residence. The same position has been, as we have seen, taken by the British Government in respect to citizens of the United States who, when residing in Ireland, have been engaged in conspiracies against the British Government. The question, however, may be merely of the meaning of words, since Sir R. Phillimore, in the next page to that from which the above passage is cited, says: 'All strangers commorant in a land owe obedience, as subjects for the time being, to the laws of it.' That the home sovereign has allegiance due him from such persons is maintained by all civilized states, there being no such state which does not maintain its right to levy taxes on such persons, and to hold them responsible for all offenses committed by them against its sovereignty. (Whart. Crim. Law (8th ed.), §§ 269 *ff.* 281; Phill. 455; Van Wyck, De delictis extra regni territ. commiss., Utrecht, 1839.)"

"An interesting question arises when a foreigner is indicted for a political offense which he is required to commit by his own sovereign. In such a case the command of the foreign sovereign is no defense. If the defendant, in such a prosecution, is convicted in violation of the law of nations, it is the duty of the executive to interfere with a pardon. If this is impracticable, the question is one for international adjustment. A foreigner cannot say that he is not bound to obey the laws of the state where he is sojourning. But if the act for which he is convicted is one enjoined by his own sovereign, then that sovereign must be held responsible."

Wharton, Int. Law Digest, II. 509, citing Whart. Com. Am. Law, § 178; Whart. Confl. of Laws, §§ 819, 820; Whart. Crim. Law (8th ed.), §§ 269, 281; chap. i., Holtzendorff, 1215; Bonfils, De la competence des tribunaux français à l'egard des Etrangers, 1865; Ueber die Fehler des Franz. Civilrechts bezüglich der Fremden.

As to compulsion by *de facto* sovereign as a defense, see Whart. Crim. Law (8th ed.), §§ 94, 283, 310; Ford *v.* Surget, 97 U. S. 594, cited in Whart. Com. Am. Law, § 210.

As to conflicts of criminal jurisprudence, see Whart. Com. Am. Law, §§ 350 et seq.

March 30, 1897, the American minister at Seoul was directed to communicate by a circular to each and every citizen of the United States, whom he might know or ascertain to be sojourning in Corea, "the repeatedly expressed view of the Government of the United States that it behooves loyal citizens of the United States in any foreign country whatsoever, to observe the same scrupulous abstention from participating in the domestic concerns thereof, which is internationally incumbent upon his Government. They should strictly refrain from any expression of opinion or from giving advice concerning the internal management of the country, or from any intermeddling in its political questions. If they do so, it is at their own risk and peril. Neither the representative of this Government in the country of their sojourn, nor the Government of the United States itself, can approve of any such action on their part, and should they disregard this advice it may perhaps not be found practicable to adequately protect them from their own consequences. Good American citizens quitting their own land and resorting to another, can best display their devotion to the country of their allegiance, and best justify a claim to its continued and efficient protection while in foreign parts, by confining themselves to their legitimate avocations, whether missionary work or teaching in schools, or attending the sick, or other calling or business for which they resort to a foreign country."

Mr. Sherman, Sec. of State, to Mr. Sill, min. to Corea, No. 179, March 30, 1897, MS. Inst. Corea, I. 590.

Martial law.

When New Orleans was governed, during the late Civil War, by martial law, a subject of a foreign power entering that port with his vessel under the special license of the proclamation, became entitled to the same rights and privileges accorded under the same circumstances to loyal citizens of the United States. Restrictions placed upon them operated equally upon him.

United States *v.* Diekelman, 92 U. S. 520.
See supra, § 196.

A resident alien owes such obedience to the laws of the country in which he resides, whether municipal or military, as a citizen. Where one resident in New Orleans transmits money across the lines to an agent to buy cotton, no valid title is acquired.

Queyrouze's case, 7 Ct. Cls. 402.

"I notice that Major-General Butler is represented to have required certain oaths from foreigners at New Orleans. Though his general right pursuant to martial law to make any exactions which he may deem necessary for the peace and safety of the district under his command can not be questioned, the expediency of requiring oaths from those who do not owe a permanent allegiance to the Government is so doubtful that I am directed by the President to request you to order him to discontinue that practice for the future and to cancel any such obligations which may have been compulsorily contracted. Foreigners owe temporary allegiance to the authorities wherever they may reside. From this nothing but a treaty stipulation can absolve them. In general, however, it is best to presume that they will observe this allegiance. If, however, they disregard it, the particular acts by which this disregard may be shown are liable to punishment by the civil or, if this should be silent or inadequate, by martial law. It is preferable for the maintenance of harmonious relations with foreign powers that misconduct on the part of their citizens or subjects within our jurisdiction should not be anticipated, but that its actual development should be awaited. When it shall have occurred, is notorious in particular instances or shall be susceptible of due proof, their Governments can not reasonably complain if the guilty parties are punished in proportion to their offense. This Department having been officially apprised by the British legation here that Mr. Coppell had been duly appointed acting British consul at New Orleans, I will again thank you to direct General Butler to respect his official acts accordingly. It is to be regretted that the General should have deemed it advisable to issue a certain order, in consequence of which that gentleman deemed it necessary formally to relinquish his consular functions. He has been requested through the British legation here to resume them."

Mr. Seward, Sec. of State, to Mr. Stanton, Sec. of War, June 24, 1862
57 MS. Dom. Let. 389.

"I have further to state that military commissions and courts-martial take cognizance of and try complaints against all classes of persons, citizens of the United States as well as foreigners, without any discrimination on the ground of their citizenship or want of citizenship, other than such discrimination as holds citizens to full obligations of a perfect allegiance to the United States, while all the rights which specially belong to domiciled or transient aliens, as such, under the law of nations, are observed and respected."

Mr. Seward, Sec. of State, to Lord Lyons, Brit. min., Apr. 20, 1864, Dip. Cor. 1864, II. 591, 592.

This note referred to previous correspondence between the Department of State and the British legation concerning a military commission appointed to investigate the cases of persons under arrest at Fort Lafayette and Fort Warren. Lord Lyons stated that if New York and Boston were under martial law, and the ordinary forms of civil trial were suspended universally and without exception or distinction of persons, British subjects brought before the military commission were "in the same condition as native citizens," and Her Majesty's Government might refrain from remonstrance on the subject; but a more explicit statement was desired as to "whether martial law universally prevails at New York and Boston, and whether it suspends for all persons equally, citizens as well as foreigners, the right of being tried before the ordinary civil tribunal." (Dip. Cor. 1864, II. 591.) Mr. Seward, in reply to this inquiry, enclosed a copy of the President's proclamation of September 15, 1863, and stated further "that military commissions and courts-martial are instituted and appointed to inquire into and decide cases of the classes in regard to which the privilege of the writ of habeas corpus is suspended by the above-mentioned proclamation, and no other cases." Then follows the passage above quoted from Mr. Seward's note to Lord Lyons.

See, also, memorandum of conversation between Mr. Seward, Sec. of State, and Lord Lyons, Brit. min., May 30, 1862, Dip. Cor. 1862, 259; Mr. Seward to Lord Lyons, Feb. 7, 1863, Dip. Cor. 1863, 449-451; same to same, June 11, 1863, id. 573.

5. Paupers and Insane.

§ 538.

While "the conspicuous liberality of our sanitary and eleemosynary institutions, which places the suffering stranger on a perfect equality with our citizens, is well known," yet, where an alien was treated and discharged as cured by an insane asylum in the United States, but, after returning to his own country, again became insane, it was declared that an attempt to send him back to the United State would be an act "unfriendly and abusive of the hospitality" which he had already received—an act with which it was not thought likely that the authorities of his country would associate them-

selves; but instructions were given, in case such an attempt should be made, to remonstrate and take measures to thwart the scheme.

Mr. Rives, Act. Sec. of State, to Mr. Pendleton, min. to Germany, No. 368, Oct. 11, 1888. MS. Inst. Germany, XVIII. 158.

See Mr. Moore, Act. Sec. of State, to the Governor of Massachusetts, April 28, 1898, 228 MS. Dom. Let. 74.

As the Government of the United States has no funds at its disposal to bring back to the United States an indigent American citizen, and has thus been compelled to decline requests made by foreign governments, it can not ask a foreign government to assume the expense of taking back one of its citizens or subjects who has become a public charge in the United States.

Mr. Day, Assist. Sec. of State, to Mr. Harbarger, Sept. 15, 1897, 221 MS. Dom. Let. 7.

The same reply was made to a request that the Government of the United States should ascertain the conditions on which the Swedish Government would take back to Sweden a leper, a native of that country, who had become a charge in the United States on the community in which he lived. (Mr. Day, Assist. Sec. of State, to Mr. Flaten, Sept. 28, 1897, 221 MS. Dom. Let. 231.)

"In diplomatic correspondence this Department has been careful to lay down the principle that the Federal or State authorities are under no obligation to bring back from foreign countries any citizens there found impoverished or diseased in body or mind, inasmuch as the charitable institutions of the United States are open to all native or foreign citizens needing relief."

Mr. Sherman, Sec. of State, to the Governor of Illinois, Nov. 17, 1897, 222 MS. Dom. Let. 482.

See Grim *v.* Haycock Township, 1 Pa. Dist. R. 815.

"The mental status of a person whose actions suggest unsoundness of mind is commonly a proper subject for determination in conformity with local law by the authorities of the place where he may be found. There is no warrant for asking that such a person be sent back to his own country for legal adjudication of his condition."

Mr. Wharton, Act. Sec. of State, to Mrs. Goerdeler, Aug. 19, 1891, 183 MS. Dom. Let. 90.

Goerdeler, her husband, had challenged the German Emperor to fight a duel and done various other things. He also insinuated that the President and his advisers had been improperly induced to neglect him by certain relations who sought to obtain his property.

"However deeply the Department may sympathize with you as to the unfortunate mental condition of your husband, the fact remains that he [Goerdeler] has been legally adjudged insane by competent authority pursuant to German law, and that his present confinement is under full observance of all legal requirements." (Mr. Foster, Sec. of State, to Mrs. Goerdeler, Sept. 15, 1892, 188 MS. Dom. Let. 184.)

See dispatch from the legation at Berlin, No. 475, Aug. 27, 1892, 53 MS. Desp. Germany.

6. Corporations.

§ 539.

By "the law of comity among nations, a corporation created by one sovereign is permitted to make contracts in another," and to sue and be sued in its courts; and this rule prevails in the United States and between the States thereof.

Bank of Augusta *v.* Earle, 13 Pet. 519; Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527; Société Foncière *v.* Milliken, 135 U. S. 304; Wilson *v.* Martin-Wilson Fire Alarm Co., 149 Mass. 24; Lancaster *v.* A. I. Co., 140 N. Y. 576; Watson *v.* Richmond & D. R. Co., 91 Ga. 222; A. T. & S. F. R. Co. *v.* Fletcher, 35 Kan. 236; Taylor *v.* Trust Co., 71 Miss. 694; Missouri Lead M. & S. Co. *v.* Reinhard, 114 Mo. 218; Cone Co. *v.* Poole, 41 S. C. 70; Lytle *v.* Custead, 4 Tex. Civ. App. 490; Humphreys *v.* Newport News & M. V. Co., 33 W. Va. 135.

The rule that the capacity of private individuals, British subjects, to hold lands or other property in this country was not affected by the Revolution, includes in its protection corporations, even such as consist of British subjects, and exist in their corporate capacity in England.

Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464.

See, as to effect of the war of 1812 on prior treaties in this respect, Mr. Bayard, Sec. of State, to Mr. Lehman, June 23, 1885, 156 MS. Dom. Let. 80.

The right to exclude foreign corporations, or to admit them on prescribed terms and conditions, is subject, in the case of the States of the American Union, to the qualification that the limitation imposed on the right to contract does not invade the exclusive power of Congress to regulate commerce.

Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 734; Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

It should be observed that, while it is generally laid down that foreign corporations may be altogether excluded, or may be admitted on such terms and conditions as a State may think proper to impose (Paul *v.* Virginia, 8 Wall. 168, 181), the rule must be considered as varying in its force and application with the character of the corporation. An attempt in these days to enforce a general exclusion against ordinary trading and manufacturing corporations, to the extent of prohibiting them from making contracts, probably would be found to involve something more than an ordinary question of "comity."

See, as to the capacity of corporations, Dicey, Conflict of Laws, 485–489.

In a note of the Italian minister for foreign affairs to the American embassy at Rome in July, 1899, it was stated that two opinions prevail in Italy as to the status and capacity of foreign corporations,

some writers holding that civil "recognition" of them is necessary to enable them to exercise their powers in Italy, while others hold that a new "recognition" is useless and even contrary to the principles of international law accepted in Italian legislation. The ministry of grace and justice had followed the latter opinion, but some of the courts had lately taken the former view. The case had not yet been passed upon by the court of cassation. It was stated that if that court should take the view that a recognition was necessary, the ministry of grace and justice would consider whether in the pending case a "formal and explicit recognition" should be granted to the corporation in question. The case referred to was that of the Missionary Society of the Methodist Episcopal Church, a New York corporation having an office in Rome. It was seeking to obtain possession of a legacy left to its presiding elder by an Italian subject for the purpose of building an evangelical school in San Marzano.

For. Rel. 1899, 408–411.

7. Taxation.

§ 540.

"As a general rule, the power to impose taxes [in this instance, to include in the levy of income taxes, in Germany, citizens of the United States there resident] is an attribute of sovereignty, and where the person or the property in question is a proper subject of taxation, the species of tax and the amount which should be collected may fairly be left to the State or Government exercising this power."

Mr. Fish, Sec. of State, to Mr. Davis, No. 29, Nov. 21, 1874, MS. Inst. Prussia, XV. 566.

See supra, § 183.

"The levying of a tax, however, by a foreign government upon property within its jurisdiction, whether belonging to American citizens or not, is not a reason for the interposition of this government when the tax is in other respects properly imposed."

Mr. Cadwalader, Assist. Sec. of State, to Mr. Melizet, Mar. 16, 1875, 107 MS. Dom. Let. 172.

"This Government has not demanded for its citizens, domiciled and carrying on business in Cuba, exemption from the payment of their ordinary and just share of the general burdens of taxation, which, for proper subjects, and within proper limits, may be assessed against them, but the act of the authorities in the Island of Cuba, in forcibly seizing property of citizens of the United States—in compelling private citizens at their own expense to erect fortifications

upon their property, or in compelling the payment of a contribution assessed for a similar purpose by a military authority or by some self-constituted committee—if correctly represented to this Government, partake of the character of military exactions, possible only in a state of war, and like them appear to have been enforced by military power, without recourse to the usual machinery by which taxation is imposed or collected. It can not, I think, be doubted that such arbitrary acts of force, which compel private individuals to give up their property or to expend such money and labor for the Spanish Government, and to do that service which a government, in general, performs at the public expense, can in no respects be called taxation and can not be justified in time of peace, nor will it be doubted that if enforced they will give rise to a valid claim for compensation and indemnity."

Mr. Fish, Sec. of State, to Mr. Mantilla, Jan. 11, 1876, MS. Notes to Spain, IX. 414. See infra, § 1034.

"Foreigners who have chosen to take up their residence, to purchase property, or to carry on business in a foreign country, thereby place themselves under the jurisdiction of the laws of that country, and may fairly be called upon to bear their fair share of the general public burdens, when properly imposed upon them and other members of the community alike. As a general proposition, the right to tax includes the power to determine the amount which must be levied, and the objects for which that amount shall be expended. These powers are powers incident to sovereignty, the exercise of which, unless abused, can not in general be made the subject of diplomatic remonstrance."

Mr. Fish, Sec. of State, to Mr. Cushing, min. to Spain, Jan. 12, 1876, MS. Inst. Spain, XVII. 432.

"While it is difficult to protest against the exaction of such taxes [those on aliens in Cuba] upon well-defined principles, the fact seems to be apparent that many of the taxes exacted are loosely if not unfairly assessed, excessive in their amount, and not infrequently fail to be in any way applied for the purposes for which they are raised."

Mr. Fish, Sec. of State, to Mr. Adee, Dec. 21, 1876, MS. Inst. Spain, XVIII. 63.

See also Mr. Evarts, Sec. of State, to Mr. Adee, April 20, 1879, MS. Inst. Spain, XVIII. 387; Mr. Evarts, Sec. of State, to Mr. Fairchild, May 1, 1880, MS. Inst. Spain, XVIII. 467; Mr. Frelinghuysen, Sec. of State, to Mr. Foster, No. 108, Dec. 19, 1883, MS. Inst. Spain, XIX. 460.

"Your dispatch No. 1076, of the 24th of December last, has been received. It relates to a forced loan recently exacted from Messrs. Mac-

manus & Sons at Chihuahua, of which firm Mr. Scott, the consul, is a member. The exaction is believed to have been contrary to public law, and in this case, as the officer pursuant to whose orders it was carried into effect was in the service of the Mexican Government for the time being, it is expected that that Government will duly reimburse the victims.

"This may be particularly claimed on behalf of the consul, who is especially exempted from such charges by the twenty-ninth article of the treaty of 1831. It is true that it does not appear that Mr. Scott was required to pay anything except as a partner in the firm adverted to, and that it may not have been easy at the time to ascertain the extent of his interest in that firm, even if there has been a disposition to limit the exaction accordingly."

Mr. Evarts, Sec. of State, to Mr. Foster, min. to Mexico, Feb. 20, 1880, For. Rel. 1880, 734.

As to forced loans, see Moore, Int. Arbitrations, IV. 3409–3411.

"Taxation may no doubt be imposed, in conformity with the law of nations, by a sovereign on the property within his jurisdiction of a person who is domiciled in and owes allegiance to a foreign country. It is, otherwise, however, as to a tax imposed, not on such property, but on the person of the party taxed when elsewhere domiciled and elsewhere a citizen. Such a decree is internationally void, and an attempt to execute it by penalties on the relatives of the party taxed gives the person so taxed a right to appeal for diplomatic intervention to the Government to which he owes allegiance. To sustain such a claim it is not necessary that the penalties should have been imposed originally and expressly on the person so excepted from jurisdiction. It is enough if it appears that the tax was levied in such a way as to reach him through his relatives."

Mr. Porter, Acting Sec. of State, to Mr. Emmet, June 8, 1885, For. Rel. 1885, 848.

But, see supra, § 460.

With reference to a protest of foreigners in the island of Mytilene, transmitted by Mr. Fottion, the American consular agent there, to the American consul at Smyrna, and to a note of the American minister at Constantinople to the Imperial minister of foreign affairs on the subject, the Department of State said:

"Mr. Fottion's appeal to the consul [apparently] is a general one in the interests of foreign residents on account of two school taxes ordered, respectively, by the central and by the communal or municipal governments. If this is so it would go to prove that there was no discrimination shown against American residents, even supposing, as does not appear from the correspondence, that they would, not

owning real estate there, be taxed at all, unless this is an income tax, which is not stated.

"On general principles it is safer not to protest against local ordinances until, at any rate, the rights of American citizens appear to be specifically invaded, so as to cause complaints from them; and for the views of this Department on the general subject of the taxation of our citizens abroad I would refer you to the Hon. Hamilton Fish's instruction, No. 29, of the 21st of November, 1874, to our minister at Berlin. The ground is there taken that as long as a tax is uniform in its operation, and can fairly be considered a tax and not a confiscation or unfair imposition, no successful representation can be made to a foreign government on behalf of the parties complaining, and that complaints of excessive taxation are more properly questions for submission to local courts.

"The fact that part of the tax goes to local and part to Imperial schools would seem to afford no additional ground for objection.

"A Government has a perfect right to say, 'We will establish and raise taxes for certain central universities, which are for the benefit of the whole land, while local and primary schools are to be established and taxed for by municipalities.' This in analogous matters is the constant practice in the United States."

Mr. Bayard, Sec. of State, to Mr. Cox, min. to Turkey, No. 44, Nov. 11, 1885, For. Rel. 1885, 878.

For Mr. Cox's dispatch, to which this was a reply, see id. 872. The tax is referred to as one "on the property of foreigners."

A law of the State of Louisiana imposing a tax on legacies payable to aliens is not repugnant to the Constitution of the United States. Every state or nation may refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state.

Mager *v.* Grima, 8 How. 490.

In acknowledging receipt of despatch No. 25, of March 25, 1878, from the American minister at Port au Prince, in relation to a new discriminating tax against foreigners, enacted by the Haytian legislature, the Department of State said: "You will in strong but respectful terms protest against the tax as contrary to the text of the fifth article of the treaty, and will say that it is expected that any sum which may be exacted from citizens of the United States contrary to that article will be refunded."

Mr. Evarts, Sec. of State, to Mr. Langston, min. to Haiti No. 25, April 12, 1878, MS. Inst. Hayti, II. 143.

A citizen and subject of Italy is exempt from the payment of the 10 per centum tax levied against foreign heirs, on property situated in Louisiana, under act 130 of 1894, the title to which he derived from a provision of his mother's will, she likewise having been a citizen of Italy at the time of her death, since the "most favored nation" clause of the treaty between Italy and the United States entitles citizens and subjects of the former to the same tax exemptions as the citizens and subjects of the latter; and the same right to acquire and dispose of personal and real property within the territory of the latter, by donation, testament, or otherwise, from or to aliens and subjects of the former.

Succession of Rixner, 48 La. Ann. 552, 19 So. 597.

The Swiss Government also claimed, under Art. V. of the treaty of 1850, exemption from the Louisiana law of July 11, 1894, imposing an inheritance tax of 10% on the value of all successions passing to nonresident foreigners, for the benefit of the Charity Hospital of New Orleans.

Mr. Olney, Sec. of State, to the governor of Louisiana, June 27, 1895, 203 MS. Dom. Let. 130.

II. *DISABILITIES.*

1. Exclusion from Privileges.

§ 541.

Alienage very generally operates as a disqualification for public office.

Drew *v.* Rogers (Cal.), 34 Pac. Rep. 1081; State *v.* Van Beek (Iowa), 54 N. W. 525.

It may also disqualify for service on a jury.

Kohl *v.* Lehlback, 160 U. S. 293, 16 S. Ct. 304; Hollingsworth *v.* Duane, 4 Dall. 353.

An alien cannot, under the laws of the United States governing the registry of vessels, be deemed master of a vessel, even for the purpose of defeating his claim to a lien for wages.

The Dubuque, 2 Abb. U. S. 20.

A State has the right to debar aliens from holding stock in its corporations, or to admit them to that privilege on such terms as it may prescribe.

State *v.* Traveler's Ins. Co. (Conn.), 40 Atl. Rep. 465.

The authority given by law to grant patents is confined to citizens of the United States. The privilege is a monopoly in derogation of common right, and, as it is not, ought not to be extended to foreigners.

Lincoln, At. Gen., 1802, 1 Op. 110.

Laws of N. Y. 1894, c. 622, forbidding an employment by contractors of aliens on public works, violates the treaty between the United States and the King of Italy, providing that resident Italians in the United States shall enjoy the same rights and privileges as are secured to our own citizens.

People *v.* Warren (Super. Buff.), 34 N. Y. S. 942, 13 Misc. Rep. 615.
See also Baldwin *v.* Goldfrank, 88 Tex. 249.

"The exemption from the *droit d'aubaine* in the French West Indies has been for some time past a subject of attention. As the National Assembly were abolishing it in France for all nations, I desired our chargé des affaires there to see that the decree should be extended to all the *dominions* of France. His letters assure me that it will be done, so as to remove this grievance hereafter. With respect to the past, I believe it has been judicially determined in France that the exemption even by our treaty did not extend to their foreign possessions."

Mr. Jefferson, Sec. of State, to Mr. Wadsworth, No. 120, May 11, 1791, 4 MS. Am. Let. 252.

"Before the French Revolution the *droit d'aubaine* (*jus albinatus*) was abolished, or rather modified, by the treaties between France and the greater part of the other civilized powers of the world. But, it seems, according to an observation of M. Tronchet, in the discussions on the civil code, that this conventional law only excluded the royal fisc from taking by escheat the property of foreigners deceased in France, but did not exclude their French relations from inheriting, in preference to their foreign heirs in the same or a nearer degree of affinity, because the foreign heirs had not the *active* power of inheriting. This was given to all foreigners, without distinction and independent of treaties, by the National Assembly in 1789. But this concession was repealed by the civil code, which again placed the matter upon its original footing of reciprocity, by enacting that foreigners should enjoy in France the same civil rights which are, or shall be, conceded to Frenchmen by the treaties with the nation to which such foreigners may belong. Liv. 1, chap. 1, De la Jouissance des Droits Civils. Art. II. Discussions du Code Civil, par M. M. Jouanneau, &c., Tom. 1, p. 45."

Chirac *v.* Chirac (1817), 2 Wheaton 259, 271, note by reporter.

October 4, 1820, Mr. Adams, Secretary of State, transmitted to the consul of Bremen at Baltimore a certificate of the Department of State, under the seal of the Department, declaring that the *droit d'aubaine* was "in force in no part of the United States, and that foreigners and aliens succeed, upon the same principles as citizens of the United States, without tax or fees to the Government, to the inheritance of personal property of other foreigners or aliens or of citizens of the United States dying with or without wills or last testaments in the United States; and that they may in like manner dispose of the same, by themselves or their lawful agents, and withdraw the proceeds or carry away such property without any charge or detention whatever for so doing."

Mr. Adams, Sec. of State, to Mr. Wichelhausen, Oct. 4, 1820, 18 MS. Dom. Let. 147.

A similar certificate by Mr. Adams, as Secretary of State, dated February 26, 1824, may be found in 20 MS. Dom. Let. 304.

It is not practicable for the Department of State to furnish information as to the regulations and restrictions under which "a foreigner is permitted to establish himself within the German Empire."

Mr. Bayard, Sec. of State, to Messrs. Libmann & Co., May 31, 1887, 164 MS. Dom. Let. 286.

2. Registration.

§ 542.

By a decree of the prefect of Lima of March 3, 1887, all inhabitants of the province between the ages of 17 and 60 were required, within 15 days, to appear before the boards of registration of their respective districts and give information as to their income, property, and business, and the persons dwelling in their houses or shops. With reference to this decree, and in compliance with a request of the prefect, the Peruvian minister of foreign affairs, March 9, 1887, requested the minister of the United States at Lima to furnish a list of all citizens of his nation from 25 to 60 years old domiciled in Lima, specifying their names, ages, professions, and places of residence, and a similar list of all from 17 to 21. The minister replied that he did not possess the information, and that it was not within his province to furnish it. The Department of State, in approving this reply, said: "While Peru may by law or decree require the registry of aliens, it can not require our consuls or other officers to carry out the enactment."

Mr. Bayard, Sec. of State, to Mr. Buck, min. to Peru, No. 129, April 19, 1887, For. Rel. 1887, 932–933.

"I inclose herewith copy and translation of the recent law on foreigners in France, which was promulgated on the 8th instant. It provides substantially that foreigners who have not obtained leave to be domiciled in France, or who come into the country for the purpose of exercising their professions or doing any kind of business therein, will have to register within eight days after their arrival at the place where they propose to reside. They will receive, upon payment of a fee, a certificate stating that they have complied with the law, without which they can not obtain employment. If they change their place of residence this certificate is to be viséed by the mayor of the locality.

"Foreigners at present established in France have a month given them to comply with the requirements of these new regulations.

"Apparently the law does not apply to foreigners traveling in France, or residing therein for the purposes of health or pleasure. It is mainly directed against foreign laborers. Foreigners who have secured the rights of domicil, which are quite different from those required by simple residence in France, are likewise exempt from the provisions of the law. Application for the rights of domicil is considered as a preliminary step toward naturalization."

Mr. Eustis, amb. to France, to Mr. Gresham, Sec. of State, No. 38, Aug. 9, 1893, For. Rel. 1893, 302, where a translation of the law is also given.

The treaty between the United States and China, signed at Washington March 17, 1894, for the regulation of emigration, was communicated to the legation at Peking, August 25, 1894. By Article V. the United States recognized, in view of its own legislation, the right of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled, who were citizens of the United States and residing in China, whether within or outside the treaty ports, and agreed within twelve months from the date of the exchange of ratifications, and annually thereafter, to furnish to the Chinese Government reports showing the full name, age, occupation, and number or place of residence of all other citizens of the United States, including missionaries, residing within and outside the treaty ports, except diplomatic and other officers and their body and household servants. The legation at Peking was instructed to cause all the included persons to be notified of their obligation to be registered in the nearest consulate or at the legation, within a date to be announced, and annually thereafter, in order that the legation might be in a position to fulfill the obligations of the convention.

For. Rel. 1894, 176–179.

"While this Government is well disposed to admit the convenience of the proposed registry [of aliens in Cuba] as an additional

evidence of the right of such citizens [of the United States] in Cuba to the protection of the authorities, and has signified its willingness to facilitate their registration," it could not consent that the failure to register should deprive them of their rights as American citizens.

Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxxvii.

With reference to a requirement of the Haytian Government, that aliens should be provided with some form of certificate to establish their status, the Department of State said that two courses were open, (1) either to endorse an appropriate certificate in the language of the country upon the citizen's passport, or (2) to require him to register his American passport in the legation or consulate, and give him a suitable certificate for use with the local authorities. In no case, said the Department of State, could a certificate of nationality be issued by a representative of the United States without the holder obtaining a passport, since otherwise the certificate would be a paper in the nature of a passport, and in lieu thereof, and would fall within the statutory prohibition. Reference was made by the Department to Foreign Relations, 1894, 18–20, containing the correspondence exchanged in July and August of that year between the American minister at Buenos Ayres and the Argentine Government as to the most convenient way of complying with the Argentine requirement of a "papeleta," or protection paper. A form of certificate used by the French legation was in that case adopted by the Department of State with some modification. The Department added: "I enclose a form in the French language, which when printed and duly filled out, signed, and sealed, would be a sufficient certification of the fact that the bearer is registered in the United States legation, or in a consulate, and thus establish his alienage to the satisfaction of the Haytian authorities. You may confer with the minister for foreign affairs and ascertain whether such a form of certificate would be sufficient and acceptable. You will explain to the minister how it is that the law and rules of your country confine the manner and form of certification of citizenship to the issuance of a regular passport, and that any local certification of personal status of a citizen can only be given by the legation upon registration of the party upon exhibition of his passport to the legation."

Mr. Hill, Act. Sec. of State, to Mr. Terres, No. 373, Sept. 29, 1899, MS. Inst. Hayti, IV. 187. See supra, § 530.

3. Communication with Foreign Governments.

§ 543.

"I am directed by the Secretary of State to inform you that the usages of foreign intercourse require that communications from citizens or subjects of foreign governments to the President should be addressed through the minister of the nation of which the writer is a subject or citizen."

Mr. Hale, Assist. Sec. of State, to Mr. Kuhlmann, May 21, 1872, 94 MS. Dom. Let. 152.

"As this Government is very unwilling to further requests of its citizens for immunity from foreign military service, it has been deemed advisable not to act upon the requests of persons so enlisted [in the United States] when merely brought to the notice of this Government, but only when the application for discharge is requested clearly on behalf of a foreign power."

Mr. Fish, Sec. of State, to Count Hoyos, Dec. 14, 1875, MS. Notes to Austria, VIII. 101.

Aug. 13, 1887, the Austrian minister brought personally to the Department of State, and left, without verbal comment and unaccompanied by any written communication, certain documents relating to a complaint of an Austrian subject resident at Tangier, Morocco, that the American consul at that port had obstructed the preferment and prosecution before him of an action for damages against a certain citizen of the United States also resident at Tangier. The Department of State said:

"The practice of this Department, following what is believed to be the settled rule of international law, is not to act upon the petitions or claims of subjects or citizens of foreign states, unless such petitions or claims are presented to it under the auspices and with the approval and authority of the diplomatic agents of such foreign states. In the case now under consideration it becomes proper, in order to relieve it from all doubt which might arise from the informality with which the documents were left at this Department, and from the absence of any explanatory note from you, to inquire, as I now do, whether this claim . . . is to be considered as having been presented with your sanction and approval."

Mr. Bayard, Sec. of State, to Chev. de Tavera, Aust. min., Oct. 12, 1887, MS. Notes to Austria, VIII. 558.

Parnell's Case.

On October 11, 1876, Messrs. Charles Stewart Parnell and John O'Connor Power, members of the British Parliament, "sent their cards to the President, at his hotel, while on a visit to New York, and, being admitted, requested an oppor-

tunity to present an address on the occurrence of the Centennial with which they stated they were charged; and the President thereupon replied that he would shortly be in Washington when the matter might be disposed of. . . . They were informed (on October 17, 1876), by a note, that before they could be so received, it would be necessary that they should submit the address for approval to the Department of State. At this date the address appeared in the public prints.

"Upon the 18th of October, a communication was received at this Department, signed by these gentlemen, asking an opportunity to present the address, and shortly after, and before the address had been examined, they called upon Mr. Cadwalader, then Acting Secretary of State in my absence, stating the object of their mission. Their attention was called to the fact that the Department of State could not properly act in such a matter unless the address had been submitted to the British minister. They stated their unwillingness to do so directly, but were understood to acquiesce entirely in the propriety of its being submitted by the Department to Her Majesty's representative.

"A copy of their note of October 17, with the address, was thereupon immediately sent to Sir Edward Thornton, for his perusal, who replied upon the same day that it would have afforded him pleasure to have asked permission to present these gentlemen to the President, had they applied to him for that purpose as was usual; but with regard to the address, that it contained such reflections on the conduct of Her Majesty's Government that he should not feel justified in taking part in its presentation without express instructions from his Government to do so.

"Mr. O'Connor Power and Mr. Parnell were thereupon informed by the Acting Secretary of State, by note dated the following day, of the substance of the reply of the British minister, and that it would not seem courteous to their own representative or their own Government to take any steps for a formal presentation of the address under such circumstances, but that arrangements would gladly be made for their personal presentation to the President if it were desired.

"Upon the 20th of October, these gentlemen again addressed the Department, renewing the request that the address be received, and suggesting that their representative did not appear to have any objection to the language of the address, and that it might still be presented, although he declined to take part therein; whereupon they were informed that as the British minister had based his refusal to take part in any presentation of the address upon the contents of the address itself, it was not possible to comply with their wishes.

"No further communication of any kind has taken place upon the question, and in making to you this statement, and in forwarding to you, as I do, at your request, a copy of all the correspondence herein referred to, including a copy of the proposed address, I have furnished you with all the information in my possession on the subject.

"The position which the Department was compelled to assume was that, while it was quite competent to present Mr. O'Connor Power and Mr. Parnell to the President individually, they being gentlemen of standing and position at home, and members of the Parliament of the United Kingdom, in order that an opportunity might be afforded them of expressing, as individuals, the good wishes of the persons at whose instance they were sent to the United States on the occasion of the Centennial, at the same time a proper respect for the Government of Her Majesty, whose subjects they were, and for Her Majesty's representative in the United States, rendered it entirely incompetent to take any steps towards the presentation of an address to the President from the subjects of another and a friendly power, political in its character, and the contents of which were deemed by the representative of that power of such a nature as to compel him to refuse to take any part in its presentation.

"Your communication requests from me information as to the position occupied by this Department 'at this moment' on the subject. On this point I have the honor to say that I am not informed as to the precise matter before your committee at the present time, nor as to the similarity between the address which it is proposed now to present with that which the President was unable to receive.

"If, however, the address is in general form or substance the same, I may remind you that its reception was refused because Her Majesty's minister found it objectionable in tone toward his Government, and it is not likely to be less objectionable when presented in another quarter."

Mr. Fish, Sec. of State, to Mr. Swann, chairman of the Committee on Foreign Affairs, House of Representatives, Dec. 29, 1876, 12 MS. Report Book, 413.

See Mr. Cadwalader, Act. Sec. of State, to Sir Edward Thornton, Brit. min., Oct. 18, 1876, MS. Notes to Great Britain, XVII. 261; Mr. Cadwalader, Act. Sec. of State, to Messrs. Parnell & Power, Oct. 19, 1876, 115 MS. Dom. Let. 484.

With regard to Mr. Fish's statement that the Department took the position that it was "quite competent" to present Messrs. Parnell and Power "individually," it may be observed that the precise language of Mr. Cadwalader, in his letter of Oct. 19, 1876, was: "Sir Edward Thornton having referred to the pleasure it would give him to request an opportunity to present you personally to the President, I may also add that it will give me equal pleasure to further any arrangements for that purpose." (115 MS. Dom. Let. 484.)

But for the construction apparently placed on the Department's position by Mr. Fish, the "arrangements" which Mr. Cadwalader expressed his readiness to further would seem to have referred to a presentation, if not by Sir Edward himself, at least with his assent, as already given.

Case of the Boer Generals.

"The generals spent Tuesday in Brussels in sight-seeing. On Wednesday they wet to Ghent. One or two of the journals remind them that, as British subjects, it is largely to England that they must look for the success of their mission.

"The Boer generals will not be received by the German Emperor. The *North-German Gazette* on Wednesday gave prominence to the following *communiqué:*

"'It was asserted yesterday by a number of journals that the audience to be given to the Boer generals by His Majesty the Emperor was not definitely certain. In reply to this statement we are in a position to make the following announcement: After it had come to the knowledge of His Majesty that the leaders of the former Boer army, Botha, De Wet, and Delarey, were coming to Berlin, imperial commands were given on September 18 to inform the generals that His Majesty was prepared to receive them provided that in Germany they abstained from every kind of anti-English agitation, and would have themselves announced (*anmelden*) to His Majesty by the agency of the English ambassador. Thereupon General De Wet declared for himself and his comrades that they agreed to the conditions under which a reception by His Majesty the German Emperor would take place.

"'According to an official dispatch received from The Hague on October 6, the generals have, nevertheless, meanwhile changed their minds: they now raise objections against applying for an audience and, on the contrary, they expect a summons from His Majesty the Emperor. In these circumstances the matter is decided and settled (*erledigt*) in the negative sense.'"

London Times, Weekly, Friday, Oct. 10, 1902, p. 646, col. 2.

III. *REGULATIONS AS TO REAL PROPERTY.*

1. Law in the United States.

(1) common law and statutes.

§ 544.

In order to ascertain what the law is in the United States, outside the territory under Federal jurisdiction, with regard to the acquisition, inheritance, or holding of lands by aliens, the statutes and the judicial decisions of the various States must be consulted.

Milliken *v.* Barrow, 55 Fed. Rep. 148; Pilla *v.* German School Assoc., 23 Fed. Rep. 700; Wirt, At. Gen., 1819, 1 Op. 275.

The prevailing rule in the various States is that aliens can inherit. (Stanbery, At. Gen., 1866, 12 Op. 5.)

The following decisions may be cited:

Alabama: Sec. 1914 of the code, which permits nonresident, as well as resident, aliens to take lands by descent, is not limited by the provision in the State constitution, which assures to resident aliens the same rights of property as citizens. (Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. Rep. 561.)

California: Sec. 671, of the civil code, which permits aliens to take, hold, and dispose of property, real or personal, is not in conflict with or limited by sec. 17, Art. I., of the State constitution, which secures similar rights to resident aliens of the white race or of African descent, who are eligible to naturalization as citizens of the United States. (Blythe *v.* Hinckley, 127 Cal. 431, 59 Pac. Rep. 787; Lyons *v.* State, 67 Cal. 380; Carrasco *v.* State, 67 Cal. 385; Re Billings, 65 Cal. 593; State *v.* Smith, 12 Pac. Rep. 121.)

Colorado: As to the extension of the right to acquire real estate to nonresident aliens, see act of April 1, 1891, Laws of 1891, 20. See, as to a mining claim, Lee *v.* Justice Min. Co., 29 Pac. Rep. 1020.

Connecticut: The common-law rule excluding from inheritance a person claiming through an alien ancestor does not obtain. (Appeal of Campbell, 64 Conn. 277, 29 Atl. Rep. 494.)

District of Columbia: By the act of March 3, 1887, 24 Stat. 476, aliens and foreign corporations are prohibited from acquiring lands. See Geofroy *v.* Riggs, 133 U. S. 258; Johnson *v.* Elkins, 1 App. D. C. 430.

Idaho: Aliens, with certain exceptions, are prohibited from acquiring and holding real estate, except for the purpose of enforcing liens. (Act of Feb. 26, 1891, Laws of 1890–91, 108. See, however, Ah Kle *v.* McLean, 32 Pac. Rep. 200.)

Illinois: By the act of June 16, 1887, nonresident aliens can not acquire or hold lands, but the heirs of aliens who have previously acquired lands are allowed a limited time in which to dispose of them. (Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195; Schultze *v.* Schultze, 144 Ill. 290; Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182; Meadowcroft *v.* Winnebago Co., 181 Ill. 504, 54 N. E. 949; Beavan *v.* Went, 155 Ill. 592, 41 N. E. 91.)

Indiana: As to the right of aliens to inherit, see Donaldson *v.* State (1903), 67 N. E. 1029.

Iowa: Nonresident aliens are forbidden to take or hold lands, except within certain limitations. (Burrow *v.* Burrow, 98 Iowa, 400, 67 N. W. 287; Furenes *v.* Mickelson, 86 Iowa, 508, 53 N. W. 416; Bennett *v.* Hibbert, 88 Iowa, 154, 55 N. W. 93; Opel *v.* Shoup, 100 Iowa, 407; Meier *v.* Lee, 76 N. W. 712; In re Gill's Estate, 44 N. W. 553; Ware *v.* Wisner, 50 Fed. Rep. 310; Purcell *v.* Smidt, 21 Iowa, 540; Greenheld *v.* Stanforth, 21 Iowa, 595.)

Kansas: Aliens are not permitted to acquire or hold real estate. (Smith *v.* Lynch, 61 Kans. 609, 60 Pac. Rep. 329.)

Kentucky: See Yeaker *v.* Yeaker, 4 Mete. 33; Eustache *v.* Rodaquest, 11 Bush. 42.

Maine: See Potter *v.* Titcomb, 22 Me. 300.

Michigan: See Crane *v.* Reeder, 21 Mich. 24.

Missouri: See Burke *v.* Adams, 80 Mo. 504; De Franca *v.* Howard, 21 Fed. Rep. 774; Wilson *v.* Kimmel, 19 S. W. 24; Utassy *v.* Giedinghagen, 33 S. W. 444.

The contract of an alien to purchase land in Missouri is not absolutely void, but his title may be perfected by naturalization. (Pembroke *v.* Huston (1904), 180 Mo. 627, 79 S. W. 470.)

Montana: See Quigley *v.* Birdseye, 11 Mont. 439, 28 Pac. Rep. 741.

Nevada: See State *v.* Preble, 18 Nev. 251; (as to mining claims) Golden Fleece *v.* Cable Co. 12 Nev. 312.

New York: Under Laws of 1874, p. 317, c. 261, and Laws of 1875, p. 32, c. 38, nonresident aliens could inherit lands in New York as if they were citizens of the United States. (Kelly *v.* Pratt (1903), 83 N. Y. Supp. 636, 41 Misc. 31. See Richardson *v.* Amsdon, 85 N. Y. Supp. 342; Stewart *v.* Russell (1904), 86 N. Y. Supp. 625, 91 App. Div. 310.) By an act of 1897 (Laws 1897, c. 593), a citizen of a nation that grants similar privileges to citizens of the United States may hold and convey lands in New York. (Fay *v.* Taylor, 31 Misc. 32, 63 N. Y. S. 572. See, also, Wainwright *v.* Low, 132 N. Y. 313, 30 N. E. 747; Heeney *v.* Brooklyn, 33 Barb. 360; Goodrich *v.* Russell, 42 N. Y. 177; Ettenheimer *v.* Heffernan, 66 Barb. 374; Maynard *v.* Maynard, 36 Hun. 227; Callahan *v.* O'Brien, 25 N. Y. S. 410; Smith *v.* Reilly, 31 Misc. 701, 66 N. Y. S. 40; In re Beck, 11 N. Y. S. 199; Stamm *v.* Bostwick, 122 N. Y. 48, 25 N. E. 233; Branagh *v.* Smith, 46 Fed. Rep. 517.)

Oregon: See Lavery *v.* Arnold, 36 Or. 84; Quinn *v.* Ladd, 59 Pac. Rep. 457; (as to mining claims) Wulff *v.* Manuel, 23 Pac. 723.

Pennsylvania: See Ondis *v.* Banta, 7 Kulp, 390.

South Dakota: By the act of Feb. 19, 1890, Laws of 1890, c. 123, p. 283, aliens may take and hold lands.

Tennessee: See Emmet *v.* Emmet, 14 Lea, 369.

Texas: See Hanrick *v.* Patrick, 119 U. S. 156; Hanrick *v.* Hanrick, 61 Tex. 596; Williams *v.* Bennett, 1 Tex. Civ. App. 498, 20 S. W. 856; Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513; Baker *v.* Westcott, 11 S. W. 157; Zundell *v.* Gess, 9 S. W. 879; Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 56 S. W. 330; Settegast *v.* Schrimpff, 35 Tex. 323; Act of April 13, 1891, Gen. Laws 1891, c. 62, p. 82.

"It is clear, by the common law, that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the yearbooks, and has been uniformly recognized as sound law from that time. . . . Nor is there any distinction, whether the purchase be by grant or by devise. In either case, the estate vests in the alien, . . . not for his own benefit, but for the benefit of the state; or, in the language of the ancient law, the alien has the capacity to *take* but not to *hold* lands, and they may be seized into the hands of the sovereign. . . . But until the lands are so seized, the alien has complete dominion over the same . . . and may convey the same to a purchaser. . . . We do not find that in respect to these general rights and disabilities, there is any admitted difference between alien friends and alien enemies. During the

war the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. . . . But as to capacity to purchase, no case has been cited in which it has been denied; and in the Attorney-General *v.* Wheeden and Shales, Park. Rep., 267, it was adjudged that a bequest to an alien enemy was good, and, after a peace, might be enforced. Indeed, the common law, in these particulars seems to coincide with the *jus gentium*."

Story, J., Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 619.
See Lambert's Lessee *v.* Paine (1805), 3 Cranch, 97; Levy *v.* McCartee, 6 Pet. 102; Craig *v.* Radford, 3 Wheat. 594; Jones *v.* McMasters, 20 How. 8; Belden *v.* Wilkinson, 68 N. Y. S. 205, 33 Misc. 659.

The statute of 11 and 12 William III., chap. 6, enacting that the King's natural-born subjects within the realm should inherit and be inheritable, and make their pedigrees and titles by descent from any of their ancestors, lineal or collateral, although the father, mother, or other ancestor, by, from, through, or under whom they might derive their title, were born out of the King's allegiance and realm, does not apply to the case of a living alien ancestor so as to create a title by heirship where none would exist by the common law if the ancestor were a natural-born subject. The language of the statute imports no more than a removal of the defect for want of inheritable blood. It does not in terms create a right of heirship where the common law, independent of alienage, prohibits it. It puts the party in the same situation, and none other, that he would be in if his parents were not aliens.

McCreery *v.* Somerville, 9 Wheat. 354.
Followed under the similar statute of Texas (Hart. Dig. art. 585), McKinney *v.* Saviego, 18 How. 235.

A court of equity will treat a devise by an alien as valid against heirs at law until the title of the alien has been impeached by proceedings on the part of the state. All the authorities agree that at common law an alien can take lands by purchase—that is, by grant or devise—though not by descent; although the estate vests in the alien not for his own benefit but for the benefit of the state. If the state sees fit to seize the lands, the same rule must prevail in equity, for it is a general principle of equity that equitable estates are subject to the same modes and condition as corresponding legal estates.

Cross *v.* De Valle, 1 Cliff. 282.

An alien mortgagee may maintain a bill to have the debt paid by a sale of the land which had been conveyed to him as security therefor.

Hughes *v.* Edwards, 9 Wheat. 489.

An alien who becomes naturalized may hold lands acquired before his naturalization.

Governeur's Heirs *v.* Robertson, 11 Wheat. 332.

A devise of land to trustees, in trust to sell the same and pay the whole proceeds to an alien *cestui que trust*, is, in equity, a bequest of personalty; and the alien may take and hold the proceeds, and can compel the execution of the trust, even as against the state.

Craig *v.* Leslie, 3 Wheat. 563.

A sale of lands in Texas, made before her separation from Mexico, by a citizen to a nonresident alien, passed the title to the latter, who thereby acquired a defeasible estate in them, which he could hold until deprived thereof by the supreme authority, upon the official ascertainment of the fact of his nonresidence and alienage, or upon the denouncement of a private citizen. "By the common law, an alien can not acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of law as 'office found.' . . . By the civil law some proceeding equivalent in its substantive features was also essential to take the fact of alienage from being a matter of mere surmise and conjecture, and to make it a matter of record. Such a proceeding was usually had before the local magistrate or council, and might be taken at the instance of the government, or upon the denouncement of a private citizen. The course pursued in the present case seems to have been in conformity with common usage. The fact of alienage and nonresidence was thus officially established; it became matter of record, and the subsequent declaration of the commissioner that the land was vacant was the judgment which the law prescribed in such cases. The land was then subject to be regranted by the commissioner, as fully as though no previous grant to Sims had ever been made."

Field, J., Phillips *v.* Moore, 100 U. S. 208, 212.

The constitution of Texas, although declaring generally that aliens shall not hold land in Texas, except by title emanating directly from the government, did not divest their title, for it adds that "they shall have a reasonable time to take possession of and dispose of the same, in a manner hereafter to be pointed out by law." Before the title can be divested, proceedings for enforcing its forfeiture must be provided by law and carried into effect, and hitherto they have not been provided.

Airhart *v.* Massieu, 98 U. S. 491.

The incompetency of a citizen of the United States, on account of alienage, to hold lands in the Republic of Texas immediately ceased on the admission of Texas into the Union.

Osterman *v.* Baldwin, 6 Wall. 116.

By the laws of Missouri, in force in 1866, an alien was capable of taking by descent lands in that State, and of holding and alienating them, if he either resided in the United States, and, by taking the oath prescribed by the act of Congress, had declared his intention to become a citizen, or resided in Missouri, although the ancestor through whom he claimed was, at the time the descent was cast, an alien, who, by reason of his nonresidence, was incapable of inheriting.

Sullivan *v.* Burnett, 105 U. S. 334.

The Missouri statute of 1855, which gave to a nonresident alien the right within a limited period to sell and convey the lands whereof the intestate died seized, applied only where at the time of his death there was no person capable of taking them by descent.

The repeal of the act of February, 1874, giving aliens the same right to hold property as their government had conferred on citizens of Kentucky, did not operate retrospectively, so as to unsettle existing titles, or to confiscate property held under the statute.

Commonwealth *v.* Newcomb, 109 Ky. 18, 22 Ky. Law Rep. 516, 58 S. W. 445.

"It is not competent for the Government of the United States to interfere with the legislation of the respective States in relation to the property of foreigners dying *ab intestato*, or in regard to inheritances of any kind, nor has Congress authority, under the Constitution, to pass a general law, as you seem to suppose, upon the subject."

Mr. Marcy, Sec. of State, to Mr. Fay, June 19, 1854, MS. Inst. Switz. 1. 17.

By the act of March 3, 1887, aliens and foreign corporations are prohibited from acquiring or holding land in the Territories of the United States and the District of Columbia.

24 Stat. 476.

An alien may hold, convey, and devise real estate in the District of Columbia. (Crittenden, At. Gen. 1852, 5 Op. 621.)

The right of preemption, under the acts of 1830 and 1834, accrues to persons who were not citizens of the United States at the time of their passage, especially where the local law authorizes them to hold and convey real estate. (Butler, At. Gen. 1836, 3 Op. 91.)

Aliens are entitled to purchase public lands, subject only as to their tenure to such limitations as particular States may enact, with the exception that preemptions are secured only to such as have declared their intention to become naturalized. (Cushing, At. Gen. 1855, 7 Op. 351.)

"There are no provisions in existing treaties between the United States and Great Britain touching the general right of British subjects to hold real estate or personal property in the United States. The right of foreigners to hold title to real estate is entirely dependent on the laws of the State in which the land is situate. Foreigners may obtain title to public lands owned by the United States by purchase. They can not, however, enter such lands under the preemption or homestead laws without having first declared their intention to become citizens of the United States." (Mr. Cadwalader, Asst. Sec. of State, to Mr. Lowe, Nov. 25, 1874, 105 MS. Dom. Let. 286. To the same effect, see Mr. Bayard to Mr. Lehman, June 23, 1885, 156 MS. Dom. Let. 80.)

The act of 1887 does not apply to land previously acquired. (Johnson *v.* Elkins, 1 App. D. C. 430.)

By the act of March 2, 1897, amending the act of March 3, 1887, except as to the District of Columbia, no person not a citizen of the United States, or who has not declared his intention to become a citizen, can, unless the right is secured to him by treaty, own land in any of the Territories. The act does not apply to land owned by aliens which was acquired on or before March 3, 1887, so long as it is held by them or their heirs or legal representatives, nor to any alien who shall become a bona fide resident of the United States; and the resident alien, if he abandons his residence, is allowed ten years in which to alienate his lands.

29 Stat. 618.

Only citizens of the United States, and aliens who have declared their intention to become citizens, can locate and purchase mining claims under R. S. § 2319.

O'Reilly *v.* Campbell, 116 U. S. 418, 6 Sup. Ct. 421; Billings *v.* Aspen Min. & Smelting Co. 52 Fed. Rep. 250, 3 C. C. A. 69, 10 U. S. App. 322; Anthony *v.* Jillson, 83 Cal. 296, 23 Pac. 419; North Noonday Min. Co. *v.* Orient Min. Co., 6 Sawyer, 299, 1 Fed. Rep. 522.

The right of an alien to inherit a mining claim located upon government land, as against every person but the United States, is determined by the laws of the State in which the claim is located.

Lohmann *v.* Helmer, 104 Fed. Rep. 178, citing Lee Doon *v.* Tesh (Cal.) 8 Pac. 621; Tibbitts *v.* Ah Tong, 2 Pac. 759; Chapman *v.* Toy Long, 4 Sawy. 28, Fed. Cas. No. 2,610; Billings *v.* Smelting Co., 2 C. C. A. 252, 51 Fed. Rep. 338; Manuel *v.* Wulff, 152 U. S. 510.

(2) TREATY STIPULATIONS.

§ 545.

France.

Under the treaty of 1778 with France, French subjects are entitled to purchase and hold lands in the United States.

Chirac *v.* Chirac, 2 Wheat. 259; Carneal *v.* Banks, 10 Wheat. 181.

The District of Columbia is one of the "States of the Union," in the sense of Art. VII. of the treaty with France of Feb. 23, 1853, in relation to the tenure of real estate in the United States by citizens of France.

Geofroy *v.* Riggs, 133 U. S. 258, 10 Sup. Ct. 295, overruling Geoffroy *v.* Riggs, 7 Mackey (D. C.), 331.

Laws of Nebraska, 1889, p. 483, prohibiting nonresident aliens from acquiring realty by inheritance, is inoperative so far as relates to citizens of France, since by the treaty between the United States and France, of 1853, citizens of France are entitled to acquire, by inheritance or otherwise, real estate in all respects the same as a citizen of the United States in the States by whose laws an alien is permitted to hold real estate, and aliens are permitted to hold realty by the laws of Nebraska.

Bahuaud *v.* Bize, 105 Fed. Rep. 485.

German States.

Under Art. VII. of the treaty between the United States and the Hanseatic Republics of Dec. 20, 1827, citizens of Bremen have three years within which to dispose of an inherited interest in lands in Illinois, notwithstanding the act of June 16, 1887, disabling nonresident aliens from taking or holding lands in that State.

Schultze *v.* Schultze, 33 N. E. 201.
See, also, Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195.

With reference to the case of a naturalized citizen of the United States, residing in the State of New York, who died leaving a will by which he devised all his real and personal property within that State to a sister, a German subject, residing in Prussia, and to a law passed by the legislature of New York, in May, 1896, granting to aliens the right to hold real property within the State on proof of reciprocal treatment in the alien's country, the Department of State said that, as between the United States and Prussia, "the reciprocal right of the citizens or subjects of the one country to succeed to and take possession under testament, donation, or otherwise, of property situated in the other country, is regulated by Article XIV. of the treaty of 1828. . . . The laws of Prussia are understood to permit aliens to acquire both personal and real property and to possess equal rights with natives as participators in an inheritance. (Cockburn's 'Nationality,' page 164, London, 1869.)"

Mr. Day, Assist. Sec. of State, to Mr. Kemper, October 21, 1897, 221 MS. Dom. Let. 582.

Art. X. of the treaty between the United States and the German Empire of Dec. 11, 1871, in prohibiting discriminating duties on

inheritances, merely recognizes existing rights, and does not confer a right of inheritance where it has not been granted by treaty.

Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195.

Great Britain.

Under Article IX. of the Jay treaty, by which it is provided that British subjects holding lands in the United States, and their heirs, so far as respects those lands and the remedies incident thereto, should not be considered as aliens, the parties must show that the title to the land for which the suit was commenced was in them or their ancestors when the treaty was made.

Harden *v.* Fisher, 1 Wheat. 300.

British subjects born before the Revolution are incapable of inheriting lands in the United States except by force of some treaty. (Blight *v.* Rochester, 7 Wheat. 535.)

By a convention between the United States and Great Britain, signed March 2, 1899, a citizen or subject of the one contracting party, who, were he not disqualified by alienage, would inherit realty in the territorities of the other, is allowed a term of three years, which may be prolonged if circumstances render it necessary, to sell the property and take away the proceeds, free from any duties or charges not imposed on citizens or subjects of the country from which the proceeds are withdrawn.

Previously to the conclusion of this convention, the treaties of the United States with Great Britain contained "no stipulations relative to the tenure of real estate except the temporary provisions of Article IX. of the treaty of November 19, 1794." (Mr. Porter, Act. Sec. of State, to Messrs. Stryker & Campbell, Aug. 2, 1887, 165 MS. Dom. Let. 48.)

It has been held, however, that, so far as it went, Art. IX. of the treaty of 1794 was permanent in its nature. (Sutton *v.* Sutton, 1 Russ. & M. 663, 675; Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464.)

The treaty of March 2, 1899 (ratifications exchanged July 28, 1900), removes the disability of alien next of kin to inherit.

Doe *v.* Roe (1903), 55 Atl. 341.

Italy.

By Article XVIII. of the treaty between the United States and Sardinia, of November 26, 1838, "where, on the death of any person holding real estate within the territories of one of the contracting parties, such real estate would by the laws of the land descend on a citizen or subject of the other party, who by reason of alienage may be incapable of holding it," such citizen or subject is "allowed a reasonable time to sell such real estate," and to take away the proceeds without paying any other taxes than those to which the inhabitants of the country where the

real estate is situated are subject in like cases. "This provision may be thought to cover the case of a Sardinian subject, who has become a citizen of the United States," but whose heirs are Italian subjects and reside in Italy. It may be argued, however, that the stipulation is only for the benefit of those aliens who, but for their alienage, would take by the laws of inheritance, and that it does [not] embrace those who take in virtue of an express devise." In such a case the interested parties, if asked to pay a discriminating tax, have an undoubted right to appeal to the judicial tribunal for relief, though such action in the particular case could not be advised by the Department of State.

Mr. Fish, Sec. of State, to Count de Colobiano, Feb., 1870, MS. Notes to Italy, VII. 53.

Mr. Fish, in the course of this note, cited Mager *v.* Crima, 8 How. 490, holding that a statute of Louisiana imposing a tax on alien succession to real estate was not repugnant to the Constitution of the United States, both the decedent and the heirs in that case being aliens and no treaty being invoked. In State *v.* Poydras, 9 La. Ann. 165, said Mr. Fish, it was held that a citizen of Louisiana domiciled abroad was subject to the tax, the statute making no discrimination between citizens of the State and aliens in the same circumstances. In the case of Poydras, added Mr. Fish, the court cited Frederickson *v.* Louisiana, 23 How. 445, holding that the treaty with Würtemberg did not apply to the succession of the estate of a former subject of Würtemberg who had been naturalized in the United States and who resided in Louisiana at the time of his death. Mr. Fish observed, however, that the terms of the treaty with Sardinia were more general, embracing "any person" holding real estate within the territories of one of the contracting parties, while the treaty with Würtemburg referred to property held by "citizens or subjects" of one party within the territory of the other.

The treaty with Sardinia of 1838 is superseded by the treaty with Italy of February 26, 1871, which provides (Art. XXII.) that in respect of real estate the citizens and subjects of the contracting parties shall be treated on the footing of the most favored nation.

Netherlands.

It seems there is no treaty stipulation between the United States and the Netherlands on the subject of the rights by inheritance of the children of a deceased child of a Netherlander dying intestate in the United States. Article 6 of the treaty of 1782 related only to personalty.

Stanbery, At. Gen., 1866, 12 Op. 5.

Sweden.

Art. VI. of the treaty between the United States and Sweden of April 3, 1783, in providing that the subjects of the contracting parties "may freely dispose of their goods and effects," and that "their heirs, in whatever place they shall reside, shall receive the succession even *ab intestato*, . . . without having occasion to take out letters of naturalization," does not confer

upon a person, claiming through a Swedish subject, the right to inherit land.

Meier *v.* Lee, 76 N. W. 712. (Iowa.)

Switzerland.

"In Chirac *v.* Chirac (2 Wheat. 259), it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them precisely in the same situation as if they had been citizens of this country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in Carneal *v.* Banks (10 id. 181), and with respect to the British treaty of 1794 in Hughes *v.* Edwards (9 id. 489). A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. (Orr *v.* Hodgeson, 4 id. 543.) By the British treaty of 1794 'all impediment of alienage was absolutely leveled with the ground, despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. Fairfax's Devisees *v.* Hunter's Lessee, 7 Cranch, 627: see Ware *v.* Hylton, 3 Dall. 242.' 8 Op. Att'ys-Gen. 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not effect this case, says: 'Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it.' (Treat. on the Const. and Gov. of the U. S. 204.)

"If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' (Const. Art. I. § 10.)

"It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. (See also Shanks *v.* Dupont, 3 Pet. 242; Foster & Elam *v.* Neilson, 2 id. 253; The Cherokee Tobacco, 11 Wall. 616; Mr. Pinckney's speech, 3 Elliot's Constitutional Debates, 231; The People, &c. *v.* Gerke & Clark, 5 Cal. 381.)

"We have no doubt that this treaty is within the treaty-making power conferred by the Constitution. And it is our duty to give it full effect."

Hauenstein v. Lynham, 100 U. S. 483, 489, upholding the constitutionality of the stipulations of the treaty between the United States and Switzerland of 1850, removing the disabilities of alienage with regard to the inheritance of real estate.

Under our treaties of 1847 and 1850 with Switzerland a citizen of the United States is as freely entitled to hold property in Switzerland as is a citizen of Switzerland.

Mr. Evarts, Sec. of State, to Mr. Fish, Sept. 26, 1879, MS. Inst. Switz. II. 14.

2. Law in Other Countries.

§ 546.

Great Britain.

The British act of May 12, 1870, 33 Vict. c. 14, § 2, provides that an alien may take, acquire, hold, and dispose of real and personal property in the same manner as a natural-born British subject, and that title may be derived through, from, or in succession to an alien in the same manner as through, from, or in succession to such a subject. It is declared, however, that the section shall not apply to real property outside the United Kingdom, nor qualify an alien for any office, or for any municipal, parliamentary, or other franchise, nor entitle him to any right or privilege as a British subject, except those expressly conferred by the act as to property.

Mr. Hill, Act. Sec. of State, to Mr. Armstrong, June 7, 1900, 245 MS. Dom. Let. 467.

A naturalized citizen of Canada, being a British subject, was entitled to the benefit of the act of February, 1874, conferring on aliens the same right to hold property as their Government gave citizens of Kentucky, by virtue of an act of the English Parliament giving aliens the same right to hold property that natural-born British subjects have.

Commonwealth v. Newcomb, 109 Ky. 18, 22 Ky. Law Rep. 516, 58 S. W. 445.

Japan.

"By Article III., convention [with Japan] of 1858, Americans have the right in the open ports 'to lease ground, and purchase the buildings thereon and may erect dwellings and warehouses.' The recent convention of November 22, 1894 (which does not take effect until July 17, 1899), confirms this by giving our citizens the right to 'there own or hire and occupy houses, manufactories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes, conforming themselves to the laws, police and customs regulations of the country like native citizens or subjects.' The premises of the United States legation at Tokyo are held under this leasehold tenure, a ground rent being paid for the land, while the buildings belong to the United States Government."

Mr. Day, Assist. Sec. of State, to Mr. Cozade, Nov. 20, 1897, 222 MS. Dom. Let. 555.

Mexico.

Citizens of the countries bordering on Mexico can not hold real estate in Mexico within sixty miles of the frontier, without the individual permission of the President of Mexico, nor can foreigners acquire real estate within five leagues of the maritime coasts of the Republic, except by permission of a special act of Congress.

Mr. Bayard, Sec. of State, to Mr. Howe, May 8, 1885, 155 MS. Dom. Let. 323, enclosing copies of Consular Reports, Nos. 32 and 34.

In a despatch No. 1033, of May 26, 1885, Mr. Morgan, then American minister to Mexico, reported that, so far as he had been able to discover, the question whether a mining grant was subject to the same consequences under Mexican law, and the same disabilities as a purchase of land, had never been adjudicated by the Supreme Court of Mexico. (Mr. Porter, Act. Sec. of State, to Mr. Howe, June 5, 1885, 155 MS. Dom. Let. 580.)

"Drawing your notice to the Mexican law of February 1, 1856, which prohibits foreigners from 'acquiring real estate in the frontier States or Territories, except 20 leagues from the line of the frontier,' without previous permission of the Supreme Government, I have the honor to advise the Department that I was to-day informed verbally by Mr. Azpiroz, acting minister of foreign affairs, that the Mexican Government had determined to issue no authorizations or permits hereafter to foreigners to purchase real estate within the territorial limits stated until there shall have been a final adjustment of the boundary between the two Republics."

Mr. Ryan, min. to Mexico, to Mr. Blaine, Sec. of State, No. 333, June 27, 1890, For. Rel. 1890, 644.

Persia.

"I have the honor to state that on account of the Persian law not allowing foreigners to hold real estate in Persia, and on account of the great difficulty of leasing property here, our missionaries were, up to the time of my coming here, obliged to resort to the unsatisfactory means of holding their property in the name of a Persian subject.

"Such a trustee, a few weeks ago, claimed that the property held in his name was his own; that he was both the legal and equitable owner. He refused either to deed to any one else or to hand the property over to the missionaries. I forced him to reliquish all claim to it and to execute a deed to the mission. I have succeeded, by representing to the Government the good, charitable, hospital, and educational work done by the missionaries in obtaining for them the right to hold real estate in their own name.

"I have also initiated the practice here of obtaining the seal of the grand vizier upon every deed of property purchased by Americans,

which not only cures all defects in the title, but is also a guarantee of our right to hold the property."

Mr. Beale, min. to Persia, to Mr. Blaine, Sec. of State, No. 26, Dec. 5, 1891, For. Rel. 1892, 355.

Russia.

"Citizens of the United States have the right, in virtue of the laws of the Empire and under the same conditions as all strangers, to acquire and possess real estate in Russia subject to certain restrictions, as set forth in article 1003 of volume 9 of our Code of Laws.

"These restrictions bear upon the holding of real estate in the province of Turkestan (law of 12 June, 1886) and of land outside the city limits in the ten governments of Poland, and in the governments of Bessarabia, Vilna, Vitebsk, of Volhynia, Grodno, Kieff, Kovno, of Courland, of Livonia, Minsk, and of Podolia (law of 14 March, 1887)."

Mr. Chichkine, Russ. for. office, to Mr. White, min. to Russia, May 13/25, 1893, For. Rel. 1894, 540.

"Personal inquiry at the foreign office reveals the fact that foreigners are not permitted to own real estate in the frontier governments of the west. These begin at Livonia, south of this point, and embrace Courland, Kovno, Suwalki, Lomsha, Plock, Kalisz, Piotrkow, Kielce, Lublin, Volhynia, Podolia, and Bessarabia. Otherwise foreigners are permitted to do business in these provinces the same as subjects of the Empire, and there are said to be no special restrictions in any other part of the Empire.

"A general exception to this, however, must be noted in the regulations relating to Jews. Anyone of Jewish origin should make special inquiry before acting upon general assurances, for the Russian Government has special regulations in regard both to its Jewish subjects and to foreigners of such origin.

"While no exceptions are made against foreigners within the limits stated, yet it should be borne in mind that regulations and requirements are much more minute and complex here than in our country, and so a foreigner needs to proceed with great care in order not to fail in such particulars."

Mr. Breckinridge, min. to Russia, to Mr. Olney, Sec. of State, March 25, 1896, For. Rel. 1896, 529.

Turkey.

"I note your statement that the land on which the girls' school building at Marsovan stood is held in the name of a Turkish subject, while the permit to erect the building thereon was also given to a Turkish subject. There is force in your comment that 'There appears to be no good reason why the title

should not have been in the name of the college society or in the name of the American professors there, so that the subject could be more directly dealt with.' The imperial rescript of 7 Sepher 1284 (January 18, 1867), expressly grants to foreigners throughout the Turkish dominions enjoyment of the same rights as Ottoman subjects in regard to holding real estate; and the Aarifi-Boker protocol of August 11, 1874, followed by the President's proclamation of October 29 of the same year, makes the recognition of such right to hold real estate in favor of American citizens a matter of conventional agreement entered into by the United States Government in the interest of its citizens and for their due protection."

Mr. Adee, Act. Sec. of State, to Mr. Thompson, min. to Turkey, No. 77, April 29, 1893, For. Rel. 1893, 632.

For the text of the protocol of 1874, see For. Rel. 1874, xxii.; 65 Br. & For. State Papers, 370.

"I have the honor to acknowledge the receipt of your instruction No. 1460 of May 26. The 'special law' to govern the holding of real estate in Turkey by subjects of Ottoman birth who have changed their nationality, referred to in Article 1 of the legislative enactments printed on page 826 of the volume of 'Treaties and Conventions between the United States and other Powers,' edited in 1889, has not yet been enacted. Subjects of Ottoman birth who have changed their nationality before 1869, or who have obtained the Imperial sanction to a change made since that year, are considered as foreigners and are subject to the provisions of Article 1 referred to above, while subjects of Ottoman birth who have changed their nationality since 1869 without the Imperial sanction are still at law Ottoman subjects and their naturalization is null and void. There is a provision of law by which persons of this latter class may have pronounced against them the loss of Ottoman citizenship entailing the forfeiture of their real property. (Article 6 of the 'Loi sur la Nationalité Ottomane' of the 19th January, 1869, and article 111, with note of the Code de la Propriété Foncière in the 'Legislation Ottomane' annotated by Aristarchi Bey.) This provision of law has, however, never been put into practice by the Ottoman Government.

"It would seem that the large class of former Ottoman subjects who have acquired American citizenship since 1869 without the Imperial sanction, and who subsequently return for a longer or shorter sojourn in the land of their origin, must in a majority of cases profit by a dual nationality. As stated in No. 881 of May 23, 1896, all such persons who are land owners in Turkey are unable to accomplish any act affecting their real property before a Turkish tribunal or bureau unless they accept the designation of 'Ottoman subject.' It may therefore be stated as generally true that the natu-

ralized American of Armenian origin who returns to this country and acquires fresh holdings of real property or disposes of property of which he is already possessed performs these acts in the guise of a subject of the Sultan."

Mr. Riddle, chargé d'aff. ad. int., to Mr. Sherman, Sec. of State, July 5, 1897, For. Rel. 1897, 589.

See Mr. Day, Sec. of State, to Mr. Tragidis, May 12, 1898, 228 MS. Dom. Let. 444.

"I send you herewith a copy of the correspondence between this Department and the consul at Jerusalem relative to the complaint of one Hyman Rose, a naturalized citizen of the United States, who alleges that he was prevented by the Turkish authorities from selling and conveying certain real estate owned by him in Jerusalem because he is a Jew. . . .

"In this connection your attention is called to the real-estate protocol of 1874 (Treaty Volume, p. 824). This protocol has all the force of a treaty engagement and secures to foreigners the right to acquire, hold, and convey real estate upon compliance with the requirements of local laws and regulations on the same footing as native Turks. You will note that there is no restriction whatever placed upon the enjoyment of this right by aliens, save in respect to 'subjects of Ottoman birth who have changed their nationality.' It is declared that they 'shall be governed by a special law.' This Government has never been informed of this special law, but it can have no relation to a prohibition alleged to rest on a religious disqualification. If an American citizen be denied the right to acquire or dispose of real estate under the rescript of 1867 and the protocol of 1874 because he is alleged to be of a certain religious faith, this Government would be bound to protest against such a discrimination as inadmissible. No religious test can be recognized by this Government, and equal rights under treaties are claimed for all American citizens regardless of the faith they profess."

Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, No. 14, July 5, 1893, For. Rel. 1893, 638.

"On receipt of your dispatch No. 14, . . . I called upon the grand vizier. He stated to me that the restrictions heretofore existing had been modified, and that no obstruction would be placed in the way of Mr. Rose to sell his land in Jerusalem if the sale is made to a citizen.

"He stated that the Government desired to prevent the alienation of the land to nonresidents, and to those who wished to purchase for speculative purposes with no intention to reside upon the property when bought.

"On his promise to remove any obstacle in the way of any one who, being the owner of land, desired to sell it to a purchaser not an alien and who wished to live upon it, I gave him the name of Mr. Rose.

"The manifest policy of the Government is to prevent the acquisition of land in Jerusalem by nonresidents and to discourage its transfer for speculative purposes."

Mr. Terrell, min. to Turkey, to Mr. Gresham, Sec. of State, No. 23, July 29, 1893, For. Rel. 1893, 651.

"It would appear that the objections of the grand vizier lie against the acquisition of lands by nonresidents for speculative purposes, and that in imposing upon Mr. Rose an obligation to sell his land to 'a citizen' or to 'a purchaser not an alien,' his excellency is not to be understood as announcing any purpose to impede the bona fide purchase of lands in Turkey by American citizens under the existing real estate protocol."

Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, No. 41, Aug. 19, 1893, For. Rel. 1893, 669.

"It appears from a report made by the governor of Jerusalem that Jewish emigrants from Russia, after going to the United States and becoming naturalized in that country, enter Palestine and seek to acquire property there.

"The acquisition of real property in Palestine by Jewish immigrants is, however, forbidden. This measure, which is dictated by considerations of a political nature, has for its sole object the prevention of the permanent establishment in Palestine of Jewish immigrants, who, in spite of the existing prohibition, have succeeded or may succeed in entering the country.

"The Imperial Government having prohibited entry into Palestine to foreign Jews emigrating in a body, as was communicated to the foreign missions by the circular notes verbales of October 4 and 8, 1888, no objection can reasonably be raised at the present day to a measure which is solely designed to safeguard and render more efficacious this prohibition.

"Besides, as the interdiction against acquiring real property in Palestine applies to native Jews as well as foreign ones, the latter can not complain of unequal treatment.

"In order, however, to avoid any prejudice being caused to the interests of foreign Jews duly settled in Palestine by the measure in question, the Defterhane (real-estate bureau) records the acquisition of real property if the purchaser, even though a Jew, presents a certificate from his consulate, attested by the governor of Jerusalem, showing that he does not belong to the class of Jews whose immigration into Palestine is forbidden, and if in addition he delivers a

declaration by which he undertakes, in the case of urban property, not to allow the house he is buying to be inhabited by Jews of this category, and, in the case of rural property, not to found Jewish colonies on it. It is well understood that measures will be taken against persons who may act in a manner contrary to their declaration."

Note verbale, Turkish min. of for. aff. to U. S. legation, March 27, 1894, For. Rel. 1898, 1106.

"The Ottoman law of 1867, which concedes to foreigners the right of holding real estate in the Ottoman Empire, and which is formally accepted by the protocol of 1874, declares in Article II.:

"'Foreigners, proprietors of real estate in town or in country, are in consequence placed upon terms of equality with Ottoman subjects in all things that concern their landed property.'

"And after specifying on certain particulars the legal effect of this equality, it says:

"'In short, they are in all things to hold real estate by the same title, on the same condition, and under the same forms as Ottoman owners, and without being able to avail themselves of their personal nationality, except under the reserve of the immunities attached to their persons and their movable goods, according to the treaties.'

"Now, Ottoman subjects of the Jewish faith not being allowed to purchase real estate in Jerusalem except under certain limitations, Jews of foreign nationality, it is claimed, may be forbidden to purchase under the same limitations.

"The prohibition under consideration applies only to Palestine, and we are assured owes its existence solely to the fear that an inundation of Jews may overflow Palestine and greatly embarrass the Government.

"The above argument is not particularly dwelt upon in the note of 1894, but it has been adduced by the secretary for foreign affairs in conversations with me, though, I am bound to say, not with great emphasis. Still, sooner or later, we may expect to see it pressed, and therefore I have deemed it well to call the attention of the Department to it, so that, if thought expedient, proper instructions may be given in regard to it."

Mr. Angell, min. to Turkey, to Mr. Sherman, Sec. of State, Jan. 5, 1898, For. Rel. 1898, 1104, 1105.

"The reservations or inhibitions derivable from Article II. of the Ottoman law of 1867, as annexed to the protocol of 1874, have heretofore attracted the attention of this Department, and, without having an express case before it for decision, it has nevertheless been inclined to think that a specific disability imposed upon Ottoman subjects for any cause as regards their tenure of real estate would in like manner

be deemed to apply to aliens, provided no discriminations among the several classes of foreigners were thereby made. As to the reason and equity of the inhibition in question, that is another matter, and in view of the fact that the inhibition is not aimed at American Jews, the conditions of whose residence do not fall within those of Russian and other Hebrews, which is supposed to have led to the adoption of the Turkish rule, it would seem proper for you to endeavor to obtain some modification of the restrictions whereby, under such limitations and regulations as may be practical and just, American citizens of the Jewish faith may be allowed to purchase real estate in Jerusalem."

Mr. Sherman, Sec. of State, to Mr. Angell, min. to Turkey, Feb. 7, 1898, For. Rel. 1898, 1107, 1108. Both in For. Rel. and in the MS. Records, this refers to article 11, but it should evidently be Art. II.

IV. *MILITARY SERVICE.*

1. Voluntary Enlistments.

§ 547.

The voluntary enlistment of an alien in the military service raises in itself no international question. The modern tendency, however, is to exclude aliens from such service, and this seems to be in harmony with sound principles.

"At the request of the Secretary of War and in view of the inquiries which have been made and are being made at the embassies and legations of the United States by officers of foreign armies who wish to take service in the American Army in the present war with Spain, you are instructed to notify such persons that the United States Government does not find it practicable to avail itself of their offer for the following reasons:

"The Regular Army is now officered exclusively by natives or naturalized citizens of the United States, and aliens are not allowed to enlist as private soldiers.

"The officers of the volunteer forces are appointed by the governors of the several States, and the General Government could not consistently recommend the appointment of foreign officers in the State troops when they are debarred from the Regular Army."

Circular, Mr. Day, Sec. of State, to the Diplomatic Officers of the United States, May 12, 1898, For. Rel. 1898, 1174.

See In re McDonald, 1 Lowell, 100; Shorner's Case, 1 Car. L. Rep. 55.

An alien who enlists is bound to serve the term of his enlistment. (Nelson, At. Gen., 1844, Op. 350. See Legaré, At. Gen., 1841, 3 Op. 670.)

The act of 1802, limiting enlistments to citizens, was not reenacted in any subsequent law. (Cushing, At. Gen., 1854, 6 Op. 474.)

"1. . . . All persons enlisted for the United States Navy have to be enlisted by regular naval recruiting officers at permanent or temporary recruiting stations in the United States; and by the commanding officers of vessels cruising on foreign stations in time of peace. During war no one can be recruited in a foreign country.

"2. Certain aliens, who declare their intentions of becoming naturalized citizens, and, in exceptional cases, those who do not, are enlisted, provided they can understand the English language sufficiently well for receiving instructions. There is no fund for paying traveling and other expenses before enlistments are made.

"3. If aliens are enlisted, they are eligible to any position for which they can qualify, but the customs and regulations of the service have been that only men of long and continued service receive the higher ratings; and it is the opinion of the Bureau that not even a citizen of the United States residing abroad can enlist in time of war without coming to the United States, unless neutrality laws are violated."

Report of Capt. Crowninshield, Chief of the Bureau of Navigation, Navy Department, June 1, 1898, communicated by Mr. Allen, Acting Sec. of the Navy, to the Sec. of State, June 1, 1898, For. Rel. 1898, 1175.

The British Government uniformly grants requests of the Government of the United States for the discharge of American citizens from the army upon satisfactory proof that they enlisted while minors without the consent of their parents. But, as a condition of making such request, the Department of State requires the deposit with the American minister at London of a sum sufficient to pay the expenses of the transportation of the individual to the United States, this rule having been adopted in consequence of the distress in which young American citizens were involved by being discharged without means in places where they could find no employment.

Mr. Bayard, Sec. of State, to Mrs. Lewis, July 17, 1886, 161 MS. Dom. Let. 20.

See, to the same effect, Mr. Porter, Act. Sec. of State, to Mr. Biggs, Oct. 4, 1886, 161 MS. Dom. Let. 547.

See Mr. Bayard, Sec. of State, to Sec. of War, Jan. 9, 1889, enclosing a note of the British legation of Jan. 2, 1889, asking for the discharge of Septimus Reynolds, who had enlisted in the military service of the United States while a minor, without the consent of his parents. (171 MS. Dom. Let. 285.)

2. Compulsory Service.

§ 548.

Three American citizens engaged in business as merchants at "Jackmel, St. Domingo" (now Jacmel, Hayti), having been subjected to forced loans and military service, decided to leave the island, and for

that purpose applied for passports, which General Pageot, the French commander, refused to give them. They then tried to depart without passports, and were arrested and imprisoned. The United States protested against their detention, saying: "The most inviolable and most obvious right of an alien resident is that of withdrawing himself from a limited and transitory allegiance having no other foundation than his voluntary residence itself. The infraction of this right is consequently among the greatest of injuries that can be done to individuals, and among the justest of causes for the interposing protection of their government."

Mr. Madison, Sec. of State, to Mr. Pichon, French chargé, May 20, 1803, 14 MS. Dom. Let. 155.

"Citizens or subjects of one country residing in another, though bound by their temporary allegiance to many common duties, can never be rightfully forced into military service, particularly external service, nor be restrained from leaving their residence when they please. The law of nations protects them against both, and the violation of this law by the avowed impressment of American citizens residing in Great Britain may be pressed with the greater force on the British Government, as it is in direct inconsistency with her impressment of her own subjects bound by much stronger ties to the United States, as above explained, as well as with the spirit of her commercial laws and policy, by which foreigners are invited to a residence. The liberation of the persons comprehended by this article, therefore, can not be justly or honorably refused, and the provision for their recompense and their return home is equally due to the service rendered by and the wrong done to them."

Mr. Madison, Sec. of State, to Mr. Monroe, min. to England, Jan. 5, 1804, Am. State Papers, For. Rel. III. 81, 87.

In reply to a complaint of the French minister, that a Mr. de Testaret, a French subject, while in Ohio on private business, had been enrolled in the militia and called on to perform military duty in defense of the country, as a citizen of the United States; and that a similar demand had been made on Mr. Dumas, another French subject, in Missouri Territory, Mr. Monroe stated that he would immediately write to the governors of Ohio and Missouri and request their attention to the subject.

Mr. Monroe, Sec. of State, to Mr. Serurier, French min., July 30, 1813, MS. Notes to For. Leg. II. 13.

"I can hardly suppose that there exists, anywhere in the world, the erroneous belief that aliens are liable here to military duty. If

you think otherwise, there will be no objection to your giving any publication you please to this communication."

Mr. Seward, Sec. of State, to Mr. Gamble, Aug. 14, 1862, 58 MS. Dom. Let. 69.

See Ex parte Blumer, 27 Tex. 734.

"I regret that absence from this city has prevented, until now, the receipt of your letter of the 28th of August last. The question which it presents is not without its difficulties. The provision found in the constitution of Indiana and in other States, which admits foreigners to citizenship there who have not perfected their naturalization, has not been unknown to this Department. So long as questions arising under it have only a local bearing, serious difficulties may easily be avoided. The occurrence of the present civil war brings up questions under it, which affect the relations of the United States to foreign nations.

"There is no principle more distinctly and clearly settled in the law of nations, than the rule that resident aliens not naturalized are not liable to perform military service. We have uniformly claimed and insisted upon it in our intercourse with foreign nations. While the State of Indiana holds that an alien becomes a citizen by one year's residence and declaration of intention to become a citizen of the United States, the law of Great Britain holds that a native British subject owes allegiance to the British Government, until he has completely effected his naturalization in the United States, under the laws of Congress.

"In the very beginning of the war, the question arose between the two Governments in this way. A British subject residing in Maryland, who had filed a declaration of intention, but had not perfected his naturalization under the laws of Congress, claimed protection and redress from this Government on the ground that he had a British passport. On examining the records of this Department, it was found that from the foundation of the Government the Department had refused to grant passports as citizens to aliens who had merely filed the preliminary declaration of intention, and who had not effected their naturalization under the United States laws, and had informally recognized the passports granted to them by the proper authorities of the governments of which they had been born subjects. It was deemed wise and prudent to adhere to this course, insomuch as it seemed to be not only equal and just, but also entirely in conformity with the laws of Congress. The conjuncture of a civil war, moreover, was thought an unfavorable one for a departure from the settled practice of the Government in its intercourse with foreign countries, with all the hazards of conflict. It is proper to state, however, that in every case where an alien has exercised suffrage in the United States,

he is regarded as having forfeited his allegiance to his native sovereign, and he is in consequence of that act like any citizen liable to perform military service. It is understood, moreover, that foreign governments acquiesce in this construction of the law. It is hoped that under this construction your militia force will not be sensibly reduced."

Mr. Seward, Sec. of State, to Gov. Morton, Sept. 5, 1862, 58 MS. Dom. Let. 169. See, however, supra, § 387.

"No alien-born person is liable to render military service unless either he has been naturalized on his own application or has made a voluntary declaration, on oath, of his intention to become a citizen by naturalization, according to law, or has claimed and actually exercised the political right of voting as a citizen of the United States."

Mr. Seward, Sec. of State, to Mr. Williams, Nov. 24, 1863, 62 MS. Dom. Let. 333, 502.

See Mr. Seward, Sec. of State, to Mr. Stanton, Sec. of War, Aug. 8, 1863, 61 MS. Dom. Let. 348.

Orders Nos. 53 and 65 of the provost-marshal-general made it the duty of provost-marshals, when not satisfied that the claimant was entitled to exemption from the military draft on the ground of alienage, to refer the case, with the affidavits and such other evidence as they might be able to procure, through the provost-marshal-general, for the decision of the Department of State, in the meantime suspending all action until such decision should be made. It was desired that the observance of these orders should be enjoined on the provost-marshals, in order that the evidence might reach the Department of State through the proper channel instead of being communicated to it by the parties interested. (Mr. Seward, Sec. of State, to Mr. Stanton, Sec. of War, Sept. 9, 1863, 61 MS. Dom. Let. 520.)

In a case of alleged fraudulent enlistment of an alien, his government has an undoubted right and duty to ask for a prompt investigation and satisfactory answer; and, if it appears that he was improperly enlisted and he has fallen in battle, his family ought to have some compensation. (Mr. Seward, Sec. of State, to Mr. Stanton, Sec. of War, Aug. 2, 1864, 65 MS. Dom. Let. 399, referring to previous letters to Mr. Stanton of March 9 and May 26, 1864, and the latter's answers of May 28, and July 8, 1864, and a note of the French legation "of the 18th instant.")

"In 1861, during the American civil war, the British Government declared that if enforced enlistments of *British subjects* for the war were persisted in, the Government would be obliged to concert with other neutral powers for the protection of their respective subjects; but neither in the Northern or Southern States was the discharge of any British subject enlisted against his will refused on proper representation. There is no international law prohibiting the government of any country from requiring aliens to serve in the militia or police, yet at the above-mentioned date the British Government intimated

that, if the United States permitted no alternative of providing substitutes, the position of British subjects to be embodied in that militia would 'call for every exertion being made in their favor on the part of Her Majesty's Government.' The British Government in 1862 informed Mr. Stuart that as a general principle of international law neutral aliens ought not to be compelled to perform any military service (*i. e.*, working in trenches), but that allowance might be made for the conduct of authorities in cities under martial law and in daily peril of the enemy, and in 1864 the British Government saw no reason to interfere in the case of neutral foreigners directed to be enrolled as a local police for New Orleans.

"By the United States act, April 14, 1802, naturalized aliens are entitled to nearly the same rights and are charged with the same duties as the native inhabitants; and aliens not naturalized, if they have at any time assumed the *right of voting at a State election* or held office, are, according to the opinion of Mr. Attorney-General Bates, liable to the acts for enrolling the national forces. (See, also, act 3d March, 1863, and act 24th February, 1864; proclamation of President May 8, 1863.) This was acted on during the American civil war, and tacitly acquiesced in by the British Government."

2 Halleck's Int. Law (Baker's ed.), 6.

"In our late civil war, when the Government of the United States was compelled to use every just effort to put down the insurrection by which its existence was assailed, and when in the application of its conscription acts it was compelled to consider many cases of aliens on its shores, there is not a single instance in which an alien was held to military duty when his Government called for his release." (Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Feb. 15, 188, For. Rel. 1888, I. 510, 512.)

"During the civil war in the United States, all persons who had voted as State citizens were claimed by the United States Government as liable to the conscription; and the act of the Congress of March 3, 1863, expressly declared that the levy should include 'all persons of foreign birth who shall have declared on oath their intentions to become citizens.'

"Mr. Sellers, a British subject, who had announced his intention to become naturalized, applied, in October, 1862, to be informed whether he could claim the protection of the British Government. He was told that, as he had so acted without consulting the British Government, he must not expect that, until a case should arise in which its interference might be requested, it would give any opinion of the view which it might take of such a case. (Parl. Papers, 1862.)

"In 1862 certain native-born British subjects in Wisconsin claimed 'that, although they had voted at elections, they had done so under the State law as aliens, and had not thereby forfeited their British nationality.'

"Mr. Seward replied that, so far as the executive authority of the United States was concerned, no foreigner who had not been naturalized, or who had not exercised the right of suffrage, had hitherto been required to serve in the militia.

"M. Mercier, the French minister, wrote, in a circular to the French consuls, that Frenchmen who had voted illegally in the United States had no doubt rendered themselves liable to legal penalties in that country, but that they had not forfeited their French nationality, or their right as aliens to be exempt from compulsory military service. And he referred to the laws of some of the States which admit aliens to the exercise of the elective franchise. (Parl. Pap. No. 536, 1862.) The matter was referred by Lord Lyons to the Home Government, and he was instructed to abide by the decision of the American law courts.

"In 1863 certain able-bodied male persons of foreign birth, who had declared on oath *their intention* to become American citizens, were called upon for military duty by the United States. On this, the British Government suggested that British subjects who had merely declared their intention to become American citizens, but had not exercised any political franchise in consequence of such declaration, ought to be allowed a reasonable period after the passing of the act to exercise the option of leaving the United States or of continuing residing therein with the annexed conditions. The United States Government thereupon allowed sixty-five days to such persons to exercise their option, and the British Government refused to interfere on behalf of any intended citizens who had not availed themselves of the opportunity. (Parl. Pap. No. 337, 1863.)"

1 Halleck's Int. Law (Baker's ed.), 365.

With reference to these statements it is to be observed that Mr. Seward at one time argued that the provision of the act of 1863, subjecting to military duty persons who had declared their intention to become citizens, operated, in connection with another provision of the same act, directing the issuance to such persons of passports, as a process of naturalization, which the proclamation gave them the option of accepting, by staying in the United States, or of declining, by going away. (Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, July 20, 1863, supra, § 495, vol. 3, pp. 871–872.

"In the absence of treaties, citizens of the United States who have become and are remaining domiciled in foreign countries, could not be exempt from certain common obligations of citizens of those countries to pay taxes and perform duties imposed for the preservation of public order and the maintenance of the government. The treaty between the United States and the Argentine Republic exempts citizens of the United States from the performance of all compulsory military service and from the payment of all forced loans, requisi-

tions, and military exactions. In assigning this effect to the treaty, your proceeding is approved."

Mr. Seward, Sec. of State, to Mr. Asboth, No. 27, March 27, 1867, MS. Inst. Argentine Repub. XV. 275.

This instruction related to the case of two persons, named Albee and Gordon, citizens of the United States, who, during a rebellious rising in 1866 in the Argentine Republic, claimed exemption from enrollment in the national guard.

"This Government is not disposed to draw in question the right of a nation in a case of extreme necessity to enroll in the military forces all persons within its territories, whether citizens or domiciled foreigners. Nevertheless, should you be drafted, as you fear, on informing this Department of that fact and furnishing proofs of your American citizenship and a statement of facts in regard to your residence in Canada, its length and reasons for the same, such representations will be made to the British authorities as will, it is to be hoped, result in your exemption or release."

Mr. Seward, Sec. of State, to Mr. White, July 10, 1868, 79 MS. Dom. Let. 73.

A person residing in Montreal, who inquired whether he was entitled to apply for naturalization and stated that he intended in two years to renew his residence in the United States, where he formerly had his home, desired to ascertain whether his naturalization, if it should be granted, would exempt him from military service while he remained in Canada. The Department of State replied: "Whether your naturalization will protect you from military service depends upon the laws of Canada. This Government, though waiving the exercise of the right to require military service from all residents, has never surrendered that right, and can not object if other governments insist upon it."

Mr. Fish, Sec. of State, to Mr. Redmond, April 3, 1869, 80 MS. Dom. Let. 530.

"When complaint was made during our late rebellion that British subjects were compelled to serve in the Virginia and Missouri militia, Lord Lyons was instructed by his Government 'that there is no rule or principle of international law which prohibits the government of any country from requiring aliens resident within its territories, to serve in the militia or police of the country, or to contribute to the support of such establishment.'

"This appears to be the kind of service required of American citizens, in common with all others, in the island of Curaçao. The commutation for such service—eight dollars per annum—appears to be

moderate and reasonable. It is therefore not deemed advisable at present to raise any question upon this subject."

Mr. Davis, Assist. Sec. of State, to Mr. Faxon, consul at Curaçao, No. 46, Feb. 17, 1870, 58 MS. Desp. to Consuls, 26.

"I must decline to enter into the question to what extent and under what circumstances do our citizens, native or naturalized (in the absence of treaty stipulations), owe military service to a foreign government in whose dominions they are *domiciled* for commercial or other purposes. They certainly do not stand on the same footing as mere travelers or temporary sojourners.

"I do not perceive any good reason why a government (in the absence of treaty stipulations) may not require from domiciled foreigners the discharge of such civic duties as service upon juries, in the ordinary municipal arrangements for the prevention and extinguishment of fires, and other duties of like character."

Mr. Fish, Sec. of State, to Mr. Wing, April 6, 1871, MS. Inst. Ecuador, I. 263.

"There is no treaty stipulation between the United States and Great Britain which exempts the citizens or subjects of either party from military duty in the forces of the other either in peace or war. Consequently we can not claim such exemption in Demerara as a matter of right. As a matter of comity and reciprocity, however, we certainly can claim them. During the late civil war in this country there were numerous instances where British subjects were drafted into the military service of the United States, but were subsequently discharged upon the application of the British minister here. The only cases in which a compliance with such an application was refused were the few in which persons of that nationality had voted in States where foreigners not fully naturalized are allowed that privilege."

Mr. Davis, Assist. Sec. of State, to Mr. Figyelmesy, consul at Demerara, No. 134, March 7, 1873, 69 MS. Desp. to Consuls, 254.

"Few of our treaties contain an express exemption of the citizens of one party from military service to the other, and, as you remark, no such stipulation is embodied in the treaty with Guatemala. We did not claim the right to impress aliens into our forces during the late civil war, but, it is understood, that, in one instance at least, in the case of a siege, we sought to justify such an impressment. Under these circumstances, if Mr. Mordaunt should be called into the military service of Guatemala, at least for any other purpose than to defend a town of which he may be a resident during a siege, you are authorized to demand his discharge."

Mr. Fish, Sec. of State, to Mr. Williamson, Min. to Cent. Am., No. 98, July 24, 1874, MS. Inst. Costa Rica, XVII. 191.

Foreigners "are not bound to discharge municipal duties, nor do military service, nor to work personally on the roads; their obligation in this last respect is limited to the payment of the corresponding road tax."

Circular of the Guatemalan Ministry of Foreign Relations, Sept. 13, 1888, For. Rel. 1888, I. 167–168.

A report having been received that an aged citizen of the United States at Matamoras, Mexico, had been taken from his house by a military force and placed on the fortifications in an exposed position, the United States, while declaring that the adoption of any vigorous measures which might comport with treaties and public law for the purpose of defending the city against invaders, could not be complained of, remonstrated against "any such objectionable course on the part of the authorities of Matamoras" as that above described, which, it was declared, would, if persisted in, "justify and require other measures towards protecting the helpless strangers under their temporary control."

Mr. Fish, Sec. of State, to Mr. Mariscal, April 1, 1876, MS. Notes to Mexican Leg. VIII. 51.

The fact that a resident in Chili is a citizen of the United States, does not, where there is no treaty stipulation covering his case, exempt him from service in a temporary civic guard in which all residents are by law required to serve.

Mr. Fish, Sec. of State, to Mr. Williamson, No. 140, June 13, 1876, MS. Inst. Chile, XVI. 181.

In 1880 the Department of State was informed that certain American citizens had, while on a visit to Mexico, been apprehended by the "colonias militares," a Mexican irregular troop, and after being despoiled of their horses, arms, and other effects, were taken to Piedras Negras and impressed into military service in a battalion of the Mexican army. The American minister in Mexico was instructed that the action of the Mexican authorities appeared to be not only in contravention of public law and international comity, but also a violation of Article XIV. of the treaty of 1831; that there was "scarcely any act of which a nation should be less tolerant than that of a neighboring power forcibly impressing its citizens into their military service, perhaps to be obliged, at some future time, to fight against their own flag;" and that, if the circumstances were found to be as stated, he was to demand of the Mexican Government the instant release of the men and to ask for a reasonable indemnity for their detention, besides urging upon the Mexican

Government the adoption of measures to prevent the recurrence of such cases.

Mr. Hunter, Act. Sec. of State, to Mr. Morgan, min. to Mexico, No. 71, Oct. 9, 1880, For. Rel. 1880, 776.

"The suggestion of the minister for foreign affairs, in his note to you of the 30th of October last, is to the effect that the parties thus forcibly compelled to enter the military service of a foreign power must, in order to secure their release, resort to the slow formalities of judicial procedure in the courts of the country whose civil and military officers committed the wrong. Your protest against this position, as novel as it is believed to be untenable, was apt and timely. Mr. Fernandez's views of international obligations in this regard, as expressed in his note of the 30th of October, can not for a moment be accepted by this Government.

"In addition to the precedent of Emilio Baiz's case, which you cite in your reply to the minister, several instances are found in the records of this Department in which, during the existence of our late civil war, the Mexican Government applied to this for protection to Mexicans resident in various States against demands of the local recruiting officers of the United States upon these Mexican citizens to serve in the armies of this Republic. In all such cases it is found to have been the practice of this Department to bring the subject at once to the attention of the Secretary of War, and no single instance is met with in which the Mexican citizen's claim to exemption from military service in the armies of the United States was not promptly recognized and respected by this government.

"As to the proof of citizenship of the persons now in question, their status as citizens of the United States was established to the satisfaction of this government before instructing you on the subject, and when that point is settled, as required by the laws of the United States, international courtesy dictates that that of Mexico should hold it to be concluded. The peculiarities of Burnato's case are sufficiently explained in my No. 71. Should the men not have been already released on your receipt of this instruction, you will lose no time in pressing for their speedy discharge from the service in which they are held, and you will report the result to the Department without delay."

Mr. Evarts, Sec. of State, to Mr. Morgan, Dec. 8, 1880, For. Rel. 1881, 751. For the note of the Mexican minister of foreign affairs of Oct. 30, 1880, see For. Rel. 1881, 748.

The Mexican Government stated, December 24, 1880, that all the persons referred to in the foregoing correspondence, except one who deserted, were discharged from the army in July, 1880, before any

request for their release was received. The American consul at Piedras Negras stated, however, in February, 1881, that this report was inaccurate, as two of the men were not discharged but were only transferred from the battalion in which they were placed to the "colonias militares," and that, while serving in this body, one of them was killed in a fight with Indians. The other afterwards deserted. The consul suggested that compensation should be made, especially in the case of the person who was killed. With regard to this suggestion Mr. Blaine said: "It is notorious that the impressment of American seamen into the naval service of a foreign power was at one time a serious grievance, not to be acquiesced in, and raised a question upon which all parties in this country were unanimous in regarding as one of international character. Public sentiment here in regard to that subject was borne in mind during the late civil war. The number of persons of foreign birth, especially in the large cities, led to the accidental or involuntary enrollment of unnaturalized aliens in the military or naval service. These, however, as is shown by the large space in the records of the Department at the time, were at once discharged upon complaint made and in the absence of proof of their naturalization. It is hoped, therefore, that in considering this subject the Mexican Government will not only have due regard to the unlawfulness of the impressment, but to the universal and strong sentiment upon the subject which pervades this country."

Mr. Blaine, Sec. of State, to Mr. Morgan, Mar. 14, 1881, For. Rel. 1881, 757. As to subsequent inquiries of the American minister at Mexico as to whether claims for compensation should be presented, see Mr. Morgan, min. to Mexico, to Mr. Blaine, Sec. of State, No. 252, Aug. 11, 1881. For. Rel. 1881, 791.

With regard to the complaint of E. R. Connell, a citizen of the United States residing at Batavia, as agent for an American house, that he was subjected to compulsory semiweekly drills, which greatly interfered with his business duties, the American minister at The Hague was instructed as follows:

"It is desirable in the first place to point out that . . . neither Mr. Connell nor this Department has questioned his treatment as being exceptional in any way or as being different from what was required by the local law of Batavia.

"The question presented by Mr. Connell and by this Department for the consideration of the Netherlands Government is whether or not the existence of such a local law is justifiable under international usage. . . .

"It appears that the 'schuttery' is a local corps in which all residents of Batavia, whether the subjects of the Netherlands Government or not, are compulsorily enrolled, and that that guard may be

called upon to take part not only in the defense of Batavia but also in expeditions to repress disorder in neighboring provinces.

"It is well settled by international law that foreigners temporarily resident in a country can not be compelled to enter into its permanent military service. It is true that in times of social disturbance or of invasion their services in police or home guards may be exacted, and that they may be required to take up arms to help in the defense of their place of residence against the invasion of savages, pirates, etc., as a means of warding off some great public calamity by which all would suffer indiscriminately. The test in each case, as to whether a foreigner can properly be enrolled against his will, is that of necessity. Unless social order and immunity from attack by uncivilized tribes can not be secured except through the enrollment of such a force, a nation has no right to call upon foreigners for assistance against their will.

"There is no evidence in the possession of this Department tending to show that the condition of affairs at Batavia is such as to bring the question within the fair meaning of the rule as I have stated it . . . , and, short of some such condition of affairs as this, it is the belief of this Government that the general principles of international law would not warrant the Netherlands Government in resorting to so extreme a measure.

"The Government of the United States has always favored the residence of its citizens abroad for commercial purposes connected with this country. Such a residence is conducive to the interests not only of the United States but also of the country in which such agents may temporarily reside.

"Although the right of the Dutch Government to expel foreigners from their control can not be disputed, the Government of the United States can not but regard it as a somewhat inhospitable manner of dealing with strangers who reside in the Dutch provinces for the purpose of commerce to insist as a condition of their residence that they shall endure compulsory military service, which may, under some circumstances, become extremely dangerous and onerous.

"You may bring this matter verbally to the attention of the minister of foreign affairs, and explain to him in a frank and friendly manner the views expressed in this instruction and impress upon him that we do not regard the position of Mr. Connell as in any way exceptional."

Mr. Bayard, Sec. of State, to Mr. Bell, min. to the Netherlands, No. 113, Feb. 3, 1888, For. Rel. 1888, II. 1324.

See, also, same to same, No. 86, April 2, 1887, For. Rel. 1887, 897.

With regard to the duration of his residence at Batavia, Mr. Connell said: "I do not pretend to be a temporary resident only, my expectation being to remain here for an extended period." (For. Rel. 1888, II. 1326.)

"After having carefully considered your instruction, I called upon the minister of foreign affairs and presented to him verbally and in a frank and friendly manner the views expressed by you.

"The minister of foreign affairs said that in his opinion and in the opinion of his Government there was nothing in the law or its operation which in any way conflicted with international usage, and that it would not therefore be possible for him to enter into any investigation of the law or its operation with a view to its modification.

"His excellency urged that the services exacted were simply of a police nature for mutual protection, and as the organization had never at any time been mobilized or mustered into the regular military service of the country, or such an event contemplated, such an emergency could not be discussed.

"His excellency did not contend that the remoteness of the colony from the home Government prevented it from being completely administered within the range of international law, nor did his excellency intimate that the disturbed state of affairs in Atcheen had in any way affected the condition of affairs at Batavia.

"Without citing any circumstance or condition in justification of the provisions of the law, his excellency concluded by saying that a similar law existed in the Netherlands, and that such laws were regarded by this Government as necessary, and not in conflict with international usage.

"In my opinion there is no excuse for the contention that it is a case of necessity.

"The whole Dutch schuttery system is only machinery for effecting a saving of national expenditure, and has no positive value for the Government beyond its economical features.

"It further seems to me not only illogical, but absolutely irrational, for this Government, while providing that citizenship must be vacated by Dutch subjects who render foreign military service without the consent of this Government, to resolutely insist upon considering all foreign residents within its jurisdiction as liable to compulsory military service."

Mr. Bell, min. to the Netherlands, to Mr. Bayard, Sec. of State, No. 300, March 3, 1888, For. Rel. 1888, II. 1329.

"Your observations on the Dutch minister's views point out very clearly the anomaly in the Dutch practice, but as Mr. Connell has withdrawn the basis of our complaint, the Department, while not assenting to the position of the Dutch Government as to the principle involved, is willing that the question may rest until another case revives it."

Mr. Bayard, Sec. of State, to Mr. Bell, min. to the Netherlands, No. 118, March 26, 1888, For. Rel. 1888, II. 1330.

Lord Salisbury, May 2, 1891, during the civil war in Chile, inquired of Mr. Kennedy, British minister at Santiago, by telegraph, whether British subjects were "being compelled to serve in the forces of the Government and of the insurgent party in Chile," and, if so, whether anything could be done to relieve them. The Admiralty was requested to telegraph in a similar sense to the naval forces.

Blue Book, Chile, No. 1 (1892), 101.

In 1894 it was reported that the South African Republic, in apprehension of trouble with the Kaffir tribes, threatened vigorously to enforce the commandeer-law by pressing into the military service all the male inhabitants of the country between certain ages. The American ambassador at London was instructed, July 3, 1894, to ascertain the decision of the British Government on this "harsh and arbitrary measure." After an interview with the foreign secretary, the ambassador, July 19, 1894, made the following report: "The question of the exemption of British subjects, resident in other countries, from compulsory military service, had been submitted to the law officers of the Crown, whose reply was to the effect that, by the general rule of law, such exemption was not held to exist, and that it was not claimed as a legal right by Great Britain, but that, by conventional agreement, based upon mutuality between governments, such an exemption could be established. And Lord Kimberley also said that by existing treaties between the South African Republic and Portugal, Belgium, France, Germany, Italy, and Switzerland, severally, it is mutually stipulated that resident citizens of either and both of the respective contracting governments shall be exempted from compulsory military service. . . . A convention (now pending) containing a 'most favored nation' clause is expected to secure to British subjects the same exemption from compulsory military duty as is enjoyed by the citizens of those governments above enumerated who have treaties with the South African Republic of a mutual nature on the subject." Subsequently, it was stated by Mr. S. Buxton, parliamentary secretary for the colonies, in the House of Commons, that the Government had, as the result of negotiations, secured "the personal exemption of British subjects from commandeering and also from contributions for goods and money."

Mr. Adee, Act. Sec. of State, to Mr. Bayard, amb. to England, July 3, 1894, For. Rel. 1894, 252; Mr. Bayard, amb. to England, to Mr. Gresham, Sec. of State, July 19, 1894, For. Rel. 1894, 253.

For the statement of Mr. Buxton, see For. Rel. 1894, 257.

"The Department understands that General Joubert's order prohibiting the drafting or enrollment of aliens in the Boer forces has

been rigidly observed, and that no question has arisen in respect to the impressment of any American citizen, at least no complaint of that character."

Mr. Adee, Second Assist. Sec. of State, to Mr. Stowe, Nov. 18, 1899, 170 MS. Inst. Consuls, 45.

3. Military Tax; Treaty with Switzerland.

§ 549.

Article II. of the treaty between the United States and Switzerland of November 25, 1850, provides that citizens of the one country residing or established in the other shall be "free from personal military service," but that they shall be liable "to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempted from the said service." With reference to a bill by which it was proposed to impose a tax in Switzerland upon the incomes of persons owing military service but exempted therefrom, from disability or other cause, the American minister at Berne was instructed to say: "While we do not controvert the abstract right of Switzerland under the treaty to exact of our citizens, resident or established within Swiss territory, the compensation contemplated by the proposed law, the President can not fail to regard with regret an exaction from citizens of the United States from which so many of other nationalities are exempted" by express treaty provision.

Mr. Fish, Sec. of State, to Mr. Rublee, chargé d'affaires, No. 197, Jan. 3, 1876, MS. Inst. Switzerland, I. 369.

See, also, same to same, No. 45, June 19, 1871, and No. 188, Oct. 27, 1875, MS. Inst. Switzerland, I. 243, 359.

Referring to Mr. Cramer's No. 6, of September 6, 1882, proposing a change in Art. II. of the treaty, the Department of State said: "The subject has heretofore received the attention of this Department, to the conclusion that, while a change in this respect might be desirable, it is not advisable at present to press it as an international issue." (Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, No. 8, Oct. 19, 1882, MS. Inst. Switzerland, II. 150.)

The design of Art. II. of the treaty of 1850, as conceded by the United States, was "simply to relieve the United States citizens from the obligation of personal military service, leaving them subject to any military contribution which may be exacted by way of commutation or otherwise from Swiss citizens who are exempted from personal military service, whether by reason of physical disability or for any other cause." By the Swiss law of June 28, 1878, in relation to the military tax, foreigners established in Switzerland are liable thereto, unless they are exempted by treaties or belong to a state in which Switzers are liable neither to military service nor to a commutation in

money. Since the treaty of 1850, Switzerland has concluded treaties with Germany, Austria, Belgium, France, Great Britain, Italy, Holland, and Russia, expressly exempting their citizens or subjects from personal military service and from any tax in lieu thereof. By an official circular of the police and military departments of the canton of St. Gall, January 19, 1894, it was stated that Swiss citizens living in the United States could not be taxed in Switzerland during their absence, but that on their return to Switzerland, if they could not prove that they had served in the army in the United States or paid a military tax during their stay, they should be required to pay a military tax in Switzerland for and during the past ten years. As complaints were made by Swiss citizens, who had been naturalized in the United States, that they were required to pay the exemption tax on their return to Switzerland, and as it appeared that no such thing as a military exemption tax existed in the United States, compulsory military service not being exacted, it was suggested by the minister of the United States at Berne that the treaty of 1850 should be amended so as to cover the case of such persons. The Department of State, while of opinion that the treaty should be amended, observed that, as Switzerland did not recognize the foreign naturalization of her citizens, it seemed to be necessary to obtain a specific agreement on the subject of naturalization. Subsequently, the Federal Council adopted a resolution to the effect that from May 1, 1894, Swiss citizens, who were residing in the United States or who had returned to Switzerland from that country, were liable to the military tax, unless they could prove that they were obliged to pay a similar tax in the United States, but that citizens of the United States residing in Switzerland were, until further order, exempted from the tax.

Mr. Broadhead, min. to Switz., to Mr. Gresham, Sec. of State, March 12, 1894, For. Rel. 1894, 678; Mr. Gresham to Mr. Broadhead, March 29, 1894, id. 680. See, also, id. 681–682.

With reference to this matter, inquiries were made by the Department of State as to whether the laws of the several States imposed any military tax on Swiss citizens resident therein, and also as to the nature of any such taxes as might be generally exacted of them equally with their own citizens. (Mr. Gresham, Sec. of State, to the governor of Alabama, May 26, 1894, 197 MS. Dom. Let. 157; the same being sent to the governors of all the States.)

Replies to these inquiries were received from forty-two States—all except Wisconsin and Texas. They were embodied in a memorandum which was sent to Mr. Broadhead on August 10, 1894, showing "that the States of this Union do not impose compulsory military service, except in cases of extraordinary emergency, nor compel the payment of any equivalent tax in money;" that "all military service is voluntary, . . . and is supported from the general fund of the State treasury." (Mr. Uhl, Assist. Sec. of State, to Mr. Richman, consul-general at St. Gall, No. 32, Aug. 15, 1894, 146 MS. Inst. Consuls, 192.)

V. *EXPULSION.*

1. General Principles.

§ 550.

Judicial declarations.

The power of the government of the United States to exclude foreigners from the country, whenever in its judgment the public interests require such exclusion, has been asserted in repeated instances, and can neither be granted away nor restrained even by treaty. Whether a proper consideration of previous laws, or a proper respect for the nation whose subjects are affected, ought to have qualified the inhibition, are not questions for judical determination. If there be any just ground of complaint on the part of the foreign government it must be made to the political department, which is alone competent to act upon it.

The Chinese Exclusion Case (1889), 130 U. S. 581, 606–611.

"It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, §§ 94, 100; 1 Phillimore (3d ed.) c. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

Nishimura Ekiu *v.* United States (1892), 142 U. S. 651, 659.
See also, Knox *v.* Lee, 12 Wall. 457; Fong Yue Ting *v.* United States (1893), 149 U. S. 698.

The authority of Congress to take away from an alien any right given by previous laws or treaties to reenter the country can not be questioned, although 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, 158 U. S. 538 (1895), citing Chew Heong *v.* United States, 112 U. S. 536, 539, 559; Head Money Cases, 112 U. S. 580, 599; Whitney *v.* Robertson, 124 U. S. 190, 195; Chinese Exclusion Case, 130 U. S. 581, 600.

The act of March 3, 1903, 32 Stat. 1213, excluding, among other classes of aliens, alien anarchists from the United States, is constitutional.

Turner *v.* Williams (1904), 194 U. S. 279, affirming 126 Fed. Rep. 253.

An alien has no legal right enforceable by action to enter British territory.

Musgrove *v.* Chun Teeng Toy (1891), App. Cas. 272.

Opinions of writers.

"A state has the right to expel from its territory aliens, individually or collectively, unless treaty provisions stand in the way. . . . In ancient times, collective expulsion was much practiced. In modern times it has been resorted to only in case of war. Some writers have essayed to enumerate the legitimate causes of expulsion. The effort is useless. The reasons may be summed up and condensed in a single word: *The public interest of the state.* Bluntschli wished to deny to states the right of expulsion, but he was obliged to acknowledge that aliens might be expelled by a simple administrative measure. (French law of Dec. 3, 1849, arts. 7 and 8.—Law of Oct. 19, 1797, art. 7.) An arbitrary expulsion may nevertheless give rise to a diplomatic claim."

Bonfils, Manuel du Droit Int. Public, § 442.

Darut, in his monograph on the expulsion of aliens, states that the right of the state to order a foreigner immediately to leave its territory, as it was established in France by the law of Dec. 3, 1849, and as it generally is found in the legislation of countries with the exception of England and Greece, has been the subject of protests by some writers, who regard it either as an infraction of the so-called right of asylum, or as an invasion of the imprescriptible rights of the individual man. Darut, however, maintains that the right of expulsion is an incident of sovereignty, and is essential to the preservation of the ends for which the state exists.

Darut, De l'Expulsion des Étrangers: Aix, 1902. The author (p. 16) cites, as holding that the right of expulsion is an incident of sovereignty, Bluntschli, Le Droit Int. Codifié (Lardy's ed.), § 382; M. Rolin-Jaequemyns, Rev. de Droit Int. XXII.; Féraud-Giraud, Ann. de l'Inst. de Droit Int. XI. 273; Bar, id. XII. 185; Ducroq, Cours de Droit Administratif, III. 494; Pradier-Fodéré, Traité de Droit Int., § 1857.

As expressing the view that the practice of expulsion is an invasion of the rights of man, he cites (p. 9) Pinheiro-Ferreira, Notes sur Vattel, II. c. 8, § 100; Fiore, Droit Pénal Int. 100; M. Clovis Hugues, Séance de la Ch. des. Dép. du 24 Févr. 1882.

"Expulsion has sometimes been advocated as a substitute for extradition, but it is obvious that the two things are not only dissimilar but in many respects antithetical. Extradition secures the administration of justice by the punishment of crime in the country in which it was committed. Expulsion merely rids the country of undesirable inhabitants. Hence expulsion is often employed in cases not affording ground for extradition, as in that of political offenders

who by their acts compromise the international relations of the state, or whose presence is otherwise inconvenient. France expelled the Carlists who were concerned in the insurrection in Spain in 1872. When Victor Hugo retired to Brussels during the days of the Commune at Paris, he announced through the *Indépendence Belge* that his house would be a refuge for all those proscribed by the Commune. The administrator of the public safety notified him that his presence was an occasion of troubles of such a character as to compromise the public peace, and requested him to leave the country, which he did. The same step was taken, under similar circumstances, by the Belgian government, in the case of General Boulanger."

Papers on International Law, by J. B. Moore, in *Progress*, V. (July, 1900), 585.

As to regulations governing the admission of aliens into the Transvaal and Orange River colonies, see For. Rel. 1903, 545.

Case of M. Jaurès.

"The Imperial Chancellor, Prince von Bülow, telegraphed to Prince von Radolin, the German ambassador at Paris, to-day to inform M. Jaurès, the French socialistic leader, that the German Government thought it best to debar him from speaking in Berlin July 9, as it had been announced he intended to do.

"The chancellor's telegram to Prince von Radolin is as follows:

"'The press has announced that M. Jaurès will appear before the socialistic meeting here July 9. Against the personality of M. Jaurès I have nothing to say. I respect his views on foreign policy and not infrequently agree with them. I am glad that on several occasions he has promoted friendly relations between Germany and France. The personal value of M. Jaurès is not considered, but the political rôle placed upon him. The leading organ of the social democracy in Germany, the Vorwaerts, has announced that the assemblage planned is the beginning of the immediate influence of the social democracy on foreign policy and that a war of the classes will be promoted upon an international foundation. Still more clearly is the aggressive intention of the promoters of this meeting expressed in the organ of the so-called scientific socialism, the New Society, which says: "The revolution has dynamited the Russian-French alliance. Now it becomes the historical task of the German social democracy to do for the French Republic what the holders of power in Russia are no longer able to do—to protect them from exaggerated claims by the use of force, as the result of imperialistic Germany's policy."

"'This is the outspoken direction in which this demonstration leads. The German socialists would use the presence of M. Jaurès in Berlin to cover by his person their hostile endeavors against the State and national interests. The Imperial Government can not refrain

from using the means at its disposal to prevent the party from seeking to destroy the existing and constitutionally established order.'

"Prince von Bülow cites instances of the French Government's interdiction of speeches which it had been announced were to be made by members of the German Reichstag, and then says:

"'Even although it were to be expected that Herr Jaurès would have the tact to avoid anything that might be unpleasant for the German and French Governments, one can not have similar confidence in the German organizers of the meeting. Nearly a year ago Herr Jaurès had an opportunity of convincing himself at Amsterdam of how far behind the more practical and patriotic aims of their French colleagues the German social democracy stands in its contradictory, doctrinaire behavior.

"'In such circumstances the Franco-German understanding would gain nothing by the probable course of events at the proposed meeting, and I therefore consider it advisable that the public appearance of Herr Jaurès in Berlin shall not take place.'

"The invitation of M. Jaurès came from the Socialist executive committee ruling the party and was designed to advance the socialist opposition to the Government's Moroccan policy and to demonstrate the similarities of view on foreign questions of socialists of all countries. The subject chosen was the task of the social democracy in the preservation of the world's peace and the solidarity of the international proletariat."

Dispatch from Berlin, Thursday, July 6, 1905, published in the New York Herald of July 7, 1905.

"The mass meeting which M. Jaurès was to have addressed was held on Sunday in the hall of the *Neue Welt*. . . . The prohibition of M. Jaurès' appearance had been promptly parried by the publication in the *Vorwärts* that morning of the text of the whole speech which he had intended to deliver. Almost every member of the audience had a copy of the paper in his possession." (London Weekly Times, July 14, 1905, p. 436, column 3.)

Case of Mr. Mann.

In a letter dated at Paris, Sept. 2, 1852, Mr. A. Dudley Mann complained of the refusal of the Russian legation in Paris, in the preceding July, to visé his passport, as a violation of Art. I. of the convention of Dec. 18, 1832, and requested the Government of the United States to demand from the Emperor of Russia an indemnity of not less than $100,000 as compensation for the injury which his interests had suffered by such refusal. Mr. Mann stated that the rule under which the visé was refused was established during the revolutionary times in Europe of 1848; that it extended to all foreign states; that France had protested against it at the time, but that Russia replied "She could well afford to deprive herself of the benefit which she derived from the entrance of French

citizens into her dominions." Upon these facts, said Mr. Everett, Secretary of State, the Russian regulation could not be "regarded as an infringement of the privileges of American citizens as such. The President is far from admitting that there are no limits to the measures to be adopted by foreign governments towards citizens of the United States, from a motive of this kind [i. e., apprehensions growing out of the disturbed state of Europe in 1848]; but he thinks it would not be safe to deny to those governments the right of judging for themselves, in the first instance, which course of policy in this respect is required by the great law of self-preservation. What we deny to other powers we must disclaim for ourselves: and this Government could never give up the right of excluding foreigners whose presence they might deem a source of danger to the United States.

"As you had no dispatches for Russia, the President entirely approves your conduct in not claiming any favor as a bearer of dispatches, although you were in possession of a passport in that capacity. . . .

"You will infer from the tenor of this letter that the President, as at present advised, is not prepared to institute so grave a proceeding as that which you expect from him. He does not, however, wish to preclude you from such additional statements and explanations as may further elucidate the case, and show, by a more precise account of the losses incurred by you, and the object of your proposed visit to Russia, that you have a well-founded claim for heavy damages for an infraction of the treaty between the two Governments."

Mr. Everett, Sec. of State, to Mr. Mann, Dec. 13, 1852, 41 MS. Dom. Let. 138.

With regard to the treaty question, Mr. Everett said:

"Strictly taken, the treaty is one of commerce and navigation, and the right of sojourn and residence must be understood to have reference to those objects. It would accordingly strengthen your case, in any complaint to be made to the Russian Government, by the direction of the President, that it should be stated that you were desirous to sojourn and reside in Russia, for the objects contemplated by the treaty. No stipulation is made for any other privilege; although it might fairly be expected of the Russian Government to grant to the citizens of the United States that free entrance into the country which the citizens and subjects of the civilized states usually enjoy in each other's territories by the courtesy of nations. Whether a neglect of what the courtesy of nations requires in this respect creates a valid claim for damages would depend upon circumstances, with respect to which your letter affords no information."

Views of Mr. Marcy.

"It is a sovereign right belonging to every independent power to determine whether it will or will not receive foreigners within its territorial limits as residents, and, having granted such permission, it has the same right to determine

whether it will or will not revoke it and send such persons out of its country. Nations may, and often do, modify or restrict this right by treaty. . . . As a general principle, Governments have the same right to send persons out of their territories as they have to deliver them up in pursuance of stipulations in extradition treaties."

Mr. Marcy, Sec. of State, to Mr. Gadsden, min. to Mexico, No. 54, Oct. 22, 1855, MS. Inst. Mexico, XVII. 54.

"Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798. That law authorized the President to order all such aliens as he should judge dangerous to the peace and safety of the United States, or that he should have reasonable ground to suspect of being concerned in any treasonable machinations against the Government, to depart out of the territory of the United States within such time as he should express in his order, and if the person so ordered to depart should be found at large within the United States after the time limited in such order, he should, on conviction, be imprisoned for a term not exceeding three years and deprived of the right ever to become a citizen of the United States; and it was further provided that, if any such alien so sent out should return without the permission of the President, he should be imprisoned so long as in the opinion of the President the public safety might require.

"It may always be questionable whether a resort to this power is warranted by the circumstances or what department of the Government is empowered to exert it; but there can be no doubt that it is possessed by all nations, and that each may decide for itself when the occasion arises demanding its exercise. Upon this principle the Cantons of Switzerland may of course prescribe the conditions on which foreigners can be permitted to remain within their jurisdiction."

Mr. Marcy, Sec. of State, to Mr. Fay, min. to Switzerland, No. 37, March 22, 1856, MS. Inst. Switz. I. 47.

Opinion of Mr. Cass.

"Even where a government is not restricted by treaty engagements, it is still a harsh measure to exclude the naturalized emigrant from his native country, or to subject him to penalties in the event of his return, even for a brief period, or when yielding to imperative circumstances. Business, anxiety to see near and valued relatives, a natural desire to visit the land of their birth—these and other motives, laudable in themselves, may well induce this class of our citizens to return to their native countries. It is difficult to perceive what rational objection can

exist to the gratification of such feelings. Surely no danger can be apprehended to the public peace, for the governments possess ample power for its preservation, even if there were a disposition, a very improbable supposition on the part of these few individuals, to disturb the tranquillity of the country. These remarks are not made in defense of the right of naturalized citizens of the United States, natives of Prussia, to revisit and reside there—that right is secured by treaty—but this government relies upon the justice and friendship of that of Prussia not to permit any unfavorable impression respecting these returned naturalized citizens to work them injury."

Mr. Cass, Sec. of State, to Mr. Wright, Dec. 10, 1858, S. Ex. Doc. 38, 36 Cong. 1 sess. 116, 120.

Utterances of Mr. Seward.

"I have carefully perused your interesting dispatch No. 109, of the 3d ultimo, with its accompaniments, relating to a decree of the Ecuadorian Government, of July last, prohibiting the landing at Guayaquil of a certain class of immigrants from the United States.

"It appears by the language of the decree that it refers expressly to the liberated slaves. Under existing circumstances in the United States involving a demand both for soldiers and laborers that can hardly be supplied, it is extremely improbable that there will be a disposition on the part of the class of persons specified to emigrate to foreign countries. I do not perceive, therefore, that the decree has any practical significance, and consequently do not feel called upon to follow with extended remark your interesting criticisms upon the abstract principles involved in the subject."

Mr. Seward, Sec. of State, to Mr. Hassaurek, min. to Ecuador, No. 66, March 10, 1864, MS. Inst. Ecuador, I. 145.

In 1866 the Russian ministry gave notice to Mr. C. M. Clay, minister of the United States at St. Petersburg, that S. P., "a native of Russian Poland, and a naturalized citizen of the United States, has been proved to have become such citizen without leave of the Emperor of Russia, and that in conformity with article 367 of the penal code he has been deprived of all the rights of Russian citizenship, and banished forever from the Russian Empire, and that this sentence has been put into execution." Mr. Clay, in advising Mr. Seward of this action, said that he did "not see that we can make it a cause of complaint, insomuch as it settles the debatable question of denaturalization in our favor," and avoids unpleasant issues. Mr. Seward acquiesced in this, "provided that Mr. P. does not feel himself aggrieved." He added, however, "that the case may, perhaps, demand careful examination if it shall turn out that the

decree of perpetual exclusion thus pronounced" was based solely on P. having become naturalized in the United States.

Mr. Seward, Sec. of State, to Mr. Clay, Aug. 24, 1866, MS. Inst. Russia, XV. 69.

On the same topic see Mr. Seward to Mr. Clay, Jan. 7, 1869, MS. Inst. Russia, XV. 145.

Opinion of Mr. Fish.

"The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the state, are too clearly within the essential attributes of sovereignty to be seriously contested.

"Strangers visiting or sojourning in a foreign country voluntarily submit themselves to its laws and customs, and the municipal law of France, authorizing the expulsion of strangers, is not of such recent date, nor has the exercise of the power, by the Government of France, been so unfrequent, that sojourners within her territory can claim surprise when the power is put in force."

Mr. Fish, Sec. of State, to Mr. Washburne, Sept. 17, 1869, MS. Inst. France, XVIII. 297, in relation to the case of General Cluseret, who claimed citizenship of the United States. He was expelled, and Mr. Fish held that the United States could not complain, especially as his treatment had been attended with much concession to Mr. Washburne's good offices.

In July, 1869, Mr. Ambrocio Mestra, a citizen of the United States, who was engaged in business at Guayaquil, was peremptorily and without charges or a hearing of any kind ordered to be banished from Ecuador. On the interposition, however, of Mr. Weile, American consul at Guayaquil, with the local government, the order was revoked. In his report of the case Mr. Weile called attention to article 110 of the new constitution of Ecuador, which gave the government the right to banish foreigners in certain cases even after they had undergone a penal sentence. Mr. Weile considered this provision to constitute a violation of Article XIII. of the treaty between the United States and Ecuador by which the contracting parties engaged to give their "special protection" to each other's citizens, "leaving open and free to them the tribunals of justice for their judicial recourse, on the same terms which are usual and customary with the natives or citizens of the country in which they may be." With regard to this suggestion, Mr. Fish said: "The power to expel from its territory persons who are dangerous to the internal or external security of the state, is an essential attribute of sovereignty. In the absence of express limitation every government must be regarded as holding this power with respect to its subjects, and much more with regard to foreigners. That it should be expressly reserved with regard to foreigners in the constitution of Ecuador is an anomalous

feature for which I can conceive no good reason. It might possibly be argued that an express grant of the power in regard to foreigners, was to be construed as excluding its exercise in respect to citizens. If so, we might have some right to complain of the banishment of a citizen of the United States as an invidious discrimination against him, prohibited by the spirit, though not by the strict letter of the treaty. I think it would be a violent interpretation of the constitution to regard it as withholding from the national authority of Ecuador a power so essentially inherent in sovereignty in the absence of very express words to that effect."

Mr. Fish, Sec. of State, to Mr. Weile, Dec. 4, 1869, 57 MS. Inst. Consuls, 35.

The President of Mexico having expelled two American priests, named Lilla and McCrealy as pernicious foreigners, and the Supreme Court of the Republic having decided that the President had the constitutional right to exercise that power at his discretion, "it is apprehended that the legality of the proceeding can not further be controverted with success.

"The same power, unless surrendered by treaty, exists in every country, and there is often a necessity for its exercise in time of foreign or civil war.

"The Mexican Constitution appears not to have restricted it to such occasions only, but to have conferred it in general terms and without reserve.

"Under these circumstances, all foreigners who resort to Mexico must expect to be liable to the exercise of the power adverted to, even in time of peace. The passage in the opinion which contends that the 14th article of the treaty of 1831 does not impair the constitutional right of the Mexican President to exercise the authority in question is at least plausible enough to command respect, though it may not be regarded as entirely conclusive. It certainly has this consideration in its favor, that, if we deny its correctness, the President of the United States would never have any authority to banish a Mexican from this country, even if the public safety should imperatively require such a step."

Mr. Fish, Sec. of State, to Mr. Foster, min. to Mexico, No. 37, Oct. 17, 1873, MS. Inst. Mex. XIX. 32.

See, also, same to same, No. 44, Nov. 1, 1873, id. 39; unofficial, Nov. 19, 1873, id. 42.

"Your despatch No. 972, of the 10th ultimo, has received attention. You therein narrate the circumstances under which Adolfo Llanos y Alcaraz, a Spanish subject resident in the city of Mexico, had been expelled from the country as a 'pernicious foreigner,' without any form of trial or opportunity to confer with his friends. . . . The question is not a new one for the consideration of the Department.

"It arose in 1873, by reason of the expulsion, in the same manner, of Messrs. Lilla and McCrealy, citizens of the United States, on the ground of being 'pernicious.' The views of my predecessor on that occasion are found in his instruction No. 37, addressed to you on the 17th of October, 1873. Although that despatch left the ultimate question undecided as to whether the 14th article of the treaty should or should not be held to be supreme over the Mexican constitution as interpreted by Mexican tribunals of the highest resort, yet the admission that, as that constitution now stands and is interpreted, foreigners who render themselves harmful or objectionable to the general government must expect to be liable to the exercise of the power adverted to, even in time of peace, remains, and no good reason is seen for departing from that conclusion now.

"But, while there may be no expedient basis on which to found objection, on principle and in advance of a special case thereunder, to the constitutional right thus asserted by Mexico, yet the manner of carrying out such asserted right may be highly objectionable. You would be fully justified in making earnest remonstrance should a citizen of the United States be expelled from Mexican territory without just steps to assure the grounds of such expulsion, and in bringing the facts to the immediate knowledge of the Department."

Mr. Evarts, Sec. of State, to Mr. Foster, No. 652, July 10, 1879, MS. Inst. Mexico, XX. 10.

Mr. Frelinghuysen's views.

This government cannot contest the right of foreign governments to exclude, on police or other grounds, American citizens from their shores.

Mr. Frelinghuysen, Sec. of State, to Mr. Stillman, Aug. 3, 1882, 143 MS. Dom. Let. 238.

Case in Switzerland.

In February, 1885, Dr. Emeis, a naturalized citizen of the United States, who was temporarily in Switzerland for his health, was ordered expelled by the local authorities on suspicion of being an agent of or in some way connected with anarchists. The American legation at Berne asked the federal council to cause the local authorities to revoke the order of expulsion. On investigation it was found that the action of the authorities was due to a misunderstanding, and the order of expulsion was revoked.

Mr. Cramer, min. to Switz., to Mr. Frelinghuysen, Sec. of State, Feb. 20, 1885; Mr. Bayard, Sec. of State, to Mr. Cramer, March 9, 1885; Mr. Cramer to Mr. Bayard, March 9, 1885: For. Rel. 1885, 796, 798, 799.

Gad's case.

"Your dispatch No. 13, of the 22d ultimo, in relation to the expulsion of Meyer Gad from Prussia, has been received and considered by the Department.

"It seems from the accompanying correspondence that Meyer Gad,

whose expulsion from Germany is the ground of complaint, was originally a Russian subject, who settled in Kempen, in Prussia, from which country he was expelled in 1878 as guilty of various acts of dishonesty towards his employer. He then made an excursion into Austria, and afterwards visited the United States, where he claims to have been naturalized. He afterwards went back to Kempen, the scene of his former alleged misconduct, where he was notified by the Government that he must leave the country at the end of six weeks.

"This is his grievance, and as to this I have to say that on general principles it is within the power of the General Government to make and enforce such a decree of expulsion, nor can this Government object, unless the exclusion be enforced with undue harshness. The same prerogative was asserted by our Government in the alien act; and we have recently taken measures to exclude paupers and convicts from our shores.

"It does not appear, therefore, that we can object to the German Government refusing to receive back to the scene of his alleged former depredations Meyer Gad, who appears to have been a wandering if not predatory Polish Jew, Russian by allegiance of birth, American by allegiance of naturalization, Austrian by allegiance of residence, and German, if he could be, by allegiance of present election.

"It may be observed that there is no treaty that covers the case of Mr. Gad, since he was not a German subject by origin, but the subject by origin of Russia."

Mr. Bayard, Sec. of State, to Mr. Pendleton, min. to Germany, No. 20, July 9, 1885, For. Rel. 1885, 423.

"The policy of expelling Russians coming into Prussia to settle is being rigorously prosecuted by this Government for the reason, no doubt, that such immigration tends to arrest the Germanization of that portion of Prussia which borders on Russian-Poland and is largely inhabited by persons of Polish origin." (Mr. Pendleton, min. to Germany, to Mr. Bayard, Sec. of State, No. 13, June 22, 1885, For. Rel. 1885, 419.)

Meyer Gad was "born in Russian Poland; emigrated to the United States from the province of Posen, in Prussia, in 1879; naturalized September 30, 1884.

"After some preliminary correspondence, between the legation and Gad, and the legation and the American consul at Breslau, in Prussia, the legation was, on April 20, 1885, placed by Gad in possession of the necessary details in the case, and on the same day presented the following statements and complaint of Gad to the foreign office: Gad, then being a Russian subject, emigrated to the United States in 1879, from which time he had there resided until his recent return to Prussia on a visit and to dispose of business. He had been naturalized in the United States in due form of law, as appeared by his certificate dated September 30, 1884. He had been ordered to leave Kempen (his place of sojourn in Prussia) prior to his emigration, solely on the ground of his being a Russian subject, no offense being charged against him. His object now was to sell some property belonging to

him at or near Kempen, and then to return with his family to the United States for permanent residence. It was now reported to the legation that the Landrath of the district had ordered him to leave, without special cause therefor, *before the 4th of May*, prior to which time he would not be able to complete the disposition of his property. It had always been his intention to return to the United States in August next. Under these circumstances it was hoped that the German Government would find it just to give him the benefits of the treaty, and to direct the local authorities to allow him to complete his lawful business in Prussia, so long as he was obedient to the laws. It was requested that the order of expulsion complained of might be suspended pending an investigation of the facts, and that, if these were found to be correctly stated, an order might be issued in compliance with the complainant's request. Gad's certificate of naturalization was inclosed as evidence of his nationality, with the request for its ultimate return. Gad was, on the same day, April 20, 1885, informed of the action taken in his behalf.

"Under date of April 24 the legation was informed by the foreign office that an investigation of the case had been ordered, the result of which would be duly communicated. On the 16th of June following, some correspondence relating to the progress of the case having ensued between the legation and Gad, the foreign office communicated the result of the investigation made, which showed that the former Russian subject, Meyer Gad, had been expelled from Prussia in the year 1878, after having been discharged from the service of a merchant, Bloch, at Kempen, at that time his master, for several dishonest acts. He had thereupon gone to Austria and then to America, where he had acquired citizenship. As he had never been a German subject the treaty of February 22, 1868, could not apply to his case. After an application made in 1882 by the wife of Gad, residing at Kempen, for permission for her husband to sojourn there, had been refused, the latter had himself appeared at Kempen, at the beginning of February last, with the purpose of settling there. He was told that he must leave Prussia within six weeks. With this order he had not complied, and later on, in a communication addressed to the Landrath at Kempen, he declared that it was his purpose to commence a business at that place, with a capital of 10,000 marks, which he claimed to possess. From this it would appear, contrary to the assumption contained in the note of the legation, that he had not in reality had even the intention of returning to America.

"Although, in general, sojourn in the German Empire, in so far as particular reasons to the contrary might not exist, was permitted to the citizens of the United States, as also to other foreigners, the royal Prussian minister of the interior was nevertheless of the opinion that the measure of expulsion adopted against Gad before his naturalization as an American citizen must be maintained, and the more for the reason that his personality and past history would not seem to justify exceptional consideration for his wishes. The foreign office expressed regret that Gad's request could not under existing circumstances be complied with.

"On June 19 the legation informed Gad of the decision reached in his case, inclosing to him at the same time a copy of the communication conveying that decision. Gad wrote to the legation on the 23d of June, thanking it for its effort in his behalf, and requesting the return of his passport, which was immediately sent to him.

"Under date of June 22, 1885, the legation reported the case, with the correspondence with the foreign office, to the Department of State." (Report of Mr. Coleman, Sec. of Leg. at Berlin, 1885, For Rel. 1885, 434.)

See the case of Jacob Wilhelm Thraenert, For. Rel. 1885, 437.

"The Department is satisfied that the judicial authorities of Germany have given Mr. Benque's case the most considerate attention. He shows no good ground now for reopening the case, which the Department has repeatedly declined to present to the German Government." (Mr. Uhl, Acting Sec. of State, to Mr. Runyon, amb. to Germany, May 14, 1895, F. R. 1895 I. 528.)

As to the case of certain naturalized citizens of the United States, of Russian origin, who were threatened with expulsion from Prussia to Russia, and the attitude of protest on the part of the United States, see Mr. Adee, Second Assist. Sec. of State, to Mr. Wolf, Nov. 26, 1897, 222 MS. Dom. Let. 669.

Expulsion of Poles from Prussia.

"I send herewith report and translation of a speech made by Count Kalnoky, the Austrian premier, in the Austrian Chamber, as the report appears in the Nord Preussische Zeitung of this city, and another report of the same speech taken from the London Times.

"Count Kalnoky admits as beyond controversy the right of Germany under the laws of nations to refuse sojourn to foreigners with or without cause according to its own will, and this under a very stringent exercise of that right against Austrian subjects."

Mr. Pendleton, min. to Germany, to Mr. Bayard, Sec. of State, Nov. 16, 1885, For. Rel. 1886, 309.

The report in the Nord Preussische Zeitung, in the form of a dispatch from Vienna, dated Nov. 10, 1885, was as follows:

"In the budget committee of the Austrian delegations Count Kalnoky stated, on the interpellation of Czerkawski, in reference to the expulsions from Prussia, that according to the authentic information the measure had not been executed throughout the whole extent of the Prussian state. Thirty-one reclamations only had reached the Austrian embassy, the most numerous expulsions, one hundred and fifty to two hundred, in reference to which important modifications had been secured, had taken place in Breslau. The minister gave them the data concerning the Russian subjects arriving in Cracow, who numbered two hundred and thirty-eight families, with eight hundred and seventy-three persons, whilst in all twenty-nine single Austrians and thirty Austrian families had arrived in Galicia; the majority of those expelled were Galician Israelites. In reference to the right of expulsion, the minister declared there existed an incontrovertible principle, that it was conceded to each state, according to its own will to permit or refuse sojourn to foreigners. No right of sojourn could be inferred from commercial treaties. The Prussian Government declared that it was constrained on strong grounds of domestic policy to secure itself against immigration out of Russian Poland and Galicia, in order to avoid a derangement of existing conditions as to language and religion. He (the minister) had on this account limited himself to attempt to secure ameliorations and considerate action, and in this he had found a very responsive recep-

tion on the part of the Prussian Government. He would in the future use his influence in Prussia to the utmost in the interest of the Austrian subjects."

The report from the London Times, of Nov. 11, 1885, was as follows:

"In the Austrian delegation to-day Count Kalnoky answered an interpellation about the expulsion of Poles from Prussia. He said that only a small minority of the persons expelled were Austrian subjects; up to the middle of October seven hundred exiles had arrived at Cracow, and of these only seven were Austrians. At Lemberg over one thousand refugees had been received, but there were only thirty Austrian families and twenty-nine unmarried Austrians. The minister said most of the exiles were Jews, and added that the Prussian Government had assured the Cabinet of Vienna that the utmost indulgence would be exercised towards Austrian subjects liable to expulsion.

"'For the rest,' said Count Kalnoky, 'we have endeavored to find a legal ground for protest against these expulsions, but have found none. Every state is free to deal with foreigners according to its own municipal laws, and treaties of commerce do not in any way curtail this liberty. We are sorry for these expulsions, but can not see that the Prussian Government has in any way violated international obligations.'

"These explanations excited the indignation of the Polish delegates, two of whom declared that the minister had produced misleading statistics. They maintained that a great number of Austrian subjects had been expelled since the middle of October, and they announced their intention of recurring to the subject. The German Liberal delegates, on the contrary, declared Count Kalnoky's explanations to be entirely satisfactory."

Opinion of Mr. Bayard.

Where a citizen of the United States, who had formerly been a consular officer in Russia, was expelled from that country on the ground of "various culpable practices" to the prejudice of Russian subjects, and it appeared that the charges had foundation, it was held that the expulsion did not afford a ground for a claim for pecuniary damages, the Department of State saying: "Under Article I. of the treaty between the United States and Russia of 1832, the inhabitants of the two countries 'are at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs,' and it is further stipulated that 'they (the said inhabitants) shall enjoy to that effect the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing, and particularly to the regulations in force concerning commerce.'

"There is certainly nothing in these provisions which precludes either the United States or Russia from expelling from their respective territories each other's citizens or subjects; and unless the expulsion be arbitrary, or involves unjust discriminations, it affords no ground for international complaint."

Mr. Bayard, Sec. of State, to Mr. Lothrop, min. to Russia, No. 95, July 1, 1887, MS. Inst. Russia, XVI, 518.

In May, 1893, Joseph Glowacki, a naturalized citizen of the United States, employed in a manufacturing establishment at Gzenstockowa, Poland, was arrested and imprisoned, and after obtaining his release, by signing an agreement not to return to Russia under the pain of banishment to Siberia, was taken to the Austrian frontier and expelled. He stated that the only reason assigned for his treatment was a charge made by a drunken employee that he had spoken disrespectfully of the Emperor. This charge he denied. The case was presented by the American legation to the Russian foreign office, and it was decided that Glowacki should be permitted to return to the Empire, but could not again inhabit the village from which he had been expelled. On his attempting to reenter the Empire, the local officials, in disregard of the permit which he bore, again ejected him. The foreign office subsequently granted Glowacki full permission to reenter Russia, and expressed regret that the misunderstanding at the frontier had taken place.

For. Rel. 1893, 542, 544, 545.

Discussions in Honduras.

During the revolution in Honduras, of 1893–4, under the lead of Policarpo Bonilla, certain American citizens, some of whom had large property interests in the country, served in the army of Señor Vasquez, the constitutional president. The revolution having been successful, an appeal for protection was made in behalf of the citizens in question to the United States legation. Mr. Pringle, then chargé d'affaires ad interim, replied that he could not act officially in the matter, but proceeded to Amapala on the U. S. S. *Ranger*, in order to ascertain the actual situation and take such other action as might be proper. He found that none of the citizens in question had been imprisoned; but he was advised by the United States consul at Tegucigalpa, who was then at Amapala, that President Bonilla had informed him, unofficially, that it was his purpose to expel from the country all foreigners who were in the service of President Vasquez, and, unless an amicable arrangement could be made in regard to them, to have them tried by a military commission as guerrillas. Mr. Pringle, however, declined to go with the consul to the capital for the purpose of "making an agreement" with President Bonilla as to the punishment of two of the Americans, who were thought to be especially exposed to injurious action, unless he should be positively instructed to do so.[a] The Department of State, while observing that on general principles it was "not compatible with the obligations of a citizen to his own state to take active part in the internal dissensions of another state," adverted to the peculiar circumstances of the case,

[a] For. Rel. 1894, 298, 303, 304.

and approved Mr. Pringle's action "in declining to make any 'agreement' whereby the eventual expulsion from Honduras of the American citizens who took part with President Vasquez in the late troubles might be acquiesced in."

Mr. Uhl, Acting Sec. of State, to Mr. Young, min. to Honduras, May 16, 1894, For. Rel. 1894, 301.

President Crespo's decree.

May 14, 1894, President Crespo, of Venezuela, issued a decree requiring foreigners arriving in the Republic to present to the chief of the custom-house of the port, or, if they had previously resided there six months, to the governor of the federal district or the presidents of the respective States, as the case might be, a written declaration giving certain particulars as to themselves, and as to their families, if accompanied by them, in order that the facts might be reported to the national executive, who would determine "whether the foreigners who have made unsatisfactory declarations, or have not been able or were unwilling to comply with the required formalities, are to be considered prejudicial or proper subjects for expulsion." This decree was issued under art. 78 of the constitution, which empowered the President of the Republic, with the approval of the council, "to prohibit the entrance into the national territory, or to expel from it, those foreigners who have no residence in the country and who are notoriously prejudicial to the public order."

For. Rel. 1894, 802.

Wiener's case.

"I have received Mr. Terres's No. 91, of October 6, 1894, relative to the expulsion of one Eugene Wiener, an American citizen, residing at Jeremie, Hayti. The Department has also received from Mr. Wiener himself a letter complaining of his arbitrary expulsion from that country in pursuance of an Executive order dated October 2, 1894, and published the next day in *Le Moniteur*, the official journal of that Republic.

"The contents of the decree, so far as it relates to Wiener, are in substance as follows:

"'That whereas international law confers on every independent state the right to expel from its territory foreigners whose conduct and acts are dangerous to tranquillity and public order; and whereas Mr. Eugene Wiener, an American, residing at Jeremie, is an active agent of the enemies of order who are plotting in Jamaica and elsewhere against the established Government; and whereas these intrigues are of a character to endanger the public safety, it is ordered that said Wiener, now at Jeremie, be expelled from the territory of the Republic of Hayti; that he be put aboard the first vessel

leaving for foreign ports, and the chief of administrative police at Jeremie is charged with the execution of this decree.'

"Wiener says his first intimation of the Government's purpose to expel him was received on the 9th of October from General de la Place, the Délégué du Gouvernement at Jeremie, who read the decree of expulsion to him and ordered him to leave by the first steamer.

"He was engaged in a general commission business, having transactions with several firms in New York. A large amount of money was due him. He had just completed a new building, and otherwise extended his business. His presence in Hayti was of great importance to him. He asked, therefore, for time to arrange his business affairs, but was refused. He then asked permission to go to Port au Prince, that he might consult the American minister and request the President to let him face his accusers. This, too, was refused. The President declined to receive him. He then wrote to the American consular agent at Jeremie, declaring his innocence of any complicity in the political affairs of the country and protesting against his treatment.

"A few days after he was notified of the decree of expulsion a French steamer, bound for Martinique, touched at Jeremie, and the authorities ordered him to leave by that steamer. He asked permission to wait for the New York steamer, which was due in a few days, and requested time to collect some of the money due him, to adjust his accounts, and arrange for the support of his family. All this was denied him, and he was forced to leave by the French vessel on October 12, only three or four days after receiving notice of his expulsion. . . .

"This Government does not propose to controvert the principle of international law which authorizes every independent state to expel objectionable foreigners or classes of foreigners from its territory. The right of expulsion or exclusion of foreigners is one which the United States, as well as many other countries, has upon occasion exercised when deemed necessary in the interest of the Government or its citizens.

"But this right, though based upon recognized principles of international law, has limitations which the same principles impose.

"'Every state is authorized, for reasons of public order, to expel foreigners who are temporarily residing in its territory. But when a Government expels a foreigner without cause, and in an injurious manner, the state of which this foreigner is a citizen has the right to prefer a claim for this violation of international law, and to demand satisfaction if there is occasion for it.' (Calvo's Dict. of Int. Law, 'Expulsion.')

"The United States neither excludes nor expels foreigners except in pursuance of general laws. The provisions of these laws are or

may be known in advance to all persons upon whom they are intended to operate. Ample time is given for compliance with the laws looking to the expulsion of foreigners, and for the settlement of the business affairs of individuals to be affected by them, and ample opportunity is afforded them to show that they are not within the operation of the law.

"In Germany and other European countries from which Americans have sometimes been expelled, they have always been first accorded a hearing, and have been given a reasonable time for the settlement of their affairs.

"There is certainly nothing in the law or practice of this country which can be cited as a precedent for the arbitrary expulsion of foreigners without hearing and without cause. The just rule would seem to be that no nation can single out for expulsion from its territory an individual citizen of a friendly nation without special and sufficient grounds therefor. And even when such grounds exist the expulsion should be effected with as little injury to the individual and his property interests as may be compatible with the safety and interest of the country which expels him.

"That universal sense of right and justice which suggests that no man should be condemned without a hearing would seem to require that the person singled out for expulsion should, as a general rule, first be notified of the charges against him and given an opportunity to refute them. If the case is so urgent and the presence of the foreigner so dangerous to the state that this can not with safety be done, the expelling government is under obligation to the government of the person expelled to explain the grounds of its action, by not only asserting, but proving, the existence of facts sufficient to justify the expulsion.

"Not only is the right of excluding or expelling obnoxious aliens as an attribute of national sovereignty limited by general principles of international law, but its exercise becomes further importantly modified by conventional obligations, such as are found in the existing treaty between the United States and Hayti, the stipulations of which clearly intend that no citizen of the United States in Hayti shall be deprived of liberty or subjected to punishment save by due process of law.

"Under our treaty with Hayti citizens of the United States are entitled to reside and do business in Hayti while conforming to the laws and regulations in force, and to have free access to the tribunals of justice on the same terms as native Haytians; and they can not be deprived of those rights unless they have been forfeited, in which case they are entitled to know the grounds of forfeiture. If forfeiture be claimed for causes other than political, they are entitled to open and fair trial; if for participation in sedition, they should be

informed of the charge against them and the evidence in support thereof. This Government can not acquiesce in the arbitrary expulsion of its citizens from the territory of a friendly state on purely political grounds without satisfactory proof that their acts withdraw them from the guaranties of our treaty of 1864; and even were such proof presented and found sufficient, they are entitled to a reasonable time to dispose of any business interests or possessions they may have there acquired.

"You will therefore call the attention of the Haytian Government to this case, and request it to furnish this Government with evidence of the acts and conduct alleged against Mr. Wiener, and which he denies."

Mr. Gresham, Sec. of State, to Mr. Smythe, min. to Hayti, Nov. 5, 1894, For. Rel. 1895, II. 801.

Mr. Smythe presented the case to the Haytian Government in the sense of the foregoing instruction. Mr. Marcelin, minister of foreign relations ad. int., Dec. 12, 1894, replied:

"As you must have seen by the decree of the department of the interior, Mr. Wiener was expelled from our territory as a dangerous individual, capable of compromising the public security. Our secret agents have notified us for a long time of the conduct of Wiener. The abusive language which on every occasion he utters against the Government and the Haytian nation and his affinity with the Haytian exiles residing in Kingston have caused us to place him under the surveillance of the police. Recently our minister plenipotentiary at Washington informed us that Wiener had proposed to a workman in New York to fabricate several millions of Haytian paper money. That criminal attempt, which threatened not only the Government but the entire society, as well as the national and foreign commerce, had among other objects that of provoking civil war and placing resources in the hands of the enemies of public order. . . .

"I desire to answer especially to the passage of your dispatch which cites our treaty with the United States of America.

"It can not be advantageously maintained that a conventional obligation of the nature of the treaty of 1864 can alienate the rights of sovereignty of a nation. If it was thus it would be, you will admit, a disguised abdication of power." (For. Rel. 1895, II. 804.)

Mr. Smythe, Dec. 15, 1894, answered that he had, in pursuance of his instructions, asked, not for an explanation of the Government's action, but for the evidence on which it was based; and, after reviewing Mr. Marcelin's note, he concluded: "Again, Mr. Secretary, permit me to ask that your Government furnish this legation with the evidence of the acts and conduct of said Wiener, and which he denies." (For. Rel. 1895, II. 805–806.)

"In conformity to the wish you expressed to me, I have the honor to record in this dispatch the statement I made to you in our interview of Thursday last, the 10th instant, of the causes and motives which finally determined my Government to expel from the territory of Hayti Eugene Wiener, an American citizen.

"The great number of foreigners who reside in Hayti, as I have told you, Mr. Secretary of State, seek by regular and honorable labor the remuneration of their intelligence and of their capital, but there is also a small number of them composed of adventurers who make a business of speculating on political revolutions. Public order is contrary to their interests, and they incessantly plot to revive troublous times; while, on the other hand, the Government watches them vigilantly in order to render them powerless when the public peace is menaced by their agitations.

"Thus, in 1890, 1891, 1892, and 1894, the Haytian Government, after having exercised the utmost degree of forbearance, had to expel an English subject, a Swiss citizen, and seven or eight Frenchmen, all compromised by revolutionary intrigues. The Governments of England, France, and Switzerland, after hearing the explanations of the Haytian Government, were convinced that it had acted at these conjunctures in the fullness of its right for self-defense and for the maintenance of the public peace. I do not for a moment doubt that it may be the same with the Government of the United States when I shall have exhibited to your excellency the proofs I bring in support of what I have to say to you in regard to Eugene Wiener.

"For about fifteen months past at Jeremie, where he resided, and at Kingston, to which he made voyages, Eugène Wiener had often been pointed out to the Haytian Government as a revolutionary propagandist, associated with its enemies. His voyages to Kingston and to New York were denounced as connected with plans of conspiracy with the revolutionary Haytian refugees in the island of Jamaica. Nevertheless, my Government was still undecided as to any measure of repression when a new revelation of the gravest character came to exhaust the degree of toleration practiced by it till then.

"The facts are these: On the 6th of August of last year I received from Mr. Freeland, director of the American Bank Note Company, a notice that in the course of an investigation made at New York by the secret police of the Treasury Department, an engraver, Jos. Pelletier by name, had revealed to the chief of said police, Mr. William Forsythe, that a Mr. Eugene Wiener, of Jeremie, styling himself agent of the Haytian Government, had given him an order for 2,000,000 Haytian dollars, in $2 bills (billets); that the said Wiener had paid him $75 for his work, in remitting to him as models Haytian notes fabricated by the American Bank Note Company. Pelletier added that he had begun the work, but the earnest recommendations to him by Wiener to act with discretion induced him, on reflection, to abandon it.

"From the office of Mr. Freeland I went immediately to that of the 'district attorney,' in whose presence Mr. William Forsythe, sum-

moned by telephone, confirmed, word for word, the information which the director of the American Bank Note Company had been so obliging as to communicate to me.

"The moment not having arrived for issuing a warrant against Eugene Wiener, he was narrowly watched, when I learned he had sailed for Jeremie. I made known these facts and his departure to President Hyppolite.

"In support of the foregoing I have had the honor to place before you: (1) The order of Mr. Freeland; (2) a memorandum by Mr. William Forsythe; (3) the Haytian bank notes (billets de caisse) given by Eugene Wiener to Jos. Pelletier, to serve as patterns; (4) the steel plate on which Pelletier had begun the counterfeiting; (5) lastly, several police reports of conversations in which Wiener convicts himself.

"These, Mr. Secretary of State, as briefly as I can sum them up, are the reasons which determined my Government to expel from the territory of Hayti this individual that it considered absolutely dangerous to the public peace, and unworthy of any consideration."

Mr. Haentjens, Haytian min., to Mr. Gresham, Sec. of State, Jan. 12, 1895, For. Rel. 1895, II. 807.

Jan. 21, 1895, Mr. Gresham stated, in reply, that he had transmitted to the minister of the United States at Port au Prince a copy of Mr. Haentjens' note, and in so doing had explained "that its statements had been verified by evidence submitted . . . to this Department," and had instructed him "to refrain from remonstrance against the expulsion of Mr. Wiener." (For. Rel. 1895, II. 809.)

"In this note [of the Haytian minister of foreign affairs ad interim, dated December, 1894] the minister maintains that a Government can not, before expelling from its territory a person whose presence is deemed dangerous, be required to furnish to the Government of such person evidence in justification of its action.

"This Department had not asserted that it should: but held that Hayti, having assumed the responsibility of expelling the citizen of a friendly power, without giving him any hearing, producing evidence against him, or allowing him opportunity for defense, was thereupon bound either to establish by proofs that there was good ground for the expulsion, or else to indemnify the expelled person for the damage he has sustained.

"The first of these alternatives has been voluntarily adopted by the Haytian Government, which, on the 10th instant, through its minister here, submitted to my examination evidence establishing prima facie ground for the exercise of the sovereign prerogative of expulsion in the case of this apparently undesirable alien. Under the circumstances so set forth this Government deems it proper to refrain from remonstrance against the expulsion of Mr. Wiener.

"The Haytian minister, at my request, has given me a written statement of the evidence in question, under date of the 12th instant, and I inclose it, in translation, for your perusal."

Mr. Gresham, Sec. of State, to Mr. Smythe, min. to Haiti, Jan. 24, 1895, For. Rel. 1895, II. 809.

The note of Mr. Marcelin, minister of foreign affairs ad int., to Mr. Smythe, dated December, 1894, and referred to in the foregoing instruction, read as follows:

"You will kindly permit me to remind you, Mr. Minister, that a sovereign state can not be held, before the expulsion from its territory of an individual whose presence it judges to be dangerous, to furnish the interested legation with the proofs and the police reports made against him.

"These documents, you will easily understand, constitute a part of the archives of state and can not be communicated. It seems to me, moreover, conformable to the rules of international law that such a manner of acting would tend to nothing less than to submit in circumstances of such nature the decision of the Government to the approbation of a diplomatic representative accredited near to it.

"Neither does it appear to me to be admissible that the statesmen who govern with such equity the Republic of the United States could contest these principles, especially to the benefit of persons whose morality leaves something to be desired.

"I have the hope, Mr. Minister, that this incident will be closed henceforth between your legation and the department in view of the information which I have had the honor to furnish to you." (For. Rel. 1895, II. 806.)

In a dispatch of Jan. 14, 1895, which was not received till January 28, and therefore was not referred to in Mr. Gresham's instruction of January 24, Mr. Smythe wrote to the latter as follows:

"In a long interview with the secretary of foreign relations at this legation on the 7th instant, Mr. Faine conveyed to me the impression, not only by his words, but his manner also, that it would be his pleasure as well as his duty to make a speedy disposition of all matters pending between his department and this legation. In that interview allusion was made to the affair of Wiener, and the secretary said that his Government would insist on the absolute right of expulsion as indicated in the dispatches of his predecessor, but hoped that the question might be determined if I would accept permission for Wiener's return under the same conditions accorded to the French minister, who 'had made in effect the same demand.' It seems, from what the French minister has said to me, that he accepted this permission to return with the guaranty on his part of the good behavior of the parties after their return. I am not clear as to the exact nature of this guaranty, and would not like to make an unqualified promise to this effect on behalf of Mr. Wiener or anyone, in fact, of whom I know so little." (For. Rel. 1895, II. 808.)

Mr. Olney's statement.

The Turkish Government having expressed a wish that Armenian revolutionists in the United States, who carried on their propaganda in the press and published articles calculated to promote revolution in Turkey, might be expelled from the United States, the Secretary of State

said: "There is no existing statute nor has any ever been enacted here which forbids the entrance into the United States of persons belonging to the category described, . . . nor any provision for the expulsion of aliens deemed obnoxious to their own governments from American territory. The only law restrictive of alien residence ever enacted by Congress is the alien act of June 25, 1798, which was passed very soon after the adoption of our present Constitution, and which, however, merely authorized the deportation of such aliens as should be deemed 'dangerous to the peace and safety of the United States.' That act continued in force for two years only from the passing thereof, and consequently expired by its own limitation June 25, 1800. . . . The present immigration laws of the United States, while forbidding the landing of certain obnoxious classes of alien convicts and authorizing the deportation within a limited time of such as should effect unlawful entrance into our territory, expressly exempts from its operation persons 'convicted of a political offense.' "

Mr. Olney, Sec. of State, to Moustapha Bey, Turkish min., Nov. 11, 1896, For. Rel. 1896, 926, 927–928.

Loewi's case.

March 18, 1896, *Le Moniteur*, official organ of the Haytian Government, contained a notice to the effect that, as international law "confers on each independent state the right to expel from its territory foreigners whose actions are a danger to the public order and tranquillity," Mr. Hugo Loewi, whose conduct was of a nature to "disquiet" the authorities and whose presence in Hayti constituted a "danger," was expelled from the territory of the Republic and was to be sent away on board the first steamer leaving for foreign ports. The minister for foreign affairs informed the minister of the United States, in an interview, that the action of the Government was "justified and is irrevocable," and that a statement of the reasons would be communicated to the legation. It was at first the Government's intention immediately to send Mr. Loewi away on a German steamer sailing for Mexican ports, but, as neither he nor the police officer who had him in charge had the money with which to pay his passage, he was detained till the sailing of a later steamer for New York, the Haytian Government having arranged with the United States minister to pay his passage on the latter. Meanwhile, he remained at the United States legation. It seems that the Haytian Government, when it decreed Mr. Loewi's expulsion, was not aware of his American citizenship. The Department of State, in acknowledging the American minister's report of the case, said:

"Your insistence that the Government of Hayti in deporting Mr. Loewi should send him to a convenient port of the United States and pay his passage thither is approved.

"The circumstances narrated by you under which Mr. Loewi was temporarily accommodated at your residence pending the sailing of a steamer bound for New York are appreciated, and your course in so doing was excusable. It is assumed, however, that you took upon yourself no responsibility for his safe-keeping in the interval. It is not the function of the legation to act in any way for the local government in carrying out an arbitrary edict of banishment against a citizen of the United States. That is necessarily an act of force in the assertion of a claimed sovereign prerogative and is to be effected by the sovereign power. In this view of the principle involved it is regretted that you intervened so far as to receive from the Haytian Government the price of Mr. Loewi's passage and to buy his ticket and put him on the steamer; unless in so doing you were careful to make it clear to the Haytian foreign minister that your only purpose was to assure yourself that he had in fact departed under actual duress applied by the Haytian authorities."

Mr. Olney, Sec. of State, to Mr. Smythe, minister to Hayti, April 21, 1896; For. Rel. 1896, 385.

Seven months later, the statement of reasons for Mr. Loewi's expulsion not having been furnished by the Haytian Government, the American minister was instructed to ask that it be promptly communicated for submission to his Government. (Mr. Olney, Sec. of State, to Mr. Smythe, min. to Hayti, Dec. 2, 1896; For. Rel. 1896, 386.)

"It appears that the grounds of the expulsion alleged by the Haytian Government, are:

"1. That his [Loewi's] conduct was of a nature to disquiet the authorities; that his continued sojourn there was dangerous to the public security and tranquillity, and that his expulsion was therefore necessary.

"2. That 'the decree of expulsion was made under the government of the late General Hyppolite, who had his personal reasons for acting thus, which the present Government is absolutely ignorant of and can not know; that the Haytian Government can only assert the right of the administration of General Hyppolite to act as it judged proper with the object of preserving order and the public tranquillity.'

"The position assumed by the Haytian Government that Loewi was expelled, either for causes unknown to the present Government, or for reasons personal to the former head of that Government, is novel and remarkable and, being unknown to international law, can not be seriously considered.

"The position assumed, however, of the right of a Government to expel an alien when his continued residence in its territory really constitutes a danger to the public security and order, does have a

qualified recognition in international law. The right of expulsion exists on that ground, but the right is not to be abused nor used oppressively, and the ground must be shown to exist in fact. Vattel says that the expelling state has the right, and is even obliged to follow in this respect the rules of precedence; the administrative authority alone can determine the public necessities which can justify the expulsion to be made and *will be able to set forth the reasons of this measure* to the Government of the country to which the expelled individual belongs, if this Government, as it rightfully may do, demands an explanation.

"Pradier-Fodéré says that 'the expulsion is legitimate only so far as it is demonstrated with evidence that the presence of those whom it affects imperils the peace within or without the security of the governors or of the governed; that, in a word, it compromises one of the interests which the state guards. It is necessary that the danger be certain, that the menace be effective; the administration should not recur to this harsh measure except so far as the condition of the individuals who are the object of it inspires real and well-founded disquietude either in the inhabitant of the country or in the government itself, or perhaps even in a friendly government. The universal conscience protests against the arbitrary use of the right of expulsion.'

"Heffter says that: 'No state can remove from its soil the subjects of another state whose nationality is duly established nor expel them after having received them, without having good reason for so doing, which it is bound to communicate to the government of which they are subjects.' He further says that 'the arbitrary and unjustifiable expulsion of a foreigner may be the point of departure of diplomatic reclamations on the part of the state of which he is a citizen. This point is above all controversy.'

"He further says that 'it is not a complete justification of the expulsion from the point of view of international law to pretend that it was not an act directed against the government of the state to which the individual expelled belonged.'

"Rolin-Jacquemyns says that 'the right of expulsion and the mode of exercise of this right may be regulated by international treaties; but in the absence of treaties the state to which the expelled individual belongs has the right to know the motives of the expulsion, and the communication of those motives can not be refused to it.'

"Article 6 of our treaty with Hayti guarantees to our citizens the right to sojourn, reside, and engage in business in Hayti, provided they submit to the laws.

"In this case of Mr. Loewi, there has been no evidence produced by the Haytian Government that Mr. Loewi was not living in submission to the laws and the constituted authorities, and the alleged reasons,

therefore, in the absence of such evidence, are deemed inadequate and unsatisfactory. There is nothing herein or in the attitude heretofore assumed by this Government in this case which is inconsistent with its rulings quoted by Mr. Firmin in his note of June 16th last. While at all times asserting the right of expulsion by a state from its territory of persons who are dangerous to its security, no such right has ever been asserted or conceded in the absence of just grounds for such expulsion; nor has this Government denied the obligation of an expelling government to communicate to the government of which the person expelled is a subject or citizen the grounds and evidence showing the reasonableness of such expulsion.

"While it is correctly stated in said note of June 16th last that this Government has always vindicated the right of expulsion, it has never asserted the right to its arbitrary exercise. The decision of Secretary Bayard in the case of one Meyer Gad, which is cited by Mr. Firmin in said note, does not seem, when attentively considered, to support the position of the Haytian Government, since Mr. Gad's misconduct is specifically stated, and it was made to appear to the satisfaction of his Government that he had been guilty of such misconduct.

Mr. Sherman, Sec. of State, to Mr. Powell, min. to Hayti, No. 94, Jan. 8, 1898, MS. Inst. Hayti, III. 622.

At the close of this instruction Mr. Powell was directed to present to the Haytian Government a claim in behalf of Mr. Loewi for indemnity. Before presenting the claim, however, Mr. Powell was informed that the reason for Loewi's expulsion was his flagrant implication in a plot against the Government of President Hyppolite, in the interest of General Manigat, then an exile and an avowed aspirant to the presidency, and on the strength of this information Mr. Powell asked for further instructions.

Mr. Powell's action was commended, and he was advised that the Government of the United States was indisposed to present a claim for indemnity for the expulsion of an "adventurer," "who embroils himself in plots for the overthrow of a friendly government;" but, as it was stated that Loewi's doings were reported to the Haytian Government through its secret system, he was instructed to bring the matter to the attention of that Government for the purpose of enabling it to furnish and with the request that it would produce the evidence in support of the charges justifying the expulsion. (Mr. Hay, Sec. of State, to Mr. Powell, min. to Hayti, No. 420, July 3, 1900, MS. Inst. Hayti, IV. 254.)

Case in Nicaragua.

Americans who were expelled from Nicaragua on account of being implicated in an insurrection, and who, in spite of their expulsion, returned to that country, were held to have placed themselves beyond the power of the Government of the United States officially to intervene in their behalf, should they be recaptured. In that event, all that could be done for them would be to endeavor by the exercise of good offices to secure for them fair

and open process of law, with every opportunity of defence, and if convicted, leniency of treatment.

Mr. Hay, Sec. of State, to Sec. of Navy, July 15, 1899, 238 MS. Dom. Let. 487, enclosing copy of an instruction to the United States consul at San Juan del Norte, No. 115, May 13, 1899.

The new Canadian mining regulations, as published in the Consular Reports for March 10, 1898, contain no provision excluding from the British northwest territory persons not possessing $200 in cash and a year's provisions.

Mr. Hay, Sec. of State, to Mr. Davis, U. S. S., March 4, 1899, 235 MS. Dom. Let. 274. The regulations in question were passed in January, 1898.

Unlawful practices.

April 24, 1900, Mr. Hay, Secretary of State, requested of the minister of the United States at Brussels a report on the case of Paul Edwards, who complained that he was arbitrarily and summarily expelled from Belgium, and that the legation declined to give him any assistance. The legation reported that Edwards, accompanied by a young woman whom he introduced as his secretary and interpreter, called at the legation March 27, 1900, and invoked his protection, stating that he had come to Brussels for the purpose of placing his son in a school there, and incidentally to practice the art of healing without medicines, by the laying on of hands, hypnotic suggestion, and personal magnetism. Mr. Edwards stated that he had been summarily ordered to leave the country, but the young woman, when questioned in French, which Mr. Edwards said he did not understand, admitted that they had received a previous warning from the police to the effect that Mr. Edwards could remain in the country only in case he refrained from practicing his art, since it was unlawful for anyone not provided with a proper certificate to practice the art of healing in Belgium. The legation informed him that this warning was given in accordance with Belgian law, and that he would be obliged to comply with it. The ministry of justice furnished the legation with a statement setting forth that Edwards, on his arrival in Brussels, caused the publication in a newspaper of an article headed "The Miracles of St. Paul." The article, which was accompanied with his portrait, described him as the "American thaumaturgus." Two other newspapers described his "miraculous power," at the same time announcing that he cured "for nothing" the sick whom regular practitioners had been unable to cure. Another article pronounced him "a most remarkable human being, the greatest mystic of our century," and alluded to his "strange appearance, his miraculous cures, called the cures of St. Paul." The police administration, on learning that these articles had drawn to Edwards a considerable

number of the sick, ordered him to leave Belgian territory within twenty-four hours, by decree of the minister of justice, who had decided on that measure. The statement of the ministry of justice added:

"This measure was enforced in accordance with the power vested in the Government touching the stay of foreigners in the country, who for any reasons of public order can not be allowed to sojourn there.

"The department of justice maintains that it is inconsistent with the public welfare for anyone to practice the art of healing, by whatever means, unless they be duly authorized so to do in the regular form provided for by law; furthermore, that the unauthorized practice of healing is prohibited by the penal code.

"At the time that this law was applied to Dr. Edwards, it was equally applied to a woman of French nationality with whom Dr. Edwards was in competition without being aware of the fact. She was likewise obliged to leave Belgian soil.

"We believe it necessary to add that very serious doubts exist as to the identity of Dr. Paul Edwards, who stated he was born at Rome in October, 1853, but who, according to certain information received which it has not appeared necessary to verify, as the expulsion was made on acount of the unlawful practices of the so-called Edwards, is said to be a certain E. Saltzmann, of Alsacian origin, formerly engaged in the rum business in Switzerland."

The Department of State said: "Whether the Belgian laws against Edwards's mode of practice of the healing art are well or ill advised is not for foreigners to say. The Belgian Government, so far as shown, appears to have been clearly within its rights in the matter of the expulsion."

Mr. Hay, Sec. of State, to Mr. Townsend, min. to Belgium, June 2, 1900, For. Rel. 1900, 53. See, also, id. 45–53.

Kennan's case.

"I have the honor to report to you for your information that Mr. George Kennan, an American citizen, recently visiting St. Petersburg, was directed day before yesterday by the Russian police authorities to quit the Empire. Mr. Kennan arrived here about three weeks ago, by way of Finland, and has since been staying at the Hotel d'Angleterre in this city. His criticisms of the Russian Government in a book which he published some years ago in relation to the penal institutions of Siberia have not been considered either just or fair by the Russians themselves, and his presence here has not been looked upon with favor by the official community of the Empire.

"Although Mr. Kennan reported himself to the police authorities of St. Petersburg upon his arrival here, as all travelers are required by

law to do, he has not been disturbed until now. He has been treated with entire courtesy and consideration; though, having voluntarily placed himself within the jurisdiction of the Russian law, he has become, as he himself admits, amenable to its provisions and is consequently ordered beyond the frontier.

"Mr. Kennan wrote to me last evening as follows:

"A very courteous officer from the department of police called at my room this afternoon to inform me that, by direction of the minister of the interior, and in accordance with chapter 313 of Volume II. of the laws of the Empire, I, as an 'untrustworthy' American citizen, am to be sent out of the country by the train leaving here for Germany at 10.30 to-morrow night. Meanwhile I am under close arrest in my room.

"Of course they are acting within their right, and I have no complaint whatever to make, nor do I ask any interposition on the part of the embassy.

"Mr. Kennan requested that Mr. Morgan, secretary of this embassy, should go to him to assist in having some books packed which he could not carry in his trunk. At my request Mr. Morgan called upon Mr. Kennan yesterday to ask whether he was in need of any assistance. Mr. Kennan replied that he had nothing to ask for, and that he met with politeness from all the officials of the imperial police. He left St. Petersburg last evening at 10.30 o'clock.

"The chapter 313 of Volume II. of the Russian law, under which this expulsion has taken place, reads as follows:

"Governors of provinces shall have supervision of all residents within their jurisdiction, and also of all foreigners who may be temporarily sojourning therein either for purposes of business or otherwise. They shall secure to such foreigners the benefits to which they may be entitled under the law, and shall protect them in the pursuit of their several occupations.

"But they shall require the passports of all foreigners to be in due legal form; and shall also keep a detailed account, to be transmitted by them to the higher police authorities, of the conduct, actions, and mode of life of all such foreigners.

"Foreigners who have come into Russia with passports may be expelled from the Empire only upon the decision of a court of law or by order of the higher police authorities.

"Those foreigners whose behavior is suspicious and those who are not desirable as residents within the Empire may be expelled by order of the minister of the interior.

"I have the honor to inclose to you herewith a copy of Mr. Kennan's letter."

Mr. Tower, amb. to Russia, to Mr. Hay, Sec. of State, July 27, 1901, For. Rel. 1901, 451.

Anarchists.

In a memorandum of December 12, 1901, handed to the Secretary of State by the German and Russian ambassadors, it was declared to be desirable that governments, agreeably to the resolutions of the conference held at Rome in 1898,

should agree on uniform administrative measures, having for their object the establishment of a rigorous surveillance of anarchists, by the creation of central bureaus in the various countries, by the exchange of information, and by international regulations for the expulsion of anarchists from all countries of which they were not the subjects. It was also suggested that the projected understanding should, so far as possible, embrace legislative measures tending to strengthen and complete the provisions of the penal codes against anarchists, against the combined effect of their common action, and against "the subversive press," besides defining more precisely the crime of anarchy.

In a memorandum of December 16, 1901, Mr. Hay, Secretary of State, expressed the President's cordial sympathy with the views and purposes above set forth. In this relation Mr. Hay quoted from the President's message of December 3, 1901, the recommendation that Congress should take into consideration the coming into the United States of anarchists, or persons professing principles hostile to all government and justifying the murder of those placed in authority, to the end that they should be kept out of the country, and if found therein deported; as well as the recommendation that anarchy should be declared an offence against the law of nations through treaties among all civilized powers. The President, it was stated, would be glad to adopt such administrative measures as were within his constitutional power to cooperate with other governments to the end of eradicating the deadly growth of anarchy from the body politic.

For. Rel. 1901, 196–198.

See, in this relation, a memorandum of the Department of State of October 13, 1900, in reply to a memorandum of the German chargé of October 15, 1900, in regard to the reciprocal furnishing of information concerning the movements of anarchists, and stating that while the United States would welcome all information that might aid in the application of the immigration statutes, and would endeavor to procure, through either State or Federal agencies, reports of the movements of any suspicious characters who might be indicated to it, yet, in the absence of Federal laws or means for adequately detecting and watching suspicious individuals, it would be impracticable for the Government of the United States to assume a reciprocal obligation, the value of which would lie mainly in its effective execution. (MS. Notes to German Leg. XII. 497.)

By the act of March 3, 1903, 32 Stat. 1213, alien anarchists are excluded from the United States.

Turner *v.* Williams (1904), 194 U. S. 279, affirming 126 Fed. Rep. 253.

2. Protests against Arbitrary Action.

§ 551.

Atocha case; other cases.

February 26, 1845, Alexander A. Atocha, a citizen of the United States, was ordered by the Mexican Government to leave the City of Mexico for Vera Cruz within eight days, in order to depart from the Republic. He protested through Mr. Shannon, then American minister in Mexico, on the ground that the order was a violation of the treaty of 1831. It appeared that Atocha was a personal friend of Santa Anna and a financial agent of his administration, and that it was on account of these associations that he was ordered to leave the country. Atocha subsequently presented a claim to the commission under the act of March 3, 1849, which was appointed for the adjustment of claims against Mexico which the United States had by the treaty of Guadalupe Hidalgo undertaken to pay. The commissioners rejected the claim on the ground that the connection of the memorialist with the political movements of Santa Anna was established (1) by the fact that he was with Santa Anna when he was ordered to leave Mexico, and (2) by the fact that Mr. Shannon did not reply to a communication of the Mexican secretary for foreign affairs, in which the latter ascribed to Mr. Shannon personal knowledge of Atocha's implication in Santa Anna's political schemes. After the adjournment of the commission the claimant found and produced a dispatch from Mr. Shannon to the Government of the United States denying the truth of the charge and explaining why he did not reply to it. On the strength of this dispatch, and of the general circumstances of the case, Congress passed an act referring the claim to the Court of Claims, which rendered a judgment in favor of Atocha's administratrix for $207,852.60.

Moore, Int. Arbitrations, II. 1264; act of Feb. 14, 1865, 13 Stat. 595; S. Rep. 70, 38 Cong. 1 sess.

The allowance of Atocha's claim was based especially on Art. 14 of the treaty between the United States and Mexico of 1831, by which it was stipulated that the citizens of the contracting parties should not only be protected in each other's territory, but that they should enjoy in every respect the same rights and privileges, either in prosecuting or defending their rights of person or of property, as the citizens of the country where the cause of action might be tried. As the constitution of Mexico provided that a citizen should not be expelled for political offenses without a trial, the Court of Claims held that it was unjustifiable for Mexico to expel without trial an American citizen for alleged complicity in a revolution, the revolution being at the time at an end and civil authority restored. (Atocha's Case, 8 Ct. of Claims, 427.)

For claims allowed by the commission under the act of March 3, 1849, for the expulsion of American citizens from Mexico during the war between that country and the United States, in violation of Art. 26 of the treaty of 1831, see Moore, Int. Arbitrations, IV. 3334–3347.

See, also, the case of Lacoste, and other cases, before the Mexican claims commission under the treaty of July 4, 1868, Moore, Int. Arbitrations, 3347–3350.

See, also, cases before other claims commissions, id. 3350–3359.

As Leon Spitzer "was expelled [from Austria-Hungary] on the vague and indefinite ground of 'the interest of public order,' and as no valid and explicit reasons in support of the order [of expulsion] are alleged, your action in making a formal protest is approved by the Department."

Mr. Foster, Sec. of State, to Mr. Grant, min. to Austria-Hungary, July 23, 1892, For. Rel. 1892, 13, 15.

The imperial law of July 27, 1871, regulating expulsion by the police, as given in For. Rel. 1892, 13, reads:

I. The expulsion from a certain place or locality can be ordered only against persons who do not belong to the territory where this law is valid, and their expulsion over the frontier by the police can only be applied to the persons herein enumerated:

(*a*) Vagabonds and people unwilling to work, who live on public charity.

(*b*) Individuals without documents and home, who have no income, and no lawful means of living.

(*c*) Public prostitutes who disregard orders to leave given them by the authorities.

(*d*) Criminals discharged from prison, when their stay endangers persons or property.

At repeated expulsion return may be prohibited.

II. The expulsion by the police from one or several places with order never to return, or not to return within a certain length of time, can be applied only to persons enumerated in paragraph 1.

It will be carried out when public interests are endangered, principally in that locality from which the person shall be removed.

The expulsion of a person from a community where his home and domicile is, is objectionable.

When the right to domicile has been acquired in a certain place, expulsion from it can not take place.

Aside from this, persons who are not domiciled within the territory in which this law is in force can be expelled from the entire territory, or from part thereof, if their stay, for reasons of danger to public order or security, is objectionable.

"The cases of certain Americans arrested and expelled by arbitrary order without formal charge or trial have had attention, and in some instances have been found to justify remonstrance and a claim for indemnity, which Hawaii has not thus far conceded."

President Cleveland, annual message, Dec. 2, 1895, referring to the acts of the Hawaiian Government in suppressing the attempted uprising of January, 1895, For. Rel. 1895, I. xxix.

Bluefields cases, 1894.

"The President is pained to learn, through reports of naval commander, that American citizens at Bluefields who, on invitation, visited the commissioner, were arbitrarily seized, denied permission to see families and friends, and forcibly taken to Managua to answer unknown charges, and that protests against this lawless proceeding have been ignored. Such arrest, besides violating treaty of 1867, is an ungenerous response to the friendly disposition recently manifested by this Government respecting the sovereignty of Nicaragua over the Mosquito territory. You will demand immediate open trial of the accused, with all guarantees of defense secured by treaty, and in default thereof their release."

Mr. Gresham, Sec. of State, to Mr. Baker, min. to Nicaragua, tel., Aug. 29, 1894, For. Rel. 1894, App. I. 332.

The foregoing telegram related to the case of two citizens of the United States, named Lampton and Wiltbank, who, together with twelve British subjects, including the British proconsul,[a] were suddenly arrested at Bluefields, by order of Señor Madriz, Nicaraguan special commissioner to the Mosquito Reservation, and taken to Managua. It appeared that after the uprising at Bluefields in July, 1894, by which the Nicaraguan provisional government was overthrown, Wiltbank accepted a position as magistrate and Lampton acted as a member of the council during the interregnum, when no regular government existed. They did this with the approval of Commander O'Neil, of the U. S. S. *Marblehead*. On the day of their arrest, they were invited by a messenger to call at the office of the commissioner. When they arrived there, they did not see the commissioner; but they were immediately seized and put under guard. They were then taken to Managua, and on the day after arriving there were sent under armed guard out of the country. The Nicaraguan Government declined either to try them or to allow them to return to Bluefields and arrange their affairs, but insisted that they must be immediately expelled, on the ground that they were "compromised in the crimes of rebellion and sedition" at Bluefields in July. By such action Nicaragua maintained that they had made themselves dangerous to the public peace, and had forfeited any right of residence under the treaty of 1867. Subsequently an offer was made to let them return and arrange their affairs and dispose of their property, if they would petition the Government to that effect.[b]

The United States admitted that if the charge was true Nicaragua's right to expel them could not consistently be challenged, "provided it was exercised in a becoming manner and without undue harshness." But it was contended that they were entitled to be informed of the charge against them and of the evidence in support of it, and in any

[a] Mr. Hatch. [b] For. Rel. 1894, App. I. 336–337, 338, 343.

event to a reasonable time to dispose of their business and possessions; and the minister of the United States was directed to investigate the truth of the charge against them, in order that it might be determined whether they were entitled to anything more.[a]

The position of the United States was further defined as follows: "Americans are entitled, under the treaty of 1867, to reside and do business in Nicaragua; that they can not be deprived of that right unless it has been forfeited, and that they are entitled to know the grounds of forfeiture. If forfeiture is claimed for causes other than political, they are entitled to an open and fair trial. If for alleged participation in an insurrectionary movement against Nicaragua, they should be informed of the charge against them and the evidence in support of it. This position will be maintained by the United States hereafter in all cases."[b]

Subsequently the Nicaraguan Government permitted the two American citizens to return to Bluefields and resume their business and residence there.[c]

Besides the twelve British subjects who were arrested, there were four other persons arrested who were said to be British subjects.[d] Some of the British subjects had participated, as Lampton and Wiltbank had done, in organizing a temporary government in July. On this point the British Government said: "If a government of some sort had not been constituted after the riots of the 5th and 6th of July, a state of anarchy would undoubtedly have ensued, and Her Majesty's Government cannot blame those British subjects who cooperated with the Mosquito chief in the maintenance of order."[e] The British Government also maintained that the conduct of Mr. Hatch was "perfectly correct." One of the charges against Mr. Hatch was that he had harbored the Mosquito chief for purposes hostile to Nicaragua. The British Government replied "that the chief, being in fear for his life, was, by the advice of Captain Clarke, commanding H. M. S. *Magicienne*, received by Mr. Hatch in his house, on the 11th of May, but that when the chief reassumed his position as Mosquito chief on the 6th of July, Mr. Hatch requested him to cease to reside in his house, and he accordingly left it."[f] And both in regard to Mr. Hatch and to the other British subjects, the

[a] Mr. Gresham, Sec. of State, to Mr. Baker, min. to Nicaragua, Oct. 1, 1894, For. Rel. 1894, App. I. 348.

[b] Mr. Gresham, Sec. of State, to Mr. Baker, min. to Nicaragua, Oct. 30, 1894, For. Rel. 1894, App. I. 351–352.

[c] For. Rel. 1894, App. I. 350, 352.

[d] For. Rel. 1895, II. 1025.

[e] Lord Kimberly, For. Sec., to Dr. Barrios, Nicaraguan min. at London, Feb. 26, 1895, For. Rel. 1895, II. 1027.

[f] Lord Kimberly, For. Sec., to Dr. Barrios, Nicaraguan min., Feb. 26, 1895, For. Rel. 1895, II. 1027, 1028.

British Government complained that they "were arrested . . . , imprisoned, and expelled from Nicaragua not only without any form of trial, but without any communication to them of the charges against them, so as to afford them an opportunity of absolving themselves." Great Britain therefore demanded of Nicaragua (1) the sum of £15,000 on account of her action "in arresting, imprisoning, and expelling" British subjects, and £500 additional for the beating of a British subject at Corn Island for refusing to perform military service and then being made to serve, and the "unwarrantable seizure" of a British schooner and the detention of her owner and crew at Corn Island; (2) the unconditional cancellation of the decrees of expulsion; and (3) the constitution of a mixed commission to assess the losses sustained by British subjects "in their property or goods in the Reserve, owing to the action of the Nicaraguan authorities."[a] Nicaragua replied that "there was no occasion for the revocation of the decree of expulsion, as all the persons guilty of taking part in the Mosquito rebellion had been pardoned;" and offered to submit the question of the right to an indemnity "to the arbitration of an impartial nation."[b] The British Government insisted upon its demands, and on April 27, 1895, occupied Corinto with its naval forces. They withdrew May 5, it having been agreed that the indemnity should be paid in London in fifteen days after the marines were withdrawn from land and the departure of the British ships from Nicaraguan ports.[c]

"The case of the British vice-consul, Hatch, and of several of his countrymen who had been summarily expelled from Nicaragua and treated with considerable indignity, provoked a claim by Great Britain upon Nicaragua for pecuniary indemnity, which, upon Nicaragua's refusal to admit liability, was enforced by Great Britain. While the sovereignty and jurisdiction of Nicaragua was in no way questioned by Great Britain, the former's arbitrary conduct in regard to British subjects furnished the ground for this proceeding.

"A British naval force occupied without resistance the Pacific seaport of Corinto, but was soon after withdrawn upon the promise that the sum demanded would be paid. Throughout this incident the kindly offices of the United States were invoked and were employed in favor of as peaceful a settlement and as much consideration and indulgence toward Nicaragua as were consistent with the nature of the case. Our efforts have since been made the subject of appreciative and grateful recognition by Nicaragua."

President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, I. xxxi.

---

[a] For. Rel. 1895, II. 1025, 1028, 1031.

[b] Mr. Matus, min. of for. aff., to Mr. Baker, U. S. min. to Nicaragua, April 23, 1895, For. Rel. 1895, II. 1031.

[c] For. Rel. 1895, I. 696–697; II. 1033–1034.

Hollander case.

"In the year 1888 Mr. Hall was the minister of the United States at Guatemala. Mr. Hosmer was the United States consul-general there, and Hollander, an American citizen, was residing there publishing a newspaper by license of the Government of Guatemala. During that year Mr. Hollander made affidavit before Mr. Hosmer that Mr. Hall and certain high officials of Guatemala had been beneficiaries of a fraudulent overissue of bonds of that Government; that Mr. Hall's participation therein was shown by the books of certain bankers there, and that a certificate of a prominent citizen, Mr. Herrera, showed the complicity of the Guatemalan officials. Hollander filed the alleged certificate with Mr. Hosmer. Mr. Hall, hearing of these charges, asked Mr. Hosmer for Hollander's affidavits, the alleged certificate of Herrera, etc. These were refused, but copies were given him, and he (Mr. Hall) brought the matter to the attention of the Guatemalan Government, asking an investigation. The investigation was held and resulted in Hollander's arrest and imprisonment on February 8, 1889, on a charge of calumny and forgery. Before Hollander's trial came on and while he was in prison, he was, on May 14, 1889, expelled from the country by an Executive decree. The expulsion followed immediately on the decree, and he was not even allowed to see his family, or to make any business arrangements whatever.

"Upon this state of facts this Government demanded a reasonable indemnity for Hollander, upon the ground that the harsh and hasty manner of his expulsion was in violation of international law. In its reply of December 22, 1893, the Guatemalan Government said:

"'It is impossible to lay aside the right which the Government had to expel Mr. Hollander at the hour and in the conditions that, according to its judgment, were convenient. The Government was not under obligation to allow him more or less time to get out of the country, nor to accommodate him in any way. All the practices of international jurisprudence, supposing them to be certain and indisputable, fall down before a law clear that comes immediately from the sovereignty of a nation. The stranger who lands on our shore knows, or ought to know, that he is exposed to those eventualities, if he does not observe a convenient behavior, and he who puts in practice a right, as the Government of Guatemala has done, does not cause injury nor violate other people's rights. Whatever may be the consequences of Mr. Hollander's expulsion he must blame himself only, and lament them as the result of his want of prudence. This is an argument that, in my opinion, can never be answered satisfactorily. I shall say no more about it, because it seems unnecessary to explain a point in itself so clear. It is contradictory not to allow that the Government had the right to expel Mr. Hollander, and to want indemnity for a legal act.'

"'The practices of international law . . . fall down before a law clear that comes immediately from the sovereignty of a nation.' The logical result of that proposition is that whenever a state by legal formula wills to do, it may do; and that international obligations are annulled, not infringed, by legalized administrative action in contravention of those obligations. The United States is unwilling to accept that proposition as seriously presented by Guatemala. I construe the language used to mean that as a rule of international law the right of expulsion is absolute and inherent in the sovereignty of a state; and that no other state can question the exercise of this right nor the manner of exercising it. It is possible some authority may be found in support of that view, and that it obtained in the earlier practice of nations; but the modern theory and the practice of Christian nations is believed to be founded on the principle that the expulsion of a foreigner is justifiable only when his presence is detrimental to the welfare of the state, and that when expulsion is resorted to as an extreme police measure it is to be accomplished with due regard to the convenience and the personal and property interests of the person expelled.

"In 1888 Rolin-Jacquemyns, the secretary-general of the Institute of International Law, made a report to that body on the 'Right of expulsion of foreigners,' which is published in the Revue de Droit International (Vol. XX., p. 498, and following). The report was in answer to a call by the association for an examination of the question 'In what manner and within what limits governments may exercise the right of expulsion of foreigners?' This jurist says:

"'The first condition of the existence of a state is not only the existence of a group of citizens who recognize its sovereignty, but also the existence of a territory on which this sovereignty is exercised, as a matter of fact and of right, to the exclusion of any other sovereign authority. But this sovereignty would be compromised if it were possible for persons under no political obligation to the state which they enter, who contribute nothing in the way of personal service, and whose country, in short, is elsewhere, to install themselves there and defy the local authorities, by whom their presence is regarded as dangerous or injurious to the community.'

"Upon this principle of territorial sovereignty he formulates the fundamental rule that—

"'Every state may limit the admission and the residence of foreigners upon its territory by such conditions as it deems necessary. But [he adds] there is another consideration which tends, not to annul, but to restrain this exercise of territorial sovereignty. The individual expelled has the double quality of being a man and a citizen of another state. As a human being, he has the right to be

exempt from needless harsh treatment and from unjust detriment to his interests; in his quality of citizen of another state, he has a right to invoke the protection of his country against unduly rigorous treatment and against spoliation of his property. The act of expulsion ought to conform to its direct, essential object, which is to relieve the soil of an obnoxious guest. The right of national sovereignty does not require nor permit more. Generally an official order to leave the country within a specified time is sufficient. If not, force may be employed. But forcible eviction should never assume a gratuitously vexatious character.'

"This author makes a practical distinction, furthermore, between the treatment of a transient visitor and that due a resident foreigner who has established a business or acquired property interests which would be ruined by sudden expulsion.

"'In the latter case it is especially important [he says] that the government which expels should exercise every indulgence, and accord all delay consistent with the public interests, if it would escape the charge of cruelty and masked persecution.'

"In closing his report, Mr. Rolin-Jacquemyns offers the following as one of five 'conclusions:'

"'Even in the absence of treaty, the state to which the expelled person belongs has a right to know the reason for the expulsion, and the communication of the reason can not be refused. Moreover, the expulsion should be accomplished with special regard for humanity and respect for acquired rights. Except in cases of special urgency, a reasonable time should be allowed to the expelled person to adjust his affairs to the new conditions. Lastly, except in cases of extradition, the expelled person ought to be allowed to depart by the route which he prefers.'

"Professor Bar (Journal Dr. Int. Privé, 1886, vol. 13, p. 5) quotes with approval Bluntschli's opinion that 'the right to expel foreigners should not be considered as an unqualified right; if so, international relations would be impossible,' and adds that, without denying the right of a state in certain contingencies to refuse foreigners access to its territory and to expel them from it, he confines himself to affirming 'that the exercise of such a power should be limited to exceptional cases rigorously justified, and should not be at variance with the principles of international law and of the necessities of the case, nor in contravention of the practice of nations. . . . Any other course finds its condemnation in Vattel (Dr. Int., II. 8, 104), who says: "The sovereign has no right to grant an entrance into his state for the purpose of drawing foreigners into a snare."'

"At a later meeting of the Institute of International Law (1891), in which a set of rules was formulated for the regulation of expulsion, Professor Bar said, in criticising one of the proposed rules

which provided for diplomatic reclamation in favor of the expelled foreigner:

"'I do not doubt that the government of the expelled person may sometimes demand an indemnity in his behalf; but this is only an application of the general and unquestioned principle of the law of nations which prohibits the unjust treatment of foreigners, a principle that needs not the sanction of an express regulation.' (Inst. Dr. Int. Annuaire, Vol. XI. p. 310.)

"Calvo (Dictionnaire de Droit International, title Expulsion) says:

"'But when a government expels a foreigner without cause, and in a harsh, inconsiderate manner (avec des formes blessantes), the state of which the foreigner is a citizen has the right to base a claim upon this violation of international law and to demand adequate satisfaction.'

"To the same effect is Bluntschli (Droit Int. Codifié, art. 384.)

"Some investigation has been made of the laws and practice of other powers touching the expulsion of foreigners, and they have been found to comport generally with the principles advocated by the jurists above quoted. These writers, Bar, Bluntschli, Calvo, and Rolin-Jacquemyns, are specialists in the science of international law, and the opinions of no modern jurists are entitled to greater respect. Their utterances were made as statements of principle and without reference to any controversy in which their sympathies were engaged or by which their judgment might be biased.

"In certain countries, of which Belgium is an example, the law relating to expulsion provides safeguards against abuse and injurious consequences, by requiring previous notice, by conceding the right of choice of the way out of the country, etc. In others, as in France, the law permits immediate expulsion, but the administration of it is tempered by executive regulation. In an executive order of December 17, 1885, the French minister of the interior deprecated and forbade harsh execution of the law by subordinate functionaries. 'Whatever may be the necessities,' he said, 'which in the interest of public order are imposed on the superior authorities, I believe that the Government of the Republic should be actuated in matters of this nature only by considerations of impartial humanity consistent with the wholesome enforcement of the law.' Referring to certain instances of harsh execution of the law by the police authorities near the frontiers, he says:

"'This is, in my opinion, a misconception of the sentiment of humanity to which I alluded above, and an application of the letter of the law with a rigor which a free republican government like France can not afford to exercise toward foreigners of any nationality.' (Journal de Dr. Int. Privé, vol. 13, 16, and 497.)

"Expulsion is a police measure, having for its object the purging of the state of obnoxious foreigners. It is a preventive, not a penal process, and it can not be substituted for criminal prosecution and punishment by judicial procedure. (See Inst. Dr. Int. Ann. 286, 300.)

"In no instance has an example been found of treatment such as that to which Hollander was subjected. Hollander had been admitted to residence in the Republic of Guatemala and encouraged to engage in business there. He lived for a long time in amity and intimacy with the high officers of the Republic, and those relations continued until he made the charge reflecting upon the integrity of certain of these officials. With the aid and support of the ruling powers he had built up a thriving newspaper and job-printing enterprise, which was in full operation at the time of his expulsion. The judicial powers of the Government of Guatemala at once took cognizance of Hollander's attack on the officials of the Government, and he was arrested upon the criminal charge of calumny and forgery. A trial and conviction upon that charge would have vindicated the Government and its officers and resulted in the punishment of Hollander if he was guilty of malicious libel and forgery. His acquittal would have been conclusive of his innocence. The circumstances of his expulsion give it the appearance of executive intervention to take the matter out of the hands of the court, and, assuming the fact of his guilt, to administer punishment by way of instant and forcible expulsion. The fact that Hollander was expelled while awaiting trial, and in a manner that defeated the ends of justice judicially administered, is one of the most aggravating of the incidents which make the manner of his expulsion a flagrant violation of Guatemala's obligations to the United States respecting the treatment of our citizens. This high-handed treatment of Hollander carried also the appearance of discourtesy and unfriendliness toward the United States; and if not so intended, the action of the Executive implied disregard of an unmistakable character for the rights and sensibilities of a neighbor Republic which feels as a wound every injury to its citizens.

"The treaty of 1849 between the United States and Guatemala (Art. XII.) provides as follows:

"Both the contracting parties promise and engage formally to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of the one or of the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial recourse on the same terms which are usual and customary with the natives or citizens of the country in which they may be; for which they may employ, in defense of their rights, such advocates, solicitors, notaries, agents, and factors as they may judge proper in all their

trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in (all) cases which may concern them, and likewise at the taking of all examinations and evidence which may be exhibited in the said trials.

"This treaty 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.)

"Without contending that the Guatemalan law of expulsion is in derogation of Article XII. of the treaty, and without taking exception to that law as a piece of domestic legislation, but having regard to the manner and circumstances only of Hollander's expulsion, it was effected in disregard of the rights guaranteed to citizens of the United States by that treaty, and of 'the prescription which,' quoting from the Guatemalan letter of June 9, 1888, 'can not be denied in any civilized country of the earth.'

"Returning to a consideration of the facts, Hollander was held in prison on bail for more than three months, in the power of the Guatemalan authorities, awaiting trial. Then, suddenly and without notice, the judicial proceeding was abandoned and the accused was taken from prison, carried under guard to the coast, and put upon an outgoing vessel under an executive decree of expulsion, leaving his family, his business, and his property unprovided for. He was literally hurled out of the country, leaving behind wife and children, business, property, everything dear to him and dependent upon him. Why that abandonment of the judicial investigation and resort to summary expulsion by administrative decree I do not inquire. But the United States takes this ground: The Government of Guatemala, whatever its laws may permit, had not the right in time of peace and domestic tranquillity to expel Hollander without notice or opportunity to make arrangements for his family and business, on account of an alleged offense committed more than three months before, Hollander having during the entire interval been in the power of the Government, subject to the proper enforcement

of any of its laws, and at the time awaiting trial in the criminal court upon the identical charge upon which he was expelled. If expulsion was lawful and proper on the 14th of May, it was lawful and proper on the 8th of February preceding, when Hollander had already committed the offending act and had been held to answer for it in the courts of the country. After deliberating three months and more, with Hollander absolutely in its power, the executive authority expelled him in a manner that defeated the course of justice in the courts of the country; that violated the rules of international law and the existing provisions of the treaty, and was contrary to the practice of civilized nations. In so doing Guatemala did Hollander, and through him the United States, a grievous injury, which can not be allowed to go without protest. He is entitled, upon the undisputed facts, to a reasonable indemnity, and you are directed to inform the Government of Guatemala that the United States expects it to be paid."

Mr. Olney, Sec. of State, to Mr. Young, min. to Guatemala, Jan. 30, 1896, For. Rel. 1895, II. 775.

For an analysis and criticism of the decree of the President of Guatemala, No. 491, in relation to the status of foreigners (For. Rel. 1894, 317–331), see For. Rel. 1895, II. 794–797.

Nov. 12, 1896, the American minister at Guatemala stated that the minister of foreign affairs had assured him "that the banishment of Mr. Hollander is removed, and that he is at liberty to return to Guatemalan territory." (Mr. Coxe, min. to Guatemala, to Mr. Olney, Sec. of State, Nov. 12, 1896, For. Rel. 1896, 380.)

"I send you herewith enclosed a copy of despatch No. 107, of the 19th of May last, from our minister to Guatemala, enclosing the argument of the Guatemalan minister for foreign affairs in refutation of the claim" of Mr. Hollander for damages. (Mr. Day, Assist. Sec. of State, to Mr. Benedict, Nov. 6, 1897, 222 MS. Dom. Let. 252.)

Scandella case.

In May, 1898, F. Scandella, a citizen of the United States, engaged in the cattle and transportation business at Ciudad Bolivar, Venezuela, was suddenly arrested while walking in the streets of that city, and was thrown into prison, where he was denied communication with his family and friends. Next day he was taken under guard to a steamer, and was sent to the British island of Trinidad. His wife and five young children were left without funds; his cattle and mules were stolen; and his house, which was about three miles from town, was sacked. The authorities of the State of Bolivar alleged as the cause of his seizure and expulsion "frequent denunciations" and "well-founded suspicions" that he was "plotting secretly against public order." The United States minister interposed in the case, presenting testimonials as to Mr. Scandella's character and standing; and the President of the Republic intimated a desire to settle the case outside of diplomatic channels. Scandella was permitted to return to Venezuela; and

early in July, 1898, the case was understood to have been adjusted on the basis of $1,600 in cash, American gold, and a promise of reimbursement for property taken or destroyed.

For. Rel. 1898, 1137–1147.

The adjustment of the case is mentioned by President McKinley in his annual message of Dec. 5, 1898, For. Rel. 1898, lxxxiv.

3. Special Discriminations.

(1) on ground of race.

§ 552.

In March, 1882, the American legation at Madrid reported overtures by the Liberian minister resident at Madrid, looking to a concerted remonstrance of the diplomatic representatives at that capital against a Spanish law or regulation prohibiting the landing of foreign negroes in Cuba unless on condition of depositing $1,000. Mr. Frelinghuysen stated that the question of the status of American citizens of African descent who might visit Cuba had lately been brought to the attention of the Department of State, when the Spanish consul-general at New York refused to visé the American passport of a colored citizen of the United States on the ground of his color, but that, when the case was brought to the attention of the Spanish minister, it was explained that the consul-general had misinterpreted the regulations and the visé was promptly given. Mr. Frelinghuysen added that the reasons for jealously watching the advent of native Africans into the Spanish colonies were evident, although happily not so urgent as when the work of emancipation was on the way to completion; but that there would seem to be no good reason why a negro resorting to the island and bearing a passport as evidence of his identity and the lawfulness of his purpose should be met by a practically prohibiting measure, such as that of depositing an excessive sum as a guaranty. The Department of State, however, was not aware that any such requirement had ever been demanded of an American citizen resorting to Cuba, and, if a case should be brought to its notice, it would remonstrate against it "as imposing a race discrimination not foreseen by treaty, or recognizable under the amended Constitution." In the absence of any such ground of complaint, it was not thought that the United States could make a formal protest such as the Liberian minister at Madrid desired in aid of his own remonstrance.

Mr. Frelinghuysen, Sec. of State, to Mr. Hamlin, No. 74, June 19, 1882, MS. Inst. Spain, XIX. 139.

See, however, infra, § 573, as to exclusion from the United States of laborers of the Chinese race, though they are subjects of powers other than China.

(2) OF PROFESSION—MISSIONARIES.

§ 553.

In 1884 the American minister at Teheran, Persia, reported that the Russian minister there had refused to visé the passport of James Bassett, a citizen of the United States, who was about to leave Persia for America, on the ground that a Russian ordinance prohibited the visé of the passports of clericals, unless permission was first obtained from St. Petersburg. Subsequently, however, the Russian minister gave the visé. It was stated that Mr. Bassett had three times previously crossed Russia without objection being raised. The American legation at St. Petersburg was instructed to bring the matter to the attention of the Russian Government, and to say that, whatever ground might exist for the establishment of such an ordinance as that described with respect to the citizens or subjects of other powers, it was conceived that the spirit of the treaty arrangements of the United States with Russia would be violated by applying it in the case of American citizens, either clergymen or laymen, whether residing in Russia or passing through that country, so long as they did not render themselves obnoxious to good order. "All citizens of the United States, whatever their occupation, are," said the Department of State, "equal before the law of this country; and are entitled to the undiscriminating protection of Russia, under our treaty obligations as such, for the treaty makes no distinction. If our citizens can sojourn in Russia, it would seem that *a fortiori* they can pass through that country, without hindrance, if provided with the passport of their Government."

Mr. Frelinghuysen, Sec. of State, to Mr. Taft, No. 5 bis, Oct. 28, 1884, MS. Inst. Russia, XVI. 415.

Mr. Denby, minister at Peking, in a despatch to Mr. Gresham, Secretary of State, March 28, 1895, adverted to the refusal of the Russian minister of the interior to allow the Russian legation at Peking to visé the passport of an American missionary so that he might travel through Siberia on his way to the United States, on the ground that no ecclesiastic was allowed to go through Siberia. This case occurred in 1891. Referring to it, Mr. Denby said that on the 20th of March he addressed a communication to Count Cassini, Russian minister at Peking, informing him that six Americans, three men and three women, residing at Kalgan, apprehended danger in China, and begging him to issue them a passport or some official paper which would enable them to take temporary refuge in Russian territory, if it became necessary to do so for the protection of their lives. The Count replied that the rules relating to the matter were very precise,

and that it would be useless to telegraph to St. Petersburg on the subject. He suggested that the Americans go to Urga, and offered to give them, if desired, a letter to the Russian consul-general there.

The Department of State sent a copy of Mr. Denby's despatch to St. Petersburg, with instructions to inquire whether the regulations against the residence or travel of foreign ecclesiastics or missionaries in Siberia were strict even to the inhospitable degree of denying shelter to citizens of a friendly state whose lives might be imperiled.

June 4, 1895, Mr. Peirce, chargé d'affaires ad interim at St. Petersburg, addressed a note of inquiry on the subject to the Imperial Government. This representation was followed by interviews, and ultimately by a note of Mr. Breckinridge, the American ambassador, Aug. 8, 1895.

The foreign office, Aug. 9/21, replied: "The Imperial Government finds no inconvenience in permitting the American missionaries, victims of religious persecution in China, to pass the frontier and to give them asylum on Russian territory. At the same time, the members of American ecclesiastical missions can only resort to Siberia after they have bound themselves in writing to abstain from all religious propaganda and from all interference in religious matters."

This permission was, at the solicitation of Mr. Breckinridge, modified, Sept. 4/16, 1895, by the statement "that the ministry of the interior does not find it inconvenient to permit the American missionaries seeking refuge in Siberia to pass the Russian frontier without, as a preliminary, obligating themselves to abstain from all religious propaganda and all interference in religious affairs. The missionaries in question will be required to deliver in writing obligations of this nature to the local Russian authorities after having passed on to the territory of the Empire."

For. Rel. 1895, II. 1074–1077, 1078, 1080–1081. See, also, For. Rel. 1895, I. 195–196.

(3) OF CREED—JEWS IN RUSSIA.

§ 554.

Views of Mr. Fish.

"The treaty of 1832 . . . is a commercial treaty. The right of residence in Russia granted to American citizens is granted 'in order to attend to their affairs;' but it is also given 'on condition of their submitting to the laws and ordinances there prevailing.'

"How can it be contended that a law or ordinance respecting religious faith is not a law or ordinance within the contemplation of the treaty? It may be a proper subject for regret that the Russian Government should feel itself constrained to adhere to a policy which

the statesmen of the United States regard as a relic of illiberality. But in the presence of history it can not be denied that the right to enact and enforce laws respecting the religious faith and observances of persons who receive the protection of a state has been insisted upon and exercised by almost every nation of modern Christendom. . . . We may deplore the ignorance of the true principles of government which leads to the enactment of such laws; we may venture to express the hope (when occasion calls) that they will not be enforced against peaceful Americans."

Mr. Fish, Sec. of State, to Mr. Jewell, min. to Russia, No. 57, June 9, 1874, H. Ex. Doc. 470, 51 Cong. 1 sess. 24, 25.

For a memorandum on the legal position of Hebrews in Russia by Mr. Eugene Schuyler, chargé d'affaires ad interim at St. Petersburg, of Sept. 29, 1872, see H. Ex. Doc. 470, 51 Cong. 1 sess. 9–13.

For an abstract of a report of Mr. Grigorieff, member of a commission for the improvement of the Hebrews, on the question of permitting them freedom of residence in Russia, see Mr. Schuyler to Mr. Fish, No. 92, March 15, 1875, H. Ex. Doc. 470, 51 Cong. 1 sess. 25–28.

Case of Rosenstrauss.

In 1873 Theodore Rosenstrauss, a citizen of the United States, who had settled at Kharkoff in 1863 as a mechanic and merchant of the second guild, invoked the interposition of the American legation at St. Petersburg in respect to the action of the Russian authorities, who, it was stated, had just required him to obtain a license of the first guild, costing about 600 roubles, instead of a license of the second guild, costing 150 roubles, which he had obtained during the nine preceding years, as well as to sign a writing to the effect that he would not ask for future licenses unless he obtained permission to continue his business from the minister of finance and the minister of the interior. He declared that the sole reason for the action of the authorities was his being of the Hebrew religion, and that the license commissioners had told him that only Hebrews of Russian birth could do business at Kharkoff and that foreigners of that faith could not enjoy the same privilege. Mr. Jewell, American minister at St. Petersburg, brought the case to the attention of the Russian Government, and maintained that, as the United States tolerated all religious beliefs, it was entitled to "equal protection" for all its citizens in their lawful enterprises "without regard to their religious principles, provided always that they obey the laws of the country in which they reside." Mr. Jewell also called attention to Article I. of the treaty of 1832, ensuring to the citizens of each country liberty to sojourn and reside in the territories of the other, in order to attend to their business, enjoying therein "the same security and protection as the natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing."

Mr. Fish, Secretary of State, commenting on Mr. Jewell's presentation of the case, remarked that the withholding of the license from Rosenstrauss "on account, as is understood, of his being a Hebrew of foreign birth," seemed to be in direct violation of the treaty, the purpose of which was to place all citizens of the United States in Russia "on the same footing as native Russians."

The Russian ministry of foreign affairs, in a note to Mr. Jewell of January 27, 1874, stated that the ministry of the interior had consulted the ministry of finance and had reported that Rosenstrauss, as an Israelite and the subject of a foreign power, would be required to conform to the provisions of paragraph 5 of the appendix to art. 128 of the Commercial Code (Vol. XI. of the Code of Laws, ed. of 1863), and that he could transact business at Kharkoff only on condition that he procure a certificate of the first guild. Mr. Fish, in acknowledging, February 23, 1874, a despatch of Mr. Jewell communicating a copy of the Russian note, stated that the permission granted to Rosenstrauss to remain in Kharkoff and carry on his business, if he provided himself with a certificate of the first guild, was "apparently a satisfactory solution of his case."

H. Ex. Doc. 470, 51 Cong. 1 sess. 14–22.

In the same document may be found a later correspondence concerning the case of H. Rosenstrauss, the brother and clerk of the person above referred to. H. Rosenstrauss complained that, being desirous to purchase an establishment in which to carry on his business, he found that he could not purchase the property, as Jews were not allowed to hold real estate in the part of Russia in which he lived, unless they were British subjects. Mr. Hoffman, secretary of legation at St. Petersburg, May 29, 1879, reported that by art. 1523 of Vol. IX. of the Russian Code of Laws "alien Jews distinguished by their position in society, or their extensive business transactions," were permitted "to establish banking houses and manufactories, and to *hold real property;*" and that in this respect all alien Jews, American and British, stood upon the same footing. (H. Ex. Doc. 470, 51 Cong. 1 sess. 29–33.)

The House of Representatives, June 10, 1879, passed a joint resolution declaring that the "rights of citizens of the United States should not be impaired, at home or abroad, because of religious beliefs; and that, if the existing treaties between the United States and Russia be found, as is alleged, to discriminate in this or in any other particular, as to any other classes of our citizens, the President be requested to take immediate action to have the treaty so amended as to remedy the grievance." The resolution failed to pass the Senate, but it was regarded as "formulating a national sentiment on the matter, which the President is well disposed to follow." (Mr. Blaine, Sec. of State, to Mr. Foster, min. to Russia, No. 80, confidential, June 22, 1881, MS. Inst. Russia, XVI. 206.)

Subsequently H. Rosenstrauss was notified by the police authorities of Kharkoff to leave Russia by August 1, 1882. This order seemed to be erroneous, since the time of his departure had, on the application of

Mr. Hoffman, secretary of legation, been extended by the minister of the interior to October 15. In a note to M. de Giers of September 14, 1882, Mr. Hunt, then American minister at St. Petersburg, stated that H. Rosenstrauss had, since he came to Kharkoff, acted as the "clerk or agent" of his brother, and that he was entitled to remain under a provision of Russian law permitting merchants of the first guild who were Israelites to employ their coreligionists as clerks or servants. The Russian Government replied, however, that this provision applied only to Russian subjects who were merchants of the first guild. Mr. Frelinghuysen took the ground that this involved a clear violation of the treaty of 1832; that Russia had previously invoked the treaty in support of her contention that an American Jew could not enjoy in the Empire privileges denied to native Jews, but now seemed to assert that an American Jew could not enjoy certain privileges conceded to native Jews, because he was a foreign Jew. (Mr. Frelinghuysen, Sec. of State, to Mr. Hunt, min. to Russia, No. 21, Dec. 15, 1882, MS. Inst. Russia, XVI. 318.) This view was submitted to M. de Giers by Mr. Hunt in a note of January 21, 1883. (H. Ex. Doc. 470, 51 Cong. 1 sess. 81.) Mr. Hunt had previously stated that he found the Russian Government disposed to extend permission for Rosenstrauss to remain till June, 1883, and that he had received an intimation from Rosenstrauss himself that upon paying for a license as a merchant of the first guild he felt assured that he might become secure against molestation. (H. Ex. Doc. 470, 51 Cong. 1 sess. 80.)

As to discriminations in Switzerland against citizens of the United States of the Jewish faith, see Mr. Seward, Sec. of State, to Mr. Hart, Aug. 9, 1861, 54 MS. Dom. Let. 426.

Cases of Pinkos and Wilczynski.

"I have to acknowledge the receipt of Mr. Hoffman's No. 205 and 208, in relation to the expulsion of foreign Jews from certain large towns and cities of Russia, and the expulsion of Mr. Henry Pinkos, a Jew and an American citizen, from St. Petersburg in particular. It appears from the latter despatch that Pinkos has been allowed to remain three months. Mr. Hoffman does not specifically state that Mr. Pinkos or the other Jews referred to have been ordered to leave Russia as well as St. Petersburg, but that is the implication of the despatches.

"In reply I have to observe that in the presence of this fact, that an American citizen has been ordered to leave Russia on no other ground than that he is the professor of a particular creed, or the holder of certain religious views, it becomes the duty of the Government of the United States, which impartially seeks to protect all its citizens of whatever origin or faith, solemnly, but with all respect to the Government of His Majesty, to protest. As this order of expulsion applies to all foreign Jews, in certain towns or localities, at least, of Russia, it is of course apparent that the same is not directed especially against the Government of which Mr. Pinkos is a citizen, and, indeed, the long-standing amity which has united the interests of Russia with those of this Government would of itself forbid a remote supposition

that such might be the case. Notwithstanding this aspect of the matter, the United States could not fail to look upon the expulsion of one of its citizens from Russia, on the simple ground of his religious ideas or convictions, except as a grievance, akin to that which Russia would doubtless find in the expulsion of one of her own citizens from the United States on the ground of his attachment to the faith of his fathers.

"It is intimated in Mr. Hoffman's No. 205 that the reason of this order may be found in the supposed implication of Jews in the plots formed against the life of the Emperor, and in so far as this may be true the Government of Russia has the entire sympathy of the Government of the United States in all just preventive efforts; and if there exists good evidence that Mr. Pinkos has been connected with any of these attempts the Government of the United States can not object to his expulsion on that ground. But such a charge does not appear to have been brought against Mr. Pinkos; and it is confidently submitted to His Majesty's Government whether in the event Mr. Pinkos should finally be expelled from Russia, or be otherwise interrupted in his peaceful occupations, on the sole ground that his religious views are of one kind rather than another, he would not be justly entitled to make reclamation for the damage and loss to which he might thereby be subjected."

Mr. Evarts, Sec. of State, to Mr. Foster, min. to Russia, June 28, 1880, For. Rel. 1880, 875.

The three months' delay granted to Pinkos having expired, he sold his property at a sacrifice and prepared to leave Russia. When he was about to embark at Cronstadt he was stopped by the Russian police, and compelled to return to St. Petersburg in order to have an informality in his passsport corrected. The ship sailed without him, carrying off his baggage and he lost his passage money. Being thus with his family rendered penniless, he was indebted to private charity for the means to leave the country. (Mr. Hoffman, chargé, to Mr. Evarts, Sec. of State, July 21 and August 11, 1880, For. Rel. 1880, 878, 879.)

See, also, Mr. Evarts to Mr. Hoffman, Aug. 10, 1880, For. Rel. 1880, 879.

With reference to a statement of Mr. Hoffman that he inferred from what Pinkos's wife said that the latter had made up his mind that Russia "was no place for one of his creed," Mr. Evarts said: "If the meaning of this is that a citizen of the United States has been broken up in his business at St. Petersburg, simply for the reason that he is a Jew rather than a believer in any other creed, then it is certainly time" to make it "clear to the Government of Russia that, in the view of this Government, the religion professed by one of its citizens has no relation whatever to that citizen's right to the protection of the United States."

Mr. Evarts, Sec. of State, to Mr. Foster, min. to Russia, No. 27, Sept. 4, 1880, H. Ex. Doc. 470, 51 Cong. 1 sess. 37.

See Mr. Foster to Mr. Evarts, No. 37, Sept. 16, 1880, and No. 41, Sept. 28, 1880, H. Ex. Doc. 470, 51 Cong. 1 sess. 38, 39.

No exceptional privileges as to the ownership of real estate in Russia are conferred on Jews who are British subjects. (Mr. Evarts, Sec. of State, to Mr. Wise, April 28, 1879, 127 MS. Dom. Let. 660; Mr. F. W. Seward, Act. Sec. of State, to Mr. Pendleton, July 1, 1879, 128 MS. Dom. Let. 642.)

October 20, 1880, Mr. Foster, American minister at St. Petersburg, reported another case of the enforcement against an American citizen, Mr. Marx Wilczynski, of the order prohibiting foreign Jews to reside in St. Petersburg. Mr. Foster, on October 7, 1880, brought the case to the attention of the Russian Government in the sense of Mr. Evarts's instructions in the case of Pinkos, supra, and requested that Wilczynski might be permitted to return to Russia.

M. de Giers, December 1/13, 1880, informed Mr. Foster that, in view of the interposition of the legation, Mr. Wilczynski was authorized to return to St. Petersburg and remain there six months.

H. Ex. Doc. 470, 51 Cong. 1 sess. 40–48.

In a note to Mr. Foster, American minister, of December 1/13, 1880, M. de Giers, imperial minister of foreign affairs, declared that the measures of which Pinkos complained were in perfect conformity with the Russian laws; that it was in virtue of those laws that, having resided six months in Russia, he could not leave Kronstadt without a passport; that, when he had obtained a passport, he was not reconducted to the frontier and subjected to the process of expulsion to which he was liable, but, after being allowed three months in which to liquidate his affairs, was permitted to leave Russia on the same conditions as every foreigner who wished to pass the frontier. It was evident, said M. de Giers, that the measures taken were not marked by any spirit contrary to the consideration which the Imperial Government had always professed for the quality of an American citizen. As regarded the measures concerning foreign Israelites, M. de Giers said that, if those measures were rigorously executed, this fact had no special significance, but resulted from the increased vigilance occasioned by the circumstances then existing, which had led the imperial authorities "to discover irregularities in the legal position of many foreigners residing in Russia." The Imperial Government was pledged to see to the strict observance of the existing laws, and it was in this way that Pinkos had felt "the effect of the precautions taken in consequence of the proceedings of the social revolutionists," although his own conduct "happily sheltered him from the direct action of the measures adopted to secure the public order." Nothing had been done in his case "beyond the regular application of existing laws."

M. de Giers, min. of for. affs., to Mr. Foster, min. to Russia, Dec. 1, 1880, H. Ex. Doc. 470, 51 Cong. 1 sess. 47.

See Mr. Foster to Mr. Evarts, No. 75, Dec. 31, 1880, as to condition and treatment of Russian subjects of the Jewish faith. (H. Ex. Doc. 470, 51 Cong. 1 sess. 50.)

See, further, for an extract from or sketch of the laws of Russia relative to foreign Jews, Mr. Foster, min. to Russia, to Mr. Blaine, Sec. of State, No. 135, July 14, 1881, For. Rel. 1881, 1022–1025; H. Ex. Doc. 470, 51 Cong. 1 sess. 54–57.

As to anti-Jewish riots in the southwestern provinces of Russia in April, 1881, see Mr. Foster, min. to Russia, to Mr. Blaine, Sec. of State, No. 121, May 24, 1881, For. Rel. 1881, 1019; H. Ex. Doc. 470, 51 Cong. 1 sess. 52.

"Your several despatches, numbered 73, 74, and 75 of the 30th and 31st of December, ultimo, in relation to the treatment of American Jews in Russia, have been received, and I have pleasure in commending your zealous presentation of the cases of Pinkos and Wilczynski, and of the general questions involved. The assurances you have received as to the liberal treatment hereafter to be accorded, as an act of comity and courtesy by the military authorities, to American citizens visiting Russia, are fully appreciated.

"I have observed, however, that in some of your conversations and writings with the foreign office, you give prominence to the natural American sympathy with oppressed Jews elsewhere as a motive for our solicitude as to the treatment of Jews in Russia. Such solicitude might very properly exist; but in your presentation of the facts you should be careful to impress that we ask treaty treatment for our aggrieved citizens, not because they are Jews, but because they are Americans. Russia's treatment of her own Jews, or of other foreign Jews resorting thither, may, in determinate cases, attract the sympathy of the American people, but the aim of the Government of the United States is the specific one of protecting its own citizens. If the hardships to which Russian and foreign Jews are subjected involves our citizens, we think we have just grounds for remonstrance and expectancy of better treatment.

"This Government does not know or inquire the religion of the American citizens it protects. It can not take cognizance of the methods by which the Russian authorities may arrive at the conclusion or conjecture that any given American citizen professes the Israelitish faith. The discussion of the recent cases has not as yet developed any judicial procedure whereby an American citizen, otherwise unoffending against the laws, is to be convicted of Judaism, if that be an offense under Russian law; and we are indisposed to regard it as a maintainable point that a religious belief is, or can be, a military offense, to be dealt with under the arbitrary methods incident to the existence of a 'state of siege.'

"This Government is not unmindful of the difficulties under which, as is alleged, that of Russia labors in dealing with those of her subjects whom she may deem disaffected; but the reasons adduced and methods adopted against them should have no application to American citizens sojourning peacefully, for business or pleasure, in Russia, for they are not to be charged with abstract political disaffection to a Government to which they owe no allegiance; and, if charged with the commission of unlawful acts, they should have guilt explicitly imputed and proven. In the latter case, the religion of the accused can not be admitted as proof or presumption, either of guilt or of innocence.

"It is not the desire of this Government to embarrass that of Russia by insistance upon these points with any degree of harshness, when the disposition reported in your despatches is so conciliatory, and when the treatment offered may operate effectively to remove or prevent future causes of complaint based on the ill-treatment of American citizens alleged to be Jews. It is most desirable, however, that you should not pretermit your efforts to bring the matter to such a stage as will insure for peaceable and law-abiding Americans in Russia like treaty rights and personal freedom of creed as Russians enjoy in the United States."

Mr. Evarts, Sec. of State, to Mr. Foster, min. to Russia, No. 55, March 3, 1881, For. Rel. 1881, 1007; H. Ex. Doc. 470, 51 Cong. 1 sess. 51.

"In acknowledging the receipt of Department No. 55, of the 3d instant, I desire to express my thanks for the kindly commendation of my presentation of the cases of Pinkos and Wilczynski, and of the general question of the treatment of Jews in Russia.

"I make careful note of the desire manifested by the late honorable Secretary of State to appeal strongly to the treaty guarantee of personal freedom to American citizens sojourning peaceably, for business or pleasure, in Russia, without regard to their religious belief. I have constantly made this appeal in my conversations with and communications to the Russian authorities. But it will be noted in my No. 73, of December 30, that I called attention to the fact that the Russian Government denies that the treaty of 1832 secures to American citizens of the Jewish faith sojourning in Russia any other or greater privileges than those enjoyed in this Empire by Russian subjects of the same faith. From the concluding sentence of Department's No. 55, it would seem that the late Secretary's construction of the treaty was that American citizens in Russia were entitled to the same rights and personal freedom as are extended to Russian subjects sojourning in the United States. This interpretation has never as yet been presented to the Russian Government, nor has the treaty been so considered by my predecessors. If that view is to be in-

sisted upon, I will thank you for specific instructions regarding this point. As stated in my No. 73, the laws imposing disabilities upon Jews, both foreign and native, antedate the treaty of 1832, and the minister of foreign affairs claims that said treaty does not exempt American Jews coming here from their operation.

"I have strongly insisted that the passport of his Government should protect every peaceable American citizen coming to Russia, and that it is not proper to institute an iquiry as to the religious belief of such citizen. The Department is correct in the supposition indicated, that no American citizen has been convicted of Judaism by 'judicial procedure.' But it is to be borne in mind that in Russia it is not necessary that a judicial procedure should take place, or even the 'military state of siege' exist, before a person undergoes the sentence of the law. The laws and regulations in question are usually intrusted to the police authorities, and it is sufficient for them to be satisfied in their own minds that the individual comes within the prohibitions to have them enforced.

"I shall not fail to continue to press the subject upon the Russian Government at every proper opportunity."

Mr. Foster, min. to Russia, to Mr. Blaine, Sec. of State, No. 100, March 25, 1881, For. Rel. 1881, 1012; H. Ex. Doc. 470, 51 Cong. 1 sess. 51.

Mr. Blaine's instructions, 1881.

The question of the treatment in Russia of American citizens of the Jewish faith is discussed at length in an instruction of Mr. Blaine to the American minister at St. Petersburg of July 29, 1881. The cases of grievance had, said Mr. Blaine, been of two kinds: (1) Absolute prohibition of residence in St. Petersburg and in other cities of the Empire, on the ground that the Russian law permitted no native Jews to reside there—of which the case of Pinkos was a type; and (2) permission of residence and commerce conditionally on obtaining a license of the first guild of Russian merchants—of which the case of Rosenstrauss was an example. A connected understanding of the subject had proved to be very difficult. While it was alleged, on the one hand, that the Russian laws in force when the treaty of 1832 was signed prohibited or limited the sojourn of foreign Jews in Russian cities, there was found, on the other hand, "specific invitation to alien Hebrews of good repute to domicil themselves in Russia, to pursue their business calling under appropriate license, to establish factories there, and to purchase or lease real estate." Similar acts were found even earlier. The ukase of the Empress Catherine of February 22, 1784 (4 Martens' Recueil, 1795, pp. 455–457), in opening to commerce the cities of Sebastopol, Kharson, and Theodocia, in the new possessions of Russia on the Black Sea, declared that "each individual" of

friendly nations, whoever he might be, so long as he remained in those cities by reason of his business or his pleasure, should enjoy the free exercise of his religion; that "all the various nationalities established in Russia shall praise God . . . each one after the worship and religion of his own ancestors;" and that all foreigners in the three cities mentioned should have the same advantages as were "enjoyed in our capital and seaport, St. Petersburg." The imperial ordinance of August 13, 1807, in relation to passports, was applicable, continued Mr. Blaine, "to all foreigners of whatsoever nationality," and neither it nor the amplified ukase of February 25, 1817, contained any religious restrictions. From that time down to 1860, Mr. Blaine said, he could find no trace of the enforcement, especially against American citizens, of the restrictions against Jewish travelers and residents which were said to have existed in 1832; nor did he find reference to such disabilities in the writings of authorities on private international law concerning the rights of aliens. He did not, however, desire to be understood "as arguing that the asserted disabilities did not exist at that time." The domestic history of Russia showed the restrictions placed on native Hebrews and especially those of Polish origin and the efforts to confine them to certain parts of the empire, but it also showed the gradual relaxation of those measures till in the capital itself the native Jewish population was said to number 30,000 souls, with their synagogues and sectarian schools; while the special ukase of Alexander II., of June 7, 1860, which permitted aliens to enter any of the trading guilds on the same footing as natives, also permitted foreign Jews "known by reason of their social position and the wide extent of their commercial operations," "upon a special authorization, issued in each case by the ministers of finance, of the interior, and of foreign affairs," to "trade in the Empire and establish banking houses therein, upon procuring the license of a merchant of the first guild," as well as to "establish factories, to acquire and to lease real estate conformably to the prescriptions of the present ukase." This provision, said Mr. Blaine, extended to the whole Empire; and if, as was understood to be stated in the Pinkos case, native Jews were forbidden to reside or trade in the capital, it placed foreign Jews on a more favored footing; while if, as a matter of fact, native Jews were permitted to reside and trade in St. Petersburg, in other guilds than the first, there might be a question whether the ukase, in restricting an American Jew to the first guild, was consonant with the treaty of 1832.

In the case of Pinkos and Wilczynski, however, there was, said Mr. Blaine, an expulsion of American citizens, not because of failure to comply with the ukase of 1860, "but simply on the allegation, unsupported by proof, that they professed the Israelitish faith, and that the law forbade the sojourn of native Israelites in the imperial capi-

tal." On this simple formulation of the case, the Government of the United States, said Mr. Blaine, believed that "under its treaty with Russia, and in view of its treatment of Russian subjects resorting under like circumstances to the United States, it has just ground for complaint, and expectancy of better treatment from the Government of Russia." By Article I. of the treaty of 1832 it is declared that there "shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation;" that the inhabitants of the two states "shall mutually have liberty to enter the ports, places, and rivers of each party wherever foreign commerce is permitted;" that they shall be "at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs;" and that they "shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing, and particularly to the regulations in force concerning commerce." It was also to be observed, said Mr. Blaine, that Article X. of the treaty conferred specific rights concerning the disposal of personal property in Russia owned by or falling to American citizens, who were to be allowed to receive and dispose of inheritances and to have recourse to the courts in settlement of questions arising thereunder. In a case arising under this article the Government of the United States would, declared Mr. Blaine, hold that all American citizens, irrespective of any conditions save those created by the article, should enjoy the rights secured thereunder. The Government of the United States concluded its treaties for the equal protection of all classes of American citizens, and could make no discrimination between them, whatever their origin or creed.

Mr. Blaine added that he had left out of consideration the question whether citizens or subjects of other nations were more or less favored than those of the United States. M. de Giers had remarked that German and Austrian Jews were subjected to the proscriptions in question. It did not belong to the United States, said Mr. Blaine, to consider the motives of policy or of international agreement which might govern in those instances; he considered that the "intention of the United States" in negotiating the treaty of 1832, and the reciprocal nature of the engagements then entered into, gave the United States "a moral ground to expect careful attention to our opinions as to its rational interpretation in the broadest and most impartial sense," and the President would deeply regret to find "that a narrow and rigid limitation of the construction possible to the treaty stipulations between the two countries is likely to be adhered to." If the existing treaty stipulations were found to be "insufficient to determine questions of nationality and tolerance of individual faith, or

to secure to American citizens in Russia the treatment which Russians receive in the United States," it was due to good relations that these stipulations should be made sufficient in these regards.

Mr. Blaine, Sec. of State, to Mr. Foster, min. to Russia, No. 87, July 29, 1881, For. Rel. 1881, 1030; H. Ex. Doc. 470, 51 Cong. 1 sess. 59.

See, in this relation, Mr. Blaine, Sec. of State, to Mr. Bartholomei, Russian min., June 20, 1881, MS. Notes to Russian Leg. VII. 350.

As to the restrictions on the ownership of real estate by Jews in Russia, see Mr. Evarts, Sec. of State, to Mr. Wise, April 28, 1879, 127 MS. Dom. Let. 660; Mr. F. W. Seward, Act. Sec. of State, to Mr. Pendleton, July 1, 1879, 128 MS. Dom. Let. 642.

"Referring to your despatch No. 87, and to my No. 150 in reply, I have the honor to inform you that I called yesterday upon Mr. de Giers in reference to the question of United States Jews in Russia. Mr. de Giers stated that he had read your despatch with interest; that the question had two sides—its legal and its moral side; that in reference to the former, he still maintained the view he had already intimated to me—viz, that in the treaty of 1832 the words 'on condition of their submitting to the laws and ordinances there prevailing' were controlling, and subjected American Jews to the treatment of native Jews. He added that he had given an analogous answer to the representations of other powers.

"As regards the moral side of the question, he, personally, would be glad to see important modifications made in the laws regulating the condition of the Jews in Russia; but that they had brought much of the harshness of these laws upon themselves. A commission had, however, been appointed to examine and report upon the whole Jewish question, under the presidency of the minister of the interior; that the commission would meet this autumn, and that he had already transmitted your despatch to that officer, to be submitted for the consideration of the commission."

Mr. Hoffman, chargé at St. Petersburg, to Mr. Blaine, No. 162, Oct. 8, 1881, H. Ex. Doc. 470, 51 Cong. 1 sess. 64.

See, also, Mr. Hoffman to Mr. Blaine, No. 150, Aug. 29, 1881, H. Ex. Doc. 470, 51 Cong. 1 sess. 63, and Mr. Blaine to Mr. Hoffman, No. 103, conf., Nov. 23, 1881, MS. Inst. Russia, XVI. 250.

See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Noar, June 14, 1882, 142 MS. Dom. Let. 405; Mr. Davis, Act. Sec. of State, to Mr. Grug, Aug. 23, 1882, 143 MS. Dom. Let. 413.

Lewisohn case.

In September, 1880, Mr. Lewisohn, a naturalized British subject of the Jewish faith, was compelled by the police to leave St. Petersburg on the ground that Jews were not allowed to reside in the capital, and he was also ordered to leave Russia, which he did. On laying a complaint before the British foreign office, he was informed by Sir Julian Pauncefote that the

notice which he received to quit Russia appeared to have been in accordance with Russian law, which was in force without regard to the nationality of those against whom it was directed. Subsequently the British ambassador at St. Petersburg requested that permission be given to Mr. Lewisohn to return to Russia for a time to attend to his private affairs. The minister of foreign affairs eventually replied that the application had been submitted to the police department, which was unable to grant it.

In an instruction to the British ambassador at St. Petersburg, July 11, 1881, Lord Granville observed that the treaty between Great Britain and Russia of January 12, 1859, applied to all Her Majesty's subjects alike, without any distinction of creed, and that the expulsion of Mr. Lewisohn therefore appeared *prima facie* to be a violation of Articles I. and XI. conferring reciprocal rights on the subjects of the contracting parties to travel, reside, and trade in any part of their respective dominions. By the terms of Article I., its stipulations were not, said Lord Granville, to affect the laws, decrees, and special regulations regarding commerce, industry, and police in force in each of the two countries and generally applicable to foreigners, and the privileges conferred by Article XI. were granted to the subjects of either of the contracting parties, provided they conformed themselves to the laws of the country. So far as appeared, Mr. Lewisohn had not violated any law or police regulation which would justify his expulsion, and the embassy was instructed to ask an explanation of what was apparently a violation of the treaty rights accorded to Her Majesty.

In a note of August 3/15, 1881, M. de Giers said: "The system by which restrictions are placed on the entrance into and sojourn in Russia of Israelites in general is made necessary by considerations affecting interests of the highest importance, and is governed by special laws, ordinances, and regulations in matters of commerce, industry, and police. I therefore beg to inform you, in reply to your inquiry, that the application of this system in the case of Mr. Lewisohn is not considered a violation of the treaty."

The British ambassador subsequently made, by direction of Lord Granville, an official request for permission for Mr. Lewisohn to reside temporarily in Russia, without prejudice to the question of treaty rights and pending the discussion of the subject by the two Governments. The Russian Government granted the permission under art. 486, Vol. XIV., Passport Regulations, Collection of Laws, extension of 1876, relating to the temporary admission of foreign Israelites into places where they may carry on commerce and manufactures.

The embassy was instructed by Lord Granville, September 20, 1881, to ask for specific information as to the law, decree, or special

regulation regarding commerce, industry, or police which had been violated by Mr. Lewisohn and in accordance with which he had been expelled from Russia; and in making this inquiry the embassy was not to admit that any law, decree, or regulation which was not applicable to foreigners generally, but in terms applied only to Russian subjects professing the Jewish religion, could warrant the action of the Russian Government in treating differently from other British subjects one who professed that religion.

The Russian Government in reply called attention to art. 486, Vol. XIV., extension of 1876, of the Passport Regulations, and to art. 128 of the Commercial Code, Vol. XI., pt. 2, of the Russian Code of Laws.

The final conclusions of the British Government on the subject were communicated to Sir Edward Thornton, British ambassador at St. Petersburg, by Lord Granville, by a note of December 28, 1881. In this note Lord Granville stated that the treaty of 1859 was open to two possible constructions: (1) That it assured to British subjects of a particular creed the same privileges as were enjoyed by Russian subjects of the same creed, and (2) that all British subjects were entitled to the same privileges without regard to religious creed. If the latter construction was adopted, said Lord Granville, British Jews in Russia were entitled to be relieved from disabilities to which native Jews were liable; but such a construction would also involve the supposition that Russia had agreed to create a state of things inconsistent with the traditions of her Government and which could not fail to be a source of embarrassment. An examination of the archives of the British foreign office had disclosed the fact that the treatment of Jews in Russia formed the subject of a complaint from certain British subjects of that faith in Warsaw in 1862, and the British Government then reached the conclusion that it could not claim for them an exemption from liabilities to which their Russian coreligionists were liable by law. This conclusion was announced in an instruction of Earl Russell to Lord Napier, which went on to say that it would seem to be beyond the scope and general intent of a treaty of commerce and navigation, if it were held to repeal in the persons of foreigners the legal disabilities to which for reasons of state policy particular classes of individuals, natives of the country, had been subjected, and that it was hardly to be supposed that such an interpretation would be accepted or adopted by an independent government as against itself. Her Majesty's Government, added Lord Granville, felt that it could not insist on a construction of the treaty at variance with that which was placed upon it in 1862.

73 Brit. & For. St. Pap. (1881–1882), 824–847, containing extracts from Parliamentary Papers, Russia, No. 3 and No. 4, 1881.

In relation to the action of the British Government, see Mr. Blaine, Sec. of State, to Mr. Foster, min. to Russia, No. 80, confidential, June 22, 1881, MS. Inst. Russia, XVI. 206.

Correspondence, 1884–1885.

"Your note of December 22, 1884 (January 3, 1885), with which you favored the imperial ministry, had for object to obtain information on the point whether the Imperial Government had issued an order by which all foreign Israelites were expelled from the city of Odessa and other localities in the Empire. You at the same time expressed in the name of your Government the desire that permits of residence might be given to all Jewish citizens of the United States of America.

"I have to-day the honor to inform you in a communication from the ministry of the interior that no such action has been taken by the Imperial Government.

"In regard to furnishing the Jewish citizens of America with Russian permits of residence, the minister of the interior observes that he cannot comply with this request, as according to the regulations established on this subject every foreigner having his national passport in due order is obliged, on his own application, to be furnished by the competent Russian authority with a permit of residence.

"The law at the same time grants to foreigners the right to bring complaint for any irregularity that may take place in this respect.

"I have also to add that the Imperial Government is unable to supply the legation of the United States with statistics concerning the number of the Jewish-American citizens residing in Russia."

Mr. Vlangaly, for the Russian ministry of for. affs., to Mr. Taft, Am. min., March 5/17, 1884, H. Ex. Doc. 470, 51 Cong. 1 sess. 84.

"It is pretty clear that this Government adheres strongly to the opinion that it is essential to the interest of the Empire to restrict by law the residence of foreign Jews in the cities of the Empire.

"I find that Germany has many more cases of the kind than we have, and England also has Hebrew citizens residing in Russia, though not so many as Germany. Both Germany and England have conventions with Russia similar to that existing between the United States and Russia. Indeed, I think the articles are identical. I understand that the German Government does not dispute the right of the Russian to adopt these laws in the regulation of its internal affairs, notwithstanding the convention.

"Although the principle has been questioned by the English Government, the regulations of the Russian Government on the subject have been submitted to without any disturbance of friendly relations." (Mr. Taft, min. to Russia, to Mr. Frelinghuysen, Sec. of State, No. 26, Jan. 17, 1885, H. Ex. Doc. 470, 51 Cong. 1 sess. 82, 83; For. Rel. 1885, 655.)

This statement of Mr. Taft's was made in reply to an instruction from Mr. Frelinghuysen referring to a report that the Russian minister of the interior had ordered the expulsion from Odessa and other

cities of all Hebrews holding foreign passports unless they also held "permits of residence." So far as any persons involved were citizens of the United States, Mr. Taft was instructed to express the desire of the President "that law-abiding American Hebrews, on due exhibition of such passports, may receive the adequate permits of residence referred to." (Mr. Frelinghuysen, Sec. of State, to Mr. Taft, min. to Russia, No. 7, Dec. 18, 1884, For. Rel. 1885, 655.)

"In your No. 77 you inform the Department of the present status of the Russian law respecting the right of an alien of the Hebrew faith to enter or reside within His Imperial Majesty's territory.

"You state that, save in exceptional cases, it is altogether denied, and that though efforts have been made on various occasions by the legation to induce the Russian Government to modify the law, there now exists no probability of such modification, although special exception has been made at your request.

"The treatment of alien Jews prescribed by the Russian law is such as we, whose system of government rests on toleration and freedom of conscience, cannot comprehend without difficulty or view without regret. Aimed, as it would appear, principally at Russian-Polish Jews by origin, and rigidly applied as to them even when they are lawful citizens of another state, the fact that the enforcement of the law in the case of worthy foreign Jews of other origin appears to be within the discretion of the police authorities, and that the representations of the legation are generally heeded when an American Jew is in question, fortunately makes occasion for protest rare.

"The instance cited by you is in point where a native-born Hebrew merchant of New York was promptly relieved from the harsh order of expulsion.

"Any case arising should be carefully examined on its merits, and where the person interested is not by origin a Russian Jew, returning to his native country under circumstances suggesting danger to the state and implying the exercise of the ultimate right of self-preservation, the earnest efforts of the legation will doubtless be exerted to secure relief in whatever way the Russian administrative system may indicate as practical. . . .

"The Government of the Czar is fully aware that we do not admit the principle of discriminating against any American citizens because of their religious tenets."

Mr. Bayard, Sec. of State, to Mr. Lothrop, min. to Russia, No. 59, Sept. 23, 1886, For. Rel. 1886, 774.

See Mr. Bayard, Sec. of State, to Mr. Samuels, May 5, 1885, 155 MS. Dom. Let. 291, enclosing copy of H. Ex. Doc. 192, 47 Cong. 1 sess.

An inconclusive correspondence as to the exclusion of Jews from Russia is printed in For. Rel. 1897, 442–445.

For an English translation of a volume in the Russian language entitled "Laws in relation to the Jews. Extracts from the Code of the Russian Empire dealing with Jews; Collected by A. N. Gussief, Charkoff: Published by W. & A. Birukoff, 1889," as printed or summarized in the New York Times, Sunday, August 24, 1890, see H. Ex. Doc. 470, 51 Cong. 1 sess. 133.

Russian Regulations.

Mr. Breckinridge, American ambassador at St. Petersburg, in 1895, asked to be supplied with a copy of the law on which the distinction between different classes of Jews was founded. In compliance with this request, Prince Lobanow, Aug 12/24, 1895, communicated to him "A translation, made from the most recent authentic texts, of the Russian laws governing the conditions of entrance and establishment of foreign Israelites upon the territory of the Empire."

The provisions of these laws are, in substance, as follows:

1. Foreign Israelites falling within the category of bankers, heads of commercial houses, brokers, representatives, clerks, and agents of house of commerce, are permitted to enter Russia, and the Russian legations and consulates are allowed to issue and visé passports for them without the previous authorization of the ministry of the interior. (Art. 992, T. IX. of Res. of Laws, edit. 1890; Imperial order of March 14, 1891.)

2. Foreign Israelites are not permitted to settle in Russia, or to become Russian subjects, except natives of Central Asia. (Art. 992, T. IX. of Res. of Laws, ed. 1890.)

3. Foreign Israelites are permitted to settle in places where Israelites enjoy the right of permanent establishment, as follows: (1) Persons whom the Government judges necessary as rabbis; (2) physicians for the army and the navy; (3) persons who come to found factories and works, except brandy distilleries, and who have at least 15,000 rubles for the purpose; (4) operatives in Jewish factories. Such operatives are allowed to swear allegiance as Russian subjects, after remaining not less than five years in the factories, and producing from their patrons and the local authorities a certificate of industry and good habits. (Art. 290, T. XIV. of Res. of Laws, ed. 1890.)

4. Foreign Israelites, favorably known for their social and commercial position, may, on the joint authorization of the ministers of finance, interior, and foreign affairs, obtain patents of the first guild, which place the alien on the same footing as the native in commerce and trade, and may then engage in commerce, establish banks and factories, and purchase real estate, except inhabited land in the country. (Art. 1001, T. IX. of Res. of Laws, ed. 1890.)

For. Rel. 1895, II. 1068–1070.

"The Russian consular officers abroad are prohibited from viséing, without authority previously obtained, the passports of foreign Hebrews, except in the case of certain exempted classes, which are bankers and chiefs of commercial houses of known importance, and brokers, representatives, clerks, and agents of said houses, having papers showing their authority to represent them. In these cases the consular officers are directed to notify the minister of the interior that they have viséed such passports.

"The attitude of the Russian Government in regard to our citizens of Hebrew faith has been and still continues to be the subject of protest on the part of this Government."

Mr. Hill, Assist. Sec. of State, to Mr. Rosenfeld, April 13, 1899, 236 MS. Dom. Letters, 291.

See, to the same effect, Mr. Moore, Act. Sec. of State, to Mr. Loveman, Aug. 31, 1898, 231 MS. Dom. Let. 172; Mr. Hill, Assist. Sec. of State, to Mr. Harrison, Jan. 20, 1899, 234 id. 165.

"The undersigned Secretary of State has the honor to say that the resolution [of the House of Representatives of April 30, 1902] involves two questions:

"(1) Whether American Jews holding American passports are, as a fact, excluded from Russia, and

"(2) Whether American Jews are discriminated against by Russia, and are at a greater disadvantage before that Government than are the Jews of other countries.

"The second question may be categorically answered in the negative. Such a discrimination, if it were made, would call forth immediate action of protest from this Government.

"This Department has no information remotely indicating that American Jews stand upon a footing different from that occupied by the Jews of other countries in the administration of Russian law.

"The exclusion of naturalized citizens of Russian origin and of Jews from Russia was commented upon by Secretary Olney in his report to the President for the year 1896:

"'The published correspondence for a number of years back has shown the persistence of the United States in endeavoring to obtain for its citizens, whether native or naturalized, and irrespective of their faith, the equality of privilege and treatment stipulated for all American citizens in Russia by existing treaties. Holding to the old doctrine of perpetual allegiance; refusing to lessen its authority by concluding any treaty recognizing the naturalization of a Russian subject without prior imperial consent; asserting the extreme right to punish a naturalized Russian on return to his native jurisdiction, not merely for unauthorized emigration, but also specifically for the unpermitted acquisition of a foreign citizenship; and sedu-

lously applying, at home and through the official acts of its agents abroad, to all persons of the Jewish belief, the stern restrictions enjoined by Russian law, the Government of Russia takes ground not admitting of acquiescence by the United States, because at variance with the character of our institutions, the sentiments of our people, the provisions of our statutes, and the tendencies of modern international comity.

"'Under these circumstances conflict between national laws, each absolute within the domestic sphere and inoperative beyond it, is hardly to be averted.'

"Since this report the position of the Department has not changed, and its efforts to secure uniform treatment for American citizens in Russia, begun many years ago, have continued, although they have not been attended with encouraging success.

"The Department of State now sends to all persons of Russian birth who receive passports an unofficial notice showing what are the provisions of Russian law liable to affect them, in order that they may not incur danger through ignorance. In transmitting a copy of this notice to the ambassador of the United States at St. Petersburg, for his information, he was instructed February 15, 1901, as follows:

"'The inclosed notice to American citizens formerly subjects of Russia who contemplate returning to that country the Department is sending to all persons born in Russia who receive passports. It is sent to you merely for your information, and you are instructed that it is not intended to mean that there has been any abatement on the part of this Government in its policy of protecting equally naturalized and native-born Americans during their travels or sojourn abroad, as the law requires. Nor does the notice foreshadow any mitigation of such dissent as this Government may have expressed to the laws or regulations of Russia which may deny equality of treatment to all law-abiding American citizens, regardless of their place of birth.'"

Letter of Mr. Hay, Sec. of State, to the House of Representatives, May 2, 1902, H. Doc. 590, 57 Cong. 1 sess.

In the negotiation of a naturalization treaty, no clause could be admitted that implied assent to the exclusion from the country of origin, by reason of their creed, of persons or any class of persons who had acquired American citizenship.

Mr. Hay, Sec. of State, to Mr. Wilson, min. to Roumania, July 17, 1902, For. Rel. 1902, 910.

(4) JEWS IN PALESTINE.

§ 555.

In his No. 429, of August 7, 1885, Mr. Heap, American consul-general at Constantinople, reported the expulsion from Palestine of two brothers named Lubrowsky, naturalized American citizens, because of their being of the Jewish faith.

In an instruction of August 29, 1885, to the American minister at Constantinople, the Department of State observed that the rights of American citizens in Turkey under treaties were to be measured in a certain degree by the rights conceded to other foreigners of the most-favored nation, and for this reason the minister was to be "careful . . . to make no untenable demand *as of right*." Friendship and comity, however, entitled the United States, said Mr. Bayard, "to ask and expect that no race or class distinction shall be made as regards American citizens abroad, and this Government cannot acquiesce in any such proscriptive measures which compel its citizens to abandon Turkey solely on account of their religious proclivities."

Through the intervention of the legation and consulate-general the order of expulsion was suspended. In approving their action, Mr. Bayard said: "This Government can not assent to any religious test being applied to citizens of the United States by any power whatever. No officer of the United States is constitutionally competent to admit the validity of such a test. Hence, Mr. Heap's telegraphic instructions to Mr. Robeson that the Lubrowsky brothers should not yield to the order of expulsion, unless force were employed, is approved as discreet and proper."

Mr. Bayard, Sec. of State, to Mr. Cox, min. to Turkey, Aug. 29, 1885; Mr. Cox to Mr. Bayard, Sept. 24, 1885; Mr. Bayard to Mr. Cox, Oct. 15, 1885: For. Rel. 1885, 862, 864, 871.

September 28, 1887, the American consul at Jerusalem reported the issuance by the Turkish Government of a special iradé prohibiting foreign Jews from settling in Palestine or from remaining there more than a month. A copy of the consul's despatch was sent to Mr. Straus, American minister at Constantinople, who, on January 28, 1888, reported that the grand vizier justified the new regulations on the ground (1) of religious fanaticism at Jerusalem, and (2) of apprehension that the Jews would return in great numbers to Jerusalem and attempt to restore their ancient kingdom. Against the measure as thus explained Mr. Straus protested. The iradé was subsequently modified by an extension of the time allowed for pilgrimages to three months. On March 2, 1888, however, the Turkish minister at Washington informed the Department of State that this

extension was coupled with the condition that the pilgrims should bear passports stating that they were going to Jerusalem on a pilgrimage, and not for commerce or to reside. The Department replied that the laws of the United States did not authorize the issuance of such a passport. Up to March 23, 1888, the Department of State had received no report of the expulsion of an American Jew from Jerusalem.

Mr. Rives, Assist. Sec. of State, to Mr. Isaacs, March 23, 1888, 167 MS. Dom. Let. 563.

See For. Rel. 1889, 716.

See, also, Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, No. 266, Nov. 7, 1894, For. Rel. 1894, 752.

Sept. 9, 1898, the Turkish minister at Washington wrote to the Department of State that the "entry of foreign Israelites into Palestine" was "prohibited," and that the imperial authorities had received orders "to prevent the landing of Jewish emigrants;" and he requested that steps be taken to prevent "the departure of groups of Israelites for that province."

The Department of State, while pointing out that the executive authorities possessed under the laws no power to comply with this request, stated that the announcement made in the minister's note would be made public, but also instructed the legation of the United States at Constantinople unofficially to ascertain whether the Ottoman authorities intended to discontinue the permission theretofore granted to individual Jews to visit and sojourn in Palestine for not more than ninety days. The Ottoman minister of foreign affairs, in response to an inquiry on the subject, said: "There is no intent to prevent American citizens, be they Jews or Christians, individually, as distinguished from *en masse*, to visit Syria or Palestine as travelers, or who come as visitors; the only object is to prevent the further colonization of Palestine by Jews, as the settlement there of religious bodies in preponderating numbers may lead to political complications, which it is the purpose of the Ottoman Government to avoid."

Ferrouh Bey, Turkish min., to Mr. Day, Sec. of State, Sept. 9, 1898, For. Rel. 1898, 1087; Mr. Day, Sec. of State, to Ferrouh Bey, Turkish min., Sept. 13, 1898, id. 1087; Mr. Hay, Sec. of State, to Mr. Straus, min. to Turkey, Oct. 14, 1898, id. 1088; Mr. Straus to Mr. Hay, Nov. 22, 1898, id. 1092, 1093.

See For. Rel. 1888, II. 1566–1568, 1588–1591.

By an order of the Turkish minister of the interior, which became effective Jan. 15/29, 1901, foreign Jewish pilgrims or visitors were allowed to sojourn in Palestine three months. Such a visitor was

required, on arriving at Jaffa, to deposit his passport with the Turkish authorities, and to receive in place of it a Turkish permit, which was to be surrendered in exchange for his passport at the end of his visit; and in case he should not leave when requested at the expiration of his permit, the consul of his nation was to be called upon to compel him to go away.

Putting aside any question of racial or religious discrimination, the Department of State, referring to instructions to Mr. Straus, No. 13, Oct. 14, 1898, and subsequent correspondence as to the Ottoman regulation respecting the entrance of foreign Jews into Palestine, observed that the order appeared to establish the rule of three months' permitted sojourn of American visitors to Palestine, for which the United States had contended. The Department added:

"It should, however, be made clear to the Turkish authorities that the consuls of the United States in Turkish jurisdiction are neither directed nor permitted by law to assist the Turkish officers in their execution of municipal laws or regulations, and therefore could not intervene to constrain the departure of an American citizen from Turkish jurisdiction. Neither can the consul be called upon to forego the performance of his duty in case an American citizen should be harshly dealt with in contravention of treaty or law.

"As the consul is without authority to compel a visiting American citizen to deposit his passport and citizen papers in the consulate, it would seem that he is not in a position to contest the Turkish requirement that such papers be surrendered to the Ottoman officers during the time of sojourn in Palestine."

Mr. Hay, Sec. of State, to Mr. Griscom, chargé at Constantinople, Feb. 28, 1901, For. Rel. 1901, 517.

See, in this relation, Mr. Hay, Sec. of State, to Ferrouh Bey, Turkish min., No. 10, Oct. 11, 1898, MS. Notes to Turkish Leg. II. 154; same the same, No. 24, Feb. 9, 1899, id. 167; Mr. Hay to Mr. Straus, min. to Turkey, No. 69, Feb. 13, 1899, MS. Inst. Turkey, VII. 319; same to same, No. 111, May 1, 1899, id. 346; Mr. Hill, Act. Sec. of State, to Mr. Cohen, Sept. 30, 1899, 240 MS. Dom. Let. 329; Mr. Adee, Act. Sec. of State, to Mr. Griscom, No. 283, Aug. 27, 1900, MS. Inst. Turkey, VII. 464.

(5) MORMONS.

§ 556.

The increase of Mormon emigration to the United States from Austria is an evil to which the attention of the Austrian Government may properly be turned, asking such measures for repressing such emigration as may be practicable.

Mr. Evarts, Sec. of State, to Mr. Kasson, Aug. 9, 1879, MS. Inst. Austria, III. 59.

The Austrian Government subsequently took steps to check such emigration. (Mr. Frelinghuysen, Sec. of State, to Mr. Taft, July 28, 1884; Mr. Frelinghuysen, Sec. of State, to Mr. Francis, Aug. 7, 1884: MS. Inst. Austria, III. 285, 288.)

"The accessions to the polygamous Mormon community are largely drawn from the ignorant classes of Europe. A recent decision of the Supreme Court of the United States has determined that the polygamy of Mormonism is a violation of the laws of the United States respecting the crime of bigamy, the provisions of which are embraced in section 5352 of the Revised Statutes. A recent statute defines the offense of polygamy and provides for prosecution and punishment. It is believed that no friendly power will knowingly lend its aïd to attempts made within its borders against the laws and Government of the United States.

"Accordingly, the diplomatic representatives of the United States in Great Britain, Denmark, Sweden and Norway, Switzerland, Germany, Austria-Hungary, Italy, Belgium, the Netherlands, and France, have heretofore been instructed to urge the subject upon the attention of the Governments to which they are accredited, in the interest not merely of a faithful execution of the laws of the United States, but of the good order and morality which are sought to be promoted by all civilized countries."

Printed Pers. Inst. Dip. Agents, 1885, § 181.

"As long as polygamy was one of the purposes of Mormon teaching, the agents of this Government abroad were instructed to refuse protection to Mormon missionaries. Such repressive action was invited in 1884 especially. (See For. Rel. 1884, pp. 10, 198, etc.) But polygamy is now no longer announced as the chief tenet of Mormonism, and the church has the same civil rights as are enjoyed by other religious bodies in this country. If the Mormon missionaries in Tahiti observe the civil law of marriage, as they profess to do, and preach and practice no doctrine violating law or morality, they should have the same impartial protection as other American citizens enjoy for the defense of their just and lawful rights.

"The Department can not complain if, in accordance with local regulations, they are forbidden to preach without a license, but it can not acquiesce in the denial of a license for any trivial cause, or at the arbitrary discretion of the authorities. Assuming that they are law-abiding and moral teachers, they should have equal treatment with other propagandists."

Mr. Uhl, Assistant Sec. of State, to Mr. Doty, U. S. consul at Tahiti, June 25, 1895, For. Rel. 1897, 124. This instruction appears to have been based on a letter of June 24, 1895, from Messrs. Woodruff, Cannon, and Smith, "first presidency of the Mormon Church," in

which assurances were given as to the propriety of the objects of the Mormon propagandism. "The letter in question sets forth the assurance on which the Department based its views that Mormon agents, as the church is now constituted, have the same right of governmental protection as any other law-observing sect of American citizens. If they preach immoral doctrines contrary to the law of the foreign country, intervention on their behalf can not be made; if their teachings and practices contravene the laws of the United States, the support of our public agencies can not be lent to their foreign propaganda." (Mr. Adee, Acting Sec. of State, to Mr. Risley, min. to Denmark, July 23, 1897, For. Rel. 1897, 123.)

The American minister at Copenhagen, having remonstrated against a decree of the Danish Government expelling two Mormon missionaries, the Department of State approved his action, saying that it had nothing to add to the instructions to Mr. Risley of July 23, 1897, For. Rel. 1897, 123. (For. Rel. 1900, 413–422.)

One of the missionaries afterwards received permission to pay a brief visit to Denmark before his return to the United States. (For. Rel. 1901, 140.)

Mr. Sherman, Secretary of State, in an instruction to Mr. Angell, minister to Turkey, Jan. 11, 1898, said that he had, at the instance of the Hon. Frank J. Cannon, a Senator of the United States from Utah, issued circular letters to the diplomatic and consular officers of the United States in Turkey, introducing Apostle Anthon H. Lund, and Elder F. F. Hintze, of the Church of Jesus Christ of Latter-Day Saints, who were about to visit Turkey for the purpose of looking after the welfare of members of that church residing in or upon the borders of that country. As indicating the "present attitude" of the United States toward Mormon missionaries, he enclosed a copy of the instruction of June 25, 1895, to Mr. J. Lamb Doty, United States consul at Tahiti, and of the letter of June 24, 1895, from Messrs. Woodruff, Cannon, and Smith, "first presidency of the Mormon Church."

For. Rel. 1898, 1112.

September 12, 1898, Mr. Day, Secretary of State, addressed to Mr. White, ambassador at Berlin, an instruction concerning the expulsion from Hanover and Prussia of two citizens of the United States, named Richards and Larkin, of Ogden City, Utah, missionaries of the Mormon Church, charged with preaching the doctrine of their sect. The Department of State surmised that the action of the German authorities was taken under orders which resulted from the circular note of August 9, 1879 (For. Rel. 1879, 11 and 12), in which each friendly foreign government was invited to "take such steps as may be compatible with its laws and usages to check the organization of these criminal enterprises," namely, the recruiting of the ranks of the Mormon Church, which was then avowedly polygamous. Mr. White was instructed that if this was the case the instruc-

tion sent to consul Doty, at Tahiti, June 25, 1895, supra, of which he was furnished with a copy, would enable him to correct any misapprehension which he might find to exist in the minds of the Prussian authorities. Mr. White was also furnished with a copy of the instruction to Mr. Doty of July 26, 1895.

Mr. White reported that the reasons given by the police for the expulsion of Messrs. Richards and Larkin were "that they were troublesome foreigners, proselyting for the Mormon Church, an institution having a malodorous reputation in Germany, on account of its supposed advocacy of polygamy, breaking up congregations, and interfering with the peace of families by inducing young and inexperienced girls to leave their homes and emigrate to Utah." It seems that they obtained written permission from the police to hold meetings, but were afterwards ordered to leave the country "because their doctrines were claimed to be pernicious and injurious to society."

For. Rel. 1898, 347–354.

In the case of Lewis T. Cannon, a native citizen of the United States, and Jacob Müller, a naturalized citizen of the United States, of Würtemberg origin, who were expelled from Prussia in 1900, on the ground that their preaching and practice of the Mormon religion rendered their presence objectionable, an application was made by the American embassy in Berlin for the recall of the order of expulsion, it being stated in respect of Mr. Cannon that he desired to remain in Prussia as a student, in case he should not be permitted to do so as a missionary. The Prussian Government replied that it did not consider it practicable under the circumstances either to recall the orders of expulsion or to permit Cannon to reside in Prussia as a student.

Mr. White, ambassador to Germany, to Mr. Hay, Sec. of State, Feb. 14, 1901, For. Rel. 1901, 165.

4. Extraterritorial Countries.

(1) treaty with japan, 1858.

§ 557.

By Article VII. of the treaty with Japan of 1858, it is provided that "Americans who have been convicted of felony, or twice convicted of misdemeanours, shall not go more than one Japanese ri inland from the places of their respective residences; and all persons so convicted shall lose their right of permanent residence in Japan, and the Japanese authorities may require them to leave the country." It is further provided that a reasonable time, to be determined by the American consular authority, but not in any case to exceed one year, shall be allowed to such persons to settle their affairs. The right of

expulsion thus conceded "belongs to and must be exercised by the Japanese Government." "The expulsion can neither be decreed nor executed" by the consul, nor is the party's refusal to leave the country a criminal offence of which the consular courts can take cognizance. The consul's duty in such a case "is merely to abstain from interference," unless the right of expulsion "should be exercised in an unnecessarily harsh and oppressive manner." The "same is true in respect to the means to be adopted to prevent the person expelled from returning to the country. The consul has no authority to prohibit or prevent his return," this being "exclusively a matter for the Japanese authorities." The consul therefore would not be authorized to arrest him for refusing to leave the country. He would, however, become subject to the criminal jurisdiction of the consul in case he should, in defiance of or resistance to a Japanese order of deportation, commit an act of criminal violence. In such a case his expulsion could take place only after his punishment for the offence had been imposed and completed.

Mr. Strobel, Third Assist. Sec. of State, to Mr. Abercrombie, consul at Nagasaki, Feb. 16, 1894, For. Rel. 1894, 386; Mr. Uhl, Act. Sec. of State, to Mr. Abercrombie, June 22, 1894, For. Rel. 1894, 389.

James C. Cavanaugh, who was convicted of manslaughter in the American consular court at Nagasaki, and who was sent to San Francisco for imprisonment, was there discharged on *habeas corpus* by Mr. Justice Field of the Supreme Court of the United States. On July 19, 1865, Mr. Seward, in ignorance of this fact, ordered that Cavanaugh, who had returned to Japan and had again been arrested, be removed from Japanese territory. On learning, however, that Cavanaugh had been discharged at San Francisco, Mr. Seward instructed the American legation in Tokio that there appeared to be no authority for his subsequent arrest and detention, but that he had lost the privilege of residing in Japan; and that, if the authorities of that Empire required him to leave the country, he was to be discharged with explicit notice that if he remained in Japan it would be at his own peril, and that he was no longer entitled to and would not receive the protection of the United States.

Mr. Seward, Sec. of State, to Mr. Van Valkenburgh, No. 17, June 10, 1867, MS. Inst. Japan, I. 201.

(2) TURKEY.

§ 558.

It was alleged by the Turkish Government that Dr. Franklin, a citizen of the United States, had killed a child by malpractice. Owing to the dispute as to jurisdiction of offences committed by

Americans in Turkey, the Turkish Government sought to expel him from its dominions, and requested the legation at Constantinople to instruct the consul at Jerusalem to cooperate in his expulsion. The minister of the United States declined to comply with this request. His action was approved on the ground that the proposed action of the Turkish Government appeared to involve an attempt to avoid the stipulations of the treaty by resorting to the measure of expulsion.

Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, Feb. 9, 1894, For. Rel. 1894, 714.

Mr. Terrell, in his report of the case, stated that no instance had come to his knowledge in which European powers had permitted their native subjects to be capriciously expelled from Turkey, although notoriously bad men had in rare cases, on application by the Porte, been required by the minister to leave. (For. Rel. 1894, 713.)

See, however, supra § 463.

The Turkish Government promised that the Rev. Geo. Knapp, an American missionary, who was charged with seditious conduct, should not be compelled to leave Bitlis before the end of April; but late in March he was sent under escort to Alexandretta, presumably under orders from the Sultan for his expulsion from the country. At Alexandretta, however, his delivery to the American consular agent was secured, and, although "expelled" was marked on his passport, he was permitted to go to Constantinople. Another missionary was permitted by the Turkish Government to supply his place at Bitlis. The Turkish Government alleged that Knapp was one of the "mainstays of the Hintchagist committee at Bitlis," and that he "indulged in all sorts of subversive intrigues."

For. Rel. 1896, 900–914; continued from For Rel. 1895, II.

"The Government does not now concede and has not at any time conceded any claim of Turkey to regard as subjects of the Empire our citizens of Ottoman origin who may return there or to imprison them because of their naturalization here without imperial consent. This Government having exercised the sovereign right of excluding aliens because they were such (as in the case of Chinese laborers), can not consistently deny that Turkey may exercise the same right. We permit no other power to question our authority to determine what aliens or classes of aliens are undesirable or dangerous, and therefore recognize Turkey's right to take similar action."

Mr. Gresham, Sec. of State, to Mr. Lamont, Dec. 22, 1894, 200 MS. Dom. Let. 703. See supra, § 463.

5. War Measures.

§ 559.

By the act of July 6, 1798, 1 Stat. 577, R. S. § 4067, whenever there is a declared war between the United States and any foreign government or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by a foreign government, and the President makes public proclamation of the event, all male natives, citizens, denizens, or subjects of the hostile government who are fourteen years old and upward and who are not actually naturalized may be arrested and removed as alien enemies; and the President is authorized to direct the conduct to be observed on the part of the United States toward the aliens who are liable to removal, the manner and degree of restraint to which they shall be subject, and the conditions and security on which their residence may be permitted.

By the act of July 6, 1812, 2 Stat. 781, R. S. sec. 4068, when an alien who becomes liable to removal as an enemy is not chargeable with actual hostility or other crime against the public safety, he must be allowed for the recovery, disposal, and removal of his goods and effects and for his departure the full time which may be stipulated in any treaty; and where no such treaty exists the President may fix such reasonable time as may be consistent with the public safety and accord with the dictates of humanity and national hospitality.

By the act of July 6, 1798, 1 Stat. 577, R. S. sec. 4069, the courts of the United States having criminal jurisdiction are, after the President has issued his proclamation, required, upon complaint that an alien enemy is at large within the jurisdiction, to the danger of the public peace or safety and contrary to the tenor and intent of the proclamation or other regulations which the President may have established, to cause such alien to be brought before them and examined, and, sufficient cause appearing, to order him to be removed from the United States or to give sureties for his good behavior or to be otherwise restrained conformably to the President's proclamation or regulations, and to imprison or otherwise secure such alien till the order made concerning him shall be performed.

Civil War regulations.

"It is not only the right but may sometimes be the duty of states to establish checks upon the transit and sojourn of foreigners, however harsh those regulations may appear, or opposed to old established policy. Indeed, in two countries where more freedom of entry and exit and fewer restrictions are to be met with than elsewhere, within the last few years such regulations have been published. Thus, during the revolutionary period of 1848, an act of Parliament (11 and 12 Vict., c.

20) was passed in Great Britain . . . by which power was given to the executive in England and Ireland to remove aliens from the realm; and in the United States it was declared, by an order, dated 19th August, 1861, 'that no person, if a foreigner, should be allowed to land in the United States, without a passport from his own Government, countersigned by a minister or consul of the United States.'"

Abdy's Kent, 110. See London Times, January 2, 1865.

The order of Aug. 19, 1861, as is elsewhere shown, was a war measure, and was not confined to aliens. It prohibited any person from leaving the United States except with a passport either issued from the Department of State or countersigned by the Secretary of State, and forbade any person to land without a passport from a minister or consul of the United States, or, if a foreigner, from his own government, countersigned by such minister or consul. See supra, §§ 532, 533, where the subject is more fully treated.

By a proclamation of the President of May 8, 1863, aliens who had made a declaration of intention to become citizens of the United States, and who, by acts of Congress of the same year, were required to perform military duty and were also declared to be entitled to passports and protection, were allowed a period of sixty-five days in which to depart from the United States. The requirement of military service Mr. Seward defended on the ground that the legislation in question constituted an exercise by Congress of its power to pass laws of naturalization and as such had the effect of converting the aliens in question into citizens, if they remained in the United States. If they did not wish to accept the character of citizens, they might depart as aliens.

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, July 20, 1863, MS. Inst. France, XVI. 408. See supra, §§ 495, 548.

Mr. Seward's argument should be read in connection with the discussion of the voluntary nature of expatriation, in the chapter on Nationality, supra, particularly § 378.

On information that four citizens of the United States were arrested, without any assignment of cause, by the military authorities in the province of Santa Clara, Cuba; that afterwards, when they were provisionally released, they were cited to appear before the military commandant, who, by order of the captain-general, directed them to leave within twenty-four hours and proceed to Havana, there to be banished from the island; and that, although the time of their departure was extended to forty-two hours and transportation to Havana was furnished them, they were obliged to leave their families behind them without resources, and were actually expelled from Cuba, the Secretary of State of the United States said: "The right of Spain, as of every other sovereign state, to expel aliens need not be discussed. If the right be conceded to the fullest extent, the mode of

its exercise may be so harsh, unreasonable, and oppressive as to give just ground of complaint, and was so, beyond all doubt, in the four cases now under consideration." He further declared that the United States would "demand adequate redress for the indignities and injuries" inflicted, and would expect such precautionary measures to be taken as would prevent such cases in the future.

Mr. Olney, Sec. of State, to Mr. Dupuy de Lôme, Span. min., Sept. 27, 1895, For. Rel. 1895, II. 1229.

The Spanish minister, while suggesting that the reports of the circumstances were exaggerated, declared that, if the American citizens in question had been "annoyed and persecuted, His Majesty's Government, which is resolved that the laws shall be respected, both by those who live in Spanish territory and by those who are bound to guard the laws and to have them executed, will punish all who have committed any wrong, and will make reparation for it if there has been any." (Mr. Dupuy de Lôme, Span. min., to Mr. Olney, Sec. of State, Oct. 2, 1895, For. Rel. 1895, II. 1230.)

November 15, 1897, Señor Gullon, Spanish minister of state, wrote to Mr. Woodford that the Spanish Government, being desirous to contribute to the pacification of Cuba by acts of mercy toward persons who were subject to the action of the courts or who were undergoing penalties for political offenses, had presented to the Queen a decree empowering the governors-general of Cuba and Porto Rico to grant pardons in all cases in which they thought proper to do so. In accordance with this decree, pardon had been granted to the crew of the bark *Competitor*, and the American citizens involved would be placed at the disposition of the consul-general of the United States at Havana, "informing them that they are free, but that they must leave the Spanish territory and not come back to it without a special authorization."

The Department of State replied that it deeply appreciated "the generous and humane motives which have prompted this act of grace."

For. Rel. 1898, 1022, 1023–1024.

With reference to the order of the Ottoman Porte, which required all subjects of Greece to depart from the Empire in fifteen days, Mr. Terrell, United States minister at Constantinople, on April 24, 1897, expressed the hope that the time would be extended for the departure of a number of peaceful Greeks who were in the employ of American citizens. It was represented that their abrupt expulsion would result in serious pecuniary loss, as in the case of the Stamford Manufacturing Company, among whose employees at Alexandretta were three Greeks, one of whom had $40,000 of the company's property in his hands unaccounted for, and two were engineers whose departure would cause the factory to be closed.

May 7, 1897, Mr. Terrell reported to the Department of State that permission had been given for the Greek agent of the Stamford Manufacturing Company to remain for a time to settle his accounts, and that a general order for further extension of time for Greeks to depart had been issued by the Porte. A disposition was shown to make special exemptions for individuals on the application of diplomatic representatives.

For. Rel. 1897, 585–588.

"I inclose herewith a memorial filed in the Department by Mr. Frank Crus, complaining of his expulsion by British authorities from South Africa. . . .

"The Department refers in this connection to its instructions No. 461, of October 6, and No. 468, of October 16, ultimo, for your guidance in this case.

"While at all times asserting the right of expulsion by a state from its territory of persons who are dangerous to its security, the Government of the United States, in consonance with the enlightened precepts of authoritative writers on international law, and especially of the more recent ones, does not assert in practice the existence of the right without just grounds for expulsion, which grounds and the evidence thereof it believes the expelling Government may be expected to communicate to the Government of the person expelled, as well as the evidence showing the reasonableness of such expulsion. It is not believed that Her Majesty's Government will assert an arbitrary right of expulsion which it has not been the practice of the Government of the United States to assert for itself.

"You will therefore bring the matter to the attention of Her Majesty's Government and request an investigation of the facts and for such further action as may be equitable and just in the premises."

Mr. Hay, Sec. of State, to Mr. Choate, amb. to England, No. 494, November 14, 1900. MS. Inst. Gr. Br. XXXIII. 505.

See, as to the South African Deportation Claims Commission, Mr. Hill, Act. Sec. of State, to Mr. Choate, No. 635, May 17, 1901, id. 608. It is stated in this instruction that the Department of State had rejected as without merit certain claims of British subjects for deportation from Hawaii during the royalist insurrection in 1893; that the British Government then proposed arbitration; and that the Department made a counter-proposal to submit to a common arbitration both the Hawaiian and South African deportation claims.

In December, 1901, the British war office gave notice that "in consequence of the establishment of martial law in all South African ports," no person, except under special circumstances, would, on or after Jan. 1, 1902, be allowed to land in that country without a permit. This permit was to be obtained in the United Kingdom and the British colonies from certain designated officials, and in foreign

countries from the British consul at the port of embarkation, and was to be issued only on evidence that the applicant possessed at least £100 or was in a position to maintain himself on arrival in South Africa. It entitled the holder only to land. In order to proceed inland, it was necessary to obtain a permit at the port of disembarkation.

The London Times, weely ed., Dec. 6, 1901, p. 778, column 4; Consular Reports (Feb. 1902), LXVIII. 149. See supra, § 533.

VI. *CONTROL OF IMMIGRATION.*

1. Compulsory or Assisted Emigration.

§ 560.

Mr. King to the Duke of Portland.

"Private. "Margate, *Sep. 13, 1798.*

"My Lord:

"The publication of the reports of the secret committees of the Irish Parliament relative to the late rebellion seems to put beyond all doubt the object and expectation of its leaders; the principles and opinions of these men are in my view so conformable to those which have unhappily prevailed in France, so dangerous, so false, and so utterly inconsistent with any practicable and stable form of government, that I feel it to be a duty to my country to express to your grace my earnest wishes that the United States may be excepted from the countries to which the Irish state prisoners shall be permitted to retire.

"I certainly do not think they will be a desirable acquisition to any nation; but in none would they be likely to prove more mischievous than in mine, where from the sameness of language, and similarity of laws and institutions they have greater opportunities of propagating their principles than in any other country.

"I have on many occasions been sensible of your grace's friendship for my country; but at this period of rational alarm when all that has been best and most wisely settled by our common ancestors is attempted to be torn up, and subjected to new speculations and experiments, your grace can afford us no stronger or more valuable token of your regards than by an interference with His Majesty that shall prevent any of the Irish state prisoners (who appear to be the converts and agents of the new school of philosophy and politicks) from seeking an asylum in America.

"With the most perfect consideration, I have the honor to be, my lord, your grace's ob & huml st,

"Rufus King.

"Duke of Portland, &c., &c., &c."

Enclosure with Mr. King's despatch from London, No. 3, Oct. 6, 1798, 7 MS. Desp. from England.

Duke of Portland to Mr. King.

" Private.

" London, *Saturday, 22d Sepr., 1798.*

" Dear Sir: I sincerely beg your pardon for having so long delayed to return an answer to the letter you did me the honor of writing to me on the 13 inst. on the subject of the countries to which the Irish state prisoners shall be permitted to retire.

" It is unnecessary that I should trouble you with a detail of the difficulties and objections which will embarrass the choice of a proper residence for them, and much more so I trust that I should assure you of my entire concurrence in the opinion and wishes which the consideration of the subject has led you to express. I can assure you with the most perfect confidence that the King will never permit any of the persons in question to set his foot in the Territory of any State in amity with his Majesty by whom there is any reason to suppose that such a visitor would be objected to.

" I can not but be flattered by the manner in which you express your sense of my conduct, though you really do me more than justice, and I will therefore take the liberty to add from myself that from the knowledge my particular situation has furnished me with of the sentiments and the declarations of these prisoners even since their confession, the country of the United States is the last in the world which I should wish to see become their residence.

" Believe me, sir, with very sincere regard & esteem, your faithful most ob. humble servt.,

" Portland.

" Rufus King, Esq., etc., etc."

Enclosure with Mr. King's despatch No. 3, Oct. 6, 1798, 7 MS. Desp. from England.

Mr. King to the Duke of Portland.

" Private.

" Great Cumberland Place, *Octo'r 17, 1798.*

" My Lord: I am concerned to trouble your grace again on the subject of the exile of the Irish state prisoners, especially after the friendly assurances that your grace has had the goodness to give me, and which have induced me to believe that they w'd not be permitted to go to America. But the late accounts from Ireland which, I hope inaccurately, state that preparations are making to send them to the United States, give me much anxiety lest I have omitted any further step that might have been expected or proper in order to prevent it. It is true that the President of the United States has power to deny, and in my opinion will refuse them a residence among us, provided he is apprized of their names and delinquency: but of these he may be ignorant, especially as I have expressed to him my expectation that they would not be permitted to go to America. If His Majesty's

Government is still free to decide, I must repeat my earnest hope that these delinquents may not be permitted to proceed to the United States—if the permission of Government has already been given, I take the liberty to ask of your grace a list of the names, and a description of the persons of those of the state prisoners who are to be sent into my country, in order that I may if possible in season apprize my Government of the measure.

"It is quite possible and I still hope, that these publications are altogether erroneous; in this case I might beg your grace's pardon for having thus unnecessarily troubled you on a subject that through your obliging interference has been already satisfactorily decided.

"With the most perfect esteem and respect, I have the honor to be,

"Your grace's mo. obt. & very humble servt.,

"RUFUS KING.

"His Grace

"THE DUKE OF PORTLAND, &c., &c., &c."

Duke of Portland to Lord Cornwallis.

WHITEHALL, *17 October, 1798.*

"MY LORD:

"The systematick attempts which have been constantly making by the French Gov't to overturn the present Constitution of the United States have naturally rendered the American minister particularly attentive to every circumstance which bears the appearance of contributing in any degree to the accomplishment of that design. In the publication, therefore, of the terms upon which the lives of the Irish traitors were spared, he thought he saw that his country was threatened by a prospect of the introduction not only of principles of that dangerous tendency, but of missionaries of the most alarming description, and these apprehensions being confirmed and increased by newspaper reports and extracts of private correspondence, he wrote me the letter of which I enclose your excellency a copy, to which I returned the answer which you will also find enclosed, by which your excellency will see what has passed between him and me upon this subject. But that your excellency may have no doubts of the sentiments of the King's confidential servants upon the question generally of the right which one state possesses to transport its subjects into the territories of another, I am to inform you that we are clearly of opinion that no such right exists according to the law of nations, and consequently that His Majesty has not the power to banish any one of his subjects to the dominions of any other state, or to authorize him to settle or to land them there without the consent of that state having been first specifically obtained. It is unnecessary, therefore, for me to enter into the policy of the measure. But I might not abstain

from adding that if the question of right was uncontrovertibly established to be the reverse of what I have stated it to be, considering the actual circumstances of the United States and their relative situation to this country and France, His Majesty would not permit any step to be taken which could give the United States any sort of umbrage or offence, and this step less, if possible, than any other, from the effects it might be capable of producing on that Government, and the injury which might result from it to the general happiness of mankind. The paragraphs which I have seen within these two or three last days, purporting the immediate departure of your state prisoners for America, have made me feel it necessary for me to write thus fully to your excellency upon this subject, and to acquaint you that it is His Majesty's commands that not one of the traitors whose lives have been spared upon condition of being banished from Ireland & passing the remainder of their days in the dominions of some state in amity with His Majesty, shall be suffered upon any account whatever to go to or reside within the territories of the United States until His Majesty's express permission for that purpose shall have been signified to your excellency by one of His Majesty's principal secretaries of state.

"I have the honor to be, &c., &c., PORTLAND.

"His Excellency,

"The LORD LIEUTENANT OF IRELAND,

"&c., &c., &c."

Enclosures with Mr. King's despatch No. 6, Oct. 19, 1798, 7 MS. Desp. from England.

"Your timely interference to prevent the emigration of the Irish traitors to this country is extremely acceptable to the President; but if removed to any other country many of them will probably find their way hither; and therefore not only a list of their names, but descriptions of their persons and their ages, would be very useful to us, if attainable."

Mr. Pickering, Sec. of State, to Mr. King, Feb. 5, 1799, MS. Inst. U. States Ministers, V. 61.

The Government of the United States "is not willing and will not consent to receive the pauper class of any community who may be sent or are assisted in their emigration at the expense of government or of municipal authorities."

Mr. Fish, Sec. of State, to Mr. Moulding, Dec. 26, 1872, 97 MS. Dom. Let. 87.

"While, under the Constitution and the laws, this country is open to the honest and industrious immigrant, it has no room outside of its

prisons or almshouses for depraved and incorrigible criminals or hopelessly dependent paupers, who may have become a pest or a burden, or both, to their own country; and the sending of such persons to our shores by the public authorities of Switzerland, either local or supreme, can not be looked upon otherwise by this Government than as a violation of our national hospitality and a disregard of the spirit of comity and good neighborhood, which it is so desirable to foster and cherish between two nations bound so closely by the ties of long and unbroken friendship and kindred institutions, as are the United States and the Swiss Republic."

Mr. Blaine, Sec. of State, to Mr. Cramer, Dec. 3, 1881, MS. Inst. Switz. II. 124.

"The policy of assisted emigration is likely to send to us many who, lacking the qualities to secure a passage to America for themselves, and depending upon Government aid for this, presumably do not possess the qualities to successfully cope with the adverse circumstances which must necessarily attend their first efforts in a strange country, and it is in this natural tendency of such a policy that we find a legitimate reason for objection to its enforcement by Great Britain. Honest, industrious, and frugal immigrants will always be gladly received here, but this Government can not look without deep concern upon any action by a foreign Government which tends to unloading its paupers, its 'ne'er-do-wells,' its aged and infirm, its cripples and weak-minded upon us, that we may afford that support through taxation which their native country owes them.

"It is quite evident how the assisted emigration of such thriftless and dependent classes may at once relieve the burdens of the home community and entail corresponding burdens on a foreign community to an extent to justify international remonstrance. It is equally clear that the expedient of assisting emigration by Government aid is one only to be resorted to under circumstances which shall produce the greatest good to all alike, analogous, for instance, to an enlightened scheme of colonization. The object in view should rationally be not mere deportation of unproductive elements, but to offer to those whose home productiveness is impeded the advantages of a fresh start in life under more auspicious surroundings, such as the Great West supplies, whether in Canada or the United States. To such emigration as comes to its shores, willing, and, within proper limits, able to join in the general work of production and self-sustenance, neither a fruitful dependency of the home state nor a friendly foreign state can rightly object."

Mr. J. Davis, Acting Sec. of State, to Mr. Lowell, May 25, 1883, For. Rel. 1883, 422, 423.

"Question has arisen touching the deportation to the United States from the British Islands, by governmental or municipal aid, of persons unable there to gain a living and equally a burden on the community here. Such of these persons as fall under the pauper class, as defined by law, have been sent back in accordance with the provisions of our statutes. Her Majesty's Government has insisted that precautions have been taken before shipment to prevent these objectionable visitors from coming hither without guarantee of support by their relatives in this country. The action of the British authorities in applying measures for relief has, however, in so many cases proved ineffectual, and especially so in certain recent instances of needy emigrants reaching our territory through Canada, that a revision of our legislation upon this subject may be deemed advisable."

President Arthur, annual message, Dec. 4, 1883, For. Rel. 1883, iv. See also President Arthur, annual message, Dec. 6, 1881, For. Rel. 1881, v.

November 22, 1884, a Swiss newspaper published a statement that the authorities of the canton of Zug had granted the petition for pardon of one Binzegger, who was sentenced in 1867 to life imprisonment for incendiarism, on condition of his promised emigration to America. The American legation at Berne asked the federal council to call the attention of the cantonal authorities to the laws of the United States which prohibited the landing of such persons. The action of the legation was approved by Mr. Frelinghuysen, with the statement that it was presumed that the federal council would prevent the consummation of the design to land a criminal in the United States, "as a violation of the comity which should obtain between the two Governments." The federal council, in reply to the legation, stated that Binzegger had been pardoned by the cantonal authorities on the ground of his good conduct during imprisonment; that he had been pardoned without any restrictive condition, and that he had manifested no intention of emigrating to the United States, but intended to go to Buenos Ayres.

Mr. Cramer, min. to Switzerland, to Mr. Frelinghuysen, Sec. of State, Nov. 26, 1884; Mr. Frelinghuysen to Mr. Cramer, Dec. 11, 1884; Mr. Cramer to Mr. Frelinghuysen, Dec. 18, 1884; For. Rel. 1885, 792, 793.

The federal council, in its reply to Mr. Cramer, December 15, 1884, said that the federal authorities had done all in their power to prevent the emigration of persons to countries where they were not permitted to land by introducing into the law of December 24, 1880, concerning the operations of emigration agents, a provision prohibiting such agents from expediting the emigration of such persons as the laws of the country of their prospective destination excluded. (For. Rel. 1885, 794.)

See the circular of the Department of State of Dec. 27, 1884, in regard to the immigration laws.

"The shipping of known paupers or criminals to the United States is regarded as a violation of the comity which ought to characterize the intercourse of nations, and should be prevented by every proper measure."

Printed Personal Instructions to Diplomatic Agents, 1885, § 180.

April 25, 1887, the British minister at Washington inquired whether under the existing law "Irish emigrants sent out at the public cost," and who had "friends in the United States able to help and support them," would be allowed to land.

May 7, 1887, Mr. Bayard, then Secretary of State, quoting the provisions of sec. 2 of the act of August 3, 1882, which required the exclusion of "any person unable to take care of himself or herself without becoming a public charge," said it was impossible to give any general assurance that persons belonging to a particular class would not be obnoxious to the provisions of the law. Besides, said Mr. Bayard, the United States could not fail to look with disfavor and concern upon the sending to this country by foreign governmental agencies and at the public cost of persons not only unlikely to develop qualities of thrift and self-support, but sent to the United States because it was assumed that they had "friends" there able to "help and support" them. While the mere fact of poverty had never been regarded as an objection to an immigrant, yet persons, whose only escape from immediately becoming and remaining a charge upon the community was the expected but entirely contingent voluntarily help and support of friends, were not a desirable acquisition to the population, "and their exportation hither," added Mr. Bayard, "by a foreign government in order to get rid of the burden of their support could scarcely be regarded as a friendly act, or in harmony with existing laws."

May 17, 1887, the British minister intimated that the intending emigrants were "not paupers, but crofters, whose passages are only partly paid from public funds."

May 20, 1887, Mr. Bayard replied: "For the reasons stated in my note of the 7th instant, the Department is unable to give any assurances that any particular class of immigrants will be permitted to land. The provisions of the law look to the actual condition of each person, and are impartial in their operation."

Sir L. West, British min., to Mr. Bayard, Sec. of State, April 25, 1887; Senate, Feb. 27, 1888, 167 MS. Dom. Let. 306, saying that the Depart- May 17, 1887; Mr. Bayard to Sir L. West, May 20, 1887: For. Rel. 1887, 520, 539.

See, in this relation, Mr. Bayard, Sec. of State, to Mr. Mitchell, U. S. Senate, Feb. 27, 1888, 167 MS. Dom. Let. 306, saying that the Department of State was unable to request from the German Government an assurance that one of its former subjects, from the island of

Föhr, would not, if returned, be expelled. Mr. Bayard said: "During the past year numerous applications have been made by foreign governments to the Department to obtain an assurance that certain of their subjects would be permitted to enter the United States and reside here, it being feared that they might be expelled on the ground that their immigration was contrary to the laws of the United States in relation to contract laborers and paupers. In every case the Department has refused to give any assurance on the subject."

In June, 1887, the legation of the United States in Paris was instructed to call the attention of the French Government to a report of an attempt on the part of the agents of France in New Caledonia, or possibly in Tahiti, to import persons of the criminal classes into the United States. The Department of State observed that such a movement "could not but cause grave concern, and, if executed by French governmental authority," would be "regarded as a distinctly unfriendly act, against which unequivocal remonstrance would be necessary." The Department added, however, an expression of confidence that such a step would not have the sanction of the French Government. The French Government replied that the report concerning the action of the colonial authorities was erroneous, but added that, in order to afford entire assurance on the subject the minister of the marine and the colonies had "written to the governors of New Caledonia and Guiana to request them to suppress, until further orders, all authorizations for departure of liberated convicts having the United States for destination."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, June 14, 1887; Mr. Flourens, min. of for. aff., to Mr. McLane, Aug. 26, 1887; For. Rel. 1887, 302, 350.

See, in relation to this subject, S. Ex. Doc. 62, 46 Cong. 3 sess.

In 1891 the United States protested against the assisted emigration from Austria of one Nikolaus Bader, who was acquitted of crime on the ground of insanity and afterwards released as cured, and assisted with communal funds to go at his own desire to the United States. He was sent back, and with the protest the incident was treated as ended.

For. Rel. 1891, 17–19, 20, 29–30.

Count Welsersheimb, imperial-royal minister of foreign affairs, in a note to Mr. Grant, Sept. 5, 1891, said: "Every state has at its command sufficient power to exclude individuals whose stay within its limits, for some reason or other, appears not to be desirable." (Id. 30.)

Representations were also made to Germany, id. 509.

January 5, 1892, the British minister at Washington asked for the suspension of an order made at New York for the deportation of John Gibbons and family as assisted emigrants. He represented that Gib-

bons was an army pensioner; that his pension had been commuted to the amount of more than £200, which was in charge of the British consul-general at New York; and that his passage money, though advanced by the war office, was paid out of funds due him.[a] The order was suspended pending an investigation. It was further represented that Gibbons was an able-bodied man, with a healthy wife and five healthy children; that the eldest girl, who had been allowed to land, had already procured a situation; that Gibbons's brother, who lived in Jersey City, could obtain employment for him at once; and that the wife was a woman quite capable of taking care of her family and herself. It was finally decided to allow Gibbons and the members of his family detained with him to land; but it was at the same time stated that whatever might be the merits of this particular case, it was not to be considered as a precedent, since the general practice of allowing persons of his class to land would violate the immigration laws. In this relation it was stated that it was understood to be the practice of the British war office, particularly in the case of invalid or disabled pensioners, to commute their pensions and pay them a lump sum on condition that they emigrate to another country, the commutation being sent to a British consul in the country of intended future residence and paid to the commuter after his landing there, when it was apparently certain that he would not be a further burden upon the British revenues.[b] The British war office in reply stated that it did not desire to allow men unfit to earn their own living to emigrate to foreign countries; that the commissioners of Chelsea Hospital required (1) that the man be found medically sound, (2) that he have letters from friends promising employment or a home, (3) that he emigrate with his family; and that the commissioners were so far from encouraging commutations that nine out of ten applications were refused because they did not fulfill those conditions.[c] The Treasury Department replied that no discrimination would be made against commuted pensioners as such; that the law would be applied to them only when they came within the excluded classes, and that such a pensioner would not be permitted to land if it appeared "that the amount of money resulting from such commutation of pension is not sufficient to preserve the immigrant from becoming a public charge for any considerable length of time, if he is otherwise unable or unwilling to

[a] Sir J. Pauncefote, British minister, to Mr. Blaine, Sec. of State, Jan. 5, 1892, For. Rel. 1892, 266. See, also, pages 267–268.

[b] Mr. Blaine, Sec. of State, to Sir J. Pauncefote, British minister, Jan. 22, 1892, For. Rel. 1892, 269, enclosing a letter of the Acting Secretary of the Treasury and a report of the Superintendent of Immigration at New York City.

[c] Sir J. Pauncefote, British minister, to Mr. Blaine, Sec. of State, March 8, 1892, For. Rel. 1892, 272.

earn a livelihood," or if he came within any of the other excluded classes.[a]

"The United States welcomes now, as it has welcomed from the foundation of its Government, the voluntary immigration of all aliens coming hither under conditions fitting them to become merged in the body politic of this land. Our laws provide the means for them to become incorporated indistinguishably in the mass of citizens, and prescribe their absolute equality with the native born, guaranteeing to them equal civil rights at home and equal protection abroad. The conditions are few, looking to their coming as free agents, so circumstanced physically and morally as to supply the healthful and intelligent material of free citizenhood. The pauper, the criminal, the contagiously or incurably diseased are excluded from the benefits of immigration only when they are likely to become a source of danger or a burden upon the community. The voluntary character of their coming is essential; hence we shut out all immigration assisted or constrained by foreign agencies."

Mr. Hay, Sec. of State, to Mr. Wilson, min. to Roumania, July 17, 1902, For. Rel. 1902, 910, 912.

2. Power to Regulate Immigration.

§ 561.

The power to regulate immigration is an incident of the sovereign right to expel or exclude objectionable aliens. The exercise of the power in a particular country is governed by the constitution and laws. In the United States it belongs to the National Government, as part of its power to regulate commerce.

"The statute of 2d of August, 1882, prohibiting the immigration of a 'lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge,' applies by its terms only to persons who are not citizens of the United States."

Mr. Porter, Act. Sec. of State, to Mr. Winchester, min. to Switz., No. 4, July 11, 1885, For. Rel. 1885, 807.

The question whether a person held for deportation as an alien immigrant is in reality an alien is open to inquiry in the courts, on an allegation of citizenship of the United States.

Gee Fook Sing *v.* United States, 49 Fed. Rep. 146, 7 U. S. App. 27, 1 C. C. A. 211; In re Panzara, 51 Fed. Rep. 275; In re Moses, 83 Fed. Rep. 995.

---

[a] Mr. Blaine, Sec. of State, to Sir J. Pauncefote, British minister, May 2, 1892, For. Rel. 1892, 276.

The plenary power of the legislative branch of the government to provide for the exclusion of aliens applies to those who have acquired a domicil in the United States, as well as to those who have not; and an alien, who is otherwise liable to exclusion under the immigration laws, may be deported, although he has acquired such a domicil.

Fong Yue Ting *v.* United States, 149 U. S. 698, 13 Supreme Ct. 1016. See In re Ota, 96 Fed. Rep. 487.

Where a naturalized citizen of the United States married his niece in Russia, and had by her a child, it was held that as the marriage, though valid in Russia, could not, by reason of its incestuous character, be recognized in the United States, the woman and her child were liable to be deported as aliens likely to become public charges.

United States *v.* Rodgers (1901), 109 Fed. Rep. 886.

An alien woman, who, pending proceedings for her deportation from the United States under the immigration laws, marries a citizen of the United States, at once takes the status of her husband, and is entitled to be discharged on a writ of habeas corpus.

Hopkins *v.* Fachant (1904), 130 Fed. Rep. 839.

Although by the provisions of the acts of April 12, 1900, and July 1, 1902, the people of the island of Porto Rico and of the Philippine Islands are declared to be citizens of those islands, respectively, "and as such entitled to the protection of the United States," the citizens and residents of those islands are admitted to the United States on the same conditions as "people from countries over which the United States claims no right of sovereignty whatever," and are therefore subject to the laws regulating immigration, including those which prescribe the payment of the head tax, and, so far as applicable, to the laws relating to the exclusion of persons of the Chinese race.

Treasury Dept. Circ., No. 97, Aug. 2, 1902, signed by the Comr.-Gen. of Immigr., and approved by the Sec. of the Treas.

It was subsequently held, however, by the Supreme Court that the immigration act of March 3, 1891, 26 Stat. 1084, relates to persons owing allegiance to a foreign government, and does not embrace citizens of Porto Rico, who, since the annexation of the island to the United States, are not "aliens," and are not, when arriving in ports of the mainland of the United States, to be treated as "alien immigrants."

Gonzales *v.* Williams (1904), 192 U. S. 1; reversing In re Gonzales, 118 Fed. Rep. 941.

The statute of New York of May 31, 1881, imposing a tax on every alien passenger who shall come by vessel from a foreign country to

the port of New York, and holding the vessel liable for the tax, is a regulation of foreign commerce, and void.

Henderson *v.* Mayor of New York, 92 U. S. 259; cited and affirmed in People *v.* Compagnie Générale Transatlantique, 107 U. S. 59.

The statute is not relieved from this constitutional objection by declaring in its title that it is to raise money for the execution of the inspection laws of the State, which authorize passengers to be inspected in order to determine who are criminals, paupers, lunatics, orphans, or infirm persons, without means or capacity to support themselves, and subject to become a public charge, as such facts are not to be ascertained by inspection alone.

People v. Compagnie Générale Transatlantique, 107 U. S. 59.

A statute of the State of California provided that the commissioner of immigration should satisfy himself whether any passenger from a foreign port, not a citizen of the United States, belonged to certain enumerated classes, among which were lunatics, idiots, and lewd or debauched women, and that no such person should be permitted to land until a bond should be given against any expense to be incurred for relief or support. The master, owner, or consignee was allowed to commute by paying such sums as the commissioner might think proper to exact. It was decided that the object of this statute being to extort money from a large class of passengers, or to prevent their immigration, thus invading the functions of Congress in regulating commerce, it was in conflict with the Constitution, and therefore void.

Chy Lung *v.* Freeman, 92 U. S. 275.

See, also, Mayor, etc., of the City of New York *v.* Commissioners of Immigration, 59 Hun. 624, 13 N. Y. Supp. 751.

"I received yesterday from the Secretary of the Senate the following resolution, together with a copy of the bill therein referred to:

"IN THE SENATE OF THE UNITED STATES,

"*January 6, 1893.*

"*Resolved*, That the Secretary of the Senate be directed to transmit to the Secretary of State a copy of Senate bill numbered thirty-five hundred and thirteen, now pending in this body, entitled 'A bill for the suspension of immigration for one year,' and that the Secretary of State be, and is hereby, directed to inform the Senate whether the provisions of the said bill absolutely suspending immigration for the period of one year are in conflict with any treaties now existing between the United States and any foreign countries, and, if so, with what countries, and any further information which he may deem necessary for the information of the Senate during the consideration of said bill.

"The bill as reported to the Senate, with amendments, December 22 last, proposes to suspend for one year, from March 1 next, the admission into the United States of any alien immigrants coming

for settlement or permanent residence from any except American countries. I had previously received a letter dated the 28th ultimo from the Hon. William E. Chandler, chairman of the Senate Committee on Immigration, requesting similar information, in which it is stated that the proposed law 'is to be passed, if at all, on account of the imminent danger of the introduction of cholera with immigrants from Europe during the coming year.' As responsive to the Senate's resolution, I have the honor to make to you the following report in order that it may be transmitted to the Senate:

"I am not aware of any treaty which specifically purports to limit or restrict the right of this Government to control immigration into the United States. The only one which makes any express reference to immigration is that with China, concluded November 17, 1880, and it reserves to the Government of the United States the power to 'regulate, limit, or suspend' the immigration of Chinese subjects. There are, however, two classes of provisions found in many of our treaties which deserve consideration in this regard.

"(1) Those granting expressly to the citizens or subjects of another country the liberty to frequent, come to, enter, travel, sojourn, or reside in the United States.

"There appear to be thirty-two treaties containing provisions of this class. (See Annex No. 1.) In six of them (see Annex No. 2) are found provisions of a second class, viz:

"(2) Those securing generally to the citizens or subjects of another country the same privileges of residence and trade as to the citizens or subjects of the most favored nation.

"Treaty provisions granting the right of entry, travel, or residence in this country generally contain in some form the condition of subjection to the laws of the land. Such a condition, if not expressed, is necessarily implied. Several of these treaties expressly or by construction join the right of visit and residence to that of trade, but the majority give liberty of entry and sojourn without necessary dependence on business operations.

"It is doubtful whether any of these treaty provisions guaranteeing rights of travel, residence, etc., were intended or can be construed to be restrictive of the right of the contracting governments to control immigration into their respective territories. The second section of the proposed bill distinguishes between aliens who wish to come here for permanent residence and those 'coming only as visitors or for a temporary sojourn in the United States.' There is a wide distinction between the two. The immigrant contemplates an abandonment of his former country. A transient visitor or temporary sojourner intends at some time to return to it. These treaty provisions were clearly intended to secure certain reciprocal privileges to persons of the latter class who leave their country *animo*

revertendi; but it would require a great stretch of their language to interpret them as obligations to receive persons of the former class with a view to their permanent incorporation into the society of the country. Every government naturally desires to secure for its citizens or subjects who intend to preserve their allegiance and their homes as full rights as possible of travel or temporary residence abroad; but there is no reason why an immigrant-receiving country should bind itself to receive immigration, and much less so why an immigrant-furnishing country should desire such a compact. Even the governments of those countries in which the individual right of expatriation is fully admitted and no obstacles are put in the way of emigration would scarcely be solicitous of securing a conventional right for their people to abandon their country and make permanent homes elsewhere. On the contrary, the whole course of European history contemporaneous with the making of these treaties discloses a marked tendency to discourage emigration. The doctrine of the individual right of expatriation was generally denied and measures restrictive of emigration were not uncommon. It may be regarded as improbable, therefore, that these treaty provisions were intended to have any applicability to the subject of immigration.

"But I do not think that even a provision guaranteeing the reception of immigrants—and much less a provision simply guaranteeing rights of entry, travel, or residence—could be held to prevent this Government from temporarily suspending immigration for the preservation of public health. It is simply the exercise of the police power of the nation, or, as it is called by the publicists, the right of self-preservation. Phillimore says:

"'The right of self-preservation is the first law of nations, as it is of individuals. A society which is not in a condition to repel aggression from without, is wanting in its principal duty to the members of which it is composed, and to the chief end of its institution. All means which do not affect the independence of other nations are lawful to this end. No nation has a right to prescribe to another what these means shall be, or to require any account of her conduct in this respect.' (1 Phillimore's International Law, 2d edition, sec. CCXI, page 252.)

"And Calvo says (translation):

"'One of the essential rights inherent in sovereignty and the independence of states is that of self-preservation. This right is the first of all the absolute or permanent rights, and serves as a fundamental basis for a great number of accessory, secondary, or occasional rights; it constitutes, it may be said, the supreme law of nations, as well as the most imperative duty of citizens, and a community which neglects the means to repel aggressions from without, fails in its moral obli-

gation to the members which compose it, and to the end even of its institution.' (1 Calvo, 4th ed., sec. 208.)

"To the same effect, see also Wheaton's Elements of International Law, part II., chap. 1, sec. 2; Halleck's International Law, chap. 4, sec. 18; Vattel's Le Droit, book 1, chap. 24, sec. 177; Twiss, Peace, sec. 99.

"Of this police power in municipal law it has been said that it—

"'is so clearly essential to the well-being of the state, that the legislature can not, by any act or contract whatever, divest itself of the power, nor fetter its discretion in the exercise of the power.' (Public Health and Safety, by Parker and Worthington, sec. 9.)

"And even the prohibitions of the Constitution of the United States and the powers granted by it are subject to this higher power. (Stone *vs.* Mississippi, 101 U. S. 814; The Passenger Cases, 7 How. 414.)

"The national power of self-preservation is peculiarly applicable to the exclusion of foreigners. Said Mr. Justice Gray in Nishïmura Ekïu *vs.* United States (142 U. S. 659):

"'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.'

"In 1852, Mr. Everett, then Secretary of State, said that—

"'This Government could never give up the right of excluding foreigners whose presence they might deem a source of danger to the United States.' (Mr. Everett, Secretary of State, to Mr. Mann, December 13, 1852; 2 Wharton's Digest, sec. 206.)

"And Mr. Justice Field, in delivering the opinion of the court in the Chinese Exclusion Case (130 U. S. 609), stated the doctrine thus:

"'The power of exclusion of foreigners being an incident of sovereignty belonging to the Government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the Government, the interest of the country requires it, can not be granted away or restrained on behalf of anyone. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They can not be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract.'

"The subjection of conventional agreements to the power of self-preservation must be implied, for it can not be presumed that when governments contract with each other they will fail to take notice of the existence of so inherent a right of sovereignty and attempt to

grant away that which, by the very nature of things, is incapable of being granted.

"This Government has for some time freely exercised without question the right to regulate and restrict immigration by excluding criminals, paupers, and diseased persons. No government, so far as I know, has contested its exercise on the ground that the treaty right of its subjects to enter the United States for travel, sojourn, or business is infringed thereby. In the Head-Money Cases (112 U. S. 597) objection was made by counsel to the validity of an act of Congress regulating immigration on the ground that it violated 'provisions contained in numerous treaties of our Government with friendly nations.' Mr. Justice Miller, for the court, said:

"'We are not satisfied that this act of Congress violates any of these treaties, on any just construction of them. Although laws similar to this have long been enforced by the State of New York in the great metropolis of foreign trade, where four-fifths of these passengers have been landed, no complaint has been made by any foreign nation to ours of the violation of treaty obligations by the enforcement of those laws.'

"The question was not further considered, as the court held that it was immaterial to the validity of the statute. To temporarily suspend all immigration for a reasonable length of time as a precautionary measure against the introduction of contagious disease which is epidemic, or threatening to become epidemic, in other parts of the world, is simply the exercise of the same power.

"Whether the occasion for the exercise of this power has arisen and the extent of the necessity are matters which this Government, in the exercise of a reasonable discretion, must determine for itself. 'Each nation,' said Mr. Marcy, 'may decide for itself when the occasion arises demanding its exercise.' (Mr. Marcy, Secretary of State, to Mr. Fay, March 22, 1856, Inst. to Switzerland; 2 Wharton's Digest, sec. 206.) Other nations, however, could scarcely question its existence in the imminent danger of the introduction of cholera into the United States with immigrants during the coming year.

"The only pertinence of the 'favored-nation' clauses included under the second class, hereinbefore referred to, is that the bill puts no restriction upon immigration from American countries. If immigration from those countries were to be allowed on account of some treaty obligation, or as a favor, it might give occasion for other countries to invoke a favored-nation clause in their treaty. Such absence of restriction, however, with reference to American countries is not in fact based upon either, but depends simply upon the fact that the threatened danger which it is the purpose of the legislation to avert does not exist in this hemisphere. I see no opportunity for invoking a favored-nation clause unless the danger in question

equally existed in American countries, and the immigration therefrom in magnitude and other respects should make the case exactly the same with respect to both American and European countries, so that a restriction with respect to one and not the other would have in it no element of reasonable discretion, but plainly be an act of discrimination.

"I am of the opinion, therefore, that this bill or any similar legislation which this Government deems it wise to enact in a reasonable way for its own protection is not in conflict with any treaty stipulations into which the United States has entered."

Report of Mr. Foster, Sec. of State, to the President, Jan. 7, 1893, S. Ex. Doc. 25, 52 Cong. 2 sess.

The treaties of the first class, referred to in the foregoing report, were: Argentine Confederation, July 27, 1853, Art. II.; Austria, Aug. 27, 1829, Art. I.; Bolivia, May 13, 1858, Art. III.; Borneo, June 23, 1850, Art. II.; Colombia, Dec. 12, 1846, Art. III.; Congo, Jan. 24, 1891, Art. I.; Corea, May 22, 1882, Art. VI.; Costa Rica, July 10, 1851, Art. II.; Denmark, April 26, 1826, Art. II.; Dominican Republic, Feb. 8, 1867, Art. III.; Ecuador, June 13, 1839, Art. III; Great Britain, July 3, 1815, Art. I.; Greece, Dec. 10/22, 1837, Art. I.; Hawaiian Islands, Dec. 20, 1849, Art. VIII.; Hayti, Nov. 3, 1864, Art. VI.; Honduras, July 4, 1864, Art. II.; Italy, Feb. 26, 1871, Art. I.; Liberia, Oct. 21, 1862, Art. II.; Mecklenburg-Schwerin, Dec. 9, 1847, Art. X.; Nicaragua, June 21, 1867, Arts. II., IX.; Oldenburg, March 10, 1847 (see treaty with Prussia); Orange Free State, Dec. 22, 1871, Art. I.; Paraguay, Feb. 4, 1859, Art. II.; Peru, Aug. 31, 1887, Art. II.; Portugal, Aug. 26, 1840, Art. I.; Prussia, May 1, 1828, Art. I.; Russia, Dec. 18, 1832, Art. I.; Salvador, Dec. 6, 1870, Arts. III., XXIX.; Serbia, Oct. 14, 1881, Art. I.; Sweden and Norway, July 4, 1827, Art. I.; Switzerland, Nov. 25, 1850, Art. I.; Tonga, Oct. 2, 1886, Art. III.

Treaties of the second class were: Borneo, June 23, 1850, Art. II.; Congo, Jan. 24, 1891, Art. I.; Hawaiian Islands, Dec. 20, 1849, Art. VIII.; Salvador, Dec. 6, 1870, Art. XXIX.; Serbia, Oct. 14, 1881, Art. I.; Tonga, Oct. 2, 1886, Art. III.

For a quotation from a despatch of Mr. Wheaton, minister to Prussia, in relation to the negotiation of the treaty between the United States and Saxony of May 14, 1845, by the first article of which the *droit de détraction*, or tax on emigration, was abolished, see Mr. Uhl, Act. Sec. of State, to Messrs. Straley et al., April 21, 1894, 196 MS. Dom. Let. 444. In the despatch quoted by Mr. Uhl, Mr. Wheaton argued that the advantage gained by the United States in the abolition of the tax in question was more than an equivalent for the power given of taking and holding lands in the United States in a limited manner. He stated that the tax on the funds of emigrants in Saxony and most of the German States amounted to ten per cent. on the capital, and that its abolition was to that extent a clear gain in the capital brought to the United States by the rich peasants and others who sold their real property and emigrated in great numbers.

The treaty between the United States and Japan of Nov. 23, 1894, does not forbid the exclusion from the United States, under the immigration laws, of a Japanese pauper likely to become a public charge.

The Japanese Immigrant Case, 189 U. S. 86.

"We are peculiarly subject in our great ports to the spread of infectious diseases by reason of the fact that unrestricted immigration brings to us out of European cities, in the overcrowded steerages of great steamships, a large number of persons whose surroundings make them the easy victims of the plague. This consideration, as well as those affecting the political, moral, and industrial interests of our country, lead me to renew the suggestion that admission to our country and to the high privileges of its citizenship should be more restricted and more careful. We have, I think, a right and owe a duty to our own people, and especially to our working people, not only to keep out the vicious, the ignorant, the civil disturber, the pauper, and the contract laborer, but to check the too great flow of immigration now coming by further limitations."

President Harrison, annual message, Dec. 6, 1892, For. Rel. 1892, xxxi.

"These manifestations against helpless aliens may be traced through successive stages to the vicious *padroni* system, which, unchecked by our immigration and contract-labor statutes, controls these workers from the moment of landing on our shores, and farms them out in distant and often rude regions, where their cheapening competition in the fields of bread-winning toil brings them into collision with other labor interests. While welcoming, as we should, those who seek our shores to merge themselves in our body politic and win personal competence by honest effort, we can not regard such assemblages of distinctively alien laborers, hired out in the mass to the profit of alien speculators and shipped hither and thither as the prospect of gain may dictate, as otherwise than repugnant to the spirit of our civilization, deterrent to individual advancement, and hindrances to the building up of stable communities resting upon the wholesome ambitions of the citizen and constituting the prime factor in the prosperity and progress of our nation. If legislation can reach this growing evil, it certainly should be attempted."

President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, I. xxx.

"Our present immigration laws are unsatisfactory. We need every honest and efficient immigrant fitted to become an American citizen, every immigrant who comes here to stay, who brings here a strong body, a stout heart, a good head, and a resolute purpose to do his duty well in every way and to bring up his children as law-abiding and God-fearing members of the community. But there should be a com-

prehensive law enacted with the object of working a threefold improvement over our present system. First, we should aim to exclude absolutely not only all persons who are known to be believers in anarchistic principles or members of anarchistic societies, but also all persons who are of a low moral tendency or of unsavory reputation. This means that we should require a more thorough system of inspection abroad and a more rigid system of examination at our immigration ports, the former being especially necessary.

"The second object of a proper immigration law ought to be to secure by a careful and not merely perfunctory educational test some intelligent capacity to appreciate American institutions and act sanely as American citizens. This would not keep out all anarchists, for many of them belong to the intelligent criminal class. But it would do what is also in point—that is, tend to decrease the sum of ignorance, so potent in producing the envy, suspicion, malignant passion, and hatred of order out of which anarchistic sentiment inevitably springs. Finally, all persons should be excluded who are below a certain standard of economic fitness to enter our industrial field as competitors with American labor. There should be proper proof of personal capacity to earn an American living and enough money to insure a decent start under American conditions. This would stop the influx of cheap labor, and the resulting competition which gives rise to so much of bitterness in American industrial life, and it would dry up the springs of the pestilential social conditions in our great cities, where anarchistic organizations have their greatest possibility of growth.

"Both the educational and economic tests in a wise immigration law should be designed to protect and elevate the general body politic and social. A very close supervision should be exercised over the steamship companies which mainly bring over the immigrants, and they should be held to a strict accountability for any infraction of the law."

President Roosevelt, annual message, Dec. 3, 1901, For. Rel. 1901, xx.

The United States having expressed the desire, with a view to the enforcement of the law of March 3, 1903, to station officers of the United States Public Health and Marine-Hospital Service at the ports of embarkation in the principal countries from which emigrants leave for the United States, in order to make a medical inspection of such emigrants, the Austrian Government said that it was not possible, under existing regulations governing the practice of medicine in that country, to permit foreign sanitary officers not licensed in Austria to make such a medical inspection, yet the Government was disposed to admit the presence of American sanitary officials at such medical inspections and to permit them, if deemed necessary, to ex-

press their opinions. The Austrian Government intimated that it would do this the more willingly if the United States could guarantee that all emigrants who might embark, after medical inspection in the presence of an American sanitary officer and with his consent, would not be refused admission by the American immigration authorities save in cases where a reason for refusal had developed after such inspection.

For. Rel. 1904, 92–94.
See supra, § 175.

By a law approved by the President of Hayti on August 1, 1904, the immigration of Syrians was forbidden. They were also denied the right to become citizens of the country, or to do certain kinds of business, or to travel and sell goods in the interior. The reason for the passage of the law appears to have been the feeling of the natives against the Syrians, growing out of their underselling the native merchants and exporting metallic money from the country.

For. Rel. 1904, 393.
As to the possession of fraudulent American naturalization papers by some of the Syrians, see For. Rel. 1904, 398.

3. Legislation of the United States.

§ 562.

By sections 3 and 5 respectively, of the act of Congress of March 3, 1875, the following things were forbidden:

Act of 1875.

1. The importation into the United States of women for purposes of prostitution.

2. The immigration of aliens "who are undergoing a sentence for conviction in their own country of felonious crimes other than political or growing out of or the result of such political offences, or whose sentence has been remitted on condition of their emigration, and women 'imported for the purpose of prostitution.'"

18 Stat., part 3, p. 477.
This act is also printed in 69 Br. & For. State Papers, 137.
As to the form of an indictment for the unlawful importation of women, see United States *v.* Pagliano, 53 Fed. Rep. 1001.

A proposal made to women while on their way to the United States under engagement for domestic service, that they should, after their arrival, commit acts of prostitution, is not a violation of the provision of the act of March 3, 1875, making it a felony to import women or to attempt to hold them for purposes of prostitution.

In re Guayde (1901), 112 Fed. Rep. 415.

Act of 1882.

The act of Aug. 3, 1882, levied, for the purpose of constituting an immigration fund, a duty of 50 cents for "every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States," and provided that if the officers of immigration should find among such passengers any—

1. Convict,
2. Lunatic,
3. Idiot,
4. Or "any person unable to take care of himself or herself without becoming a public charge"—they should so report in writing to the collector of the port, "and such persons shall not be permitted to land."

Sec. 4 reads: "That all foreign convicts except those convicted of political offenses, upon arrival, shall be sent back to the nations to which they belong and from whence they came."

The expenses of the return of the excluded persons were imposed on the vessel.

22 Stat. 214.

Till the provisions of the act of Aug. 3, 1882, "shall be made applicable to passengers coming into the United States by land carriage, said provisions shall not apply to passengers coming by vessels employed exclusively in the trade between the ports of the United States and the ports of the Dominion of Canada or the ports of Mexico." (Sec. 22, act of June 26, 1884, 23 Stat. 58.)

Act of 1885—Contract labor.

The act of Feb. 26, 1885, forbade the immigration of aliens under contract to labor.

By section 1 it was made unlawful "to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia."

By section 2 all such contracts or agreements were declared to be "utterly void and of no effect."

By section 3 a penalty of $1,000 was imposed on every violation of section 1.

By section 4 "the master of any vessel who shall knowingly bring within the United States on any such vessel, and land, or permit to be landed, from any foreign port or place, any alien laborer, mechanic, or artisan who, previous to embarkation on such vessel, had entered into contract or agreement, parol or special, express or implied, to perform labor or service in the United States, shall be deemed guilty of a mis-

demeanor, and on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such alien laborer, mechanic, or artisan so brought as aforesaid, and may also be imprisoned for a term not exceeding six months."

"SEC. 5. That nothing in this act shall be so construed as to prevent any citizen or subject of any foreign country temporarily residing in the United States, either in private or official capacity, from engaging, under contract or otherwise, persons not residents or citizens of the United States to act as private secretaries, servants, or domestics for such foreigner temporarily residing in the United States as aforesaid; nor shall this act be so construed as to prevent any person, or persons, partnership, or corporation from engaging, under contract or agreement, skilled workmen in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States: *Provided*, That skilled labor for that purpose can not be otherwise obtained: nor shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants: *Provided*, That nothing in this act shall be contrued as prohibiting any individual from assisting any member of his family or any relative or personal friend, to migrate from any foreign country to the United States, for the purpose of settlement here."

23 Stat. 332.

May 21, 1888, the British minister at Washington stated that a number of Indians in British Columbia, under the leadership of a person who was formerly a lay missionary of the Church Missionary Society, had settled within the territory of Alaska. He remarked that he presumed that such immigration and settlement were not contrary to the laws of the United States. The question was submitted to the Secretary of the Treasury, who expressed the opinion that, as section 1 of the act of August 3, 1882, applied only to passengers who should "come by steam or sail vessel from a foreign port to any port within the United States," and sec. 22 of the shipping act of June 26, 1884, in effect abolished the capitation tax on immigrants from contiguous foreign territory, the immigration in question was not unlawful.

Sir L. West, British min., to Mr. Bayard, Sec. of State, May 21, 1888; Mr. Bayard, Sec. of State, to Mr. Edwardes, British chargé, June 8, 1888: For. Rel. 1888, I. 808, 809.

Act of 1887.

By the act of Feb. 23, 1887, the execution of the act of Feb. 26, 1885, was committed to the Secretary of the Treasury, who was empowered to enter into contracts and make rules and regulations for its enforcement: and it was provided that

all persons included in the inhibitions of the act should "be sent back to the nations to which they belong and from whence they came."

24 Stat. 414.

Act of 1888.

By the act of Oct. 19, 1888, the act of Feb. 23, 1887, was "so amended as to authorize the Secretary of the Treasury, in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of that law, to cause such immigrant within the period of one year after landing or entry, to be taken into custody and returned to the country from whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person previously contracting for the services."

25 Stat. 565, 566.

May 17, 1889, the Swiss minister at Washington brought to the attention of the Department of State the case of certain citizens of Switzerland whom the authorities at New York had refused to permit to land and had caused to be sent back to Europe. The minister stated that by the Swiss federal law of March 22, 1888, it was provided that emigration agencies should not ship to foreign countries any persons who were not allowed to enter there by the laws in force in such countries. For such sending the law provided appropriate penalties. The minister therefore requested to be advised of the exact reasons why the persons in question had not been allowed to land. It appeared by investigation that two of them were sent back because they were unable to take care of themselves, and were likely to become a public charge; that another was subject to the same objections, besides being a convict, who had served a term of imprisonment in Switzerland, while three others were returned as paupers.

Mr. de Claparède, Swiss min., to Mr. Blaine, Sec. of State, May 17, 1889; Mr. Wharton, Act. Sec. of State, to Mr. Kloss, Swiss chargé, Aug. 5, 1889; For. Rel. 1889, 701, 702.

See a report of Mr. Winchester, min. to Switzerland, to Mr. Bayard, Sec. of State, Jan. 24, 1889, concerning the policy of the Swiss authorities in discouraging emigration and the federal law of 1881. See, also, Mr. Winchester to Mr. Blaine, April 15, 1889. (For. Rel. 1889, 692, 698.)

Act of 1891.

By the act of March 3, 1891, sec. 1, "the following classes of aliens" are "excluded from admission into the United States," in accordance with existing legislation, other than that concerning Chinese:

1. "All idiots."

2. " Insane persons."

3. " Paupers or persons likely to become a public charge."

4. " Persons suffering from a loathsome or a dangerous contagious disease."

5. " Persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."

6. " Polygamists."

7. " Also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes, or to the class of contract laborers excluded by the act of Feb. 26, 1885; but this section shall not be held to exclude persons living in the United States from sending for a relative or a friend who is not of the excluded classes under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That nothing in this act shall be construed to apply to or exclude persons convicted of a political offense, notwithstanding said political offense may be designated as a ' felony, crime, infamous crime, or misdemeanor, involving moral turpitude ' by the laws of the land whence he came or by the court convicting."

By section 2, no suit for the violation of the act of Feb. 26, 1885, can be settled or discontinued without the recorded consent of court.

By section 3, it is declared to be a violation of the act of Feb. 26, 1885, " to assist or encourage the importation or migration of any alien by promise of employment through advertisements printed and published in any foreign country; and any alien coming to this country in consequence of such an advertisement shall be treated as coming under a contract as contemplated by such act; and the penalties by said act imposed shall be applicable in such a case: *Provided*, This section shall not apply to States and immigration bureaus of States advertising the inducements they offer for immigration to such States."

By section 4, the penalties imposed by the act of Feb. 26, 1885, on violations of section 1 thereof, are imposed on any steamship or transportation company or owners of vessels who " shall directly, or through agents, either by writing, printing, or oral representations, solicit, invite, or encourage the immigration of any alien into the United States except by ordinary commercial letters, circulars, advertisements, or oral representations, stating the sailings of their vessels and the terms and facilities of transportation therein; " and the same penalties are imposed on the agents.

By section 5, the 5th section of the act of Feb. 26, 1885, is " amended by adding to the second proviso in said section the words ' nor to ministers of any religious denomination, nor persons belonging to any

recognized, profession, nor professors for colleges and seminaries,' and by excluding from the second proviso of said section the words 'or any relative or personal friend.'"

By section 6, the bringing into or landing in the United States, or the aiding in so doing, by vessel or otherwise, of any alien not lawfully entitled to enter is made a misdemeanor, punishable by a fine not exceeding $1,000, or by imprisonment not exceeding a year, or both.

By section 7, the office of superintendent of immigration is created in the Treasury Department.

By section 8, provision is made for the inspection of alien immigrants; and it is declared that "all decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury."

By the same section, "the Secretary of the Treasury may prescribe rules for inspection along the borders of Canada, British Columbia, and Mexico, so as not to obstruct or unnecessarily delay, impede, or annoy passengers in ordinary travel between said countries;" and all duties imposed and powers conferred by sec. 2 of the act of Aug. 3, 1882, on State officials acting under contract with the Secretary of the Treasury, are transferred to United States inspection officers.

Any officer or agent, or person in charge, of a vessel, who shall knowingly or negligently land or permit to land any alien immigrant at a place or time other than that designated by the inspection officers, may be punished as for a misdemeanor, as under section 6.

By section 9, local peace officers are permitted to make arrests for crimes under the local laws at immigrant stations.

By section 10, all aliens unlawfully coming into the United States "shall, if practicable, be immediately sent back on the vessel by which they were brought in," the cost of their return, including their maintenance while on land, to be borne by the owners; and any master, agent, consignee, or owner refusing to perform these duties is guilty of a misdemeanor, punishable with a fine of not less than $300, besides refusal of clearance to the vessel while the fine is unpaid.

By section 11, "any alien who shall come into the United States in violation of law may be returned as by law provided, at any time within one year thereafter, at the expense of the person or persons, vessel, transportation company, or corporation bringing such alien into the United States, and if that can not be done, then at the expense of the United States; and any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to his landing therein shall be deemed to have come in violation of law and shall be returned as aforesaid."

By section 12, all proceedings, criminal or civil, begun under previous acts, were saved; and by sec. 13, the United States circuit and district courts are invested with concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of the act.

The act went into effect on April 1, 1891.

26 Stat. 1084.

An advertisement in a foreign newspaper for workmen of a certain kind, at a certain wage, at a certain manufacturing establishment in the United States is a violation of section 3 of the act of March 3, 1891, 26 Stat. 1084, making it penal to "assist or encourage" the "importation or migration" of an alien "by promise of employment through advertisements printed and published in any foreign country."

United States *v.* Baltic Mills Co. (1903), 124 Fed. Rep. 38, reversing United States *v.* Baltic Mills Co. (1902), 117 Fed. Rep. 959.

In 1891–92 the British Government complained of hardships in the enforcement at Boston of the immigration act of 1891, and asked that passengers who were not allowed to land be taken in charge by the port authorities till the ship was ready to proceed on her return voyage.

For. Rel. 1892, 255, 257, 271, 274.

Acts of 1893.

By the act of Feb. 15, 1893, sec. 7, it is provided that "whenever it shall be shown to the satisfaction of the President that by reason of the existence of cholera or other infectious or contagious diseases in a foreign country there is serious danger of the introduction of the same into the United States, and that notwithstanding the quarantine defense this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce the same is demanded in the interest of the public health, the President shall have power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate and for such period of time as he may deem necessary."

27 Stat. 449, 452.

By the act of March 3, 1893, further provision was made for the enforcement of the immigration and contract-labor laws.

By section 1 the masters of vessels having on board alien immigrants are required to deliver on arrival to the inspector of immigration "lists or manifests made at the time and place of embarkation of such alien immigrants on board such steamer or vessel, which shall, in answer to questions at the top of said lists, state as to each immigrant the full name, age, and sex, whether married or single; the

calling or occupation; whether able to read or write; the nationality; the last residence; the seaport for landing in the United States; the final destination, if any, beyond the seaport of landing; whether having a ticket through to such final destination; whether the immigrant has paid his own passage or whether it has been paid by other persons or by any corporation, society, municipality, or government; whether in possession of money, and if so, whether upwards of thirty dollars and how much if thirty dollars or less; whether going to join a relative, and if so, what relative and his name and address; whether ever before in the United States, and if so, when and where; whether ever in prison or almshouse or supported by charity; whether a polygamist; whether under contract, express or implied, to perform labor in the United States; and what is the immigrant's condition of health mentally and physically, and whether deformed or crippled, and if so, from what cause."

By section 2, no one list or manifest shall group more than thirty names; each immigrant or head of family must be ticketed for identification; and each list or manifest must be verified in a prescribed manner. Section 4 requires each list or manifest to be certified in a prescribed manner, under oath or affirmation, before the departure of the vessel, by the vessel's surgeon, or, if none, by some competent surgeon employed by the owners of the vessel. Section 4 imposes on the master of the vessel a fine of $10 for each immigrant qualified to enter the United States who is not duly listed, or manifested, besides excluding such immigrants and requiring them to be "returned like other excluded persons."

By section 5 the inspector is required to "detain for a special inquiry," under sec. 1 of the act of March 3, 1891, "every person who may not appear to him to be clearly and beyond doubt entitled to admission." Special inquiries are conducted by not less than four inspectors, the concurrence of at least three of whom is necessary to a favorable decision; and such a decision may be appealed by any dissenting inspector to the superintendent of immigration, whose action is subject to review by the Secretary of the Treasury.

Sec. 6 relates to medical examinations.

By sec. 7 no bond or guaranty that an alien immigrant shall not become a public charge can be received except under specific authority of the superintendent of immigration, with the written approval of the Secretary of the Treasury.

Sections 8 and 9 contain further regulations, and section 10 provides that the act shall not apply to Chinese persons.

The act went into effect sixty days after its passage.

27 Stat. 569.

As to the detention at Seattle, and deportation, of certain Japanese immigrants under the immigration laws, see For. Rel. 1901, 366.

An Italian immigration bureau was established at Ellis Island in 1894, at the request of the Italian ambassador at Washington, as an experiment for the purpose of breaking up the padrone system. In the spring of 1898 notice was given that the bureau was to be discontinued, but on the request of the Italian Government the order of abolition was temporarily revoked. In 1899 notice was again given of an intention to discontinue it on the ground that it had not accomplished the principal object for which it was established, and that it had interfered with the effective enforcement of the immigration laws. These conclusions were combatted by the Italian ambassador at Washington. November 27, 1899, the ambassador was officially advised that on January 1, 1900, the privileges granted to the bureau would cease. It was stated that other nations had desired similar privileges, and that the efficient administration of the laws compelled the Government of the United States to deny them. The Italian Government earnestly sought to have the bureau continued. The United States, however, deemed it inexpedient to reconsider its decision.

For. Rel. 1899, 411, 414, 415, 419, 426, 427, 430, 431, 433.

Act of 1894.

The sundry civil appropriations act of Aug. 18, 1894, provides: "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

28 Stat. 390.

This act also increased the head money, under the act of Aug. 3, 1882, from 50 cents to $1.00.

Act of 1895.

By the act of March 2, 1895, making appropriations for the legislative, executive, and judicial expenses of the Government, the title of the Superintendent of Immigration was made Commissioner-General of Immigration; and by the act of June 6, 1900, he was also charged with the administration of the Chinese-exclusion laws.

28 Stat. 764, 780; 31 Stat. 588, 611.

Act of March 3, 1903.

By the act of March 3, 1903, "to regulate the immigration of aliens into the United States," a head tax of $2 is imposed for "every passenger not a citizen of the United States, or of the Dominion of Canada, the Republic of Cuba, or of the Republic of Mexico, who shall come by steam, sail, or other vessel from any foreign port to any port within

the United States, or by any railway or any other mode of transportation, from foreign contiguous territory to the United States." The money thus collected constitutes a permanent appropriation called the "immigrant fund," to be used for purposes connected with the immigration of aliens.

By section 2 the following classes of aliens are excluded:

1. "Idiots."

2. "Epileptics."

3. "Insane persons," "persons who have been insane within five years previous," "persons who have had two or more attacks of insanity at any time previously."

4. "Paupers," "persons likely to become a public charge," "professional beggars."

5. "Persons afflicted with a loathsome or with a dangerous contagious disease."

6. "Persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude."

7. "Polygamists."

8. "Anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials."

9. "Prostitutes, and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution."

10. "Those who have been, within one year from the date of the application for admission to the United States, deported as being under offers, solicitations, promises or agreements to perform labor or service of some kind therein;" and, also,

11. "Any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes."

But it is provided that "this section shall not be held to prevent persons living in the United States from sending for a relative or friend who is not of the foregoing excluded classes: *Provided*, That nothing in this act shall exclude persons convicted of an offense purely political, not involving moral turpitude: *And provided further*, That skilled labor may be imported, if labor of like kind unemployed can not be found in this country: *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

By section 3 the importation of any woman or girl for purposes of prostitution is punishable as a felony, with imprisonment of not less than one nor more than five years, and a fine not exceeding $1,000.

Section 4 makes it unlawful "to prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parole or special, expressed or implied, made previous to the importation of such alien to perform labor or service of any kind, skilled or unskilled, in the United States."

By section 5 any violation of section 4 is subject to a penalty of $1,000, while by section 6 it is likewise punishable "to assist or encourage the importation or migration of any alien by a promise of employment through advertisements printed and published in any foreign country;" but this does not apply to State or Territorial advertising of inducements to immigrants.

Section 7 substantially reenacts sec. 4 of the act of March 3, 1891.

By section 8 the bringing into or landing in the United States, or the attempt to do so, by vessel or otherwise, either personally or through an agent, of an alien not duly admitted by an immigrant inspector, or not lawfully entitled to enter the United States, is a misdemeanor, subject to a fine not exceeding $1,000 for each such act or attempt, or imprisonment for not less than 3 months nor more than 2 years, or to both.

Sections 9, 10, and 11 relate to the exclusion of diseased persons and to medical inspections.

Section 12 substantially repeats section 1 of the act of March 3, 1893, except that the list or manifest must show, in addition to the other things, the alien's "race," whether he has fifty (instead of thirty) dollars, whether he is going to join a relative "or friend," whether he was ever in prison or almshouse "or an institution or hospital for the care and treatment of the insane," etc., whether he is an "anarchist," and whether "coming by reason of any offer, solicitation, promise, or agreement, expressed or implied," to perform labor, and, if deformed or crippled, "for how long," as well as from what cause.

Section 13 substantially repeats, *mutatis mutandis*, section 2 of the act of March 3, 1893.

Section 14 substantially repeats sec. 3 of the same act.

Section 15 imposes, for the failure of the master or commanding officer of a vessel to deliver lists or manifests as required, a fine of $10 "for each alien concerning whom the above information is not contained in any list as aforesaid."

Sections 16 and 17 relate to the process of inspection and examination of immigrants.

By section 18 any owner, officer, agent, or person in charge of a vessel who lands or permits to land an alien at any time or place other than that designated by the immigration officers is guilty of a misdemeanor, and punishable by a fine of not less than $100 nor more than $1,000 for each alien, or by imprisonment not exceeding a year, or both, and every alien so landed is to be deported.

Section 19 substantially repeats section 10 of the act of March 3, 1891, with certain regulatory additions.

By section 20 "any alien who shall come into the United States in violation of law, or who shall be found a public charge therein, from causes existing prior to landing, shall be deported as hereinafter provided to the country whence he came at any time within two years after arrival at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing such alien into the United States, or, if that can not be done, then at the expense of the immigrant fund referred to in section one of this act."

"SEC. 21. That in case the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of this act he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided in section twenty of this act, or, if that can not be so done, at the expense of the immigrant fund provided for in section one of this act; and neglect or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of the Treasury to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this section shall be punished by the imposition of the penalties prescribed in section nineteen of this act."

By sections 22 and 23 the Commissioner-General of Immigration administers the immigration laws, under the direction of the Secretary of the Treasury.

By section 24 the decision of an immigration officer, if favorable to the alien, may be challenged by any other immigration officer, and in that case the alien is taken before a board of special inquiry. So, also, is every alien who may not appear to the inspector to be "clearly and beyond a doubt" entitled to land.

By section 25 a board of special inquiry consists of three members. Such boards "have authority to determine whether an alien who has been duly held shall be allowed to land or be deported." Their hearings are "separate and apart from the public," but they keep records of their proceedings and of testimony, "and the decision of any two members" is "final," subject to an appeal by the alien or

by a dissenting member to the Secretary of the Treasury, "whose decision shall then be final."

Section 26 is similar to section 7 of the act of March 3, 1893.

Sections 27–31 contain regulatory clauses, some of which were embraced in previous acts.

By section 32 the Commissioner-General of Immigration, acting under the Secretary of the Treasury, "shall prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico, so as not to unnecessarily delay, impede, or annoy passengers in ordinary travel between the United States and said countries."

By section 33 the words "United States" mean, for the purposes of the act, "the United States and any waters, territory, or other place now subject to the jurisdiction thereof."

Section 35 provides that "the deportation of aliens arrested within the United States after entry and found to be illegally therein, . . . shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

By section 36 the laws relating to the immigration or exclusion of Chinese remain unaffected.

By section 37 if a person who had taken up his permanent residence in the United States, and has declared his intention to become a citizen, sends for his wife or minor children, and the wife or any of the children is infected with a contagious disorder, such wife or child, if the disease was contracted on the ship, must be held till it shall be "determined whether the disorder will be easily curable, or whether they can be permitted to land without danger to other persons," and meanwhile they are not to be deported.

Finally, by section 38 "no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, shall be permitted to enter the United States or any Territory or place subject to the jurisdiction thereof;" and any person who knowingly aids or assists, "or who connives or conspires with" anyone "to allow, procure, or permit," such a person to enter, is liable to a fine of $5,000, or imprisonment for not less than one year nor more than five years, or both.

32 Stat. L. 1213.

The authority conferred on the Secretary of the Treasury by the act of March 3, 1903, 32 Stat. 1218, to cause the deporation of aliens found in the United States in violation of its provisions, does not extend to aliens who entered before its passage, and the question of the time of entry, being jurisdictional, may be inquired into on habeas corpus.

In re Lea (1903), 126 Fed. Rep. 234.

Act of Feb. 14, 1903.

By the act of February 14, 1903, to establish the Department of Commerce and Labor, the Commissioner-General of Immigration, the commissioners of immigration, the Bureau of Immigration, and the immigration service at large are transferred to that Department, and are placed under its jurisdiction and supervision.

32 Stat. 825, 828–829.

See, also, act of March 22, 1904, to extend the exemption from head tax to citizens of Newfoundland (33 Stat. part 1, p. 144); act of April 28, 1904, substituting words "Secretary of Commerce and Labor" for words "Secretary of the Treasury" in immigration law (id. 591); act of Feb. 6, 1905, in relation to the enforcement of the immigration laws in the Philippines. (Id. 689, 692.)

4. Judicial Decisions.

§ 563.

As the act of 1882 makes no provision for a review by the courts of the decision of the immigration commissioners as to whether an immigrant is likely to become a public charge, any additional facts ascertained after the decision should be presented to the commissioners, and not to the court on habeas corpus.

In re Day, 27 Fed. Rep. 678.

See, to the same effect, under the act of Feb. 23, 1887, In re Dietze, 40 Fed. Rep. 324.

An alien, whom it is sought to exclude under the act of 1882, may enforce his right to land by habeas corpus, if none of the facts authorizing his exclusion is found.

In re O'Sullivan, 31 Fed. Rep. 447.

Where the proceedings are regular and the person appears to be within the purview of the exclusion acts, the courts will not interfere.

In re Dietze, 40 Fed. Rep. 324; In re Florio, 43 Fed. Rep. 114; In re Didfirri, 48 Fed. Rep. 168; In re Vito Rullo, 43 Fed. Rep. 62.

By the regulations of the Secretary of the Treasury, under the acts of 1885 and 1887, the power of determining whether a person

should be permitted to land was vested in the superintendent of immigration and not in the collector.

In re Bucciarello, 45 Fed. Rep. 463.
See In re Palagano, 38 Fed. Rep. 580; In re Vito Rullo, 43 Fed. Rep. 62.

Under the act of Oct. 19, 1888, 25 Stat. 565, authorizing the Secretary of the Treasury, if satisfied that an immigrant has been allowed to land contrary to law, to cause such immigrant, within a year, to be arrested and returned, the Secretary may grant authority for the purpose to the superintendent or inspector of immigration by general or by special regulations or instructions.

In re Lifieri, 52 Fed. Rep. 293.

Sec. 11 of the act of March 3, 1891, refers by implication to the act of Oct. 19, 1888; and the fact that the decision of the Secretary of the Treasury in such a matter is not made conclusive, as it is in the case of a denial of the right to land, does not affect its validity so long as it remains unreversed.

United States *v.* Yamasaka, 100 Fed. Rep. 404, 40 C. C. A. 454.

An order of deportation by an inspection officer, under the act of 1891, constitutes, subject to the appeal to the superintendent of immigration and the review of the Secretary of the Treasury, as therein provided, due process of law as to an alien, and is not reviewable by the courts.

Nishimura Ekiu *v.* United States (1892), 142 U. S. 651.
See, also, United States *v.* Chung Shee, 71 Fed. Rep. 277.

Section 13 of the act of 1891, giving the United States circuit and district courts concurrent jurisdiction of "all causes, civil and criminal," arising thereunder, refers only to actions for penalties under sections 3 and 4, and indictments for misdemeanors under sections 6, 8, and 10.

Nishimura Ekiu *v.* United States, 142 U. S. 651.

The provisions of the act of 1891 empowering inspectors of immigration and their assistants to take testimony on oath does not require them to do so, but they may decide on their own inspection and examination.

Nishimura Ekiu *v.* United States, 142 U. S. 651.
See In re Feinknopf, 47 Fed. Rep. 447.

The decision of the inspection officers on a special inquiry under the act of 1891 is conclusive on the courts, the remedy, if error was

committed, being an appeal to the superintendent of immigration and then to the Secretary of the Treasury, as the act provides.

In re Hirsch Berjanski, 47 Fed. Rep. 445.

The decision of the Secretary of the Treasury can not be reviewed on habeas corpus.

United States *v.* Arteago, 68 Fed. Rep. 883, 16 C. C. A. 58.

See, however, United States *v.* Amor, 68 Fed. Rep. 885, 16 C. C. A. 60, holding that persons held on a warrant of the Secretary which did not contain their names, or any like them, should be released.

The burden of proof, on an indictment under section 8 of the act of March 3, 1891, is on the prosecution.

United States *v.* Spruth, 71 Fed. Rep. 678.

The agent of a vessel who is ordered to detain on board and return immigrants, under the act of March 3, 1891, must do so at all hazards, and can be relieved only by vis major or inevitable accident.

Warren *v.* United States, 58 Fed. Rep. 559, 7 C. C. A. 368.

An alien immigrant was, by agreement between her attorney and the attorney of the United States, detained in a mission house pending judgment on habeas corpus. (Nishimura Ekiu *v.* United States, 142 U. S. 651, 12 Sup. Ct. 336.)

See, also, In re Palagano, 38 Fed. Rep. 580.

The penalty imposed by sec. 10 of the act of March 3, 1891, 26 Stat. 1084, on the master of a vessel for neglecting to detain on board any "alien who may unlawfully come to the United States" thereon, applies only to the entry of immigrants.

Moffitt *v.* United States (1904), 128 Fed. Rep. 375, 63 C. C. A. 117.

The commitment of an alien pending his examination, under section 8 of the act of March 3, 1891, to the custody of a sheriff, does not affect his rights.

In re Way Tai, 96 Fed Rep. 484.

Permission to an alien immigrant to go ashore temporarily, pending the decision of the authorities on the question of the right to land, does not exempt such immigrant from the operation of the law.

In re Gayde (1901), 113 Fed. Rep. 588.

Under the act of March 3, 1891, 26 Stat. 1086, aliens who came into the country unlawfully from France, and were afterwards temporarily in British Columbia, but, within a year from their arrival from France, returned to the United States, are properly deported to France.

Lavin *v.* Le Fevre (1903), 125 Fed. Rep. 693,

The fact that an alien, within one of the prohibited classes, had three years before been in the United States and remained four months, during which he bought a farm and took out his first papers, and that, after his second arrival, he had married in the United States, will not exempt him from the operation of the statute.

In re Kleibs (1904), 128 Fed. Rep. 656.

A proceeding for the deportation of an alien under the act of March 3, 1891, 26 Stat. 1084, is, unless begun by the arrest of the alien within a year after his last entry, barred by sec. 11 of the statute.

In re Russomanno (1904), 128 Fed. Rep. 528.

The provision of the act of Aug. 18, 1894, 28 Stat. 390, declaring the decision of the appropriate immigration or customs officer, if adverse to the admission of an alien, to be final, unless reversed on appeal to the Secretary of the Treasury, precludes a judicial review of such officer's decision by habeas corpus.

In re Way Tai, 96 Fed. Rep. 484; In re Ota, 96 Fed. Rep. 487; In re Lee Yee Sing, 85 Fed. Rep. 635; In re Moses, 83 Fed. Rep. 995; United States *v.* Gin Fung, 100 Fed. Rep. 389, 40 C. C. A. 439, reversing In re Gin Fung, 89 Fed. Rep. 153; In re Neuwirth (1903), 123 Fed. Rep. 347; the Japanese Immigrant Case (1903), 189 U. S. 86.

But see, as to special cases, In re Monaco, 86 Fed. Rep. 117; In re Kornmehl, 87 Fed. Rep. 314; Lavin *v.* Le Fevre (1903), 125 Fed. Rep. 693.

The provision of the act of Aug. 18, 1894, that, "where an alien is excluded from admission into the United States," the "decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury," does not apply to aliens unlawfully in the country and arrested for deportation.

Chan Gun *v.* United States, 9 App. D. C. 290.

Nor does it apply to the case of an attempt by such an officer to constrain a shipmaster, by refusing clearance to his ship or otherwise, to pay a penalty for an alleged violation of the immigration laws.

United States *v.* Burke, 99 Fed. Rep. 895.

Nor does it preclude the court, in determining whether a penal violation of the laws was committed, from inquiring whether the alien, in respect of whom such violation is alleged, was in reality an immigrant within the meaning of the laws.

United States *v.* Burke, 99 Fed. Rep. 895.

A bond may be required conditioned on the alien immigrant's not becoming within a certain time a public charge.

United States *v.* Lipkis, 56 Fed. Rep. 427.

5. Contract Laborers.

§ 564.

The prohibition by Congress of the importation of aliens under contract to perform labor is a constitutional exercise of the power to regulate commerce.

United States *v.* Craig, 28 Fed. Rep. 795; In re Florio, 43 Fed. Rep. 114; Lees *v.* United States, 150 U. S. 476, 14 Sup. Ct. 163.

See Chy Lung *v.* Freeman, 92 U. S. 275.

As to the form of a declaration in debt for the collection of a penalty under the act of Feb. 26, 1885, see United States *v.* Craig, 28 Fed. Rep. 795; United States *v.* Borneman, 41 Fed. Rep. 751.

The manufacture of fine lace curtains, which was brought into existence in the United States by the McKinley tariff act of 1890 and has been carried on only three years, and which is still confined to two or three establishments and is apparently dependent on the protection given by the tariff, is a "new industry" within the exception, in sec. 5 of the act of 1885, to the exclusion of contract laborers.

United States *v.* Bromiley, 58 Fed. Rep. 554.

While the manufacture of "French silk stockings" was a "new industry," it was held that, as the evidence did not show that skilled labor for the purpose could not be otherwise obtained, the importation of foreign workmen constituted a violation of the act of 1885.

United States *v.* McCallum, 44 Fed. Rep. 745.

A woman engaged as a milliner is not a "professional artist" within the meaning of the act of 1885.

United States *v.* Thompson, 41 Fed. Rep. 28.

The importation of a person under contract to work as a laborer on a farm is prohibited by the act of Feb. 26, 1885, 23 Stat. 332.

United States *v.* Parsons (1904), 130 Fed. Rep. 681.

A laborer in England wrote to a manufacturer in the United States that he had heard that the latter wanted men to do a certain kind of work, and offered to "come out" with a comrade if passes were sent them. The manufacturer sent tickets, and said he could give the applicants steady work, but nothing was said on either side as to terms or compensation. Held, that this did not constitute a contract, "made previous to the importation or migration," to perform labor or service, under the act of Feb. 26, 1885.

United States *v.* Edgar, 48 Fed. Rep. 91, 4 U. S. App. 41, 1 C. C. A. 49; affirming 45 Fed. Rep. 44.

The employment by a railroad company in its office in the United States of a person who lives in Canada and comes daily to his work is not an assisting or encouraging of the "importation or migration" of an alien under the act of Feb. 26, 1885.

United States *v.* Mich. Cent. R. R. Co., 48 Fed. Rep. 365.

The act of Feb. 26, 1885, in prohibiting the immigration of aliens under contract to perform labor, does not apply to an alien engaged to come to the United States by a religious corporation and act as its rector or minister.

Church of the Holy Trinity *v.* United States (1892), 143 U. S. 457.

The court in its opinion declared that "the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor," i. e., manual labor. (Id. 465.)

This decision reversed 36 Fed. Rep. 303.

A chemist on a sugar plantation is a person of a "recognized profession," under section 5 of the act of March 3, 1891.

United States *v.* Laws (1896), 163 U. S. 258.

An expert accountant is not exempt, as a member of a "recognized learned profession," from the operation of the contract labor law.

In re Ellis (1903), 124 Fed. Rep. 637. In re Charalambis, ibid.

I am indebted to Alfred Hayes, jr., esq., of the New York bar, counsel for petitioner, for information as to the final disposition of the second case here cited. Sotirios S. Lontos Charalambis, a Greek subject, arrived at New York, May 6, 1903, as a first-cabin passenger on the steamer Trave. Questioned by the immigration officials, he stated that he expected to act as chief accountant for the Greek Currant Company (a Greek corporation), at a salary of $1,000 a year, in a branch which was to be established in the United States. He was ordered to be deported as a contract laborer. On a rehearing, before a special board of inquiry, it appeared that Lontos was a cousin of the chairman of the directors of the Greek Currant Company and a nephew of the president of the National Bank of Greece, who was the largest stockholder in the company; that, by reason of these facts, his position was peculiarly confidential and representative; and that he was also to make a special study of the banking business in the United States. The chairman of the special board expressed the view that the contract-labor law did not apply to such a case, but this view did not prevail and the order of deportation was reaffirmed. The Secretary of the Treasury on appeal, May 29, affirmed this decision, and the Acting Secretary, on June 2, refused a rehearing. On the next day the writ of habeas corpus was obtained. Lontos remaining in the custody of his counsel. The court, however, declined to review the decision of the special board, and an appeal was then taken

to the Supreme Court. Meanwhile, the Greek government had strongly and repeatedly protested. In January, 1905, after the case was placed on the day calendar of the Supreme Court, Mr. Hayes agreed to move for a dismissal of the appeal, on an assurance from the Department of Justice that his client would be admitted. An order of admission was made by the Secretary of Commerce and Labor, Jan. 21, 1905. The appeal was dismissed. (196 U. S. 643.) The proposed agency of the Greek Currant Company was established in New York, and has been conducting, as Mr. Hayes states, a large and successful wholesale business.

Certain natives of the Philippine Islands, not being professional actors, artists, or singers, within section 5 of the contract-labor law, are properly excluded, unless on other grounds they may be regarded as not within the prohibition of the law.

As the claim of these aliens for admission appears meritorious and no possible competition with American labor will be involved, and as they will be returned to their country in due time, there is no conclusive objection to the Secretary of the Treasury exercising his favorable administrative discretion in admitting them.

The law does not necessarily exclude all persons who do not come within its express exceptions if they are not manual laborers.

Syllabus, Richards, Acting At. Gen., May 29, 1899, 22 Op. 495.

Sec. 1 of the act of February 26, 1885, 23 Stat. 332, forbidding the entrance of contract laborers, embraces skilled as well as unskilled labor, and therefore includes alien "lacemakers," one of whom was also described as a "draughtsman." The distinction drawn in Church of the Holy Trinity *v.* United States, 143 U. S. 457, is that between manual labor, including the mechanical trades, on the one side, and the professions on the other.

Griggs, At. Gen., Jan. 28, 1901, 23 Op. 381.

Neither the prepaying of transportation nor the assisting or encouraging the importation of an alien is a violation of the act of Feb. 26, 1885, if there was no contract or agreement made prior to the importation or migration, binding the alien to perform labor or service.

Moller *v.* United States, 57 Fed. Rep. 490, 6 C. C. A. 459.

In 1889 the British minister in Washington informally brought to the attention of the Secretary of State a grievance of the Canadian authorities to the effect that while they understood the object of the legislation of the United States prohibiting the importation and immigration of aliens under contract to labor to be to prevent the immigration of laborers from Europe under contract at low wages,

the provisions of the law had been applied to people living along the boundary, so that at Niagara workmen living in Canada had been warned to remove their residences to the south side of the line or lose their employment.

Mr. Blaine, Sec. of State, to Mr. Windom, Sec. of Treasury, June 12, 1889, 173 MS. Dom. Let. 359.

With regard to the exclusion as contract laborers of five citizens of Switzerland, named Jacob Wahl, Pens Dubi, Otto Weber, Gustave Rucksee, and Ludwig Fischer, see Mr. Olney, Sec. of State, to Mr. Pioda, Swiss min., No. 28, Feb. 11, 1896, MS. Notes to Switzerland, I. 380.

The contract need not be an express and direct engagement to perform any particular "labor or services," but it is sufficient if the immigrant comes under an engagement to accept work which a certain person or agency is to provide.

Sir J. Pauncefote, British min., to Mr. Blaine, Sec. of State, May 22, 1889; Mr. Blaine to Sir J. Pauncefote, May 22, 1889; Sir J. Pauncefote to Mr. Blaine, June 1, 1889; Mr. Wharton, Act. Sec. of State, to Sir J. Pauncefote, July 2, 1889; Sir J. Pauncefote to Mr. Blaine, July 3, 1889; Mr. Wharton, Act. Sec. of State, to Mr. Edwardes, British chargé, July 22, 1889; For. Rel. 1889, 470, 473, 475, 476, 477.

In an action to recover a penalty under the contract-labor laws, the declaration should distinctly allege the particulars of the violation charged.

United States *v.* River Spinning Co., 70 Fed. Rep. 978; United States *v.* Gay, 80 Fed. Rep. 254.

See, however, United States *v.* Great Falls & C. Ry. Co., 53 Fed. Rep. 77.

Neither the act of Feb. 26, 1885, 23 Stat. 332, nor the act of Oct. 19, 1888, 25 Stat. 565, authorizes a private individual to maintain an action to recover for his own use, as informer, the penalty imposed for violation of the prohibition against the entry of contract laborers.

Rosenberg *v.* Union Iron Works (1901), 109 Fed. Rep. 844.

See, as to the proper form of action, United States *v.* McElroy (1902), 115 Fed. Rep. 252.

The United States district courts have, under sec. 563 R. S., concurrent jurisdiction with the circuit courts of suits for the recovery of penalties under the act of Feb. 26, 1885.

United States *v.* Whitcomb Metallic Bedstead Co., 45 Fed. Rep. 89.

The act of March 3, 1903, 32 Stat. 1213, in omitting to provide for the deportation of contract laborers, did not repeal the acts of Feb. 26, 1885, 23 Stat. 332, and March 3, 1891, 26 Stat. 1084, which cover the subject.

In re Ellis (1903), 124 Fed. Rep. 637.

6. Convicts.

§ 565.

"In the first place, the term 'convicts' covers all persons convicted, by due process of law, of any offense whatever not being a political offense. This would include many offenses not specified in any extradition treaty of the United States, and might give rise to inquiries on the part of any Government, whether having a treaty with us or not, or even positive demands for surrender with submission of legal proof of conviction, which, as the law stands, it might be difficult to decline compliance with. The idea of surrender of convicts, it seems to me, should be excluded, leaving it the clear intent of the law to enable the deportation of obnoxious criminals as a measure of social self-defense.

"In the second place, the provision that the convicts 'shall be sent back to the nations to which they belong and from whence they came,' might involve the question: To what nation does a convict belong; to that which claims him as a citizen or that which claims him as a convict under its laws? And from what nation does he come; from that of allegiance, or of conviction, or of last departure? A decision in any given case might involve a practically judicial act to be performed by persons or charitable bodies, in whom the law could not have intended to vest judicial powers.

"The statute is mandatory that the convicts it names *shall* be sent back. It would seem desirable, that in the regulations which you are directed to prescribe for such sending back, the interpretation in these regards shall be clear, and I might add that it is especially desirable that neither officers of this Government nor State boards nor private associations or individuals be held responsible for the safe conveyance of any foreign convict from the United States to the territory of the country where the crime was committed."

Mr. Frelinghuysen, Sec. of State, to Mr. Folger, Sec. of Treasury, Nov. 15, 1882, 144 MS. Dom. Let. 421.

The word "convict," as used in the act of Aug. 3, 1882, covers persons who have been convicted of felonious crimes, even after the expiration of their sentences.

Mr. Bayard, Sec. of State, to Mr. Kasson, min. to Germany, March 13, 1885, For. Rel. 1885, 406.

This instruction related to the case of one Andreas Rausch, to whom the Bavarian local authorities furnished money to enable him to emigrate to the United States, after he had undergone a five years' imprisonment for arson. Because the act of 1874 (chap. 140, sec. 5) in terms excluded only convicts who were "undergoing" their sentence, or whose sentence had been "remitted on condition of their emigration," the German Government claimed that Rausch did not come within the prohibition. Mr. Kasson, in reply, called attention to the employ-

ment in the later statute of the word "convict," which he construed as covering persons who had been convicted of felonious crimes, even though their sentence had expired. (For. Rel. 1885, 402.) His action was approved. (Id. 406.)

See, in the same sense, Mr. Bayard, Sec. of State, to Baron Fava, Ital. min., June 8, 1888, For. Rel. 1888, II. 1057.

With regard to a petition of sundry citizens of Chicago, addressed to the lord lieutenant of Ireland, asking for the release of William Naugle, a British subject, who was under sentence of imprisonment in Ireland for crime there committed, the Department of State, replying to a request for the official transmission of the petition to the British Government, said that it would not be competent for an official of the United States to aid in procuring the release of a person convicted of crime in a foreign country in order to enable him to come to the United States in violation of the act of August 3, 1882. The petition was therefore respectfully returned.

Mr. Bayard, Sec. of State, to Mr. Lawler, March 2, 1887, 163 MS. Dom. Let. 273.

It appears to be in the nature of the case impossible to distinguish by a general ruling the offences that justify from those that do not justify the exclusion of a convict from the United States. It is "not the extent of the injury done to the sufferer or to society which is the consideration in barring immigrants as convicts, but the criminal intent displayed by the offender, the object of the law being not to punish an offence either against society or an individual, but to exclude from the territory of the United States persons of criminal dispositions."

Mr. Hay, Sec. of State, to Count Vinci, Italian chargé, No. 429, Jan. 14, 1899, MS. Notes to Ital. Leg. IX. 318, quoting from a letter of the Acting Secretary of the Treasury.

An immigrant who has been convicted in the country from which he came of an assault with a deadly weapon, and who has served a sentence of imprisonment therefor, is a convict within the meaning of the immigration laws.

In re Aliano, 43 Fed. Rep. 517.

Joseph Mullett, aged 39, and James Fitzharris, aged 60, who were convicted in England of complicity in the Phoenix Park murders, arrived at New York on the steamer *Lucania*, May 26, 1900. Being arrested for deportation under sec. 1 of the act of March 3, 1891, their case was submitted to a special board of inquiry, before which they contended by counsel that the offence of which they were convicted was of a political nature. The decision of the board was

adverse to them, and they appealed to the Commissioner-General of Immigration, by whom it was decided, June 20, 1900, after conference with the Attorney-General and the Solicitor-General, that the offence of which they were convicted was murder in the ordinary sense and could not be classed as a "political offence." The appeal was therefore dismissed, and they were ordered to be deported to the country from which they came, in conformity with the law.

Mr. Larned, Act. Comr. Gen. of Immigr., to Mr. Moore, March 29, 1901, MS. See New York *Evening Post*, June 20, 1900, where it is stated that Messrs. Mullett and Fitzharris, in a letter to Mr. Fitchie, commissioner of immigration at New York, made the point that they were "pardoned" convicts, and also complained of being kept under restraint so that they had been prevented from going to church. See infra, § 604.

In the case of a Portuguese subject who, while undergoing imprisonment on conviction of poisoning her husband, escaped in November, 1882, from her prison in the Azores and fled to the United States, it was held that the act of August 3, 1882, although it authorized the return of foreign convicts to the country to which they belong and from which they come, did not operate as a general extradition act under which fugitive criminals could be delivered up to foreign governments on request, but was confined in its interpretation and execution to the limits and methods of expulsion which it expressly provided.

Moore on Extradition,' I. §§ 31, 38–40; and see the correspondence there cited.

7. Seamen.

§ 566.

"By a decision of the Treasury Department of November 2, 1899, it is held that a foreign seaman after being discharged at a United States port is simply an alien, and, as such, is subject to the provisions of section 1 of the act of Congress approved March 3, 1891, and acts amendatory thereof, as to the examination prescribed in order to determine whether he is entitled to admission into this country; and collectors of customs have been directed to take steps for the examination of discharged seamen and for the fulfillment of all the requirements of the United States immigration laws and regulations.

"This action was necessitated by the complaints made to the Treasury Department of the defeat of the purposes of the United States immigration laws resulting from the landing of aliens who were not regularly employed as members of the crew, upon the claim that as seamen they were exempt from the operation of those laws.

"In order to obviate any difficulties that might arise in enforcing the terms of the circular, I have the honor to request that your excel-

lency will be good enough to instruct the consular officers of Germany at seaports of the United States to require the masters of German vessels arriving at such ports to furnish lists, as required by United States law, of all alien persons signed on the ships' articles who are not bona fide members of the crew, including stowaways and workaways.

"Such an arrangement would insure the examination of all such alien persons in accordance with the requirements of the United States immigration laws and enable the masters of vessels upon which those who are inadmissible have come to return them immediately before expenses for maintenance, etc., which are chargeable to the vessels bringing them, have been incurred, thus inuring, as your excellency will readily see, to the advantage of the vessel as well as to that of the United States.

"Adding that I have addressed similar requests to your excellency's colleagues of the diplomatic corps in Washington, I beg," &c.

Mr. Hay, Sec. of State, to Herr Von Holleben, German ambass., Jan. 16, 1900, Notes to German Leg. XII. 456.

A Norwegian vessel entered the port of Mobile with a crew articled for a voyage to the United States and thence to Europe. One of the crew, being an alien seaman, sought to obtain his discharge at Mobile, but his application was refused. He then deserted, but under a threat of arrest returned to the vessel. He afterwards deserted again, and clearance was refused the vessel on the ground that the master had violated the immigration laws by not holding the seaman on his return to the vessel after his first absence. Held, that the seaman in question was not an alien immigrant in the sense of the immigration laws, and that clearance could not be refused.

United States *v.* Burke, 99 Fed. Rep., 895, cited by Beck, Act. At. Gen., Sept. 10, 1901, 23 Op. 521, 522; Report of the Commr. of Navigation (1902), 319.

The question of the application of the immigration laws to seamen is one to be determined according to circumstances. While they are not expressly excepted from the operation of those laws, they have in practice always been so excepted, unless where there was an evident design to defeat the objects of the statutes by immigrants shipping as sailors. The question of the applicability of those statutes, as well as the question of the liability to payment of head money under the act of August 3, 1882, depends upon the individual's intention and must be dealt with according to the evidence in each particular case. If persons ship as seamen, as a convenient way of securing passage and of gaining entrance as immigrants, then they are to be treated not only as immigrants, but also as passengers subject to the capitation

tax. If, on the contrary, they ship with the intention in good faith to continue their occupation as seamen and with no intention to make entry into the United States, they are not immigrants nor are they subject as passengers to that tax.

Beck, Act. At. Gen., Sept. 10, 1901, 23 Op. 521, and Report of the Comr. of Navigation (1902), 319, citing United States *v.* Burke, 99 Fed. Rep. 895; the case of the *Lancashire*, Treas. Dept. Dec. 21724; Griggs, At. Gen., May 8, 1899, 22 Op. 460; Miller, At. Gen., Dec. 29, 1890, 19 Op. 706.

As to the practice of desertion from British and Norwegian vessels of seamen from the Orient, chiefly Japanese, at Portland, Oregon, apperently with a view to evade the immigration laws, see Mr. Day, Sec. of State, to Sec. of Treas., June 18, 1898, 229 MS. Dom. Let. 421.

In July, 1902, the *City of Peking*, of the Pacific Mail Steamship Company, shipped a Chinese crew at Hongkong for a voyage to San Francisco and return, the return to be made by the same ship or by any other vessel of the same company in the trans-Pacific trade. On her voyage to San Francisco the *City of Peking* was disabled and was towed to Kobe, Japan, for repairs. Her crew were put on the *Gaelic*, a vessel of the British Occidental and Oriental Company, and brought to San Francisco, where the Pacific Mail Steamship Company sought to transfer them to the *Korea*, a vessel which had been substituted for the *City of Peking* for the voyage to Hongkong. It was held—

1. That the transfer of the crew of the *City of Peking* to the *Korea* might be permitted when they should have duly signed for the return voyage to Hongkong, in accordance with their contract, before a United States shipping commissioner.

2. That the alien contract labor laws had no application to Chinese or other foreign seamen.

3. That the bare landing of the seamen, if it was to be considered as a landing at all, in order that they might be reshipped on the *Korea*, would not violate the treaty and laws in relation to the exclusion of Chinese.

Hoyt, Act. At. Gen., Aug. 29, 1902, 24 Op. 111, and Report of Comr. of Navigation (1902), 317, citing 23 Op. At. Gen. 521; In re Moncan, 14 Fed. Rep. 44, 47; In re Ah Kee, 22 Fed. Rep. 519; Schermacher *v.* Yates, 57 Fed. Rep. 668; United States *v.* Burke, 99 Fed. Rep. 895, 898; In re Jam, 101 Fed. Rep. 989.

May 16, 1896, the British ambassador at Washington made a representation as to the action of the customs authorities at New Orleans in fining the master of the British steamer *Cuban* $300 for a violation of the immigration laws. It appeared that two stowaways, who had concealed themselves on the vessel in order to go to the United States, were, on being discovered at sea, allowed to sign the

ship's articles and were enrolled as members of the crew. On the arrival of the vessel at New Orleans the customs officials, becoming acquainted with the facts, ordered the men to be detained on board and to be deported, but they subsequently escaped. The Treasury Department took the view that the master had violated the laws of his own Government, with a view also to violate the laws of the United States, and that the penalty should not be remitted. The British ambassador called attention to the case of the United States vessel *Sandrey*, in which it was held that a stowaway on a British vessel, once enrolled as a member of the crew, acquired the status of a British seaman and was, in the event of desertion, to be considered as such. It was also represented that the master had not intended any breach of law, but after being ordered to deport the men, had used his utmost endeavors to prevent their landing. It was stated that it was the practice at New York, when stowaways discovered at sea in British vessels were entered on the ship's articles, to take them into custody on arrival and hold them at the expense of the ship until her departure. The Treasury Department replied that an appeal would be taken from the decision in the *Sandrey* case, which was apparently in conflict with the decision In re Vito Rullo, 43 Fed. Rep. 62, and that the masters of the British vessels bound to New Orleans seemed to consider the placing of stowaways on their crew list, in order to avoid trouble from the immigrant laws, as one of their prerogatives. As to the case at New York, it was stated that the master of the vessel declined to restrain the stowaways, under the advice of the British consul, for the reason that they were British seamen. In a subsequent communication it was stated that the number of immigrants of the prohibited classes entering New Orleans was too small to warrant an establishment similar to that maintained at New York.

For. Rel. 1896, 301–307.

VII. *EXCLUSION OF CHINESE.*

1. Treaty of 1880.

§ 567.

By Art. V. of the treaty between the United States and China, commonly called the Burlingame treaty, concluded at Washington, July 28, 1868, by Mr. Seward, on the part of the United States, and Anson Burlingame, on the part of China, the high contracting parties "cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity,

of trade or as permanent residents;" they "therefore join in reprobating any other than an entirely voluntary emigration for these purposes;" and "consequently agree to pass laws making it a penal offence for a citizen of the United States or Chinese subjects to take Chinese subjects either to the United States or to any other foreign country, or for a Chinese subject or citizen of the United States to take citizens of the United States to China or to any other foreign country without their free and voluntary consent, respectively."

"In connection with this subject I call the attention of Congress to a generally conceded fact, that the great proportion of the Chinese immigrants who come to our shores do not come voluntarily to make their homes with us and their labor productive of general prosperity, but come under contracts with head-men who own them almost absolutely. In a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes, to the disgrace of the communities where settled and to the great demoralization of the youth of those localities. If this evil practice can be legislated against, it will be my pleasure as well as duty to enforce any regulation to secure so desirable an end."

President Grant, annual message, Dec. 7, 1874, For. Rel. 1874, vii.

Sections 2158–2163 of the Revised Statutes and the act of March 3, 1875 (1 Supp. R. S. 86, ch. 141), prohibit the importation of "cooleys" and of women for immoral purposes. (S. Doc. 291, 57 Cong. 1 sess. 8.)

The application of the settled principles of international law to the Chinese in the United States is to be modified by the fact that the Chinese decline to accept these principles, leading an isolated life in the communities in which they are settled, always expecting to return to China, and never, therefore, becoming domiciled among us, and that they maintain the same system of isolation towards Americans in China, regarding them always as strangers, more or less outside of the protection of the law.

Mr. Fish, Sec. of State, to Mr. G. F. Seward, Aug. 31, 1876, MS. Inst. China, II. 429.

May 25, 1880, Mr. Evarts, Secretary of State, announced to the Chinese legation at Washington the appointment of Messrs. John F. Swift, of California, and William Henry Trescot, of South Carolina, as commissioners to act jointly with Mr. James B. Angell, minister plenipotentiary to China, to conclude a settlement by treaty of such pending matters as might be confided to them. Mr. Evarts expressed, in the name of the President, the conviction that the sending of this high commission to China could not fail to draw closer the bonds of amity between the two countries, and that the result of its

wise and conciliatory counsels, met in a like spirit of wisdom and conciliation by the enlightened statesmen of China, would build up a lasting monument of the good will and kindred interests which animated the two nations.

Messrs. Angell, Swift, and Trescot reached Peking on September 19, 1880, and found that Messrs. Pao Chün and Li Hung Tsao, men of high rank and both members of the privy council, as well as ministers in the foreign office, had been appointed as commissioners to negotiate with them.

October 1, 1880, the American commissioners laid before the Chinese commissioners a memorandum exhibiting the difficulty and dangers attending the free immigration of Chinese laborers into the United States, and the desire of the United States to revise the treaty stipulations between the two countries bearing on the subject.

The Chinese commissioners, in a memorandum of October 7, 1880, intimated that they were ready to enter upon negotiation to prohibit the four classes—coolie laborers, criminals, prostitutes, and diseased persons. The American commissioners intimated that this proposal was insufficient and asked that the Chinese Government consent to such a modification of the free immigration clauses of the Burlingame treaties as would avoid the raising of questions that might disturb the friendly relations of the two countries. To this end the American commissioners submitted a project of a treaty which, while it provided that citizens of the one country visiting or residing in the other for purposes of trade, travel, or temporary residence, or of teaching, study, or curiosity, should enjoy most-favored-nation treatment, the Government of the United States should have the right to regulate, limit, suspend, or prohibit the coming of Chinese laborers, by which term was to be understood all immigration other than that for teaching, trade, travel, study, and curiosity.

The Chinese commissioners agreed to the limitation of immigration, but not to the prohibition, and they sought to confine the limitation to California.

The American commissioners finally agreed to omit the word "prohibit," and use the words "regulate, limit, or suspend." But the right thus secured they declined to subject to conditions, saying that the Chinese Government ought to assume that the right would be exercised by the United States in a friendly and judicious manner, but that it would be entirely useless without the power of employing it when and how, in the judgment of that Government, it ought to be exercised. They also declined to admit the exception of "artisans" from the class of Chinese laborers.

The terms of the treaty were agreed upon on November 6, 1880.

For. Rel. 1880, 302; For. Rel. 1881, 168, 171, 173, 174–178, 182–188, 189, 195–198.

The treaty between the United States and China, concluded Nov. 17, 1880, provides:

"ARTICLE I. Whenever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"ARTICLE II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

For the full text of the treaty, see the U. S. Treaty Volume (1776–1887), 182.

Secs. 2158–2163, R. S., and the act of March 3, 1875 (1 Supp. R. S. 86, ch. 141), prohibit the importation of coolies, as well as of women for purposes of prostitution.

As to the exclusion of Chinese from Australia, see For. Rel. 1888, I. 340.

As to restrictive measures in Canada and Hawaii, see Mr. Bayard, Sec. of State, to Mr. Mitchell, U. S. S., March 12, 1886, 159 MS. Dom. Let. 298, enclosing copies of dispatches from Hawaii, No. 135, March 26, 1884; No. 138, April 14, 1884 (For. Rel. 1884, 281, 282); No. 20, Sept. 12, 1885 (For. Rel. 1885, 475); No. 45, Feb. 12, 1885; and of a note from the British minister of Aug. 27, 1885.

2. LEGISLATION, 1882–1893.

§ 568.

By the act of May 6, 1882, provision was made for the execution of the foregoing stipulations.

Act of 1882.

It suspended (sec. 1) for ten years the coming of Chinese laborers to the United States, provided for the deportation of any who should come in violation of the prohibition, and imposed (sec. 2) on the master of any vessel who should "knowingly bring within the United States on such vessel, and land

or permit to be landed, any Chinese laborer, from any foreign port or place," a fine of not more than $500 for each such laborer, to which might also be added a year's imprisonment. These sections, however, did not apply (sec. 3) to Chinese laborers in the United States on Nov. 17, 1880, or who should have come within ninety days after the passage of the act; but such laborers, in order to establish their right to go and come, were required (sec. 4), on departing from the United States, to obtain from the collector of customs certificates of identity entitling them to return.

It was further provided (sec. 6) that Chinese persons, other than laborers, who might be entitled to enter the United States, should be so identified "by a certificate issued under the authority of" the Chinese Government; and the forgery of such a certificate was made a misdemeanor, punishable by a fine not exceeding $1,000 and imprisonment not exceeding a year.

Masters of vessels were required (sec. 8) to furnish lists of Chinese passengers; and any vessel whose master knowingly violated any provision of the act was subject to forfeiture (sec. 10). Bringing in by land was also made (sec. 11) a misdemeanor, punishable with fine and imprisonment.

Any Chinese person who, on hearing before a "justice, judge, or commissioner of a court of the United States," was found to be unlawfully in the United States, was to be deported.

The credentials of "diplomatic and other officers" of the Chinese Government were made equivalent to the certificate required in other exempt classes (sec. 13).

It was forbidden to admit Chinese to citizenship (sec. 14). Finally, the words "Chinese laborers" were defined as including "both skilled and unskilled laborers and Chinese employed in mining."

22 Stat. 58.

With regard to the certificates under sec. 6, "the obligation imposed on the Chinese Government may be discharged in its own way and by such local officers as that Government may choose to designate and under such municipal regulations as it may deem proper to make; but the Imperial Government at Peking is the party responsible in the matter." (Mr. Frelinghuysen, Sec. of State, to Mr. Folger, Sec. of Treas., Aug. 7, 1882, 143 MS. Dom. Let. 262.)

As to the case of the niece of the wife of an officer of the Chinese consulate at New York, under sec. 13, see Mr. Olney, Sec. of State, to Sec. of Treas., Jan. 8, 1897, 215 MS. Dom. Let. 127.

As to the return of Chinese laborers, see In re Shong Toon, 21 Fed. Rep. 386; In re Tom Mun, 47 Fed. Rep. 722.

For indictments for aiding and abetting unlawful entry, see United States *v.* Trumbull, 46 Fed. Rep. 755; United States *v.* Wilson, 60 id. 890.

For a prosecution under sec. 2, *supra*, see In re Ah Sing, 7 Sawy. 536. See, also, In re Ah Tie, id. 542.

The finding of a United States commissioner that a Chinese person is unlawfully in the United States is competent evidence to justify a grand jury in finding an indictment for bringing such person into the United States in violation of the act of 1882. (United States *v.* Hilis (1903) 124 Fed. Rep. 831.)

For proceedings against vessels, see United States *v.* The Geo. E. Wilton, 43 Fed. Rep. 606; The Haytian Republic, 154 U. S. 118.

Act of 1884.

By the act of July 5, 1884, sec. 1 of the act of 1882 was amended so as to make it unlawful for any Chinese laborer to come to the United States "from any foreign port or place."

Sec. 4 was amended so as to provide (1) that the certificate of identity of a laborer, instead of being "prima facie" evidence, should be "the only evidence permissible to establish his right of reentry;" (2) that every Chinese person of the exempt classes claiming a right to enter should "obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject," and that the certificate thus required should be viséed by the American diplomatic representative "in the foreign country from which such certificate issues," or by the American consular representative at the port or place of departure; and, while it was made prima facie evidence of the facts stated in it, it was declared to be "the sole evidence permissible" of the individual's exempt character.

Various other amendments of the act of 1882 were made, and it was expressly declared that the provisions of the act should "apply to all subjects of China and Chinese, whether subjects of China or any other foreign power."

23 Stat. 115.

For an instance of the issuance of a certificate of indentity by the Tsung-li yâmen, see For. Rel. 1887, 223; For. Rel. 1890, 177.

The act of May 6, 1882, 22 Stat. 58, as amended by the act of July 5, 1884, 23 Stat. 115, 117, was continued in force for ten years by the act of May 5, 1892, 27 Stat. 25, and was further continued in force by the act of May 5, 1902.

Sims *v.* United States (1903), 121 Fed Rep. 515, 55 C. C. A. 92.

As to the requisites of an indictment for violation of the act of July 5, 1884, see ibid.

Section 12 of the act of May 6, 1882, 22 Stat. 58, 61, as amended by the act of July 5, 1884, 23 Stat. 115, 117, 118, and continued in force by the act of May 5, 1892, 27 Stat. 25, is not inconsistent with and is not abrogated by the treaty proclaimed Dec. 8, 1894.

United States *v.* Lee Yen Tai (1902), 185 U. S. 213; affirmed in Chin Bak Kan *v.* United States (1902), 186 U. S. 193.

The same reasoning applies to sec. 6 of the act of 1882. (Lee Lung *v.* Patterson (1902), 186 U. S. 168.)

Chinese subjects of the permitted class, coming into the United States from China, must produce the certificate of the Government of China.

Privileged Chinese subjects resident within a foreign jurisdiction in order to gain admission into the United States must have a certificate issued by the foreign government and not by the officials of China.

Boyd, Acting At. Gen., Aug. 31, 1898, 22 Op. 201.

Unratified treaty of 1888.

"A treaty was concluded by Secretary Bayard and the Chinese minister under date of March 12, 1888. By this arrangement the United States secured the cooperation of China in the main purpose and object of the treaty, which is stated in the first article to be the absolute prohibition of Chinese laborers from coming into the United States for twenty years, and unless notice should be given by either Government six months before the expiration of that period it should remain in force for another like period of twenty years. To this prohibition the only exception made was that of any Chinese laborer who had a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Mr. Bayard says, in making his report of the negotiations to the President, that 'considerations of humanity and justice require these exceptions to be made, for no law should overlook the ties of family, and the wages of labor are entitled to just protection.'

"The treaty did not affect the right at present enjoyed of Chinese subjects being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but stipulated that in order to entitle them to admission they must produce a certificate from their Government or from the Government of the country where they last resided, viséed by the diplomatic or consular representative of the United States in the country or port whence they departed."

Treaty Volume (1776–1887), 1259–1260.

President Cleveland, in his special message of Oct. 1, 1888, giving his reasons for approving the law of that date for the absolute exclusion of Chinese laborers said, with reference to the incidental exclusion of any to whom debts might be due in the United States:

"And it is here pertinent to remark that everywhere in the United States laws for the collection of debts are equally available to all creditors without respect to race, sex, nationality, or place of residence, and equally with the citizens or subjects of the most favored nations and with the citizens of the United States recovery can be had in any court of justice in the United States by a subject of China, whether of the laboring or any other class.

"No disability accrues from nonresidence of a plaintiff, whose claim can be enforced in the usual way by him or his assignee or attorney in our courts of justice.

"In this respect it can not be alleged that there exists the slightest discrimination against Chinese subjects, and it is a notable fact that large trading firms and companies and individual merchants and traders of that nation are profitably established at numerous points throughout the Union, in whose hands every claim transmitted by an absent Chinaman of a just and lawful nature could be completely enforced." (S. Ex. Doc. 273, 50 Cong. 1 sess. 4.)

Act of Sept. 13, 1888.

By the act of Sept. 13, 1888, provision was made for the carrying into effect of the treaty signed at Washington, March 12, 1888, the ratifications of which it was supposed, when the act was passed, would duly be exchanged. The act contained, among others, the following provisions:

"SEC. 5. That from and after the passage of this act, no Chinese laborer in the United States shall be permitted, after having left, to return thereto, except under the conditions stated in the following sections.

"SEC. 6. That no Chinese laborer within the purview of the preceding section shall be permitted to return to the United States unless he has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. The marriage to such wife must have taken place at least a year prior to the application of the laborer for a permit to return to the United States, and must have been followed by the continuous cohabitation of the parties as man and wife.

"If the right to return be claimed on the ground of property or of debts, it must appear that the property is bona fide and not colorably acquired for the purpose of evading this act, or that the debts are unascertained and unsettled, and not promissory notes or other similar acknowledgments of ascertained liability.

"SEC. 7. That a Chinese person claiming the right to be permitted to leave the United States and return thereto on any of the grounds stated in the foregoing section, shall apply to the collector of customs of the district from which he wishes to depart at least a month prior to the time of his departure, and shall make on oath before the said collector a full statement descriptive of his family, or property, or debts, as the case may be, and shall furnish to said collector such proofs of the facts entitling him to return as shall be required by the rules and regulations prescribed from time to time by the Secretary of the Treasury, and for any false swearing in relation thereto he shall incur the penalties of perjury. He shall also permit the collector to take a full description of his person, which description the collector shall retain and mark with a number. And if the collector, after hearing the proofs and investigating all the circumstances of the case, shall decide to issue a certificate of return, he shall at such time

and place as he may designate, sign and give to the person applying a certificate containing the number of the description last aforesaid, which shall be the sole evidence given to such person of his right to return. If this last-named certificate be transferred, it shall become void, and the person to whom it was given shall forfeit his right to return to the United States. The right to return under the said certificate shall be limited to one year: but it may be extended for an additional period, not to exceed a year, in cases where, by reason of sickness or other cause of disability beyond his control, the holder thereof shall be rendered unable sooner to return, which facts shall be fully reported to and investigated by the consular representative of the United States at the port or place from which such laborer departs for the United States, and certified by such representative of the United States to the satisfaction of the collector of customs at the port where such Chinese person shall seek to land in the United States, such certificate to be delivered by said representative to the master of the vessel on which he departs for the United States. And no Chinese laborer shall be permitted to reenter the United States without producing to the proper officer of the customs at the port of such entry the return certificate herein required. A Chinese laborer possessing a certificate under this section shall be admitted to the United States only at the port from which he departed therefrom, and no Chinese person, except Chinese diplomatic or consular officers, and their attendants, shall be permitted to enter the United States except at the ports of San Francisco, Portland, Oregon, Boston, New York, New Orleans, Port Townsend, or such other ports as may be designated by the Secretary of the Treasury.

"SEC. 8. That the Secretary of the Treasury shall be, and he hereby is, authorized and empowered to make and prescribe, and from time to time to change and amend such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles second and third of the said treaty between the United States and the Empire of China, the rights therein mentioned, and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles. And he is hereby further authorized and empowered to prescribe the form and substance of certificates to be issued to Chinese laborers under and in pursuance of the provisions of said articles, and prescribe the form of the record of such certificate and of the proceedings for issuing the same, and he may require the deposit, as a part of such record, of the photograph of the party to whom any such certificate shall be issued.

"SEC. 9. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land,

or permit to be landed any Chinese laborer or other Chinese person, in contravention of the provisions of this act, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished with a fine of not less than five hundred dollars nor more than one thousand dollars, in the discretion of the court, for every Chinese laborer or other Chinese person so brought, and may also be imprisoned for a term of not less than one year, nor more than five years, in the discretion of the court.

"SEC. 10. That the foregoing section shall not apply to the case of any master whose vessel shall come within the jurisdiction of the United States in distress or under stress of weather, or touching at any port of the United States on its voyage to any foreign port or place. But Chinese laborers or persons on such vessel shall not be permitted to land, except in case of necessity, and must depart with the vessel on leaving port.

"SEC. 11. That any person who shall knowingly and falsely alter or substitute any name for the name written in any certificate herein required, or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in any such certificate, and any person other than the one to whom a certificate was issued who shall falsely present any such certificate, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, and imprisoned in a penitentiary for a term of not more than five years.

"SEC. 12. That before any Chinese passengers are landed from any such vessel, the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise.

"SEC. 13. That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within

ten days from such conviction, appeal to the judge of the district court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and it may be executed by the marshal of the district, or any officer having authority of a marshal under the provisions of this section. And in all such cases the person who brought or aided in bringing such person into the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority in reference to carrying out the provisions of this act, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers.

"SEC. 14. That the preceding sections shall not apply to Chinese diplomatic or consular officers or their attendants, who shall be admitted to the United States under special instructions of the Treasury Department, without production of other evidence than that of personal identity."

By sec. 15 the acts of 1882 and 1884 were to stand repealed on the ratification of the pending treaty.

25 Stat. 476.

So much of the act of Sept. 13, 1888, as provides for arrest and trial before a commissioner, or on appeal to a federal judge, merely upon the filing of an affidavit, is unconstitutional, in that it permits the arrest and trial of persons who may not be Chinese, without compliance with the constitutional guarantees. (United States *v.* Coe (1904), 128 Fed. Rep. 199.)

Sec. 13 of the act was held to be effective, although the treaty was not ratified. (United States *v.* Jim, 47 Fed. Rep. 431; In re Mah Wong Gee, Id., 433; United States *v.* Gee Lee, 50 Fed. Rep. 271.)

The 5th section and succeeding sections took effect, though the treaty was not ratified. (United States *v.* Chong Sam, 47 Fed. Rep. 878.)

Contra, United States *v.* Gee Lee, 50 Fed. Rep. 271; United States *v.* Loo Way, 68 Fed. Rep. 475. See also People *v.* Ah Teung, 92 Cal. 421, 28 Pac. Rep. 577.

July 7, 1899, the Solicitor of the Treasury held that sections 5–14, inclusive, became immediately operative on the passage of the act. (S. Doc. 291, 57 Cong. 1 sess. 19, 39.)

Section 12 did not become effective. (Li Sing *v.* United States (1901), 180 U. S. 486, 488–490.)

These sections are declared to be continued in force by the act of April 29, 1902.

Chinese laborers who depart from the United States have the right to return only on compliance with sections 5, 6, and 7 of the act of Sept. 13, 1888, 25 Stat. 477, continued in force by subsequent statutes. (United States *v.* Tuck Lee (1903), 120 Fed. Rep. 989.)

For correspondence as to the rejected treaty of March 12, 1888, see For. Rel. 1888, 1. 356, 371, 381, 388, 392, 396, 403.

A sentence by a commissioner, of deportation under sec. 13 of the act of Sept. 13, 1888, is conclusive against the person's right to remain, subject to the appeal allowed thereunder to the district judge. (In re Tsu Tse Mee, 81 Fed. Rep. 702.)

For other decisions under sec. 13, see United States *v.* Lee Ching Goon, 60 Pac. Rep. 692; United States *v.* See Ho How, 100 Fed. Rep. 730; United States *v.* Lee Seick, 100 Fed. Rep. 398, 40 C. A. 448.

The right of appeal from a commissioner to a district court under sec. 13 is not taken away by sec. 3 of the act of May 5, 1892. (United States *v.* Wong Dep Ken, 57 Fed. Rep. 203.)

An appeal by a Chinese person, taken under section 13 of the act of September 13, 1888, to a judge of a district court, from the judgment of the commissioner, does not vacate, but merely suspends the judgment of the commissioner and proceedings thereunder until the appeal is dismissed. In case of an appeal to a higher tribunal for review, the original judgment stands in suspense until the appellate court, by a judgment of its own, shall supersede it. (Griggs, At. Gen., Feb. 11, 1899, 22 Op. 340.)

An appearance by attorney and notice of an appeal from a commissioner's order of deportation is sufficient under section 13 of the act of Sept. 13, 1888, to preserve appellant's right to a review. (Chow Loy *v.* United States (1901), 112 Fed. Rep. 354. See In re Chow Loy (1901), 110 Fed. Rep. 952.)

An appeal lies to the Circuit Court of Appeals from the judgment of a district court affirming the order of a commissioner for the deportation of a Chinese person under section 13 of the act of Sept. 13, 1888. (Tsoi Yii *v.* United States (1904), 129 Fed. Rep. 585.)

The appeal allowed by sec. 13 of the act of Sept. 13, 1888, 25 Stat. 476, to the "judge" of the district court is held to mean an appeal to the district court. (The United States, Petitioner (1904), 194 U. S. 194.)

Act of Oct. 1, 1888.

By the act of Oct. 1, 1888, it was made unlawful for any Chinese laborer "who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States;" and all certificates of identity under sections 4 and 5 of the act of 1882 were declared to be void, and the issuance of such certificates in the future was forbidden.

25 Stat. 504.

Repealed by the convention of March 17, 1894. (21 Op. At. Gen. 68.)

For Chinese protest against and correspondence concerning the act of Oct. 1, 1888, see For. Rel. 1889, 115–150; For. Rel. 1890, 177, 206, 210–219, 228–230.

The validity of the act was upheld in the Chinese Exclusion Case (Chae Chan Ping *v.* United States), 130 U. S. 581, 9 S. Ct. 623.

See, also, Nishimura Ekiu *v.* United States, 142 U. S. 651; Fong Yue Ting *v.* United States, 149 U. S. 698; Lem Moon Sing *v.* United States, 158 U. S. 538.

The President, in approving the act of Oct. 1, 1888, communicated to Congress a review of the situation. Referring to the treaty signed on March 12, 1888, he stated that on May 12, 1888, the Chinese minister signified his approval of two amendments which the Senate had on the 7th of the month engrafted upon it, "as they did not alter the terms of the treaty," and that they were at once telegraphed to China, and that the act of Sept. 13, 1888, was approved in the confident expectation that the treaty, which it was designed to supplement, would soon be ratified. Continuing, the President said:

"No information of any definite action upon the treaty by the Chinese Government was received until the 21st ultimo—the day the bill which I have just approved was presented to me—when a telegram from our minister at Peking to the Secretary of State announced the refusal of the Chinese Government, to exchange ratifications of the treaty, unless further discussion should be had with a view to shorten the period stipulated in the treaty for the exclusion of Chinese laborers, and to change the conditions agreed on, which should entitle any Chinese laborer who might go back to China to return again to the United States.

"By a note from the chargé d'affaires *ad interim* of China to the Secretary of State, received on the evening of the 25th ultimo (a copy of which is herewith transmitted, together with the reply thereto), a third amendment is proposed, whereby the certificate, under which any departing Chinese laborer alleging the possession of property in the United States would be enabled to return to this country, should be granted by the Chinese consul instead of the United States collector, as had been provided in the treaty.

"The obvious and necessary effect of this last proposition would be practically to place the execution of the treaty beyond the control of the United States.

"Article I, of the treaty proposed to be so materially altered, had, in the course of the negotiations, been settled in acquiescence with the request of the Chinese plenipotentiary, and to his expressed satisfaction.

"In 1886, as appears in the documents heretofore referred to, the Chinese foreign office had formally proposed to our minister the strict exclusion of Chinese laborers from the United States without limitation; and had otherwise and more definitely stated that no term whatever for exclusion was necessary, for the reason that China would of itself take steps to prevent its laborers from coming to the United States.

"In the course of the negotiations that followed, suggestions from the same quarter led to the insertion in behalf of the United States of a term of 'thirty years,' and this term, upon the representations

of the Chinese plenipotentiary, was reduced to 'twenty years,' and finally so agreed upon.

"Article II. was wholly of Chinese origination, and to that alone owes its presence in the treaty. . . .

"The admitted and paramount right and duty of every government to exclude from its borders all elements of foreign population which for any reason retard its prosperity or are detrimental to the moral and physical health of its people, must be regarded as a recognized canon of international law and intercourse. China herself has not dissented from this doctrine, but has, by the expressions to which I have referred, led us confidently to rely upon such action on her part in cooperation with us as would enforce the exclusion of Chinese laborers from our country.

"This cooperation has not, however, been accorded us. Thus from the unexpected and disappointing refusal of the Chinese Government to confirm the acts of its authorized agent and to carry into effect an international agreement, the main feature of which was voluntarily presented by that Government for our acceptance, and which had been the subject of long and careful deliberation, an emergency has arisen, in which the Government of the United States is called upon to act in self-defense by the exercise of its legislative power. I can not but regard the expressed demand on the part of China for a reexamination and renewed discussion of the topics so completely covered by mutual treaty stipulations, as an indefinite postponement and practical abandonment of the objects we have in view, to which the Government of China may justly be considered as pledged."

Under the circumstances the President stated that he deemed it his duty to join with Congress in dealing with the subject by legislation; but he recommended that provision should be made for the admission of such Chinese laborers as were actually on their way back to the United States before the law was approved, if they presented certificates lawfully obtained, entitling them to return.

President Cleveland, special message, Oct. 1, 1888, S. Ex. Doc. 273, 50 Cong. 1 sess.

Referring, in the course of the message, to the use of fraudulent certificates, the President said: "The courts in the Pacific States have been for some time past overwhelmed by the examination of cases of Chinese laborers who are charged with having entered our ports under fraudulent certificates of return, or seek to establish by perjury the claim of prior residence."

"In a message accompanying my approval, on the first day of October last, of a bill for the exclusion of Chinese laborers, I laid before Congress full information and all correspondence touching the negotiation of the treaty with China, concluded at this Capital on the 12th day of March, 1888, and which, having been confirmed by the

Senate with certain amendments, was rejected by the Chinese Government. This message contained a recommendation that a sum of money be appropriated as compensation to Chinese subjects who had suffered injuries at the hands of lawless men within our jurisdiction. Such appropriation having been duly made, the fund awaits reception by the Chinese Government.

"It is sincerely hoped that by the cessation of the influx of this class of Chinese subjects, in accordance with the expressed wish of both Governments, a cause of unkind feeling has been permanently removed."

President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, I. xiii.

Act of 1892.

By the act of May 5, 1892, the legislation of 1882 being about to expire, all laws in force in relation to the exclusion of Chinese were continued in force for another ten years. The act also contained the following provisions:

"SEC. 2. That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: *Provided*, That in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

"SEC. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.

"SEC. 4. That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States, as hereinbefore provided.

"SEC. 5. That after the passage of this act on an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay.

"SEC. 6. And it shall be the duty of all Chinese laborers within the limits of the United States, at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer, within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested, by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly to the satisfaction of said judge, that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases, the cost of said arrest and trial shall be in the discretion of the court. And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right may apply for and receive the same without charge."

Section 7 empowered the Secretary of the Treasury to make rules and regulations for the enforcement of the act, while sections 8 and 9 related to other matters of detail.

27 Stat. 25.

For Chinese protest against, and correspondence concerning, the act of May 5, 1892, see For. Rel. 1892, 106, 118, 119, 123, 126, 134–138, 145, 147–155, 158.

For complaints as to the action of the customs authorities at San Francisco, see For. Rel. 1892, 139; at Whidbey Island, id. 138, 140.

Sec. 3 of the act applies to a Chinese person who, in seeking to enter and remain in the United States, alleges birth therein. (In re Jew Wong Loy, 91 Fed. Rep. 240. See In re Li Sing, 30 C. C. A. 451.)

Sec. 3 of the act is constitutional. (Li Sing *v.* United States, 180 U. S. 486; United States *v.* Chun Hoy, 111 Fed. Rep. 899.)

A commissioner has jurisdiction to make an order of deportation under sec. 6. (In re Tsu Tse Mee, 81 Fed. Rep. 562; In re Wong Fock, 81 Fed. Rep. 558.)

So, also, a justice of the supreme court of the District of Columbia. (Chan Gun *v.* United States, 9 App. D. C. 290.)

A formal complaint on oath is not a prerequisite to jurisdiction. (Chan Gun *v.* United States, 9 App. D. C. 290.)

As to the contents of the judgment of deportation, see In re Tsu Tse Mee, 81 Fed. Rep. 562; In re Gut Lun, 83 Fed. Rep. 141.

Where Chinese persons unlawfully came into the United States from British Columbia, it was held that they should under the act of May 5, 1892, § 2, be deported to China, there being no evidence that they were "citizens or subjects" of British Columbia and neither of them claiming to be such, although there was proof that one of them had lived there three years and the other a year and a half. (United States *v.* Lee Kee (1902), 116 Fed. Rep. 612.)

The duties of commissioners are judicial rather than ministerial, and the Treasury Department is not authorized to instruct them as to the discharge of their duties. (Griggs, At. Gen., March 7, 1900, 23 Op. 40.)

A commissioner can not be required to act in face of the refusal of the Treasury to pay his lawful fees and disbursements. (United States *v.* Lee Lip, 100 Fed. Rep. 842.)

A Chinese person shown to be entitled to remain in the United States can not be deported because he refuses to be sworn to testify at the request of the prosecution. (Ex parte Sing, 82 Fed. Rep. 22.)

Sec. 4, supra, so far as it contemplates imprisonment at hard labor without trial by jury or presentment by a grand jury, is unconstitutional. (Wong Wing *v.* United States (1896), 163 U. S. 228, 16 S. Ct. 977, citing Yick Wo *v.* Hopkins, 118 U. S. 356, 359. See, also, United States *v.* Wong Sing, 51 Fed. Rep. 79; United States *v.* Wong Dep Ken, 57 Fed. Rep. 206.)

But, deportation under the act is not a punishment for crime, in the sense of the Constitution. (United States *v.* Wong Dep Ken, 57 Fed. Rep. 206; In re Tsu Tse Mee, 81 Fed. Rep. 562.)

The order of deportation need not explicitly refer to the act under which the person ordered to be deported is adjudged to be unlawfully in the United States. (In re Tsu Tse Mee, 81 Fed. Rep. 562.)

A Chinaman who failed to show one of the prescribed excuses for not having procured a certificate under sec. 6, is liable to deportation, though he show the requisite residence. (In re Ny Look, 56 Fed. Rep. 81. See, also, United States *v.* Williams, 83 id. 997.)

The throwing upon the accused Chinese person of the burden of proof, is constitutional. (United States *v.* Wong Dep Ken, 57 Fed. Rep. 206; United States *v.* Williams, 83 Fed. Rep. 997; In re Li Sing, 86 id. 896; Li Sing *v.* United States (1901), 180 U. S. 486; United States *v.* Sing Lee (1903), 125 Fed. Rep. 627.)

The burden of proving that the person arrested is a Chinese person rests on the United States. (United States *v.* Hung Chang, 126 Fed. Rep. 400.)

A district judge will assume that there are funds for the enforcement of the act of 1892. (In re Lintner, 57 Fed. Rep. 587; United States *v.* Chum Shang Yuen, id. 588.)

Sec. 6 does not authorize the deportation of a Chinese woman who, having lawfully entered the United States, was, prior to her arrest, married to a citizen of the United States. (Tsoi Sim *v.* United States (1902), 116 Fed. Rep. 920.)

A Chinese laborer having a certificate of residence under the act of May 5, 1892, is entitled to remain in the United States, though he has no certificate under the amendatory act of Nov. 3, 1893. (United States *v.* Jung Jow Tow (1901), 110 Fed. Rep. 154. See, also, In re Chin Ark Wing (1902), 115 Fed. Rep. 412.)

A judgment of deportation for being without a certificate of registration under § 6 of the act of May 5, 1892, will not be disturbed, unless it be satisfactorily proved that the appellant was a resident of the United States at the date of the act. (Quong Sue *v.* United States (1902), 116 Fed. Rep. 316. See, also, Yee *v.* N'Goy (1902), 116 Fed. Rep. 333.)

The provision of section 6 of the act of 1892, that Chinese laborers without certificates may be "taken before a United States judge," is satisfied by proceedings before "a justice, judge, or commissioner." (Chin Bak Kan *v.* United States (1902), 186 U. S. 193, 199, citing and approving Fong Mey Yuk *v.* United States, 113 Fed. Rep. 898.)

The fact that a Chinaman, who had never registered as a laborer or a merchant, had been permitted to live in the United States nineteen years without molestation was held to be insufficient to raise a presumption that he came to the United States before the passage of the Chinese exclusion laws. (United States *v.* Ah Chung (1904), 130 Fed. Rep. 885.)

Neither § 3 of the act of May 5, 1892, 27 Stat. 25, putting on Chinese laborers the burden of proving their right to remain in the United States, nor § 6 of the same act, requiring Chinese laborers to obtain certificates of residence, is repealed by § 1 of the act of April 29, 1902, 32 Stat. 176, continuing all laws then in force so far as they were "not inconsistent with treaty obligations." (Ah How *v.* United States (1904), 193 U. S. 65.)

"The legislation of last year, known as the Geary law, requiring the registration of all Chinese laborers entitled to residence in the United States, and the deportation of all not complying with the provisions of the act within the time prescribed, met with much opposition from Chinamen in this country. Acting upon the advice of eminent counsel that the law was unconstitutional, the great mass of Chinese laborers, pending judicial inquiry as to its validity, in good faith declined to apply for the certificates required by its provisions. A test case upon proceeding by *habeas corpus* was brought before the Supreme Court, and on May 15, 1893, a decision was made by that tribunal sustaining the law.

"It is believed that under the recent amendment of the act extending the time for registration, the Chinese laborers thereto entitled, who desire to reside in this country, will now avail themselves of the renewed privilege thus afforded of establishing by lawful procedure their right to remain, and that thereby the necessity of enforced deportation may to a great degree be avoided."

President Cleveland, annual message, Dec. 4, 1893, For. Rel. 1893, iv.

The correspondence in relation to the legislative proceedings which resulted in the act of May 5, 1892, commonly called the "Geary Act," may be found in S. Ex. Doc. 54, 52 Cong. 2 sess.

After the passage of the act the Chinese minister applied to the Government of the United States to expedite the determination of its constitutionality by the Supreme Court of the United States. (For. Rel. 1893, 244–247.) He also asked that measures be taken for the protection of the Chinese against evil-disposed persons when the act should take effect. (For. Rel. 1893, 247–249.) At the same time, the United States asked that measures be taken for the protection of American citizens in China against possible outbreaks. (For. Rel. 1893, 252.)

Correspondence touching the enforcement of the act may be found in Foreign Relations 1893, 251–265.

The power of Congress to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to remain in the country has been made by Congress to depend.

Congress has the right to provide a system of registration and identification of any class of aliens within the country, and to take all proper means to carry out that system.

Fong Yue Ting *v.* United States (1893), 149 U. S. 698. See, also, Lem Moon Sing *v.* United States, 158 U. S. 538; Li Sing *v.* United States, 180 U. S. 486; Fok Yung Yo *v.* United States (1902), 185 U. S. 296, 302.

As to the invalidity of State laws and municipal ordinances on the subject, see In re Lee Sing, 43 Fed. Rep. 359, declaring invalid an ordinance of the city of San Francisco requiring all Chinese inhabitants to remove to a certain quarter; and Ex parte Ah Cue, 35 Pac. Rep. 556, holding invalid an act of the California legislature of March 20, 1891, to prevent the coming of Chinese into the State and to prescribe conditions of residence and travel.

Act of 1893.

By the act of Nov. 3, 1893, the time within which Chinese laborers in the United States were permitted to register was fixed at six months from that date; for the phrase "at least one credible white witness," in sec. 6 of the act of 1892, there was substituted "at least one credible witness other than Chinese;" there was excluded from registration any Chinese person who had been convicted in the United States of felony; and the certificate of residence was required to contain the applicant's photograph.

28 Stat. 7. See infra, pp. 220, 227.

See Am. Law Rev. for Sept.–Oct., 1894, XXVIII. 734.

By the act of Dec. 7, 1893, 28 Stat. 575, collectors are not entitled to fees for registering Chinese. (S. Doc. 291, 57 Cong. 1 sess. 30.)

The finding of a commissioner that a Chinaman is not lawfully in the United States will not be disturbed on appeal, unless clearly against the weight of evidence. (United States *v.* Chung Fung Sun, 63 Fed. Rep. 261.)

The act of 1893 applied to the return to the United States of a merchant who departed before the act was passed. (United States *v.* Loo Way, 68 Fed Rep. 475. See, also, Lew Jim *v.* United States, 66 id. 953, 14 C. C. A. 281; Lal Moy *v.* United States, 66 Fed. Rep. 955, 14 C. C. A. 283.)

The requirement that the mercantile character of a Chinaman who seeks to reenter the United States shall be established by the testimony of two credible witnesses other than Chinese does not apply to an allegation of American nativity, which is to be determined by the ordinary rules of evidence. (United States *v.* Lee Seick, 100 Fed. Rep. 398, 40 C. C. A. 448; United States *v.* Jue Wy, 103 Fed. Rep. 795.)

See, further, as to proof of American nativity, In re Louie You, 97 Fed. Rep. 580; United States *v.* Lau Sun Ho, 85 Fed. Rep. 422; United States *v.* Chu Chee, 87 Fed. Rep. 312; Gee Fook Sing *v.* United States, 49 Fed. Rep. 146, 7 U. S. App. 27, 1 C. C. A. 211; Lem Hing Dun *v.* United States, 49 Fed. Rep. 148, 7 U. S. App. 31, 1 C. C. A. 210; McKenna, At. Gen., Nov. 19, 1897, 21 Op. 614.

A Chinese laborer convicted of felony is not entitled to register under the act of 1893. (United States *v.* Chew Cheong, 61 Fed. Rep. 200.)

Imprisonment for crime is not an excuse for failure to register. (United States *v.* Ah Poing, 69 Fed. Rep. 972.)

The provision that a Chinese laborer may, on establishing one of the specified excuses, obtain a certificate of residence on "paying the cost," does not refer to the cost of his arrest and trial. (United States *v.* Tye, 70 Fed. Rep. 318.)

A Chinese person can not, pending the execution of the order for his deportation, obtain bail. (Chan Gun *v.* United States, 9 App. D. C. 290.)

A Chinese laborer does not lose his residence in the United States by spending a night in Mexico. (United States *v.* Lee Yung, 63 Fed. Rep. 520.)

A certificate of residence is prima facie evidence of the holder's right to remain, and of this right he can be deprived only upon clear proof that he has forfeited it. (Jew Sing *v.* United States, 97 Fed. Rep. 582; In re See Ho How, 101 id. 115.)

The provision of the act of Nov. 3, 1893, 28 Stat. 8, that a Chinese person ordered to be deported shall, pending the execution of the order, remain in the custody of the marshal without bail, applies only where the order is final, and does not preclude bail pending an appeal. (In re Ah Tai (1903), 125 Fed. Rep. 795 See, also, In re Lum Poy (1904), 128 Fed. Rep. 974.)

An appeal by the United States does not lie from the order of a commissioner discharging a Chinese person from arrest for being unlawfully in the country. (United States *v.* Mar Ying Yuen (1903), 123 Fed. Rep. 159.)

Where a Chinese person has been ordered to be deported by a commissioner in one district, a proceeding for his deportation in another district will be dismissed. (United States *v.* Lucy Guey Auck (1902), 115 Fed. Rep. 252.)

The act of Nov. 3, 1893, amendatory of sec. 2 of the act of May 5, 1892, in declaring that the word "laborer" should include "both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in

taking, drying or otherwise preserving shell or other fish for home consumption or exportation," did not limit the meaning and operation of the word so as to exclude any persons who were laborers within the meaning of the treaty of 1880; and in the latter sense a Chinese prostitute is to be considered as a laborer. (Lee Ah Yin *v.* United States (1902), 116 Fed. Rep. 614.)

In March, 1894, the Chinese minister at Washington complained that Chinese persons were required to travel with their witnesses long distances and at great expense, to be registered under the McCreary law, and he stated that it would be impossible for all Chinese persons to register before the 3rd of the following May. It appears that in making regulations for the enforcement of the law, a provision was adopted which permitted deputy collectors to receive applications and affidavits of witnesses so as to enable Chinese laborers to register with as little inconvenience as possible. (For. Rel. 1894, 160–166.)

In May, 1894, the Attorney-General of the United States, with a view to protect from unjust liability the masters of ships having on board Chinese who claimed the right to land, issued general instructions to the United States marshal and the United States district attorney for Oregon in regard to preventing the risk of escape of such Chinese on the way from vessels to the court-house under writs of habeas corpus. (For. Rel. 1894, 257–258.)

3. Treaty of 1894.

§ 569.

By the treaty signed at Washington, March 17, 1894, it was agreed (Art. I.) that for a period of ten years, from the date of the exchange of ratifications, the coming of Chinese laborers to the United States, except under the conditions specified in the treaty, should be "absolutely prohibited."

The treaty also contained the following stipulations:

"Article II. The preceding article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Nevertheless every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited. And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States may be extended for an additional period, not to exceed one year, in cases where by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be

rendered unable sooner to return—which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required.

"Article III. The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided visé by the diplomatic or consular representative of the United States in the country or port whence they depart.

"It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

"Article IV. In pursuance of Article III. of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880 (the 15th day of the tenth month of Kwanghsu, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III., to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

"Article V. The Government of the United States, having by an act of the Congress, approved May 5, 1892, as amended by an act approved November 3, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first-named act to be registered as in said acts provided, with a view of affording them better protection, the Chinese Government will not object to the enforcement of such acts, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled (not merchants as defined by said acts of Congress), citizens of the United States in China, whether residing within or without the treaty ports.

"And the Government of the United States agrees that within twelve months from the date of the exchange of the ratifications of this convention, and annually, thereafter, it will furnish the Government of China registers or reports showing the full name, age, occupation, and number or place of residence of all other citizens of the United States, including missionaries, residing both within and without the treaty ports of China, not including, however, diplomatic and other officers of the United States residing or travelling in China upon official business, together with their body and household servants."

The ratifications of this convention were exchanged at Washington, December 7, 1894.

January 24, 1904, the Chinese Government gave notice of the termination of the treaty on December 7, 1904.[a]

The stipulation of Art. II. of the treaty with China of 1894, which permits a Chinese laborer to return to the United States "who has a lawful wife, child, or parent in the United States, or property therein of the value of $1,000, or debts of like amount due him and pending settlement," refers to the condition of the laborer at the time of his return, and a certificate as to the existence of such a condition of things at the time of his departure does not preclude an examination on his return.

In re Ong Lung (1903), 125 Fed. Rep. 814.

The phrase "Chinese consul at the port of departure," used in Art. II. of the convention of 1894, means the consul representing the Chinese Government at the place where the laborer leaves the United States. The words "port" and "land," as used in the convention, do not limit the right to return to Chinese traveling by sea. Hence, while it is necessary that Chinese laborers should leave the United States at a place which is a port and within the jurisdiction of a Chinese consul, and that they should return at a port of entry where there is a collector, they may go and come by land.

Harmon, At. Gen., May 26, 1896, 21 Op. 357.

The Secretary of the Treasury has no authority to permit the return to the United States of Chinese laborers who, availing themselves of the extension of one year provided by the treaty of 1894, left China in time to reach the United States within the extended year, but were delayed in quarantine by the Canadian authorities, so that they arrived in the United States three days late. Neither the Secretary of the Treasury nor the collector has discretion to inquire into causes of further delay or grant an additional extension.

Richards, Solicitor Gen., July 16, 1897, 21 Op. 575; approved by McKenna, At. Gen.

4. Legislation, 1894–1905.

§ 570.

Act of 1894.

By the act of Aug. 18, 1894, "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse

[a] For. Rel. 1904, 117.

to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

28 Stat. 390.

This act precluded the courts from reviewing the decision of the officers in question as to the right of a Chinese person to enter the United States. (Lem Moon Sing *v.* United States, 158 U. S. 538, 15 Sup. Ct. 967.)

It was previously held that a Chinaman who was not allowed to land was entitled to a writ of habeas corpus, though not to a trial by jury. (Re Chow Goo Pooi, 9 Sawy. C. C. 606, 25 Fed. Rep. 77; Re Jung Ah Lung, 25 Fed. Rep. 141; United States *v.* Jung Ah Lung, 124 U. S. 621.)

See further, as to the writ of habeas corpus, before and since the act of 1894, In re Leo Hem Bow, 47 Fed. Rep. 302; In re Wong Yung Quy, 47 id. 717; United States *v.* Don On, 49 id. 569; In re Chin Yuen Sing, 65 id. 788; United States *v.* Chung Shee, 76 id. 951, 22 C. C. A. 639; In re Li Foon, 80 Fed. Rep. 881; In re Tsu Tse Mee, 81 id. 562; In re Li Sing, 86 id. 896; In re Leong Youk Tong, 90 id. 648; In re Lee Lung, 102 id. 132; In re Lee Ping, 104 id. 678.

The act of 1894 does not give the executive officials final jurisdiction to determine the truth of an allegation of American citizenship. (In re Tom Yum, 64 Fed. Rep. 485.)

The act applies to an attempt unlawfully to reenter the United States after the individual has been deported. (McKenna, At. Gen., Nov. 19, 1897, 21 Op. 614.)

It does not confer on the President any power to interfere in cases of exclusion. (Mr. Hay, Sec. of State, to Mr. Wu Ting-fang, Chinese min., Dec. 5, 1900, For. Rel. 1901, 63.)

As to the payment of the cost of subsistence of persons arrested under the Chinese exclusion acts, see Griggs, At. Gen., March 18, 1898, 22 Op. 51.

Uncontradicted evidence of native citizenship entitles the Chinese person to his discharge.

United States *v.* Jue Wy (1900), 103 Fed. Rep. 795.

Under the Chinese exclusion act, July 5, 1884, 23 Stat. 117, which makes final the decision of the collector, subject to appeal to the Secretary of the Treasury, the courts can not review the collector's decision, even though he refuses to permit the landing of a person who has a certificate of his student character, conforming to the requirements of the law.

In re Lee Ping (1900), 104 Fed. Rep. 678.

See the same principle as to a person claiming to be a merchant, United States *v.* Wong Soo Bow, 112 Fed. Rep. 416.

Under the act of Aug. 18, 1894, 28 Stat. 390, the courts can not review an order of deportation from which no appeal has been taken.

United States *v.* Wong Chow (1901), 108 Fed. Rep. 376, citing Lem Moon Sing *v.* United States, 158 U. S. 538; Li Sing *v.* United States, 180 U. S. 486.

The decision of the appropriate immigration or customs officer under the act of August 18, 1894, 28 Stat. 390, is, subject to an appeal to the Secretary of the Treasury, final, only where it excludes the alien from admission. Where his decision admits the alien, then the provisions of the act of July 5, 1884, are applicable.

Li Sing *v.* United States (1901), 180 U. S. 486, 490, citing Lem Moon Sing *v.* United States, 158 U. S. 538, 547.

While a person of Chinese descent, who is a native citizen of the United States, can not be excluded from the United States, yet the decision of a United States commissioner, denying the claim of citizenship, will not be disturbed unless it is clearly against the weight of evidence.

United States *v.* Leung Sam (1902), 114 Fed. Rep. 702.

See Lee Ah Yin *v.* United States (1902), 116 Fed. Rep. 614; United States *v.* Lee Huen (1902), 118 Fed. Rep. 442; United States *v.* Moy You (1903), 126 Fed. Rep. 226; United States *v.* Leung Shue (1903), 126 Fed. Rep. 423; United States *v.* Ng Young (1903), 126 Fed. Rep. 425; Ark Foo *v.* United States (1904), 128 Fed. Rep. 697, 63 C. C. A. 249.

The courts will not review the action of the administrative authorities under the statutes as to the alien's right to land.

Lee Lung *v.* Patterson (1902), 186 U. S. 168.

Congress may empower a United States commissioner to determine the various facts on which citizenship depends under the decision in United States *v.* Wong Kim Ark, 169 U. S. 649.

Chin Bak Kan *v.* United States (1902), 186 U. S. 193.

The decision of the proper immigration officer denying the claim of a Chinese person to nativity in the United States is conclusive.

United States *v.* Lue Yee (1903), 124 Fed. Rep. 303.

Where an alleged Chinese alien, apprehended in deportation proceedings, establishes a prima facie case of citizenship of the United States, he is entitled to have the legality of his detention judicially determined on habeas corpus.

Sing Tuck *v.* United States (1904), 128 Fed. Rep. 592, reversing 126 Fed. Rep. 386.

Under the act of August 18, 1894, 28 Stat. 372, 390, making the decision of the appropriate immigration or customs officer, excluding an alien from admission to the United States, final, unless reversed on appeal to the Secretary of the Treasury, the jurisdiction of the inspector is not ousted by a mere allegation of citizenship by a Chinese

person; and, unless an appeal is taken to the Secretary of the Treasury, no appeal to the courts can be entertained.

United States *v.* Sing Tuck (1904), 194 U. S. 161.

Under the act of August 18, 1894, 28 Stat. 372, 390, the decision of the proper immigration officers, approved on appeal by the Secretary of Commerce and Labor, that a person of Chinese descent is an alien and not entitled to enter the United States, is conclusive; and such person is not entitled to a writ of habeas corpus on the allegation that he is a native citizen of the United States, there being in his petition for the writ no allegation of abuse of authority by the administrative officials.

United States *v.* Ju Toy (1905), 198 U. S. 253.
Justices Brewer, Peckham, and Day dissented.

Act of 1900.

By the act of June 6, 1900, the administration of the Chinese exclusion laws is committed to the Commissioner-General of Immigration, under the supervision and direction of the Secretary of the Treasury.

31 Stat. 588, 611.

Act of 1901.

The Chinese exclusion act of May 5, 1892, is supplemented by an act of March 3, 1901, which provides that it shall be lawful for the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States or having unlawfully entered the United States, to designate the United States commissioner within such district before whom such Chinese person shall be taken for hearing; and a fee of five dollars is allowed the commissioner for hearing and deciding a case arising under the Chinese exclusion laws. The supplementary act further provides that no warrant of arrest for violations of the Chinese exclusion laws shall be issued by United States commissioners except upon the sworn complaint of a United States district attorney, assistant district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which issued.

31 Stat. 1093.

Act of 1902.

"With the sole exception of the farming interest, no one matter is of such vital moment to our whole people as the welfare of the wage-workers. If the farmer and the wage-worker are well off, it is absolutely certain that all others will be well off too. It is, therefore, a matter for hearty congratulation

that on the whole wages are higher to-day in the United States than ever before in our history, and far higher than in any other country. The standard of living is also higher than ever before. Every effort of legislator and administrator should be bent to secure the permanency of this condition of things and its improvement wherever possible. Not only must our labor be protected by the tariff, but it should also be protected so far as it is possible from the presence in this country of any laborers brought over by contract, or of those who, coming freely, yet represent a standard of living so depressed that they can undersell our men in the labor market and drag them to a lower level. I regard it as necessary, with this end in view, to reenact immediately the law excluding Chinese laborers, and to strengthen it wherever necessary in order to make its enforcement entirely effective."

President Roosevelt, annual message, Dec. 3, 1901, For. Rel. 1901, xviii.

As to the illegal entry of Chinese persons into the United States, see S. Doc. 167, 55 Cong. 1 sess.

For complaints as to the alleged harsh and unfair enforcement of the exclusion laws, see For. Rel. 1901, 72–75; Mr. Hill, Act. Sec. of State, to Sec. of Treas., Jan. 7, 1901, 250 MS. Dom. Let. 115.

See, also, the following documents:

Argument of Mr. John W. Foster on the Treaty Rights of Chinese subjects as to Admission and Residence in the United States, before the Senate Committee on Immigration, Jan. 23, 1902, S. Rep. 776, 57 Cong. 1 sess., part 2, p. 32.

Arguments in opposition to exclusion, S. Doc. 106, 57 Cong. 1 sess.

Arguments of the American Federation of Labor in favor of exclusion, S. Doc. 137, 57 Cong. 1 sess.

Memorial of California Chinese Exclusion Convention, S. Doc. 191, 57 Cong. 1 sess.

Memorandum on bill for exclusion of Chinese laborers, presented April 14, 1902, by Mr. Penrose. (S. Doc. 304, 57 Cong. 1 sess.)

Letter of Chinese Minister, S. Doc. 162, 57 Cong. 1 sess.

Memorandum as to Employment of Chinese on American vessels, S. Doc. 254, 57 Cong. 1 sess.

Report of Mr. Perkins, Committee on Foreign Affairs, March 26, 1902, H. Report 1231, 57 Cong. 1 sess.

Mr. Clark, Com. on For. Aff., April 1, 1902, H. Report 1231, 57 Cong. 1 sess., part 2.

Petition for exclusion of Chinese and Japanese from Hawaii, S. Doc. 292, 57 Cong. 1 sess.

Protest of Chinese Government against exclusion of Chinese from the Philippines, H. Doc. 562, 57 Cong. 1 sess.

By section 1 of the act of April 29, 1902, all laws relating to the exclusion of Chinese and their residence in the United States, including sections 5, 6, 7, 8, 9, 10, 11, 13, and 14 of the act of Sept. 13, 1888, were, so far as not inconsistent with treaty obligations, continued in force, and were made applicable to the island territory of the United States, so as to prohibit the immigration of Chinese laborers, not

citizens of the United States, from such territory to the mainland territory, or from one part to another of the island territory, except in the same group; and the islands within the jurisdiction of any State or the District of Alaska are considered as part of the mainland.

By section 2 the power of the Secretary of the Treasury to make rules and regulations is confirmed and continued.

By section 3 it is declared that the exclusion laws shall not be construed to prevent foreign exhibitors, at an exposition authorized by act of Congress, from bringing into the United States, under contract, such employees, natives of their respective countries, as they may deem necessary in connection with their exhibits, under regulations of the Secretary of the Treasury as to the admission and return of such persons.

Section 4 requires all Chinese laborers, other than citizens, in the insular territory of the United States, except Hawaii, to obtain within a year certificates of residence in such territory, on pain of deportation; but the Philippine Commission is authorized to extend the time in those islands.

32 Stat. 176.

In view of the termination of the treaty of 1894, Congress, by the act of April 27, 1904, 33 Stat. I. 428, amended section 1 of the foregoing act by omitting the reference to treaty obligations.

Acts of 1903.

By the act of February 14, 1903, to establish the Department of Commerce and Labor, the authority possessed by the Secretary of the Treasury in relation to the exclusion of Chinese is transferred to the Secretary of Commerce and Labor, and the authority, power, and jurisdiction in relation thereto vested by law or treaty in the collectors of customs and the collectors of internal revenue are conferred upon and vested in such officers under the control of the commissioner-general of immigration, as the Secretary of Commerce and Labor may designate therefor.

32 Stat. 825, 828–829.

The act of March 3, 1903, to regulate the immigration of aliens into the United States, declares that all acts and parts of acts inconsistent therewith are repealed, but it expressly provides that the act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent.

32 Stat. 1213, 1221.

Acts relating to Hawaii.

The joint resolution of July 7, 1898, to provide for annexing the Hawaiian Islands to the United States, provided:

"There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the

United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands."

30 Stat. 750, 751.

See Mr. Hay, Sec. of State, to Sec. of Treas., Dec. 23, 1898, 233 MS. Dom. Let. 409; Jan. 13, 1899, 234 id. 73; March 9, 1899, 235 id. 366.

By the act of April 30, 1900, to provide a government for the Territory of Hawaii, it is provided, sec. 101, that Chinese in the Hawaiian Islands, when the act takes effect, may within a year thereafter obtain certificates of residence, required by the Chinese exclusion act of May 5, 1892, as amended by the act of November 3, 1893, and until the expiration of that year shall not be deemed to be unlawfully in the United States, if found within the Hawaiian Islands without such certificates; provided, however, that no Chinese laborer, whether he shall hold such certificate or not, shall be allowed to enter any State, Territory, or District of the United States from the Hawaiian Islands.

31 Stat. 141, 161.

See the provision as to the Philippines and other insular territory of the United States, except Hawaii, in sec. 4 of the act of April 29, 1902, supra.

There is nothing in the resolution of annexation of the Hawaiian Islands (30 Stat. 750), nor in the organic act which provides a government for that Territory (31 Stat. 141), nor in any law of Congress, which would prevent the entrance into those islands of Chinese, now legally resident in the United States and holding certificates of registration provided for by the acts of May 5, 1892 (27 Stat. 25) and November 3, 1893 (28 Stat. 7).

The "further importation" of Chinese forbidden by the resolution of annexation is immigration from countries other than the United States.

The question of the right of such Chinese persons to return to the United States from the Hawaiian Islands, not decided.

Knox, At. Gen., Aug. 12, 1901, 23 Op. 487.

Provisions as to international exhibitions.

By a joint resolution of June 6, 1900, exhibitors at the Ohio Centennial and Northwest Territory Exposition, to be held in Toledo, Ohio, in 1902, were authorized to bring to the United States foreign laborers under contract to perform labor, for the purpose of preparing for and making their exhibits, under regulations prescribed by the Secretary of the Treasury; but laborers so brought in were not to be allowed to remain in the United States for more than three months after the close of the exposition. It was further provided

that the resolution should not be construed as applying to the acts of Congress prohibiting the coming of Chinese persons into the United States.

31 Stat. 721.

A similar joint resolution was passed with reference to the Pan-American Exposition, at Buffalo. (31 Stat. 721.)

The Secretary of the Treasury ordered the collector at New York to admit Chinese artisans in connection with an exhibit at the New Orleans Exposition. (Mr. Frelinghuysen, Sec. of State, to Mr. Burke, Nov. 11, 1884, 153 MS. Dom. Let. 177.)

For a recommendation that Chinese laborers be permitted temporarily to enter the United States in connection with exhibits at the Columbian Exposition, see President Harrison's annual message, Dec. 9, 1891, For. Rel. 1891, x.

The number of Chinese to be admitted as participants in the Tennessee Centennial Exposition may be limited by the Secretary of the Treasury. (Conrad, Solicitor-Gen., April 19, 1897, 21 Op. 517.)

See the general provision in section 3 of the act of April 29, 1902, supra.

5. Exempt Classes.

(1) persons included.

§ 571.

The Chinese exclusion acts are not applicable to Chinese persons who are, by reason of birth in the United States, citizens thereof, since a citizen can not be excluded from the United States, except as a punishment for crime.

Re Look Tin Sing, 21 Fed. Rep. 905. See, however, United States *v.* Ju Toy, supra, § 570. They apply to Chinese persons "domiciled" in the United States. (Lem Moon Sing *v.* United States, 158 U. S. 538.)

The executive officers do not have, under the act of 1894, final jurisdiction of the question of American citizenship, where such citizenship is claimed by a person of Chinese descent. (In re Tom Yum, 64 Fed. Rep. 485.)

As is elsewhere shown, Chinese are, by the act of 1882, forbidden to be naturalized, and it was held, before the enactment of that statute, that they did not come within the naturalization laws of the United States. (Supra, § 383.)

The true theory of the Federal law is not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed.

A trader is not expressly known to the law as among the exempt classes, nor is such a person fairly included in them, unless as a merchant, and the statutory language can not be so construed.

Griggs, At. Gen., July 15, 1898, 22 Op. 130; Nov. 3, 1898, id. 260.

Affirmed by Knox, At. Gen., Aug. 12, 1901, 23 Op. 485.

By the Treasury Regulations of 1900 direction was given to admit only

Chinese whose occupation or station clearly indicated that they belonged to the exempt classes named in Art. III. of the treaty of 1894, which was then in force, viz. "officials, teachers, students, merchants or travelers for curiosity or pleasure," and "to deny admission to Chinese persons described as salesmen, clerks, buyers, bookkeepers, accountants, managers, storekeepers, apprentices, agents, cashiers, physicians, proprietors of restaurants, etc." Reference was made to the Attorney-General's opinion of July 15, 1898. (S. Doc. 291, 57 Cong. 1 sess. 34.)

By the regulations governing the admission of Chinese, approved by the Secretary of Commerce and Labor Feb. 5, 1906, it is stated that "only those who are teachers, students, travelers for curiosity or pleasure, merchants and their lawful wives and minor children, officials of the Chinese Government, together with their body and household servants, Chinese persons registered under the laws of the United States, seamen, . . . those seeking in good faith to pass through the country to foreign territory, . . . and persons whose physical condition necessitates immediate hospital treatment," shall be permitted to land at any port of the United States. It is further stated that only those Chinese persons who are expressly declared by the treaty and laws relating to the exclusion of Chinese to be admissible shall be allowed to enter the United States. On this point the opinion of the Attorney-General of July 15, 1898, supra, is cited.

In a note of November 7, 1898, the Chinese minister at Washington, referring to the opinion of the Attorney General of July 15, 1898, and to a decision of the Treasury Department of July 21, 1898, to the effect that only the classes of persons expressly named in the first clause of Article III. of the treaty of 1894 were entitled to admission into the United States, contended that the object both of the treaties and of the exclusive legislation was to keep out laborers, and that it never was held by the United States authorities that the enumeration of certain exempt classes should operate as an exclusion of all other classes and of laborers besides.[a]

The Department of State replied: "The opinion of the Attorney-General of July 15, 1898, to which you specially refer, holds that Chinese 'traders' are not entitled to admission . . . , and by consequence that no Chinese persons are entitled to admission unless they fall within the classes marked out by Article III. of the treaty of 1894, viz, officials, teachers, students, merchants, or travelers for curiosity or pleasure. This view proceeds upon the theory that the true intent, purpose, and result of all the laws is that not only those Chinese should be excluded from this country who are particularly and expressly forbidden entrance, namely, Chinese laborers, but that only those may be admitted who are expressly allowed, namely, the classes marked out in Article III. of the treaty of 1894, and those who neces-

[a] Mr. Wu, Chinese min., to Mr. Hay, Sec. of State, Nov. 7, 1898, For. Rel., 1899, 189–194.

sarily are adjunct to those classes, such as the valid wife and legitimate minor children, or children of tender years, of a permitted Chinaman. . . . As to the decisions of the courts and departmental construction, it is admitted that there is authority in both for the contrary view. . . . Such rulings proceed upon the opposite theory of the law that it is only necessary not to be a laborer; that the question is not whether an applicant is, for instance, a merchant, but merely whether he is not a laborer. The bearing, however, and stress of the question was not fully perceived in earlier years, and the reversal of the previous view, which, however, did not universally and in all instances prevail, was determined upon after careful consideration of all the facts and all the law of the case, and no valid reason can now be perceived for receding from the position taken or modifying the present deliberate view of the Executive." It was added, however, that the question might perhaps be raised judicially and ultimately be brought to the Supreme Court.

Mr. Hay, Sec. of State, to Mr. Wu, Chinese min., Jan. 5, 1900, For. Rel. 1899, 197, 198, 199–200; MS. Notes to Chinese Leg. II. 45.

"Section 2 of the act [Nov. 3, 1893] referred to defines a merchant in the following language: 'A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.'

"This requirement that a merchant must conduct the business in his own name can have but one purpose, to wit, that he who is a merchant in fact shall also be known to be such by the parties with whom he deals and by the public generally. That purpose could readily be defeated if it were permissible to conceal his identity by trading under an assumed name, or under the disguise of a 'Co.'

"I am therefore of the opinion that a Chinese person does not bring himself within the statutory definition of merchant unless he conducts his business either in his own name or in a firm name of which his own is a part."

Olney, At. Gen., April 6, 1894, 21 Op. 5.

Embodied in a circular of the Treasury Department, April 10, 1894, For. Rel. 1894, 168.

See Wong Fong *v.* United States, 77 Fed. Rep. 168, 23 C. C. A. 110; United States *v.* Wong Lung, 103 Fed. Rep. 794; United States *v.* Lung Hong, 105 Fed. Rep. 188; United States *v.* Moy Yim, 115 Fed. Rep. 652; In re Chin Ark Wing, 115 Fed. Rep. 412.

The burden of proving the merchant character rests on the Chinese person. (United States *v.* Lung Hong, 105 Fed. Rep. 188.)

A person described in a certificate as a "salesman" is not a "merchant" in the sense of the Chinese exclusion acts. (United States *v.* Gin Hing (1904), 76 Pac. Rep. 639).

"In the case of Lee Kan *v.* United States (62 Fed. Rep. 914), decided in the circuit court of appeals for the ninth circuit, it was held that the requirements of section 2 of the act of November 3, 1893, to the effect that a merchant must conduct his business in his own name, were fulfilled if the Chinaman could prove that he was an actual bona fide partner of a legitimate mercantile firm, even though his name did not appear in the firm name. The Attorney-General states that the decision of the circuit court of appeals in this case is final.

"The practice of officers of this Department will, therefore, conform to the decision in the case of Lee Kan."

Treasury Regulations, S. Doc. 291, 57 Cong. 1 sess. 37.

See, also, Wong Fong *v.* United States, 77 Fed. Rep. 168, 23 C. C. A. 110 (reversing 71 Fed. Rep. 283); United States *v.* Wong Lung, 103 Fed. Rep. 794; United States *v.* Pin Kwan, 100 Fed. Rep. 609, 40 C. C. A. 618 (reversing 94 Fed. Rep. 824); In re Quan Gin, 61 Fed. Rep. 395.

A Chinese proprietor of a restaurant was duly classified as a merchant and obtained the necessary certificate entitling him to reenter the United States; but, at the time of his return, such persons were deemed laborers and he was refused admission. Held, that, as he had been regularly classified as a merchant, he should in fairness be admitted; and that the authority vested in the Secretary of the Treasury by the act of August 18, 1894, to determine the question of admission, might be exercised in such manner as would keep faith and do no injustice.

Richards, Solicitor Gen., Feb. 8, 1899, 22 Op. 324.

A Chinese person, resident in the United States, and a member of a firm engaged in the manufacture of cigars within the United States and of selling the cigars so manufactured, who, having temporarily left the United States, desires readmission, is a returning merchant in the sense in which that word is used in the treaty and the laws relating to the exclusion of Chinese, and, as such, is entitled to readmission into this country. The fact that he is a manufacturer as well as a merchant does not make him the less a merchant within the meaning of the treaty and laws.

Knox, At. Gen., Aug. 12, 1901, 23 Op. 485.

See, also, Wong Fong *v.* United States, 77 Fed. Rep. 168, 23 C. C. A. 110; In re Chu Poy, 81 Fed. Rep. 826.

Chinese persons who were in the United States prior to May 5, 1892, and who from 1891 to 1894 carried on a mercantile business

under a corporate title, and who had books of account and articles of partnership, were merchants within the meaning of § 6 of the act of May 5, 1892, as amended by the act of Nov. 3, 1893, and were not required to register under the terms of that act.

Tom Hong *v.* United States (1904), 193 U. S. 517.

A Chinaman who, after lawfully entering the United States and carrying on business as a merchant, ceases to be a merchant, is not subject to deportation.

In re Yew Bing Hi (1904), 128 Fed. Rep. 319.
See, also, United States *v.* Louie Juen (1904), 128 Fed. Rep. 522.

Paragraph 3 of section 2 of the act of Nov. 3, 1893, provides:

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

This section is to be regarded as wholly prospective in its operation and as applying exclusively to Chinese merchants who both come into the United States for the first time since November 3, 1893, and having carried on business here, afterwards leave the country and seek to return. Merchants already here when the statute took effect may leave the country and return as if the act of November 3, 1893, had not been passed.

Olney, At. Gen., May 14, 1894, 21 Op. 21, 23.
Affirmed by Olney, At. Gen., Dec. 19, 1894, id. 99, with citation of Lee Kan *v.* United States, 62 Fed. Rep. 914, 10 C. C. A. 669, in consequence of which decision the petitioners in In re Yee Lung, 61 Fed. Rep. 641, and In re Loo Yue Loon, id. 643, were discharged from custody.
See, also, Wong Fong *v.* United States, 77 Fed. Rep. 168, 23 C. C. A. 110; United States *v.* Wong Lung, 103 Fed. Rep. 794; United States *v.* Lung Hong, 105 Fed. Rep. 188.

The occupation of a laborer is not imputable to his child who enters and remains in the United States as a student.

United States *v.* Chu Chee, 87 Fed. Rep. 312.

In the case of Tong Tseng, a Chinese youth of 15, whom the collector of customs at Honolulu refused to permit to land, for the purpose of attending the Chinese-American school there, the Chinese minister at Washington protested against the definition of a student

given in the regulations relating to the exclusion of Chinese, 1900, p. 35, as "a person who (1) intends to pursue some of the higher branches of study, or one who (2) seeks to be fitted for some particular profession or occupation for which facilities of study are not afforded in his own country; one (3) for whose support and maintenance in this country, as a student, provision has been made, and who (4), upon completion of his studies, expects to return to China."

The Secretary of the Treasury reversed, on appeal, the decision of the collector in the particular case.

For. Rel. 1901, 68–71. By rule 36 of the Chinese Exclusion Regulations, May, 1905, a student is defined as "a person who intends to pursue some of the higher branches of study, or to become fitted by study for some profession or occupation, and for whose support and maintenance in this country, as a student, provision has been made." This definition is omitted from the regulations approved Feb. 5, 1906.

(2) CERTIFICATES.

§ 572.

In 1886 President Cleveland recommended the amendment of section 6 of the act of 1884, touching the certificates required of the exempted classes as the prima facie and sole permissible evidence to establish their right of entry into the United States. He stated that the act provided in terms for the issuance of certificates in only two cases: (1) Chinese subjects departing from a port of China, and (2) persons of the Chinese race, being at the time subjects of a foreign government other than China, who might depart for the United States from a port of such government. The statute, he said, thus made no provision for Chinese persons who, remaining Chinese subjects, desired to come to the United States from a country other than China. The Secretary of the Treasury had sought to remedy the omission by directing the revenue officers to recognize certificates, issued at the port of departure by the Chinese diplomatic or consular officer, when viséed by the American representative at that port. This appeared to be a just application of the spirit of the law, but he went beyond even the spirit when, in a circular of Jan. 14, 1884, he provided for the original issuance of such a certificate by the American consular officer at the port of departure, in the absence of a Chinese diplomatic or consular representative. It therefore became necessary to amend the circular, as was done July 13, 1885, by striking out the clause permitting original certification by American consuls. The consuls might, indeed, issue certificates of facts within their knowledge, but such certificates possessed no statutory validity; and the Chinese minister, in a note of March 24, 1886, had complained of the sending back from San Francisco to Hong Kong

of a Chinese merchant who exhibited a certificate from the American consul at Hong Kong as to his being a merchant. While the certificate he bore was, said the President, insufficient under the law, yet there was at Hong Kong no representative of the Government of China competent or authorized to issue the certificate required by the statute. The President asked that this anomalous feature of the law be reformed.

President Cleveland, special message, April 6, 1886, Richardson's Messages, VIII. 390.

In the course of his message the President quoted the Supreme Court as saying that "the supposition should not be indulged that Congress, while professing to faithfully execute the treaty stipulations, and recognizing the fact that they secure to a certain class the right to go from and come to the United States, intended to make its protection depend upon the performance of conditions which it was physically impossible to perform." (Chew Heong *v.* United States, 112 U. S. 554.)

See Mr. Porter, Act. Sec. of State, to Sec. of Treasury, Feb. 1, 1886, 158 MS. Dom. Let. 611; Mr. Bayard, Sec. of State, to Mr. Fairchild, Sec. of Treas., March 31, 1886, 159 MS. Dom. Let. 488.

As to merchants' certificates under the act of 1882, see Mr. Frelinghuysen, Sec. of State, to Mr. Young, No. 60, Dec. 8, 1882, 3 MS. Inst. China, 368.

For Treasury circulars of Dec. 6, 1884, Jan. 14, 1885, and July 13, 1885, and correspondence in relation thereto, see For. Rel. 1885, 184–186, 191–193.

As to certificates given by the Chinese consul at Yokohama, see For. Rel. 1891, 456–457, 459–461.

The circular of Jan. 14, 1885, was sent to the United States consuls in China and Japan, and at Havana and Victoria. (Mr. Hunter, 2nd Assist. Sec. of State, to Mr. Rivedan, March 20, 1885, 154 MS. Dom. Let. 536.)

After the passage of the act of Oct. 1, 1888, absolutely prohibiting the entry of Chinese laborers, no Chinese person was entitled to enter the United States without the prescribed evidence, under the acts of 1882 and 1884, of his belonging to one of the exempt classes.

Wan Shing *v.* United States, 140 U. S. 424, 11 S. Ct. 729.

See, also, In re Wo Tai Li, 48 Fed. Rep. 668; United States *v.* Don On, 49 Fed. Rep. 569; United States *v.* Jim, 47 Fed. Rep. 431; United States *v.* Pin Kwan, 100 Fed. Rep. 609, 40 C. C. A. 618; Chan Gun *v.* United States, 9 App. D. C. 290; In re Chinese Relators, 58 Fed. Rep. 554.

A Chinese person erroneously permitted to enter without the certificate required by Sec. 6 of the act of 1884 is unlawfully in the United States and may be deported; and the action of the customs officials in admitting him can not be received as evidence of his right to remain.

Mar Bing Guey *v.* United States, 97 Fed. Rep. 576; following United States *v.* Lau Sun Ho, 85 Fed. Rep. 423, and citing In re Lee Yee Sing, 85, Fed. Rep. 635; United States *v.* Gue Lim, 83 id. 136; Wan Shing *v.* United States, 140 U. S. 424, 11 S. Ct. 729; United States *v.* Chu Chee, 35 C. C. A. 613, 93 Fed. Rep. 797; In re Li Foon, 80 Fed. Rep. 881; In re Wo Tai Li, 48 Fed. Rep. 668.

See United States *v.* Lee Hoy, 48 Fed. Rep. 825.

The requirements of the act of July 5, 1884, should be strictly complied with by Chinese applicants for admission to the United States.

Olney, At. Gen., April 10, 1894, 21 Op. 6; Griggs, At. Gen., July 15, 1898, 22 Op. 130; Hoyt, Act. At. Gen., Oct. 12, 1899, id. 608.

The United States consul in discharging, under the act of 1884, his duty of viséing the certificates of Chinese persons going to the United States, must examine into the truth of the statements in the certificates, and refuse his visé if he finds any of them to be untrue. (Mr. Cridler, 3rd Assist. Sec. of State, to U. S. consuls, circular, July 21, 1899, 168 MS. Inst. Consuls, 332.)

See United States *v.* Mock Chew, 54 Fed. Rep. 490, holding that a certificate of identity issued by a Chinese consul in Japan, and viséed by the United States vice-consul-general at Yokohama, was not in itself sufficient evidence of the authority of the consul to issue it.

In a note to Mr. Gresham, May 27, 1893, the Chinese minister at Washington stated that the form of certificates then in use to identify Chinese persons other than laborers, under the acts of May 6, 1882, and Jan. 5, 1884, was prepared by the ex-Minister Chang Yen Hoon and submitted by him on July 10, 1889, through the Department of State, to the Secretary of the Treasury, who on the 23rd of the same month approved it. Instructions were then sent to all the officials of the Imperial Government to use it, and Chinese consuls in foreign countries were similarly instructed. The minister subsequently stated that he had received advices from New York that the customs officials there declined to recognize the certificates, and claimed that they acted under orders of the Secretary of the Treasury. The Secretary of the Treasury expressed the opinion that the complaint of the minister presumably had reference merely to instructions given to scrutinize closely the certificates from consular officers presented by Chinese persons claiming to be of the exempt class, and before landing such persons to make inquiry as to the truth of the statements set forth in the certificates. The United States had in a spirit of liberality allowed Chinese laborers to pass in transit through the country, although the law provided that they should not be allowed to enter the United States, and it had been found necessary, on account of abuses, to scrutinize cases where certificates were issued by Chinese consuls. Instructions were issued by the Secretary of the Treasury to collectors of customs to place no unnecessary obstacles in the way of the landing in the United

States of Chinese entitled to enter, but it was not deemed advisable to renew the practice under which collectors viséed certificates issued by Chinese consuls in the United States to Chinese about to depart for China with the intention of returning.

For. Rel. 1893, 251, 260, 261, 265.

A certificate of naturalization issued to a Chinese person by the circuit court of the district of Montreal, Canada, and a passport issued by the Governor-General of Canada, upon which the right is claimed as a merchant to enter into and travel through the United States, can not be accepted as a substitute for the certificate prescribed by section 6 of the act approved July 5, 1884.

Olney, At. Gen., Jan. 30, 1895, 21 Op. 123.

In rule 30 of the Chinese Exclusion Regulations of Feb. 5, 1906, a list is given of the officers who had been authorized by their respective governments to issue to Chinese subjects, or citizens, of such governments the certificate prescribed by sec. 6 of the act of July 5, 1884.

Under Article III. of the convention of 1894, a Chinese subject residing in a British colony and belonging to one of the classes of Chinese permitted to enter the United States, may be admitted on a certificate from the government of such a colony.

Conrad, Acting At. Gen., May 20, 1896, 21 Op. 347. As has been seen, the treaty of 1894 has been terminated on notice given by the Chinese Government.

See Mr. Rockhill, Assist. Sec. of State, to Mr. Partridge, July 11, 1896, 211 MS. Dom. Let. 298; Mr. Cridler, 3rd Assist. Sec. of State, to Sec. of Treas., March 10, 1899, 235 MS. Dom. Let. 389.

It was held, in the opinion of the Acting Attorney-General, above cited, that the registrar-general was the proper representative of the government at Hong Kong to issue the certificate under the act of 1884, sec. 6.

Certificates presented by Chinese persons as evidence of their right to enter this country for the first time, conformably to the provisions of section 6 of the act of July 5, 1884, signed by a Chinese consul-general within the United States, are not entitled to be treated as made by the Chinese Government within the meaning of that act, notwithstanding the fact that the Chinese minister had by letter communicated to the Secretary of State the information that his Government had "authorized the consuls of China in foreign countries to issue" such certificates.

Harmon, At. Gen., Feb. 2, 1897, 21 Op. 481.

The statute does not authorize the issuance of certificates under sec. 6 of the act of 1884 by Chinese consuls in the United States.

Op. of Solicitor of Treasury, Feb. 3, 1898, cited in Regulations (1900), S. Doc. 291, 57 Cong. 1 sess. 34.

October 5, 1898, Mr. Hay, Secretary of State, enclosed to the Chinese minister at Washington a copy of an opinion of the Acting Attorney-General of the United States, of August 31, 1898, to the Secretary of the Treasury, holding that there was no authority under the existing laws of the United States for recognizing the right of Chinese consuls in foreign countries to issue the certificates prescribed by section 6 of the act of Congress of July 5, 1884. In view of this opinion, Mr. Hay stated that certificates issued by Chinese consuls to Chinese subjects of the exempt class would not be accepted, and that the United States consuls had been directed no longer to visé them. He further stated that persons of the exempt class would be required to produce certificates from the Government of China or from the governments of other countries in which they might reside. The opinion of the Attorney-General was based upon article 3 of the convention between the United States and China of March 17, 1894, which reads: "To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided viséed by the diplomatic or consular representative of the United States in the country or port whence they depart."

The Chinese minister protested against the view taken, maintaining that the language of the treaty was not restrictive and was not intended to take away the right previously exercised by the Chinese consuls of issuing certificates.

Mr. Hay, Sec. of State, to Mr. Wu, Chinese min., Oct. 5, 1898, For. Rel. 1899, 187; Mr. Wu, Chinese min., to Mr. Hay, Sec. of State, Nov. 7, 1898, For. Rel. 1899, 189.

In accordance with an opinion of the Acting Attorney-General of August 31, 1898, Mr. Lei Yok, a Chinese merchant, was detained by the customs authorities at New Orleans, on his way from Havana to San Francisco, where he was the proprietor of a mercantile establishment. He had a certificate issued by the Chinese consul-general at Havana and viséed by the British consul in behalf of the United States. On the strength of the opinion in question, that there was no authority under existing laws whereby Chinese consuls in foreign countries might issue to Chinese subjects of the exempt classes the certificates prescribed by section 6 of the act of July 5, 1884, the action of the authorities at New Orleans in excluding the merchant in question was approved.

Mr. Hay, Sec. of State, to Mr. Wu, Chinese min., Jan. 11, 1899, and Jan. 23, 1899, For. Rel. 1899, 201, 202; Feb. 1, 1899, MS. Notes to Chinese Leg. II. 9.

See Mr. Gresham, Sec. of State, to Sec. of Treas., July 11, 1894, 197 MS. Dom. Let. 645.

The return certificate of Chinese persons entitled to return to the United States under the contingency contemplated by Article II. of the treaty of 1894 with China must be accompanied by a certificate as to the facts, made by the Chinese consul at the port of departure.

Certificates issued to Chinese persons of the exempted class by the Chinese consul at Havana, in the absence of certification by a consular officer of the United States, should not be accepted by the customs officials of the United States.

The terms on which the representation of the interests of the United States at Havana was entrusted to the British consul during the existence of war with Spain are informal, and do not specifically include the service of viséing certificates to be issued to Chinese persons; but certificates so viséed may be accepted by the authorities of the United States, provided this duty is voluntarily performed by such officer with the consent of the British Government.

Griggs, At. Gen., May 6, 1898, 22 Op. 72.

See Mr. Moore, Act. Sec. of State, to Assist. Attorney-General, May 6, 1898, 228 MS. Dom. Let. 296; Mr. Day, Sec. of State, to Sir J. Pauncefote, Brit. min., May 18, 1898, MS. Notes to Brit. Leg. XXIV. 194.

During the military occupation of Cuba by the United States the officers of the United States Army, acting as collectors of customs in Cuba, were designated to issue to the exempt classes of Chinese, under Art. III. of the treaty with China, the certificates entitling them to enter the United States.

Mr. Hay, Sec. of State, to Mr. Shen Tung, May 17, 1899, MS. Notes to Chinese Leg. II. 23.

Certain Chinese subjects, who were bona fide merchants, were refused admission into the United States on the ground that the nature and character of their business, plainly specified in the Chinese portion of the certificates issued by the representative of the Chinese Government, were not stated in the English translation of the certificates accompanying the same. Held, the collector was justified in refusing permission to land.

Hoyt, Acting At. Gen., Oct. 12, 1899, 22 Op. 608.

The law requires the certificate to be in "the English language." The opinion proceeds on the ground that under the law the English certificate must be treated as the original.

Certificates under sec. 6 of the act of 1884 must strictly fulfill the conditions of the statute. (United States *v.* Yong Yew, 83 Fed. Rep. 832.)

See United States *v.* Lee Hoy, 48 Fed. Rep. 825, Regulations (1900). S. Doc. 291, 57 Cong. 1 sess. 35.

Defects in the certificate can not be cured by statements in the visé. (Regulations, S. Doc. 291, 57 Cong. 1 sess. 35.)

Defective certificates should be cancelled. (Id. 36.)

Sec. 6 of the act of May 6, 1882, as amended by the act of July 5, 1884, does not apply to Chinese merchants domiciled in the United States, who, having left the country for temporary purposes with the intention of returning, seek to reenter the United States on their return to their business and their homes.

Lau Ow Bew *v.* United States (1892), 144 U. S. 47.
See, however, Lem Moon Sing *v.* United States (1895), 158 U. S. 538.
See, as following the case of Lau Ow Bew, United States *v.* Gee Lee, 50 Fed. Rep. 271, 7 U. S. App. 183, 1 C. C. A. 516.

The judges have differed upon the question whether the wife and minor children of a Chinese merchant, entitled to come to the United States under Art. II. of the treaty of 1880, could come to the United States, with him or after him, without the certificate prescribed by section 6 of the act of July 5, 1884, 23 Stat. 115. It was finally held by the Supreme Court that the wives and children of Chinese merchants domiciled in the United States were entitled to enter without such certificates.

United States *v.* Mrs. Gue Lim (1900), 176 U. S. 459, citing with approved the opinion of Judge Deady in In re Chung Toy Ho, 42 Fed. Rep. 398. See rule 29, Regulations governing the Admission of Chinese, approved Feb. 5, 1906, p. 44.
See United States *v.* Gue Lim, 83 Fed. Rep. 136; In re Lee Yee Sing, 85 Fed. Rep. 635; In re Li Foon, 80 Fed. Rep. 881; Griggs, At. Gen., Nov. 3, 1898, 22 Op. 260.

6. Excluded Classes.

(1) persons included.

§ 573.

As has been seen, supra, § 571, while the main object of the treaties and statutes is, as their terms indicate, to prohibit the immigration of Chinese laborers, it is now held that only the classes expressly designated as having the right to come to the United States are entitled to enter. It is also to be observed that Chinese aliens are examined as to their right to admission to the United States under the provisions of the general laws regulating immigration as well as under the laws relating to the exclusion of Chinese.

The word "laborer" or "laborers" means "both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation."

Act of Nov. 3, 1893, 28 Stat. 7, 8.

The term Chinese laborers, in the act of May 6, 1882, embraces laborers of that race born at Hongkong after its cession to Great Britain.

In re Ah Lung, 18 Fed. Rep. 28.

The words Chinese laborers, in sec. 6 of the act of 1892, are broad enough to embrace Chinese gamblers and highbinders.

United States *v.* Ah Fawn, 57 Fed. Rep. 591. So, also, a Chinaman serving a term of imprisonment at hard labor. (United States *v.* Wong Ah Hung, 62 Fed. Rep. 1005.)

Nor is a person's status as a laborer changed by enforced idleness in jail. (United States *v.* Chung Ki Foon, 83 Fed. Rep. 143.)

One who gains his livelihood partly by manual labor is a laborer within the meaning of the exclusion laws.

Lai Moy *v.* United States, 66 Fed. Rep. 955, 14 C. C. A. 283; Lew Jim *v.* United States, 66 Fed. Rep. 953, 14 C. C. A. 281; United States *v.* Wong Hong, 71 Fed. Rep. 283; Mar Bing Guey *v.* United States, 97 Fed. Rep. 576.

See, however, United States *v.* Sun, 76 Fed. Rep. 450.

A restaurant proprietor is a laborer and not a merchant within the meaning of the exclusion acts.

In re Ah Yow, 59 Fed. Rep. 561; United States *v.* Chung Ki Foon, 83 Fed. Rep. 143.

A person who was a merchant at the time of the passage of the act of May 5, 1892, and during the period thereby prescribed for registration, did not become liable to deportation by afterwards becoming a laborer.

United States *v.* Sing Lee, 71 Fed. Rep. 680.

A person who, prior to the act of Nov. 3, 1893, ceased peddling and became a member of a trading firm, is not liable to deportation for having omitted to register. (United States *v.* Mark Ying, 76 Fed. Rep. 450.)

But a Chinese person who secures admission on pretense of being a merchant, and afterwards becomes, in accordance with his real intent, a laborer, is not entitled to remain in the United States. (United States *v.* Yong Yew, 83 Fed. Rep. 832; United States *v.* Ng Park Tan, 86 Fed. Rep. 605.)

The status of laborer is not changed by teaching in a Sunday school and other religious work.

In re Leung, 86 Fed. Rep. 303.

A Chinese seaman who ships as steward on an American vessel, in which he enters the United States, intending to reship as soon as possible, is not excluded, but may be required to give bond to reship within a certain time.

In re Jam, 101 Fed. Rep. 989, 22 Blatchf. 520.

See, also, Re Ah Kee, 22 Fed. Rep. 519, 22 Blatchf. 520.

In November, 1891, the British steamship *Oxford* arrived at Baltimore, manned by a Chinese crew who were engaged at Hongkong and were said to be British subjects. The master of the vessel was warned by the port authorities that any member of the crew who landed would, under the existing law, be liable to arrest. The British minister, in presenting the case to the Department of State, referred to the decision of the Supreme Court of the United States in the case of Ross *v.* McIntyre, in which it was held that a British subject was, while serving as a seaman on board an American vessel, subject to the jurisdiction of the consular courts of the United States in Japan. The British minister suggested that, "according to this decision, the men on board the *Oxford*, even if they were not natural born or naturalized British subjects, would, by virtue of their enrollment as seamen on board a British ship, be entitled to the privileges enjoyed by British subjects in the ports of the United States."

Sir J. Pauncefote, British minister, to Mr. Blaine, Sec. of State, Nov. 25, 1891, For. Rel. 1892, 255.

The case was referred to the Sec. of the Treasury. (Id. 257.) By rule 32 of the Chinese exclusion regulations, Feb. 5, 1906, it is provided that, "to prevent violations of law by Chinese seamen discharged or granted shore leave at ports of the United States, bond with approved security in the penalty of $500 for each such seaman shall be exacted for his departure from and out of the United States within thirty days." This requirement was embodied in previous regulations.

"Chinese laborers who go out of the country under the provisions of the recent treaty with China, promulgated December 8, 1894, can not be permitted, upon return, to bring their wives with them. The wife partakes of her husband's status as a laborer, and as such is debarred admission by law. (Opinion Solicitor of Treasury, February 7, 1896. Letter to collector, Burlington, February 11, 1896.)"

Treasury Regulations, 1900, S. Doc. 291, 57 Cong. 1 sess. 44. The treaty of 1894 having ceased to be in force, this paragraph is not found in the regulations of the Department of Commerce and Labor of Feb. 5, 1906; but the rule is well settled that the laborer's wife takes his status and can enter only on the same conditions as a male domiciled laborer, and not upon her husband's certificate. (Mr. Sargent, Comr. Gen. of Immigration, to Mr. Moore, April 14, 1906, MS.)

See, to this effect, Re Ah Quan, 21 Fed. Rep. 182; Re Ah Moy, id. 785; United States *v.* Ah Fawn, 57 Fed. Rep. 591.

The question whether a Chinese resident of the United States could "have his young son brought to him from China . . . would appear to depend on whether the father belongs to the class exempted by the treaty. If the father be a laborer, it would probably be held that his privilege of residence and power to go and come is personal only to himself, and can not extend to members of his

household." It was added, however, that the decision of such questions belonged to the Secretary of the Treasury. (Mr. Bayard, Sec. of State, to Miss Saunders, March 23, 1886, 159 MS. Dom. Let. 404.)

A Chinese student may enter the United States, though his father be a laborer. (United States *v.* Chu Chee, 87 Fed. Rep. 312.)

(2) CERTIFICATES OF RESIDENCE AND REENTRY.

§ 574.

The fourth section of the act of Congress, approved May 6, 1882, chapter 126, as amended by the act of July 5, 1884, chapter 220, prescribing the certificate which shall be produced by a Chinese laborer as the "only evidence permissible to establish his right of re-entry" into the United States, is not applicable to Chinese laborers who, residing in this country at the date of the treaty of November 17, 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884.

Chew Heong *v.* United States, 112 U. S. 536 (reversing 21 Fed. Rep. 791).

See Re Low Yam Chow, 7 Sawyer C. C. 546; Re Ah Ping, 23 Fed. Rep. 329; Re Ah Kee, 21 Fed. Rep. 701; Re Kew Ock, 21 Fed. Rep. 789; Re Ah Quan, 21 Fed. Rep. 182; Re Chin A On, 18 Fed. Rep. 506; Re Pong Ah Chee, 18 Fed. Rep. 527; Re Tung Yeong, 19 Fed. Rep. 184; Re Leong Yick Dew, 19 Fed. Rep. 490.

But a laborer who left after the act took effect, but did not procure a certificate because he did not then intend to return, can not reenter the United States. (Re Tong Ah Chee, 23 Fed. Rep. 441.)

Section 6 of the act of May 5, 1892, c. 60, requiring all Chinese laborers within the United States at the time of its passage, "and who are entitled to remain in the United States," to apply within a year to a collector of internal revenue for a certificate of residence; and providing that anyone who does not do so, or is afterwards found in the United States without such a certificate, "shall be deemed and adjudged to be unlawfully within the United States," and may be arrested by any officer of the customs, or collector of internal revenue, or marshal, or deputy of either, and taken before a United States judge, who shall order him to be deported from the United States to his own country, unless he shall clearly establish to the satisfaction of the judge that by reason of accident, sickness, or other unavoidable cause, he was unable to secure his certificate, and "by at least one credible white witness" that he was a resident of the United States at the time of the passage of the act—is constitutional and valid.

Fong Yue Ting *v.* United States (1893), 149 U. S. 698.

Li Sing was a Chinaman who, after residing for years in the United States, returned temporarily to China, taking with him a

certificate purporting to have been issued by the Imperial Government of China, at its consulate in New York, and signed by its consul, stating that he was permitted to return to the United States, that he was entitled to do so, and that he was a wholesale grocer. On his return to the United States by way of Canada, he presented this certificate to the United States collector of customs at Malone, New York, who cancelled it and permitted him to enter the country. Subsequently he was brought before the commissioner of the United States for the southern district of New York, charged with having unlawfully entered the United States, being a laborer. At the examination he set up that he had a right to remain here, and that he was a merchant. The commissioner found that on his departure from the United States he was and had long been a laborer, and ordered his deportation. Held, that the decision of the collector at Malone was not final, and that by the act of October 1, 1888, c. 1064, the certificate issued to him by the Chinese consul on his departure from the United States was annulled.

Fong Yue Ting *v.* United States, 149 U. S. 698, affirmed and followed, especially as to the points: (1) That the provision of the statute which puts the burden of proof upon the alien of rebutting the presumption arising from his having no certificate, as well as the requirement of proof "by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government; (2) that the provision not allowing the fact of residence at the time of the passage of the act to be proved solely by the testimony of aliens in a like situation was a constitutional provision; and (3) that the question whether, and upon what conditions these aliens shall be permitted to remain within the United States, being one to be determined by the political departments of the Government, the judicial department can not properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

Li Sing *v.* United States (1901), 180 U. S. 486.

The convention of March 17, 1894, between the United States and China did not repeal any prior legislation except the act approved October 1, 1888.

The Secretary of the Treasury has power to require the production of a certificate, in such form as he may prescribe, evidencing the right of certain subjects of China to enter the United States, and has authority to require that Chinese laborers leaving the United States

temporarily shall return to this country only at the ports from which they depart.

Olney, At. Gen., Oct. 16, 1894, 21 Op. 68.

The Treasury Department has no authority to direct the admission of Chinese laborers who fail to obtain before departure from this country the certificate required by the treaty with China, although they have complied with all the requirements affecting Chinese who leave the United States, except the procuring of this certificate. But a Chinese laborer who proposes to leave the United States and return, complies with the conditions necessary to demand a certificate if he files the required papers "with the collector of customs of the district from which he departs;" and any rule directing him to file such papers with the collector of any other district imposes a condition not warranted by the treaty.

Harmon, At. Gen., Oct. 14, 1896, 21 Op. 424.

Art. II. of the convention with China, proclaimed December 8, 1894, repealed that part of sec. 7 of the act of September 13, 1888, 25 Stat. 476, which required a returning Chinese laborer, after an absence of more than one year and less than two years, to present with his return certificate a certificate of the consular representative of the United States at the foreign port of departure, showing that the holder had been unable to return sooner by reason of sickness or other cause of disability beyond his control; the convention providing that the disability should be reported by the laborer to the Chinese consul at the port of departure in the United States, and should be by the latter certified to the satisfaction of the collector of the port at which the laborer should land.

Knox, At. Gen., Oct. 10, 1901, 23 Op. 545.

As to the form and contents of laborers' certificates of right to return, see Regulations (1900), S. Doc. 291, 57 Cong. 1 sess., pp. 39–42.

Certificates of registration, under the acts of 1892 and 1893, do not suffice as evidence of the holder's right to depart from and return to the United States. (Id. 43, 45.

(3) PRIVILEGE OF TRANSIT.

§ 575.

The Attorney-General, in an opinion given to the Secretary of State, December 26, 1882, held that Chinese laborers, in transit across the territory of the United States from one foreign country to another, were neither emigrants nor Chinese coming to the United States as laborers, within the treaty of November 17, 1880, or the act of May 6, 1882, and further that they were not required to produce the certificates of identification prescribed by sections 4 and 6 of that

act, provided that they established by competent proof their transient status. This opinion was approved by the Department of State and transmitted to the Secretary of the Treasury, who revoked a contrary decision of his Department of July 20, 1882, and adopted on January 23, 1883, regulations permitting Chinese consuls in the ports of the United States to issue certificates to Chinese laborers arriving in transit. Such a certificate was required wherever there was a resident Chinese consul, but, if there was no such consul, other competent evidence was receivable, such as a through ticket across the territory of the United States, and affidavits.

Mr. Frelinghuysen, Sec. of State, to Mr. Cheng Tsao Ju, Chinese min., Jan. 6, and Feb. 2, 1883, For. Rel. 1883, 212, 213.

See, also, Mr. Cheng Tsao Ju to Mr. Frelinghuysen, Feb. 5, 1883, and Mr. Frelinghuysen to Mr. Cheng Tsao Ju, Feb. 23, 1883, For. Rel. 1883, 214, 215; Mr. Bayard, Sec. of State, to Mr. Morrow, M. C., April 7, 1886, 159 MS. Dom. Let. 549; Mr. Bayard, Sec. of State, to Mr. Manning, Sec. of Treas., April 8, 1886, id. 564; Mr. Bayard, Sec. of State, to Mr. Morrow, M. C., March 30, 1886, id. 467.

Chinese persons accompanying, as servants or nurses, visitors entitled to enter the United States, and temporarily remaining during the stay of such visitors, were held to be within the transit privilege. (For. Rel. 1887, 193–195.)

By Treasury Department circular No. 100, Sept. 28, 1889, Chinese laborers entering the United States in transit were required to be bonded.

For. Rel. 1889, 123–150; 1890, 210–219; 1893, 261.

For the text of the circular of Sept. 28, 1889, see For. Rel. 1889, 144.

The question of the right of transit of Chinese from a port of the United States overland to Mexico, or from such port directly by sea to a foreign port, being before the courts, the Attorney-General declined to express an opinion concerning it. (Knox, At. Gen. Nov. 15, 1901, 23 Op. 585.)

The privilege of transit across the United States is secured to Chinese laborers by the treaty proclaimed Dec. 8, 1894, expressly subject to governmental regulation, and the action of the collector of customs under existing regulations in refusing transit will not be reviewed by the courts.

Fok Yung Yo *v.* United States (1902), 185 U. S. 296. Also, Lee Gon Yung *v.* United States (1902), 185 U. S. 306, affirming In re Lee Gon Yung (1901), 111 Fed. Rep. 998. Although the treaty of 1894 has been terminated, the transit of laborers is still permitted under regulations, which include the giving of a bond in the penal sum of $500. (Regulations governing the admission of Chinese, approved Feb. 5, 1906.)

(4) DEPORTATION.

§ 576.

The act of 1882 required a Chinese person convicted of being unlawfully in the United States to be returned to the country "whence he came," and similar language was used in subsequent statutes.

Re Chin Ah Sooey, 21 Fed. Rep. 393. See the case of Ah Moy, id. 808.
See, also, United States *v.* Chong Sam, 47 Fed. Rep. 878; In re Mah Wong Gee, 47 Fed. Rep. 433; In re Leo Hem Bow, 47 Fed. Rep. 302.

Where a Chinaman was ordered to be deported to British Columbia, and, owing to his inability to pay the head tax of $50 there imposed on persons of his class, the order could not be executed, it was held that China might be considered the country from whence he came.

United States *v.* Ah Toy, 47 Fed. Rep. 305.

By sec. 2 of the act of May 5, 1892, it is provided that a Chinaman, convicted and adjudged to be not lawfully in the United States, shall be removed to China, unless he shows that he is a citizen or subject of some other country; but, even in that case, he is to be removed to China, if the country in question demands a tax as a condition of receiving him.

27 Stat. 25.

Where Chinese persons, sentenced to be deported, were brought to the United States on a vessel which, before her return to the country from which the prisoners came, was to make a trip to a port in an adjacent country, where they would be likely to be released, it was advised that, under the act of May 5, 1892, sec. 7, the Secretary of the Treasury might authorize their temporary landing and detention at an American port, pending the return of the vessel from the port of the adjacent country.

Olney, At. Gen., May 4, 1894, 21 Op. 18.

(5) DISCUSSION AS TO THE PHILIPPINES.

§ 577.

By an order issued by General Otis, Sept. 26, 1898, the coming of Chinese to the Philippines was prohibited, except as to the classes permitted to enter the United States and laborers formerly resident in Manila and temporarily absent therefrom.

For. Rel. 1899, 211; Magoon's Reports, 482.

By another order of General Otis, issued April 1, 1899, only such Chinese as were in good health and had been residents of any of the provinces of the Philippine Islands were permitted to land "in Manila, Iloilo, and Cebu, the only three open ports of the archipelago."

For. Rel. 1899, 212.

With reference to these orders, the Department of State said: "It is the opinion of the War and Treasury Departments that the enforcement of the Chinese exclusion act is incident to the military administration of the Philippine Islands during a state of hostilities therein, and therefore without prejudice to the future action of Congress in permanently extending the laws of the United States to such territory; so that, while it seems appropriate and desirable not to interfere with the discretion of the military commander in that quarter, the measure he has adopted should not be regarded as in pursuance of a settled policy on the part of the United States Government."

Mr. Adee, Acting Sec. of State, to Mr. Wu, Aug. 18, 1899, For. Rel. 1899, 209.

Against the order of Sept. 26, 1898, the Chinese minister at Washington protested on the ground (1) that it was not warranted as a military measure, (2) that it was a departure from the policy previously foreshadowed of leaving the determination of the status of the newly-acquired possessions to Congress, and (3) that it was unjust and would disturb friendly relations.

Mr. Wu, Chinese min., to Mr. Hay, Sec. of State, Sept. 12, 1899, For. Rel. 1899, 212, 214.

As to the second ground, see Mr. Hay to Mr. Wu, Feb. 6, 1899, For. Rel. 1899, 209.

See, also, as to question of exclusion, Mr. Hay to Mr. Wu, Sept. 4, 1899, MS. Notes to Chinese Leg. II. 34; Mr. Adee, Act. Sec. of State, to Sec. of Treas., Sept. 7, 1899, 240 MS. Dom. Let. 44; Mr. Hay to Mr. Wu, No. 119, Dec. 5, 1899, MS. Notes to Chinese Leg. II. 43; Mr. Cridler, 3rd Assist. Sec. of State, to Sec. of War, Jan. 11, 1900, 242 MS. Dom. Let. 224; Mr. Wu to Mr. Hay, May 7, 1900, For. Rel. 1900, 402, referring to For. Rel. 1899, 207 et seq., and S. Doc. 397, 56 Cong. 1 sess.

Representations against the reenactment of the Chinese-exclusion laws and their extension to the Philippines, containing a comprehensive review of the whole subject, may be found in Mr. Wu to Mr. Hay, Dec. 10, 1901, For. Rel. 1901, 75–97.

"In your note of February 4 last you asked to be advised, for the information of the Government of the Straits Settlements, whether Chinese persons who are British subjects are permitted to travel in the Philippine Islands.

"You also asked to be informed whether a determination has yet been reached as to whether the Chinese-exclusion laws are or are not held to be operative in those islands.

"Replying to both inquiries, I have the honor to state that the position taken by the United States War Department, by whom the affairs of the islands are being administered, is as follows:

"1. Chinese persons are to be excluded from the Philippines 'whether subjects of China or any other foreign power.'

"2. That such exclusion is a military measure adopted to meet existing military necessity. Being a military expedient, it is not to be considered as in any way affecting the permanent policy of the government of the islands under the conditions of peace.

"3. The military order relating to said exclusion did not extend the Chinese-exclusion acts of the United States Congress to and over the Philippine Islands as a law of the United States; the provisions of said acts were adopted as appropriate remedies for the military necessity, and made operative independently of the statute by authority resulting from military occupation."

Mr. Hill, Acting Sec. of State, to Lord Pauncefote, Brit. amb., May 7, 1901, For Rel. 1901, 214.

See, as to the Philippines and other insular territory of the United States, except Hawaii, sec. 4, act of April 29, 1902, supra, § 570.

By section 5 of the act of April 27, 1904, sec. 1 of the act of April 29, 1902, was amended so as to provide that the laws regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States, and their residence therein, should "also apply to the island territory under the jurisdiction of the United States, and prohibit the immigration of Chinese laborers, not citizens of the United States, from such island territory to the mainland territory of the United States, whether in such island territory at the time of the cession or not, and from one portion of the island territory of the United States to another portion of said island territory: *Provided, however*, That said laws shall not apply to the transit of Chinese laborers from one island to another island of the same group; and any islands within the jurisdiction of any State or the district of Alaska shall be considered a part of the mainland under this section."

By section 6 of the act of February 6, 1905, it is provided "that the immigration laws of the United States in force in the Philippine Islands shall be administered by the officers of the general government thereof designated by appropriate legislation of said government."

By rule 38 of the Regulations of the United States, approved Feb. 5, 1906, "Chinese persons of the exempt classes who are *citizens*, or *subjects*, of the insular territory of the United States," and who wish

to go " from one insular territory to another insular territory of the United States, or from such insular territory to the mainland territory of the United States," must obtain from an officer designated for the purpose by the chief executives of the insular territories, respectively, a permission in a form analogous to the certificate prescribed by section 6 of the act of July 5, 1884.

The issuance of such certificates in the Philippines is regulated by an executive order of the insular government of September 23, 1904.

Treaty, Laws, and Regulations governing the Admission of Chinese, Department of Commerce and Labor, Bureau of Immigration, February 5, 1906, pp. 26, 32, 48.

(6) PROPOSALS OF COOPERATION.

§ 578.

By a concurrent resolution adopted by the Senate May 2, and by the House Oct. 1, 1890, the President was requested to enter into negotiations with a view to prevent by treaty stipulation the illegal entry of Chinese laborers into the United States by way of Canada and Mexico. The President made corresponding overtures to the Governments of Great Britain and Mexico, but without success.

Mr. Blaine, Sec. of State, to Mr. Lincoln, min. to England, Oct. 22, 1890, For. Rel. 1890, 357; and an identic instruction to Mr. Ryan, min. to Mexico, Oct. 22, 1890, For. Rel. 1890, 655.

The Mexican Government stated that it was unable to negotiate on the subject, since by Art. XI. of the Constitution " every man has a right to enter and to go out of the Republic, to travel through its territory and change his residence, without the necessity of any safeguard, passport, letter of safe-conduct, or other like requisite." (Mr. Ryan, min. to Mexico, to Mr. Blaine, Sec. of State, No. 471, Nov. 1, 1890, For. Rel. 1890, 656; Mr. Blaine to Mr. Ryan, No. 399, Nov. 19, 1890, id. 656; Mr. Ryan to Mr. Blaine, No. 487, Nov. 26, 1890, id. 657; Mr. Blaine to Mr. Dougherty, No. 426, Dec. 31, 1890, MS. Inst. Mex. XXII. 690; Mr. Blaine to Mr. Ryan, No. 451, Feb. 11, 1891, MS. Inst. Mex. XXIII. 36.)

The minister of the United States at Mexico was instructed officially to apprise the Mexican Government that, under the provisions of the exclusion laws, persons of Chinese descent, if laborers, would not be permitted to enter the United States, " although they may present certificates of citizenship from that Government." (Mr. Wharton, Act. Sec. of State, to Mr. Ryan, No. 747, June 14, 1892, MS. Inst. Mex. XXIII. 235, enclosing copy of Treasury circular, June 2, 1892.)

For the British answer, see For. Rel. 1892, 234, 236, 297, 298, 309, 310, 316, 322, 324.

As to the release at Victoria, on habeas corpus, of certain Chinese persons in transit under bond to Hong Kong, under an order of deportation from the United States, see Mr. Gresham, Sec. of State, to Sec. of Treas., June 25, 1894, 197 MS. Dom. Let. 464.

"The enforcement of the Chinese exclusion act has been found to be very difficult on the northwestern frontier. Chinamen, landing at Victoria, find it easy to pass our border, owing to the impossibility, with the force at the command of the customs officers, of guarding so long an inland line. The Secretary of the Treasury has authorized the employment of additional officers who will be assigned to this duty, and every effort will be made to enforce the law. The Dominion exacts a head tax of fifty dollars for each Chinaman landed, and when these persons, in fraud of our law, cross into our territory and are apprehended, our officers do not know what to do with them, as the Dominion authorities will not suffer them to be sent back without a second payment of the tax. An effort will be made to reach an understanding that will remove this difficulty."

President Harrison, annual message, Dec. 3, 1889, For. Rel. 1889, xiii.

"The enforcement by the Treasury Department of the law prohibiting the coming of Chinese to the United States has been effective as to such as seek to land from vessels entering our ports. The result has been to divert the travel to vessels entering the ports of British Columbia, whence passage into the United States at obscure points along the Dominion boundary is easy. A very considerable number of Chinese laborers have, during the past year, entered the United States from Canada and Mexico.

"The officers of the Treasury Department and of the Department of Justice have used every means at their command to intercept this immigration; but the impossibility of perfectly guarding our extended frontier is apparent. The Dominion Government collects a head tax of $50 from every Chinaman entering Canada, and thus derives a considerable revenue from those who only use its ports to reach a position of advantage to evade our exclusion laws. There seems to be satisfactory evidence that the business of passing Chinamen through Canada to the United States is organized and quite active. The Department of Justice has construed the laws to require the return of any Chinaman found to be unlawfully in this country to China as the country from which he came, notwithstanding the fact that he came by way of Canada; but several of the district courts have, in cases brought before them, overruled this view of the law and decided that such persons must be returned to Canada. This construction robs the law of all effectiveness, even if the decrees could be executed, for the men returned can the next day recross our border. But the only appropriation made is for sending them back to China, and the Canadian officials refuse to allow them to reënter Canada without the payment of the $50 head tax. I recommend such legislation as will remedy these defects in the law."

President Harrison, annual message, Dec. 9, 1891, For. Rel. 1891, xxii.

CHAPTER XIV.

EXTRADITION.

I. *EXTRADITION A NATIONAL ACT.*

§ 579.

Although the question whether the several States of the United States possess the power to surrender fugitive criminals to foreign governments has never been actually decided by the Supreme Court, yet it may now be regarded as settled doctrine that they do not possess such power, but that it belongs exclusively to the National Government. The question has, however, been by no means free from controversy, and the present accepted view is the result of a gradual evolution of opinion and practice.

The Earl of Dalhousie, governor of Canada, having in 1821 delivered over to the authorities of New York, on the request of Governor Clinton, one Jacob Smith, alias Jacob S. Redington, charged with forgery, Governor Clinton, in order that the State might practise reciprocity, recommended to the legislature the adoption of an act for the purpose. Such an act was passed April 5, 1822. It authorized the governor in his discretion to deliver up, on due requisition, persons charged with murder, forgery, larceny, or other crime, which, if committed in the State of New York, would there be punishable with death or imprisonment in the State prison.

Laws of New York, 1822, p. 139; Journals of N. Y. Legislature, 1822; 3 U. S. Law Intelligencer and Rev. 408, 409; Moore on Extradition, I. 59 et seq.

This statute was embodied in the Revised Statutes of New York of 1827. For analogous provisions in the laws of other States, see Moore on Extradition, I., ch. iii., 53 et seq.

"Your letter of the 16th instant having been laid before the President of the United States for his consideration, I am directed by him to inform you that, the treaty with Great Britain of 1794 being no longer in force, no demand can be made upon the British authorities,

by virtue of the stipulations which it contained, for the delivery of persons charged with forgery and fugitives from justice. The Government of the United States have recently declined the delivery, upon application from the British minister, of a British subject within our jurisdiction, charged with a statute piracy. It is believed, however, that the British Government in Canada has delivered up persons, fugitives from justice, in the States of New York and Vermont, upon direct application from the governors of those States, respectively, and a similar application from the executive of Pennsylvania, to the governor-general of Canada, would probably obtain the same result."

Mr. Adams, Sec. of State, to Mr. Gregg, Sec. of State to the Commonwealth of Pennsylvania, Dec. 28, 1822, 20 MS. Dom. Let. 67.

"I have the honor to transmit herewith to your Excellency a copy of a note from Mr. Vaughan, his Britannic Minister and E. E., addressed to this Department, with certain documents which accompany it. The object of that note is to obtain the arrest of Michael Neilson, a British subject, now a resident or sojourner in the State of New York, who is charged with having committed the crime of forgery in his own country. Whether the laws of New York admit of the arrest and delivery of the accused as requested by Mr. Vaughan, or not, Your Excellency is most competent to determine. If they do, you will judge how far it may tend to promote the amicable relations which exist between Great Britain and the United States, and the cause of justice, to comply with the request."

Mr. Clay, Sec. of State, to Governor De Witt Clinton, Nov. 11, 1825, 21 MS. Dom. Let. 188.

See, further, as to this case, Moore on Extradition, I. 60–61.

As to the delivery up by the governor of New York, on the request of the Dutch minister, in 1831, of Carrara, alias Polari, the purloiner of the jewels of the Princess of Orange, see id. § 51, p. 61 et seq.

As to the surrender in 1834 of one Mariana, alias Fanelle, alias Penelli, charged with murder and robbery in the French West Indies, see id. § 52, p. 64 et seq.

In or about the year 1837, the Department of State sanctioned a demand from the governor of Michigan on Texas (then an independent state) for the delivery of a fugitive, and in 1840 a demand of the governor of Georgia on Texas for the same purpose, there being no extradition treaty on which the Federal Government could act.

Mr. Forsyth, Sec. of State, to Mr. Rogers, dist. attorney at Buffalo, N. Y., July 25, 1837, 29 MS. Dom. Let. 145; Mr. Forsyth, Sec. of State, to Mr. Hardee, Mar. 30, 1840, 31 MS. Dom. Let. 7. In the letter to Mr. Rogers, the Department of State refused itself to make a request for extradition by the government of Texas at the solicitation of the New York authorities.

In 1839, when Mr. Seward became governor of New York, the operation of the act of 1822 was virtually suspended, Mr. Seward taking the view that the subject of extradition was "intimately connected with the foreign relations of the United States, and should be exclusively under the control of the General Government." He offered, indeed, in one case, to deliver up a person charged with murder in Canada, if the President of the United States would make a "requisition" upon him to do so. The President, however, declined to take such action, though he was in favor of Mr. Seward's executing the New York statute till it had been decided by some judicial tribunal to be unconstitutional.

Mr. Forsyth, Sec. of State, to Mr. Spencer, June 20, 1839, 30 MS. Dom. Let. 272; Moore on Extradition, I. §§ 53, 54, 55, pp. 66–70.

In 1839 Governor Jenison, of Vermont, issued a warrant for the surrender of George Holmes, who was charged with murder in the Province of Quebec. Holmes having applied for a writ of habeas corpus, the case was eventually brought on writ of error before the Supreme Court of the United States. The court was equally divided as to the question of jurisdiction, and the writ of error was therefore dismissed; but Chief Justice Taney, in his opinion, in which Justices Story, McLean, and Wayne concurred, declared that the power of extradition belonged "exclusively to the Federal Government," and that the action of the governor of Vermont was "repugnant to the Constitution of the United States."

Holmes *v.* Jennison (1840), 14 Pet. 540, 579.

The supreme court of Vermont subsequently discharged Holmes from imprisonment. (Ex parte Holmes, 12 Vt. 631; Moore on Extradition, I. § 48, pp. 55–59.

Without the consent of Congress, no State can enter into any agreement or compact, express or implied, to deliver up fugitives from the justice of a foreign state who may be found within its limits.

Legaré, At. Gen., 1841, 3 Op. 661.

For the history of this opinion, see Moore on Extradition, I., § 56, p. 68 et seq.

The Belgian Government having requested through its minister at Washington the surrender of one Carl Vogt, alias Stupp, charged with murder and other crimes in that country, Mr. Fish, who was then Secretary of State, answered the minister that the request "could not be complied with in the absence of a treaty of extradition;" but that, "in view of the gravity of the crimes alleged," he was "willing to point out to him a statute of the State of New York, passed as early as 1822, and included in the recent revisions," which authorized

the governor in his discretion to deliver up fugitives from justice, and that the Department "would interpose no obstacle, should an application to the governor be successful."

Mr. Fish, Sec. of State, to Mr. Jones, min. to Belgium, No. 108, May 1, 1872, MS. Inst. Belgium, II. 28.

The Belgian minister, acting upon Mr. Fish's suggestion, applied to Governor Hoffman, of New York, for Vogt's extradition. Governor Hoffman issued his warrant, and Vogt was arrested. Vogt, however, obtained a writ of habeas corpus, on which it was held, first by the superior court of New York City, then by the supreme court of the State, and finally by the court of appeals, that the prisoner was entitled to be discharged, on the ground that the act of 1822 was unconstitutional.

People *v.* Curtis (1872), 50 N. Y. 321. Cited with approval in People *v.* Supervisors, 134 N. Y. 1, 9.

"There can be little doubt of the soundness of the opinion of Chief Justice Taney [in Holmes *v.* Jennison] . . . It can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of fugitives from justice can become the subject of negotiation between a State of this Union and a foreign government."

Mr. Justice Miller, delivering the opinion of the court, United States *v.* Rauscher (1886), 119 U. S. 407, 414.

Article II. of the extradition treaty with Mexico of Dec. 11, 1861, is as follows:

In the case of crimes committed in the frontier States or Territories of the two contracting parties, requisitions may be made through their respective diplomatic agents, or through the chief civil authority of said States or Territories, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or when, from any cause, the civil authority of such State or Territory shall be suspended, through the chief military officer in command of such State or Territory.

Unless the conditions of arrest under this section are strictly complied with, the parties arresting and carrying off the alleged fugitive may be chargeable with kidnapping.

Mr. Bayard, Sec. of State, to Mr. Jackson, Aug. 23, 1886, MS. Inst. Mex. XXI. 56.

Jan. 26, 1893, the Mexican minister informed the Department of State that Nueva Leon had been made a border State in order that the stipulations above quoted might be applicable to it. (Mr. Gresham, Sec. of State, to Mr. Lyman, April 20, 1895, 201 MS. Dom. Let. 572.)

The treaty of Dec. 11, 1861, is superseded by that of Feb. 22, 1899, infra. As to cases under the treaty of 1861, see Moore on Extradition, I. 75 et seq.

Article II. of the treaty between the United States and Mexico of 1861, which provides for requisitions by the governors of border States or Territories for crimes therein committed, does not apply to offences committed against Federal law in the State of Texas. For such an offense it would not be within the province of the governor of Texas to request extradition.

Mr. Bayard, Sec. of State, to Mr. Whitehouse, chargé at Mexico, No. 170, Nov. 22, 1888, For. Rel. 1888, II. 1247.

The provision in the treaty between the United States and Mexico, making extraditable, in the case of the frontier States and Territories, certain offences for which extradition is not otherwise granted, refers to the place of the commission of the offence and not to the place from which the fugitive entered the one country or the other. Hence, a fugitive who, after committing an offence in Vermont, fled to California, and then proceeded from California to Mexico, would not come within the stipulation.

Mr. Gresham, Sec. of State, to Mr. Lowles, Dec. 26, 1894, 200 MS. Dom. Let. 78.

Under Article IX. of the treaty between the United States and Mexico of February 22, 1899, where crimes or offences are charged to have been committed in the frontier States or Territories the requisition may be made either through the diplomatic channel or through the chief civil authority of the State or Territory, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may be duly authorized for the purpose by the chief civil authority of the proper State or Territory; or when, from any cause, the civil authority of the State or Territory shall be suspended, the requisition may be made through the chief military officer there in command. In reply to an inquiry made by the "extradition agent for the western district of Texas," under this article, as to his duties, the Department of State said:

1. Where extradition was sought by the national Government of Mexico, and proceedings were instituted by some one acting in behalf of that Government, his duties were prescribed by sec. 5270, Revised Statutes.

2. Where extradition was sought by a frontier State, the requisition was to be made by one of the authorities indicated in the article. In that case the article made it the duty of the "proper judicial authority," before whom the fugitive was brought and before whom proceedings doubtless might be instituted by some person acting in behalf of the frontier State, district or county, to forward the record of the examination with the evidence duly attested to the "proper Executive authority of the United States." While this language

might, said the Department of State, be construed to mean that the record was to be forwarded to the National Executive in every case, it was believed that this was not the intent of the treaty, but that in this class of cases the record was to be forwarded to the State executive for his action upon the requisition.

In cases of extradition from Mexico to the United States, the correspondent was advised that he was not understood to have any functions unless he was designated by the executive of Texas as the "chief judicial authority" of the frontier, district, or county, through whom the treaty provided that requisitions might be made upon the corresponding authority of the Mexican border, district, or county.

Mr. Adee, Act. Sec. of State, to Mr. Foster, Oct. 24, 1900, 248 MS. Dom. Let. 453.

II. *EXTRADITION WITHOUT TREATY.*

1. Question of Obligation.

§ 580.

Although we have the high authority of Grotius and Vattel for the view that extradition is a matter of international obligation, yet the prevalent modern doctrine, which has been adopted in practice, is that which was expressed by Chief Justice Tilghman: "No State has an *absolute* and *perfect right* to *demand* of another the delivery of a fugitive criminal, though it has what is called an *imperfect right*, that is, a right to ask it, as a matter of courtesy, good will and mutual convenience. But a refusal to grant such request is no just cause of war."

Commonwealth *v.* Deacon, 10 S. & R. 125.

In accord with this view are United States *v.* Rauscher, 119 U. S. 407; Heffter, Bergson's ed., § 63; Foelix, Droit. Int. Privé, II. § 608; Twiss, Law of Nations, Time of Peace, ed. 1884, § 238; Phillimore, 3rd ed., I. 517; Creasy, Int. Law, 202; Lewis, For. Juris. 37; Pomeroy, Int. Law, Woolsey's ed. (1886), 236; Lawrence's Wheaton (1863), 233.

Contra, Grotius, De Jure Belli ac Pacis, Lib. II. c. 21, §§ 2, 4, 5; Vattel, Lib. I. § 233; Chancellor Kent, Matter of Washburn, 4 Johns. Ch. 105, 107; Clarke on Extradition (3rd ed.), 3.

See, further, Moore on Extradition, I. §§ 9–15, pp. 13–20.

"The laws of nations embrace no provision for the surrender of persons who are fugitives from the offended laws of one country to the territory of another. It is only by treaty that such surrender can take place."

Mr. Rush, Sec. of State, to Mr. Hyde de Neuville, Apr. 9, 1817, MS. Notes to For. Leg. II. 218.

See instructions of Mr. Jefferson, Sec. of State, to Messrs. Carmichael & Short, March 22, 1792, with reference to negotiations with Spain. (Am. State Papers, For. Rel. I. 258.)

"The undersigned must beg leave to differ entirely from M. d'Argaïz in regard to the rule of law for delivering up criminals and fugitives from justice. Although such extradition is sometimes made, yet, in the absence of treaty stipulations, it is always matter of comity or courtesy. No government is understood to be bound by the positive law of nations to deliver up criminals, fugitives from justice, who have sought an asylum within its limits."

Mr. Webster, Sec. of State, to Mr. d'Argaïz, June 21, 1842, Webster's Works, VI. 399, 405.

"But the practice of nations tolerates no right of extradition. Whatever elementary authors may say to the contrary, one nation is not bound to deliver up persons accused of crimes who have escaped into its territories on the demand of another nation against whose laws the alleged crime was committed. The government of the United States has from the very beginning acted on this principle. Mr. Jefferson, when Secretary of State under the administration of General Washington, declared that 'the laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender, coming within their pale, is received by them as an innocent man, and they have authorized no one to seize or deliver him.' It has been contrary to the practice of the United States even to request as a favor that the government of another country should deliver up a fugitive from criminal justice, because under our laws we possess no power to reciprocate such an act of grace. Since I came into the Department of State the President, after full deliberation with his Cabinet, refused for this reason to prefer such a request to the government of Texas. The truth is, that it has been for a long time well settled, both by the law and practice of nations, that, without a treaty stipulation, one government is not under any obligation to surrender a fugitive from justice to another government for trial."

Mr. Buchanan, Sec. of State, to Mr. Wise, Sept. 27, 1845, MS. Inst. Brazil, XV. 119.

2. Question of Legal Power.

§ 581.

"The delivery of fugitives from one country to another, as practiced by several nations, is in consequence of conventions settled between them, defining precisely the cases wherein such deliveries shall take place. . . . The laws of the United States, like those of England, receive every fugitive, and no authority has been given to our executives to deliver them up."

Mr. Jefferson, Sec. of State, to the President, Nov. 7, 1791, MSS. Dept. of State; quoted in Moore on Extradition, I. 22.

This report related to a letter addressed to President Washington, Aug. 18, 1791, by Gov. Charles Pinckney, of South Carolina, concerning a request which the latter proposed to make to the governor of east Florida for the delivery up of two fugitives from South Carolina who were charged with forging the securities of that State. In another letter to the President, of January 8, 1792, Gov. Pinckney stated that, in view of Mr. Jefferson's opinion, although it differed from his own, he had directed the attorney-general of the State not to make the request to the governor of east Florida. At the same time he said: "It is the opinion of some well-informed gentlemen of the law that an application for persons charged with *felonies is* perfectly consistent with the usages of nations, notwithstanding there may be *no convention* between them on the subject. It is true in such cases there can be *no right* to demand, but it may be expected that as by the law of nations 'they are not only bound to observe justice with respect to each other, but to abstain from everything which may violate it,' it is in some degree their duty and certainly their interest to attend to such applications when accompanied by the opinion of a grand jury or other equally presumptive proof of the probability of guilt, according to the mode of administering justice in the countries from which they fled." Gov. Pinckney added that a line should be drawn between political and other offenses, but that with regard to felonies, as they were destructive to the order of society, it appeared to be a matter of interest that the offenders should be delivered up.

See, also, Mr. Jefferson, Sec. of State, to Mr. Genet, French min. Sept. 12, 1793, Am. State Pap. For. Rel. I. 177.

Feb. 21, 1794, M. Fauchet, French minister to the United States, demanded, by order of the Directory, the arrest, with a view to their transportation to France, of his predecessor, M. Genet, "and all the other agents who may have participated in his faults and his sentiments." The Secretary of State replied that the President, notwithstanding his disposition to cultivate the friendship of the French Republic, "thinks his legal power too questionable to cause the arrest to be made."

Mr. Randolph, Sec. of State, to M. Fauchet, Feb. 27, 1794, 6 MS. Dom. Let. 85.

See, to the same effect, Resp. *v.* De Longchamps (1784), 1 Dallas, 111; Com. *v.* Deacon, 10 S. & R. 125; United States *v.* Davis, 2 Sumner, 482; W. B. Lawrence, 14 Alb. L. J. 90; Dana's Wheaton, pp. 182–4, note.

"The Secretary of State respectfully lays before the President of the United States a note from Mr. Liston, his Britannic Majesty's minister plenipotentiary, with copies of two letters, one from Lord Dorchester, the other from the sheriff of Montreal; and expresses his concurrence with Mr. Liston in the opinion, that while the reciprocal delivery of murderers and forgers is expressly stipulated in the 27th article of our treaty with Great Britain, the two Governments are left at liberty to deliver other offenders, as propriety and mutual advan-

tage shall direct. That it will therefore be expedient to express this opinion to the governor of Vermont, in order to procure the arrest and delivery of Barnes. Lord Dorchester's information respecting James Clarkson Freeman is correct. He was convicted of forgery in Jersey, broke jail, and fled to Canada, some four or five years since.

[P. S.] "The Attorney-General has just called and thinks the opinions expressed to be correct."

Mr. Pickering, Sec. of State, to the President, June 3, 1796, 9 MS. Dom. Let. 148.

See comments in Moore on Extradition, I. § 23, p. 30.

"The reciprocal delivery of murderers and forgers is positively stipulated by the 27th article of the treaty; the conduct of the two Governments with respect to other offenders is left, as before the treaty, to their mutual discretion; but this discretion will doubtless advise the delivery of culprits for offences which affect the great interests of society. The President approves of this opinion and of the communication of it to your excellency."

Mr. Pickering, Sec. of State, to the Governor of Vermont, June 3, 1796, 9 MS. Dom. Let. 150.

If a Spanish subject who has violated the territorial law of Florida be within the United States, and a demand be made for his surrender, he ought to be given up for trial and punishment; and a law should be made directing the mode of procedure.

Lee, At. Gen., 1797, 1 Op. 68.

See comment in Moore on Extradition, I. §§ 13, 23, pp. 18, 30.

A requisition from the British minister is not authorized by the twenty-seventh article of the treaty of 1794, unless the persons demanded are charged with murder or forgery committed within the jurisdiction of Great Britain.

Lee, At. Gen., 1798, 1 Op. 83.

The President has no power "to make the delivery" unless under treaty or act of Congress.

Wirt, At. Gen., 1821, 1 Op. 509, 521; Legaré, At. Gen., 1841, 3 Op. 661.

See, to the same effect, Mr. Rush, Sec. of State, to Mr. Hyde de Neuville, French min., April 9, 1817, MS. notes to For. Leg. II. 218; Mr. Gallatin, min. to France, to Min. for For. Aff., April 23, 1817, enclosed with Mr. Gallatin's No. 41, Aug. 20, 1817, 18 MS. Desp. from France; Mr. Adams, Sec. of State, to Mr. Bagot, Brit. min., Dec. 29, 1817, and May 2, 1818, MS. notes to For. Leg. II. 269, 324; same to Mr. Antrobus, May 11, 1819, MS. Notes to For. Legs. II. 367.

Every citizen of the United States being secured by the Constitution against unreasonable arrest, and magistrates being prohibited

from issuing warrants except on probable cause, supported by oath or affirmation, the President can not order the arrest of the master of an American vessel and his confinement for trial upon a communication from the British minister, accompanied by copies of depositions taken before a justice of the peace of the island of Antigua, charging him with the murder of a British subject on the high seas.

Berrien, At. Gen., 1829, 2 Op. 267.

Mr. Vaughan, the British minister, having requested the extradition of one Andrew Cawlen, charged with the murder of two persons in England, Mr. Forsyth, by direction of the President, replied that, in the absence of an appropriate treaty between the two countries, the authority of the Executive "to exercise an act of such important effect upon the rights of personal security is more than questionable," and that the case was therefore "without any remedy in the competency of this Government to apply."

Mr. Forsyth, Sec. of State, to Mr. Vaughan, July 7, 1834, MS. Notes to Br. Leg. VI. 1.

The language of this reply was taken from Mr. Adams's note to Mr. Bagot, the British minister, of May 2, 1818, MS. Notes to For. Legs. II. 324.

See, to the same effect, Mr. Forsyth, Sec. of State, to Mr. Cass, min. to France, May 29, 1840, MS. Inst. France, XIV. 261; Mr. Upshur, Sec. of State, to Mr. Everett, Nov. 23, 1843, MS. Inst. Gr. Br. XV. 177; and other letters cited in Moore on Extradition, I. § 16, p. 21.

The duty to grant extradition is not deducible from the most-favored-nation clause in treaties of commerce and navigation.

Cushing, At. Gen., 1853, 6 Op. 148.

In 1864 one Arguelles, a Spanish subject and an officer of the Spanish army, who was charged with having clandestinely sold into slavery part of a cargo of African negroes which he had captured, and for the capture of which he had received a large sum of prize money, was seized and delivered up at New York, by order of the Executive of the United States, to an agent of the captain-general of Cuba, and conveyed back to that island. The proceedings were so summary that no opportunity was allowed to obtain a writ of habeas corpus.

1 Moore on Extradition, § 27, p. 33 et seq.; Dip. Cor. 1864, II. 60, 72, IV. 35; Dana's Wheaton, § 115, note 73; W. B. Lawrence, 14 Alb. L. J. 88; McPherson's Hist. of the Rebellion, 355.

"The elaborate letter of Mr. Seward of June 24, 1864, to the chairman of the Judiciary Committee of the House of Representatives (a copy of which was inclosed in Mr. Seward's No. 108½ to Mr. Koerner of the same date) lays down and enforces the following affirmative propositions:

"1. That 'the object to be accomplished in all these cases is alike interesting to each Government; namely, the punishment of malefactors—the common enemies of every society. While the United States afford an asylum to all whom political differences at home have driven abroad, it repels malefactors, and is grateful to their Governments for undertaking their pursuit and relieving us from their intrusive presence.' This doctrine, originally put forth by Attorney-General Cushing in an official opinion dated October 4, 1853, was quoted and adopted by Mr. Seward.

"2. That 'the true position of the national obligation and authority for the extradition of criminals' may be found 'defined and established *by the law of nations*.'

"3. That 'this obligation and authority, under the Constitution of the United States, and *in the absence of treaty stipulations* and statutory enactments, rests with the President of the United States.'

"4. That 'the sole elements of consideration upon which the Executive is to determine whether or not a proposed case of extradition should or should not call forth the exercise of this power and duty under the law of nations, and the precepts of humane and Christian civilization' are 'the traits of the alleged criminality as involving heinous guilt against the laws of universal morality and the safety of human society and the gravity of the consequences which will attend the exercise of the power in question or its refusal.'

"Whether these propositions would or would not commend themselves to the judgment of the President, should a case arise for their application to a fugitive from justice from a state with whom we have no extradition convention, found within the jurisdiction of the United States, about which I express no opinion, it seemed clear that this Government was not in a position to dispute the right of Spain to apply them in Bidwell's case on the demand by Great Britain for his surrender."

Mr. Fish, Sec. of State, to Mr. Sickles, Apr. 30, 1873, MS. Inst. Spain, XVI. 453.

To same effect, see Mr. Fish to Mr. Beardsley, June 30, 1873, MS. Inst. Barb. Powers, XV. 147.

Bidwell, who was referred to in the last paragraph, was Austin Bidwell, an American citizen, who was extradited from Cuba to England, although there was then no treaty on the subject between Great Britain and Spain. (1 Moore on Extradition, § 145, p. 184.)

"I have the honor to acknowledge the receipt of your note of the 24th instant, in which . . . you . . . renew the request formerly made, that Vogt may be delivered up to Belgium as an act of comity. In the personal interview which I had with you on this subject, . . . I informed you . . . that, under the circumstances of this case, the Secretary of State had felt disposed to examine into

the power to surrender Vogt to your government as an act of comity. The result of that examination has, to say the least, raised grave doubts as to the power of the President to do so. The authority of the Executive to abridge personal liberty within the jurisdiction of the United States, and to surrender a fugitive from justice in order that he may be taken away from their jurisdiction, is derived from the statutes of Congress, which confer that power only in cases where the United States are bound by treaty to surrender such fugitives, and have a reciprocal right to claim similar surrender from another power. I am, therefore, constrained to decline to comply with your request for the surrender of Carl Vogt."

Mr. J. C. B. Davis, Acting Sec. of State, to Mr. Delfosse, Belg. min., July 28, 1873, For. Rel. 1873, 1. 81.

In 1878, Mr. Evarts, in instructing the diplomatic representative of the United States at Lisbon to secure, if practicable, the surrender by Portugal of Angell, the defaulting secretary of Pullman's Palace Car Company, as an act of comity, said: "It is presumed that the Government of His Majesty will have no difficulty in acceding to the prevalent opinion in respect of extradition, that it is a right inherent in the sovereignty of a nation, and not born of specific treaty obligations; while, on the other hand, the right to claim the extradition of a criminal flows exclusively from the reciprocal stipulations of treaty." Further on Mr. Evarts remarked: "It is not known whether any constitutional or statutory impediment exists in Portugal to such a course."

In the same year Mr. Evarts in directing the American minister at Santiago, Chile, to seek the extradition of a criminal as an act of courtesy, instructed him "in no event" to "give the Chilean authorities an assurance that . . . we would reciprocate if a similar request should be made of us."

Mr. Evarts, Sec. of State, to Mr. Moran, chargé at Lisbon, Nov. 26, 1878, 1 Moore on Extradition, 44; Mr. Evarts, Sec. of State, to Mr. Osborn, min. to Chile, Sept. 28, 1878, MS. Inst. Chile, XVI. 228. See, also, Mr. Evarts, Sec. of State, to Mr. Shishkin, June 18, 1879, MS. Notes to Russian Leg. VII. 274.

In the case of Alexander Trimble, an American citizen, whose extradition was demanded in 1884 by the Government of Mexico, Mr. Frelinghuysen maintained "that, by the opinions of several Attorneys-General, by the decisions of our courts, and by the rulings of the Department of State, the President has not, independent of treaty provision, the power of extraditing an American citizen: and the only question to be considered is whether the treaty with Mexico confers that power."

Report of Mr. Frelinghuysen, Sec. of State, to the President, February 13, 1884, S. Ex. Doc. 98, 48 Cong. 1 sess.

"A long and almost unbroken course of decisions has established it as a rule of executive action not to grant the surrender of fugitive criminals except in pursuance of a treaty."

Mr. Bayard, Sec. of State, to Mr. Davie, May 29, 1886, 160 MS. Dom. Let. 354.

See, also, Mr. Bayard, Sec. of State, to Baron d'Almeirim, Portuguese chargé, June 4, 1888, For. Rel. 1888, II. 1394.

With reference to a law of Belgium of March 30, 1891, permitting the arrest and detention on board of Belgian vessels, outside the territorial waters of that kingdom, of persons prosecuted or condemned under its laws, Mr. Foster, replying to an inquiry whether there was any objection to the execution of the law in the ports of the United States, said: "A fugitive from justice from Belgium who arrives at any of the ports of the United States comes within their territorial jurisdiction and has a right to claim the protection of their laws, and this Government, in the absence of legislation or treaty authorizing the recognition or enforcement of a foreign law within its territorial jurisdiction, can not acknowledge its binding effect."

Mr. Foster, Sec. of State, to Mr. Le Ghait, Nov. 12, 1892, MS. Notes to Belg. Leg. VII. 571.

See, also, Mr Gresham, Sec. of State, to Mr. Le Ghait, Oct. 16, 1893, MS. Notes to Belg. Leg. VIII. 5; same to same, Dec. 30, 1893, id. 14.

"In the absence of a treaty or an act of Congress authorizing it, the President has no authority to cause the arrest and extradition to another country of an alleged criminal found within the jurisdiction of the United States."

Mr. Gresham, Sec. of State, to Mr. Souza Roza, June 5, 1895, MS. Notes to Portugal, VII. 171.

See, to the same effect, Mr. Gresham, Sec. of State, to Mavroyeni Bey, Turkish min., Aug. 23, 1894, For. Rel. 1894, 730.

"The United States asks nothing which may not be demanded under the treaty. Nothing is sought upon the ground of favor or comity; for the United States is powerless to reciprocate, the executive being bound under our law to surrender or to refuse to surrender according as upon facts the case is within or without the obligation of the treaty."

Mr. Olney, Sec. of State, to Mr. Ransom, min. to Mexico, Dec. 13, 1895, For. Rel. 1895, II. 1008.

See, to the same effect, Mr. Olney, Sec. of State, to Attorney-General, Jan. 8, 1896, 207 MS. Dom. Let. 76.

In the United States the general opinion and practice has been that, in the absence of a convention or legislative provision, there is no

authority in the Government to deliver up a fugitive criminal to a foreign power.

Mr. Day, Sec. of State, to Mr. Viso, May 26, 1898, MS. Notes to Argentine Leg. VII. 29.

"In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision. 1 Moore on Extradition, 21; United States v. Rauscher, 119 U. S. 407."

Terlinden *v.* Ames (1902), 184 U. S. 270, 289.
See, also, Tucker *v.* Alexandroff (1902), 183 U. S. 424, 431.

The existence of a treaty providing for the extradition of persons for certain crimes does not deprive either nation of the power and right to exercise its own discretion in respect of the surrender of persons for offences not specified in the treaty.

Ex parte Foss, 102 Cal. 347.
This was a case of the surrender of a fugitive by the provisional government of Hawaii to an agent appointed by the governor of California to receive him and convey him back to that State. The question of the power of the Government of the United States to surrender a fugitive from justice in the absence of a specific law or treaty was not involved.

3. Requests on Grounds of Courtesy.

§ 582.

In 1827 Mr. Clay instructed Mr. Tudor, then lately appointed chargé d'affaires to Brazil, to apply to the British Government for the extradition of a teller in the Bank of Virginia at Petersburg, who was charged with robbery in that State. "The application which you are thus instructed to make to the British Government is," said Mr. Clay, "not founded upon strict right, that Government being under no obligation, by any existing treaty, or by the public law, to surrender the fugitive. It addresses itself solely to the courtesy and discretion of that Government, to its sense of justice, and to the interest common to all nations that notorious offenders should not escape with impunity. Commercial states, such as Great Britain and the United States, have a powerful motive for repressing and punishing offences like that of Snelson, tending as they do to insecurity in that paper medium which enters so largely into all commercial transactions." By way of strengthening the application, Mr. Tudor was instructed to remind the British Government of the application made to the United States by the British minister on November 3, 1825, for the extradition of one Neilson charged with forgery in Scotland. The demand was recommended, said Mr. Clay,

to the favorable consideration of the governor of New York, and he believed that possession of the fugitive was finally obtained. Mr. Clay also stated that he had been informed that an agent of the bank of Scotland had recently obtained at Savannah, Ga., possession of a person charged with robbery of the bank, and that, although the local authorities might have interfered to prevent his transportation, he was permitted to be taken away.

Mr. Clay, Sec. of State, to Mr. Tudor, Nov. 23, 1827, MS. Inst. U. States Ministers, XII. 44.

That the United States can no longer refer to State laws as a possible means of reciprocity, see supra, § 579.

As to Neilson's case, see 1 Moore on Extradition, § 50, p. 60.

In 1828 Mr. Poinsett, American minister at Mexico, was, at the instance of Mr. James K. Polk, then a member of the House of Representatives, instructed to request from the Government of Mexico the extradition of certain persons named Hardin, who were charged with the commission of several murders in Tennessee and who had taken refuge in the province of Texas. The Mexican Government directed the government of the State of Coahuila and Texas to arrest and deliver up the fugitives; and the Secretary of War of the United States was, at Mr. Polk's suggestion, requested to order a small part of the military force on the border to aid the agent of the State of Tennessee in transporting the fugitives to that State.

Mr. Brent, Act. Sec. of State, to Mr. Porter, Sec. of War, Sept. 6, 1828, 22 MS. Dom. Let. 275; and see Am. State Papers, For. Rel. VI. 611.

See, also, Mr. Van Buren, Sec. of State, to Mr. Vaughan, Brit. min., July 21, 1829, MS. Notes to For. Legs. IV. 196; Mr. Livingston, Sec. of State, to Governor of Canada, Aug. 1, 1831, id. 413; Mr. Marcy, Sec. of State, to Mr. Seibels, July 16, 1855, MS. Inst. Belg. I. 88; Mr. Evarts, Sec. of State, to Mr. Welsh, min. to England, Jan. 9, 1879, MS. Inst. Gr. Br. XXV. 314.

"It has been contrary to the practice of the United States even to request as a favor that the government of another country should deliver up a fugitive from criminal justice, because under our laws we possess no power to reciprocate such an act of grace. Since I came into the Department of State the President [Polk], after full deliberation with his cabinet, refused for this reason to prefer such a request to the government of Texas."

Mr. Buchanan, Sec. of State, to Mr. Wise, Sept. 27, 1845, MS. Inst. Brazil, XV. 119.

As it is the settled policy of the United States not to make such extradition, except in virtue of express stipulations to that effect, the United States ought not to ask for extradition in any case as an act of mere comity.

Cushing, At. Gen., 1853, 6 Op. 85.

In 1874 the authorities of the State of New York sought to obtain the extradition of William J. Sharkey, convicted of murder, who had escaped to Havana. The Department of State declined to "request the actual return" of the fugitive; but afterwards, when informed by the consul-general at Havana that he believed that the Cuban authorities would not object to the delivery of Sharkey without the formalities of an extradition process, the Department, while still declining to make "any formal application," instructed the consul-general that, if the delivery of Sharkey could be accomplished, it "would be greatly pleased to see this criminal delivered up to justice, and would promptly communicate to the authorities of New York any information on the question."

Mr. Cadwalader, Act. Sec. of State, to Mr. Cushing, min to Spain, May 11, 1875, MS. Inst. Spain, XVII. 236.

Referring to Spain's surrender of Tweed, in 1876, before the conclusion of the extradition treaty between the two countries, Mr. Fish said: "The United States has from time to time carefully avoided making requests for the surrender of criminals, for the reason among others that it might not be possible to reciprocate on such a matter. The Government of Spain, in its action in this case, has appreciated the peculiarity of the case."

Mr. Fish, Sec. of State, to Mr. Adee, chargé, Nov. 3, 1876, MS. Inst. Spain, XVIII. 17.

See, also, Mr. Fish to Mr. Adee, chargé, Dec. 8, 1876, id. 46; Mr. Fish to Mr. Adee, chargé, Nov. 3, 1876, id. 14.

See 1 Moore on Extradition, 40–41.

In 1884 the Department of State requested from Guatemala, with the explanation that the Government of the United States could not promise reciprocity, the extradition of Bill Tucker, alias John Nie.

Mr. Frelinghuysen, Sec. of State, to Mr. Gosling, Dec. 18, 1884, 153 MS. Dom. Let. 459.

"We would not feel justified in demanding from Canada extradition for offence not comprehended in treaty." (Mr. Frelinghuysen, Sec. of State, to Mr. Olney, tel., Dec. 10, 1884, 153 MS. Dom. Let. 394.)

"During the past thirty years this Government has repeatedly refused to make a request for extradition in the absence of a treaty, and several notable surrenders of fugitive criminals to the United States, among which may be instanced that of Tweed, have been made without any request on the part of this Government. But where a treaty of extradition exists, it is believed that the action of the executive branch of the Government has uniformly been guided by the principle that the expression of one thing is the exclusion of another. An agreement between two nations to comply with

demands for extradition for certain enumerated offences implies that surrender will neither be granted nor asked for others not enumerated."

Report of Mr. Bayard, Sec. of State, to the President, in the case of William J. McGarigle, Sept. 14, 1887, 17 MS. Rept. Book, 13.

The fact that the escape of a criminal was concocted by foreigners, and carried out by them by means of a foreign vessel, is not a ground for demanding his surrender from the country to which he fled.

Report of Mr. Bayard, Sec. of State, to the President on McGarigle's case, Sept. 14, 1887, 17 MS. Rept. Book, 13.

"The ownership of a vessel, or of the vehicle in which a fugitive criminal escapes, does not appear to have any bearing upon the question of extradition. It is probable that a majority of the fugitive criminals from the United States, who in recent years have found refuge beyond the seas, have escaped on foreign-owned vessels; but this is not known ever to have been made a ground for asking the extradition of a fugitive. Even if the vessel in which the criminal flees should be a foreign man-of-war—a national vessel—this is not regarded as a valid ground for claiming a surrender. On the contrary this Department, in 1872, as appears by its records, in the case of two seamen of the U. S. S. *Wachusett*, who were charged with having committed larceny in the city of Leghorn and had escaped to that vessel, approved the action of the commanding officer of the European fleet, in refusing to comply with the request of the Italian authorities for the surrender of the men, the offence with which they were charged not being included in the extradition treaty between the United States and Italy."

Report of Mr. Bayard, Sec. of State, to the President, on McGarigle's case, Sept. 14, 1887, 17 MS. Rept. Book, 13.

The government of the United States is embarrassed in requesting the extradition of a fugitive from Brazil in the absence of a treaty by the fact that it is precluded from extending a like courtesy to the government of Brazil under similar circumstances.

Mr. Foster, Sec. of State, to Mr. Conger, min to Brazil, No. 167, July 18, 1892, MS. Inst. Brazil, XVII. 593.

Subsequently Mr. Foster made it discretionary with the minister to request the extradition of a fugitive, and instructed him if he did so, frankly to state that the United States could not promise reciprocity. (Same to same, No. 229, Jan. 19, 1893, id. 632.)

Premising that the Government of the United States could not in the absence of a treaty surrender a fugitive from justice, and therefore could not promise reciprocity, Mr. Olney stated that, upon the

requisition of the executive of Massachusetts, the Department of State would "make the attempt" to obtain the surrender of a fugitive criminal from Venezuela "as an act of courtesy."

Mr. Olney, Sec. of State, to Mr. Moody, March 7, 1896, 208 MS. Dom. Let. 386.

Under the Mexican law no extradition can take place without the authority of a treaty, unless the government demanding it shall promise strict reciprocity, and the United States, being unable to grant extradition in the absence of a treaty, is therefore not in a position to request the surrender of a fugitive by the Mexican Government in a case not covered by the treaty.

Mr. Hay, Sec. of State, to Mr. Graves, Dec. 7, 1899, 241 MS. Dom. Let. 456.

In June, 1900, Mr. Hay declined to comply with a request of the governor of Porto Rico that the United States demand the extradition of a certain person from Spain on a charge of murder, on the ground that there was then no extradition treaty in force between the United States and Spain, and that the United States could not, in the absence of a treaty, surrender a fugitive from justice under similar circumstances.

Mr. Hay, Sec. of State, to the governor of Porto Rico, June 19, 1900, 245 MS. Dom. Let. 649.

That the United States will not request extradition from Chile, since it is unable to promise reciprocity, see Mr. Hill, Act. Sec. of State, to Mr. Warner, Oct. 6, 1899, 240 MS. Dom. Let. 407. "It has been deemed impolitic," said Mr. Hill, "to ask of foreign governments a favor which this Government could not grant. This policy has been maintained with few exceptions for a long period of time, and the Secretary of State has directed that it shall be observed in the present case."

4. Delivery of Fugitives to United States.

§ 583.

In 1834 the British Government spontaneously, without any request by the United States or its diplomatic agent in London, sent to the United States on an armed vessel certain persons who were supposed to have been concerned in the piratical acts committed on board the *Mexican*, and who were desired for trial in the district of Massachusetts. The British minister at Washington, at the instance of the Secretary of State, prepared a letter in triplicate, which was sent to the United States revenue cutters, requesting the commander of the British ship to bring the offenders into that district.

Mr. Forsyth, Sec. of State, to Mr. Dunlap, United States attorney at Boston, Aug. 8, 1834, 26 MS. Dom. Let. 318.

For other instances of the delivery up of offenders by the British authorities, see the preceding section, and Moore on Extradition, I. § 40, pp. 45–47.

In 1817 certain members of the crew of the American ship *Plattsburg*, charged with murder and piracy, were delivered up by Sweden and Denmark.

In 1828 one Hardin, charged with murder in Tennessee, was surrendered by Mexico; and in 1839 one Cooke, charged with murder in Mississippi, by Texas.

In 1855 Switzerland handed over one Schrock, charged with embezzlement of public funds in Ohio.

In 1856 Austria delivered up one Morris, charged with murder on an American vessel on the high seas.

In 1864 the captain-general of Cuba delivered up some convicts who had escaped from the Tortugas.

In 1879 Brazil surrendered one Conyngham, charged with forgery.

In 1888 Denmark surrendered one Benson, charged with land frauds.

In 1885 Japan surrendered one Calvin Pratt, charged with murder in California.

Moore on Extradition, I. § 41, pp. 47–49.

"Costa Rica has lately testified its friendliness by surrendering to the United States, in the absence of a convention of extradition, but upon duly submitted evidence of criminality, a noted fugitive from justice. It is trusted that the negotiation of a treaty with that country to meet recurring cases of this kind will soon be accomplished. In my opinion treaties for reciprocal extradition should be concluded with all those countries with which the United States has not already conventional arrangements of that character."

President Cleveland, annual message, Dec. 4, 1893, For. Rel. 1893, v.

In 1886 the legation of the United States at Brussels reported a statement made in conversation by Mr. van Eetveldē, the administrator of the Congo, that if the United States should signify its desire for the extradition of a fugitive criminal from the Independent State of the Congo, the fugitive would, on presentation of proper proofs, be arrested and delivered up without regard as to whether there was any extradition treaty or reciprocal arrangement with the United States.

Mr. Tree, min. to Belgium, to Mr. Bayard, Sec. of State, No. 108, June 12, 1886, For. Rel. 1886, 33.

See, also, Mr. Bayard to Mr. Tree, No. 44, May 21, 1886, ibid.

5. Immigration Acts.

§ 584.

The act of Congress of August 3, 1882, authorizing the return of alien convicts to the country to which they belong, although it may incidentally result in placing a criminal within reach of the authorities of the country from which he escaped, does not take the place of an extradition treaty and does not authorize the Executive to deliver up fugitives from justice on the demand of foreign governments.

Mr. Frelinghuysen, Sec. of State, to Mr. Willamov, Nov. 14, 1882, MS. Notes to Russia, VII. 403; Mr. Frelinghuysen, Sec. of State, to Viscount das Nogueiras, Portuguese min., Feb. 9, Feb. 15, Feb. 17, and March 20, 1883, MS. Notes to Portugal, VII. 61, 63, 66, 71, and Moore on Extradition, I. § 31, pp. 38–40; Mr. Bayard, Sec. of State, to Baron d'Almeirim, Portuguese chargé, June 4, 1888, For. Rel. 1888, II. 1394.

6. Extraterritorial Jurisdiction.

§ 585.

Although various powers have to a certain extent obtained the recovery of their fugitive criminals through their ministers and consuls in countries in which such ministers are by treaty invested with judicial powers, the United States has not generally sought to enjoy this privilege, but has, on the other hand, in two cases, that of the Ottoman Empire in 1874, and Japan in 1888, entered into extradition treaties with countries in which citizens of the United States are entitled to extraterritoriality. The Government of the United States has been induced to take this position not only by reason of doubts as to the applicability of the extraterritorial stipulations to extradition, but also because the statutes passed to carry such stipulations into effect confer upon the ministers and consuls no authority for that purpose.

In 1866, however, Mr. Hale, United States consul at Alexandria, arrested and sent to the United States, on an American man-of-war, with the assent of the Egyptian authorities, John H. Surratt, who was charged with complicity in the assassination of President Lincoln.

1 Moore on Extradition, §§ 89–93, pp. 100–106; Dip. Cor. 1866, II. 275–277; id. 1867–68, II. 82 (correspondence as to Surratt's case).

Article IX. of the treaty between the United States and Japan of 1858 does not invest the consuls of the United States in that country with power to commit for extradition a fugitive from the justice of the United States.

Mr. Porter, Act. Sec. of State, to Mr. Stanford, Feb. 2, 1886, 158 MS. Dom. Let. 621; Mr. Porter, Act. Sec. of State, to Mr. Hubbard, min. to Japan, Feb. 3, 1886, MS. Inst. Japan, III. 378.

The two communications related to the case of Calvin Pratt, a fugitive from the justice of California, who had sought refuge in Japan. He was delivered up by the Japanese Government as an act of comity, and his surrender was followed by the conclusion of an extradition treaty.

The stipulations of consular conventions, conferring on consular officers jurisdiction over acts affecting the internal order and discipline of vessels of their respective countries, and differences between the masters and crews not affecting the peace of the port, are not analagous to extradition treaties.

Mr. Gresham, Sec. of State, to Mr. Le Ghait, Oct. 16, 1893, MS. Notes to Belg. Leg. VIII. 5.

See, also, same to same, Dec. 30, 1893, id. 14.

In 1891, Mr. Denby, American minister at Peking, raised the question whether an American consul in China could direct a fugitive criminal, found on board an American ship in a Chinese port, to be delivered up to a nation with which the United States had an extradition treaty. Mr. Denby referred to a case in 1889, in which, in view of the extradition treaty between the United States and Spain, he directed the United States consul at Amoy to surrender to the Spanish authorities, on proper proofs, a convict who had escaped from Manila on an American ship bound to Amoy.

The Department of State, replying to Mr. Denby's question, expressed the opinion that, in the case presented by him, it would be desirable to eliminate the idea of "formal conventional extradition." The Department suggested that the case might perhaps be met either by the master exercising on his own responsibility the power to exclude a person from his ship, or by the intervention of the consul in some mode not definitely stated. The Department in this relation observed that it was hardly open to dispute that a consul had the power to bring before him, "by a warrant of arrest on due complaint," any person on board a vessel of his nation in port, and that it not infrequently happened that a consul, sitting in his judicial capacity, found that he had "not cognizance of the case" and turned the accused "over to the court of competent jurisdiction." The Department, however, stopped here, and omitted to indicate how a person charged, for example, with a crime in Spain, could be arrested therefor by an American consul in China, on "due complaint," which we may assume to mean a bona fide complaint, unless in virtue of an extradition treaty.

Mr. Denby, min. to China, to Mr. Blaine, Sec. of State, No. 1401, Oct. 10, 1891, For. Rel. 1892, 69; Mr. Blaine, Sec. of State, to Mr. Denby, min. to China, No. 680, Dec. 7, 1891, id. 74.

For a proclamation of the Chinese Government with regard to the recovery of its own fugitives from justice, see For. Rel. 1888, I. 258.

A citizen of the United States charged with the commission of a crime in one consular district in China having gone into another district, and there being apparently no authority under which he could be brought back to the former district for trial, the minister of the United States at Peking proposed to make a decree or regulation providing that when a criminal action was pending in any consular district in China against an American citizen who might be found in any other consular district in China, it should be lawful for the consul before whom the action was pending to issue his warrant for the arrest of such person wherever he might be found in China, the warrant so issued to be viséed by the consul in whose district the accused should be found, and the accused then to be arrested and transported to the district in which the case was pending for trial before the consular court thereof.

The proposal and form of decree were approved.

Mr. Olney, Sec. of State, to Mr. Denby, min. to China, Feb. 2, 1897; Mr. Sherman, Sec. of State, to Mr. Denby, min. to China, Oct. 28, 1897: For. Rel. 1897, 80, 82.

Mr. Sherman, Sec. of State, to Mr. Denby, min. to China, No. 1524, Dec. 23, 1897, MS. Inst. China, V. 504, encloses a copy of S. Doc. 52, 55 Cong. 2 sess., containing the President's message submitting to Congress the decrees issued by Mr. Denby, under sec. 4086, Rev. Stat., providing for the arrest by United States consuls in China of American citizens charged with offences committed within the jurisdiction of other United States consuls.

7. Canadian Act, 1889.

§ 586.

By an act of the Canadian Parliament of May 2, 1889, the minister of justice is authorized to issue his warrant for the surrender of fugitive criminals to foreign powers in certain cases, in the absence of an extradition treaty. By the 4th section, however, the act is not to come into force with respect to fugitive offenders from any foreign state until the governor-general shall have issued his proclamation declaring it so to be in force.

1 Moore on Extradition, § 449, p. 692.

"I send you herewith copy of a letter of the 18th instant and enclosures, from the Hon. the Acting Attorney-General, in regard to Darcy M. Cashin, who has been indicted for conspiracy to defraud, in violation of sec. 5440 Revised Statutes, and sec. 9 of the act of Congress of June 10, 1890, and is now a fugitive from the justice of the United States in Vancouver, British Columbia. I also enclose copies of the sections in question.

"I have the honor to enquire whether the Government of the Dominion, in view of the act of its Parliament May 2, 1889, (52 Vic. ch. 36,) would feel competent to deliver the fugitive to the authorities of the United States, and would be willing to do so upon production of the necessary evidence of his culpability. The fugitive has been a party to an extensive system of fraud upon the Treasury, and the law officers of the Government consider it of the greatest importance to secure his arrest. May I ask you to kindly give the matter as early consideration as possible. If the Canadian government are able to comply with our request for the fugitive's surrender, their action will be greatly appreciated by this Government."

Mr. Blaine, Sec. of State, to Sir Julian Pauncefote, Brit. min., April 19, 1892, MS. Notes to Great Britain, XXI. 643.
This note is personal in form.

"I have the honor to inform you that on the receipt of Mr. Blaine's note of the 19th April last, . . . Sir Julian Pauncefote forwarded a copy of it, together with its enclosures, to the Governor-General of Canada.

"I have now received a despatch from Lord Stanley in reply forwarding a report from the Canadian Minister of Justice on the subject.

"In this report Sir John Thompson states that, with respect to Mr. Blaine's request that the fugitive Cashin should be surrendered as a matter of comity, the Canadian Government have ever recognized to the fullest extent the moral obligation as between nations of surrendering fugitive criminals to justice, and have always been desirous in the case of Canada and neighboring countries that the accomplishment of that duty should be surrounded by such few and simple restrictions only as are imperatively necessary, and this was one of the considerations which moved the Canadian Government to support in its passage through Parliament the act (52 Vic. cap. 36), which Mr. Blaine cites in his note. It would, therefore, Sir John Thompson goes on to say, afford the Canadian Government the greatest pleasure in this instance to meet the views of the United States Government. Unfortunately, however, in the absence of express treaty stipulations, and the act above referred to being inoperative, no steps having been taken to render it effective by means of a proclamation as therein provided, there exists no authority or procedure whereby the criminal could be lawfully apprehended and committed for surrender; nor does there appear to be (according to the view which has for many years prevailed as well in Canada as in the United States) any power in the Executive to order his surrender.

"In communicating to you the opinion of the Minister of Justice in regard to this matter, I am desired by Lord Stanley to express His Excellency's regret that, even if it should be found possible very shortly to make the act effective, it is more than doubtful, in view of subsection 2 of section 3 thereof, whether it would cover the case now under consideration."

Mr. Herbert, chargé, to Mr. Wharton, Act. Sec. of State, June 11, 1892, 120 MS. Notes from Brit. Leg. In the manuscript text of Mr. Herbert's note, Sir John Thompson is represented as saying that "the Canadian government have never recognized to the fullest extent the moral obligation" etc. The word "never" seems to have been substituted by oversight for "ever." The original of Sir John Thompson's report was not communicated.

Subsection 2, of section 3, above referred to, restricts the operation of the act in any event to crimes specified in an annexed schedule.

8. Removal of Indians.

§ 587.

It appearing by a report of the Canadian Privy Council that the Canadian authorities were prepared to take back certain Cree Indians belonging to Canada, upon their being conducted to the border for that purpose, a copy of the report was sent to the Secretary of War and the Secretary of the Interior, respectively, with the suggestion that instructions be given to the proper officers of those departments in Montana to cooperate in sending the Indians back to Canada.

Mr. Blaine, Sec. of State, to Sec. of War, April 19, 1892, and to the governor of Mont., same date, 186 MS. Dom. Let. 147, 702.

See Mr. Frelinghuysen, Sec. of State, to Mr. West, Brit. min., Sept. 5, 1883, MS. Notes to Gr. Br. XIX. 339; Mr. Bayard, Sec. of State, to Mr. Lamar, Sec. of Interior, July 20, 1885, 156 MS. Dom. Let. 308; same to same, April 29, 1887, 164 id. 48; Mr. Olney, Sec. of State, to Mr. Carter, U. S. S., April 29, 1896, 209 MS. Dom. Let. 611.

See, also, H. Ex. Doc. 341, 50 Cong. 1 sess.

As to Chiricahua Indians and their return by Mexico, see Mr. Bayard, Sec. of State, to Mr. Endicott, Sec. of War, March 14, 1885, 154 MS. Dom. Let. 487.

"In connection with the Department's note of March 5, last, in reply to yours of the 1st of the same month, touching the alleged illegal occupancy of certain lands in Lower California, owned by Señor Don Guillermo Andrade, by a number of Indians said to belong to the Yuma Reservation, and the desire of the Mexican Government to have them removed to the United States, I have the honor to inclose herewith copy of a report of the Acting Commissioner of Indian Affairs to the Secretary of the Interior, to whom the matter had been referred for investigation.

"It will be seen therefrom that the case does not come within the purview of the provisions of the extradition treaty of 1861, and that no demand on the part of this Government for the return of these absentee Indians seems warrantable, unless they are charged with some crime, as provided in said treaty. On the other hand, if the Government of Mexico insists upon removing them from its territory, this Government will be prepared to receive them in the manner suggested in the report of the Acting Commissioner of Indian Affairs, and will make every proper and lawful effort to induce them to remain within the territorial jurisdiction of the United States."

Mr. Sherman, Sec. of State, to Mr. Romero, Mex. min., May 19, 1897, For. Rel. 1897, 391.

The report of Mr. Smith, Acting Commissioner of Indian Affairs, referred to by Mr. Sherman, bears date May 12, 1897. It contains the following:

"The case does not appear to be one covered by the provisions of the extradition treaty with the Republic of Mexico proclaimed by the President December 11, 1861 (12 U. S. Statutes at Large, 1199), unless the Indians shall be charged with some crime, as provided in said treaty.

"Their condition appears to be similar in some respects to that of a number of British Cree Indian refugees from the Dominion of Canada, who are thought to have been implicated in what was known as the Riel rebellion during the year 1885, and who settled upon land in this country.

"October 6, 1885, certain reports respecting the matter were transmitted by this office to the Department with recommendation that the subject be referred to the Department of State with request that arrangements be made with the Dominion authorities for the return of the fugitives to the British territory.

"October 13, 1885, the Secretary of State replied, in a letter addressed to the Department, as follows:

"'* * * On the state of facts shown by your letter and its inclosures, I beg to say that unless there should be a specific demand from the Dominion authorities, such demand being good under the extradition treaty and followed by a warrant of surrender, the Indians in question can not be returned by us to Canada, nor can the United States authorities, military or civil, properly connive at their being kidnapped and sent over the line. If, however, there is satisfactory proof that a demand is coming in due form, they can be arrested to await such demand. If they are guilty of offenses within the jurisdiction of the United States, they can be proceeded against for such offenses; but they can not be prosecuted in our courts or before our military tribunals for offenses committed in the Dominion of Canada.'

"Although the British Cree Indians were alleged to be criminals, no demand appears to have been made by the Dominion of Canada for their extradition. They were found to be well behaved and law-abiding, and this Government not only permitted them to remain for a number of years but fed them while they were in destitute condition.

"It appears, however, that in April, 1892, the Canadian government expressed a willingness to take these Indians back, provided they were taken to the border by the authorities of this country; but they continued to remain until the summer of 1896, when they were removed to the boundary line and delivered to the Canadian authorities under the act of Congress approved May 13, 1896, which appropriated the sum of $5,000 to defray the expense of such removal. (29 Stats. 117.)

"In 1862, when a portion of the Sioux tribe fled to Canada after the Indian massacre in Minnesota, the Canadian Government assigned them to a reservation within her territory, and while since then she has endeavored to persuade them to return to the United States, they still continue to occupy, with the consent of that government, the reservation set apart for them. I allude to the British Cree and refugee Sioux incidents to show the action of the two governments in dealing with these unfortunate people.

"No demand was made by the Government in either case for their return. No demand is made by this Government for the return of the refugees, or more properly stated, the absentee Yumas, by the Government of Mexico. They, are, however, entirely welcome to a home in this country, and upon their return they will receive the same care and attention that is given their brethren. But their evident preference for Mexico is the obstacle that will make their retention in this country, if returned, a matter of difficulty.

"If, therefore, the Government of Mexico insists upon removing them from her territory, I can only suggest that they be carried to the border line and delivered to the Indian police of the Yuma Reservation. This being done, every proper and lawful effort will be made to induce them to remain. But if, despite such efforts on the part of the Government, they persist in returning to Mexican soil, and the Government of that Republic will not permit them to occupy a tract of unappropriated land by sufferance, there will probably be no consideration other than that of humane regard for their condition that will prevent the Government dealing with them as trespassers as provided by the laws of Mexico relating to trespass."

Mr. Bayard's letter of Oct. 13, 1885, to Mr. Lamar, Secretary of the Interior, quoted in the letter of Acting Commissioner Smith, is recorded in 157 MS. Dom. Let. 352.

9. Occupied Territory.

§ 588.

By a letter of Mr. Hay, Secretary of State, to Mr. Von Mumm, October 25, 1899, it appeared that Mr. Griggs, Attorney-General, had stated in reply to two informal inquiries from the German embassy that no case had come before him in relation to the procedure to be followed in obtaining the extradition of fugitives from Cuba, and that his official functions did not permit him to advise the embassy on the subject, except through the Department of State, and then only on a question actually arising in the Department of State. The letter continued: "It has appeared proper to Mr. Griggs to state, and he

desires me to repeat it to you, that in the recent case of the return to Cuba from New Orleans of a person committing an offense in Habana, he took the ground that in view of our military occupation and government in Cuba extradition was not really involved, and that the criminal should be returned upon the proper requisition of our military authorities in Cuba; and he adds that he can perceive no reason to doubt that the same view and practice would apply in the reverse case to a criminal going to Cuba from the United States, should such a case arise."

For. Rel. 1899, 318–319.

"This section [5270 R. S.] was amended by Congress June 6, 1900, by adding thereto the following proviso:

"'*Provided*, That whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offences, namely: Murder and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value; robbery; burglary, defined to be the breaking and entering by night time into the house of another person with intent to commit a felony therein; and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering, or of breaking and entering the offices of the government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any Territory thereof or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the writ-

ten request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offence was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further*, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offence charged: *And provided further*, That no return or surrender shall be made of any person charged with the commission of any offence of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial.' 31 Stat. 656, c. 793."

Neely *v.* Henkel (1901), 180 U. S. 109. The amendment, as printed above, has been compared with the text as printed in 31 Stat. 656.

The act of June 6, 1900, which provides for the delivery up of fugitives from the justice of a foreign country or territory occupied by the United States, is constitutional, and can not be successfully assailed because it does not secure to the accused when surrendered the same rights as to trial that are guaranteed to persons charged with crimes against the United States, since the personal guarantees of the Constitution, such as writs of habeas corpus, bills of attainder, ex post facto laws, and trial by jury, have no relation to crimes committed outside the United States against the laws of a foreign country.

Neely *v.* Henkel (1901), 180 U. S. 109.

The act of June 6, 1900, 31 Stat. 656, which provides for the surrender of persons charged with having committed certain offences in violation of the criminal laws in "any foreign country or territory . . . occupied by or under the control of the United States," was held to apply to Cuba, while the island was occupied by the United States pursuant to the stipulations of the treaty of peace with Spain, concluded at Paris, Dec. 10, 1898.

Neely *v.* Henkel (1901), 180 U. S. 109.

III. *TREATIES.*

As to particular treaty negotiations, see 1 Moore on Extradition, §§74–81, pp. 83–95.

For a draft of an extradition treaty, formulated by a congress of legal plenipotentiaries who met at Lima, December 9, 1877, represent-

ing the Governments of the Argentine Republic, Bolivia, Chile, Costa Rica, Ecuador, Peru, and Venezuela, see Seijas, El Derecho Internacional Hispano-Americano, 193–218.

The convention for extradition between the United States and Bavaria, of 1853, was not abrogated by the operation of the constitution of the German Empire, adopted in 1871, as affecting the further independent existence of Bavaria.

Thomas, In re Hermann, 12 Blatch. 370.

The extradition treaty between the United States and Prussia of June 16, 1852, is still in force.

Terlinden *v.* Ames, 184 U. S. 270.

In 1900 the American ambassador at Berlin reported that his attention had been called to the fact that "extradition between Alsace-Lorraine and the United States is not regulated by treaty."

Mr. White, ambassador to Germany, to Mr. Hay, Sec. of State, Jan. 23, 1900, For. Rel. 1900, 520.

1. Rules of Construction.

§ 589.

A treaty constitutionally made is, subject to the provisions of the Constitution, the supreme law of the land, abrogating all prior inconsistent laws, whether national or State, and overriding conflicting provisions in the State constitutions.

Ware *v.* Hylton, 3 Dall. 199; United States *v.* Schooner Peggy, 1 Cranch. 103; Parrott's Chinese case, 6 Sawyer, 349; Cushing, At. Gen., 6 op. 293, 8 Op. 417; Akerman, At. Gen., 13 Op. 354.

Treaty stipulations for the extradition of fugitives from justice do not fall within the scope of the most-favored-nation clause.

Cushing, At. Gen., 1853, 6 Op. 155.

Where a treaty provides that an offence, in order to be extraditable, must be "punishable by the laws of both countries," it suffices if the act charged is criminal by the laws of the demanding country and by the laws of the particular State of the United States in which the person charged is found.

Wright *v.* Henkel (1903), 190 U. S. 40.
To the same effect was In re Wright (1903), 123 Fed. Rep. 463.

Where no special stipulation on the subject is made, a treaty is binding upon the contracting parties from the date of its signature, the exchange of ratifications having in such case a retroactive effect.

Davis *v.* Parish of Concordia, 9 How. 280; Hylton's Lessee *v.* Brown, 1 Wash. C. C. 343.

See, as to private rights, Haver *v.* Yaker, 9 Wall. 32.

Extradition treaties, unless they contain a clause to the contrary, cover offences committed prior to their conclusion.

In re Giacomo 12 Blatchf. 391.

It was held in this case that an extradition treaty, when applied to a prior offence, is not in the nature of an ex post facto law within the meaning of Art. I., § 9, of the Constitution; and that the restrictions of Articles IV. and V. do not apply to the subject of extradition as regulated by treaty and by statute.

See, as to the retroactive operation of extradition treaties, Bar, Rev. de Droit Int. (1877) IX. 5; 1 Moore on Extradition, § 86, p. 99.

By Article XVIII. of the extradition treaty between the United States and Mexico, concluded February 22, 1899, it is provided that the convention "shall take effect from the date of the exchange of ratifications, but its provisions shall be applied to all cases of crimes or offences enumerated in Article II. which may have been committed since the 24th day of January, 1899." The Department of State of the United States, while deeming the question not to be entirely free from doubt, reached the conclusion that, in view of the stipulations contained in Article XVIII., extradition for offences committed prior to January 24, 1899, was not authorized by the treaty.

Mr. Hay, Sec. of State, to Mr. Aspiroz, Mexican ambass., No. 17, July 1[1], 1899, MS. Notes to Mexican Leg. X. 469.

By the Mexican law of 1897, extradition may be granted outside of treaty on promise of reciprocity. In October, 1903, the United States asked for the extradition of Charles Kratz, charged with bribery in Missouri. This offence, when committed by Kratz, was not embraced in the extradition treaty between the United States and Mexico, but it was covered by a supplemental convention which afterwards went into effect. On the strength of the latter convention the Government of the United States made a promise of reciprocity, stating that it had been held by a Federal court that an extradition treaty operates in the United States retroactively where there is no express stipulation to the contrary, so that the United States could deliver up persons charged with bribery in Mexico prior to the supplemental convention. The extradition of Kratz was, after examination, duly ordered.

For. Rel., 1903, 674.

"Steps have been taken by the State Department looking to the making of bribery an extraditable offense with foreign powers. The need of more effective treaties covering this crime is manifest." (President Roosevelt, annual message, Dec. 7, 1903, For. Rel. 1903, xv.)

When demand for a fugitive from justice is made under treaty stipulation by any foreign government, it is the duty of the United States to aid in relieving the case of any technical difficulties which may be interposed to defeat the ends of public justice, the object to be accomplished being alike interesting to both governments, namely, the punishment of malefactors, who are the common enemies of all society.

Cushing, At. Gen., 1855, 7 Op. 536.

2. Legislation.

§ 590.

Whether an extradition treaty requires legislation for its execution by the Government of the United States has become a speculative question, as general legislation on the subject is now provided. By the Constitution, however, treaties are supreme laws, and as such are directly binding upon the courts, as well as upon the executive; and while they may, by reason of the generality of their terms, or by reason of an express reservation, require to be supplemented by legislation, an act of the legislature is not necessary to give them legal force.

The British Prisoners, 1 Wood. & M. 66; In re Kaine, 10 N. Y. Leg. Obs. 257; United States *v.* Watts, 14 Fed. Rep. 130; S. D. Thompson, 17 Am. Law Rev. 316; United States *v.* Rauscher, 119 U. S. 407.
See 1 Moore on Extradition, § 87, pp. 99–100.

"You will have seen in the American papers the efforts of a party to criminate the Executive for delivering up to the British a Thomas Nash, an Irishman, who was a ringleader in the mutiny and murders committed on board the British frigate Hermione. The columns of the Aurora and other Jacobin papers have for months been filled with lies and reproaches on this subject. This Thomas Nash assumed the name of Jonathan Robbins and declared himself a native of Connecticut. Clear evidence of his perjury does not prevent the repetition of the lie in the newspapers. But lately Mr. Livingston brought forward a motion in the House of Representatives, formally to criminate the President; but the attempt has been defeated by a demonstration of the correctness of the Executive proceedings in this case. The motion was negatived by 61 to 34. The discussion will not be without good consequences, as it has produced important illustrations on a great national question, respecting not only the meaning of the 27th article of our treaty of amity with Great Britain, but the construction of some parts of our own criminal law."

Mr. Pickering, Sec. of State, to Mr. Vans Murray, No. 29, March 10, 1800, 5 MS. Inst. U. States Ministers, 303.

Nash was delivered up under article 27 of the Jay treaty, for the execution of which article no legislation had been adopted. John Marshall, who was then a member of the House of Representatives, triumphantly vindicated the act of the President in causing the treaty to be executed.

See Adams' Gallatin, 231–232; Bee's Adm. Rep. 266; Wharton's State Trials, 392 et seq.; 1 Phillmore Int. Law (3d. ed.), 544; Spear on Extrad. 54; 5 J. Q. Adams' Mem. 400.

The mode of procedure under the treaty of Washington of 1842 is the preferment of a complaint to a judge or magistrate, setting out the offense charged on oath, whereupon the judge or magistrate may issue a warrant for the apprehension of the person accused. Upon the accused being brought before the judge or magistrate, the latter should hear and consider the evidence of criminality; and if on such hearing the evidence be deemed sufficient to sustain the charge, the same should be certified to the executive authority, that a warrant may issue for the surrender.

Nelson, At. Gen., 1843, 4 Op. 201.

Certain British seamen being charged with piracy committed on board a British vessel, contrary to acts of Parliament, the offense not being piracy under the law of nations, and being imprisoned under a warrant issued from the Secretary of State at the request of the British minister, under the treaty of 1842, it was held that the prisoners might be arrested and surrendered without any special act of Congress to carry the treaty into effect. It was further held that without legislation as to the means of enforcing the treaty the prisoners might be examined, and, if probably guilty, be ordered into custody, with a view to surrender. It was held, also, that the order of surrender might be signed by the Secretary of State and issued from the State Department.

Case of the British Prisoners, 1 Woodbury and Minot, 66.
No legislation on the subject was enacted by Congress till 1848.

"I duly received your note of the 11th ultimo, whereby you answered that of this legation of the 8th relative to the application which, in pursuance of instructions received from my Government, I made to you for the extradition of Rafael Treviño, who is charged with the crime of embezzlement, committed in Mexico, and whereby you informed me of the views of the United States Government with respect to the formalities to be fulfilled by my Government in order to secure the extradition of criminals.

"I at once communicated your aforesaid note to Mr. Mariscal, secretary of foreign relations of the United States of Mexico, and, in obedience to instructions received from him dated City of Mexico,

January 3, 1889, I have the honor to inform you in reply that the Government of Mexico can have no objections to the President of the United States consulting the judicial authorities, if that is required by the laws of this country, as to whether there is or is not ground for the extradition that is asked for, or to the issuance of a warrant by those authorities for the arrest of the individual who is wanted. On the contrary, it is perfectly willing that this course should be taken. My Government can not, however, admit that, in order to secure the extradition of any person, it is obliged to do anything more than what is stipulated in article 1 of the treaty of December 11, 1861; that is to say, anything more than to present its requisition, through its diplomatic agent, in ordinary cases, and through the frontier authorities in cases which have occurred on the frontier. The diplomatic requisition mentioned in this article can not be addressed to any authority other than the Secretary of State, and Mexico has not bound herself to apply to the courts of this country likewise.

"My Government thinks that the laws of the United States are not binding upon Mexico, for the same reason that any laws that Mexico might enact concerning extradition would not be binding upon this Government. Although any nation has a right to make the surrender of criminals by it conditional, other countries are obliged to submit to the conditions thus established only when they have concluded no treaty; when a treaty exists, however, the demanding country is obliged to submit to no conditions save those to which it has agreed.

"If the consul-general of Mexico at New York applied to the courts of this country in the extradition case of George Benson, he did so unofficially, and in so irregular a manner that the course pursued by him, although tolerated by my Government in consideration of the end desired, was never approved by it.

"In the case of the extradition, for which application was made to this Government, of Francisco G. Casanova, in the year 1874, this legation addressed the Department of State, and not the judicial authorities, in order to secure the arrest, to the end that extradition might be granted. The same course was taken in the case of Francisco Querejasu, in 1881.

"In the first of the cases cited certain lawyers in New York were instructed to endeavor to prevent the escape of the criminals, and to assist the judicial authorities in their proceedings, while, in the second case, the consul-general of Mexico was so instructed; this, however, in no wise implies that the Government of Mexico considers itself under obligations to apply to the courts for the arrest or surrender of the delinquent."

Mr. Romero, Mexican min., to Mr. Bayard, Sec. of State, Jan. 17, 1889, For. Rel. 1889, 619.

"The Department finds itself compelled to dissent from the views entertained by your Government. Since 1848 the United States has had among its statutes laws for the execution of its treaties of extradition. These laws are operative under all such treaties alike, and it has always been understood that when, as in the case of the Mexican treaty, provision was made that extradition should be granted only when the fact of the commission of the crime should be so established as that the laws of the country in which the person charged should be found would justify his apprehension and commitment for trial if the crime had been there committed, an express recognition was intended of the methods of ascertaining the question of criminality in that country. The provision in the Mexican treaty is not exceptional, but may, it is believed, be found in all our extradition treaties. Nor is the United States peculiar in having laws for the execution of such treaties. While some treaties are regarded as self-executing, many require legislation for their execution. It would be superfluous to cite examples to show that extradition treaties have generally been regarded as belonging to the latter category.

"The application by a foreign government or its agents to the judicial branch for the arrest and detention of a fugitive is not regarded by the United States as onerous, nor as, in any sense, affixing a condition to the execution of its treaties. Such application is constantly made under the direction of this Department to the judicial tribunals of other countries, and is found to be a convenient method of procedure. And it is thought that, under the statutes of the United States, as construed by the Supreme Court in case of Benson, there exists an efficient and liberal method of initiating and carrying on the preliminary judicial proceedings, which, under our treaties and the laws adopted for their execution, form the basis of the decision of the Executive upon the question of surrender."

Mr. Bayard, Sec .of State, to Mr. Romero, Mexican min. Feb. 19, 1889, For. Rel. 1889, 620, 621.

For the case of Benson, referred to by Mr. Bayard, see Benson *v.* McMahon, 127 U. S. 457.

3. Interpretation of Terms—Particular Offenses.

§ 591.

Extradition can not be demanded of France by the United States, in the case of a breach of trust in the State of California, made grand larceny by the laws of that State.

Cushing, At. Gen. 1856, 7 Op. 643.

A public officer of the United States who embezzles moneys of the United States intrusted to his care, and escapes from justice to the

territory of France, is liable, under the extradition treaty with France of 1843, to be returned to this country for trial.

Stanbery, At. Gen., 1867, 12 Op. 326.

The term " public officers " in the treaty of 1843 between the United States and France, or, as it stands in the French copy, "*dépositaires publics*," signifies officers or depositaries of the Government only, and does not comprehend officers of a railroad company, notwithstanding the latter was authorized and subventioned by the French Government.

Cushing, At. Gen., 1856, 8 Op. 106.

The extradition treaty between the United States and Spain of 1882 inluded: " 12. The embezzlement or criminal malversation of public funds committed within the jurisdiction of one or the other party, by public officers or depositaries." Art. 401 of the penal code of Cuba read as follows: "A public employee who, having charge, by virtue of his office, of public funds or effects, takes, or allows others to take, the same, shall be punished," etc. It was held that a public official in Cuba who falsely certified the invoices in which certain coupons were enclosed and obtained payment by the Spanish bank of the money due upon them, which could not have passed from the bank's possession to his own except as a consequence of his official action, was guilty of an extraditable offence, similar acts being made criminal by express statutes of the United States and of the State of New York, where he was.

In re Cortes, 42 Fed. Rep. 47.
This decision was affirmed in In re Oteiza, 136 U. S. 330.

Art. 401 of the penal code of Cuba, which provides for the punishment of a public employee who, having in charge by reason of his office public funds or property, takes or consents that others shall take any part thereof, applies to persons in the employ of the government that succeeded Spain in the island, the code remaining unrepealed.

Neely *v.* Henkel (1901), 180 U. S. 109.

Embezzlement of the funds of a savings bank, maintained and owned by a city in Germany, is embezzlement of " public moneys."

In re Reiner (1903), 122 Fed. Rep. 109.

Under a statute punishing embezzlement of property which has come into defendant's control or care " by virtue of his employment " as clerk, agent, or servant, it is sufficient to allege that, while he was

so employed, it was entrusted to and received by him "in his capacity as clerk."

Grin *v.* Shine (1902), 187 U. S. 181, 189.

Where a check is delivered to a clerk with instructions to draw the money from the bank, take it to the railway station and forward it to another city, and he subsequently converts the money to his own use, there is prima facie a case of embezzlement and not of larceny.

Grin *v.* Shine (1902), 187 U. S. 181, 195–197.

The facts that a person holds stock in a corporation by which he is employed, and that his salary varies with the profits, do not exempt him from extradition under a clause providing for surrender for "embezzlement by any person or persons, hired or salaried, to the detriment of their employers."

In re Balensi (1903), 120 Fed. Rep. 864.
As to what constitutes embezzlement, in the case of a fugitive found in Oregon, see In re Frank (1901), 107 Fed. Rep. 272.

The misappropriation of money by a bailee, to whom it is intrusted, although without any direction in writing, as an agent to reinvest it whenever he or his principal shall have found a suitable investment, is punishable by English law.

In re Bellencontre, 2 Q. B. D. (1891), 122.

Although robbery on the lakes is piracy within the meaning of the treaty with Great Britain of 1842, yet where the parties engaged in certain outrages on Lake Erie were guilty of robbery and assault with intent to commit murder, the Secretary of State was advised, in view of the disputed question of piracy on the lakes, that their extradition should be demanded at the hands of the Canadian authorities for the other offenses.

Bates, At. Gen., 1864, 11 Op. 114.

Under the extradition treaty between the United States and Mexico of February 22, 1899, the extradition of a fugitive can not be granted on a charge of "robo de valores," or of "robbery without violence," no such offence being included in the treaty. The treaty includes neither "robo" nor "robo de valores." It includes "hurto o robo sin violencia," the English equivalent of which is larceny, and "robo con violencia," the English equivalent of which is robbery.

The Mexican Government suggested that "robo" under Mexican law was a generic term for theft, and included theft without violence as well as theft with violence. The United States replied, however, that the use in the treaty of language expressly defining

certain offences excluded the supposition that the contracting parties intended to employ a general expression which might include the offence intended, but which might at the same time also cover another offence.

Mr. Hill, Act. Sec. of State, to Mr. Aspiroz, Mexican ambass., No. 159, March 15, 1901, and Mr. Hay, Sec. of State, to Mr. Aspiroz, March 23, 1901, MS. Notes to Mex. Leg. X. 574, 576.

The fugitive to whom this correspondence relates was afterwards arrested on the request of the Mexican government on a charge of embezzlement, an offense within the treaty. (Mr. Hay, Sec. of State, to Herr von Holleben, No. 587, April 13, 1901, MS. Notes to German Leg. XII. 580.)

In 1894 the government of the United States declined to surrender one Cienfuegos, who was committed on a charge of attempt to murder, on the ground that the requisition of the Salvadorean government for his surrender specified only the crimes of murder, arson, and robbery, and that the crime of attempt to commit murder was not embraced in the charge of murder.

Case of the Salvadorean Refugees, Am. Law Rev., Jan.–Feb. 1895, 8–9.

It was also intimated, when the surrender of Cienfuegos was refused, that he had in fact been pardoned before trial; but this was suggested merely as an inference, as there was no evidence to show that a pardon had actually been granted. The real ground of the refusal to surrender was the fact that the offence for which Cienfuegos was committed was not specified in the requisition.

General terms, such as "murder" or "arson," in extradition treaties are not necessarily to be confined in their operation to their meaning at common law, but may be interpreted according to the law in the two countries as it exists at the time when the extradition is applied for.

Cohn *v.* Jones, 100 Fed. Rep. 639.

Under the convention for extradition between the United States and Switzerland, which provides for the delivery of persons charged with certain crimes "when these crimes are subject to infamous punishment," it is sufficient if the crime be subject to infamous punishment in the country where it was committed without its being also subject to infamous punishment in the country from which the extradition is demanded.

In re Farez, 7 Blatch. 345.

In 1890 the government of the United States demanded of Switzerland the extradition of one Piguet on a charge of embezzlement. His extradition was resisted on the ground, among others, that the crime

for which he was demanded was not subject to infamous punishment in the country in which he was found. The high federal tribunal, before which the case was ultimately brought, stated that, according to art. 361, sec. 2, of the criminal code of Geneva, breach of trust committed by an accomplice to the detriment of his employer was only punishable with imprisonment for from two to five years, which was not an infamous punishment according to the terms of art. 10, sec. 2, of the same code; but that Article XIV. of the treaty did not require that the offence should be punishable with infamous punishment in both countries; that it sufficed that the offence was subject to infamous punishment in the country in which it was committed. "This results," said the high federal tribunal, "from Article XIV. of the treaty *in principio*, as well as from the message of the 3d of December, 1850 (see feuille fédérale of 1850, vol. 3, p. 644)."

Mr. Washburne, min. to Switzerland, to Mr. Blaine, Sec. of State, No. 50, March 23, 1891, 28 MS. Desp. from Switzerland.

It appearing that the crime for which extradition was demanded constituted an extradition offence according to the law of the country in which it was committed, as well as that in the country in which the fugitive was found, it was not held to be material that the offence did not bear the same name in both countries.

Ex parte Seitz, 8 Rap. Jud. Que. B. R. (Canada), 392.

In In re Cross, 43 Fed. Rep. 517, 519, the court intimated *obiter* that the treaty between the United States and Great Britain of 1842 includes only such acts as were extraditable offences according to the laws of the two countries at the time when the treaty was made.

4. Forgery.

§ 592.

Under the treaty with Prussia, of 1852, the forging of checks on the communal chest of Breslau is a crime for which the mutual extradition of fugitives from justice is stipulated.

Cushing, At. Gen., 1854, 6 Op. 761.

Demand was made for the surrender of a fugitive from the justice of Mexico on a charge of forgery, under the treaty of December 11, 1861. It was argued that the offence charged was not extraditable, since it did not constitute forgery at English common law. The court inclined to the view that it did, but at the same time declared that the common law of England could "hardly be said to be the only criterion by which to construe the language of a treaty between Mexico and the United States," countries neither of which owed allegiance to England. It had been frequently held that there were

"no common-law crimes of the United States," and most of the States had recast their criminal law so that the common law was appealed to only as an aid in the definition of crimes. By the Roman Civil Law, forgery was merely one of the subdivisions of the *crimen falsi*. The Mexican text of the treaty used, as a corresponding term to "forgery," the word "falsificación;" and it did not appear that the Mexican authorities intended to be bound by a restricted use of the word "forgery," where the question related to an offence of that character committed in Mexico. Under the circumstances the court was not bound to examine "with very critical accuracy" the question whether the act committed was forgery at common law.

Benson *v.* McMahon (1888), 127 U. S. 457, 466.

It was held by the Mexican Government, in the case of certain fugitives from the United States, that the making of original false entries in books of account, which was charged as forgery in the third degree, under a Missouri statute, did not constitute forgery within the meaning of the treaty of 1861, the equivalent word in the Spanish text being "falsificación."

Mr. Foster, Sec. of State, to Mr. Ryan, min. to Mexico, No. 837, Oct. 17, 1892, MS. Inst. Mexico, XXIII. 288.

The offence of uttering forged paper is included in the common law definition of forgery, and a fugitive charged with the former offence may be delivered up under a treaty specifying forgery as an extraditable crime.

In re Adutt (1893), 55 Fed. Rep. 376.

A person charged under the treaty between the United States and Austria-Hungary with the crime of forgery should be extradited when the facts constituting the offence are duly proved, no matter by what name the crime may be described in the criminal code of Austria, e. g., "fraud by means of forgery."

In re Adutt (1893), 55 Fed. Rep. 376.

5. Jurisdiction.

§ 593.

Term "jurisdiction."

The extradition treaties usually provide for the surrender of persons who, being charged with the commission of any of the specified offences within the "jurisdiction" of the one contracting party, shall seek an asylum or be found within the "territories" of the other.

Before extradition proceedings are commenced, it should appear that the crime alleged was committed within the jurisdiction of the demanding government.

Cushing, At. Gen., 1856, 8 Op. 215. See, also, Lee, At. Gen., 1 Op. 83.

In the extradition convention of 1852, between the United States and Prussia, it is provided that in certain cases the contracting parties shall, on requisition, deliver up to justice all persons who, being charged with the crimes therein specified, "committed within the jurisdiction of either party, shall seek an asylum or shall be found within the territories of the other." Under this convention an arrest was made in New York of S., alleged to be a native of Prussia, and since his birth and still a subject of the King of Prussia. The demand was from Prussia, and he was charged with having committed at Brussels, in Belgium, "and within the legal jurisdiction of Prussia," crimes specified in said convention. The claim was that inasmuch as such crimes were, at the time they were committed, punishable by the laws of Belgium, S., being, when they were committed, a subject of Prussia, was by the laws of Prussia subject to be punished for said crimes in Prussia; that a prosecution against him therefor had been commenced in Prussia, and a warrant of arrest had been issued against him by the proper judicial tribunal in Prussia having jurisdiction thereof; and that, immediately after committing the crimes he had fled from the justice of Belgium and Prussia. There was no extradition treaty between the United States and Belgium. It was held that the demand could be sustained under the convention.

Stupp, In re, 11 Blatch. 124.

Attention was called by the court to the fact that out of the seventeen extradition treaties and conventions between the United States and other powers which were then in force, all but one provided for the delivery of persons charged with crimes committed within the "jurisdiction" of one party, who should seek an asylum within the "territories" of the other.

The case being referred to the Attorney-General, it was held by him (herein differing from the ruling of the court above stated) that it did not fall within the treaty, and a warrant was refused. It was held by him that the term "jurisdiction" is convertible with "country."

Williams, At. Gen., 1873, 14 Op. 281.

The Attorney-General cited Allsops' case, Forsyth's Cases on Const. Law, 368.

Under the treaty between the United States and Great Britain of 1889, which provides for the extradition of persons charged with

offenses "committed within the jurisdiction" of either party, the British government can not obtain the extradition from the United States of a person who committed a crime in Johannesburg prior to Lord Roberts' proclamation, in 1900, declaring the South African Republic to be a British colony.

In re Taylor (1902), 118 Fed. Rep. 196. It may be suggested that the view taken in this decision is extremely technical.

"You also mention the desire expressed by the Russian minister for foreign affairs, that the treaty contain a provision for the extradition of persons charged with the commission of crimes against the laws of either country outside of the territorial jurisdiction of the country whose laws are offended against. This can not be conceded. It is at once repugnant to the policy of this Government and to the criminal jurisprudence of the United States, and in effect would render the municipal law of one country operative within the territorial sovereignty of another independent sovereign power. By the Constitution of the United States an accused party is entitled to trial within the State and district wherein the crime shall have been committed; no offender can be tried in the United States for an offense committed without its jurisdiction."

Mr. Fish, Sec. of State, to Mr. Jewell, May 9, 1874, MS. Inst. Russia, XV. 426.

That the statement that "no offender can be tried in the United States for an offense committed without its jurisdiction" should not be construed in its most sweeping sense, see supra, § 202, vol. 2, pp. 264–268.

In 1891 the government of the United States requested of that of Great Britain the arrest, upon his expected arrival in that country, of one Becker, who had escaped from jail at Constantinople and who was then supposed to be on his way from New York to England. Sir T. H. Sanderson, for the Marquis of Salisbury, in a note of "June 1891," stated that her Majesty's Government had no power to arrest the fugitive "in respect of his escape from prison at Constantinople."

Mr. Lincoln, min. to England, to Mr. Blaine, Sec. of State, No. 485, June 30, 1891, 168 MS. Desp. from Great Britain.

Concurrent jurisdiction.

In a homicide case, where it appeared that a shot had been fired from an American vessel in the harbor of a foreign port, killing a person on board a foreign vessel lying in the port, and the prisoner was acquitted on account of want of jurisdiction of the case, it was ruled that it was not the duty of the court, there being no treaty stipulations with the foreign country, to send back the offender to the foreign Government, whose laws he had violated, that he might be tried.

United States *v.* Davis, 2 Sumn. 482.

R., a person who took passage on board a British vessel at Portland, bound for New Brunswick, attacked and wounded the mate of the vessel when on the high seas, and then escaped to the shore in Maine. The vessel then put into Portland, Me., where the mate died. The British Government demanded the surrender of R. for trial. The offense was indictable by statute in Maine. His extradition was refused, though it was added that "in case the proceedings now commenced against the accused by the authorities of the State of Maine should not be prosecuted to a trial, or should it appear that without good reason the prisoner should be discharged, and the British Government should see fit to again request the extradition of the accused, such request would receive careful consideration."

Mr. Fish, Sec. of State, to Mr. Watson, Aug. 15, 1874, MS. Notes to Gr. Brit. XVI. 413.

The defendant was subsequently acquitted in Maine on the ground of insanity, and this was held such an acquittal as to bar extradition. (Mr. Cadwalader, Acting Sec. of State, to Mr. Watson, Oct. 17, 1874; id. 451.)

A person accused of poisoning, which resulted in death in Canada, may be extradited to that country, though it appears that the poison, if administered at all, was given in the United States.

Sternaman *v.* Peck, 83 Fed. Rep. 690, 28 C. C. A. 377.

Vessels.

"I have no doubt that an offense, committed on board a public ship of war, on the high seas, is committed within the jurisdiction of the nation to whom the ship belongs. How far the President of the United States would be justifiable in directing the judge to deliver up the offender, is not clear. I have no objection to advise and request him to do it."

President Adams to Mr. Pickering, Sec. of State, May 21, 1799; 8 John Adams's Works, 651; Moore on Extradition, I. 135, 138, Wharton's State Trials, 392.

This passage related to the case of Nash, alias Robbins, who was delivered up under art. 27 of the Jay treaty for murder on H. B. M. S. *Hermione* on the high seas.

The British minister having requested the extradition, under the treaty of 1794, of Thomas Nash, a seaman on the British frigate *Hermione*, Mr. Pickering said: "He [the President] considers an offence committed on board a public ship of war on the high seas to have been committed within the jurisdiction of the nation to whom the ship belongs. Nash is charged, it is understood, with piracy and murder, committed by him on board the above-mentioned British frigate, on the high seas, and consequently 'within the jurisdiction of his Britannic Majesty.'"

Mr. Pickering, Sec. of State, to Judge Bee, June 3, 1799, Wharton's State Trials, 416.

Nash, *alias* Robbins, was, after examination by Judge Bee, delivered to the United States marshal with orders to hand him over to the British consul, or to such person as should be appointed to receive him, and he was accordingly delivered over to Lieutenant Jump, of H. B. M. sloop *Sprightly*, which sailed with him for Jamaica. (Bee's Adm. Rep. 266.)

The speech of John Marshall, afterwards Chief Justice, made in the House of Representatives, in defense of the course of the Administration, is attached as a note to the report of the case in Bee's Admiralty Reports.

The position assumed by Marshall on the question of the jurisdiction of Great Britain in the Robbins case was that, "according to the practice of the world then, and the opinions of writers on the law of nations, the murder committed on board of a British frigate navigating the high seas, was a murder committed within the jurisdiction of the British nation." (Whart. St. Tr. 444.)

See Wirt, At. Gen., 1821, 1 Op. 509.

In the construction of the British treaty of extradition a crime committed at sea, on board of an American vessel, has been considered the same as if committed in the territory of the United States.

Mr. Buchanan, min. to England, to Mr. Marcy, Sec. of State, August 3, 1855, 67 MS. Despatches from Gr. Brit.

An extraditable crime on board a United States merchant ship at sea being "committed within the putative territory of the Union, it is justiciable by the Federal courts and by them alone;" and if the offender takes refuge in a foreign land, he may be demanded, under treaty, from such land.

Cushing, At. Gen., 1856, 8 Op. 73, 84.

In August, 1889, the British government demanded of that of the United States the extradition of Peter Lynch, a British subject, on a charge of murder committed on board the British steamship *Charles Morand*, on which Lynch was a seaman, at San Ramon, Manzanillo, Cuba, where the vessel was then lying. The authorities in Cuba had refused to take jurisdiction of the offence on the ground that it was committed on board a British vessel by a British subject, a member of the crew, on another member of the crew. The culprit was afterwards brought on the regular voyage of the steamer to New York, where, in compliance with the British demand, he was arrested and after examination delivered up.

Moore on Extradition, I. 138.

See also, in the same work, p. 137, the case of Markham, assistant paymaster of H. B. M. S. *Espoir*, who was delivered up by the United States on the charge of forging the name of the commander of the ship in Chinese waters.

With reference to the case of Lynch, supra, it may be observed that, if the Cuban authorities had taken jurisdiction of the offence, the Bri-

ish Government doubtless would have made no objection. In 1890 the Italian vice-consul at Bombay applied to the governor of the Bombay presidency for the extradition of an Italian seaman who was charged with a fatal assault on board a ship then lying at the Victoria dock, Bombay. The victim was also a member of the crew. The Italian vice-consul maintained that the extradition should be granted, (1) because the crime was committed by an Italian seaman on another Italian seaman on an Italian ship; (2) because it concerned only the internal discipline of the ship and did not disturb the peace of the port; and (3) because the Italian law would in such a case reciprocally let the crime be dealt with by the government to which the ship belonged. The governor refused to interfere in the case, and the accused was tried in the Bombay criminal sessions, in which he was convicted of culpable homicide, not amounting to murder, with a recommendation to mercy, and was sentenced to one year's imprisonment. (*The Juridical Review*, Oct. 1890, II. 374.)

October 1, 1889, a murder was committed in Chinese waters on the ship *Sea Swallow*, flying the British flag. The murdered man was an American and captain of the ship, and was the only white man on board. The rest of the crew, including the person who committed the murder, were natives of the Philippine Islands and Spanish subjects. The culprit was arrested and taken before an English magistrate, and was bound over to appear before the British court at Shanghai to answer a charge of manslaughter. An indictment was found and a jury convened, when the Spanish consul claimed the sole right to hear the case. The trial was postponed and the question submitted to Sir John Walsham, the British minister at Peking, and Count Llorente, Spanish chargé d'affaires. On the advice of the British minister's law officers that the extraterritorial jurisdiction allowed by China to foreign powers did not extend to the flag, but must be determined by the nationality of the defendant, the accused was surrendered to the Spanish consul for trial. (Mr. Denby, min. to China, to Mr. Blaine, Sec. of State, No. 997, Nov. 8, 1889, 86 MS. Desp. from China.)

Term "territories."

"In the event that a person on board the foreign ship [man-of-war] should be charged with a crime for the commission of which he would be liable to be given up, pursuant to an extradition treaty, the commander of the vessel may give him up if such proof of the charge should be produced as the treaty may require. In such case, however, it would always be advisiable to consult the nearest minister of the United States. This was done in the present instance, and the decision of Mr. Marsh, that the persons demanded were not liable to be given up pursuant to the treaty with Italy, is approved by the Department."

Mr. Fish, Sec. of State, to Mr. Case, Jan. 27, 1872, MS. Dom. Let., cited in Wharton's Int. Law Dig. II. 804.

"In Wharton's International Law Digest (section 271*a*, p. 804, vol. 2) . . . the principle is laid down that if 'a person on board the foreign ship should be charged with a crime for the commission of

which he would be liable to be given up, pursuant to an extradition treaty, the commander of the vessel may give him up if such proof of the charge should be produced as the treaty may require.'

"I can not, however, infer from the circumstances of the case which called forth this expression of the views of the Department, that it was the intention of Mr. Fish to declare the commander of the vessel competent to execute a treaty of extradition by surrendering, under its provisions, a person demanded on an extraditable charge. The context shows that the case in question arose on board a vessel of war, and that the refusal of her commander to surrender a fugitive charged with theft was approved, on the ground that the powers of the commander include discretion as to whom he may admit on board, even to the extent of refusing to recognize an application to give up a man on board who may have committeed an offence on shore. The case, therefore, really resolved itself into a question of internal discipline on a vessel of war, a matter within the commander's control, and not of compliance with a foreign demand of extradition . . . A decision under his discretionary power as commander would doubtless be aided by satisfactory proof that the fugitive was amenable to justice; but the commander would not necessarily be deemed competent to perform the judicial functions of a commissioner in extradition, or to fulfill the requirements of the treaty as to the form and mode of surrender. The treaty serves him merely as a convenient guide, by analogy, not as a precept. A naval commander can not execute the extradition treaty under the laws of the United States or in conformity with its express stipulations. No order of his, for instance, would legally take the place of the warrant of surrender, which can only be issued by the Secretary of State after due fulfillment of the precedent judicial requirements."

Mr. Blaine, Sec. of State, to Mr. Denby, min. to China, No. 680, Dec. 7, 1891, For. Rel. 1892, 74, 75.

In June, 1894, the legation of the United States in London, acting under instructions of the Department of State, obtained a provisional warrant for the arrest of a person charged in the State of New York with embezzlement and larceny. The warrant was placed in the hands of a detective, with instructions to arrest the fugitive, who was on board the ship *Normannia*, of the Hamburg-American Line, which was to touch at Southampton. When the detective sought to go on board the steamer for the purpose of making the arrest, entrance to the tender was refused unless he would buy a ticket and proceed to Hamburg, which was the vessel's destination. The arrest was not made, and the case does not appear to have given rise, so far as the British Government is concerned, to further official action.

Mr. Lincoln, min. to England, to Mr. Blaine, Sec. of State, No. 480, June 24, 1891, MS. Desp. from England.

The Mexican ambassador at Washington having inquired, in a note of Dec. 27, 1899, how the extradition of a fugitive from justice might be obtained from Cuba, which was then occupied by the United States, his inquiry was referred to the Secretary of War, who was advised, by the law officer of the Bureau of Insular Affairs, (1) that a requisition in the usual form, with duly authenticated proofs, should be presented to the Secretary of State; (2) that the Secretary of State should then authenticate the papers and transfer them to the Secretary of War, and (3) that the Secretary of War, if he deemed the case a proper one, should issue an order to the military governor of Cuba to cause the accused to be arrested and handed over to the demanding government. The Mexican Government was duly acquainted with this opinion.

Report of Jan. 9, 1900, Magoon's Reports, 523; Mr. Hay, Sec. of State, to Sec. of War, Dec. 30, 1899, 242 MS. Dom. Let. 82; Mr. Hay, Sec. of State, to Mr. Aspiroz, Mex. amb., No. 66, Jan. 13, 1900, MS. Notes to Mex. Leg. X. 511.

The requisition made by the United States, at the instance of the military governor of Cuba, which was then occupied by the United States, upon the Government of Mexico for the delivery up of Carlos de la Torre and another person, who were charged with crime in Cuba, and whose extradition was sought in order that they might be tried there, was based upon "the well received doctrine and established usage of nations, that territory subject to military occupation is considered and treated by all other nations as territory belonging to the realm of the nation maintaining the military occupation, without regard to the political relations existing between it and the occupied territory. The United States is committed to this doctrine by the decisions of our highest courts. (Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191; United States *v.* Rice, 4 Wheat. 254; Fleming *v.* Page, 9 How. 615, 616.)"

Letter of Sec. of War, August 17, 1900, quoted in Mr. Hill, Act. Sec. of State, to Mr. Aspiroz, Mex. amb., No. 101, Sept. 4, 1900, MS. Notes to Mex. Leg. X. 537. See, also, Mr. Hay, Sec. of State, to Sec. of War, June 1, 1900, 245 MS. Dom. Let. 376.

As the Mexican Government had granted the provisional detention of fugitives from justice from Cuba, the Secretary of War was requested to give telegraphic orders for the provisional detention of certain Spaniards, charged with crime in Mexico, who had fled to Cuba. (Mr. Hay, Sec. of State, to Sec. of War, Dec. 31, 1900, 250 MS. Dom. Let. 48, enclosing copy of a note from the Mexican ambassador, No. 160, of Dec. 31, 1900.)

"Fugitives from justice"

The party demanded is subject to extradition, notwithstanding that he may have come to this country otherwise than as an apparent fugitive on account of the particular crime; the treaties applying not only to persons seeking an asylum here professedly, but to such as may be found in the country.

Cushing, At. Gen., 1857, 8 Op. 306.

August 14, 1894, the U. S. S. *Bennington* arrived off the Golden Gate, having on board certain citizens of Salvador, to whom asylum had been granted in the waters of that country. The *Bennington* remained outside until the 23rd of August when, under instructions from the Navy Department, she came inside the Golden Gate, where a United States marshal served warrants on the refugees and took them into custody on charges of crime preferred under the extradition treaty between the two countries. The prisoners were afterwards taken before Judge Morrow, then of the United States district court at San Francisco, and a plea was entered to the jurisdiction of the court, on the ground that they were brought by the Government of the United States within its jurisdiction forcibly and against their will, and therefore could not be considered within the territories of the United States as fugitives from justice within the meaning of the treaty. Judge Morrow overruled the plea.

The case of the Salvadorean Refugees, Am. Law Rev., Jan.–Feb. 1895, 4.

The treaty in question provided that persons should be given up who, being charged with crime within the jurisdiction of one of the contracting parties, should "seek an asylum or be found within the territories of the other," a clause similar to that which is usually found in the extradition treaties of the United States.

It may be observed that the argument in behalf of the refugees on the plea to the jurisdiction ranged somewhat outside the strict line of the law, since it was contended not only that they were not fugitives from justice, but that the omission or refusal of the United States either to order their transfer to the first mail steamer that was encountered in Salvadorean waters, or to yield to their desire to be put ashore at the first neutral port at which the *Bennington* touched, was an outrage on their rights which required their immediate judicial liberation. For comments on this contention, the validity of which Judge Morrow declined to admit, see Am. Law Rev., Jan.–Feb. 1895, 5–7.

While there can be no doubt that the authorities of a State of the United States may punish a conspiracy formed and carried on therein to perpetrate a crime abroad, yet the persons in the United States who participate in such a conspiracy would not be liable to extradition on the demand of the authorities of the government within whose territory the conspiracy (e. g., to commit murder) was actually carried into effect, the treaty between the two countries providing that

persons should be delivered up who, being convicted of or charged with crime in the jurisdiction of the one country, shall seek an asylum or be found within the territory of the other.

Mr. Hay, Sec. of State, to Baron Fava, Italian ambass., No. 654, March 8, 1901, MS. Notes to Ital. Leg. IX. 508, citing a letter of the Attorney-General.

A different view, however, has been taken in England, where a person in that country who obtained goods from Germany by false pretenses contained in letters sent to the latter country, and paid for the goods by forged bills of exchange sent to Germany, was held to be a fugitive from justice within the treaty and the act of 1870. (Reg. *v.* Nillins, 53 L. J. M. C. 157; see, also, Reg. *v.* Jacobi, 46 L. T. 595, n.)

IV. *CITIZENS.*

1. Of the Country of Refuge.

§ 594.

General principles.

Many of the extradition treaties of the United States provide that neither contracting party shall be required to deliver up its own citizens. No such provision is found in the treaties with France, Great Britain, Italy, and Switzerland, or perhaps with certain other states; but, in spite of this fact, Italy has refused to deliver up her subjects, and it was once intimated that France would not surrender one of her own citizens. To the insertion in its treaties of the clause exempting citizens from extradition, the United States at one time peremptorily objected, and it yielded the point only when convinced that treaties could not be concluded with certain states on any other basis. The only logical ground on which, among civilized nations, a state can justify its refusal to deliver up its citizens to justice is, that it is itself capable of punishing them. By the laws of various states, provision is made for the punishment of their citizens for crimes committed abroad; and in this way justice may to some extent be done, though very imperfectly. In countries, however, such as England and the United States, in which the local theory of the punishment of crime generally prevails, the citizen who has committed a crime abroad, unless he is delivered up to justice, must usually go unpunished. The only mode in which the ends of justice can be completely satisfied is by the extradition of fugitives, without regard to their nationality, for trial at the place where their crime was committed.

See Moore on Extradition, I. 152 et seq.; Wharton's State Trials, 392; Dana's Wheaton, § 120, note; Lawrence's Wheaton (1863), 236, note.

A government may decline to subject its citizens to modes of trial unknown to its laws and abhorrent to its government and people. (Mr. Fish, Sec. of State, to Mr. Jewell, May 9, 1874, MS. Inst. Russia, XV. 426.)

As to the refusal of Denmark to surrender one Anderson, a Danish subject, see Mr. Gresham, Sec. of State, to Mr. Carr, May 8, 1893, MS. Inst. Denmark, XV. 543; Mr. Gresham, Sec. of State, to governor of Wyoming, May 8, 1893, 191 MS. Dom. Let. 594.

"Although signed, the treaty of extradition with Venezuela is not yet in force, owing to the insistence of the Government that, when surrendered, its citizens shall in no case be liable to capital punishment." (President Cleveland, annual message, Dec. 3, 1894, For. Rel. 1894, xv.)

An American citizen charged with crime in a foreign country can not complain if required to submit to such modes of trial and punishment as the laws of such country may prescribe for its own people, unless a different mode be stipulated for by treaty.

Neely *v.* Henkel (1901), 180 U. S. 109.

The practice in extradition does not require the demanding government to allege or prove that the fugitive is not a citizen of the government on which the demand is made. Citizenship of the country of refuge, if citizens are excluded from the operation of the treaty, is a matter of defence to be alleged and proved by the fugitive. To require the demanding government to prove that the fugitive is not a citizen of the country on which the demand is made would be to exact proof of a negative fact, which would often be impossible. Moreover, as the fact of citizenship is usually peculiarly within the knowledge of the person claiming it, the imposition upon him of the burden of proof seems to be merely the application of a rule of evidence well understood and constantly acted on in judicial proceedings.

Mr. Gresham, Sec. of State, to Atty. Gen., May 22, 1893, 192 MS. Dom. Let. 82.

"The President is unwilling to enter into any treaty of extradition excluding citizens of either country from its operation. No good reason is perceived why citizens of the United States who commit crimes in Venezuela, or Venezuelan citizens who commit crimes in the United States, should not, if they take refuge in their own country, be delivered up by its authorities to the country whose laws they have violated. A refusal to surrender them would result, in the case of Americans committing crime in Venezuela, in an utter failure of justice; and, although Venezuela may undertake to punish her subjects who, after committing crime here, return within her jurisdiction, yet the means of ascertaining the truth and doing justice must, under such circumstances, always be difficult and often unattainable."

Mr. Gresham, Sec. of State, to Mr. Bartleman, No. 110, June 11, 1894, MS. Inst. Venezuela, IV. 304.

This instruction related to an extradition treaty between the two countries signed at Caracas, June 6, 1894, in which a stipulation was

inserted to the effect that neither government should be bound to surrender its own citizens.

For a statement that the President was unwilling to conclude an extradition treaty with the Argentine Republic unless it authorized the surrender of citizens, see Mr. Uhl, Act. Sec. of State, to Mr. Buchanan, min. to Argentine Repub., No. 32, Sept. 1, 1894, MS. Inst. Argentine Repub. XVII. 94.

"The United States is ever ready to annul or to narrow the exemptions contained in its extradition treaties based on the citizenship of the fugitive."

Mr. Olney, Sec. of State, to Mr. Ransom, min. to Mexico, Dec. 13, 1895, For. Rel. 1895, II. 1008, 1009.

By Art. III. of the treaty concluded between the United States and the Argentine Republic, September 26, 1896, it was stipulated that in no case should the nationality of the accused be an impediment to his extradition. The Senate of the United States, January 28, 1898, added the following—"but neither government shall be bound to deliver its own citizens for extradition under this convention; but either shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

This amendment is embodied in the treaty as ratified by the two governments and proclaimed.

Mr. Day, Sec. of State, to Mr. Viso, May 26, 1898, MS. Notes to Argentine Leg. VII. 29.

"Declaration of intention to become a citizen of the United States does not confer citizenship. It is provided by the treaty of naturalization between the United States and Mexico that 'the declaration of intention to become a citizen of the one or the other country has not for either the effect of naturalization.' Under the circumstances I have felt constrained to issue a warrant of surrender."

Mr. Olney, Sec. of State, to Mr. Townsend, Nov. 13, 1896, 213 MS. Dom. Let. 680; case of Antonio Vizcarra.

Article IV. of the extradition treaty between Spain and Mexico, in force in 1895, provided:

"For the purposes of this article, the foreigners who may be naturalized in Mexico or in Spain will not be considered as Mexicans or Spaniards if the offense was committed before the date of their naturalization."

According to the view of the Mexican Government, the rule thus prescribed is not "a principle of national right for general application, but a special stipulation of said treaty, inapplicable therefore

to other nations, which can not invoke its provisions, even in case they seek to allege for themselves most-favored-nation treatment."

Mr. Mariscal, Mex. min. of foreign affairs, to Mr. Butler, chargé d'affaires ad int., July 29, 1895, For. Rel. 1895, II. 1004, 1006, citing Cushing, At. Gen., 1853, 6 Op. 148.

Treaty with Italy.

In the case of Salvatore Paladini, whose surrender by the Italian Government to the United States was resisted on the ground that, being an Italian subject, he could not be extradited, the Department of State declared that it possessed in the matter no guide but "the language of the treaties, which contain no such limitation as that suggested."

Mr. Bayard, Sec. of State, to Mr. Dougherty, chargé at Rome, September 10, 1888, For. Rel. 1888, II. 1047.

"I have had the honor to receive your note of the 20th of April last, in relation to the cases of the two Italian subjects, Bevivino and Villella, who, having committed murders in the United States of a most aggravated and atrocious character, have sought asylum in their own country, which has refused to comply with the demand of this Government, based upon treaty, for their extradition. The immediate occasion of your note was the reply made by me to your request for the execution in this country of letters rogatory issued by a court in Italy, before which the two fugitives have been arraigned for trial, under Italian law, for the crimes committed in the United States. In that reply I stated that, with a view to preventing, if possible, the total defeat of the ends of justice in the cases in question, I would forward the letter to the governors of the States of Pennsylvania and New York for such action as they might find it proper to take, the letters being respectively addressed to the authorities in those States. At the same time I took occasion to reserve what I regarded as the clear right of the Government of the United States, under the treaty with Italy, to require the delivery of the fugitives for trial in this country.

"In answer to this you remind me that this question has been discussed at length and entirely settled by the royal ministry of foreign affairs and the United States legation at Rome; that Mr. Stallo, lately the minister of the United States to Italy, must have informed this Department that, according to Italian law, no citizen can be removed from the jurisdiction of his natural judges, the judges of his own country; and that, although an exception is made to this principle when a citizen who has committed a crime in a foreign country is there arrested, it nevertheless resumes its force when he returns to his own country. You also state that the new Italian penal code expressly forbids the extradition of Italian subjects, and declare

that this principle now forms a part of public law, which the United States has recognized in many of its treaties. . . .

"You are correct in your supposition that Mr. Stallo informed the Department of the provisions of Italian law on the subject, but the Department is surprised to learn that the Government of Italy entertains the impression that the question was settled by the royal ministry of foreign affairs and the United States legation at Rome. In various interviews with the royal ministry of foreign affairs reported by him to the Department, as well as in formal communications addressed to that ministry, Mr. Stallo protested against the position of the Italian Government; and the Department is not informed of anything said or written by him that savored of acquiescence. . . .

"In order to understand the present controversy, it is necessary to revert to its origin. It did not arise in the cases of Villella and Bevivino, but in that of Salvatore Paladini, whose extradition Mr. Stallo, on May 17, 1888, demanded of the Italian Government on a charge of passing counterfeit money of the United States, for which Paladini was under indictment in the district court of the United States for the district of New Jersey. . . . On October 25 Mr. Crispi, more than 5 months after the original demand, announced that, according to the Italian procedure, the minister of grace and justice had submitted the demand to the successive examination of the criminal section of the court of appeals of Messina, of the council of state, and of the council of ministers, and that they were unanimously of opinion that Paladini should not be extradited, for the reason that he was an Italian subject. This opinion, he said, was based upon certain principles, which he stated. It is unnecessary to recount them, since they are the same, in almost the same language, as those set forth in your note.

"In January, 1889, the Department received from Governor Beaver, of Pennsylvania, information that two Italians, named Vincenzo Villella and Giuseppe Bevivino, charged with the commission of atrocious murders in Luzerne County, Pa., had taken refuge in Italy. The Department at once telegraphed information of the facts to the legation at Rome. Mr. Stallo saw the minister of foreign affairs, and, laying the facts before him, was assured that measures would at once be taken for the arrest of the accused and for their eventual trial in Italy as soon as he could give their names, which he was at that time unable to do, owing to a confusion in the telegrams.

"On January 30, 1889, Governor Beaver made a formal request that the extradition of the fugitives be demanded. He had been informed of the attitude of the Italian Government in the case of Paladini, but because of the importance of inflicting punishment upon the criminals in Pennsylvania, and influenced by an opinion which, he had been informed, had been expressed by the Italian

consul at Philadelphia to the effect that the fugitives would be given up, he asked the Department to endeavor to obtain their surrender. A President's warrant was accordingly issued to John R. Saville and Frank P. Dimaio, the persons designated by Governor Beaver to receive the fugitives, and Mr. Stallo was so informed. These agents, Mr. Stallo was also informed, would take with them authentic proof of the guilt of the fugitives, and upon arriving in Italy would proceed at once to Rome to consult with him. Meanwhile he was to ascertain whether the extradition of the fugitives could be obtained, and to apply to the Italian Government for that purpose.

"On February 20 Mr. Stallo acknowledged the receipt of the papers, which he transmitted to the foreign office, with an application for the fugitives' surrender, coupled with an expression of the earnest desire of the United States that the determination in the Paladini case should be reconsidered. Mr. Stallo also called attention to the fact that the principal witness against the two fugitives was their accomplice, Michele Rizzolo, who was under arrest at Wilkes-Barre, in Pennsylvania, and had made a full confession, and that it was impracticable to bring this witness, either before or after his trial, to Italy in order to testify before an Italian court.

"On the 7th of March Mr. Stallo enclosed to the Department a note from Mr. Crispi, bearing date of the preceding day, in which the surrender of the fugitives was refused. The reasons given were the same as those stated in the case of Paladini.

"It was in view of the total divergence of opinion between this Government and that of His Majesty, developed in the preceding correspondence, that I deemed it necessary to make the reservation contained in my note of the 21st of March last. I shall now endeavor to show that that reservation was not only justified, but also required, by the circumstances.

"I do not understand the Italian Government to deny that the provisions of the treaty of 1868, if not obstructed by any municipal statute or qualified by any principle of international law, would oblige the contracting parties to deliver up their citizens. Indeed, I assume this to be admitted. The treaty says that the two governments mutually agree to deliver up 'persons who, having been convicted of or charged with the crimes specified in the following article committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other.' As the term 'persons' comprehends citizens, and as the treaty contains no qualification of that term, it is unnecessary to argue that the treaty standing alone would require the extradition by the contracting parties of their citizens or subjects.

"I shall also assume it to be admitted by the Italian Government that the parties to a treaty are not permitted to abridge their duty

under it by a municipal statute. It is true that the authorities of a country may, by reason of such a statute, find themselves deprived of the power to execute a treaty. But if, in obeying the statute, they violate or refuse to fulfill the treaty, the other party may justly complain that its rights are disregarded and may treat the convention as at an end. Hence, in appealing to its statutes to justify its action in the present case, I understand the position of the Italian Government to be that those statutes are merely declaratory of the law by which nations are bound to be governed in their dealings one with another.

"We are brought, therefore, to the consideration of the question whether the refusal of the Italian Government to deliver up Paladini, Villella, and Bevivino, under the treaty of 1868, is justified by the principles of international law. The answer to be given to this question must be decisive of the matter.

"It is stated—and the statement has the sanction of the eminent Italian publicist Fiore—that the refusal to surrender citizens had its origin in the practice of extradition by France and the Low Countries in the eighteenth century. Formerly such an exception was not recognized. Even the Romans, who were not wanting in a disposition to assert their imperial prerogatives, did not refuse to deliver up their citizens, their feciales being invested, in respect to states in alliance with Rome, with authority to investigate complaints against Roman citizens and to surrender them to justice if the complaints were found to be well grounded. The exception of their citizens by France and the Low Countries originated in the following manner:

"The two countries practiced extradition, not under a convention, but under independent declarations of a general character. By the Brabantine Bull, issued by the German Emperor in the fourteenth century, subjects of the Duke of Brabant enjoyed the privilege of not being withdrawn from his jurisdiction. A similar privilege was gradually extended by law and usage to other subjects of the House of Austria, while the Low Countries were still under its dominion. In consequence of the establishment of this rule, the Low Countries refused to deliver up their subjects, and France, as an act of retaliation, refused to surrender Frenchmen. Thus, not in recognition of any principle, but merely with a view to observe a strict reciprocity, was the precedent first established.

"That the example thus set has generally been followed by European states is not to be questioned: for, with the single exception of England, it is believed that they have adopted the rule of refusing to deliver up their citizens. But, in order to determine the force and effect of this rule from the point of view of international law, it is necessary to inquire how it has been secured and enforced. Where no treaty exists, the subject is simple. It is generally agreed that, in

the absence of a convention, extradition is a matter of comity, and not of positive obligation. In such case, each nation is free to regulate its conduct according to its own discretion. If it declines to surrender its citizens, its action, though detrimental to the interests of justice, does not afford ground for complaint or pressure, since it is acting within its right. But, where the subject is regulated by treaty, the case is different. What before was a matter of comity and discretion, becomes a matter of duty, and the measure of that duty is the treaty. It is not strange, therefore, that, in order to avoid the obligation to extradite their citizen, the states of Europe have industriously inserted in their treaties an express stipulation to exempt themselves from that obligation. With respect to those who are to be surrendered, they usually employ, as is done in the treaty between the United States and Italy, the general term 'persons.' Having used this term, they then proceed to insert a clause to except their citizens from the general obligation; and it is by means of this clause, and not by reason of an implication created by international law, that the duty of surrender is avoided.

"More cogent proof of this fact could not be found than is afforded by the extradition treaties of the United States with European nations, to which you refer for the purpose of showing that this Government has recognized the exemption of citizens by international law. Among those treaties is that with Prussia and other German states, concluded June 16, 1852, which is the first in which the United States admitted an exception of citizens. It is a part of the public history of extradition that for years the Government of the United States refused to negotiate treaties for the surrender of fugitives from justice with several of the states of Europe, because, owing to the limitations of their domestic laws, they insisted upon the insertion of a clause to exempt their citizens. It was for this reason alone that this Government, in order to avoid the misfortune of a total lack of extradition, finally admitted the exception. Accordingly, we find in the preamble to the treaty with Prussia and other German states the following recital:

"Whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and jurisdiction of the parties respectively that persons committing certain heinous crimes, being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, and also to enumerate such crimes explicitly; and whereas the laws and constitution of Prussia, and of the other German states, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States: Therefore, etc.

"This recital, it is to be observed, was not a declaration by the United States alone, but by both parties, of the reason for the exclu-

sion of citizens. The same declaration is found in the treaty with Bavaria of 1853, with Austria-Hungary of 1856, with Baden of 1857, and with various German states by virtue of their accession to the treaty with Prussia, which was, in 1868, finally extended to the whole of the north German Confederation.

"In the record of the negotiation of the treaty with Italy no reference is found to the subject of citizens. What may have been said in the oral discussions can not now be discovered. It is, however, a matter of record in this Department that in the same year, 1868, Mr. Seward, who, as Secretary of State, signed the treaty on the part of the United States, refused to conclude a convention with Belgium because she insisted upon the exception of her citizens. In this relation I may advert to another fact which possesses great significance. The treaty of extradition concluded between the United States and Italy in 1868 was one of two treaties concluded between those countries in that year, the other relating to the rights and privileges of consuls. These treaties were designed to take the place of the treaties formerly made between the United States and the independent states of Sardinia and the Two Sicilies. In the treaty with the latter Government of 1855, there was stipulations relating to extradition, and among them was the following provision:

"The citizens and subjects of each of the high contracting parties shall remain exempt from the stipulations of the preceding articles, as far as they relate to the surrender of fugitive criminals. (Article XXIV.)

"In view of the existence of this clause in the treaty with the Two Sicilies, it can scarcely be supposed that the parties to the substitutionary arrangement of 1868 negotiated that instrument in oblivion of the question as to citizens. And when we consider the omission of the clause, especially in conjunction with Mr. Seward's refusal to negotiate with Belgium, the inference seems to be morally irresistible that the obligation to deliver up their citizens, under the treaty of 1868, was fully understood by the contracting parties at the time of its conclusion.

"From what has been stated I am forced to conclude, not only that international law does not except citizens from surrender, but also that it has been well understood, especially in dealing with the United States, that the term 'persons' includes citizens and requires their extradition, unless they are expressly exempted.

"Nor am I able to find sufficient ground for the refusal to surrender citizens in the general principles on which extradition is conducted. It does not satisfy the ends of justice to say that, although a nation does not extradite its citizens, it undertakes to try and punish them. This argument may be admitted to have great force where, by reason of the absence of any conventional assurance of reciprocity, a

nation declines a demand addressed to its discretion. But the chief object of extradition is to secure the punishment of crime at the place where it was committed, in accordance with the law which was then and there of paramount obligation. It is for this purpose that extradition treaties are made, and, except in so far as their stipulations may prevent the realization of that design, they are to be executed so as to give it full effect. It is at the place where the offense was committed that it can most efficiently and most certainly be prosecuted. It is there that the greatest interest is felt in its punishment and the moral effect of retribution most needed. There, also, the accused has the best opportunity for defense, in being confronted with the witnesses against him; in enjoying the privilege of cross-examining them; and in exercising the right to call his own witnesses to give their testimony in the presence of his judges. These and other weighty considerations, which it is not necessary to state, have led what I am inclined to regard as the great preponderance of authorities on international law at the present day to condemn the exception of citizens from the operation of treaties of extradition. In France I need only to refer to such well-known writers on extradition as Billot and Bernard. In Italy I may refer again to the eminent publicist Fiore, who says that, in spite of all that has been said on the subject, his opinion is that, while in former times the absolute prohibition against the surrender of citizens had some reason for its existence, it is insisted upon to-day rather as one of numerous conventional aphorisms, accepted without searching discussion for fear of showing too little regard for national dignity (Traité de droit pénal int., section 362). I will not extend the length of this note by citing other books, but, as showing the general view of eminent publicists, will refer to two resolutions of the Institute of International Law, adopted at the session at Oxford in 1881–'82. Those resolutions are as follows:

"VI. Between countries whose criminal legislation rests on like bases, and which should have mutual confidence in their judicial institutions, the extradition of citizens would be a means to assure the good administration of penal justice, since it ought to be regarded as désirable that the jurisdiction of the *forum delicti commissi* should, so far as possible, be called upon to judge.

"VII. Admitting it to be the practice to withdraw citizens from extradition, account ought not to be taken of a nationality acquired only after the perpetration of the act for which extradition is demanded. (Annuaire, v, 1881–'82, pp. 127, 128.)

"At the session at which these resolutions were adopted seventeen members and eight associates of the institute were present, including some of the most eminent publicists in Europe, and representing Italy, Germany, Austria, Belgium, Spain, France, Great Britain, Greece, Russia, and Sweden.

"In view of what has been shown, I am unable to discover any ground of reconciliation of the totally opposite views entertained by

the United States and Italy in regard to the force and effect of the treaty of 1868, unless the Government of Italy will reconsider its position. The present situation, therefore, seems to me to require either the denunciation of that treaty or the conclusion of new stipulations upon which the contracting parties will find themselves in agreement. If, as a part of those stipulations, citizens should be excepted, it would be essential to reach an understanding as to the effect of naturalization. These matters it is not my purpose to discuss on the present occasion, but I deem it my duty to suggest them for consideration."

Mr. Blaine, Sec. of State, to Baron Fava, Ital. min., June 23, 1890, For. Rel. 1890, 559.

Bevivino and Villella were convicted in the Italian courts, and sentenced, the former to twenty years' imprisonment, and the latter to fifteen years. (Mr. Gresham, Sec. of State, to the governor of Penna., Jan. 31, 1894, 195 MS. Dom. Let. 329.)

In April, 1894, the Italian Government, responding to an inquiry whether it would deliver up two Italians, replied that it "could never consent to the delivery in extradition . . . of its subjects." The United States responded: "While this Government will not at this time insist upon its rights under the treaty . . . it, nevertheless, does not waive such rights nor acquiesce in the view taken by the Government of Italy." (For. Rel. 1894, 369–371.)

Baron Fava, in a note of Jan. 22, 1894, referring to Mr. Blaine's note of Nov. 18, 1890, enclosed a draft of a supplementary extradition treaty, declaring that neither party should be obliged to surrender its own citizens or subjects. Mr. Gresham, Secretary of State, replied, June 13, 1894: "The President is unwilling to enter into any treaty of extradition which will exclude citizens or subjects of either country from its operation.

"No good reason is perceived why citizens of the United States who commit crimes in Italy, or Italian subjects who commit crimes in the United States, should not, if they take refuge in their own country, be delivered up by its authorities to the country whose laws they have violated. A refusal to surrender them would result in the case of Americans committing crime in Italy in an utter failure of justice; and though Italy may undertake to punish her subjects who, after committing crime here, return within her jurisdiction, yet the means of ascertaining the truth and doing justice must under such conditions always be difficult and often unattainable." (For. Rel. 1894, 361, 364.)

"As it appears that Di Blasi [who was charged with murder in Massachusetts] is an Italian subject, the Department is of the opinion that it would be useless to incur the expense of sending an officer to Italy to endeavor to secure his return. Our extradition treaty with Italy provides for the surrender of 'persons' charged with crime, and no express exemption is made of citizens. This Government has taken the view that where no exception is expressed in the treaty, the obligation to surrender 'persons' includes citizens or subjects of the contracting parties. The Italian Government, however, declines to accept this view, and uniformly refuses to surrender its subjects,

usually accompanying its refusal with an offer to try and punish the fugitives in Italy." (Mr. Hay, Sec. of State, to the governor of Massachusetts, February 11, 1899, 234 MS Dom. Let. 504.)

See, to the same effect, Mr. Uhl, Act. Sec. of State, to Gov. of New York, Feb. 13, 1894, 195 MS. Dom. Let. 443.

"Mr. Moustier's second point is, that France construes her extradition treaty with the United States as not containing an obligation on each of the contracting parties to deliver its own subjects to the other. You have correctly opposed to this view the literal construction of the treaty. Your argument in opposition to Mr. Moustier's construction of the treaty is sound and conclusive, and is approved by this Government. Your only error is in making an apparent concession that, if the French Government should adhere to Mr. Moustier's construction, then this Government might consent to accept and apply the same construction by way of reciprocity. I think this concession can not safely be made. The Executive of the United States has no power to depart from, or waive, or modify a treaty. It follows, therefore, that it would be necessary to celebrate a new treaty with France in order to change or depart from what this Government holds to be the true and legal effect of the existing extradition treaty."

Mr. Seward, Sec. of State, to Mr. Dix, min. to France, No. 148, Feb. 8, 1868, MS. Inst. France, XVIII. 157.

Treaty with Switzerland.

In 1890, the Government of the United States demanded of that of Switzerland the extradition of Eugene Piguet on a charge of embezzlement. Piguet's extradition was resisted on the ground that he was a citizen of Switzerland, and as such was not subject to surrender. The case was finally carried before the high federal tribunal, which decided that under the treaty between the two countries the fugitive should be delivered up. The opinion of the tribunal on the point of citizenship was as follows:

"1. The first point raised against the demand for extradition consists in saying that Piguet is a Swiss citizen; that the non-extradition of citizens is a fundamental principle of international law, and that in addition Art. XIII. of the treaty of extradition does not expressly provide for the extradition of a citizen of the required country.

"Although the non-extradition of citizens is to-day the rule, confirmed by the practice of many states; although Switzerland has also adopted this principle in the treaties which it has concluded on this subject, which it has even expressly sanctioned in many among them—nevertheless there exists no constitutional or legal provision, which formally interdicts the extradition of citizens. Therefore, inasmuch as the obligation of extradition has been regulated by a treaty, the question of the extradition of Swiss citizens ought to be

determined solely according to the spirit and the letter of the provision of the international agreement on this subject.

"2. The question of deciding whether Art. XIII. of the treaty of 1850 between Switzerland and the United States implies the obligation which is under consideration, must be determined in the light of the interpretation of its text while giving due weight to the negotiation which preceded the final ratification of this international covenant.

"Now, by the aforesaid article the two contracting countries reciprocally promise to give up for legal prosecution 'persons who, being charged with the crimes enumerated in the following article, committed within the jurisdiction of the requiring party, shall seek asylum or shall be found within the territories of the other.'

"This promise is made in general terms, and with no distinction between strangers and citizens.

"In presence of this text it would be necessary, in order to exclude the obligation of extraditing citizens, to show that it was the intention of the parties, notwithstanding the silence of the treaty upon this point, respectively to except their citizens. Now, a like purpose could only be taken for granted and as resulting from the nature of things in case the principle of the non-extradition of citizens were an absolutely universal rule, which is by no means the case, several states, as, for example, England, Norway, and the United States, admitting and practicing the contrary custom.

"In concluding a treaty of extradition with a country which, like the United States of America, consents to deliver up its citizens, it seems clear that if the co-contracting party—in the present case Switzerland—had wished to introduce a different principle, it would have made it the object of an express provision. The absence of every provision of this kind therefore does not in the least authorize one to attribute to the contracting parties the intention of excluding citizens from the stipulations of the treaty.

"3. The genesis of the treaty of 1850, ratified in 1855, likewise proves that the contracting parties were in accord upon the meaning to be attributed to Art. XIII. of the said treaty as to the extent of the obligation to extradite.

"The message of the 3rd of December, 1850, to the Federal Chambers, relating to this law, fully proves that the said parties did not intend to stipulate that they should not be bound to deliver up their respective citizens.

"In quite the contrary sense the Federal Council expressly declares in the said message 'that it has not considered it expedient to insist upon this clause' which, moreover, it had vainly sought to introduce during the negotiations of 1846 upon the same subject. The Federal Council adds as a reason for this surrender 'that it would be com-

pletely useless and that there are not sufficient reasons for renouncing a treaty of extradition rather than to consent to give up citizens accused of grave crimes.' (v. Feuille fédérale de 1885, vol. 3, page 641.)

"Although the aforesaid treaty was not ratified until 1855, the cause of this delay is not to be sought in differences which arose between the parties with respect to obligations in the matter of extradition, but in the fact that the negotiations were prolonged over other articles.

"When these negotiations were resumed in 1852, it was agreed between the parties after deliberation 'to leave as they were the entire portion of the treaty already accepted by them and to change nothing at the date of the conclusion.'

"It is also in this sense that the treaty was submitted to the ratification of the Federal Chambers (see message of the Federal Council of the 30th of April, 1855, feuille fédérale of 1855, vol. 2, pages 40 and 52, and Rec. off. des lois, V. page 188). Thus the parties were both of the opinion that the part of the treaty already ratified in 1850, and among others the articles concerning extradition, did not require a new ratification, but only the modification introduced into other subjects of this international agreement.

"It follows from all which precedes that the said treaty, so far as extradition is concerned, must be interpreted and applied in the sense already fixed in 1850, of an obligation imposed upon the contracting parties to extradite even their citizens, in the cases provided for in Art. XIV. . . .

"6. Finally, the circumstance that art. 8 of the Geneva code of criminal procedure of the 25th of October, 1884, stipulates that 'every citizen of Geneva accused of crimes or offences committed without the territory of the Republic shall be prosecuted and judged in the Canton and according to the laws of Geneva, if he has not been prosecuted and judged abroad,' can not be held to modify in the least the provisions of the treaty of extradition with the United States."

Mr. Washburne, min. to Switzerland, to Mr. Blaine, Sec. of State, No. 50, March 23, 1891, 28 MS. Desp. from Switzerland.

See, also, Mr. Washburne's despatches, Nos. 18 and 39, Dec. 29, 1890, and Feb. 26, 1891, 27 id.

As is indicated above, the treaty between the United States and Switzerland of 1850 provides for the surrender of "persons" charged with crime, and contains no clause exempting the citizens of the contracting parties from surrender. That the treaty, as concluded and ratified, was understood to embrace the surrender of citizens, is shown in Moore on Extradition, I. 172–174.

Piguet was duly delivered up, and on a plea of guilty to one of the charges on which he was indicted was sentenced to imprisonment at hard labor for the term of nine years. (Dist. Atty., city and county of New York, to the Dept. of State, May 1, 1891, MS. Misc. Let.)

The treaty with Mexico of 1861 provided that neither contracting party should be bound to deliver up its own citizens.

Mexican treaties and cases.

In 1874 Francisco Perez, a Mexican, committed a murder in Texas and escaped to Mexico. Mr. Fish, who was then Secretary of State, instructed Mr. Foster, the American minister at Mexico, that, although, under the treaty with Mexico, the surrender of Perez could not be demanded as of right and would not be asked as a favor, or even accepted with an understanding that it would be reciprocated, the circumstances might be made known to the Mexican Government with a view to ascertain whether it would voluntarily surrender the fugitive if this could be done. October 3, 1874, Mr. Foster reported that the Mexican Government declined to surrender Perez. Mr. Fish replied that it was not surprising that the Mexican Government had so acted, especially as it was within its right in so doing.

Report of Mr. Frelinghuysen, Sec. of State, to the President, February 13, 1884, S. Ex. Doc. 98, 48 Cong. 1 sess.

In 1879, Zeferino Avalos, a Mexican soldier, murdered a fellow Mexican in Texas and escaped into his own country, where he was arrested, tried, and executed. (Ibid.)

In 1884 the Mexican Government demanded the extradition of Alexander Trimble, a citizen of the United States. Article VI. of the treaty of 1861, under which the demand was made, provided that neither of the contracting parties should "be bound to deliver up its own citizens." Mr. Frelinghuysen, who was then Secretary of State, held that Trimble could not be surrendered. Setting out with the premise that the Government of the United States is not authorized to deliver up a fugitive from justice in the absence of a treaty or law to that effect, Mr. Frelinghuysen argued that Article VI., since it negatived any obligation to surrender the fugitive, left the President without power to do so. He pointed to the fact that a clause similar to that in Article VI. of the treaty with Mexico was to be found in numerous other extradition treaties of the United States, and that it had always been construed as exempting the citizens of the contracting parties from surrender.

Report of Mr. Frelinghuysen, Sec. of State, to the President, February 13, 1884, S. Ex. Doc. 98, 48 Cong. 1 sess.

Mr. Frelinghuysen's view is judicially upheld in Ex parte McCabe, 46 Fed. Rep. 363.

See, also, Mr. Gresham, Sec. of State, to Mr. Romero, Mex. min., May 22, 1893, MS. Notes to Mexico, IX. 668; Mr. Gresham, Sec. of State, to Mr. Brookes, July 25, 1894, 198 MS. Dom. Let. 85; to U. S. Marshal, July 25, 1894, id. 96.

In 1893 the President declined to surrender Francisco Benavides, who had been committed for extradition to Mexico, on charges of

crime in connection with the raid on San Ignacio, in December, 1892, on the ground that the evidence showed that he was a citizen of the United States, the treaty providing that the contracting parties should not be bound to deliver up their own citizens.

Mr. Gresham, Sec. of State, to Mr. Romero, Mex. min., May 13, 1893, MS. Notes to Mex. IX. 664.

In July, 1895, the Mexican Government declined to surrender to the United States Chester W. Rowe, a fugitive from justice, on the ground that he had, by the purchase of real estate in Mexico, assumed Mexican nationality. Reference was made to Article VI. of the extradition treaty, and also to Article XXX. of the Mexican constitution and to Article I., section 10, of the law relating to foreigners, as reported in the despatch of the legation in Mexico, No. 241, June 10, 1886. There was reason to believe, however, that Mexican nationality was assumed for the purpose of evading extradition, and on this ground the legation of the United States in Mexico was instructed to urge his extradition. The Mexican Government persisted in its position and Rowe was held for trial in Mexico under article 185 of the penal code, which reads as follows: "In regard to continuous offenses, the commission of which was previously begun in a foreign country and continues in the Republic, the offenders, whether Mexicans or foreigners, shall be punished in accordance with the laws thereof." The Mexican Government denied that his naturalization could be considered as fraudulent, since the facts set forth by him in obtaining it actually existed, and also came "within the scope of law, the very Constitution of this Republic, to wit, the naturalization of a foreigner acquiring in Mexico real estate." The law, said the Mexican Government, did not inquire into the motive of the interested party, but merely declared any foreigner to be a Mexican "who acquires real estate, and omits to set forth his desire to preserve his previous nationality." The Mexican Government also denied that by its action a retroactive effect was given to Rowe's naturalization, since effect was given to it not in respect of acts which he performed before he became a Mexican citizen, but in respect of the demand for his extradition.

The United States suggested that Rowe's naturalization might be considered as inconsistent with the spirit, if not the letter, of the Mexican law and subversive of its intent, which seemed to be to attract immigrants of probity and industry who desired to own homes, by extending to them the privileges of citizenship, without any period of long waiting as strangers in the land of their adoption. If Rowe's naturalization should be held to be valid, criminals who had "but the price of a bit of land" would, said the United States, "flock to the Mexican border like the criminals of old to

the city of refuge, and there, unwhipped of justice and rejoicing in evil, they will take on the highest honor and privilege the Mexican nation can bestow—its citizenship." The United States therefore expressed a desire that a judicial interpretation of the law, as it affected the question at issue, might be secured. The Mexican Government replied that it did not lie within its powers to institute proceedings for a judicial interpretation of the law, but that the Mexican courts would be prepared to pass upon it if the United States should institute proceedings.

Mr. Olney, Sec. of State, to Mr. Ransom, min. to Mex., Dec. 13, 1895, For. Rel. 1895, II. 1008; Mr. Mariscal, min. of foreign affairs, to Mr. Butler, chargé, Jan. 23, 1896, For. Rel. 1895, II. 1010. See, also, For. Rel. 1895, II. 998, 999–1001, 1002–1003, 1004–1007.

Rowe was afterwards convicted in Mexico of bringing stolen property into the Republic and sentenced to 12 years' penal servitude, a fine of $2,000, and political disfranchisement. The United States, while expressing appreciation of Mexico's action in preventing him from going unpunished, adhered to its position on the question of extradition. (Mr. Olney, Sec. of State, to Mr. Ransom, min. to Mex., May 14, 1896, For. Rel. 1896, 455.)

See Mr. Olney, Sec. of State, to Mr. Lacy, Dec. 13, 1895, 206 MS. Dom. Let. 442, citing 1 Moore on Extrad. 128, 137.

Art. IV. of the treaty between the United States and Mexico of February 22, 1899, provides that neither party shall be bound to deliver up its own citizens, but that "the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

July 15, 1899, the Department of State transmitted to the Mexican embassy a warrant for the surrender of Mattie D. Rich, charged with the murder of her husband, John D. Rich, in Ciudad Juarez, State of Chihuahua, Mexico, both the deceased and the accused being citizens of the United States. Strong pressure was brought to bear upon the President to prevent her surrender on the ground (1) that she was an American, (2) that by her own statements she was enceinte, and (3) that she was temporarily insane. None of these considerations was brought before the examining magistrate. In declining to be controlled by them, the President took the view that the prisoner would receive a fair trial in Mexico, with every opportunity for defence; that, if she should be condemned to capital punishment, her execution would in any event be delayed till the birth of her child; and that the claim of insanity would be properly investigated by the Mexican judicial authorities. The ambassador of the United States in Mexico was, however, instructed to say that, as the evidence of her guilt was "only circumstantial, the President would be pleased, if she shall be found guilty, if the extreme penalty of death should not be visited upon her; or, if pro-

nounced, that it might be commuted to imprisonment." This request was not communicated to the Mexican Government, the American ambassador finding that under the laws of the State of Chihuahua females were not subject to capital punishment for murder. The other circumstances of the case were, however, represented to the Mexican Government in a note, a copy of which that Government transmitted to the governor of the State of Chihuahua, in order that he might communicate it to the judge who was trying the case.

For. Rel. 1899, 497–501.

See annual messages of President McKinley, Dec. 5, 1898, and Dec. 5, 1899.

While it was stated, in response to a confidential inquiry, that the President of the United States would be disposed to consider favorably a certain proposed request for extradition, it was added that the exercise of the discretion conferred on him by Article IV. of the convention between the United States and Mexico of February 22, 1899, "would necessarily depend on all the facts and circumstances of the case, as they should appear when the case is ripe for consideration and decision." (Conf. mem., May 16, 1899, MS. Notes to Mex. Leg. X. 466.)

2. Of a Third Country.

§ 595.

In 1850 four American sailors, belonging to the U. S. S. *Constitution*, threw a boatman at Marseilles into the sea, thus causing him to drown. They fled to Genoa, where, upon a demand by the French Government for their extradition, they were arrested; but the Sardinian Government declined to surrender them without the United States' consent. To a request of the French minister at Washington that such consent be given, Mr. Derrick, Acting Secretary of State, Oct. 23, 1850, replied "that the President of the United States neither exercises any authority, nor claims any control, in respect to the persons of citizens of this country who are accused of offenses committed beyond its jurisdiction, against the laws of a foreign government; that he would, however, willingly throw no obstacle in the way of their prompt trial by the proper judicial tribunals or authorities of the state within whose jurisdiction the offense was alleged to have been perpetrated; and, consequently, that, in the particular case of the sailors belonging to the crew of the American frigate *Constitution*, charged with the murder of a boatman of Marseilles in France, he is not disposed to interpose any objection to their surrender by the Sardinian Government, on whose territory they had sought an asylum, to the French Government, to be taken to France for trial."

1 Moore on Extradition, § 143, p. 178. See, as to the case of Silveira, in 1867, id., § 144, pp. 179–184.

"If a Mexican citizen should commit a crime in England and flee to the United States there is no doubt in my mind that this Government would have a right to surrender him as a fugitive on a requisition by Great Britain under our treaty of extradition with her."

Mr. Marcy, Sec. of State, to Mr. Gadsden, min. to Mexico, No. 54, Oct. 22, 1855, MS. Inst. Mexico, XVII. 54.

"The criminal law of this country asserts jurisdiction over all offenses committed within the territorial limits of the State or Territory enacting the law, but over no crimes committed beyond it. An American citizen, therefore, committing an offense in Europe, can not be punished for that offense by the infliction of any punishment under American laws, and will escape punishment altogether if he can claim the protection of his Government against a demand for extradition.

"On motives of general policy it would not be thought worth while to authorize any intervention in favor of a criminal in such case, even if he were a native-born citizen. In the case of a naturalized citizen, the representative of the Government should further inquire whether he be a *bona fide* naturalized citizen, and whether he has done any act indicating a purpose to forfeit his acquired citizenship."

Mr. Fish, Sec. of State, to Mr. Gorham, Apr. 16, 1874, For Rel. 1874, 779, 780.

This related to the case of one Schmiderberg, who claimed to be a naturalized citizen of the United States, and whose extradition was demanded by Belgium from Holland. (1 Moore on Extrad. 186.)

See, as to Austin Bidwell's case, in 1873, 1 Moore on Extradition, § 145, p. 184; and supra, § 580.

"If an American citizen commits a crime in a foreign country and escapes thence to another foreign country, between which and that wherein the offense was committed there exists an extradition for offenses such as that charged, his citizenship does not afford ground for the American representative to do more than to see that his reclamation and extradition are properly made and conducted." (Mr. Fish, Sec. of State, to Mr. Beardsley, Mar. 22, 1873, MS. Inst. Barb. Powers, XV. 127.)

As to the case of the Collins brothers in 1880, and the case of Lenning in 1883, see 1 Moore on Extradition, §§ 146–147, pp. 187–193.

As to the case of Proios, in 1888, see For. Rel. 1888, II. 1406.

"Mexican citizenship certainly need not be proved by the Mexican Government, for its right to demand extradition is not limited to the case of its own citizens but extends to all cases, save that of American citizenship."

Mr. Gresham, Sec. of State, to the Atty. Gen., May 22, 1893, 192 MS. Dom. Let. 82.

See Mr. Rockhill, Act. Sec. of State, to Mr. Enstis, amb. at Paris, tels., Sept. 21, and Sept. 23, 1896, MS. Inst. France, XXIII. 344, 346.

While the Swiss authorities, in requesting the extradition of a certain citizen of the United States from Bavaria, acted upon an application which upon investigation appeared to have been designed to subserve a private purpose, and while the circumstances of humiliation and suffering attendant upon the arrest and imprisonment of the citizen in question were such as to excite great sympathy, yet, as there was nothing to show that the Swiss authorities acted in bad faith, as the requisition appeared to have been made in the usual course, and as the sufferings of the prisoner were due to a peculiar malady and not to any unusual hardness of treatment, it was held that the United States would not be justified in preferring a claim for damages against the Swiss Government, especially as it was assumed that the Swiss courts would give redress upon proceedings properly instituted.

Mr. Uhl, Act. Sec. of State, to Mrs. Jewett, April 13, 1894, 196 MS. Dom. Let. 350.

V. *LIMITATIONS AS TO TRIAL.*

1. Winslow Case.

§ 596.

In February, 1876, the Government of the United States demanded of that of Great Britain the extradition, under Article X. of the treaty of 1842, of Ezra D. Winslow, charged with numerous forgeries and with the utterance of forged paper in the State of Massachusetts. In reply, Lord Derby, February 29, 1876, called attention to the third clause of subsection 2 of the British Extradition Act of 1870, which provides that a fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that he shall not, until he has had an opportunity of returning to her Majesty's dominions, be detained or tried for any offense committed prior to his surrender, "other than the extradition crime proved by the facts on which the surrender is grounded." Lord Derby inquired whether any provision had been made by the law of the United States, or by arrangement, that Winslow, if surrendered, should be treated in accordance with this requirement; and added that the secretary of state for the home department feared that the "claim advanced" by the United States "to try Lawrence, in the recent case of extradition," for crimes other than that for which he was surrendered amounted to a denial that any such law existed in the United States, while the disclaimer made by Mr. Fish, Secretary of State, in a conversation with the British minister at Washington, of any implied understanding between the Governments in that regard, precluded any longer the belief in the existence of an effective

arrangement which her Majesty's Government "had previously supposed to be practically in force."

The case of Lawrence, to which Lord Derby referred, was that of one Charles L. Lawrence, the head of a band of revenue swindlers in New York, whose extradition was demanded by the United States on various charges of forgery. The warrant, however, on which he was delivered up, stated that he was surrendered for "the crimes of forging and uttering a certain bond and affidavit." It appears that when the demand for Winslow's extradition was made, the British Government had been advised by Lawrence's attorneys that Lawrence, after he was taken to New York, was held not only on the charges on which he was surrendered but also on charges of conspiracy and smuggling, and that it was apprehended that he would be put on trial for the latter offenses.

In answering Lord Derby's reply to the demand for Winslow's extradition, Mr. Fish stated, March 31, 1876, that, although a large number of indictments had been found against Lawrence, he had not at that time been arraigned on any indictment other than that for the forgery for which he was surrendered. Mr. Fish, however, also maintained that the treaty of 1842, which contained no clause prohibiting trial for another offense, had always been construed as permitting such trial; that there was no agreement, understanding, or practice on which such a limitation could be based; and that the raising of the question by the British Government under the act of 1870 involved a claim, which the United States could not admit, to alter or attach conditions to the executory parts of a treaty by domestic legislation. Mr. Fish also stated that as Winslow, if surrendered, would be tried for offenses against the laws of one of the States, the President could not give any stipulation or make any arrangement as to the offenses for which he should be tried.

Lord Derby, on the other hand, affirmed that it was an essential principle of extradition that a person surrendered for one offense should not be tried for another; that this was the proper construction of the treaty of 1842; and consequently that the act of 1870 imposed no new conditions on that treaty.

While the correspondence was pending, Winslow, on June 17, 1876, was discharged on *habeas corpus*. The execution of the treaty was thus suspended, and requisitions for the surrender under it of fugitives from justice ceased to be made.

August 5, 1876, Mr. Fish, in an instruction to Mr. Pierrepont, then American minister at London, stated that Lawrence, since he was brought back to the United States, had not been arrested, had not given bail, and had not been arraigned upon or called on to plead to any indictment or to any charge whatever not based upon the

particular accusation of forgery upon which he was surrendered. To the indictment on this charge he pleaded guilty, June 24, 1876, and, this plea being entered, he was then admitted to bail, and had since been at large pending sentence.

October 27, 1876, Sir Edward Thornton, British minister at Washington, informed Mr. Fish that the British Government would be prepared, as a temporary measure until a new extradition treaty could be concluded, to put in force all the powers vested in it for the surrender of accused persons under the treaty of 1842, without asking for any engagement as to such persons not being tried for offenses other than those for which they were surrendered. Subsequently, in a speech in the House of Lords, Lord Derby explained that, in view of the disposition made of the Lawrence case, it appeared that the two governments were discussing an abstract question which might well remain in abeyance till it arose in actual practice.

October 30, 1876, Mr. Fish informed the British minister at Washington that, on an indication of the readiness of the British Government to surrender Winslow and two other fugitives, named Brent and Gray, whose extradition was sought by the United States, but who were discharged on the same ground as Winslow, the Government of the United States would regard the treaty as again in full force. In the latter part of November, 1876, operations under the treaty were actually resumed. Orders were issued by the British Government for the arrest of Winslow, Brent, and Gray. Brent was found and sent to the United States; Winslow and Gray escaped. During the suspension of operations under the treaty many criminals went free. No requisitions were made by either Government for six months.

Moore on Extradition, I. 196–215.

For the full correspondence between the two Governments, see For. Rel. 1876, 204–309, and Appendix A, 615.

In proof of the fact that the treaty of 1842 had been construed as permitting trials for offenses other than that for which extradition was granted, Mr. Fish cited the following Canadian cases: Regina *v.* Van Aerman, 4 Upper Canada Reports, Com. Pleas, 288; Regina *v.* Paxton, 10 Lower Canada Jurist, 212; 11 id. 352; In re Isaac Rosenbaum, 20 L. C. Jur. 165; Case of Burley, 1 U. C. L. Jour. N. S. 34; Case of Worms, 22 L. C. Jur. 109.

For an examination of these cases, see Moore on Extradition, I. 632–634.

Mr. Fish also cited the English case of Heilbronn, who was extradited from the United States to Great Britain on a charge of forgery, and after acquittal of that charge was immediately convicted on a charge of larceny, an offence not enumerated in the treaty and for which his surrender could not have been demanded.

The principal diplomatic papers in the case of Winslow are as follows: Mr. Fish, Sec. of State, to Mr. Hoffman, chargé ad interim at London, No. 864, March 31, 1876, For. Rel. 1876, 210; Lord Derby to Mr. Hoffman, May 4, 1876, id. 227; Mr. Fish to Mr. Hoffman, No. 887,

May 22, 1876, id. 233; Lord Derby to Mr. Hoffman, June 30, 1876, id. 257.

For the message of Pres. Grant to the Senate, Dec. 23, 1876, announcing the resumption of operations under the treaty of 1842 and transmitting certain correspondence, see For. Rel. 1877, 271–289.

July 16, 1875, Mr. Phillips, Solicitor-General, gave an opinion on a petition presented by Lawrence claiming immunity from prosecutions and actions pending against him on charges other than that on which he was surrendered. Lawrence claimed immunity on the ground (1) that it was provided for by the British act of 1870, (2) that it was to be implied from the treaty of 1842, and (3) that it was conceded by section 5275, Revised Statutes. The Solicitor-General advised (1) that the British act of 1870 and section 5275, Revised Statutes, did not apply; (2) that such immunity did not arise by implication from the treaty of 1842, and (3) that the jurisdiction of the courts was not restricted to the extradition crime. (15 Op. At. Gen. 500.)

A similar view was expressed by Judge Benedict, March 28, 1876, in United States *v.* Lawrence, 13 Blatchf. 295.

For discussions of the Winslow case, see W. B. Lawrence, 14 Alb. L. J. 85; 15 id. 224; 16 id. 361; Judge Lowell, 10 Am. Law Rev. 617; A. G. Sedgwick, 136 N. Am. Rev. 497; S. D. Thompson, 17 Am. Law Rev. 318; E. McQuillin, 25 Cent. L. J. 267; Judge Cooley, 3 Int. Rev. 438; Westlake, Proceedings of the National Association for the Promotion of Social Science, Liverpool, Oct. 1876; Amos, 2 Am. Jour. Soc. Sci. 117, 121. The views of these writers are summarized in Moore on Extradition, I. 212–215.

2. Rauscher Case.

§ 597.

In October, 1884, one Rauscher was indicted in the circuit court of the United States for the southern district of New York, under sec. 5347, Revised Statutes, for the offence committed by him, as second mate of an American ship, of the cruel and unusual punishment of a member of the crew on the high seas. On the trial it was shown that the prisoner was extradited from England on a charge, formulated under sec. 5339, Revised Statutes, but based upon the same facts, of murdering the seaman. The case was certified to the Supreme Court on a difference of opinion as to whether the prisoner, after he had been extradited under the treaty of 1842 on a charge of murder under the one section, could be held and tried for the cruel and unusual punishment of a seaman under the other section. Mr. Justice Miller, delivering the opinion of the court, held that the treaty of 1842, being the supreme law of the land, was binding upon the courts, which were bound to take judicial notice of it, and that, although the treaty contained no prohibition of the trial of a person for an offence other than that for which he was surrendered, yet the weight of authority and of sound principle were in favor of the proposition that a person who had been brought within the jurisdic-

tion under an extradition treaty could be tried only for one of the offences described in the treaty and for the offence with which he was charged in the proceedings for his extradition, until a reasonable opportunity should have been given him, after his release or trial on such charge, to return to the country from whose asylum he was taken.

United States *v.* Rauscher (1886), 119 U. S. 407.

Mr. Justice Gray concurred in the decision of the court, but placed his concurrence solely upon the language of sec. 5275, Revised Statutes. Chief Justice Waite alone dissented.

The judicial history of the subject in the United States may be briefly summarized. In the case of Caldwell, in 1871, Judge Benedict, sitting in the circuit court of the United States for the southern district of New York, sustained a demurrer by the government to a plea on the part of the prisoner that he was extradited from Canada to the United States under the treaty of 1842, and that the offence for which he was indicted was not one of those specified in the treaty. (United States *v.* Caldwell, 8 Blatchf. 131.)

In 1873 Mr. Justice Fancher, of the supreme court of New York, refused an application for the discharge of one Lagrave on habeas corpus. Lagrave had been surrendered by France under the treaty of 1843, which contained no express limitation as to trial, and it was represented that he was indicted for an offence other than that for which he was delivered up. (Matter of Lagrave, 14 Abb. Pr. N. S. 333; Moore on Extradition, I. 221.)

The case of Lawrence, in 1876, is noticed above.

In 1877 one Hawes was delivered up by Canada on charges of forgery in Kentucky. On a representation by the British minister at Washington that Hawes's extradition was really sought in order that he might be tried for embezzlement, the Department of State communicated with the authorities of Kentucky and urged upon them, in view of the question that had arisen in Winslow's case, the importance of avoiding any action which might give color to the British minister's representations. The case went through the courts of Kentucky, by which the view afterwards taken by the Supreme Court in Rauscher's case was anticipated. (Com. *v.* Hawes, 13 Bush., 697; see, also, opinion of Judge Jackson, in Kenton Co. crim. ct., 6 Am. Law Rec. 97; and Moore on Extradition, I. 222–225.)

In 1881 the courts of Texas, in the case of one Blanford, whose extradition was obtained from Mexico, followed the view taken by the Kentucky courts in Hawes' case. (Blandford *v.* The State, 10 Tex. App. 627; Moore on Extradition, I. 225.)

In 1882 Judge Hoffman, of the United States district court for the southern district of California, held that one Watts, who had been extradited by the British Government under the treaty of 1842, could not be tried for an offence other than that for which he was surrendered, thus following the course of the decisions in Kentucky and Texas. In his opinion Judge Hoffman examined the correspondence between Mr. Fish and Lord Derby in the Winslow case, and reached the conclusion that Lord Derby's position as to the true construction of the treaty of 1842, as expressed in his note of June

30, 1876, was abundantly sustained. (United States *v.* Watts, 14 Fed. Rep. 130, 8 Sawyer, 370; Moore on Extradition, I. 225–227.)

The same view was taken by the supreme court of Ohio. (State *v.* Vanderpool, 39 Ohio St. 273; Moore on Extradition, I. 227–229.)

A different view was taken by Judge Acheson, in the case of Miller, in 1885. (In re Miller, 23 Fed. Rep. 32; Moore on Extradition, I. 229–231.)

In 1886, however, Judge Deady, of the United States district court for the district of Oregon, in 1886 resumed the course of the later decisions and held that the prisoner, who had been extradited under the treaty of 1842, could not be tried for an offence other than that for which he was surrendered. (Ex parte Hibbs, 26 Fed. Rep. 421; Moore on Extradition, I. 231–233.)

A few months later came the decision of the Supreme Court in Rauscher's case.

This decision was accepted by the Queen's Bench Division of the High Court of Justice, in May, 1888, in a case then pending before it, as being equivalent to a provision of law made by the United States securing extradited persons immunity from trial for other than extradited offences. (Case of Alice Woodhall, Moore on Extradition, I. 240. For proceedings in Woodhall's case, after she was brought to the United States, see Moore on Extradition, I. 241–244.)

See the case of Ex parte Coy (1887), 32 Fed. Rep. 911; People *v.* Reinitz (1889), 7 N. Y. Crim. Rep. 71; Moore on Extradition, I. 244.

A distinction has sometimes been urged between offences enumerated and those not enumerated in the treaty, as affecting the question of the right to try an extradited person for an offence other than that for which he was surrendered; and such a distinction has in fact been made in some of the treaties, but it rests upon convenience rather than upon principle. See, in this relation, Moore on Extradition, I. § 170, pp. 245–246.

It would seem advisable, however, to stipulate by treaty that a fugitive may be tried for another offence, either with his consent, or at any rate with that of the government by which he was surrendered. See Moore on Extradition, I. 247–259.

As to misapplications of the Rauscher decision, see Moore on Extradition, I. § 187, pp. 276–280.

The fact that a fugitive was originally charged with a different offence from that for which he was surrendered, does not prevent his trial on the charge on which he was actually surrendered. (Hall *v.* Patterson, 45 Fed. Rep. 352.)

But, where a fugitive is brought back by kidnapping, or by other irregular means, and not under an extradition treaty, he can not, although an extradition treaty exists between the two countries, set up in answer to the indictment the unlawful manner in which he was brought within the jurisdiction of the court. It belongs exclusively to the government from whose territory he was wrongfully taken to complain of the violation of its rights.

Ker *v.* Illinois, 119 U. S. 436.

3. Particular Applications.

§ 598.

C., a Canadian, was extradited to the United States from Canada on a charge of larceny, made by the United States marshal for the eastern district of Michigan before a police justice of the city of Detroit. The act on which the charge was based was the taking of a boat which was at the time in the custody of the marshal under a writ of attachment issued by the United States district court. The charge before the police justice was made November 7, 1895. On December 3, 1895, a warrant was issued for C's arrest on an indictment found in the United States district court, charging him with obstructing the United States marshal in the execution of a writ, the act involved being the same as that in the proceedings before the State magistrate. This Federal charge was not embraced in the extradition proceedings, the offense not being included in the treaty. The warrant of extradition was issued by the Canadian Government, May 19, 1896. On this warrant C. was brought to Detroit, where he was examined in the police court and bound over to the ensuing term of the recorder's court. Being admitted to bail by this court, he returned to Canada; but, in December, 1896, the extradition charge against him being still undisposed of, he came back voluntarily to Detroit, where, on December 10, 1896, he was arrested on the warrant issued a year before by the United States district court. It was conceded that if C. had remained in Michigan, within reach of his bail, he would have been exempt from the second arrest; but it was argued that, as he was during his absence in Canada beyond the control of his sureties, he had lost his exemption. It was held, however, that the treaty and statute secured to him a reasonable time to return to the country from which he was surrendered, after his discharge on account of the offense for which he was extradited; that, when he was arrested the second time, the proceedings on the extradition charge were not terminated; that he "retained the right to have the offense for which he was extradited disposed of and then to depart in peace, and that this [second] arrest was in abuse of the high process under which he was originally brought into the United States, and can not be sustained."

Cosgrove *v.* Winney (1899), 174 U. S. 64.

An order setting aside the indictment mentioned in the warrant issued by the surrendering government does not operate as an acquittal of the defendant of the offence therein charged, and is no bar to his prosecution and trial for the same offence by a new indictment or by information.

Ex parte Foss, 102 Cal. 347, 36 Pac. Rep. 669.

The fact that an indictment which was used in obtaining the extradition of a fugitive proves to be defective does not prevent the finding of a new indictment charging the same offence.

In re Rowe, 77 Fed. Rep. 161, 23 C. C. A. 103.

A fugitive from justice charged by information with having counselled and advised another to embezzle public moneys in the State of Iowa was extradited by the Mexican Government as an accomplice. He was afterwards indicted as a principal, the distinction between principals and accessories having been abolished in Iowa by statute. An effort was made to obtain the prisoner's discharge on the ground that he was sought to be tried for an offence other than that for which he was surrendered. The court found that the indictment in substance charged the same offence as that for which the extradition was granted, and that the objection made was technical and invalid.

In re Rowe, 77 Fed. Rep. 161, 23 C. C. A. 103.
See, to the same effect, State *v.* Rowe (Iowa, Jan. 18, 1898), 73 N. W. 833.

A fugitive was extradited from Canada on a charge of arson committed in the State of Iowa. The information on which the proceedings was based alleged that the arson consisted in the burning of a "house," which was at the time "occupied and inhabited" by certain persons in carrying on business. The indictment on which he was convicted charged him with the burning of a "store building," which was "occupied" as such by certain persons. Held, that the word "house," as used in the information, could not be considered as a dwelling house, but must be construed in connection with the other averments as a building used as a store, and that there was no variance between the charge on which the defendant was extradited and that for which he was tried.

Cohn *v.* Jones, 100 Fed. Rep. 639.

The rule against trial for another offense is not violated where a person, extradited on a charge of setting fire to and burning a certain brick "house," occupied and inhabited as a retail shoe store, is indicted and tried for setting fire to and burning a certain store "building," occupied as a store.

State *v.* Spiegel (1900), 111 Iowa, 701, 83 N. W. 722.

A fugitive from justice was charged under the treaty between the United States and Great Britain with the crimes of forgery, larceny, embezzlement, and false entries, committed in the city of London. The commissioner held the evidence to be sufficient to warrant the prisoner's commitment for extradition, and committed him generally on the charges made. The prisoner applied for a writ of *habeas*

corpus, on the ground, among others, that, as he could be tried only for the offence for which he was surrendered, the demanding government and the commissioner should have elected a particular offence, and that the commissioner, if he deemed the evidence sufficient to commit upon one of the charges, should not have committed upon the others. It was held that the objection was invalid, the court saying that so long as the prisoner was "tried upon the facts which appeared in evidence before the commissioner, and upon the charges or one of the charges for which he is surrendered, it is immaterial whether the indictment against him shall contain counts for forgery, larceny, or embezzlement. That is a matter of practice with which we have nothing to do."

Bryant *v.* United States, 167 U. S. 104, 17 S. Ct. 744.

A person arrested on board an American ship, while he is returning to the United States, is not entitled to claim immunity from trial for offences other than that embraced in proceedings which had been set on foot to secure his extradition under a treaty.

Ward *v.* State, 102 Tenn. 724, 52 S. W. 996.

May 19, 1891, the Department of State brought to the attention of the British minister the report that Leda Lamontagne, who had been extradited to Canada on a charge of arson, was detained in jail in Canada without trial on a commitment for contempt of court for refusing, subsequently to her extradition, to testify against her brother, who was afterwards convicted and executed on a charge of murder; and that her extradition was obtained for the purpose of using her as a witness rather than of prosecuting her on the charge of arson. Should this be the case, it constituted, said the Department of State, an abuse of extradition process which it was not supposed that her Majesty's Government would countenance. But there was, said the Department, another aspect of the case, namely, the bearing of the provision of the convention of July 12, 1889, prohibiting trial for any other than the extradition offence. The insertion of this stipulation was first entertained by the United States on the urgent demand of the British Government; but, even before it was adopted, the Supreme Court of the United States, acquiescing in the contention of the British Government in the Winslow case, decided in the case of Rauscher, in 1886, that a fugitive delivered up under a treaty for one offence could not be tried for another.

The British minister, in a note of June 27, 1891, stated that the prisoner was detained as alleged, but that it was the intention of the authorities to try her for the offence for which she was surrendered, and he pointed out that the offence for which she was sentenced was committed subsequently to her extradition.

The Department of State, July 11, 1891, replied that, while this was true, the question at issue was whether in refusing to answer the question put to her Leda Lamontagne did not stand under the protection of the treaties; that the stipulation in the convention of 1889 against trial for another offence was understood to signify that the fugitive was delivered up for the sole purpose of being tried for the offence for which the extradition was granted, and that in regard to other matters occurring previously to extradition he was not to be regarded as being subject to the jurisdiction of the government which obtained his surrender till he should have had an opportunity to return to the jurisdiction of the surrendering government. On this principle the courts of the United States had lately, said the Department, refused to permit an extradited person to be served with process or be detained in civil proceedings.

June 15, 1892, the British legation stated that the prisoner had been arraigned on the charge on which she was extradited and had been duly convicted and sentenced upon it.

The Department of State declared that in view of these facts the Government was satisfied that her extradition was sought in good faith, and would not under the circumstances request a commutation of her sentence.

Mr. Adee, Act. Sec. of State, to Sir J. Pauncefote, British min., May 19, 1891, MS. Notes to Great Britain, XXI. 419; Mr. Wharton, Act. Sec. of State, to Sir J. Pauncefote, July 11, 1891, id. 467; Mr. Foster, Sec. of State, to Mr. Herbert, July 16, 1892, id. XXII. 10.

In issuing its warrant for the surrender of the fugitive in this case, the Department of State declined to ask for a stipulation which was desired by counsel that she should not be examined as a witness against her brother. Whether the precise point was covered by the treaty, it was, said the Department, unnecessary then to consider. If it was, a guaranty was unnecessary; if it was not, it would be improper to ask for a guaranty. The United States had always acted on this principle, and had contended for its observance by Great Britain in the Winslow case. (Mr. Wharton, Act. Sec. of State, to Mr. Hall, Aug. 26, 1890, 179 MS. Dom. Let. 3.)

The Department of State, in transmitting the warrant of surrender to the British minister, informed him that it had refused to ask for the stipulation above mentioned. (Mr. Wharton, Act. Sec. of State, to Sir J. Pauncefote, Aug. 26, 1890, MS. Notes to Great Britain, XXI. 267.)

4. Included Offences.

§ 599.

"Your letter of the 15th instant addressed to the President, in regard to the case of James and Alfred Henderson, extradited to Canada on the charge of assault with intent to commit murder, has been referred to this Department.

"The question raised by your letter is as to the right of a demandant government in extradition to introduce in an indictment varying phases of an offense. It is not necessary to consider, in connection with the present application, whether, after Canada has obtained possession of a prisoner on extradition process directed to the United States, where the prisoner was arrested, the prisoner under the treaty can be prosecuted for other offences than that specified in the demand and warrant. That question does not arise in the present case. The indictment on which the prisoner was tried contained two counts: One for assault with intent to kill, the other for assault to do bodily harm. He was acquitted on the first of these counts and convicted on the second. The count for assault with intent to kill, on which he was acquitted, is an extraditable offence under the treaty, but not so assault with intent to do bodily harm. Were assault with intent to do bodily harm an offence utterly distinct from assault with intent to kill, then the question put in the petition which accompanied your letter might be considered. But there is no such variance between the two offences. The second count is to be regarded as merely a formal variation of the first. Under these circumstances this Department holds that there is no ground whatever for the intervention of this Government in the matter."

Mr. Bayard, Sec. of State, to Mr. Essery, May 26, 1885, 155 MS. Dom. Let. 491.

"I have received your letter of the 18th instant, in further reference to the case of Charles Young, who was recently extradited from England.

"In reply I have to say that, since the decision of the Supreme Court in the Rauscher case, it is believed by the Department to be well settled that a fugitive secured by extradition can neither be lawfully tried nor punished except for the offense for which his extradition was granted. And this rule holds good notwithstanding the offense for which it is proposed to try or convict him be included in that for which his extradition was granted, unless the former is also included in the treaty, which is not the case here.

"It is proper to say that this is also the view taken by the British Government."

Mr. Uhl, Act. Sec. of State, to Mr. Hanford, April 21, 1894, 196 MS. Dom. Let. 443.

After the foregoing letter was written, the British ambassador at Washington enclosed to the Department of State a petition from Young, who was a British subject, in which it was stated that he was surrendered for "assault with intent to commit murder," and that, when tried for that offence, on an indictment containing two counts,

one of which covered a lower grade of assault, he was acquitted on the former count and convicted on the latter. Young raised in his petition the question whether this was inconsistent with the treaty, and on this question the ambassador requested the opinion of the Department. The Department replied that Young might invoke judicial remedies, and that, so long as they were open to him, it did not "feel warranted in expressing an opinion upon the question." Its previous definitely expressed opinion seems thus to have been impliedly withdrawn.

For the answer of the Department to the ambassador, see Mr. Uhl, Act. Sec. of State, to Sir J. Pauncefote, May 16, 1894, MS. Notes to Gr. Br. XXII. 539.

A person delivered up under an extradition treaty on a charge of assault with intent to commit murder cannot be convicted of an assault with intent to do great bodily harm, although under the laws of the State a person may be convicted of the lesser crime under an indictment charging a higher.

People *v.* Stout (Young's case), 30 N. Y. S. 898, 81 Hun, 336, citing United States *v.* Rauscher, 119 U. S. 407, and People *v.* Cross, 135 N. Y. 540, 32 N. E. 246.

See, to the same effect, People *v.* Hamman, 30 N. Y. S. 370, 9 Misc. Rep. 600.

For a review of the decisions on the question of trial for another offence, see 10 Am. St. Rep. 207, note; N. Y. L. J., Feb. 28, 1890, reprinted in 22 Chic. Leg. N. 221.

A. W. Platt was extradited from Canada on a charge of murder, and, on his trial for that offence, in Kentucky, was convicted of voluntary manslaughter. The point was raised, through the British chargé d'affaires ad interim, that the prisoner was convicted of a crime other than that for which he was extradited, in that at common law it was not admissible to convict of manslaughter on a trial for murder. The Department of State held that the rule of the common law was otherwise, citing Blackstone's Comm. 201; Bishop, Crim. Law, § 795; Moore on Extrad. § 171; Reg. *v.* O'Brian, 2 Carr. & K. 115, 1 Denison's Cr. Cas. 9; Rex. *v.* Chatburn, 1 Moody Cr. Cas. 403; and added:

"The conclusion reached is in harmony with the ruling of this Department made by Secretary Bayard, and set out in a note to section 171 of Moore on Extradition. The ruling was adverse to the contention which was there made in behalf of J. and A. Henderson, who had been extradited to Canada on a charge of an assault with intent to commit murder, and were convicted of an assault with intent to do bodily harm. This Government refused to intervene, on the ground that they were tried for the offense for which they were sur-

rendered; and the conviction of the lesser offense, included in the one charged, was not in contravention of the terms of the treaty.

"The treaty declares that 'no person surrendered shall be triable or tried for any crime or offense other than the offense for which he was surrendered.'

"Platt was tried for such offense, and the trial, conviction, and judgment seem to have been regular, according to the course of the common law; and the conviction being in due form does not in itself contravene the letter or the spirit of the treaty.

"If, however, this conclusion be erroneous, it is competent for Platt to have the question judicially determined.

"The treaty being the supreme law of the land, he has a remedy by way of appeal for the correction of any error committed in violation of his treaty rights. Any intervention by this Government at present would therefore be premature."

Mr. Sherman, Sec. of State, to Sir J. Pauncefote, Brit. amb., No. 840, Nov. 26, 1897, MS. Notes to Brit. Leg. XXIV. 68.

5. Judicial Remedies.

§ 600.

Edward Underwood, a citizen of the United States, was extradited from Canada in 1896 on a charge of murder committed in Texas. He was tried and acquitted, but was immediately afterwards re-arrested on two charges of robbery committed prior to his extradition, and on these charges was found guilty and sentenced to 16 years' imprisonment. This sentence was duly affirmed on appeal. The British ambassador subsequently lodged a protest against the imprisonment, as a violation of Art. III. of the treaty of 1889. It appeared that at no time during the judicial proceedings did the prisoner raise the question of his privilege from trial for another offence under that article. On these facts it was advised that, as the question was of a judicial nature, there were no steps to be taken to fulfill the obligations of the treaty except through the appropriate judicial proceedings, which the Department of Justice expressed its readiness to facilitate in every proper way, if it should be deemed advisable by the prisoner or by those interested in his behalf to apply for a writ of habeas corpus.

Griggs, At.-Gen., March 27, 1901, 23 Op. 431.

This opinion was reaffirmed by Knox, At.-Gen., Dec. 24, 1901, 23 Op. 604, in the case of Henry E. Acosta, who, after serving a sentence in Florida, on conviction of an offence for which his extradition was obtained from Mexico, was on the day of his release, as the Mexican Government complained, immediately rearrested for another offence committed prior to his extradition. In the course of his

opinion Attorney-General Knox said: "I do not mean to intimate that his only resort is to the courts, or that if they deny him any rights which he may possess, the Federal Government is powerless or free from obligation to interfere in that which may then be a matter of international obligation. . . . My present opinion is only intended to intimate that his primary resort is to the courts, and that the executive department . . . is under no obligation to take steps to protect Acosta in his legal rights until he has himself asserted them in the judicial department."

The opinion of Attorney-General Griggs was in substance communicated to the British embassy, with the statement that, under the circumstances, while the Department of State recognized the binding obligation of the treaty, the usual rule touching denial of justice by municipal courts before resort was had to diplomatic intervention should be observed.

Mr. Hay, Sec. of State, to Lord Pauncefote, British ambass., April 3, 1901, No. 2127, MS. Notes to British Leg. XXV. 502.

6. Question of Consent.

§ 601.

"I have the honor to acknowledge the receipt of your note of the 4th instant, enclosing a declaration made by Joseph Stupp, under date of January 18, 1876, in which he renounces the right granted to him by Article III. of the treaty of March 19, 1874, with Belgium, and declares his willingness to be tried for theft, as charged in the indictment, and conveying, at the same time, the additional information that Stupp has been found guilty of all the crimes with which he was charged."

Mr. Fish, Sec. of State, to Mr. Delfosse, Belg. min., Feb. 11, 1876, MS. Notes to Belg. Leg. VII. 41.

Art. III. provided that the treaty should not apply to any offence committed prior to its date, except murder and arson. The theft in question, which was committed prior to that date, as were all the crimes with which Stupp, alias Vogt, was charged, was therefore excluded. Mr. Fish, by his simple response, the whole of which is here given, impliedly assented to Stupp's voluntary waiver of immunity.

By the treaty with Belgium of June 13, 1882, Art. III., trial for another than the extradition offence is inhibited, without the consent of the surrendering government.

See Mr. Wharton, Act. Sec. of State, to Mr. Nicoll, June 14, 1892, 186 MS. Dom. Let. 682.

In 1888 two persons charged with forgery in North Carolina fled to Canada, where they were apprehended for extradition. While under arrest they entered into an agreement with the United States attorney for the eastern district of North Carolina, as representing

that State in the matter, to the effect that, if they should surrender themselves to the person designated by the President of the United States to receive them and return to North Carolina, there to be dealt with according to law, they should not be tried in the courts of the United States nor in the State courts on any charges other than those for which their extradition was sought. The fugitives returned to North Carolina, and were tried and convicted for forgery. They subsequently sought to be released on the ground that they were tried for a statutory forgery, whereas if they had been regularly extradited they could have been tried only for common-law forgery. The court took the view that the agreement under which the prisoners returned had not been violated, but added that, if it had been violated, they should have raised the objection at their trial and could not set it up on habeas corpus after they had been duly tried and convicted.

In re Cross, 43 Fed. Rep. 517.

"I have the honor to acknowledge the receipt of your note of the 10th of January last in relation to the case of Jacob David, a citizen of the United States, who was extradited from Germany to the United States in January, 1893, on charges of forgery and of fraudulent use of forged papers.

"In order to present this case in its proper light, I will briefly refer to the prior correspondence. On the 25th of January, 1894, your excellency, acting under the instructions of your Government, addressed to me a note in which you drew attention to certain statements in the American press in which it was represented that David, apparently after his extradition, was indicted for the offenses of larceny, forgery, and embezzlement—all of which were embraced in one indictment, and that when arraigned on this indictment he pleaded guilty and was sentenced on the charge of larceny, the other charges being dismissed or abandoned. It appearing, according to these representations, that David had been arraigned and sentenced on a charge for which his extradition was not, and under the treaty between the United States and Germany could not have been, demanded, you requested me to inform you whether he had 'actually, since his extradition, been criminally prosecuted for any acts' other than those for which he was surrendered.

"Inquiry of the governor of Illinois, against the laws of which State David's offense was committed, elicited the fact that in October, 1892, he was indicted for forging a bond and also a transfer of stock. He had previously been indicted for larceny. When, more than a year afterwards, he was brought back on the charges involving forgery, he offered to plead guilty to the charge of larceny if the other charges against him should be dismissed. This offer, which seems to have been dictated solely by motives of self-interest on the part of

David, was accepted by the State, and after pleading guilty to the charge of larceny he was sentenced to a term of imprisonment, which expired about five months ago. These facts were duly communicated to your excellency. It appears from them that David was not prosecuted after his surrender on the charge of larceny, but that, having previously been charged with that offense, the indictment for which was still pending, he sought to plead guilty to it in order to avoid a prosecution for the offenses for which he was extradited. The voluntary character of the proceeding on the part of David is shown not only by these circumstances, but also by the fact that it has not been suggested that he fancied himself to have any ground for complaint. Indeed, it may well be assumed that he owes his liberty to-day to the lenient compliance of the authorities of Illinois with his wishes.

"The circumstance that in your note of the 10th of January you refer to 'the extension of the criminal prosecution of Jacob David to other acts than that for which the extradition was granted,' and protest in behalf of your Government 'on the ground that in the present case proceedings have been instituted against the extradited person without its consent for acts for which the extradition was not granted,' has led the Department to doubt whether the facts in the case, as they are herein again set forth, have been correctly apprehended by the Imperial Government. It certainly appears that there was no extension of the prosecution of David, and that no new proceedings were instituted against him after his extradition. But, whatever may be the understanding of the Imperial Government as to the facts in the case, there are certain propositions of law laid down in the note of your excellency from which this Government is compelled to dissent. It is said to be the opinion of the Imperial Government that rights can not in general be derived by an extradited criminal from the treaty under which his extradition is granted, since extradition treaties 'rather create rights only between the Governments concerned.' This Department was not aware that such was the law in Germany. It certainly is not the law in the United States. It is true that at one time various courts in this country held the opinion now expressed by your excellency in behalf of the Imperial Government, and, acting upon that opinion, they maintained that an extradited person could, in spite of his protest, be prosecuted for offenses other than that for which he was delivered up, unless the surrendering Government formally objected. But, since the decision of the Supreme Court of the United States in the case of Rauscher, it has been the settled law of the land that the exemption from such prosecution is so far a personal right that the extradited person may demand and obtain its judicial enforcement.

"This Department is not unaware of the fact that it is often loosely said that the exemption from trial for offenses other than that for

which extradition was granted is a right belonging to the surrendering Government rather than to the person surrendered. When properly interpreted, the meaning of this statement appears to be only that if the surrendering Government waives the right the individual can not set it up. To permit him to do so would be to concede what no state will now admit, viz. that a fugitive from justice can claim, as against the country of refuge, a right of asylum. As the Government of the country of refuge may, in accordance with its own laws and views of policy, deliver up fugitives from justice against their will, so, after their surrender, it may waive the limitations which it may have seen fit to impose in regard to their trial.

"But, while the fugitive does not acquire any right as against the surrendering Government by reason of his extradition, it seems equally plain that the surrendering Government does not, by reason of the same transaction, acquire any right as against the person surrendered. For this reason the Department is unable to regard as sound the proposition advanced in the note of your excellency that 'the declarations of the criminal can not be taken into consideration.'

"It is not difficult to show that this proposition, when followed to its logical consequences, carries us beyond any rule ever laid down on the subject of limitations as to trial. The case, with reference to which extradition treaties are made, is that of the recovery and prosecution of an offender against his will, and it is with reference to such a case that the rules of extradition are usually discussed. The object of the whole system is to punish crime, not to protect it; to compel offenders to submit to prosecution, not to prevent them from doing so.

"With the idea of compulsory prosecution in view, it is laid down as a general rule, not merely that a person delivered up shall not be tried for an offense other than that for which he was surrendered, but that he shall not be so tried until he shall have had an opportunity to return to the jurisdiction of the surrendering Government. This is the construction given by writers to the limitation as to trial, whether the limitation be expressed in terms thus comprehensive or in terms more brief.

"It needs no argument to show that this rule necessarily presupposes the right and the power of the accused voluntarily to waive his immunity from trial. While it assumes that he is averse to trial, it treats his omission to leave the jurisdiction as an implied waiver of his exemption. It is obvious that such a waiver could not be implied from his conduct if he had not the power to make it by an express declaration. The theory advanced by the Imperial Government would place the accused under a positive disability and convert a rule made for his protection into a means of oppression. It would deprive him of his free volition by denying him, after his surrender, the freedom of action which he enjoyed before, when it was within his

power voluntarily to deliver himself up to be tried for any and every offense with which he was charged.

"Of the possible practical consequences of such a theory the case under consideration affords an excellent illustration. By the acceptance of his offer to plead guilty to the charge of larceny, David acquired immunity from punishment on graver charges, and soon acquired his liberty. Had he been deprived of his freedom of action, he might have been required not only to undergo trial and probably longer imprisonment on the charges for which he was surrendered, but afterwards to become a fugitive from justice again in order to avoid prosecution for larceny. The proposition he made, and of which he secured an acceptance, was manifestly for his advantage.

"Such being the views of this Government, I do not see any ground for attempting to bring to account the officials of the State of Illinois who participated in the transaction to which David was voluntarily a party. Nor can this Government undertake to guarantee in each particular case that a fugitive surrendered for one offense will not voluntarily submit to be tried for another, and that the courts, should he so submit, will refuse to try or punish him."

Mr. Gresham, Sec. of State, to Baron Saurma, German amb., Feb. 26, 1895, For. Rel. 1895, I. 492.

"In reply to your excellency's note of the 26th of February last, relative to the extradition of Jacob David to the United States authorities, I have the honor, in obedience to instructions received, to submit the following remarks to your excellency:

"The Imperial Government has taken cognizance, with great interest, of the statements made in the aforesaid note, and is able to agree with some of them entirely.

"As is therein remarked, with reference to the Rauscher case, a criminal who has been surrendered to the German authorities may, in the opinion of the Imperial Government, when arraigned before the German courts, appeal to the treaty under which his extradition has been granted and demand that its provisions be executed. This is the case at least when the treaty in question has been ratified by the proper legislative bodies and has been made public in the manner required for laws.

"The treaty then is, at the same time, a law, and the accused may demand, as he may in the case of any law, that it be executed, and may oppose its violation by the same means by which he may oppose the violation of other laws. To that extent it is true that an extradited person may derive rights, as regards the country to which the extradition has been granted, from the treaty as from a law of the land. That, however, is a domestic affair of this country, and was consequently not referred to by the Imperial Government in the

first statement which it made to your excellency in the note of this embassy of January 10, 1895. For, between the two Governments, the international side only comes into question, and, while the Imperial Government claims that an extradited criminal can derive no rights from a treaty between two states, as being an international instrument, it thinks that the United States Government will not object to this. The two ways of considering the question do not exclude one another. A treaty of extradition has a double character, both as a law of the land and as a standard of international law. The first side of the case has been thoroughly discussed in the note of the Honorable Mr. Gresham, Secretary of State. The second side has, however, in the opinion of the Imperial Government, not received sufficient attention. For, while an extradited person may be authorized to renounce the rights which he may himself derive from the treaty as a law, the rights are not thereby affected which the extraditing state has acquired—as regards the other state—from the international instrument of extradition. Those rights are within the domain of international law and are entirely independent of the will of the extradited person.

"Your excellency's note of the 26th of February last seeks, it is true, to show that those rights are, to a certain extent, independent of the will of the extradited person, inasmuch as it states that extradition treaties are concluded for the recovery and prosecution of an offender against his will, that the limitations to which the prosecution is subjected by the treaty form a rule made for his (the offender's) protection, and that he would be deprived of his free volition if the freedom of action were denied him after his extradition which he enjoyed before. The Imperial Government, however, does not think that it can fully share all these views.

"Although it may usually be the case that an offender is extradited against his will, this by no means belongs to the conception of extradition. It not infrequently happens that a fugitive criminal declares that he is willing to be surrendered, and it is quite conceivable that such a person should consent before, as David did after, his extradition, to be prosecuted for acts other than those provided for in the treaty.

"Would the United States Government suppose that such a declaration was deserving of consideration, and that, for instance, a criminal who should be surrendered by the United States to Germany would, on giving his consent thereto, be sentenced by the German courts for a political or military offense, or for an act which, according to American ideas of law, was not even a criminal offense? The Imperial Government would not suppose such a thing if the case were reversed. It holds the opinion, on the contrary, that when an offender does not appear before the courts whose duty it is try him,

and thus furnishes ground to one state to ask legal aid of another, his will, as regards the arrangement to be made by the two states concerning his extradition, can no longer be entitled to consideration. As no American officer whose duty it is to take charge of a criminal who has been surrendered by Germany would set such criminal at liberty on his declaring that he would voluntarily appear before the proper American court, just so the Imperial Government can attach no significance to such a person's declaration that he thus submits to prosecution, as if he had appeared voluntarily; it can do so neither when such declaration is made after extradition nor when it is made before. If an offender has once failed to apear voluntarily, he can not afterwards pretend that he has appeared. An enforced return then takes the place of a voluntary appearance, application therefor being made by one state and granted by another, and, in the view of the Imperial Government, such enforced return is to be considered as an international act, from the point of view of public law. To what extent such legal aid is to be rendered depends upon the agreement that has been made, once for all, by means of a treaty of extradition or for that particular case.

"The main object to be kept in view in such cases is, as is pertinently remarked in your excellency's note of February 26, to punish crime, not to protect it. When the state to which application is made grants the application, but only on certain conditions, this is to be explained by the fact that, while it is perfectly willing to lend the foreign state the required legal aid, it must, to some extent, consider its own sovereignty and its own interest. Thus is explained the fact that extradition is not granted for acts that are not punishable in the state to which application is made. The latter state, in the opinion of the Imperial Government, will not be likely to aid in the punishment in another state of a person whom it does not itself consider a criminal, and if it requires that the extradited person shall not subsequently be held responsible for such acts, it does so for the purpose of upholding its sovereignty and its views of what is right. It seems evident that this state right is dependent solely upon its (the extraditing state's) will, and that it can be renounced by it only, and not by the person extradited. That person may secure immunity from punishment under the protection of such reservations, but that is only a consequence, not the object of this or of any similar reservation made in connection with the extradition. If, for instance, no provision is made in the treaty in force between Germany and the United States for extradition for embezzlement and theft, the lack of such provision is evidently not to be ascribed to the fact that one of the two parties thinks that a man who has been guilty of one of these offenses deserves to be protected from the other state, but to the fact that when the treaty was concluded these offenses were

not considered by the two parties as being of sufficient importance to warrant them in assuming the international obligation to extradite and the burden upon their own sovereignty which is therein involved.

"In their own interest the treaty-making parties have thus restricted their obligation to grant extradition, and if a criminal derives any advantage therefrom this is unfortunately not to be avoided while the existing treaty is in force, and must be accepted as an undesirable consequence of that restriction. It would, however, in the opinion of the Imperial Government, be wrong, and would not appear to be in harmony with the principle upheld by the United States Government, viz, that the object of extradition is to punish crime, not to protect it, if the protection of the criminal were to be regarded as the real object of the restrictions made in connection with extradition, and if the renunciation thereof were to be made dependent upon his will. The state to which application for extradition is made derives from the international act of extradition rights which belong to international law, and which can be renounced by none but the state alone.

"The Imperial Government therefore thinks, to its regret, that it must maintain its protest against the action taken in the United States in the case of David. It has considered the procedure in that case exactly as it is rehearsed in your excellency's note of the 26th ultimo [meaning February 26]. In that rehearsal it finds confirmation of the fact that David was sentenced in the United States for an act for which his extradition could not have been demanded according to the treaty, and for which he should not have been punished without the consent of the Imperial Government, so long as he was in the power of the American authorities in consequence of the extradition.

"As the United States Government declares that it can not undertake to guarantee, in each particular case, that no repetition of such proceedings shall occur, the only thing that remains to be done, in the opinion of the Imperial Government, is to settle the point by means of a new treaty of extradition, so that such treaty, as a law of the land, may furnish a proper criterion to the American courts."

Baron Saurma, German amb., to Mr. Gresham, Sec. of State, April 9, 1895. For. Rel. 1895, I. 494.

The Mexican Government having inquired whether the Government of the United States would grant permission for the trial of Antonio Vizcarra, who had been extradited to Mexico and convicted on a charge of embezzlement, on the further charges of making an attack on a mail coach, of destroying correspondence and a telegraph line, and of kidnaping and robbery, of all which the evidence showed him to be guilty, the Department of State replied that as the treaty

of 1861 did not authorize either government to consent to the trial of an extradited fugitive for a crime other than that for which he was surrendered, and as the treaty of 1899 was not retroactive, it was not in its power to give the desired permission.

Mr. Hay, Sec. of State, to Mr. Aspiroz, Mex. amb., No. 81, April 6, 1900, MS. Notes to Mex. Leg. X. 523.

7. Civil Suits.

§ 602.

"The case of Adriance *v.* Lagrave, 59 N. Y. 110, has been cited as supporting the doctrine held by Judge Benedict [United States *v.* Lawrence, 13 Blatchf. 295], and undoubtedly the language of the opinion delivered by Chief Justice Church, for the court, in that case, adopts the reasoning of Judge Benedict's opinion. Considering the high character of that court, it may be proper to make an observation or two on that case. First. It seems that while Lagrave was held for trial in this country under extradition proceedings, by which he was removed from France under the treaty of 1843 with that nation, being out on bail, he was arrested under a writ in a civil suit for debt, which issued from one of the courts of the State of New York. He made application by a writ of *habeas corpus* to be released from this arrest, on the ground that he was protected from it by the terms of the treaty under which he was surrendered, which, in that respect, are similar to those of the treaty of 1842 with Great Britain. The difference between serving process in a civil action brought by a private party, whether arrest be an incident to that process or not, and the indictment and prosecution of a person similarly situated for a crime not mentioned in the treaty of extradition under which the defendant was by force brought to this country, is too obvious to need comment. And while it is unnecessary to decide now whether he could be so served with process in civil proceedings, it does not follow that he would be equally liable to arrest, trial, and conviction for, crime, and especially a crime not enumerated in the extradition treaty, and committed before his removal. Second. The case of Adriance *v.* Lagrave was decided in the supreme court of the State by an order discharging Lagrave from arrest under the writ, and the writ was vacated. This judgment was the unanimous opinion of the court, in which sat three eminent judges of that State, to wit, Daniels, Davis, and Brady. In the court of appeals this judgment was reversed by a divided court, Judges Folger and Grover dissenting."

Miller, J., delivering opinion of court in United States *v.* Rauscher, 119 U. S. 426; Moore on Extradition, I. 267.

It was advised by Mr. Phillips, Solicitor-General, July 16, 1875 (15 Op. 501), in the case of Lawrence, that as a fugitive criminal when surrendered was, in the absence of a stipulation to the contrary, delivered up to justice "generally, absolutely, and simply," he might be prosecuted for offences other than that for which he was surrendered, and by parity of reasoning might be served with process and even arrested in civil actions. The only authorities cited by the Solicitor-General were the cases of Caldwell, 8 Blatchf. 131; Adriance v. Lagrave, 59 N. Y. 110; Clarke on Extradition, 2d ed., p. 90, and note; and certain parts of the report of the British Commission on Extradition of 1868—all antedating, as did the Solicitor-General's opinion itself, the controversy in the Winslow case.

While it has been held that the plaintiff in a civil action, who has wrongfully brought the defendant within the jurisdiction by extradition proceedings, cannot take advantage of his own wrong, yet it has also been held that where no such connection exists the defendant is liable to civil actions. (Martin *v.* Woodhall, 56 N. Y. Super. Ct. 439.)

A contrary view, however, has been taken on the strength of the principles laid down by the Supreme Court in Rauscher's case. (In re Reinitz, 39 Fed. Rep. 204; Moore on Extradition, I. §§ 184, 185, pp. 270–272.)

See, also, In re Baruch, 41 Fed. Rep. 472; Moore on Extradition, I. 273–280.

The position that statutes for the protection of an extradited person from general criminal prosecution do not apply to civil proceedings, is sustained by Allen *v.* Dykers, 3 Hill, 593, 597; Childs *v.* Smith, 55 Barb. 45, 53; Rich *v.* Husson, 1 Duel, 617, 621; Billings *v.* Baker, 28 Barb. 343.

The same view has been taken by the English courts in Pooley *v.* Wetham, 15 L. R. Ch. D. 435; Moore on Extradition, I. 270, 740–741.

VI. *IRREGULAR RECOVERY OF FUGITIVE.*

§ 603.

"I have received your letter of the 12th of January, in reply to which I have to inform you that no definitive answer has yet been received to the application for the release of Mr. Hooper, but a communication has been made by the Canadian government to the British minister residing here, stating that the transportation of Mr. Hooper from within the State of New York into Canada was made entirely by citizens or persons residing in the State, in which no person subject to the Canadian government cooperated. Should this prove to be the fact, the only remedy for the violation of our jurisdiction appears to be by legal process within the State of New York against the offenders."

Mr. Adams, Sec. of State, to Mr. Jackson, Jan. 24, 1822, 19 MS. Dom. Let. 248.

See, for numerous cases, 1 Moore on Extradition, Chap. VII., p. 281 et seq.

A nation claiming a fugitive from justice cannot invade the territorial waters of another state for the purpose of arresting such fugitive.

Mr. Buchanan, Sec. of State, to Mr. Wise, Sept. 27, 1845, MS. Inst. Brazil, XV. 119.

As to "kidnaping" in Canada, see Mr. Fish, Sec. of State, to Mr. Williams, Aug. 23, 1873, 100 MS. Dom. Let. 2.

In 1849 it was reported in the press that a Spaniard named Juan Garcia, alias Juan Francisco Rey, a political refugee from Cuba, who had escaped to New Orleans, was there, by order of the Spanish consul or of the Spanish or Cuban government, kidnapped or enticed on board a vessel ostensibly bound for St. Thomas, but in reality for Havana, and taken back to Cuba. The American consul at Havana was instructed to investigate the case, and, if he found it to be true that the Spanish authorities or their agents had been concerned in so gross an outrage upon the sovereignty of the United States, to demand of the captain-general of the Island the prompt surrender of the person in question, in order that he might be sent back to New Orleans, as well as the punishment of every individual concerned in the crime. The consul was also instructed, in case he should have occasion thus to address the captain-general, to declare, in the name of the President, that such a violation of the sovereignty of the United States, if committed by the Spanish or Cuban authorities or with their sanction and connivance and not promptly and satisfactorily atoned for, would be regarded as a ground for bringing the matter to the attention of Congress with a view to such action on their part as the occasion might demand and their patriotism and wisdom might dictate.

Mr. Clayton, Sec. of State, to Mr. Campbell, consul at Havana, July 28, 1849, 10 MS. Desp. to consuls, 532; same to same, Aug. 20, 1849, id. 540.

April 12, 1863, Mr. Seward complained to Lord Lyons of the abduction by two Canadian constables of two persons named Wilson and McElvery from Port Huron, Michigan. Earl Monck, governor-general of Canada, disavowed and expressed regret for the action of the officers, whom he had rebuked, and offered at once to restore the abducted persons if the United States should require it. Satisfaction was expressed with Lord Monck's action, and, as the papers showed that the abducted persons were felons who had violated the laws of Canada and sought refuge in Michigan, Mr. Seward stated that the United States would not insist on their liberation or restoration, but would cheerfully leave them to the penalties which had been adjudged against them by a judicial tribunal of the country whose laws they had violated.

Mr. Seward, Sec. of State, to Lord Lyons, British min., June 6, 1863, MS. Notes to Great Britain, X. 67.

"The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct from the territory of one party a person charged with crime for trial within the jurisdiction of the other."

Mr. Blaine, Sec. of State, to Mr. Roberts, May 3, 1881, 137 MS. Dom. Let. 326.

See, to same effect, Mr. Frelinghuysen to Mr. Roberts, Feb. 5, 1883, 145 MS. Dom. Let. 447.

Investigation having shown that an attempt to abduct was successfully resisted, the case was held not to require further action. (Mr. Frelinghuysen, Sec. of State, to Mr. Robie, Jan. 7, 1885, 153 MS. Dom. Let. 590.)

See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Crittenden, Dec. 12, 1884, 153 MS. Dom. Let. 415.

In 1891 the United States demanded the return to American jurisdiction, subject to such regular extradition process as the Spanish government might afterwards institute under the treaty, of one Rufino Rueda, who, on June 19, 1891, after his arrest at Key West, with a view to extradition on a charge of murder in Havana, was during the night taken by Spanish agents on board of a vessel and carried to Havana. The Spanish government caused the prisoner to be returned to Key West.

See instructions of the Department of State to the American minister at Madrid, of Aug. 18, Sept. 12, Sept. 16, and Dec. 8, 1891, and March 24, 1892, MS. Inst. Spain, XXI. 54, 65, 66, 91; and despatch No. 216, of March 5, 1892, from the American legation at Madrid, 124 MS. Desp. from Spain.

In 1892 the British Government voluntarily agreed to return to the place in the State of New York, from which he was abducted, a boy 15 years of age, a citizen of Canada, who was kidnapped or enticed across the boundary into Canada, and who was afterwards tried there and convicted and sentenced to a reformatory.

Mr. Foster, Sec. of State, to Mr. Washburn, min. to Switzerland, July 27, 1892, For. Rel. 1894, 649, 650.

See Mr. Foster, Sec. of State, to Mr. Herbert, July 25, 1892, MS. Notes to Gr. Br. XXII. 20.

See, also, Mr. Hay, Sec. of State, to Lord Pauncefote, No. 1299, Dec. 31, 1898, 24 MS. Notes to Br. Leg. 413; same to same, No. 1616, Nov. 22, 1899, 25 id. 4.

"I have the honor to acknowledge the receipt of Your Excellency's note of the 12th instant relative to the action of one J. H. Seeley, a detective employed by the North West Mounted Police, in obtaining possession of the person of one George A. West, alias 'Kid' West, and who is charged with being an accessory to the crime of murder committed in the Yukon Territory.

"No complaint has been made by the governor or other officials of the State of Washington, of the manner in which the possession of West was obtained, and as it appears in the report of Mr. Seeley, copy of which was enclosed with your note, that West signed an agreement consenting to return to Dawson in the custody of an officer or officers of Her Majesty to be tried for the offense, the Department does not feel called upon to take any action with a view to the release or return of West from the custody of Her Majesty's authorities.

"From the foregoing, it follows that the Department sees no objection to West's testimony being made available in the murder trial. The frank disavowal by the Canadian Government of the violation of territory is accepted with great satisfaction. Under all the circumstances, the Department is not disposed, on its own initiative, to interpose obstacles to the conveyance of the prisoner to Yukon through the disputed territory. This is subject, however, to the understanding that the Department is compelled to reserve its entire freedom of action in case further information should seem to require its action."

Mr. Hill, Acting Sec. of State, to Lord Pauncefote, January 16, 1901, MS. Notes to British Legation, XXV, 431.

Where a fugitive is wrongfully taken from the jurisdiction of another country, it belongs exclusively to the government of such country to complain of the violation of its territory; the fugitive cannot set it up, even though there exists an extradition treaty between the two countries, if he was not extradited under the treaty.

Ker v. Illinois, 119 U. S. 436.

The fact that the original complaint on which a fugitive is arrested charges a different offence from that for which he is eventually extradited, does not constitute an irregularity which he can set up when he is brought to trial for the offence for which he was surrendered. The method in which a foreign government may execute its own laws or carry into effect its treaties does not concern the government which obtains the extradition. The fugitive, when duly surrendered by the government from which his extradition is demanded, cannot attack the method of his surrender and thereby seek to defeat justice.

Hall *v.* Patterson, 45 Fed. Rep. 352, citing 1 Moore on Extradition, § 204; Kelly *v.* State, 13 Tex. App. 158.

Under Article X. of the treaty between the United States and Great Britain of 1842, which provides that the fugitive shall be surrendered upon such evidence of criminality as, according to the laws of the place where he is found, would justify his apprehension and commit-

ment for trial if the crime had been there committed, it is the duty of the authorities of the country in which he is found to determine whether the facts alleged in the papers constitute an offence within the treaty, and, if they hold that such an offence is established and deliver him up, their decision cannot, in the absence of fraud practiced upon them, be questioned by the prisoner upon his trial.

Cohn *v.* Jones, 100 Fed. Rep. 639, citing In re Rowe, 77 Fed. Rep. 161, 23 C. C. A. 103.

The rule that the jurisdiction of the court is not affected by an objection raised by the prisoner to the manner in which he was brought before it applies to the action of a governor of a State in obtaining the extradition of a fugitive from a foreign country where, because of the absence of a treaty, the Government of the United States refused a request for his surrender.

People *v.* Pratt, 78 Cal. 345, 20 Pac. 731.

The question whether the acts of the judicial authorities in a foreign country taking part in the extradition of a fugitive to the United States are in excess of their authority, cannot be inquired into by the Government of the United States.

Mr. Frelinghuysen, Sec. of State, to Mr. Romero, Mexican min., May 15, 1884, MS. Notes to Mexico, IX. 6.

VII. *POLITICAL OFFENCES.*

§ 604.

"Most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government* and acts against the *oppressions of the government.* The latter are virtues, yet have furnished more victims to the executioner than the former. . . . The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries. . . . Treasons, then, taking the *simulated* with the *real*, are sufficiently punished by exile."

Mr. Jefferson, Sec. of State, to Messrs. Carmichael and Short, Mar. 22, 1792, Am. State Pap. For. Rel. 258.

See 1 Moore on Extradition, chap. VIII., p. 303.

Case of Myers and Tunstall.

In February, 1862, Henry Myers and J. F. Tunstall, American citizens, members of the crew of the Confederate vessel *Sumter*, then lying at Gibraltar, took passage on the French merchant steamer *Ville de Malaga* for Cadiz, in order to obtain a suply of coal for the Confederate cruiser. The *Ville de Malaga*, having called at Tangier, Morocco,

Myers and Tunstall went ashore, where, as they were walking in the street, the United States consul, with the aid of a Moorish military guard, seized them and conveyed them to the consulate, where they were kept in irons till the arrival of the U. S. S. *Ino*, on which they were shipped for the United States. They were subsequently committed to military custody at Fort Warren, Boston. The point having been raised that, because the men were political offenders, Morocco should have been asked to deliver them up, Mr. Seward replied that none of the treaties of the Christian nations with Morocco excepted that class of offenders from its operation. He intimated that extradition treaties between Christian nations contained such an exception, because those nations trusted one another to prevent any abuse of their protection by refugees. No Christian state had shown itself willing thus to trust the Empire of Morocco. The utmost, he said, that could be pretended was "that some Christian nations, including the United States, have informally manifested their approval of the extension of the right of asylum granted by the Sultan of Turkey to the Hungarian refugees in the late civil war in Austria. But they were no longer combatants; their attempted revolution was ended, and the refugees were demanded by Austria, not on the ground of apprehensions of danger from the continued hostility, but to punish them for the treason which she alleged they had committed. Assuming the facts as reported, the offenders in this case were not held or sheltered in Tangier as exiles, or as refugees in asylum, but they were taken in the very act of war against this government." Mr. Seward added that the whole proceeding was conducted with the acquiescence and aid of the Moorish governor.

Mr. Seward, Sec. of State, to Mr. McMath, consul at Tangier, April 28, 1862, Dip. Cor. 1862, 873, 875.

The Government of the United States can not consent to the surrender, by the city of Bremen, to another German State, on the plea of dereliction in military service, of a citizen of the United States temporarily residing in Bremen.

Mr. Cass, Sec. of State, to Mr. Schleiden, Apr. 9, 1859, MS. Notes to Hanse Towns, VII. 31.

"I have to inform you that Bremen, and it is believed the German States generally, claim the right under treaties with the Government of Prussia to surrender any persons to that Government who owe it military service, and who may be found in their respective territories. This claim has not been acquiesced in by the United States and is now a subject of discussion with Bremen, but it is proper to inform you that it is still asserted by the German States." (Mr. Appleton, Assist. Sec. of State, to Mr. Byck, April 18, 1859, 50 MS. Dom. Let. 237.) See supra, § 436.

"Neither the extradition clause in the treaty of 1794 nor in that of 1842 contains any reference to immunity for political offenses or to the protection of asylum for political or religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible, any more than, by the laws of Solon, was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation."

Mr. Fish to Mr. Hoffman, May 22, 1876, For. Rel. 1876, 233, 237.

"I have the honor to acknowledge the receipt of your note of the 3d instant, requesting the extradition of the eight Mexican revolutionists who were in the custody of Captain Rafferty, of the Sixth Regiment of United States Cavalry, now stationed in the Territory of Arizona. . . . It would not be competent for this Department to take any steps with a view to the extradition of the prisoners unless their names shall have been furnished, and the offenses with which they are charged shall have been specified. The fact, too, that they are charged with being revolutionists shows that whatever may have been their other crimes they may also have been guilty of a political offense, for which the treaty stipulates that no extradition shall be granted."

Mr. Hunter, Acting Sec. of State, to Mr. Navarro, Sept. 22, 1880, For. Rel. 1880, 788.

For a resolution requesting that the extradition of Agüero, the Cuban insurgent, to Spain be refused until charges against him were ascertained to be true, and requesting the Attorney-General to investigate the case, and ascertain if his offense was a political one, see House Mis. Doc. 34, 48th Cong. 1st sess., Feb. 8, 1884.

Case of the Salvadorean refugees.

In 1894 the Salvadorean Government sought to obtain from the United States the extradition of General Antonio Ezeta, and certain other citizens of Salvador, named Bolanos, Colocho, Cienfuegos, and Bustamante, for certain acts, charged as murder and robbery, committed during the progress of a revolution in which all the fugitives in question were concerned.

The first charge, which was that of murder, was as follows: It appears that on June 3, 1894, one Henriquez was taken from his father's house at Coatupeque by General Emilio Avelar, an officer under General Ezeta; that he was subsequently turned over by Avelar to Bolanos, after the former had attempted to shoot him; that, on reaching General Ezeta's headquarters, that officer, on being told that Henriquez was a spy, struck him and ordered him to be hanged; that he was stoned and beaten and hung up in the plaza, and

that Bustamante and Cienfuegos helped to kill him, the latter firing several shots into his body before he was dead.

The second charge was that of the alleged robbery, by General Ezeta, of the agency of the International Bank of Salvador and Nicaragua, at Santa Tecla, on June 5, 1894. It appeared that on the day in question an officer of the rank of colonel, acting under the orders of Antonio Ezeta, who was then president of Salvador, as well as commander in chief of the army, Carlos Ezeta having fled on the 4th, demanded of an official of the bank the sum of ten thousand dollars, and accompanied his demand with threats, in order to enforce compliance with it. The official declared that there were not ten thousand dollars in the agency, to which the colonel replied that he should turn over whatever there was, as "the president, Antonio Ezeta, was becoming impatient." The official then opened the vault, and the money, amounting to two thousand five hundred and eighty-four dollars, was extracted and carried to Ezeta, who ordered it to be delivered to the paymaster of his forces.

The last charge, which was against Ezeta and Cienfuegos, was that of the murder of one Canas, on June 6, 1894, and was supported by the testimony of several witnesses. It was shown that on that day, while General Ezeta was proceeding with his staff on the road from Santa Tecla to La Libertad, he was approached by Canas, who told him that the enemy wanted his head. Ezeta and Canas then both drew their revolvers, and the former fired at the latter. Cienfuegos followed with three shots at Canas, who was subsequently found dead by the roadside with several bullet wounds in his body. The accused admitted that they killed Canas, but alleged that they did it in self-defense. They claimed that Canas had been traitorous to his trust as an officer under Ezeta, having surrendered, on the day on which he was killed, a force under his command; that, when he came up to Ezeta, he appeared somewhat intoxicated, and that he seized Ezeta by the throat and made a movement as if to draw his revolver. One witness, whose testimony was not corroborated, testified that Cienfuegos took Canas' pistol from his pocket, and that it was after that that he was shot.

It was held by the court, Morrow, J., that the offences charged were all of a political character.

In re Ezeta, 62 Fed. Rep. 972; the Case of the Salvadorean Refugees, 29 Am. Law Rev. (Jan.–Feb. 1895) 1, 9–18.

See, also, For. Rel. 1894, 563–576.

A committing magistrate has jurisdiction, and it is his duty, to determine whether the offence charged is of a political character.

In re Ezeta, 62 Fed. Rep. 972.

San Ignacio raid.

In notes of July 17, 1893, and May 22, 1894, the Mexican minister at Washington requested the extradition of Inez Ruiz, Juan Duque, and Jesus Guerra, three Mexicans, on charges of murder, arson, robbery, and kidnapping in that country. The prisoners, on being committed by the examining magistrate for surrender, applied for a writ of habeas corpus. The evidence tended to show that on December 10, 1892, a band of armed men, of which the petitioners were members, under the leadership of one Benavides, crossed the Rio Grande from Texas into Mexico and attacked about forty Mexican soldiers stationed at the village of San Ignacio, killing and wounding some of them and capturing other, who were afterwards released, besides burning their barracks and taking away their horses and equipments; that private citizens were also assaulted and their horses taken; that houses were burned, small sums of money extorted from women, and clothes, provisions, and goods appropriated; that three citizens were kidnapped and carried over into Texas, but finally escaped; that the raiders were bandits without uniforms or flag, but wore a red band on their hats, and that Garza was not there and had nothing to do with the expedition. The band remained on the Mexican side of the river about six hours and then went back into Texas. The revolutionary movement under Garza took place in 1891. The United States district judge held that the offence was of a political character and ordered the prisoners to be discharged, thus substituting his judgment for that of the commissioner. Held, that, as the evidence before the commissioner was not such as to leave him no choice but to hold that the offences were of a political character, the district court erred in reviewing his judgment on habeas corpus. The order of the district court was therefore reversed and the case remanded for further proceedings in conformity with the law.

Ornelas *v.* Ruiz (1896), 161 U. S. 502.

The district judge referred in the course of his opinion to the views of the Department of State as to the transaction at San Ignacio. The Supreme Court understood him to refer to the note of Mr. Gresham, Secretary of State, to the Mexican minister, of May 13, 1893, in relation to the extradition of Benavides. The extradition of Benavides was not granted, since it appeared that he was a citizen of the United States; but Secretary Gresham, in reviewing the facts, expressed the opinion that his offence was not of a purely political character. "The idea," said Secretary Gresham, "that these acts were perpetrated with bona fide political or revolutionary designs is negatived by the fact that immediately after this occurrence, though no superior armed force of the Mexican Government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas."

It may further be observed that the Supreme Court stated that the right of the executive authority to determine when offences charged were

of a political character was not involved in the case before it, nor was it concerned with the question of the actual criminality of the petitioners. "It is enough," said the Supreme Court, "if it appear that there was legal evidence on which the commissioner might properly conclude that the accused had committed offenses within the treaty charged, and so be justified in exercising his power to commit them to await the action of the executive department." (161 U. S. 512.)

On July 9, 1896, a warrant was issued for the surrender of Ruiz and Duque, Guerra having escaped.

See Mr. Wharton, Assist. Sec. of State, to Mr. Prince, April 27, 1892, 186 MS. Dom. Let. 225.

For correspondence as to the Garza raids, see For. Rel. 1893, 440–456.

Sept. 28, 1897, the Mexican legation again asked for the surrender of Guerra, who had been apprehended and duly committed for extradition.[a]

The request was refused on the ground that, while it appeared by the evidence that Guerra was "a member of the expedition" by which the attack on San Ignacio was made, it did not appear that he was "implicated, either as an abetter or participant, in the commission of any offense against private parties"; and that, as the evidence showed "the expedition to have been revolutionary in its origin and purpose," the offense of being "a member thereof" was of "a purely political character, outside of the purview of the extradition treaty between the United States and Mexico."[b]

"I can not refrain from expressing, Mr. Secretary, my regret at seeing that you have reversed the decisions given by your two predecessors in the high post that you occupy. Permit me to recall to you that the Hon. Walter Q. Gresham, Secretary of State of the United States, decided in a communication addressed to this legation on April 6, 1893, following the opinion of the then Solicitor of the Department of State, that the assault at San Ignacio, committed December 10, 1892, by a party of bandits organized in Texas to commit depredations against persons and property in Mexico, was of a political character; but in view of the observations made to him, in a communication of this legation dated April 7, 1893, and in a conference between us in the presence of the Solicitor of the Department, he became convinced that the said assault was not of a character purely political, of the nature to warrant its exception from extradition by the treaty of December 11, 1861, and revoked his decision in a letter of May 13, 1893. I think it proper to subjoin the account given by the said Secretary of State in this letter of the assault at

[a] Mr. Romero, Mex. min., to Mr. Sherman, Sec. of State, Sept. 28, 1897, For. Rel. 1897, 405.

[b] Mr. Sherman, Sec. of State, to Mr. Romero, Mex. min., Nov. 13, 1897, For. Rel. 1897, 406.

San Ignacio, and of the reasons on which he relied in deciding that this assault was not of a purely political character.

"'Benavides was in charge of a party of bandits, numbering some 150, who on December 10 last passed over the Rio Grande from Texas into Mexico and assaulted a Mexican garrison of about 40 men stationed at San Ignacio, a ranch immediately on the Mexican border of the river. A number of the garrison were killed, a number wounded, and all the survivors made prisoners by the bandits. Benavides himself proposed that the prisoners be shot, but his purpose was frustrated, or at least not executed, and the members of the garrison who had been taken prisoners were released on the Mexican side of the river.

"'Several private citizens, noncombatants, were violently assaulted, but none were killed. All the horses of the garrison were taken by the bandits, and at least two belonging to private citizens. Several small sums of money were taken from women. The supplies and equipments of the garrison were also taken.

"'It further appears that the bandits, in the course of the assault upon the garrison, fired the barracks and also burned some buildings belonging to private parties.

"'The idea that these acts were perpetrated with bona fide political or revolutionary design is negatived by the fact that immediately after their recurrence, though no superior armed force of the Mexican Government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas.'

"In view of this decision the Mexican consul at San Antonio, Tex., began proceedings for extradition, among the other bandits who composed the company of Benavides, of Ines Ruiz, Jesus Guerra, and Juan Duque, and the commissioner, L. F. Price, decided that the evidence presented against these three prisoners was enough, according to the law, to consider them guilty of the said offenses, and declared that they should be retained in confinement awaiting the decision of the President of the United States. The accused then had recourse to habeas corpus before the Federal court of the western district of Texas, which granted it, giving as reason that the assault at San Ignacio was an offense of a political character. The Mexican consul at San Antonio, considering this decision unfounded, appealed to the Supreme Court of the United States from the sentence of Judge Maxey, and that high tribunal, in a decision of March 16, 1896, revoked the decision of Judge Maxey, asserting that, since Commissioner Price had had jurisdiction, recourse to habeas corpus could not be had, and that the offenses of which Inez Ruiz, Jesus Guerra, and Juan Duque were of a common order and not of a purely

political character. I think it proper to quote the following extracts from the decision of the Supreme Court:

"'The district judge entertained different views from those of the secretary and arrived at a different result from that reached by the commissioner on the evidence on which the latter proceeded, and so was induced to substitute his judgment for that of the commissioner, in whom was reposed the authority of decision, unless jurisdiction was lacking.

"'Can it be said that the commissioner had no choice on the evidence but to hold, in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed, that this was a movement in aid of a political revolt, an insurrection, or a civil war, and that acts which contained all the characteristics of crimes under the ordinary law were exempt from extradition because of the political intentions of those who committed them? In our opinion this inquiry must be answered in the negative.'

"The sentence of Judge Maxey having thus been revoked, the Mexican Government again asked, through a letter from this legation sent to the Department on the 18th of March, 1896, the extradition of Inez Ruiz, Jesus Guerra, and Juan Duque, and on receiving advices of the arrest of Ruiz and Duque the legation asked for their delivery, in letters dated May 21 and July 2, 1896, respectively. The Hon. Richard Olney, Secretary of State of the United States, successor of Mr. Gresham, granted that of Inez Ruiz and Juan Duque, sending to this legation the orders for their delivery, with letters Nos. 137 and 138 of July 9, 1896. The delivery of Jesus Guerra was not insisted upon, because he had fled; but on receiving notice of his arrest I sent you the letter of September 28.

"It appears from the above that your two predecessors as Secretary of State and the Supreme Court of the United States decided that the assault at San Ignacio was not an offense of purely political character. You now inform me that the evidence shows that the assault was revolutionary in its origin and purpose, and that consequently its character was purely political; and this decision, which is contrary to that expressed by your two predecessors and by the Supreme Court, reverses the decisions granted by them after mature deliberation.

"If the assault on San Ignacio was not of a purely political nature, as has been recognized by your predecessors and by the Supreme Court, the persons who took part in the same are responsible for the crimes committed, even if they did not personally commit them, inasmuch as the crimes were committed by the organization created by the assailants and in virtue of the direct cooperation of all, although they may not personally have committed them. I therefore think it unnecessary to discuss the point of the direct participation which Guerra may have had in the commission of the crimes, since you have

thought it best to revoke the decision of the Department in regard to the true character of the offenses.

"Before closing I should recall to you that, as I have informed the Department, armed expeditions were organized for three years in Texas to attack the defenseless people of Mexico, with the object of assassination and robbing individuals and of exercising personal vengeance, the chief incitement of such expeditions being the immunity which the said bandits enjoy in the United States, and that from the time that the authors were delivered to the Mexican Government to be tried for actions committed in Mexican territory the expeditions ceased.

"It is also a fact that the persons delivered to Mexico by the United States Government have been tried with all impartiality by Mexican tribunals, and that in no case has the most severe punishment been decreed."

Mr. Romero, Mex. min., to Mr. Sherman, Sec. of State, Nov. 15, 1897, For. Rel. 1897, 406.

Mr. Gresham, in his note of May 13, 1893, above quoted, added, however: "Notwithstanding the proof of Benavides' connection with the assault on San Ignacio, and the occurrences there, this Government finds itself unable to grant his extradition, because the evidence clearly shows that he is an American citizen." (MS. Notes to Mexico, IX. 664.)

"I have the honor to acknowledge the receipt of your note of the 15th instant. . . .

"The petition filed before the magistrate for extradition . . . charges Guerra with murder, to wit, shooting certain named Mexican officers and soldiers; with arson, to wit, the burning of the barracks; with robbery, to wit, the taking of cavalry horses, etc.; with kidnaping, to wit, the taking of Mexican soldiers as prisoners. This is the gravamen of the charge; for while the complaint makes a vague general charge of robbery, it is so vague as not to warrant the detention or extradition of any man.

"The decision was necessarily based on the complaint made and the evidence adduced in support of it, secundum allegata et probata. The ground of the decision, and what actually was decided, was that the evidence shows that the assault was revolutionary in its origin and object, and that the aforesaid acts, which were in aid thereof, being incidents of regular military warfare, can not be characterized as common crimes; that they were shown to be committed, not from motives of revenge or pecuniary gain, but for the political one of revolution. The evidence fails to show the presence of a merely criminal motive of the actors, except in so far as it may be inferred from the nature of the acts. But to argue that the acts themselves were intrinsically wicked and therefore demonstrate the presence of the intent characteristic of common crimes would have the effect in all cases of

unsuccessful revolutionary movements, conducted by force and bloodshed, to destroy the right of asylum to political offenders and refugees. It was therefore by no means intended to be decided that since the assault was revolutionary, 'crimes committed by a member of the expedition are of a purely political character.' The decision was that, as the movement was revolutionary, acts done in aid thereof are not common crimes; and as Guerra was not implicated, either as principal or accessory, in the commission of offenses against private persons, the guilt of such crimes could not be imputed to him any more than if, during a lawful political assemblage, some one of those present should commit a lawless act could the commission of that offense be imputed to the entire assembly.

"Your excellency observes that—

"'If the assault on San Ignacio was not of a purely political nature, . . . the persons who took part in the same are responsible for the crimes committed, even if they did not personally commit them, inasmuch as the crimes were committed by the organization created by the assailants, and in virtue of the direct cooperation of all, although they may not personally have committed them.'

"Without assenting or dissenting from this position in the absence of a distinct understanding of what is meant by the assault being 'not of a purely political nature,' it may be observed that if what is meant that when the movement is revolutionary in its origin and object it ceases to be of a purely political character, because lawless acts not germane to the object of the movement may be committed by individuals without authority or privity of their leaders or associates, the contention, if interpreted in that sense, could not be acceded to, since it would be an unwarranted extension of the doctrines of principal and accessory so as to implicate all political offenders engaged in the same revolutionary movement in the guilt of such acts and render them all common criminals. If it is meant that the expedition had a dual object, to wit, the overthrow of the Mexican Government and the plunder of the Mexican people, the two objects would seem inconsistent, except so far as the overthrow of organized resistance was incidentally necessary to the pursuit of plunder. The evidence wholly fails to show that object; the course pursued by the expedition seems utterly inconsistent with that object, for after the Mexican soldiery had been captured or disabled in battle and all resistance overcome, and San Ignacio and the surrounding country lay at the mercy of Benavides and his followers, and pillage was at length within their easy grasp, the evidence fails to show any attempt to pursue and accomplish the very thing which your excellency deems to have been the main or sole object of the assault.

"The point on which the decision turns is the question of fact whether the expedition was organized and conducted for the accom-

plishment of a political object. This question your excellency passed over and conceded that it was partly political by the contention that it was not purely political; and Guerra's extradition was sought on the assumption of fact that the expedition was either not political or at least was only partly so. And on that assumption guilt was constructively imputed to Guerra for all isolated acts of lawlessness committed by any other individual or group of individuals without his participation, cognizance, or privity. This would seem a dangerous extension of the doctrine of principal and accessory unsupported by any authority, and in the absence of which, or of evidence of his participation in such lawless acts, the ordinary presumption of innocence should prevail. Such is the humanity of the law.

"The solution of the question in this case is complicated by the want of a definition of the phrase 'crime or offense of a political character;' and by the further question of the significance and force of the term 'purely' political. 'What constitutes an offense of a political character has not yet been determined by judicial authority.' (In re Ezeta, 62 Fed. Rep. 997.) In the Castioni case (1 Q. B. 149) Lord Denman said:

"'I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things, which might bring a particular case within the description of an offense of a political character. . . . The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character, with a political object and as part of the political movement and rising in which he was taking part.'

"Judge Hawkins said:

"'I can not help thinking that everybody knows that there are many acts of a political character done without reason, done against all reason; but at the same time one can not look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat, and in heated blood, men often do things which are against and contrary to reason: but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who calmly reflect upon it after the battle is over.' (62 Fed. Rep. 999.)

"Calvo, speaking of the exemption from extradition of persons charged with political offenses, says:

"'The exemption even extends to acts connected with political crimes or offenses, and it is enough, as says Mr. Faust in Helio, that a common crime be connected with a political act—that it be the out-

come of or be in the execution of such—to be covered by the privilege which protects the latter.'

"In the International American Conference in Washington, Mr. Silva, of Colombia, discriminating between an offense of a political character and a common crime, said:

"'In the revolutions, as we conduct them in our countries, the common offenses are necessarily mixed up with the political in many cases. A revolutionist has no resources. My distinguished colleague, General Caamano (of Ecuador), knows how we carry on wars. A revolutionist needs horses for moving beef to feed his troops, etc.; and since he does not go into the public markets to purchase those horses and that beef, nor the arms and saddles to mount and equip his forces, he takes them from the first pasture or shop he finds at hand. This is called robbery everywhere, and is a common offense in time of peace, but in time of war it is a circumstance closely allied to the manner of waging it.' (62 Fed. Rep. 1000.)

"Calvo says:

"'All treaties, except that concluded between Belgium and the United States April 30, 1874, article 3, declare the general rule that extradition shall not be accorded for an act connected with a political delict without discriminating whether the separation of the delicts can be made. The connected delict is considered as an incident of the principal delict and is excluded from extradition.

"'We consider as delicts of common law those which are connected with political events only in a very indirect manner—those which have been committed in favor of the insurrection without being otherwise related to it; that is to say, those which a private vengeance or personal hatred has inspired, as for example, the murder of an adversary, the burning of his house.

"'We regard as criminals at common law the perpetrators of acts connected with the insurrection but which the law of nations disavows; for example, those who assassinate hostages, prisoners.

"'The practice is more favorable to the authors of such acts; none of the members of the commune, refugees in foreign lands in 1871, has been surrendered to France by the various powers.' (Calvo (Paris, 1896), Droit International, sec. 1036.)

"The treaty with Belgium, referred to by Calvo, by a special exception, makes certain 'connected' crimes extraditable. In his opinion in all our other treaties 'connected' crimes are not extraditable.

"Rivier advocates the extension of extradition treaties so as to include the more heinous offenses, regardless of the political motives or objects of their authors, yet he says:

"'The political offense for which extradition should never be granted is the act considered as punishable solely and exclusively

because of its political character. These are absolute political offenses. The qualification according to which the offense should be characterized as such and punishable by similar analogous penalties in the two states will suffice in the majority of cases to exclude extradition. If offenses which do not constitute common crimes, exhibiting the gravity just now characterized, have been committed with a political object, this object can, in the view of the impartial and disinterested state, impart to them a special character differing from that which they would have if they had been committed for the purpose of gain or of political or private revenge. These are offenses connected with political offenses, which may thus be called relative-political; that is, not absolute. They have a political character by reason of their object, and this political character may suffice to exclude extradition. We are considering now the political object which the accused has wished to attain. We are not considering a political motive; a political motive does not suffice to give to an offense the political character relieving the requested state from the duty of extradition. * It follows, moreover, from the very tenor of the most of the extradition treaties, that when they exclude political offenses, it is precisely connected, complex, or relative-political offenses which are meant, the nonextradition for absolute political offenses being considered as implied.' (Rivier, Principles du Droit des Gens, p. 353.)

"Had it not been for the use of the word 'purely' in the treaty Guerra was clearly not extraditable, since the evidence adduced by him stood uncontradicted that the object of the expedition was political. Does the term 'purely' extend the scope of the right to extradition? According to Rivier it is tacitly implied in all extradition treaties that when they exclude political offenses, connected or complex crimes are not included, since crimes of an absolutely or purely political character are excluded by implication, and the use of the word 'purely,' therefore, according to Rivier, would seem not to give any extension to the right of extradition. If, however, it does not give any such extension it must be by construction, since the meaning of the term is not defined by treaty; but the right to personal liberty may not be taken away by mere judicial construction, especially where, in cases of doubt, the obligation of extradition is interpreted in a limitative manner and in favor of the right of asylum.

"But it not being necessary to decide the question whether or not the word 'purely' should be construed to extend the right of extradition between the two Governments, it may be suggested that it receive in this case the construction contended for by your excellency, namely, that a private offense committed by one or a few members of a revolutionary body should be imputed to all the rest of that body,

although the rest may not have been in anywise privy to it, it would in effect make all political offenses extraditable, since there perhaps never was a political revolution without some of the elements of lawlessness attending it, even against the will of its leaders. Such construction would also put the ban of the treaty on all political revolutions conducted by force and violence, and subject all engaged in them to extradition for acts done causing bloodshed and the capture of prisoners and their equipments.

"In your excellency's note it is stated that—

"'Your two predecessors, as Secretary of State, and the Supreme Court of the United States decided that the assault at San Ignacio was not an offense of a purely political character. You now inform me that the evidence shows that the assault was revolutionary in its origin and purpose, and that consequently its character was purely political. This decision, which is contrary to that expressed by your two predecessors and by the Supreme Court, reverses the decisions granted by them after mature consideration.'

"Being unable to assent to the above conclusion as a whole, I beg leave to suggest to your excellency that, as shown by your excellency's communication, Secretary Gresham decided the same question twice, and in opposite ways, the then solicitor of this Department concurring with his first decision that the offense was of a purely political character, while Secretary Olney does not appear to have rendered any opinion at all; and if there appear any aberration of decision on this question it does not appear in the decision now under consideration, since, with the single exception mentioned by your excellency, this decision is in harmony with all former decisions of this Department on analogous states of fact having the same essential legal character.

"In support of this statement, I would respectfully call your excellency's attention to the decision by Secretary Bayard, on February 17, 1897, in the Cazo case, and other decisions cited in Moore on Extradition, section 217 and notes; Wharton's Digest of International Law, section 272.

"Being unable to concur in the conclusion expressed by your excellency that the Supreme Court decided 'that the offense of which Ines Ruiz, Jesus Guerra, and Juan Duque (were accused) were of a common order and not of a purely political character,' it is due to the distinguished consideration entertained for your excellency's opinions that the grounds of this dissent be stated.

"In deciding cases it not unfrequently happens that the courts use, arguendo, expressions which are not intended to be taken in all their literal amplitude of meaning, but their meaning is restricted to and construed in connection with what is actually decided. The judgment itself determines what is decided. And what the Supreme

Court decided in this case is expressed in the concluding paragraph of its opinion:

"'We are of the opinion that it can not be held that there was substantially no evidence calling for the judgment of the commissioner as to whether he would, or would not, certify and commit under the statute, and that therefore, as matter of law, he had no jurisdiction over the subject-matter; and this being so, his action was not open to review on habeas corpus.' (Ornelas *v.* Ruiz, 161 U. S., p. 512.)

"From which it does not seem that the Supreme Court decided 'that the assault at San Ignacio was not an offense of a purely political character.' What it did decide was, that there was evidence calling for the decision of the commissioner one way or the other, and that, on the state of the case, the Federal court could not review his decision. The Supreme Court did not pass upon the weight or probative force of the evidence, nor any portion of it, since according to its own decision it had no authority to do so. I am therefore unable to share the regret expressed by your excellency that the decision of the Supreme Court has been reversed; and whatever regret may be felt at not apparently following the last decision rendered by Secretary Gresham, it is greatly lessened by the consideration that it is in harmony with the first decision rendered by that distinguished Secretary and with the decisions rendered on analogous states of fact by Secretary Bayard in 1887, and by Acting Secretary Hunter in 1880; and, in short, with every decision rendered by this Department since the negotiation of the treaty with Mexico in 1862; and in harmony with the traditionary policy of this Government.

"Referring to the point made in conclusion in your excellency's reply that 'armed expeditions were organized for three years in Texas to attack the defenseless people of Mexico,' it may be observed that said consideration would have its appropriate and, doubtless, great weight with the treaty-making power, as such, in the formation of a treaty; but in the execution of the treaty the parties to it are bound by its terms and can not arbitrarily wrest it from its true intent for the accomplishment of political objects foreign thereto, however laudable those objects might be, and that in the absence of a treaty provision for the extradition of political offenders, the neutrality laws afford a remedy for hostile incursions of a political character across the border of the two countries.

"In reaching this conclusion, the Department wishes to state that this is a very close case and the decision announced has resolved the doubts in favor of liberty.

"It is placed upon the distinct ground that as far as Guerra is concerned, whatever others may have done, it does not appear from the testimony that he committed any extraditable offense, and for that reason could not be delivered. The Department is not prepared to say

that others may not, in the same expedition, have committed offenses of a character which would warrant their extradition under the terms of the treaty. Should cases arise or further consideration of this matter be asked, the Department is at all times ready to hear any representation your excellency may wish to make, and when consistent with its sense of duty, to accede to the same. The Department feels that no less than this is due to friendly relations with the Government which your excellency represents with so much ability and fidelity at this capital."

Mr. Sherman, Sec. of State, to Mr. Romero, Mex. min., Dec. 17, 1897 (For. Rel., 1897, 408).

Mr. Romero, in reply, Dec. 18, 1897 (For. Rel., 1897, 414), said:

"In the state which this case has now reached, there is nothing for me to do but to send a copy of your note to my Government, in order that, in view thereof, it may reach such decision as it thinks proper.

"I do not think, nevertheless, that I should allow this occasion to pass without stating that, in my opinion, it can not be doubted that, when the Hon. Richard Olney, your immediate predecessor, granted, by his notes to this legation, Nos. 137 and 138, of July 9, 1896, the extradition of Ines Ruiz and Juan Duque, who were guilty of the same crimes with which Jesus Guerra is charged, he admitted that the attack on San Ignacio was not a crime of a merely political character, and that, consequently, those who took part in it were not exempted from extradition by the treaty of December 11, 1896. As his predecessor, the Hon. Walter Q. Gresham, had decided this point in his note of May 13, 1893, in the sense that that attack was not of a merely political character, Mr. Olney did not need to examine the same question, and would have needed to do so only in case he had thought it necessary to revoke the decision of his predecessor, and for that reason he did not enter into special considerations with respect to the attack, but confined himself to issuing a warrant for the surrender of the accused persons, whereby he undoubtedly admitted that the crime with which they were charged was not of a purely political character.

"I understand that the Department of State observes the wise system of maintaining the decisions reached by the Secretaries who have been at its head, and of not revoking them unless new incidents arise or fresh evidence is obtained of a nature so clear and conclusive that, if they had been considered by the Secretary who reached the decision concerned, they would have led him to form a decision at variance with that which he did form. In view of this circumstance the Government of Mexico hoped that the decision reached by Mr. Gresham and upheld by Mr. Olney would be considered valid in the case of Jesus Guerra, since no evidence or incidents have arisen of such a nature as to change the character of the attack on San Ignacio, which has been considered by your predecessors as not having been a purely political offense.

"Referring to the decision of the Supreme Court of the United States pronounced March 14, 1896, in the habeas corpus case of Ines Ruiz, Jesus Guerra, and Juan Duque, I must say that I clearly understand that the point which was submitted to it on appeal was to decide concerning the validity or invalidity of the decision which granted a writ of habeas corpus to the accused persons, and which

revoked the decision granting their surrender which had been pronounced by the United States commissioner at San Antonio, and that it was not to determine whether the crime with which they were charged was or was not of a purely political character; nevertheless, the statement contained in the extract from that decision, which I inserted in my note of November 15 last, in which it is positively stated that the attack on San Ignacio was not of a purely political character, is, in my opinion, not without force, and is entitled to high respect. I frequently see quoted, in decisions pronounced by the courts of this country, declarations made in the 'whereases' and not in the resolutory part of the decisions of the Supreme Court of the United States.

"It is a generally recognized principle that those who are guilty of political crimes are not subject to extradition, and the citations contained in your note on this point refer to really political crimes, even though in case of crimes of this nature common crimes are incidentally committed, but when, in order to conceal common crimes, political pretexts are invoked, the case is different, and for the very purpose of authorizing the extradition of persons charged with these latter crimes the provision was inserted in the extradition treaty signed in the City of Mexico December 11, 1861, between Mexico and the United States, that persons guilty of purely political crimes were not subject to extradition, which, in the opinion of the Government of Mexico, means that when a crime is of a common character, and, in order to conceal it, the attempt is made to make it appear to be a political crime, as in the present case, it is considered as a crime which renders its perpetrator subject to extradition. The treaty signed between the United States and France November 9, 1843, is the only one containing a clause similar to that of the treaty with Mexico, and the one signed with Belgium April 30, 1874, authorizes the extradition of persons guilty of certain common crimes connected with others of a political character. The circumstance that Mexico and the United States are neighbors renders special stipulations necessary with regard to extradition still more ample than those contained in the treaty with Belgium."

Mr. Sherman, Jan. 6, 1898, made the following response (For. Rel. 1897, 415):

"I concur entirely in your excellency's opinion of the wisdom of a uniform rule of decision in all cases when the facts are of the same essential legal character. And from this standpoint the refusal to extradite Guerra finds sufficient vindication, since the refusal was in keeping with the uniform rule of decision in all such cases except in the single case, on which your excellency relied for the reversal of all other previous decisions.

"I observe with pleasure—and it does great credit to your excellency's character for candor and sincerity—the abandonment, in your excellency's note, of the former contention that the Supreme Court decided that 'the assault at San Ignacio was not an offense of a purely political character,' and the admission that the question for its decision 'was not to determine whether the crime with which they were charged was or was not of a purely political character.' But the contention now made is that an isolated dictum of the Supreme Court is 'not without force and is entitled to high respect.' In this opinion I fully concur, and as the court studiously refrained from

deciding a question over which it virtually held that it had no jurisdiction, I should have felt wanting in respect to its great character had I imputed to it any intention to decide indirectly and with great impropriety what it could not do directly, and therefore abstained from doing.

"I concur entirely in your excellency's view that 'when political pretexts are invoked to conceal common crimes,' such pretexts, or any others, can not be allowed to shield the guilty. But in the Guerra case there is such evidence to show the revolutionary character of the expedition, and no evidence to contradict it.

"In the absence of any reference to historical evidence in support of it, I can neither assent to nor dissent from your excellency's opinion of the object of the insertion of the word 'purely' in the extradition treaty. The word is sometimes used interchangeably with the word 'absolutely,' and if it is used in this sense, then, as shown in my last note, nonextradition for absolute political offenses is always implied in treaties without making any express exception; when they exclude political offenses, it is precisely connected or complex offenses which are meant.

"It being unnecessary in this case to construe the treaty, no opinion is expressed as to the construction placed on it by your excellency. But it may be doubted whether it was the intendment of the treaty to include connected or complex offenses in the category of extraditable offenses. For, on the one hand, the exclusion of absolutely or purely political offenses is implied without express exception, while the express exception of political offenses excludes mixed or connected offenses; and, on the other hand, if so wide a departure from the traditional policy of this Government had been intended, it is reasonable to suppose that the inclusion of such offenses would have been clearly and specifically indicated, as was done in the treaty with Belgium. And if the intent in the insertion of the word had been such as your excellency supposes, it is remarkable that no allusion appears to have been made to it heretofore either in the Cazo case or in the case of the eight Mexican revolutionists, when extradition was refused for the same reasons as in this case.

"Over thirty years have elapsed since the adoption of the treaty, and so far as I am informed the construction of the treaty now made by your excellency is made for the first time, and if it had been made and accepted in the two cases above mentioned, extradition should have been granted instead of being refused."

"The interpretation of certain provisions of the extradition convention of December 11, 1861, has been at various times the occasion of controversy with the Government of Mexico. An acute difference arose in the case of the Mexican demand for the delivery of Jesús Guerra, who, having led a marrauding expedition near the border with the proclaimed purpose of initiating an insurrection against President Diaz, escaped into Texas. Extradition was refused on the ground that the alleged offense was political in its character and therefore came within the treaty proviso of nonsurrender. The Mexican contention was that the exception only related to purely political offenses, and that as Guerra's acts were admixed with the

common crimes of murder, arson, kidnaping, and robbery the option of nondelivery became void, a position which this Government was unable to admit in view of the received international doctrine and practice in the matter. The Mexican Government, in view of this, gave notice January 24, 1898, of the termination of the convention, to take effect twelve months from that date, at the same time inviting the conclusion of a new convention, toward which negotiations are on foot."

President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, lxxix.

The correspondence in relation to these cases, beginning with Mr. Romero's note to Mr. Sherman, September 28, 1897, and ending with Mr. Sherman's note to Mr. Romero, of January 6, 1898, printed in For. Rel. 1897, 405–416, and quoted supra, is reprinted in For. Rel. 1898, 498–510, with certain correspondence that preceded it and followed it.

The first of the additional correspondence is a note of Mr. Romero, Mexican minister, to Mr. Gresham, Secretary of State, of May 22, 1894, demanding the extradition of Ruiz and Guerra for crimes committed in the attack on San Ignacio, December 10, 1892. Mr. Romero referred to the fact that he had applied for their extradition on July 17, 1893, but that his request could not then be granted for the reason that the accused were awaiting trial before the United States courts in Texas on charges of having violated the neutrality laws. Mr. Romero stated that on May 19, 1894, Judge Maxey dismissed these charges in respect of twenty-eight persons, among whom were Ruiz and Guerra. (For. Rel. 1898, 491.)

The Department of State replied that so far as appeared no proceedings had been taken against the persons in question beyond the request made in July, 1893, but that as soon as the requirements of the law had been complied with the subject would receive due consideration. (Mr. Uhl, Acting Sec. of State, to Mr. Romero, Mexican min., May 24, 1894, For. Rel. 1898, 491.)

Ruiz and Guerra were subsequently committed for extradition by a United States commissioner at San Antonio, Texas, but the Department of State postponed action upon the demand for their extradition till an application, which they had made to the courts, for a writ of habeas corpus should have been disposed of. (Mr. Gresham, Sec. of State, to Mr. Romero, Mexican min., July 9, 1894, For. Rel. 492.)

The United States district attorney for the western district of Texas was, however, instructed to appear for the Government and oppose the application for the writ. (Mr. Olney, Atty. Gen., to Mr. Gresham, Sec. of State, July 24, 1894, For. Rel. 1898, 493.)

The Mexican minister subsequently complained that in spite of the fact that the Department of State declared, as in the case of Francisco Benavides, that the crimes in question were not of a political character, the Federal courts took a different view, and the Mexican Government was endeavoring to obtain a decision of the Supreme Court on the question by means of an appeal from the decision of Judge Maxey, granting the writ of habeas corpus in the cases of Ruiz, Guerra, and Juan Duque. (Mr. Romero to Mr. Olney, Nov. 14, 1895, For. Rel. 1898, 493.)

The Supreme Court, in an opinion delivered March 16, 1896, reversed the decision of Judge Maxey on the ground that, as the commissioner had jurisdiction of the case, there was no ground for an application for habeas corpus. The Mexican minister therefore renewed his request for the surrender of Ruiz, Guerra, and Duque. (Mr. Romero, Mexican min., to Mr. Olney, Sec. of State, March 18, 1896, For. Rel. 1898, 496.)

The Department of State was at the moment unable to consider the application for the surrender, since the defendants were then at large on bail and could not be arrested till the decision of the Supreme Court had been officially communicated to the lower court and had become a part of its record. (Mr. Olney, Sec. of State, to Mr. Romero, Mexican min., April 24, 1896, For. Rel. 1898, 497.) Subsequently, on receipt of information that Ruiz had been arrested, a warrant for his surrender was issued. (Mr. Olney, Sec. of State, to Mr. Romero, Mexican min., July 9, 1896, For. Rel. 1898, 498.)

The next paper is the note of Mr. Romero to Mr. Sherman of September 28, 1897, which was printed in For. Rel. 1897.

The first paper after Mr. Sherman's note to Mr. Romero of January 6, 1898, is a note of Mr. Romero to Mr. Sherman of January 24, 1898. In this note Mr. Romero gave notice of the denunciation of the treaty. He stated that the reasons of his Government for this step had on several occasions been pointed out when it was proposing a revision, and to those reasons was added the conviction that the treaty lacked "sufficient precision to prevent the confusion of purely political offenses with those of the common order perpetrated under some political pretext, as is demonstrated by what has recently occurred in the case of Jesus Guerra." (For. Rel. 1898, 510.)

The United States expressed its willingness to enter into negotiations for a new treaty. (Mr. Sherman, Sec. of State, to Mr. Romero, Mexican min., Jan. 28, 1898, For. Rel. 1898, 511.)

A new treaty was concluded Feb. 22, 1899, and a supplementary convention June 25, 1902. The former contains the clause that extradition shall not take place where the offence charged is "of a purely political character."

Mutineers of the "Pilcomayo."

On March 31, 1891, the Chilean gunboat *Pilcomayo* was lying at the docks in Buenos Ayres, when a mutiny broke out on board in which three of the crew were killed and eleven wounded. At the instance of the commander, twelve of the mutineers were taken into custody by the local police, and the Chilean minister requested that they be detained till the vessel was ready to start for Chile, in order that they might be taken there for trial. At this time, the *Pilcomayo* was being dismantled by order of the Chilean Government, and when this was completed the vessel was to be conducted back to Chile and put out of service, while a part of her crew was to be taken overland to Chile and incorporated into the army. The mutineers having obtained a writ of habeas corpus, the Federal judge decided that the exemption of ships of war from the local jurisdiction could not extend so far as to bestow authority to maintain jurisdiction

over persons in foreign territory under its flag; and that the Chilean minister, by causing the men to be taken from the vessel and placed in custody of the Argentine authorities, had renounced or rather lost the right to remove and try them, as he might have done had they been retained on board the vessel or held under arrest in the Chilean legation. The court also intimated that, as the *Pilcomayo* had by dismantlement lost its character as a ship of war, the men could not be detained as part of the crew of a man-of-war. On appeal from this decision, the supreme court of the Argentine Republic held that, as the mutiny appeared to be for political reasons, it was to be considered as a political offence; that, as the mutineers were brought on shore and delivered to the Argentine authorities because of the inability to retain them on board the vessel, their return to the representative of Chile could not be granted without violating the exemption of political offenders from extradition; that their delivery up would also violate the principle of public law which protects prisoners of war, whether public or insurrectionary, from surrender; and that it is a rule of international law that, where acts of hostility are committed by foreign insurgents in territorial waters of another state, only the vessels or things taken from them and not the persons are to be delivered up.

Mr. Buchanan, min. to the Argentine Republic, to Mr. Hay, Sec. of State, No. 584, Dec. 1, 1898, 37 MS. Desp. from Arg. Rep., enclosing a report of Mr. François S. Jones, sec. of legation, citing Fallos de la Suprema Corte de la Republica Argentina, 1893, XLIII, 321–322.

See the case of Tucker *v.* Alexandroff, supra, § 252.

Crimes against political persons.

By the treaties between the United States on the one hand, and Belgium and Luxemburg on the other, which were respectively concluded in 1882 and 1883, when the memory of the assassination of President Garfield was still fresh, it was provided that an attempt against the life of the head of a government or against that of any member of his family, when such attempt "comprises the act either of murder or assassination, or of poisoning, shall not be considered a political offence or an act connected with such an offence."

A similar clause is contained in the treaty with Belgium of Oct. 26, 1901.

A similar clause was inserted in the extradition treaty with Russia, concluded March 28, 1887, the ratifications of which were exchanged April 21, 1893; also, in the treaty with Denmark of Jan. 6, 1902.

By the treaty of extradition with Brazil, signed at Rio de Janeiro, May 14, 1897, and May 28, 1898, it is provided that extradition shall not be granted for political offences, but it is also stipulated as follows:

"The following shall not be considered political crimes when they are unconnected with political movements, and are such as constitute murder, or willful and illegal homicide, as provided for in section 1 of the preceding article:

"1. An attempt against the life of the President of the United States of America, or against the life of the Governor of any of the States; an attempt against the life of the President of the United States of Brazil, or against the life of the President or Governor of any of the States thereof;

"2. An attempt against the life of the Vice-President of the United States of America, or against the life of the Lieutenant-Governor of any of the States; an attempt against the life of the Vice-President of the United States of Brazil, or against the life of the Vice-President or Vice-Governor of any of the States thereof."

"After the death of Lincoln, several governments were requested to surrender his assassin, if he should be found within their jurisdiction; and in no case did the application meet with any other than a ready and favorable response. The Government of Great Britain, of the Papal States and of Italy, all intimated their readiness to comply; and in 1866 John H. Surratt, who was charged with complicity in the assassination, was arrested at Alexandria and put on board of a United States man-of-war, with the cooperation of the Egyptian authorities."

J. B. Moore, in 29 Amer. Law Rev. (Jan.–Feb. 1895), 17.
See 1 Moore on Extradition, 308.

"It has been deemed advisable to take advantage of the visit which it is understood you are about to make to St. Petersburg to send by you an official copy of the resolution of Congress congratulating the Emperor of Russia upon his recent escape from assassination. The copy is consequently transmitted by this post. Mr. Clay has been instructed to apply for an interview, in order that you may present the copy to the Emperor. If the application should be successful, you will make suitable but brief remarks on the occasion. It is probable, however, that a copy of them will be required beforehand, with a view to an answer, if any should be thought proper. A letter introducing you to Mr. Clay, and a special passport, are herewith enclosed."

Mr. Seward, Sec. of State, to Mr. Fox, Assist. Sec. of Navy, May 28, 1866, 73 MS. Dom. Let. 175.

See, in For. Rel. 1894, 219–220, the resolutions adopted by the Senate and the House of Representatives of the United States on the assassination of President Carnot of France, as well as the correspondence between the two governments, printed at pages 220–224.

In 1882 the British minister at Washington presented a request from the British consul at New York that a revenue cutter be placed at his disposal or at that of the United States marshal, in order that officers might be placed on board the Cunard steamer in advance of her arrival at Sandy Hook, so as to make an examination of the passengers, among whom it was thought might be the murderers of Lord Frederick Cavendish and Mr. Burke, in Phœnix Park. The Department of State assured the minister that what the consul suggested would be done, and both revenue cutters were offered for the desired service.

Mr. J. C. B. Davis, Act. Sec. of State, to Mr. West, British min., May 12, 1882, MS. Notes to Great Britain, XIX. 42. For the subsequent exclusion from the United States of the convicted offenders in this case as nonpolitical alien convicts, see supra, § 565.

"Under our existing extradition treaty with Italy political offenses are not extraditable. Department is not inclined to consider offense in any case political merely because victim is head of Government. Whether the offense in present case was political can only be determined from the evidence when presented."

Mr. Hill, Acting Sec. of State, to Baron Fava, tel., September 12, 1900, MS. Notes to Ital. Leg. IX. 462.

Anarchists.

Although anarchists profess political motives for their acts, yet in June, 1894, the British government, after full consideration of the question by the court of Queen's Bench, delivered up to France a fugitive from justice, who was charged with causing the explosion at the Café Véry in Paris, as well as another explosion at certain government barracks. The court held "that, in order to constitute an offense of a political character, there must be two or more parties in the state, each seeking to impose the government of their own choice on the other;" and that the offense must be "committed by one side or the other in pursuance of that object."

In re Meunier, 2 Q. B. D. (1894), 415, 419; cited in 29 Am. Law Rev. 16–17.

See, to the same effect, as to what constitutes a political offense, In re Castioni, 1 Q. B. D. (1891), 149.

See article on Anarchistic Crimes, by Gustavo Tosti, Polit. Science Quarterly (Sept. 1899), XIV. 404.

For a German proposal of joint action for the suppression of anarchists, and the favorable reply of the United States, see For. Rel. 1901, 196, 197.

VIII. *REQUISITIONS.*

1. General Rules.

§ 605.

All demands for extradition must come from the executive authority of the demanding state.

Cushing, At. Gen., 1854, 7 Op. 6.

See Mr. Uhl, Act. Sec. of State, to Mr. Fellows, Dist. Att'y at New York City, April 27, 1894, 196 MS. Dom. Let. 512.

See, generally, as to requisitions, 1 Moore on Extradition, Chap. IX., p. 327 et seq.

There can be no actual extradition without proper requisition to that effect, addressed by the foreign government to the Secretary of State; and although extradition can not be ordered by the President on mere judicial documents, but requires executive requisition, still it may be effected, in the absence of any diplomatic minister of the demanding government, through other intermediate agencies recognized by the law of nations.

Cushing, At. Gen., 1856, 8 Op. 240.

As to the action of consuls in such matters, see 1 Moore on Extradition, § 225, p. 331.

In 1885 the United States asked for the extradition from Canada of two persons designated as John Doe and Richard Roe, adding that, while the real names of the criminals were unknown, their calling and personal description were set forth in the depositions and the warrant of arrest with all the particularity needful to their complete identification, and that the unknown offender styled Richard Roe was said to have gone under the alias of "Beales."

Mr. Porter, Act. Sec. of State, to Mr. West, British min., July 18, 1885, MS. Notes to Great Britain, XX. 87.

The provision in the treaty between the United States and Mexico that persons shall be delivered up to justice who are "accused" of a specified crime means accused in due form of law, and embraces an accusation by information as well as a charge by indictment, a proceeding by information being authorized by statute.

State *v.* Rowe (Ia.), 73 N. W. 833.

2. Applications for Requisitions.

§ 606.

The Department of State will not "inaugurate applications for extradition, on the mere reference to it of papers, without a specific request or expression of the wish of the Department of Justice or of

the authority of a State (as the case may be) through which the papers may come to this Department."

Mr. Fish, Sec. of State, to Mr. Pierrepont, Feb. 2, 1876, 111 MS. Dom. Let. 539.

See, to the same effect, Mr. Hay, Sec. of State, to Messrs. Kingsford & Son, Feb. 25, 1899, 235 MS. Dom. Let. 152.

The United States will not demand from Great Britain the extradition of an alleged fugitive from justice, except on a judicial warrant, with proper evidence to justify it, issued by the local authority of the State in which the crime is alleged to have been committed.

Cushing, At. Gen., 1854, 6 Op. 485.

A requisition will not be made for the extradition of a fugitive for receiving money fraudulently obtained where the evidence submitted in the application tends to show the commission of the offence of obtaining money fraudulently, the latter not being included in the treaty.

Mr. Hay, Sec. of State, to the governor of Ohio, Dec. 2, 1898, 233 MS. Dom. Let. 27.

By the supplementary extradition treaty with Great Britain of Dec. 13, 1900, the offence of obtaining money, valuable securities, or other properties by false pretenses was added to the list of extraditable offences.

Where a prima facie case is presented under the particular treaty, the Department of State, acting in the interest of justice, does not allow technical reasons to control its conduct, but will request extradition, and leave it to the authorities of the country in which the person accused is found to determine whether he should be delivered up.

Mr. Bayard, Sec. of State, to Mr. Torrey, March 10, 1886, 159 MS. Dom. Let. 279.

No instance is found in which the Department of State has heard counsel in opposition to its making a demand on a foreign government for the extradition of a fugitive from justice; nor would it be proper to introduce such a practice.

Mr. Gresham, Sec. of State, to Mr. Peffer, Jan. 30, 1895, 200 MS. Dom. Let. 425.

General circular.

MEMORANDUM RELATIVE TO APPLICATIONS FOR THE EXTRADITION FROM FOREIGN COUNTRIES OF FUGITIVES FROM JUSTICE.

DEPARTMENT OF STATE.

Washington, October, 1892.

Extradition will be asked only from a government with which the United States has an extradition treaty, and only for an offense specified in the treaty.

All applications for requisitions should be addressed to the Secretary of State,

accompanied by the necessary papers as herein stated.[a] When extradition is sought for an offense within the jurisdiction of the State or Territorial courts, the application must come from the governor of the State or Territory. When the offense is against the United States, the application should come from the Attorney-General.

In every application for a requisition it must be made to appear that one of the offenses enumerated in the extradition treaty between the United States and the government from which extradition is sought has been committed within the jurisdiction of the United States, or of some one of the States or Territories, and that the person charged therewith is believed to have sought an asylum or has been found within the dominions of such foreign government.

The extradition treaties of the United States ordinarily provide that the surrender of a fugitive shall be granted only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her commitment for trial if the crime or offense had been there committed.

If the person whose extradition is desired has been convicted of a crime or offense and escaped thereafter, a duly authenticated copy of the record of conviction and sentence of the court is ordinarily sufficient.

If the fugitive has not been convicted, but is merely charged with crime, a duly authenticated copy of the indictment or information, if any, and of the warrant of arrest and return thereto, accompanied by a copy of the evidence upon which the indictment was found, or the warrant of arrest issued, or by original depositions setting forth as fully as possible the circumstances of the crime, are usually necessary. Many of our treaties require the production of a duly authenticated copy of the warrant of arrest in this country; but an indictment, information, or warrant of arrest alone, without the accompanying proofs, is not ordinarily sufficient. It is desirable to make out as strong a case as possible, in order to meet the contingencies of the local requirements at the place of arrest.

If the extradition of the fugitive is sought for several offenses, copies of the several convictions, indictments, or informations and of the documents in support of each should be furnished.

Application for the extradition of a fugitive should state his full name, if known, and his alias, if any, the offense or offenses in the language of the treaty upon which his extradition is desired, and the full name of the person proposed for designation by the President to receive and convey the prisoner to the United States.

As the application proper is desired solely by the Department as a basis for its action, and is retained by it, it is not necessary that it should be attached to the evidence.

Copies of the record of conviction, or of the indictment, or information, and of the warrant of arrest, and the other papers and documents going to make up the evidence are required by the Department, in the first instance, as a basis for requesting the surrender of the fugitive, but chiefly in order that they may be duly authenticated under the seal of the Department, so as to make them receivable as evidence where the fugitive is arrested upon the question of his surrender.

---

[a] The only exception is found in the treaty with Mexico, under which, in the case of crimes committed in the frontier States or Territories, requisitions may be made directly by the proper authorities of the State or Territory. (Article 2, treaty with Mexico, concluded December 11, 1861.)

Copies of all papers going to make up the evidence, transmitted as herein required, including the record of conviction, or the indictment, or information, and the warrant of arrest, must be duly certified and then authenticated under the great seal of the State making the application or the seal of the Department of Justice, as the case may be; and this Department will authenticate the seal of the State or of the Department of Justice. For example, if a deposition is made before a justice of the peace, the official character of the justice and his authority to administer oaths should be attested by the county clerk or other superior certifying officer; the certificate of the county clerk should be authenticated by the governor or secretary of state under the seal of the State, and the latter will be authenticated by this Department. If there is but one authentication, it should plainly cover all the papers attached.

All of the papers herein required in the way of evidence must be transmitted in duplicate, one copy to be retained in the files of the Department, and the other, duly authenticated by the Secretary of State, will be returned with the President's warrant, for the use of the agent who may be designated to receive the fugitive. As the governor of the State, or the Department of Justice, also ordinarily requires a copy, *prosecuting attorneys should have all papers made in triplicate.*

By the practice of some of the countries with which the United States has treaties, in order to entitle copies of depositions to be received in evidence the party producing them is required to declare under oath that they are true copies of the original depositions. It is desirable, therefore, that such agent, either from a comparison of the copies with the originals or from having been present at the attestations of the copies, should be prepared to make such declaration. When the original depositions are forwarded, such declaration is not required.

Applications by telegraph or letter are frequently made to this Department for its intervention to obtain the provisional arrest and detention of fugitives in foreign countries in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. Such applications should state specifically the name of the fugitive, the offense with which he is charged, the circumstances of the crime as fully as possible, and a description and identification of the accused. It is always helpful to show that an indictment has been found or a warrant of arrest has been issued for the apprehension of the accused. In Great Britain the practice makes it essential that it shall appear that a warrant of arrest has been issued in this country.[a]

Care should be taken to observe the provisions of the particular treaty under which extradition is sought, and to comply with any special provisions contained therein. The extradition treaties of the United States may be found in the several volumes of the Statutes at Large, in the "Revised Statutes of the United States relating to the District of Columbia and Post Roads, together with Public Treaties in force on the 1st day of December, 1873," and in the volume of Public Treaties, 1887. Copies of particular treaties will be furnished by the Department upon application.

If the offense charged be a violation of a law of a State or Territory, the agent authorized by the President to receive the fugitive will be required to deliver him to the authorities of such State or Territory. If the offense charged be a violation of a law of the United States, the agent will be required to deliver the fugitive to the proper authorities of the United States for the judicial district having jurisdiction of the offense.

---

[a] For fuller information with respect to procedure in cases of provisional arrest within British jurisdiction, see Department's memorandum of May, 1890.

Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only when the offense is against its own laws.

A strict compliance with these requirements may save much delay and expense to the party seeking the extradition of a fugitive criminal.

MEMORANDUM RELATIVE TO THE EXTRADITION OF FUGITIVES FROM THE UNITED STATES IN BRITISH JURISDICTION.

Circular as to Great Britain.

DEPARTMENT OF STATE,
Washington, May, 1890.

Where application is made for a requisition for the surrender of a fugitive from the justice of the United States in British jurisdiction, it must be made to appear—

1. That one of the offenses enumerated in the treaties between the United States and Great Britain has been committed within the jurisdiction of the United States or of some one of the States or Territories.

2. That the person charged with the offense has sought an asylum or been found within the British dominions.

All applications for requisitions should be addressed to the Secretary of State, and forwarded to the Department of State, accompanied with the necessary papers, as herein stated, and must furnish the full name of the person proposed for designation by the President to receive the prisoner and convey him to the United States. When the offense is within the jurisdiction of the State courts, the application must come from the governor of the State. When the offense is against the United States, the application must come from the Attorney-General or the proper executive department.

It is stipulated in the treaties with Great Britain that extradition shall be granted only on such evidence of criminality as, according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed.

It is admissible as constituting such evidence to produce a properly certified copy of an indictment found against the fugitive by a grand jury or of any information made before an examining magistrate, accompanied by one or more depositions setting forth as fully as possible the circumstances of the crime. An indictment alone has been held to be insufficient.

By the fourteenth section of the English extradition act of 1870, "depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of, or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence of proceedings under this act."

The fifteenth section of the same act provides as follows: "Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of, or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this act if authenticated in manner provided for the time being by law, or authenticated as follows: (1) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued; (2) if the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; and (3) if the certificate of, or judicial documents stating the fact of conviction purport to

be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice, or some other minister of state; and all courts of justice, justices and magistrates, shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

If the fugitive be charged with the violation of a law of a State or Territory, his delivery will be required to be made to the authorities of such State or Territory.

If the offense charged be a violation of a law of the United States (such as piracy, murder on board of vessels of the United States, or in arsenals or dockyards, etc.), the delivery will be required to be made to the officers or authorities of the United States.

Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only where the offense is against its own laws.

PROVISIONAL ARREST.

Applications, both by telegraph and by letter, are frequently made to this Department for its intervention to obtain the arrest and provisional detention of fugitives from justice in England, Scotland, or Ireland in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. In such cases the only manner in which the Department can intervene is by informing the ambassador of the United States in London of the facts and instructing him to take the necessary measures. This the ambassador does by authorizing some one connected with the embassy to make complaint on oath before a magistrate, in accordance with the requirements of the British extradition act of 1870. The form of this complaint is hereto annexed as appendix 2. Attention is invited to its provisions, and especially to the statement deponent is required to make that he is informed and believes that a warrant has been issued in the foreign country for the arrest of the accused. This Department, when requested to intervene in such a case, should always be enabled to inform the ambassador that such a warrant has been issued, in order that the complaint before the British magistrate may be made in due form and without delay.

APPENDIX 1.

The tenth article of the treaty between the United States and Great Britain, concluded August 9, 1842, provides for the surrender of criminals for (1) murder, (2) assault with intent to commit murder, (3) piracy, (4) arson, (5) robbery, (6) forgery, (7) the utterance of forged paper.

The convention concluded July 29, 1889, provides for extradition for the following additional offenses:

1. Manslaughter, when voluntary.
2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.
3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.
5. Perjury, or subornation of perjury.
6. Rape; abduction; child-stealing; kidnapping.
7. Burglary; house-breaking or shop-breaking.
8. Piracy by the law of nations.
9. Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievious bodily harm.
10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries.

By the seventh article of the convention of 1889, it is stipulated as follows:

"The provisions of the said tenth article (of the treaty of 1842) and of this convention shall apply to persons convicted of the crimes therein respectively named and specified whose sentence therefor shall not have been executed."

The eighth article of the convention of 1889 is as follows: "The present convention shall not apply to any of the crimes herein specified which shall have been committed, or to any conviction which shall have been pronounced, prior to the date at which the convention shall come into force."

The ninth article provides that the convention "shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the high contracting parties." The convention was proclaimed both in the United States and in Great Britain March 25, 1890, and thus came into force in both countries April 4, 1890.

APPENDIX 2.

(Form of information used in obtaining provisional warrants of arrest in the United Kingdom of Great Britai nand Ireland.)

METROPOLITAN POLICE DISTRICT, *to wit:*

The information of ———, of ———, taken on oath this —— day of ———, in the year of our Lord one thousand eight hundred and ———, at the Bow Street Police Court, in the county of Middlesex, and within the Metropolitan police district, before me, the undersigned, one of the magistrates of the police courts of the metropolis, sitting at the police court aforesaid, who saith that ——, late of ——, is accused [or convicted] of the commission of the crime of ——— within the jurisdiction of ———, and now suspected of being in the United Kingdom. I make this application on behalf of the ——— Government.

I produce ———.

I am informed and verily believe that a warrant ——— has been issued in ——— for the arrest of the accused; that the said Government will demand h— extradition in due course, and that there are reasonable grounds for supposing the accused may escape during the time necessary to present the diplomatic requisition for h— surrender, and I therefore pray that a provisional warrant may issue under the provisions of 33 and 34 V., c. 52, s. 8.

Sworn before me, the day and year first above mentioned, at the police court aforesaid.

Rules as to Mexico.

The practice of extradition between the United States and Mexico became the subject of careful consideration and exposition in the case of Leonardo Gonzalez, whose surrender, as requested by the governor of Texas, the Mexican government declined to grant. As Gonzalez was a Mexican citizen, it was at first supposed that the refusal to deliver him up was due to an indisposition on the part of the Mexican government to exercise, as the United States had done in the case of Mrs. Rich, the discretion vested by the treaty in the contracting governments to surrender their own citizens. The Mexican government, however, disclaimed any such motive; and, as the result of the correspondence, a conference was held at the Department of State, Jan. 25, 1900, between Mr. Aspiroz, the Mexican ambassador, and Judge Penfield, the Solicitor of the Department, at which the Mexican law was explained.

Mr. Hay, Sec. of State, to the governors of the States, circular, March 26, 1900, 244 MS. Dom. Let. 5.

See, also, Mr. Hay, Sec. of State, to the Mex. ambassador, No. 64, Jan. 12, 1900, MS. Notes to Mex. Leg. X. 509.

The points in discussion between the Mexican ambassador and Judge Penfield related to Art. IV.; par. 3, Art. VIII.; and Art. X., of the treaty of February 22, 1899.

With regard to the case of Gonzalez, Mr. Aspiroz declared that the sole reason for refusing his extradition was that the existence of the *corpus delicti* was not duly proved. He was charged with murder; and the proof, to justify his arrest and commitment for trial, must, said the ambassador, conform to the laws of the State of Coahuila, where he was found, and to the Federal extradition act of May 19, 1897, in all things not otherwise provided for by the treaty. According to the code of penal procedure of Coahuila, which was in this respect substantially the same as that in force in the other States, in the Federal District, and in the Territories of Mexico, "the basis for a criminal proceedings is the proof of the existence of an act or that of an omission, which law considers to be a delict; without such proof no further proceedings can be had." In cases of homicide, the law requires an autopsy upon the body of the deceased, if possible; if this is not possible, and secondary proof is produced, such proof must, if possible, be passed upon by experts; and it is only when it is "absolutely impossible" to obtain the opinion of experts, that the testimony of other witnesses, who may have seen the corpse and the wounds, or who may otherwise know the facts of the crime, may be received, to establish "the certainty, or a great probability," that a homicide has been committed, "and at least a suspicion as to who may have caused it." The ambassador observed that he understood these provisions of law to be substantially in accord with those that prevailed in the United States.

Judge Penfield inquired whether the Mexican Government would grant Gonzalez's extradition if a second demand should be presented, fortified with new evidence.

The ambassador replied that he found no legal objection to the presentation of a second demand; but that, in his personal opinion, certain

new evidence which had been offered would not be satisfactory, since it consisted of the depositions of two children, aged 14 and 12, which were considered as among the weakest proofs that could be produced.

As to the "authenticated copy of the law of the demanding party, which defines the crime and establishes its punishment," required by par. 3 of Art. VIII. of the treaty, the ambassador agreed with Judge Penfield that this requisite applied only to the crimes specified in secs. 19 and 21 of Art. II. "Finally, they both were of the opinion that Article I. devolves the surrender of the accused to each one of the contracting Governments, respectively; that Article VIII. prescribes that the demands made in conformity thereto should be presented by the diplomatic agents, and that only in their absence by the superior consular officers of each one of the contracting parties, or in the cases mentioned in Article IX., by the first civil, military, or judicial authority of the proper frontier State or Territory, and that in conformity with those prescriptions Article X. requires that the diplomatic channel should be resorted to in order to obtain the provisional arrest of the accused and his safe custody, while the demand for his extradition is completed, and that each of the contracting Governments are required to endeavor to render efficient these precautionary measures; or in other words, that all demands in extradition cases should be addressed by one of the two contracting Governments to the other through the channel of its respective diplomatic agent, excepting in the cases specified in the first paragraph of Article VIII. and Article IX. of the treaty."

In the course of the conference, the ambassador handed to Judge Penfield a copy and English translation of the articles of the code of criminal procedure of the State of Coahuila, relating to the subject under discussion, as follows:

Artículos del Código de Procedimientos penales del Estado de Coahuila relativos á la comprobación del cuerpo del delito.

Art. 133. La base del procedimiento criminal es la comprobación de la existencia de un hecho ó la de una omisión que la ley reputa delito: sin ella no puede haber procedimiento ulterior.

Art. 134. Todo juez que adquiera conocimiento de que se ha cometido un delito, si existe el objeto material sobre el cual ha sido cometido, deberá hacer que se extienda una acta en que se describan minuciosamente los caracteres y señales que presente la lesión, ó los vestigios que el delito haya dejado, el instrumento ó medio con que probable ó necesariamente haya debido cometerse y la manera de que se haya hecho uso

Articles of the Code of Criminal Procedure of the State of Coahuila relative to the proof of the corpus delicti in criminal cases.

Art. 133. The basis for a criminal proceeding is the proof of the existence of an act or that of an omission which the law considers to be a delict; without it no further proceedings can be had.

Art. 134. Any judge who may obtain knowledge that a delict has been committed, if the material object on which it has been committed should exist, ought to have a report made wherein the character and signs presented by the hurt, or the traces which may be left by the delict shall be minutely described, as well as the instrument or means with which it may probably or necessarily have been committed, and

del instrumento ó medio para la ejecución del delito. El objeto sobre que éste haya recaido, se describirá de modo que queden determinadas su situación y cuantas circunstancias puedan contribuir á indagar el orígen del delito, así como su gravedad y los accidentes que lo hayan acompañado. Esta acta se llama de descripción.

Art. 135. Además de la acta de descripción se extenderá otra de inventario, si se encontraren algunos instrumentos ú otras cosas que puedan tener relación próxima ó remota con el hecho mismo. Cuando los objetos encontrados fueren pocos y se hallaren en el mismo sitio ó á las inmediaciones del lugar en que se cometió el hecho, el acta de descripción podrá contener el inventario de aquellos.

Art. 141. En el acto de la inspección del lugar en que se cometió el delito, el juez debe examinar á todas las personas que puedan proporcionar algun esclarecimiento sobre el delito y sobre sus autores y cómplices, ó algunas noticias útiles para la averiguación de la verdad ó designar otras personas que puedan darlos.

Art. 148. Si el delito fuere de homicidio ú otro caso de muerte por causa desconocida y sospechosa ó solamente sospechosa, se procederá al examen del cadáver con intervención de peritos, y se ordenará su autopsia extendiéndose diligencia formal con expresión circunstanciada de la postura en que se halle el cadáver, del número de heridas ó lesiones, de las partes del cuerpo en que las tiene, del vestido y demás efectos que se encontraren y de las señales que se adviertan en el terreno inmediato.

the manner in which the instrument may have been used for the execution of the delict. The object on which the delict may have been committed, shall be described in such a way that its situation and any circumstances that may contribute to determine the origin of the delict shall be set forth, as well as the gravity and the accidents that may have accompanied the delict. This report shall be called the description of the delict.

Art. 135. Besides the description of the delict there shall be made an inventorial report, if there should be found any instruments or other things that may have a proximate or remote relation to the act itself. Should the objects found be few and be discovered in the same place or near by the place where the act was committed, the report containing the description may also comprise the inventory of such articles.

Art. 141. During the official investigation relative to the place where the delict was committed, the judge ought to examine all persons whose testimony may throw light on the delict and on its principals and accomplices, or afford any information that may be useful for the investigation of the truth, or designate some other persons who may be able to give such testimony.

Art. 148. If the delict should be homicide, or any other case of death owing to an unknown and suspicious cause, or simply owing to a suspicious cause, the examination of the corpse shall be proceeded with the attendance of experts, and the autopsy of the body shall be ordered, and a report be made stating with precision the position in which the corpse is found, the number of wounds or hurts, the portions of the body where the same may be discovered, the clothing and other articles that may be found, and any marks or signs that may be discovered in the immediate vicinity of the place.

Art. 149. Antes de procederse á la autopsia del cadáver se comprobará su identidad por medio de sus parientes ó amigos, que serán examinados en debida forma, para que declaren el nombre del muerto, su profesión y vecindad, las señas personales y las ropas que vestía cuando salió de su casa.

Art. 150. Si no se puede indentificar el cadáver, se describirán las señas particulares que tuviere, sus facciones, sus vestidos ó cualquiera otro objeto que se le encuentre; y si el estado del cadáver lo permite, se le expondrá al público por las horas que el juez crea conveniente, á fin de que pueda ser visto y reconocido, sacándose además, si fuere posible, retratos fotográficos de los cuales se agregará uno á los autos y se mandarán fijar los demás en los lugares públicos, cuando no se haya podido obtener aquel reconocimiento.

Art. 152. Si se hubiere sepultado el cadáver antes de practicar las diligencias anteriores, se ordenará su exhumación cuando el juez lo juzgue necesario ó lo soliciten las partes acusadoras, por su cuenta, observando las debidas precauciones higiénicas y asistencia de peritos, y practicándose en seguida las diligencias que fueren posibles de las que mencionan los antecedentes artículos.

Art. 153. Cuando por cualquiera causa *no pueda formarse juicio pericial con el examen del cadáver, ó éste no pueda exhumarse, aquel juicio se suplirá con las declaraciones de los testigos que hubieren visto antes el cadáver y las lesiones que haya tenido. Estos testigos manifestarán en que parte del cuerpo existían las lesiones, indicarán las armas con que creen que se hayan hecho y dirán si son de opinión que*

Art. 149. Before beginning the autopsy of the corpse, its identity must be proved by means of the relatives or friends of the deceased, who shall be examined in legal form so that they may testify as to the name of the deceased, his profession and residence, his personal description and the clothing he wore when he left his house.

Art. 150. Should it not be possible to identify the corpse, the peculiar description of the deceased, as well as his features, his clothing and any other article that may be found on him shall be recorded; and if the condition of the corpse should permit, it may be exposed for inspection by the public during the hours which the judge may deem proper, so that it may be seen and recognized and, if possible, photographs shall be taken of the body and one of them shall be added to the record and the rest shall be affixed in public places if the corpse shall not have been identified.

Art. 152. If the corpse shall have been buried before the foregoing proceedings can be had, an order shall be issued so as to have it exhumed, should the judge think this proceeding be proper or the complainants demand it at their expense; all due hygienic precautions being taken and the exhumation being carried on in the presence of experts, and thereupon such proceedings as are mentioned in the foregoing articles shall, if possible, be carried on.

Art. 153. Whenever, owing to any circumstances, *no examination can be made by experts, or the corpse cannot be exhumed, such proceedings shall be substituted by the testimony of the witnesses who shall have seen the corpse before, as well as the hurts that it may have had. Said witnesses shall state in what part of the body the hurts existed and shall testify as to the arms with which they may believe that said*

todas ó algunas de las lesiones hayan ocasionado la muerte.

Art. 154. En caso de que el cadáver no pueda encontrarse, el juez comprobará la existencia de la persona, el tiempo que haya trascurrido desde que no se tenga noticia de ella, el último lugar en que se le haya visto, y cómo el cadáver haya podido ser ocultado ó destruído. Además recogerá todos los medios de prueba que conduzcan á la comprobación ó existencia del cuerpo del delito.

Art. 155. Los peritos darán su declaración sobre la causa de la muerte, manifestando en qué tiempo más ó menos próximo pudo acontecer éste, y si fué á consecuencia de las lesiones ó antes de ellas, ó por el concurso de causas preexistentes ó de las que sobrevinieron ó de otras extrañas al delito, teniendo presente lo que disponen los artículos 544, 545, y 546 del Código penal. Cuando los peritos no se expliquen respecto de estas circunstancias, el juez de oficio les interrogará acerca de ellas.

Art. 156. Si se tratare de alguna persona herida ó golpeada, el juez, acompañado de los peritos, describirá las lesiones ó golpes, indicará el lugar en que estén, y señalará su longitud, anchura y profundidad ostensible, si hubiere peligro en averiguar cual sea la profundidad real. Hará que los peritos expresen la calidad de las lesiones y si están hechas con armas de fuego, ó con armas punzantes, cortantes ó contundentes, ó de otro modo.

Art. 157. *Si los peritos no pudieren ser habidos desde luego, el juez procederá sin su asistencia*, en los términos del artículo anterior.

hurts were made, and will state if, in their opinion, all or any of the said hurts shall have brought about the death of the deceased.

Art. 154. Should it not have been possible to find the corpse, the judge must obtain proofs as to the existence of the individual, the time that may have elapsed since no news have been received regarding him, the last place where he may have been seen, and how the corpse could have been hidden or destroyed. Furthermore, he shall obtain all means of proof that may lead to the evidence or existence of the *corpus delicti*.

Art. 155. The experts shall give their opinion regarding the cause of death, the approximate time when that event may have occurred, and if the death occurred owing to the hurts or before these were inflicted, or owing to a combination of preexisting causes or of those that occurred afterwards, or to others entirely foreign to the delict, and for that purpose they shall take into consideration the prescriptions of articles 544, 545, and 546 of the Penal Code. Whenever the experts shall not give any explanation regarding such circumstances, the judge *ex officio* must interrogate them concerning the same circumstances.

Art. 156. If the case may be of a person wounded or beaten, the judge, assisted by experts, shall describe the wounds or blows and determine the site and the length, breadth and apparent depth thereof, should there be any danger of determining its real depth. He shall require the experts to express the nature of the hurts and whether they were caused by fire, cutting, or pointed arms, or by bruising instruments, or in any other manner.

Art. 157. *If it is not possible to obtain experts at once, the judge shall proceed with his investigation without them*, in conformity with the prescriptions of the foregoing article.

Artículos 544, 545, y 546 del Código penal citados en el artículo 155 del Código de Procedimientos penales.

ART. 544. Para la imposición de la pena no se tendrá como mortal una lesión sino cuando se verifiquen las tres circunstancias siguientes:

I. Que la lesión produzca por sí sola y directamente la muerte; ó que aun cuando ésta resulte de causa distinta, esa causa sea desarrollada por la lesión ó efecto necesario ó inmediato de ella.

II. Que la muerte se verifique dentro de sesenta días contados desde él de la lesión.

III. Que después de hacer la autopsia del cadáver, declaren dos peritos que la lesión fué mortal, sujetándose para ello á las reglas contenidas en este artículo y en los dos siguientes.

ART. 545. Siempre que se verifiquen las tres circunstancias del artículo anterior, se tendrá como mortal una lesión, aunque se pruebe que se habría evitado la muerte con auxilios oportunos: que la lesión no habría sido mortal en otra persona; ó que lo fué á causa de la constitución física de la víctima, ó de las circunstancias en que recibió la lesión.

ART. 546. Como consecuencia de las declaraciones que preceden, no se tendrá como mortal una lesión, aunque muera el que la recibió; cuando la muerte sea resultado de una causa que ya existía y que no sea desarrollada por la lesión, ni cuando ésta se haya vuelto mortal por una causa posterior á ella como la aplicación de medicamentos positivamente nocivos, operaciones quirúrgicas desgraciadas ó excesos ó imprudencias del paciente ó de los que lo asistan.

Articles 544, 545, and 546 of the Penal Code referred to in Art. 155 of the Code of Criminal Procedure.

ART. 544. For the infliction of punishment, a hurt shall not be considered mortal, unless the three following circumstances shall have occurred:

I. That the hurt by itself and directly shall produce death; or that even if death shall have occurred from another cause, the latter cause shall be due to the hurt or be the immediate or necessary result of the same.

II. That death shall occur within sixty days after the hurt may have been inflicted.

III. That after the autopsy of the corpse may be had, two experts shall have declared that the hurt was mortal, in conformity for such purpose with the rules contained in this article and the two following.

ART. 545. Whenever the three circumstances named in the foregoing article may occur, the hurt shall be considered mortal, although it may be proved that death could have been prevented by opportune help; that the hurt would not have been mortal in another person; or that it was mortal owing to the physical constitution of the deceased or to which occurred when he received the hurt.

ART. 546. As a result of the foregoing statements, a hurt shall not be considered mortal, even if the person who received it may die, when death shall have been the result of a cause already existing and may not have been due to the hurt, nor when the hurt shall become mortal through a cause occurring thereafter, as the application of medicines really noxious, unfortunate surgical operations, or abuses, or imprudent acts of the patient or of those who may have assisted him.

Subsequently, the Mexican ambassador, at Judge Penfield's request, prepared a memorandum on the formalities to be observed in extradition under the treaty of Feb. 22, 1899. This memorandum, with corrections subsequently made by the ambassador, is as follows:

"1. Every requisition for extradition under the provisions of the treaty between the United States of American and Mexico shall be accompanied either by a copy of the sentence of the court in which the extraditable person was convicted, or by papers proving that the alleged crime or offense has been committed and that there are presumptions against the accused. The requisition shall, in all cases, be also accompanied by a description of the accused, in order to establish his identity with the person whose extradition is demanded.

"2. The corpus delicti of homicide in cases of a person not yet sentenced must be established by ocular inspection of the corpse and by medical testimony. If scientific evidence can not be had, upon their impracticability being set forth, the testimony of reliable persons (experts to be preferred) or other proper evidence may be produced.

"3. The general rule shall always be that, in order to prove the existence of the corpus delicti, which is a requisite for the arrest and commitment for trial of a person charged with the crime or offense, the best evidence the nature of the case admits of shall be presented, if possible to be had; but if not possible, then the best that can be had may be allowed.

"4. The testimony of witnesses under fourteen years or of other disqualified persons will not be admitted, unless the circumstances of the case show that better evidence can not be had.

"5. Each witness must explain satisfactorily the manner in which the facts asserted by him or came to his or her knowledge.

"6. The provision contained in the third paragraph of Article VIII of the treaty for the addition of 'an authenticated copy of the law of the demanding country defining the crime or offense' shall be observed only when the extradition is demanded for a crime or offense under the numbers 19 or 21 of the schedule of Article II.

"7. In the cases of crimes or offenses committed or charged to have been committed by extraditable persons in any of the frontier States or Territories, requisitions for surrender may be made either through the diplomatic or consular agents of the demanding country, or through the authorities of such bordering State or Territory enumerated in Article IX of the treaty. In all other cases requisitions shall be made by the respective diplomatic agents, or, in their absence, by the superior consular officers, as prescribed by the first paragraph of Article VIII.

"8. The provisional arrest authorized by Article X of the treaty must invariably be requested through the diplomatic or consular agent, whether the crime or offense was committed or charged to have been committed in the frontier States or Territories, or elsewhere." (Mr. Hay, Sec. of State, to the governors of the States, April 10, and May 14, 1900, 244, MS. Dom. Let. 251, 245 id. 97.)

IX. *MANDATE.*

§ 607.

Under the Webster-Ashburton treaty of 1842 a requisition for a fugitive is not necessary to a preliminary examination upon which the evidence of criminality is to be heard and considered, when such

examination is with a view only to the surrender after the ascertainment of the facts showing the party charged to be in a condition which justifies the apprehension and commitment for trial according to the laws of the place where he or she shall be found.

Nelson, At. Gen., 1843, 4 Op. 201.

Complaint on oath was presented on June 14, 1852 to a commissioner of the United States by the British consul at New York, charging that Thomas Kaine had committed a murder in Ireland, and stating also that a warrant had been issued for his apprehension in Ireland; that he was in the United States; and requesting his apprehension for extradition under the treaty of 1842. The commissioner, after an arrest and examination, ordered him to be committed for extradition, to abide the order of the President, and he was held in custody by the marshal. A writ of habeas corpus issued from the circuit court, which was dismissed. Application was made to the Supreme Court for a writ of habeas corpus. On this application, four of the judges held that the writ should be refused on the merits. It was held, however, by the Chief Justice and two of the judges that no proceedings under the treaty could be entertained without a requisition made on the President, and his authority obtained for that purpose; and that a United States commissioner was not an officer within the treaty or acts of Congress to hear and determine the question of criminality; and one justice held that the court had no jurisdiction to grant the writ asked, but did not express an opinion on the merits.

In re Kaine, 14 How. 103.

The prisoner was afterward brought before Mr. Justice Nelson at chambers, and discharged. (Ex parte Kaine, 3 Blatchf. 1.)

On August 31, 1853, an opinion was given by Mr. Cushing, Attorney-General, to the effect that under the opinions in Kaine's case, 14 How., 103, it might be advisable, under the extradition treaty with Great Britain, for a "mandate" to issue from the executive department "to move to action the proper judicial authorities of the country, in order to the arrest and lawful examination of the party charged with crimes, and the investigation thereof for the information of the Government."

Cushing, At. Gen. 1853, 6 Op. 91.

After the reception of this opinion, the practice grew up in the Department of State of issuing documents in the nature of certificates that requisitions had been received. These certificates, which were variously called "mandates" or "warrants," were issued only when applied for, and therefore in most cases were not issued, the application for arrest being made directly to the commissioner or judge.

The President may initiate extradition proceedings without requiring such proof as would justify extradition.

Cushing, At. Gen., 1853, 6 Op. 217.

When, however, a preliminary certificate of the President is by treaty or otherwise required, it has been held that a mere notification by the local officer of a foreign government of the escape of an alleged criminal is not sufficient *prima facie* evidence of a case to call for such preliminary action of the President.

Cushing, At. Gen., 1854, 7 Op. 6.

A foreign *mandat d'arrêt*, setting forth the offense of a fugitive from the justice of a foreign country, within the terms of any treaty of extradition, such *mandat* coming through the proper political channel, is sufficient foundation for the issue of the President's mandate authorizing the institution of proceedings before the judicial authorities of the United States.

Cushing, At. Gen., 1855, 7 Op. 285.

A competent magistrate may take jurisdiction of an extradition case, without the previous issue of the mandate of the United States; but the extradition cannot take place until a requisition has been made by the proper "authorities" of the demanding government to the Secretary of State, and favorably acted upon. The proper "authorities" are such executive agents or officers of the foreign government as may be entitled to recognition for that purpose at the department of foreign affairs. The requisition need not come through a regular diplomatic minister. The government applied to may, in its discretion, recognize whom it will as agent *ad hoc* to make the requisition.

Cushing, At. Gen., 1856, 8 Op. 240.

The act of Congress does not require or authorize the issuing of any warrant by the State Department in an extradition case until the facts are judicially ascertained and certified.

Black, At. Gen., 1859, 9 Op. 379.

It is sufficient if the mandate charge the offence in the terms of the treaty.

In re Macdonnell, 11 Blatchf. 79.

"This provision of the statutes of the United States (Rev. Stat. U. S., § 5270) is deemed by this Government to be in aid of the provisions of the convention, and the provisions of Article XI. of the convention (of Jan. 5, 1877, with Spain) are held to be directory

only. Under these circumstances the warrant of authorization from the Secretary of State is not considered as indispensable. It may often happen that an instant arrest is expedient in order to secure the accused fugitive for examination into his criminality, and in such emergencies the delay incident to procuring the warrant of authorization from this Department might defeat the purposes of justice.

"The personal rights, moreover, of the accused are secured by the provisions of the convention no less than by those of the statute, inasmuch as he can only be surrendered on satisfactory evidence of his criminality."

Mr. Frelinghuysen, Sec. of State, to Mr. Barca, May 23, 1882, MS. Notes to Spain, X. 204.

"After a careful examination of the treaty now in force between the United States and Great Britain in reference to extradition, I have come to the conclusion that it is neither necessary nor proper that any mandate or other authorization should issue from this Department as a preliminary to arrest by the commissioners or other judicial officers in whom the function of arrest and examination in such cases is specifically vested. I am strengthened in this conclusion by the fact that in all cases in which the question had come up before the judicial department of this Government it has been held that, under the treaty in question and the distinctive legislation of the United States, no such preliminary process of this Department is requisite. It is proper, also, to observe that this seems to be the general sense of those who represent Her Majesty's Government in such process, since in most cases the application for arrest is made directly to the commissioner, or other judicial authority vested with the jurisdiction, the case not coming before this Department until the application for surrender."

Mr. Bayard, Sec. of State, to Mr. West, Feb. 16, 1886, MS. Notes to Gr. Brit. XX. 189.

December 4, 1886, the Mexican minister at Washington asked that the Department of State, pending the receipt of a formal requisition, cause orders to be issued for the arrest of one Mayer who, falsely representing himself as an agent for the sale of season tickets for an operatic performance by the company of Madame Adalina Patti, obtained the sum of $20,000 and absconded with it. The Department of State replied that, in its opinion, the provisions of sec. 5270, Revised Statutes, were sufficient for the purpose of obtaining the fugitive's arrest, and that the Department was not authorized to take any action at that stage of the case.

Mr. Romero, Mexican min., to Mr. Bayard, Sec. of State, Dec. 4, 1886, For. Rel. 1887, 868; Mr. Bayard to Mr. Romero, Dec. 8, 1886, ibid.

See, also, Mr. Romero to Mr. Bayard, Dec. 8, 1886; Mr. Bayard to Mr. Romero, Dec. 15, 1886; Mr. Romero to Mr. Bayard, Dec. 15, 1886: For. Rel. 1887, 869–870.

See, further, Mr. Bayard, Sec. of State, to Mr. Parkhurst, chargé at Brussels, No. 18, Jan. 28, 1889, For. Rel. 1889, 50.

In the case above mentioned, the prisoner, on his arrival in New York, was arrested on a warrant issued by a commissioner of the circuit court, without the intervention of the Department of State, upon a complaint made before him by the consul-general of Mexico at the city of New York, charging the fugitive with having committed the crime of forgery in Mexico. The prisoner, after being duly examined and committed for extradition, applied for a writ of *habeas corpus*. The writ was discharged, and he appealed to the Supreme Court of the United States. By the unanimous judgment of this tribunal, delivered by Mr. Justice Miller, it was held that under sec. 5270, Revised Statutes, a preliminary mandate was unnecessary. There was no evidence in the record, said Mr. Justice Miller—at least there was no copy—of any demand or requisition made by the Mexican authorities for the prisoner's extradition. The proceedings, therefore, rested up to that time upon the initiative authorized by the statute, the Mexican Government, however, being represented by counsel, and the correspondence with its officers, which was introduced into the record, showing its interest in the matter and its purpose to have the prisoner brought to trial in that country. The court held this to be sufficient.

Benson *v.* McMahon, 127 U. S. 457.

"This judgment settles the point that under sec. 5270 of the Revised Statutes of the United States a fugitive from the justice of a government with which the Government of the United States has a treaty or convention of extradition may be arrrested in this country and held for examination on the charge of having committed in the foreign country an offence specified in such treaty or convention, without any previous intervention on the part of the President or proof that a requisition has been made." (Mr. Bayard, Sec. of State, to Mr. Parkhurst, No. 18, Jan. 28, 1889, For. Rel. 1889, 50, 53.)

See In re Orpen, 86 Fed. Rep. 760; In re Adutt, 55 id. 376, following Benson *v.* McMahon.

See previous cases as follows: In re Farez, 7 Blatchf. 34; In re Macdonnell, 11 id. 79; In re Thomas, 12 id. 370; In re Kelley, 2 Lowell, 339; Ex parte Ross, 2 Bond, 252; Ex parte Van Hoven, 4 Dillon, 415.

See, generally, 1 Moore on Extradition, chap. x., p. 357 et seq.

Article VII. of the extradition treaty between the United States and Russia of March 16/28, 1887, provides that "it shall be lawful" for any competent judicial authority of the United States, upon the production of a certificate issued by the Secretary of State, stating that request has been made by the Russian Government for the pro-

visional arrest of a fugitive, and upon complaint duly made that an extradition crime or offence has been committed, to issue his warrant for the apprehension of the persons accused. In transmitting to the Russian minister such a certificate, the Department of State said: "I beg to inform you that under the decisions of our courts and the practice in this country it is believed that the provisional arrest desired would be granted by the judicial officer even in the absence of such certificate."

Mr. Gresham, Sec. of State, to Prince Cantacuzene, Russian min., Dec. 13, 1893, MS. Notes to Russia, VIII. 32.

See, to the same effect, with regard to the issuance of a mandate under the treaty with Spain, Mr. Gresham, Sec. of State, to Mr. Muruaga, Spanish min., Feb. 10, 1894, MS. Notes to Spain, XI. 23; and, with regard to the treaty with the Netherlands, Mr. Uhl, Act. Sec. of State, to Mr. de Weckherlin, Feb. 15, 1894, MS. Notes to Neth. VIII, 319.

After issuing the mandate, where one is provided for by treaty, the Department of State is unable to prosecute the proceedings further.

Mr. Gresham, Sec. of State, to Prince Cantacuzene, Russian min., June 4, 1894, MS. Notes to Russia, VIII. 55.

X. *PROCEDURE.*

1. Magistrates.

§ 608.

See sec. 5270, Revised Statutes of the United States; 1 Moore on Extradition, Chap. XI., p. 395.

A commissioner of the circuit court of the United States, specially appointed by the court to act in extradition cases, is a competent examining magistrate under the law and treaties.

Nelson, At. Gen., 1843, 4 Op. 201; Calder's case, Cushing, At. Gen., 1853, 6 Op. 91; Rice *v.* Ames (1901), 180 U. S. 371, 378.

A district judge may make the warrant returnable directly before a commissioner who is on the same day appointed to act in extradition proceedings; it need not be made returnable before himself.

Grin *v.* Shine (1902), 187 U. S. 181, 187.

A county judge in the State of Texas, being a judge of a court of record of general jurisdiction of that State, possesses authority, under section 5270, Revised Statutes of the United States, to entertain complaints in extradition cases, and a warrant of arrest issued by him

need not recite that he is authorized to act in such cases, since he does not need to be specially appointed for the purpose.

Ex parte McCabe, 46 Fed. Rep. 363.

It is not necessary that the proceedings be either carried on or approved by the attorney of the United States for the proper district.

Black, At. Gen., 1858, 9 Op. 246.

Attorneys of the United States are not required to appear for foreign governments in extradition cases.

Black, At. Gen., 1860, 9 Op. 497.

"I have the honor to enclose herewith translation of a note from the Mexican minister in this capital, stating that the United States commissioner at El Paso, Texas, from whom the governor of the state of Chihuahua asked the extradition of Demetrio Cortes and accomplices, returned the papers in the case on account of their not being translated.

"The Mexican Government considers this a new requirement, not contemplated in the treaty, and one which has never been observed by the United States when applying for extradition from Mexico; and the minister asks the opinion of this Government on the subject.

"In the case of Henrich, 5 Blatchford, 414, Judge Blatchford expressed the opinion that parties seeking the extradition of a fugitive should be required by the commissioner to furnish an accurate translation of every document offered in evidence which is in a foreign language. This Department concurs in what Judge Blatchford says on this subject; but, inasmuch as the treaty does not require translation of the evidence, the question arises whether the commissioner should formally reject and return the papers to the country seeking extradition because they, or some part of them, have not been translated. It would seem that, as a general rule, a defect of this character might be remedied while the case is pending before the commissioner, action being suspended until satisfactory translations are furnished.

"In order that this Department may be able to answer the Mexican minister's inquiry, I have the honor to request that you will give me the benefit of your opinion."

Mr. Olney, Sec. of State, to the Attorney-General, Oct. 20, 1896, 213 MS. Dom. Let. 299.

It was advised, in accordance with the view indicated by Mr. Olney, that the commissioner should, instead of rejecting and returning the papers in the first instance, notify the demanding government that a translation of them was required, and make a liberal allowance of time for the production of such a translation; and it was added that,

while the treaty did not in terms require the papers to be translated, yet the proceedings must accord with the procedure in the tribunals whose jurisdiction was invoked, and, inasmuch as the commissioner was made the judge of the weight and sufficiency of the evidence on which the extradition was sought, the evidence must be presented in language that was intelligible to him.

Conrad, Act. At. Gen., Oct. 24, 1896, 21 Op. 428.

That the documentary evidence must be translated and a translation presented, with the original documents, before the magistrate, is stated in Mr. Hay, Sec. of State, to Mr. Wilde, No. 19, March 20, 1901, MS. Notes to Argentine Leg. VII. 74.

"The proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him."

Benson *v.* McMahon (1888), 127 U. S. 457, 463.

In the examination of certain persons with a view to their extradition to Salvador under the treaty between the United States and that country, Judge Morrow, sitting in the district court of the United States for the northern district of California as a committing magistrate, said: "The defendants having been found within the territory of the State of California, the law of this State must furnish the rule of procedure in this examination." This statement was made with reference to the question of the amount of proof which should be required in order to commit the fugitive for surrender.

In re Ezeta, 62 Fed. Rep. 972, 981.

During the hearing of an extradition case motions were made to strike out certain parts of the documentary evidence on the ground that it was either incompetent, irrelevant, or immaterial, as, for instance, that it was clearly hearsay. Motions of this kind were at first allowed, but the court, doubting the propriety of its ruling, afterwards suggested that a motion to strike out was unnecessary, as it would disregard the testimony which might be deemed inadmissible under the rules of evidence prevailing in the United States.

In re Ezeta, 62 Fed. Rep. 972, 985; Case of the Salvadorean Refugees, Am. Law Rev., Jan.–Feb., 1895, 18.

In the case of the Salvadorean refugees, in 1894, Judge Morrow, of the United States district court for the northern district of California, sitting as a committing magistrate, refused to admit the prisoners to bail, on the ground that there was no provision for it either in the statutes or the treaty.

Case of the Salvadorean Refugees, Am. Law Rev., Jan.-Feb., 1895, 18.

The court, in refusing an application for bail, said: "The only case found in our reports which deals with the subject of bail in international extradition proceedings is adverse to petitioner. In re Carrier (D. C.) 57 Fed. Rep. 578."

In re Wright (1903), 123 Fed. Rep. 463, 464.

The court, while holding that bail could not ordinarily be granted in extradition cases, and while refusing to disturb an order of the court below refusing bail, observed that it was unwilling to hold that the circuit courts might not in any case or in any circumstances extend that relief. The court also observed, however, that sec. 5270, R. S., was inconsistent with the allowance of bail after commitment for surrender.

Wright *v.* Henkel (1903), 190 U. S. 40.

In the case of the Salvadorean refugees, in 1894, Judge Morrow, of the United States district court for the northern district of California, sitting as a committing magistrate, permitted the prisoners in the extradition proceedings to testify in their own behalf under the law of California, as well as under the statute of the United States giving the defendant the right to testify in all cases.

The case of the Salvadorean Refugees, Am. Law Rev., Jan.-Feb., 1895, 18.

The old doctrine that extradition proceedings are to be conducted with extreme technicality has been abandoned. The proceeding before the commissioner is not to be treated as if it were a trial before a petit jury.

In re Breen, 73 Fed. Rep. 458.

"In reply to your . . . question, 'Whether there exists in the United States any uniform criminal procedure, that is to say, whether the same laws and rules are in force in relation to criminal procedure in all the States, or whether the laws concerning such procedure are different in the different States,' I have to say that the criminal code of the United States applies only to offenses defined by the General Government, or committed within its exclusive jurisdiction, or upon the high seas, or some navigable water, and that each State estab-

lishes and regulates its own criminal procedure, as well with respect to the definitions of crimes as to the mode of procedure against criminals and the manner and extent of punishment."

Mr. Fish, Sec. of State, to Mr. Westenberg, Dutch min., Nov. 12, 1873, For. Rel. 1874, 785, 786.

The question of holding the prisoner for further examination is one for the magistrate to determine.

Cushing, At. Gen., 1853, 6 Op. 91.

Continuances of the examination may be granted in the discretion of the commissioner, and in this matter he is not controlled by a State statute limiting such continuances to ten days.

Rice *v.* Ames (1901), 180 U. S. 371.

2. COMPLAINT.

§ 609.

A complaint before a commissioner in an extradition case, verified by the consul of a foreign government, in which he charges the offense properly, is sufficient, if made by him officially, although he does not make the averments on his personal knowledge of the facts.

In re Farez, 7 Blatch. 345.

A complaint under section 5270, Revised Statutes, if made solely upon information and belief, without any attempt to set forth the sources of information or the grounds of affiant's belief, is bad; nor is it saved by the fact that affiant described himself "as government detective for the Province of Ontario, and duly authorized by the attorney-general to act as the agent of the government to prosecute extradition proceedings." The complainant, however, need not be a person having actual knowledge of the offence charged; but he may make the complaint on information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and the act of Congress.

Rice *v.* Ames (1901), 180 U. S. 371, 374.

Where a complaint stated that the complainant was the duly accredited official agent and representative of the Government of Austria-Hungary at Chicago, and he signed it as consul of that Government, it was held to be immaterial that he did not positively swear in the jurat that he was such consul.

In re Adutt, 55 Fed. Rep. 376.

A complaint under sec. 5270, R. S., may be made by any person acting under the authority of the foreign government having knowledge of the facts, or, in the absence of such person, by the official representative (e. g., a consul) of the foreign government based upon depositions in his possession.

Grin *v.* Shine (1902), 187 U. S. 181, 193.

It is not necessary that the evidence before the commissioner should show that a requisition has been made by the foreign government, the complaint on which the fugitive was arrested having been made by the official agent of that government.

In re Adutt, 55 Fed. Rep., 376.

A complaint under section 5270, R. S., need not be accompanied by a warrant of arrest issued in the demanding country, even though the treaty provides that the application for extradition shall be accompanied by such a document.

Grin *v.* Shine (1902), 187 U. S. 181, 190.

Under sec. 5270, Revised Statutes, a requisition from the foreign government and a mandate from the Department of State are not necessary to the initiation of proceedings before an extradition magistrate in the United States, it being sufficient if it appears that the complainant is acting for the foreign government.

In re Orpen, 86 Fed. Rep. 760.

A complaint on oath, made by a duly authorized Canadian officer, alleged that the fugitive had been charged before a justice of the peace in Canada with a murder there committed; that a warrant for her arrest, the original of which was attached to the complaint, had been issued; and that the charge stated in the warrant was believed by complainant to be true. It was held that the complaint was sufficient to give the commissioner jurisdiction to issue his warrant of arrest.

Ex parte Sternaman, 77 Fed. Rep. 595.

Objection was made to a complaint on the ground that it was not made by authority of the demanding government. It was made by a person who was described in it as "a resident and citizen of Montreal," and the proceedings did not show that it was made at the request or by authority of the Canadian government. It had been shown at the hearing, however, that an agent had been appointed by the Canadian government to act in obtaining the extradition of the fugitive. Under the circumstances it was held that the prisoner was not entitled to discharge on habeas corpus. The court said that, while

the request or authority of the government within whose jurisdiction the offence was alleged to have been committed "must appear at some stage of the extradition proceedings, it need not be shown in the first instance."

In re Mineau, 45 Fed. Rep. 188.

The complaint need not set forth the offence with the precision and particularity of an indictment; it is sufficient if it set forth the substance of the offence in such manner that the court can see that the crime charged is one of those enumerated in the treaty.

In re Adutt, 55 Fed. Rep. 376; Rice *v.* Ames (1901), 180 U. S. 371, 378; Grin *v.* Shine (1902), 187 U. S. 181, 189.

A complaint which, in charging embezzlement, alleges that "the accused wrongfully, unlawfully and feloniously appropriated said money" is not invalid because it does not add the word "fraudulenty," since the term "embezzlement" itself implies fraudulent conduct on the part of the person receiving the money.

Grin *v.* Shine (1902), 187 U. S. 181, 189.

A complaint containing various counts, some of which purport on their face to be made on the personal knowledge of the complainant, is not invalidated by the presence of a count based merely on information and belief.

Rice *v.* Ames (1901), 180 U. S. 371, 376.

The oath to the complaint need not necessarily be taken before a commissioner specially authorized to act in extradition proceedings, but the judge issuing the warrant may act upon a complaint sworn to before a United States commissioner authorized generally to take affidavits.

Grin *v.* Shine (1902), 187 U. S. 181, 186.

In an application for extradition under the treaty between the United States and Prussia of June 16, 1852, it was charged that the offences in question were committed "contrary to the laws of the Kingdom of Prussia." It appeared by the record that the proceedings in Prussia were taken under certain sections of the German imperial code, by which the particular laws of Prussia on the subject had been superseded. Held, that the provisions of the code, though prescribed by imperial authority, were in a proper sense laws of Prussia, which, as the record disclosed, were being administered as such by the Prussian court before which the charges were pending, and that the inquiry into the source of the laws of the demanding Government was not material.

Terlinden *v.* Ames (1902), 184 U. S. 270, 280–282.

Articles II. and IV. of the extradition treaty between the United States and Mexico of 1861, relating to requisitions for crimes commited in the frontier States and Territories, do not dispense with the making of a complaint on oath under section 5270, Revised Statutes, as a preliminary to the issuance of a warrant of arrest by a judicial magistrate in such cases.

Ex parte McCabe, 46 Fed. Rep. 653.

3. ARREST.

§ 610.

Objection was made to the issuance of a warrant by a commissioner of the circuit court of the United States for the arrest of a person for examination on charges of forgery and the utterance of forged paper under the treaty between the United States and Great Britain of 1842, on the ground that Congress had not expressly provided for the issuance of such a warrant in respect of arrest under that particular treaty. The court held that the practice of issuing warrants in such cases was governed by the general provisions of the Revised Statutes and was well settled.

In re Mineau, 45 Fed. Rep. 188, citing In re Herres, 33 Fed. Rep 165; Revised Statutes, §§ 5270, 5271.

The court also intimated an opinion that the general power in commissioners under sec. 727, Revised Statutes, to hold persons for security of the peace and good behavior, included "power to arrest in order to carry out treaty obligations." In this relation the court cited Wharton's Int. Law Dig. § 276b.

Although a United States marshal may execute a warrant of arrest issued by an extradition commissioner in another district or State, it is his duty to take the fugitive for examination before the nearest magistrate in the district in which the arrest is made.

Pettit *v.* Walshe (1904), 194 U. S. 205.

The warrant need only describe the offense in the words of the treaty.

Castro *v.* De Uriarte, 16 Fed. Rep. 93.

"I am just in receipt of your letter of this date, enclosing copy of a telegram addressed to the Navy Department by the commandant of the Navy Yard at Mare Island, saying the United States marshal for the northern district of California has requested that the *Bennington* be brought into the harbor of San Francisco, in order that he may serve warrants addressed to him by the district court of the United States for that district on Ezeta and companions. You ask for an

expression of the opinion of this Department as to the propriety of complying with this request.

"In reply, I have to say that I presume the marshal holds process directing him to arrest Ezeta and his companions and take them before the court on an application made by the Government of Salvador for their extradition under the treaty between that Government and the United States, and that I think the officer should be permitted to execute the process in his hands."

Mr. Gresham, Sec. of State, to Rear-Admiral Ramsey, Act. Sec. of Navy, Aug. 22, 1894, 198 MS. Dom. Let. 362.

This letter related to certain citizens of Salvador to whom the *Bennington* had granted asylum at La Libertad, in Salvador, on the fall of the Ezeta government. The Ezeta referred to in the letter was Gen. Antonio Ezeta, brother of Carlos Ezeta, the late president.

On an application made by the British Government for the extradition of a fugitive from justice by the United States, the arrest of the fugitive may be effected on a British vessel in United States waters.

In re Newman, 79 Fed. Rep. 622.

Second arrest.

The fugitive may be arrested a second time on a new complaint, either with or without a new mandate of the President.

Cushing, At. Gen., 1853, 6 Op. 91.

A discharge by a district judge of a person apprehended as a fugitive from justice does not preclude his rearrest under the warrant of another judge, with a view to a reexamination of the case.

Coffey, Act. At. Gen., 1863, 10 Op. 501.

A warrant for extradition, issued under section 3 of the act of August 12, 1848, can not be used to rearrest a person who has been discharged from the custody of the marshal.

Stanbery, At. Gen., 1866, 12 Op. 75.

While the alleged fugitive was lawfully held in custody, under a valid warrant of arrest, and the inquiry thereunder was being proceeded with, a second warrant, on a new complaint, for a distinct offense, was issued for his extradition. He was discharged subsequently from the arrest under the first warrant for want of sufficient evidence to justify his commitment, and he was thereafter arrested under the second warrant. It was ruled that the latter arrest was not invalid.

In re Macdonnell, 11 Blatch. 170.

A prisoner who has been discharged on habeas corpus, on the ground that the extradition commissioner, on whose warrant he was arrested, had no jurisdiction in the province in which he was found, may be arrested again when found in the province in which the commissioner has jurisdiction and may be examined before such commissioner, if the previous arrest was not fraudulently made for the purpose of bringing him within the jurisdiction.

Ex parte Seitz, 8 Rap. Jud. Que. B. R. (Canada), 392.

Provisional detention.

October 20, 1888, the American minister at Brussels was instructed by telegraph to request the detention of one Sambolino, then under arrest at Antwerp, pending the arrival of extradition papers charging him with forgery. The Belgian Government complied with the request, but remarked that in so doing it went beyond the stipulations of the extradition treaties between the two countries, besides adverting to the fact that in 1886 the United States postponed consideration of a proposal made by Belgium to add to the treaty an express clause to provide for arrests on telegraphic information. The Belgian Government betrayed an impression that provision was not made in the United States for the provisional detention of fugitives from justice.

Mr. Bayard, in reply, referred to the then recent decision of the Supreme Court in Benson *v.* McMahon, 127 U. S. 457, in which it was held that under sec. 5270 of the Revised Statutes a fugitive from the justice of a foreign government may be arrested in the United States and held for examination without any intervention on the part of the President or proof even that a requisition had been made, and added:

"Under this statute it is believed that there exists in the United States a very liberal system of provisional arrest and detention of fugitives from foreign justice, under which, upon oaths made on information and belief (a requirement which the preliminary mandate formerly issued by the Executive did not dispense with), such fugitives are constantly arrested and held without interference on the part of the executive branch of the Government of the United States to await examination before our judicial magistrates in accordance with our laws. No time is specified during which a fugitive may be so held; but the judicial officer decides in each case what term is reasonable under all the circumstances for the detention of the fugitive pending the reception of the formal proofs of his culpability and their examination. Save in cases in which the question of the necessity of executive interference was formally raised, this Department has received no complaints of the refusal of judicial magistrates to grant proper facilities. On the contrary, it is believed that such magistrates have generally construed their powers with as much liberality

as is consistent with the security which all persons, both citizens and foreigners, should enjoy against unfounded arrest and detention.

"It is hoped that this statement will prove satisfactory to the Belgian Government in respect to the subject of provisional arrest in the United States, and you are at liberty to communicate a copy of this paper to his excellency the minister of foreign affairs."

Mr. Bayard, Sec. of State, to Mr. Parkhurst, No. 18, Jan. 28, 1889, For. Rel. 1889, 50, 53.

See, as to provisional arrest and detention in the United States, Moore on Extradition, I. 395–407.

"Applications both by telegraph and by letter are frequently made to this Department for its intervention to obtain the arrest and provisional detention of fugitives from justice in England, in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. In such cases the only manner in which the Department can intervene is by informing the minister of the United States in London of the facts and instructing him to take the necessary measures. This the minister does by authorizing some one connected with the legation to make complaint on oath before a magistrate, in accordance with the requirements of the British extradition act of 1870. The form of this complaint is hereto annexed.

"Attention is invited to its provisions and especially to the statement deponent is required to make that he is informed and believes that a warrant has been issued in the foreign country for the arrest of the accused. This Department, when requested to intervene in such a case, should always be enabled to inform the minister that such a warrant has been issued in order that the complaint before the British magistrate may be made in due form and without delay."

Circular of Mr. Blaine, Sec. of State, to the governors of the States and Territories, Oct. 9, 1889, For. Rel. 1889, 466.

For the form of the complaint or information, enclosed with the circular, see supra, p. 361.

"It is a common practice for magistrates to issue warrants for the arrest of fugitives from justice, and to detain them for a reasonable time on complaint duly made before them by consular officers on the strength of telegraphic information received from their government. Without citing the numerous cases to this effect, the Department ventures to refer to that of Oteiza y Cortes *vs.* Jacobus, 136 U. S. 330, in which the complaint on which the fugitive was arrested and held for examination was based altogether on telegraphic information."

Mr. Moore, Assist. Sec. of State, to the Attorney-General, May 26, 1898, 227 MS. Dom. Let. 651.

By Article X. of the treaty between the United States and Mexico, of February 22, 1899, explicit provision is made for the provisional

arrest and detention of fugitives from justice, and it is provided that each government, on receiving a proper request, shall endeavor to procure the arrest of the criminal "and to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded."

In a case where the period thus indicated had nearly expired, it was suggested that the papers should be promptly forwarded to the examining magistrate, since there was "no provision under the laws of the United States for an extension of the period of provisional detention prescribed by the treaty."

Mr. Hill, Act. Sec. of State, to Mr. Aspiroz, Mexican ambass., No. 174, May 14, 1901, MS. Notes to Mex. Leg. X. 585.

The precise point of the Acting Secretary's statement doubtless was that the stipulation that the fugitive should be kept in custody "not exceeding forty days" impliedly prevented his provisional detention for a longer period. As has been seen, the laws of the United States, while not in terms providing for the "provisional" arrest of fugitives, do in practice provide an efficient system of provisional arrest and detention.

XI. *EVIDENCE.*

1. Documentary Proofs.

§ 611.

In order to be admissible at the hearing, the certificate, under the act of 1860 (12 Stat. 83; Rev. Stat. § 5271), should show upon its face that the officer who made it is the principal diplomatic or consular officer of the United States resident in the country making the demand of extradition, and should declare that the documents to which it is attached are legally authenticated, according to the laws of the country from which the fugitive escaped.

Coffey, Act. At. Gen., 1863, 10 Op. 501.

See In re Farez, 7 Blatchf. 345.

For a full discussion of the course of the law in the United States with regard to the authentication of documentary proofs in extradition cases, see 1 Moore on Extradition, Chap. XIV., p. 465 et seq.

For early correspondence as to proofs under the Webster-Ashburton treaty of 1842, see 33 Br. and For. State Papers (1844–1845), 892 et seq.

Under section 2 of the act of 1848 (9 Stat. 302; Rev. Stat. § 5271), as supplemented by the act of 1860 (12 Stat. 84), copies of depositions taken in London, before the lord mayor of London, and certified under his hand to be copies of the depositions on which he issued a warrant of arrest against the person charged, and further certified by the minister of the United States in Great Britain to be so authen-

ticated as to entitle them to be received for similar purposes by the tribunals of Great Britain, are competent evidence in an inquiry, under a warrant of arrest, in an extradition case.

In re Macdonnell, 11 Blatch. 170.

After the above rulings, section 5271, Revised Statutes, was modified by act of June 19, 1876; Revised Statutes (ed. 1878), section 5271.

In re Fowler, 18 Blatchf. 430.

Under the act of Congress of August 3, 1882, sec. 5, which provides that depositions taken in a foreign country to be used in extradition proceedings "shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped," the certificate of a principal diplomatic or consular officer of the United States in such foreign country is sufficient, if it follows the words of the statute.

In re Krojanker, 44 Fed. Rep. 482, citing In re Behrendt, 23 Blatchf. 40, 22 Fed. Rep. 699.

See, also, In re Ezeta, 62 Fed. Rep. 972.

For a query as to whether the words "evidence of criminality" include a definition of the crime charged as well as the determination of the law by which the elements of the crime are fixed, see Grin *v.* Shine, 187 U. S. 181, 188.

The certificate of the American ambassador to Great Britain that the documentary proofs "are properly and legally authenticated, so as to entitle them to be received in evidence for similar purposes by the tribunals of Great Britain," renders such proofs admissible as evidence under the statute.

In re Breen, 73 Fed. Rep. 458.

"There is reason to apprehend that in future applications for the extradition of British fugitives from justice grave difficulties of procedure will arise in consequence of a decision recently given by Commissioner Edmunds, at Philadelphia, in the case of one Thomas Barton, whose surrender had been applied for by Her Majesty's Government on charges of forgery. It will be seen on referring to the proceedings in that case, which are no doubt in the hands of the State Department, that the form of certificate of authentication of documents which has been in use since the passing of the act of Congress of August, 1882, was held by the commissioner to be defective. That form was settled between the foreign office in London and the United States minister in 1883.

"The undersigned has therefore the honor to draw the attention of the Secretary of State to the decision in Barton's case, in the hope that the difficulty which it has created may receive his early consideration, with a view to the adoption of a new form of certificate, which, if possible, may meet the requirements of section 5 of the act of 1882, and yet may not be inconsistent with the statement of British law contained in the certificate of authentication now issued by the under secretary of state for the home department in London."

Memorandum of Sir J. Pauncefote, Brit. min., to Mr. Blaine, Sec. of State, June 20, 1889, For. Rel. 1889, 474.

The form in question, which was held in the Barton case to be insufficient, was as follows:

LEGATION OF THE UNITED STATES,
London, ——— —, 188—.

I hereby certify that I believe the signature ——— ———, on the preceding page, is the handwriting of ——— ———, under secretary of state for the home department; and that the signature ——— ———, at the foot of the preceding page, is the handwriting of ——— ———, under secretary of state for foreign affairs. And I further certify that the annexed copy of the warrant of arrest and of the depositions upon which it was granted, so certified by a magistrate having jurisdiction in the place where the same was issued and taken, and authenticated by a minister of state and sealed with his official seal, would be received as evidence of criminality of a fugitive criminal from the United States charged before a tribunal in Great Britain with an extradition crime under the extradition treaty between the United States and Great Britain.

In witness whereof I hereto sign my name and cause the seal of this legation to be affixed this —— day of ———, 188—.

[SEAL.] ——— ———,
Envoy Extraordinary and Minister Plenipotentiary of the United States of America to the United Kingdom of Great Britain and Ireland.

In order to avoid such difficulties in the future, a blank form of certificate, prepared in the Department of State, was sent to the legation in London for its use.

Mr. Blaine, Sec. of State, to Mr. Lincoln, min. to England, No. 25, June 25, 1889, For. Rel. 1889, 450.

This form of certificate, which was prepared by the editor of the present work, was afterwards embodied in the general instructions to the diplomatic and consular officers of the United States, and is as follows:

"I, ——— ———, ——— of the United States at ———, hereby certify that the annexed papers, being [here state what the papers are], proposed to be used upon an application for the extradition from the United States of ———, charged with the crime of ———, alleged to have been committed in ———, are properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the tribunals of ———, as required by the act of Congress of August 3, 1882.

"In witness whereof I hereunto sign my name and cause the seal of the ——— to be affixed this ——— day of ———, 18—.

"———— ————,

"——— of the United States."

See Sir J. Pauncefote, Brit. min., to Mr. Blaine, Sec. of State, May 10, 1890, For. Rel. 1890, 417; Mr. Blaine to Sir J. Pauncefote, May 15, 1890, id. 419.

As to the authentication of Hungarian and Croatian extradition papers, see Mr. Cridler, Third Assist. Sec. of State, to Mr. Chester, No. 89, May 28, 1900, 172 MS. Inst. Consuls, 503, enclosing copy of dispatch from the United States minister at Vienna, No. 77, Feb. 10, 1900.

Where the certificate required by the act of August 3, 1882 (22 Stat. 216), to depositions and other papers, is signed by the chargé d'affaires ad interim, the court will take judicial notice that such chargé d'affaires was at the time the certificate was given the principal diplomatic officer.

In re Orpen, 86 Fed. Rep. 760.

The act of August 3, 1882, having provided that foreign depositions and other documents may be received in extradition proceedings when they are certified as being "properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped," it was held that a certificate of the American ambassador at St. Petersburg that certain papers were "properly and legally authenticated so as to entitle them to be received and admitted as evidence for similar purposes by the tribunals of Russia," constituted a compliance with the statute; and that the certificate was not vitiated by the insertion, after the word "admitted," of the words "as evidence."

Grin *v.* Shine (1902), 187 U. S. 181, 192–193.

Papers purporting to be depositions, and duly certified as such under sec. 5 of the act of August 3, 1882, are admissible for what they are worth, though the recitals contained in the introductory part do not distinctly show that the statements contained in the papers were made on oath.

In re Ezeta, 62 Fed. Rep. 972.

A presumption should be made in favor of the regularity of the proceedings in foreign courts of justice, and it should be presumed that they would not proceed on unsworn evidence. In a case, therefore, in which the merits are all against the prisoner, he should not be discharged on *habeas corpus* merely because it does not appear on the face of the proceedings that all the depositions were taken on oath.

Such cases ought not to be dealt with on grounds which are so purely technical and which might defeat justice.

Ex parte Jean Baptiste Van Inthondt, Q. B. D., March 13, 1891, London *Times*, March 14, 1891.

The courts in the United States have held that, in the absence of authentication by the proper American diplomatic or consular officer, the omission may be supplied by oral proof. In the latter event the demanding government must produce before the examining magistrate a witness to prove "that the evidence is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge" in the demanding country.

Mr. Hay, Sec. of State, to Mr. Wilde, No. 19, March 20, 1901, MS. Notes to Argentine Leg. VII. 74.

2. Weight and Effect.

§ 612.

A fugitive charged, under the treaty with Great Britain of 1842, with the commission of murder in Scotland, apprehended in the United States and examined before a commissioner, and by him certified to be probably guilty on the evidence adduced, should be delivered up to justice if the evidence upon which the application is founded be such as, according to the laws of the place where the fugitive shall be found, would justify his or her commitment for trial if the crime had there been committed.

Nelson, At. Gen., 1843, 4 Op. 201.

The rule is the same in the treaty with France of 1843. (Nelson, At. Gen., 1844, 4 Op. 330.)

It is the rule generally prescribed in the treaties of the United States.

To the same effect as the opinions of Attorney-General Nelson, supra, are Mr. Calhoun, Sec. of State, to Mr. Everett, min. to England, Aug. 7, 1844, MS. Inst. Gr. Br. XV. 205; same to same, Jan. 28, 1845, id. 241; to Mr. Pageot, French min., Dec. 4, 1844, MS. Notes to France, VI. 85; Mr. Buchanan, Sec. of State, to Mr. Pageot, Nov. 3, and Nov. 10, 1847, id. 107, 111.

In an early circular issued by the Department of State, respecting the extradition of fugitives from the United States in British jurisdiction under Article X. of the treaty of August 9, 1842, it was stated that "the regular and most proper evidence of the guilt of the fugitive would be a copy, properly certified, of an indictment found against him by a grand jury, or proof of the issuing of a warrant for his arrest by some competent authority."

MS. Circulars, I. 87.

"The insufficiency of an indictment under the 10th article of the Treaty of Washington as proof of criminality against a party claimed as a fugitive from justice in Great Britain, has heretofore been maintained by the Imperial Government under the act of Parliament for carrying the treaty into effect. The Department understands from a note of Lord Napier, of the 20th instant, referring to the case of Wood, that the Canadian authorities take the same position under the act of the parliament of that province entitled 12 Vict., chap. xix.

"Mr. Everett, when United States minister in England, was instructed to maintain the sufficiency of an indictment, and he accordingly addressed a note to Lord Aberdeen to this effect, requesting that the act of Parliament might be altered accordingly. That change, however, has never been made, nor can it be ascertained that the subject has since been pursued. The escape of Wood is to be regretted."

Mr. Appleton, Acting Sec. of State, to Mr. Howard, June 22, 1857, 47 MS. Dom. Let. 126.

Depositions are to be allowed the same weight as if the deponent were present at the hearing.

In re Farez, 7 Blatch. 491; 2 Abb. U. S. 346. See In re Wadge, 16 Fed. Rep. 332, 21 Blatch. 300.

Evidence amounting to probable cause of guilt, or such as would lead a cautious man to believe the fugitive to be guilty of the offence with which he is charged, suffices for commitment for surrender.

See In re Ezeta, 62 Fed. Rep. 972, citing Chief Justice Marshall, 1 Burr's Tr. 11; Munns *v.* Dupont, 3 Wash. C. C. 31; In re Farez, 7 Blatchf. 345; In re Wadge, 15 Fed. Rep. 864, 16 Fed. Rep. 332; In re Macdonnell, 11 Blatchf. 170; In re Behrendt, 22 Fed. Rep. 699; Benson *v.* McMahon, 127 U. S. 462.

Circumstantial evidence as to the manner of drawing checks and posting books by an employee was held to be sufficient to justify a commissioner in committing him for extradition on a charge of forgery.

In re Bryant, 80 Fed. Rep. 282.

Two Salvadoreans, named Bolanos and Bustamante, were charged in extradition proceedings with hanging four persons at the gulch of Las Pulgas, in Salvador. The charge rested mainly on the depositions of a witness named Maza, who stated that what he knew from "ocular evidence" was "only that Florencio Bustamante, alias 'Monkey-in-the-Hole,' by order of Leon Bolanos, hung four persons in the Pulgas ravine;" that he did not know the names of these persons, but that he knew they were from the volcano of Santa Ana.

The testimony of Maza, while somewhat circumstantial, was apparently based, to a great extent, on hearsay. Held, that the evidence was not sufficient to sustain the charge.

In re Ezeta, 62 Fed. Rep. 972.

Where the papers charged that a fugitive received checks for money due to a municipality and deposited them in a bank to its credit but accounted for only part thereof, this is sufficient proof of embezzlement to justify his surrender; and it is immaterial that the amount accounted for was according to certain testimony greater or less than the amount charged.

In re Breen, 73 Fed. Rep. 458.

"The complaint of the Mexican consul at El Paso, upon which the warrant for Vizcarra's arrest was issued, charges that Vizcarra was an agent of the Republic of Mexico employed in the department of public works at Cuencame; that by virtue of such agency he was authorized to receive for the use and benefit of the Republic of Mexico any stamps or money that might be paid to him as such agent in payment for stamps, dues, concessions, privileges, revalidation of titles to mines, and other charges due the Mexican department of public works; that while acting as such agent Vizcarra at certain times in 1892 and 1893 embezzled and converted to his own use, without the consent of the Government of Mexico, certain sums of money and stamps which has been paid to him by certain persons for the revalidation of titles to mines and other charges on account of titles to mines imposed by the Government of Mexico. The evidence presented by the Mexican Government before the commissioner tended to show that Vizcarra was guilty of the crime set forth in the complaint. You contend that the mining agent, while authorized to receive the stamps required by law, was not authorized to receive money to secure the payment for stamps; that money so deposited with him remained the private property of the individuals depositing it until their titles to the mining claims were approved and the money paid into the stamp department of the federal treasury; and hence that the offense committed by Vizcarra was only embezzlement of private moneys, which is not an extraditable offense under the treaty.

"It is the duty of the commissioner to commit a fugitive for extradition and of the secretary of state to order his surrender when there is probable cause to believe him guilty of the offense for which his extradition is asked. The surrender is for trial, and it is not necessary that the evidence should be sufficient for a conviction; it is only required that it be sufficient to warrant a commitment for trial had the offense been committed in this country. In my judgment the

evidence shows probable cause for believing Vizcarra guilty of embezzlement of public moneys. That being the case, I am bound to order his surrender. It will be open to the accused upon his trial to show that the offense committed was not embezzlement of public moneys under the Mexican law."

Mr. Olney, Sec. of State, to Mr. Townsend, Nov. 13, 1896, 213 MS. Dom. Let. 680.

In extradition proceedings in England, it suffices that there is prima facie evidence of the commission of what would be a crime against English law.

In re Bellencontre, 2 Q. B. D. (1891), 122.

Under a treaty providing that extradition shall be granted only "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found," would justify his arrest and commitment for trial if the offence had been there committed, the "place" by whose law the question is to be tested is, if the fugitive is apprehended in the United States, the State in which he is found.

Pettit *v.* Walshe (1904), 194 U. S. 205.
In re Frank (1901), 107 Fed. Rep. 272.

3. Defensive Testimony.

§ 613.

A fugitive is entitled, on examination before the magistrate, to produce witnesses in his own defense.

In re Farez, 7 Blatchf. 345; In re Henrich, 5 id. 414; Ex parte Ross, 2 Bond. 252; In re Kelly, 25 Fed. Rep. 268; act of Aug. 3, 1882.
The fugitive should be permitted to testify in his own behalf. (In re Farez, 7 Blatchf. 345.)
Contra, In re Dugan, 2 Lowell, 367.

The magistrate is not bound to adjourn proceedings to enable the accused to obtain evidence of an *alibi*.

In re Wadge, 15 Fed. Rep. 864.

Evidence of insanity is admissible in extradition proceedings before a United States commissioner, to explain the evidence adduced against the person charged, where it is made the duty of the commissioner to decide upon the sufficiency of the evidence so adduced.

Phillips, At. Gen., 1879, 16 Op. 642. (Catlow's case.)

One Cienfuegos, a citizen of Salvador, was charged under an extradition treaty with the crime of attempt to murder. The fact of the

attempt to kill was not denied, but it was alleged that Cienfuegos was acting in obedience to the command of a superior officer and that his victim, one Amaya, was the aggressor. Held, that the matters of justification alleged by Cienfuegos were matters of defence which could properly be determined only in his trial in the country to which he was to be surrendered.

In re Cienfuegos, 62 Fed. Rep. 972.

The Department of State subsequently declined to surrender Cienfuegos on the ground that the offence for which he was committed was not embraced in the requisition for his extradition in which the crimes that were specified were murder, arson, and robbery. (Am. Law Rev., Jan.–Feb. 1895, 8–9.)

The words "for similar purposes" in section 5 of the act of August 3, 1882, 22 Stat. 216, mean "as evidence of criminality," and therefore depositions, or other papers, or copies thereof, authenticated and certified in the manner prescribed in sec. 5 are not admissible in evidence, on the hearing before the commissioner, on the part of the accused.

In re Luis Oteiza y Cortes, 136 U. S. 330, citing In re Wadge, 15 Fed. Rep. 864; In re Wadge, 21 Blatchf. 300; In re McPhun, 24 Blatchf. 254.

The court stated that Judge Brown, in the case of In re Wadge, 15 Fed. Rep. 864, considered the act of August 3, 1882, and held that, while it was the duty of the commissoner under sec. 3 to receive the testimony of such oral witnesses as the accused should offer, the statute did not apply to testimony obtained upon commission or by deposition.

XII. *HABEAS CORPUS.*

§ 614.

The Federal courts may grant writs of habeas corpus when it appears that a petitioner is restrained of his liberty in violation of a law or treaty of the United States, and the power should be exercised where a writ is sought on account of the infraction of a treaty between the United States and another nation, by seeking to try a person for an offence other than that for which he was surrendered.

Cohn *v.* Jones, 100 Fed. Rep. 639.

An appeal lies directly to the Supreme Court of the United States from the judgment of a district in a habeas corpus case, where the constitutionality of a law of the United States, or the validity or construction of a treaty, is drawn into question.

Rice *v.* Ames (1901), 180 U. S. 371.

See, generally, as to the writ of habeas corpus in extradition cases, 1 Moore on Extradition, Chap. XV., p. 534.

See Matter of Metzger, 5 How. 176.

An appeal in a case arising on a writ of habeas corpus may be taken directly from the circuit court to the Supreme Court "if the *construction* of a treaty is therein drawn in question."

Pettit *v.* Walshe (1904), 194 U. S. 205, 216.

Certain persons who were committed for extradition to Mexico, on a complaint made under oath by a Mexican consul, applied for a writ of habeas corpus, on which they were discharged on the ground that their offences were political. From this judgment the consul took an appeal. Held, that, as the Mexican government was the real party interested, the appeal was properly prosecuted by him, and that, as the construction of the treaty was drawn in question, it was properly taken to the Supreme Court.

Ornelas *v.* Ruiz, 161 U. S. 502.

It is the right of the United States marshal to refuse to have the body before the State court, and it is the duty of the courts and other authorities of the United States to protect the marshal in such refusal by all means known to the laws. Where a commissioner of the United States has made return according to law that an alleged fugitive from justice is subject to extradition, the President should order the extradition, notwithstanding any conflicting proceedings pending in a State court.

Cushing, At. Gen., 1854, 6 Op. 270. See, also, 6 Op. 237.

The practice of issuing such writs by State courts in cases pending before Federal magistrates is inconvenient if not unconstitutional. (Mr. Buchanan, Sec. of State, to Mr. Butler, dist. attorney at New York, March 23, 1847, 36 MS. Dom. Let. 211; and to Mr. Durant, dist. attorney at New Orleans, May 20, 1847, id. 254.)

State courts may issue writs of habeas corpus where the proceedings are pending before State magistrates. (People *v.* Curtis, 50 N. Y. 321.)

Where an application was made to a single justice of the supreme court in the State of New York, at special term, for the discharge of a prisoner on habeas corpus, on the ground that the offence for which he was convicted was different from that for which he was extradited, and the question appeared to be doubtful, the justice declined to order the prisoner's discharge, but remanded him to await the decision of the general term upon the legality of the conviction.

People *v.* Hannan, 30 N. Y. S. 370, 9 Misc. 600.

On a writ of habeas corpus the main questions to be decided are whether the commissioner had jurisdiction, and whether there was sufficient legal ground for the commitment of the prisoner; and the court will decline to consider questions touching the introduction of

evidence and the sufficiency of the authentication of documentary proof.

Benson *v.* McMahon (1888), 127 U. S. 457, 461.

If the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offence charged is within the terms of the treaty, and the magistrate in deciding to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, his decision can not be reviewed on habeas corpus.

Ornelas *v.* Ruiz, 161 U. S. 502, 508, cited and followed in Bryant *v.* United States, 167 U. S. 104, 17 S. Ct. 744; Terlinden *v.* Ames, 184 U. S. 270, 278; In re Krojanker, 44 Fed. Rep. 482; In re Adutt, 55 Fed. Rep. 376; Neely *v.* Henkel, 180 U. S. 109.

The settled rule is that the writ of habeas corpus can not perform the office of a writ of error, and that, if the committing magistrate has jurisdiction of the subject-matter and of the accused and the offence charged is within the terms of the treaty, the decision of such magistrate can not be reviewed on habeas corpus if he had before him competent legal evidence on which to base his judgment that the facts were sufficient to establish the fugitive's criminality for the purposes of extradition.

Terlinden *v.* Ames (1902), 184 U. S. 270, 278, citing Ornelas *v.* Ruiz, 161 U. S. 502, 508; Bryant *v.* United States, 167 U. S. 104; In re Stupp, 12 Blatch. 501.

See, also, In re Oteiza, 136 U. S. 330; Benson *v.* McMahon, 127 U. S. 457; Grin *v.* Shine (1902), 187 U. S. 181, 192; Fong Yue Ting *v.* United States, 149 U. S. 698, 714; Ex parte McCabe, 46 Fed. Rep. 363.

For a review of the earlier decisions, see In re Macdonnell, 11 Blatchf. 170.

Where the committing magistrate has before him evidence, though it be conflicting and far from convincing, of the commission of the offence by the person whose extradition is demanded, the court will not on habeas corpus review his determination on the facts.

Sternaman *v.* Peck, 80 Fed. Rep. 883.

On an application for a writ of habeas corpus to bring up a fugitive criminal committed for surrender under the Extradition Act, 1870, the court can not review the decision of the court below on the ground that further evidence has come to light, provided that the committing magistrate had competent evidence before him and had jurisdiction.

Rex *v.* Governor of Holloway Prison (1902), 87 L. T. 332, 71 Law J. K. B. 935.

"The decisions of the executive department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they can not be put an end to by writs of habeas corpus."

Terlinden *v.* Ames (1902), 184 U. S. 270, 290.

Where a writ of habeas corpus was applied for before the examination by the commissioner was entered upon, it was held that the commissioner had jurisdiction if there was a treaty in force between the United States and the demanding country, and the commission of an extraditable offence was charged.

Terlinden *v.* Ames, 184 U. S. 270.

May 4, 1902, the United States laid an information and complaint before an extradition commissioner at Montreal, Canada, asking for the arrest of two persons, named Gaynor and Greene, who had been indicted in the United States courts in Georgia in 1899 for conspiracy to defraud the United States, in order that they might be delivered up for trial. The commissioner issued warrants charging the fugitives with participation in fraud in obtaining money by false pretenses, in embezzlement, and in theft. On these warrants they were arrested; and the commissioner, after receiving proof of their identity, committed them for examination. They then obtained a writ of habeas corpus from a judge in Quebec, who, on finding that the cause of their detention was the remand of the commissioner, quashed the habeas corpus. They then obtained writs of habeas corpus from another judge. The United States moved to quash these writs, but the judge denied the motion, on the grounds, among others, that the warrant under which the fugitives were detained did not allege any date of the commission of the offenses charged, and that, as the indictment charged a "conspiracy to defraud," which was not an offense within the treaty, the United States was estopped from treating as distinct and independent acts of larceny the overt acts of larceny charged in the indictment. Held, on appeal to the privy council of England, that, as these were questions which the commissioner had jurisdiction to investigate, his remand warrant could not be treated as a nullity, and that the prisoners were improperly ordered to be released.

United States *v.* Gaynor (1905), L. R. Appeal Cas. (1905), 128.

A commissioner issued his warrant for the arrest of a fugitive from justice. The fugitive was apprehended, but, before his examination before the commissioner was begun, he applied for a writ of habeas corpus. Return to the writ was duly made, to the effect that the

fugitive was arrested and held by virtue of warrants of arrest and commitment issued by the magistrate, and copies of the warrants were attached. To this return there was filed a traverse, which, while referring to various documents that accompanied the complaint before the commissioner, annexed only a part of them, and on those so annexed invoked a judgment that there was no evidence of guilt. Held, that the petitioner could not select a portion of the documents accompanying the complaint and ask the court to sustain his conclusions of law thereon, and that the inadequacies of the traverse could not be remedied by a writ of certiorari, which could do no more than bring up what should have been furnished in the first instance.

Terlinden *v.* Ames (1902), 184 U. S. 270, 278–279.

A writ was granted in order to enable the relator to execute a commissioner's warrant for the arrest in extradition proceedings of a fugitive from justice who was detained in jail on writ of attachment in civil actions.

In re Mineau, 45 Fed. Rep. 188.

On the examination before a commissioner of a fugitive charged with forgery, larceny, and embezzlement, the evidence showed that the accused, as bookkeeper and assistant cashier of a firm, had its check books under his control and paid checks returned from the bank, but had no authority to sign the firm's name to checks; that there were missing from the check books three checks for which no corresponding memoranda were made on the stubs; that three checks were presented to a bank, at which the firm kept a deposit, by another bank at which the accused kept a personal account; that this account showed a credit of three checks, which upon the following day were presented to and paid by the firm's bank; and that the firm's books were altered so that the balances of the cashbook, ledger, and pass-book should agree. Held, that the evidence was sufficient to justify the commissioner in committing the accused for extradition.

Bryant *v.* United States, 167 U. S. 104, 17 S. Ct. 744.

A prisoner should not be discharged on habeas corpus where the merits of the case are all against him, because it does not appear on the face of the proceedings that all the foreign depositions produced in the case were taken on oath. Such cases ought not to be dealt with on grounds which are purely technical and which might defeat justice.

Ex parte Jean Baptiste Van Inthoudt, Q. B. D., March 13, 1891, London *Times*, March 14, 1891.

Where a person, charged in France with nineteen separate offences of embezzlement or misappropriation of money, was committed in

England for extradition on a warrant in which he was charged generally with "the crimes of fraud by a bailee and frauds as an agent," it was held that he was not entitled to be discharged on habeas corpus because it was found that only four of the nineteen charges constituted offences under English law. Said Cave, J.: "I do not see that there is any reason why the warrant, which is in perfectly general terms, is not to be held by us to be good in respect of those cases as to which there is sufficient prima facie evidence to go upon." Said Wills, J.: "The warrant is statutory in its form, and is not to be construed as an ordinary English common law document, and it is not at all necessary, in my judgment, that there should be anything like the same particularity that there would be in respect of the warrant of committal to the gaols of this country under ordinary circumstances."

In re Bellencontre, 2 Q. B. D. (1891), 122, 127, 140, 144.

XIII. *SURRENDER.*

1. An Executive Function.

§ 615.

The surrender of fugitives from justice is an act of government to be performed by the executive authority. In the United States the warrant of surrender is issued by the Secretary of State, as the representative of the President in foreign affairs; and the act of the Secretary of State is regarded as the act of the President.

The only exception to this rule in the United States is the provision in the treaty with Mexico, authorizing extradition by the authorities of the frontier States and Territories; but even in this case aplication may be made to the general government, and it has been held that the President may intervene as the supreme and final authority.

1 Moore on extradition, § 359, p. 549; § 68, p. 76.
See, also, supra, § 579.

"The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. Holmes *v.* Jennison, 14 Pet. 540, 569. Its exercise pertains to public policy and governmental administration, is devolved on the executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs."

Terlinden *v.* Ames (1902), 184 U. S. 270, 289.

"This Department approves of the conduct of that officer in refusing to give up the men charged with larceny, to whom his dispatch

refers. A man-of-war of one country in the port of another, is, during her stay, to be regarded as a part of the country to which she belongs. As such, her commander may exercise his discretion as to whom he may admit on board. This right extends even to a refusal to receive a ministerial officer of the law in the foreign port, or to recognize an application to give up a man on board who may have committed an offense on shore. Any person, however, attached to such a man-of-war, charged with an offense on shore, is liable to arrest therefor in the country where the offense may have been committed.

"In the event that a person on board the foreign ship should be charged with a crime for the commission of which he would be liable to be given up, pursuant to an extradition treaty, the commander of the vessel may give him up if such proof of the charge should be produced as the treaty may require. In such case, however, it would always be advisable to consult the nearest minister of the United States. This was done in this instance, and the decision of Mr. Marsh that the persons demanded were not liable to be given up pursuant to the treaty with Italy, is approved by the Department."

Mr. Fish, Sec. of State, to Commodore Case, Jan. 27, 1872, 92 MS. Dom. Let. 322.

See, however, Mr. Blaine, Sec. of State, to Mr. Denby, min. to China, No. 680, Dec. 7, 1891, supra, § 593.

A United States minister has no power, by statute or treaty, to grant extradition. "Neither has a consul. . . . To vest the judicial power of granting extradition in a minister or consul in European or other countries of sovereign territorial jurisdiction, would need the special agreement of treaties to that end. You may recall the recent incident of the killing of General Barrundia on board an American steamer in the port of Guatemala when he, a fugitive, resisted arrest at the hands of Guatemalan officers armed with an order of surrender addressed by the minister to the captain of the vessel. Apart from the question of political asylum there involved, the action of Minister Mizner was disavowed because of his having so far exceeded his legitimate authority as to sign the paper which, in the hands of the officers of Guatemala, became their warrant for the capture of General Barrundia."

Mr. Blaine, Sec. of State, to Mr. Denby, min. to China, No. 680, Dec. 7, 1891, For. Rel. 1892, 74, 75.

See, for a further passage from this instruction, supra, § 593.

American consuls have no authority to require masters of American vessels to take on board, and convey to the United States for trial, persons accused of crime.

Cushing, At. Gen., 1856, 7 Op. 722.

When suits are brought against marshals of the United States for lawful acts done by them in the extradition of fugitives from justice, the President may authorize the employment of counsel in their behalf by the United States.

Cushing, At. Gen., 1854, 6 Op. 500.

It is incumbent upon the United States to provide a place of imprisonment for persons detained for extradition at the instance of foreign governments.

Cushing, At. Gen., 1857, 8 Op. 396.

2. Executive Discretion.

§ 616.

From 1842, when the Webster-Ashburton treaty, which contains the oldest extradition arrangement of the United States now in force, was concluded, down to a comparatively recent period, it was the doctrine of the Department of State that, where the judicial magistrate found the evidence of criminality sufficient to justify the commitment of the person charged, the action of the executive in ordering his delivery to the agents of the foreign government was purely ministerial. The first case in which the executive assumed to exercise a revisory power over the decision of a committing magistrate occurred in 1871, when the Secretary of State, without assigning any reasons for his action, issued a warrant for the surrender of only four out of seven persons who had been committed for extradition by a commissioner in New York City, on charges of piracy and assault with intent to commit murder on a British vessel on the high seas. In 1873, however, the Secretary of State explicitly exercised a revisory power in the case of Carl Vogt, *alias* Stupp, a Prussian subject who was charged with the commission of certain crimes in Belgium. Vogt was committed for extradition by a commissioner in the city of New York, and the action of the commissioner was sustained by Judge Blatchford on habeas corpus, in an exhaustive opinion in which he discussed and decided an important point of treaty construction, relating, not to the question of the criminality of the accused, but to the right of the Prussian Government to demand his extradition for an offense against its laws, growing out of acts committed in Belgium. Nevertheless, when the papers came before the Department of State, the treaty question was referred to the Attorney-General; and, on the strength of his opinion, extradition was refused.

1 Moore on Extradition, 551–556; In re Stupp, 11 Blatchf. 124; 14 Op. 281; In re Stupp, 12 Blatchf. 501.

The President will not issue his warrant for the surrender of fugitives, under the tenth article of the treaty of 1842 with Great Britain, where the record does not exhibit the fact that an offense within the terms of the treaty has been committed, nor that there is such evidence of criminality as, according to the laws of the place where the alleged fugitives have been found, would justify their apprehension and commitment for trial if the crime had been there committed, nor that any complaint has been made to any magistrate of the United States by whom such evidence had been heard.

Nelson, At. Gen., 1843, 4 Op. 240.

The sufficiency of the evidence is a question for the courts, without whose certificate of criminality the President can not order the extradition.

Cushing, At. Gen., 1853, 6 Op. 217.

The Executive has no authority to surrender a fugitive upon any charge other than one which has been heard before a magistrate and certified by him to be sustained by the evidence.

Mr. Blaine, Sec. of State, to Sir J. Pauncefote, British min., May 17, 1892, MS. Notes to Great Britain, XXI. 664.

"I have the honor to acknowledge the receipt of your note of the 23d instant, relative to the extradition of Prudencio Gonzalez, in which you suggest that your Government may desire to present further evidence as to the prisoner's citizenship. Under our law, the examining magistrate is the proper authority to hear and pass upon evidence as to the citizenship of the prisoner. While his decision upon this question is subject to revision by the State Department, the evidence upon which the matter must be finally determined should always be presented to him. I regret, therefore, that the Department can not consistently consider any evidence as to the citizenship of Gonzalez which was not produced before the examining magistrate."

Mr. Gresham, Sec. of State, to Mr. Romero, Mex. min., May 25, 1893, MS. Notes to Mexico, IX. 669.

Where the extradition of a fugitive was sought from Canada on two charges, one made in Ohio and the other in New York, the Department of State, in answer to an inquiry of the British ambassador, stated that the Government preferred that the Canadian authorities should give precedence to the requisition based on the New York charge, this being the one first presented by the United State. "This is in accordance with the practice universally followed by the Department."

Mr. Hay, Sec. of State, to Messrs. Kingsford and Son, Feb. 25, 1899, 235 MS. Dom. Let. 152.

3. Obstacles to Surrender.

§ 617.

The warrant of the Secretary of State for the surrender of a fugitive from justice is subject to the authority of the courts of the United States to hold the fugitive for trial on any charge which may be pending therein against him.

Mr. Gresham, Sec. of State, to Mr. Romero, Mex. min., May 15, 1893, MS. Notes to Mex., IX. 666; Mr. Adee, Act. Sec. of State, to Mr. Romero, July 3, 1893, id. 676; Mr. Gresham to Mr. Romero, July 12, 1893, id. 679; Mr. Rockhill, Act. Sec. of State, to Attorney-General, July 21, 1896, 211 MS. Dom. Let. 440.

"The right of Mexico to hold Rowe for trial upon the charge of bringing stolen property into Mexico is acknowledged, and the United States has no desire to interfere with the execution of the Mexican law upon him; but the offense for which he is arraigned in Mexico is not the offense for which he is wanted in the United States, and the punishment which may be administered in the Mexican court is no vindication of the law of the State of Iowa, which was violated and set at naught by Rowe. There is, furthermore, another reason why it is important that Rowe should be brought back to the place where he committed the crime and there tried and punished for it, and why any amount of punishment in Mexico will not suffice. In our law, the end of punishment judicially administered is not in the nature of atonement or expiation for the crime committed, but it is a precaution against future offenses of the same kind, and has for its prime object and purpose the deterrent influence of the offender's example upon others who were cognizant of his crime and might otherwise be tempted to imitate it. This element of the effect of legally administered punishment is wanting when the crime is committed in one place and the consequent punishment is inflicted at another and a distant place. The State of Iowa earnestly desires, not to avenge itself upon Rowe, but to make an example of him for the benefit of those who may otherwise be tempted to do as he has done—embezzle trust funds and escape to Mexico."

Mr. Olney, Sec. of State, to Mr. Ransom, min. to Mexico, Dec. 13, 1895, For. Rel. 1895, II. 1008, 1009.

The instruction from which this extract is taken relates to the case of Chester W. Rowe, a fugitive from justice, whose extradition from Mexico was demanded by the United States, under the treaty between the two countries, on the charge of embezzlement of public moneys. The Mexican Government declined to surrender him on the ground that he had acquired Mexican nationality, but stated that he would be held for trial under art. 185 of the Penal Code, which provides for the punishment of persons, whether Mexicans or foreigners,

who commit "continuous offenses, the commission of which was previously begun in a foreign territory and continues in the Republic." The United States questioned the applicability of the objection of citizenship to its demand, under the special circumstances of the case, and in urging the desirableness of the fugitive's surrender employed the argument above quoted. See supra, § 594.

On the principle that extradition shall not be required till the fugitive has first satisfied the demands of the country in which he is found, the Attorney-General directed the United States marshal at St. Augustine, Fla., who held in custody certain persons charged with fraudulent use of the mails, to detain them to await the arrival of a United States marshal from the proper jurisdiction, instead of delivering them over to another officer to be taken to New York for examination for extradition on a charge of fraud committed in England.

Mr. Hay, Sec. of State, to Sir J. Pauncefote, British ambass., No. 1336, Feb. 4, 1899, MS. Notes to Brit. Leg. XXIV. 435.

Article V. of the treaty between the United States and Mexico of February 22, 1899, provides that, if the person whose surrender is claimed has been charged with or convicted of the commission of a crime in the country in which he is found, his extradition may be deferred till he is entitled to be liberated on account of acquittal, expiration or commutation of sentence, or of pardon.

Mr. Hay, Sec. of State, to Mr. Aspiroz, No. 158, March 14, 1901, MS. Notes to Mex. Leg. X. 573, replying to a request for the extradition of Juan Krug, who, as it appeared, was detained in Texas in a criminal prosecution begun prior to the extradition proceedings.

In a case where the Mexican Government requested the provisional detention in Texas of a fugitive against whom proceedings were pending for an offence against the laws of the United States, the Department of State requested the Attorney-General, in the event of his acquittal of the charge on which he was held, or of the expiration of his sentence, to cause a complaint to be made before the appropriate magistrate on information and belief, so as to cause his arrest, under Article X. of the treaty of 1899, in order that the Mexican Government might have an opportunity to present the documents on which its claim for extradition was founded.

Mr. Hay, Sec. of State, to the Attorney-General, March 24, 1900, 243 MS. Dom. Let. 676.

The rule that a government is not obliged to surrender a person who is held in custody on a charge of crime within its own jurisdiction, also holds good where the two governments have concurrent jurisdiction of the offence for which extradition is requested.

Black, At. Gen., 1859, 9 Op. 59; Tyler *v.* People, 8 Mich. 320; In re Tivnan, 5 B. & S. 645 (same case under title of Turnan, 12 W. R. 848); Clarke on Extradition (3rd ed.) 68; 1 Moore on Extradition §§ 367–369, pp. 559–567.

In the case of piracy by law of nations, which is an offence of general jurisdiction, the treaties sometimes expressly provide for extradition. See In re Sheazle, 1 Wood. & M. 66; In re Bennet, 11 L. T. R. 488; In re Tivnan, 5 B. & S. 645.

A United States deputy marshal, who held a commissioner's warrant for the arrest of one Mineau as a fugitive from the justice of Canada, on a charge of uttering forged paper in that country, applied for a writ of habeas corpus in order to obtain the custody of the fugitive, who was detained in jail in Vermont as an absconding debtor on certain executions and writs of attachment in civil suits. The court granted the writ, citing Moore on Extradition, § 370, to the effect that arrest in a civil proceeding would not preclude extradition for crime, for the reason that "the public interest in the punishment of crime is paramount in importance to the enforcement of private demands."

In re Mineau, 45 Fed. Rep. 188.

In the case of Joseph Reaside, who was committed for extradition to Great Britain, Mr. Frelinghuysen stated that the Department of State had, upon full consideration of the matter, decided that the case did not fall within the provisions of the treaty of 1842, and that no warrant would be issued.

Mr. Frelinghuysen, Sec. of State, to Mr. Hoyne, Dec. 19, 1884, 153 MS. Dom. Let. 472.

It is within the discretion of the President to refuse to surrender even after the accused has been remanded on habeas corpus. "Referring to your note of the 14th instant, and the inclosed argument of Mr. P. Æ. Irving, representing the British Columbia government, relative to the extradition of Edward Kelly, I have the honor to inform you that after a careful consideration of the proceedings certified by the commissioner in the last examination of the prisoner, as well as of the argument of Mr. Irving, the President is of opinion that the evidence produced is not sufficient to justify the issuance of a warrant of surrender, the doubts previously entertained by him not having been removed."

Mr. Bayard, Sec. of State, to Mr. West, Apr. 15, 1886, MS. Notes to Gr. Brit. XX. 233. But see Cushing, At. Gen., 1853, 6 Op. 91.

The fact that a fugitive from the justice of a foreign country was, before his flight, released from arrest by a superior executive order, which seemed to have been treated as the equivalent of an order

entered only by judicial authority in the United States permitting a prisoner to go abroad on his recognizance, is no objection to a demand for his extradition.

In re Ezeta, 62 Fed. Rep. 972.

Condonation of the offence by the persons directly injured by it is not a ground for declining to surrender the accused.

Mr. Olney, Sec. of State, to Mr. Townsend, Nov. 13, 1896, 213 MS. Dom. Let. 680.

"From the evidence before the commissioner it seems clear that the crime charged against the defendant is not barred by limitation in Mexico. The statute of limitations of Texas is not applicable to the case."

Mr Olney, Sec. of State, to Mr. Townsend, Nov. 13, 1896, MS. Dom. Let. cexiii. 680; case of Antonio Vizcarra, a fugitive from the justice of Mexico, charged with the embezzlement of public moneys.

As the surrender of fugitives from justice under extradition treaties is a matter of law, no plea could be effective to prevent surrender unless it be a legal one. Hence, the representation that a fugitive, who had taken part in a raid into Mexico, afterwards rendered services to the Government of the United States by assisting in the apprehension and bringing to justice of his comrades in the expedition can not be considered as a ground for refusing a demand of the Mexican Government for his extradition.

Mr. Rockhill, Assist. Sec. of State, to Mr. Sanchez, July 13, 1896, 211 MS. Dom. Let. 315.

Under sec. 5273, Revised Statutes, a person committed for extradition, who has not been conveyed out of the United States within two calendar months after his commitment, is entitled, after the expiration of that period, to be discharged, although an officer is on the way from the demanding country to remove him, no sufficient cause for the delay in such officer's arrival being shown.

In re Dawson, 101 Fed. Rep. 253.

The Department of State can not extend the time for taking a prisoner out of the United States, which is limited by statute to two calendar months from his commitment by the magistrate. (R. S. § 5273.)

Mr. Olney, Sec. of State, to Messrs. Ingham & Hewitt, May 11, 1896, 210 MS. Dom. Let. 94.

4. Disposition of Personal Effects.

§ 618.

Application for an order for the seizure and delivery of the effects of a fugitive from justice should be made, at least in the first instance, to the judicial authorities. The propriety of such application is rendered more apparent, in the case of a demand by the British government, by Article IV. of the treaty of July 12, 1889, touching the rights of third parties.

Mr. Wharton, Act. Sec. of State, to Sir J. Pauncefote, British min., Aug. 17, 1891, MS. Notes to Great Britain, XXI. 485.

In transmitting to the minister of Sweden and Norway a warrant for the surrender of a fugitive from justice charged with obtaining money by false pretenses, Mr. Olney said: "By Article IX. of the extradition treaty the money found in possession of the fugitive at the time of his arrest is to be given up when the surrender takes place, and no order from this Department is necessary for that purpose." In a subsequent note Mr. Olney advised the Swedish minister of the receipt of a telegram from the United States marshal at New York stating that the claim of a "third party" to the property in question had been withdrawn, and that he had notified the Swedish consul that he was prepared to deliver to him the money taken from the prisoner upon his consent to discontinue, without costs, the action which had been begun.

Mr. Olney, Sec. of State, to Mr. Grip, Swedish min., No. 40, Dec. 17, 1895, and No. 42, Dec. 23, 1895, MS. Notes to Sweden VIII. 5, 7.

With regard to a charge made by the United States marshal for the custody of the money taken from the person of the fugitive, Mr. Olney subsequently said that, in the opinion of the Attorney-General, no part of the marshal's bill should be paid by the consul, and that the marshal had been instructed to render his bill according to law to the Department of State. (Mr. Olney, Sec. of State, to Mr. Grip, Swedish min., No. 53, March 13, 1896, MS. Notes to Sweden, VIII. 13.)

May 5, 1900, C. F. W. Neely, formerly chief of the bureau of finance of the Cuban postal department, was arrested at Rochester, N. Y., on charges of embezzlement of funds of that department. When arrested he had upon his person upwards of $6,000 in U. S. money, which was turned over to the chief inspector of the United States post-office department, at whose instance the arrest was made. Neely was duly extradited to Cuba, and the United States War Department, acting upon a request which the Cuban judicial authorities preferred to the military governor of the island, asked that the money be delivered over to that department in order that the military governor might transmit it to the court having jurisdiction of the case. It

was advised that, under the general usage in extradition, property found on a fugitive at the time of his arrest, if obtained by the crime charged, or if material as proof of it, is generally turned over with the person surrendered; that the money in question, if needed for purposes of evidence, should be sent to Cuba for production in court; but that, as it presumptively belonged to Neely, it should be handed over under such conditions as would insure its return to him if it should finally appear to be his rightful property. It was therefore suggested that the money be delivered to the Secretary of War for transmission to the military governor of Cuba, who should retain it pending a final decision as to its true ownership, but who could produce it if it were needed as evidence in any civil or criminal actions which might be pending against Neely in Cuba, proper receipts in all cases to be taken.

Knox, At.-Gen., Oct. 5, 1901, 23 Op. 535.

5. TRANSIT.

§ 619.

"I have the honor to transmit to you herewith for your information and consideration a copy of a letter addressed to this Department by Mr. J. T. Ronald, deputy district attorney at Seattle, Washington Territory, in relation to the action of a British judge at Victoria, Vancouver's Island, in discharging certain prisoners who were being conveyed from California for trial in Washington Territory.

"It is understood here that the precedents establish the rule that the conveyance of a prisoner of one party across any part of the territory of the other is contrary to comity. For example, a convicted British subject who was conveyed down the Stikine River some years ago and camped out on American soil for a night or two was released on our complaint.

"It is understood, moreover, that a vessel in port is to be regarded as within local municipal law, except only as to disputes arising out of crew discipline when treaties give consuls jurisdiction."

Mr. Frelinghuysen, Sec. of State, to Mr. Brewster, At. Gen., Jan. 2, 1885, 153 MS. Dom. Let. 549.

As to the special rights of the United States on the Isthmus of Panama, see supra, § 349.

As to the transit across Spain, with the permission of the Spanish Government, of Angell, who had been surrendered by Portugal for embezzlement, see 1 Moore on Extradition, § 382, p. 578.

As to the case on the Stikine River, mentioned by Mr. Frelinghuysen, see Moore's Report on Extraterritorial Crime, 121 et seq.; 68 Br. and For. State Papers, 1227.

In 1894 the deputy attorney-general of the province of Ontario requested the American consul at Toronto to secure from his Government permission for the Canadian authorities to bring a fugitive

criminal, then in the West Indies, through the territory of the United States to Toronto. The deputy attorney-general stated that he was under the impression that the British Government once granted a similar privilege to the United States. In this, said the Department of State, he was mistaken, since in the case of Angell, to which he referred, the British Government stated that, if the prisoner while on his way from Portugal to the United States should be landed in England, he would be entitled to apply for a writ of habeas corpus, and if the judge decided that he was not in lawful custody would be set at liberty. In conclusion, the Department of State said: "There is no law of Congress authorizing the President or this Department to give the permission which the Canadian authorities request, and such permission, even if granted, could not avail to prevent the courts, upon the landing of the fugitive upon American soil, from releasing him by the writ of habeas corpus.

Mr. Strobel, 3rd Assist. Sec. of State, to Mr. Coppinger, consul at Toronto, No. 9, Feb. 20, 1894, 144 MS. Inst. Consuls, 411; Mr. Uhl, Act. Sec. of State, to Mr. Forman, Feb. 20, 1894, 195 MS. Dom. Let. 520.

"Experience suggests that our statutes regulating extradition might be advantageously amended by a provision for the transit across our territory, now a convenient thoroughfare of travel from one foreign country to another, of fugitives surrendered by a foreign government to a third state. Such provisions are not unusual in the legislation of other countries, and tend to prevent the miscarriage of justice. It is also desirable, in order to remove present uncertainties, that authority should be conferred on the Secretary of State to issue a certificate in case of an arrest for the purpose of extradition, to the officer before whom the proceeding is pending, showing that a requisition for the surrender of the person charged has been duly made. Such a certificate, if required to be received before the prisoner's examination, would prevent a long and expensive judicial inquiry into a charge which the foreign government might not desire to press. I also recommend that express provision be made for the immediate discharge from custody of persons committed for extradition where the President is of opinion that surrender should not be made."

President Cleveland, annual message, Dec. 6, 1886, For. Rel. 1886, xi.

"Statutory provision might well be made for what is styled extradition by way of transit, whereby a fugitive surrendered by one foreign government to another may be conveyed across the territory of the United States to the jurisdiction of the demanding state. A recommendation in this behalf, made in the President's Message of 1886, was not acted upon. The matter is presented for your consideration."

President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, lxxix.

XIV. *EXPENSES.*

§ 620.

The ordinary expenses of extradition, including fees of counsel, if any, should be paid by the demanding government.

Cushing, At. Gen., 1855, 7 Op. 396.

As requests for the extradition of fugitives from justice charged with crimes against the United States are made by the Department of State only at the instance of the Attorney-General, who nominates an agent to be designated by the President to proceed to the foreign country and bring back the accused, the Department of State can not pay, out of the annual appropriation for "actual expenses incurred in bringing home from foreign countries persons charged with crime," a claim for services, in connection with a proposed case of extradition, by a person who was neither designated as agent nor went to the foreign country, there being in fact no extradition treaty between the United States and the country in which the accused sought asylum and no request for his extradition having ever been made.

Mr. Day, Assistant Sec. of State, to Mr. Perkins, Feb. 4, 1898, 225 MS. Dom. Let. 237.

"When the fugitive is charged with an offense against the laws of the United States and his surrender is sought for the purpose of trial and punishment under those laws, the expenses attending his extradition are borne by the United States. It is otherwise, however, where the fugitive is charged, as in the case of Fraser, with an offense against the laws of a particular State, and the extradition is demanded by this Government at the request of the State authorities. In the latter case the expenses are borne by the State at whose instance the surrender of the fugitive is asked."

Mr. Fish, Sec. of State, to Mr. Harvey, June 18, 1874, 102 MS. Dom. Let. 458. See Mr. Fish to Mr. Williams, Feb. 4, 1875, 106 MS. Dom. Let. 385.

See, also, Mr. Fish, Sec. of State, to Mr. Hammond, Feb. 19, 1870, 83 MS. Dom. Let. 307; Mr. Evarts, Sec. of State, to Mr. Gordon, U. S. S., Feb. 16, 1878, 121 MS. Dom. Let. 638.

Where the offence is against the laws of a Territory, the practice also is to require the expenses attending the arrest, examination, and safe-keeping of the fugitive to be borne by such Territory. (Mr. Cadwalader, Act. Sec. of State, to Mr. Ferry, Aug. 21, 1875, 109 MS. Dom. Let. 489.)

For a request that the State of Washington pay the expenses incurred by the Territory of Washington in the extradition of Thomas Pierre, in 1874, see Mr. Hay, Sec. of State, to governor of Washington, Dec. 9, 1898, 233 MS. Dom. Let. 160, enclosing copy of note from the British ambassador of Dec. 5, 1898.

In 1879 Lord Salisbury proposed an arrangement under which an account of expenses in extradition cases should be kept, and be settled once annually. The Department of State, adverting to the fact that, in the numerous cases of offences against State or Territorial laws, the expenses were borne by the local authorities, replied: "These expenses the agent appointed by the President, on the nomination of the executive of the State, is expected to pay at the time of taking charge of the fugitive. If, in any case, they should be left unpaid, as in some few cases they have been, this Department might be called upon to audit and pay a considerable sum at the end of the year without any fund under its control from which it could properly pay, and might, moreover, find it difficult to get reimbursement from the State. As the matter is now, each case can be scrutinized on its own merits and at the moment. In view of these circumstances this Department does not consider it expedient to enter into the arrangement proposed in the Marquis of Salisbury's note above mentioned. I will thank you to communicate this conclusion to Her Majesty's Government." (Mr. Hunter, Act. Sec. of State, to Mr. Hoppin, Sept. 15, 1879, For. Rel. 1880, 465.)

The previous practice was permitted to continue undisturbed. (For. Rel. 1880, 473, 475.)

Consuls have no authority to require masters of American vessels to convey to the United States for trial persons charged with crime. (Cushing, At. Gen., 1856, 7 Op. 722.)

The provision in Article X. of the treaty between the United States and Great Britain of 1842, that the expense of extradition shall be borne by the "party" who makes the requisition and receives the fugitive, refers to the high contracting parties and not to any individual, officer, or authority of the government by which the demand is made.

People *v.* Board of Supervisors, 56 Hun, 17, 8 N. Y. S. 752.

Under 2 Rev. Stat., N. Y., p. 383, § 89, making it the duty of the district attorneys of the various counties to "conduct the prosecution for crimes," a district attorney is entitled to reimbursement by the county for expenses necessarily incurred by him in obtaining the extradition of a fugitive from justice from a foreign country.

People *v.* Board of Supervisors, 56 Hun, 17, 8 N. Y. S. 752.

The penal code of New York, sec. 51, which makes it a misdemeanor for any officer of the State to ask or receive any fee or compensation for services or expenses in procuring from the governor of the State a demand for the extradition of a fugitive from its justice, does not apply to expenses incurred by a district attorney in procuring the extradition of a fugitive from a foreign country.

People *v.* Supervisors, 134 N. Y. 1.

See, to the same effect, Ellis *v.* Jacob, 45 N. Y. S. 177, 17 App. Div. 471.

The authorities of Wyoming County, Pennsylvania, objected to the payment of certain charges incurred in 1892 in the extradition of a fugitive from Canada. It appeared that, while there was no express provision authorizing commissioners in Canada to charge fees, yet such fees were customarily charged and received; and that, although the per diem charges made by Canadian commissioners differed, the charge of twenty dollars a day, which was made in the case under consideration, was customary. The Department of State expressed the opinion that, while the charges made were higher than those for similar services in the United States, where the fees are regulated by law, it would not be proper to refuse to pay them in the case under consideration.

Mr. Gresham, Sec. of State, to Mr. Hensel, April 25, 1894, 196 MS. Dom. Let. 482.

The act of Pennsylvania of March 31, 1860, imposing on the county in which an offense is charged to have been committed the expense of bringing back "from another State" a fugitive from justice, does not cover the case of bringing back a fugitive from a foreign country, e. g., Canada.

Goldfon *v.* Allegheny County (1900), 14 Pa. Super. Ct. 75.

By treaty between the United States and Great Britain, the expense attending proceedings in extradition is to be borne by the government making the demand. But where the government of the United States is compelled to intervene, in a conflict between State and United States authorities, to maintain its supremacy and secure the extradition, the special expense should be paid, in the first instance at least, by the United States.

Cushing, At. Gen., 1855, 7 Op. 396.

By the extradition treaty between the United States and Prussia, the expenses of extradition are borne by the government demanding it, and a commissioner or marshal may lawfully charge such fees as are usual for analogous cases rendered to the United States.

Black, At. Gen., 1860, 9 Op. 497.

"All accounts in extradition cases where the fees are to be paid by the Secretary of State, under the provisions of the act of Congress of the 3d of August, 1882, should be made out and forwarded in accordance with the provisions of that act. The fee bills of the several officers of the United States in this case, including your own, appear to be substantially in such accord, and no objection is now made to these. The translator's bill, however, is no proper part of the extradition expenses; and the Department does not feel authorized under

the act in question to pay it. It is the business of the proceeding or demanding Government to adduce the evidence and bring forth the testimony upon which it expects to establish the criminality of the accused, and this must be put forward in such form and language as will be intelligible to and convenient for the court. In other words, it must be ready for immediate use—instantly available. The bill in this case, moreover, appears to be extremely large."

Mr. Frelinghuysen, Sec. of State, to Mr. Patterson, Apr. 2, 1884, 150 MS. Dom. Let. 448.

The method of paying expenses incurred in the examination of fugitives from justice in the United States is for the commissioner who hears the case to send to the Department of State a statement of costs, including expenses incurred by the marshal in paying witnesses' fees. Money is then sent to the marshal for paying the fees, or for reimbursing him if it appears that he has already paid them.

Mr. Olney, Sec. of State, to Messrs. Joske Brothers, June 20, 1895, 202. MS. Dom. Let. 691.

XV. *RESTORATION OF PROPERTY.*

§ 621.

The jewels of the Princess of Orange were stolen, and having been brought into the United States in violation of the revenue laws, were seized by the customs authorities. It was advised that, as their rightful owner had done nothing to subject them to forfeiture, the person who brought them into the country having obtained them fraudulently, without her knowledge and against her will, they were not liable to condemnation, but stood on the same footing as property cast upon our shores by the violence of the wind and waves, and were entitled to the same protection. It was also advised that, there being sufficient evidence (there was no other claimant) that they belonged to the princess, the President might order the district attorney to discontinue the prosecution, and direct the marshal having the jewels in charge to deliver them over to the minister of the Netherlands.

Taney, At. Gen., 1831, 2 Op. 482. See, also, id. 496.
See, further, as to this case, 1 Moore on Extradition, § 386, p. 585.

In 1868 the Portuguese minister at Washington brought to the attention of the Department of State the complaint of a Portuguese subject residing in the city of Recife, in Brazil, that a slave belonging to him had been induced by the master of the American brig *Mira* to run away on that vessel. The minister stated that he was instructed to ask the Government of the United States to employ its good offices to ascertain the truth of the facts, and if they were found

to be as stated to do all within his power to influence the captain of the brig, on the principle of equity, to indemnify the Portuguese subject in question for the loss he had suffered. Mr. Seward replied that the Constitution and laws of the United States recognized no property in slaves, and in this respect were understood to be in harmony with the law of nations and the general sentiments of mankind, and that the Government was therefore obliged to decline to take the action requested.

Mr. Seward, Sec. of State, to Mr. da Roza, Portuguese min., Feb. 15, 1868, MS. Notes to Portugal, VI. 239.

See 1 Moore on Extradition, §§ 388, 389, pp. 587, 588.

Case of the "Georgia."

June 23, 1876, the steamer *Georgia*, belonging to the Panama Transit Company, an American concern, while on her way from New York to Panama, in order to take her place on the route between Panama and San Francisco, went ashore near Punta Arenas, in Chile, on the Straits of Magellan. A diver from Montevideo, named Lasky, who was employed by the master to examine her, reported that she could not be floated; and the master applied to the governor of Punta Arenas for an order for her sale. The governor caused a three days' notice of sale to be given, and the vessel was then sold to one Jones, who was said to be a citizen of the Argentine Republic and a partner of Lasky's, for 950 Chilean dollars.

Meanwhile the company had sent out from New York the steamer *Wilmington*, under command of Captain Holmes, with wrecking apparatus, for the purpose of raising the *Georgia*, and with authority to take charge of both steamers. Captain Holmes, on arriving at Punta Arenas, found the *Georgia* in possession of the wreckers. He examined her and decided that she could be saved, and in order to obtain possession of her decided, without authority from the company, to pay Jones $14,500, giving him $1,500 in cash and $13,000 in a draft on a firm in Valparaiso. He then got the steamer afloat, but in very bad condition. Before he was ready to sail, however, the draft reached Valparaiso and was protested, the company declining to pay it on the ground that the sale to Jones was collusive and in other respects invalid.

Jones then brought suit against Captain Holmes, and obtained from the tribunal of commerce at Valparaiso an order to embargo the *Georgia* until the draft and damages should be paid. Under this order the governor of Punta Arenas placed the steamer in charge of a lieutenant in the army. Captain Holmes, however, disregarded the embargo and sailed away with the officer on board. Subsequently running short of coal he put into the Chilean port of Lota, where he found that the authorities also had orders to detain him, and where an addi-

tional officer was put on board; but after getting a supply of coal he sailed away, taking both officers with him. The next port at which he called was Mejillones, in Bolivia. Here he put the Chilean officers on board a British packet, paying their passage to Valparaiso, and then proceeded to Callao, where he stopped for repairs to enable him to continue his voyage to Panama. He arrived at Callao on May 11, 1877. On the 15th Mr. Kissam, American consul at Callao, called at the legation of the United States at Lima, and informed the minister, Mr. Gibbs, that the Chilean consul had invoked his authority to prevent the *Georgia* from leaving port, as she was demanded by the Chilean Government for offences committed within its jurisdiction. Mr. Gibbs, after hearing the statement of Captain Holmes, who accompanied the consul, advised Mr. Kissam to answer the Chilean consul that he was not authorized to detain the steamer.

Next day Mr. Gibbs learned that the *Georgia* had been ordered to anchor near a Peruvian man-of-war. He then called upon the Peruvian minister of foreign affairs, and, on inquiring the cause of the order, was informed that the Chilean Government had through its minister, Mr. Godoy, requested the detention of the vessel to answer grave charges against the captain of abducting or kidnapping two Chilean officers, and placing in contempt the authorities of Chile by breaking an embargo by main force or trick. Mr. Gibbs gave notice that he should protest, throwing the responsibility of the affair on Peru. The minister of foreign affairs replied that his Government had no interest in the matter except as an act of comity to Chile. May 17 Mr. Godoy called on Mr. Gibbs and stated that his Government had instructed him to request the detention of the *Georgia*. Mr. Gibbs acknowledged the indiscretion of the captain, but denied the right of the Peruvian Government to stop the vessel.

Some days elapsed before Mr. Gibbs was furnished with a copy of the note by which Mr. Godoy had requested of Peru the *Georgia's* detention. This note bore date May 16. In describing the charges against the steamer, it referred to the carrying away of the two Chilean officers, whose "fate" was said then to be unknown, as an "act of piracy;" and it requested the steamer's detention by the Peruvian Government, as a preliminary measure, till a decision should be reached as to whether to proceed against Captain Holmes and the steamer, civilly and criminally, in the Peruvian courts, or to "solicit the extradition of the criminal with the articles that have served him in the perpetration of the crime." In this relation Mr. Godoy cited, merely by reference to title and page, Heffter, secs. 36 I and 63 III; Foelix, secs. 148, 574, 609; Bluntschli, art. 395; and he concluded his note as follows: "To carry into effect any of the legal proceedings alluded to, the detention and embargo indicated is absolutely indispensable. For that reason, according to specific instructions

from my Government, I have the honor to solicit it of your excellency, and I trust it will be granted. To the motives and considerations which I have expressed, it is unnecessary to add others, which are evident and irresistible, inspired by moral sentiment, social convenience, and the reciprocal interest of nations, motives, and considerations which have recently induced our Governments to form an extradition treaty, which has been approved and ratified on the part of Peru, and in which is expressly mentioned the crime of piracy, of which Captain Holmes is guilty."

Captain Holmes was not arrested. He sailed from Callao, May 28, in the *Wilmington*, leaving the *Georgia* behind, guarded by a Peruvian gunboat.

Before Mr. Gibbs's dispatches reached Washington the fact and circumstances of the governmental detention of the *Georgia* at Callao were communicated by the Panama Transit Company to the Department of State, with a petition for aid. June 4, 1877, Mr. Evarts, who was then Secretary of State, telegraphed Mr. Gibbs to demand the "immediate release" of the steamer, thus "forcibly detained," and stated that the United States naval commanders had been ordered to cooperate with him.

Mr. Gibbs communicated the demand for the *Georgia's* release to the Peruvian Government on the 7th of June. On the 9th it was granted; and on the 11th Mr. Gibbs cabled that the steamer was released. Later in the day, however, he learned that, after the governmental embargo was lifted, the steamer was detained on judicial process issued by the tribunal of commerce of Callao, in an action *in rem* instituted some time previously by Jones. On the 14th of June the U. S. S. *Omaha* arrived, and her commanding officer, after conferring with Mr. Gibbs, concurred with him in the opinion that, as the steamer was then detained on judicial process, nothing further could be done.

June 18, 1877, Mr. Evarts, in a telegraphic instruction written with reference to the change in the situation, directed Mr. Gibbs to "complain" of the original "unlawful detention" of the *Georgia* as the "sole cause of involving her in judicial coercion," and to insist on her being put in the "same position for her voyage as if first detention by government had not occurred."

In a formal instruction to Mr. Gibbs, on June 21, Mr. Evarts, after adverting to the judicial detention of the *Georgia*, "immediately upon the release of the vessel from under the guns of a Peruvian man-of-war," said that the steamer sought shelter in Callao, a Peruvian port, in order to make such repairs as were necessary to her voyage, and was entitled to hospitality; that the case was covered by Arts. XIII. and XIV. of the treaty of 1870, but that the right to hospitality existed independently of them. Continuing, Mr. Evarts said:

"The *Georgia* is not charged with any infraction of Peruvian laws, either general or maritime. As to any liability she may or may not have incurred to Chile, arising from the misconduct of her captain or from any other cause, it is a question which (in the present attitude of the Peruvian authorities with regard to the seizure and detention of the vessel) this Government can not recognize as a proper or legitimate subject of discussion with that of Peru.

"I can not permit myself to believe that the first act of the seizure of the *Georgia* or the proceedings which have followed, and which have caused no little inconvenience and very considerable loss to the owners of that vessel, have at any time [been] made with the deliberate approval of the Government of Peru, but am rather disposed to think that these proceedings have occurred by inadvertence to the real nature of this interference with our flag. The hope is therefore indulged that, before this instruction shall reach you, this view of the transaction shall have been verified by the complete liberation of the ship from restraint of any kind that would interfere with her proceeding on her voyage. Should it prove to be otherwise, however, you will, adhering to the instructions which have already been forwarded by wire, and to the views now expressed, press the question of the vessel's release, remitting to the appropriate sphere of such discussion all questions or suggestions as to any infraction of the laws of Chile by the vessel or her officers."

The judicial embargo of the vessel was raised on the 28th of June, and the captain of the *Georgia*, on receiving the news, immediately left Callao, as Mr. Gibbs reported, "without going through the form of clearing." The raising of the embargo seems to have been due, at least in part, to private arrangement. In a dispatch of the 20th of June, Mr. Gibbs stated that the company's agent had been trying to effect a settlement with Jones and had offered, subject to the company's approval, to pay him 16,220 Chilean dollars and to leave to private arbitration in New York the question of damages.

Mr. Evarts, Sec. of State, to Mr. Gibbs, min. to Peru, tel., June 4, 1877, MS. Inst. Peru, XVI, 330; same to same, No. 65, June 5, 1877, id. 330; same to same, tel., June 18, 1877, id. 334; same to same, No. 66, June 21, 1877, id. 331; Mr. F. W. Seward, Act. Sec. of State, to Mr. Gibbs, No. 68, June 28, 1877, id. 335; same to same, No. 75, Aug. 14, 1877, id. 342.

See dispatches from Mr. Gibbs to Mr. Evarts as follows: No. 154, May 19, 1877; No. 157, May 28, 1877 (enclosing copy of Mr. Godoy's note of May 16 to the Peruvian minister of foreign affairs); No. 163, June 12, 1877; No. 172, June 20, 1877; No. 174, June 27, 1877; No. 175, June 30, 1877; 29 MS. Desp. from Peru.

Mr. F. W. Seward, in his No. 68, June 28, 1877, acknowledging the receipt of Mr. Gibbs's No. 157, May 28, 1877, said: "This Department is not aware that any definition of piracy under the law of any country would make Captain Holmes chargeable with that crime for his

acts in Chile in respect to the steamer *Georgia*. The texts of public law referred to by Mr. Godoy have been critically examined here without finding the least application to the case of the steamer. Not one of them even intimates the right forcibly to detain at the informal request of a friend the vessel of another friend which may happen to be in or may be compelled to seek refuge in the port of the country to whose government the application may be addressed."

Mr. Gibbs, in a note to the Peruvian Government of June 20, 1877, copy of which accompanies his No. 172, cites Wheaton, Part II., chap. ii., secs. 1, 2, and 13; Woolsey, Part IV, sec. 55; and states that by the Peruvian Code of Commerce, Book III, Tit. I, Art. 568, "foreign vessels lying in the ports of the Republic can not be libelled for debts not contracted in Peruvian territory to the advantage of the said vessel."

"Telegram June 6 received. Represent to Haytian Government that seizure and surrender of steamer would be an unjustifiable act. No authority exists for extraditing ships."

Mr. Day, Sec. of State, to Mr. Powell, min. to Hayti, tel., June 7, 1898, MS. Inst. Hayti, III. 691.

"Mr. Liston has lately presented a demand for the restoration of three American vessels captured by the British, and recaptured or *rescued* by the masters and parts of crews left on board. It is suggested that the law of nations warrants the demand, but no law is explicitly stated. It is conceived that it behooves captors to secure their prizes, and at any rate, that the *executive* cannot order a restoration; but that resort must be had to the judiciary by the *captors* for remedy against the *wrong doers* if such they are."

Mr. Pickering, Sec. of State, to Mr. King, min. to England, No. 75, March 7, 1800, MS. Inst. U. States Ministers, V. 300.

For the correspondence concerning these cases, see 1 Moore on Extradition, § 392, p. 595; Am. State Pap. For. Rel. III. 576.

July 20, 1838, the French minister at Washington asked for the restitution by the United States of the American schooner *Lone*, which, after capture by a French brig of war, then engaged in the blockade of the Mexican coasts, was rescued by her master and taken to New Orleans, where she was duly admitted to entry. The blockade in question was represented as a pacific blockade, but the Department of State, in its answer to the French minister's demand, merely adverted to this fact and treated the case as if it were one involving a breach of a regular hostile blockade. Treating the case from this point of view, the Department said it was well settled that a captor must place an adequate force on board the captured vessel, and that if he failed to do so it was at his own peril. The President, it was declared, was unable to intervene in the matter, and an application for redress, if any was due, should be made to the courts.

Mr. Vail, Act. Sec. of State, to M. Pontois, French min., Oct. 19, 1838, MS. Notes to French Leg. VI. 32.

See, also, same to same, Oct. 23, 1838, id. 38.

The position taken by the Department of State was in conformity with the opinion of Gundy, At. Gen., 1838, 3 Op. 377.

See the case of the *St. Mary's*, 1 Moore on Extradition, § 390, p. 592.

Cattle.

The Mexican minister at Washington stated in a note of November 2, 1896, that the Mexican treasury department had given instructions to the Mexican custom-houses at Nogales, Ciudad Juarez, and Las Palmas to permit the cattlemen of the United States to cross into Mexico to aid in collecting their herds under the same conditions that the custom-houses of the United States exacted from Mexican cattlemen under similar circumstances, thus establishing a reciprocity of practice of both governments in the matter.

Mr. Hay, Sec. of State, to Mr. Clayton, ambass. to Mexico, No. 144, June 10, 1899, MS. Inst. Mexico, XXV. 30, enclosing copies of the following documents: Despatch from the American consul at Nogales, No. 38, May 12, 1899; Treasury Decisions of Dec. 1, 1896; note to Mexican minister, No. 151, Sept. 9, 1896; notes from Mexican minister of Sept. 11 and Nov. 2, 1896.

For a case in which the Mexican Government granted an extension of time for the removal of cattle from Mexico, see Mr. Adee, 2nd Assist. Sec. of State, to Mr. Carter, Jan. 3, 1898, 224 MS. Dom. Let. 133.

XVI. *DESERTING SEAMEN.*

§ 622.

"In Moore on Extradition (sec. 408), it is laid down as a general proposition that, in the absence of a treaty, the surrender of deserting seamen cannot be granted by the authorities of the United States; and an opinion of Attorney-General Cushing (6 Op. 148) is cited upon that point. There is also another to the same effect (6 Op. 209)."

Tucker *v.* Alexandroff (1902), 183 U. S. 424, 431, 467–469.

See, to the same effect, Mr. Pickering, Sec. of State, to Mr. Liston, Brit. min., May 3, 1800, Dip. Cor. 1862, 149.

Oct. 19, 1802, Mr. Madison, as Secretary of State, sent a circular to the United States district attorneys, asking them to report "whether any or what provision may exist in the laws of the States, respectively," by which seamen deserting from foreign vessels might be restored. (14 MS. Dom. Let. 82.)

See, also, Mr. Madison, Sec. of State, to Mr. Thornton, Brit. chargé, Nov. 9, 1802, 14 MS. Dom. Let. 89.

To prove desertion, the ship's roll must be exhibited, containing the deserter's name; a consul's certificate will not do as a substitute.

Black, At. Gen., 1857, 9 Op. 96.

See, also, United States *v.* Motherwell, 103 Fed. Rep. 198; Tucker *v.* Alexandroff, 183 U. S. 424.

There is no law or regulation of the United States that provides for the recovery of deserters from foreign merchant vessels, where there is no treaty on the subject with the country to which the vessel belongs.

Congress, by an act of Dec. 2, 1898, repealed the law that authorized the arrest of deserters from vessels of the United States in the ports of the country.

Mr. Adee, Acting Sec. of State, to the Duke of Arcos, Span. min., Oct. 9, 1901, For. Rel. 1901, 484.

The arrest and return of deserting seamen, under the treaties and the act of Congress, is a judicial duty, in the performance of which the Department of State can not interfere.

Black, At. Gen., 1857, 9 Op. 96, referring to the treaty with Spain of 1819.

See, to the same effect, Mr. Cass, Sec. of State, to Chev. Bertinatti, Sardinian min., Sept. 30, 1858, MS. Notes to Italy, VI. 198, referring to the treaty with Sardinia of 1838.

It was advised that the issuance of a warrant under Art. IX. of the convention with France of 1788, for the arrest of a deserter, was within the discretion of the district judge, and that this discretion could not be interfered with by the Supreme Court. (Bradford, At. Gen., 1795, 1 Op. 55.)

The proceedings need not be carried on or approved by the local United States district attorney. (Black, At. Gen., 1858, 9 Op. 246.)

"In reply to your letter of yesterday enclosing certain questions propounded by the minister plenipotentiary of the Republic of France, I have the honor to state to you my opinion.

"That upon application to the district judge or other competent officer, by any consul or vice-consul of France making the requisite demand and proof, the arrestation of French sailors who have deserted the vessels of that nation may be obtained, notwithstanding the vessels from which they deserted *have put to sea and are no longer in the ports of the United States*. But the proper officer for assisting in such arrest is the *marshal* of the district or his deputy, and not a *constable*, unless such constable be also deputed by the marshal for that service. Such deserters when arrested are to be detained until the consul or vice-consul shall find means of *sending them back*, and may for *that* purpose be put into the custody of the French commandant, but such delivery of them to the commandant, I appre-

hend, must be the act of the consul or vice-consul and not of the district judge."

Mr. Bradford, Attorney-General, to the Sec. of State, March 15, 1794, communicated to M. Fauchet, French min., March 19, 1794, 6 MS. Dom. Let. 127.

Art. IX. of the consular convention between the United States and France of Nov. 14, 1788, provided for the recovery of deserting seamen.

For correspondence leading up to the insertion in the convention between the United States and France of 1822 of a provision (Art. VI.) for the recovery of deserting seamen, see Am. State Papers, For. Rel. V. 152.

As to Art. VI. of the convention of 1822 and Art. IX. of the convention of 1853, see Mr. Bayard, Sec. of State, to district attorney of city courts of New Orleans, June 27, 1887, 164 MS. Dom. Let. 491.

"The statute respecting the restoration of deserters was approved March 2, 1829, and was entitled 'An act to provide for the apprehension and delivery of deserters from certain foreign vessels in the ports of the United States.' (4 Stat. L. 359.) It provides 'that on application of a consul or vice-consul of any foreign government, having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government while in any port of the United States; and on proof, by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged at the time of desertion to the crew of said vessel, it shall be the duty of any court, judge, justice, or other magistrate having competent power, to issue warrants to cause the said person to be arrested for examination; and if, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the said consul or vice-consul to be sent back,' etc."

Mr. J. C. B. Davis, Notes, Treaty Volume (1776–1887), 1280. That the act of 1829 is applicable only where there is a treaty expressly providing for the surrender of deserting seamen, see Cushing, At. Gen., 1853, 6 Op. 148.

"From this letter, a copy of which is herewith inclosed, it appears that there are no United States laws punishing those engaged in aiding or abetting desertion from foreign vessels in the ports of this country."

Mr. Bayard, Sec. of State, to Mr. de Bounder, Belgian min., June 10, 1886, For. Rel. 1886, 41.

The enclosed letter from Mr. James C. Reed, United States shipping commissioner at New York, to whom the Treasury Department had referred the inquiry of the Belgian minister, said: "Sections 4079, 4080, 4081, and 5280 of the Revised Statutes prescribe the method

of proceeding against deserters from foreign vessels in American ports, but I know of no law of the United States that distinctly authorizes the prosecution of the accomplices in such cases. Sections 4598 and 4599, as well as 4601 and 4607, of the Revised Statutes, do not seem to authorize such prosecution, in view of the limitations established by section 4612."

See Mr. Bayard, Sec. of State, to Mr. Manning, Sec. of Treas., April 19, 1886, 159 MS. Dom. Let. 668, enclosing copy of Mr. de Bounder's note of inquiry of April 5, 1886.

Sec. 5280, Revised Statutes, in providing that a deserting seaman shall, on application of a consul or vice-consul of any foreign government having an appropriate treaty with the United States and on due proof of desertion, be delivered up to the consul or vice-consul "to be sent back to the dominions of any such government," is not to be construed as preventing the return of a deserter to his ship unless it is bound to a port in such dominions. The language of some of the treaties refers to the return of deserters to their own country; of others, to the return of the deserter to his ship, or, if it has sailed, then to his country; and of others still, to the delivery of the deserter to the consul. Sec. 5280 contains the only provision for the enforcement of these stipulations, and, if it were construed as authorizing the return of a deserter only where he was to be taken back to the dominions of the demanding government, would prevent the execution of many of the treaties and conventions.

Mr. Hay, Sec. of State, to the Atty. Gen., March 26, 1900, 244 MS. Dom. Let. 12, enclosing copy of a note of the British ambassador of March 20, 1900, by which it appeared that the United States shipping commissioner at Portland, Me., had refused to surrender deserters to a British vessel then bound for Buenos Ayres, except on condition that they be sent direct to the United Kingdom. Mr. Hay stated that the New York shipping commissioners appeared to give the statute a different construction, and that the Department was not aware that any of the treaty stipulations of the United States on the subject of desertion had been construed by the foreign government so as to prevent the return of an American deserting seaman to his own ship, no matter what might be its destination.

In 1883 certain deserters from an Italian bark at Buenos Ayres, who were arrested at the instance of the Italian consul at that port, were discharged by the Argentine courts, on the ground that there existed, in the absence of treaty provisions, no right of reclaiming and recovering the members of a foreign ship's company who had deserted in Argentine territory.

Mr. Hunter, Act. Sec. of State, to Mr. Osborn, min. to Argentine Republic, No. 190, Nov. 6, 1883, MS. Inst. Argentine Repub. XVI. 292.

Mr. Hunter in this instruction expressed approval of the position taken by the Argentine courts and instructed Mr. Osborn to negotiate an additional article to the treaty of 1853, and suggested as a model Art. XII. of the treaty between the United States and Belgium of March 9, 1880.

An additional article was signed July 27, 1883. Mr. Osborn, in his No. 423, announced that the Argentine Congress had ratified the article, but in his No. 455 he stated that objections had been made to the ratification, in consequence of which he signed, on June 22, 1885, an addendum. On the 2nd of the preceding April the additional article had been withdrawn from the United States Senate, in order that certain changes might be made in it; and under the circumstances it was deemed advisable to open new negotiations. (Mr. Bayard, Sec. of State, to Mr. Hanna, min. to Argentine Republic, No. 5, Aug. 5, 1885, MS. Inst. Argentine Repub. XVI. 367.)

A new article was signed, but was amended by the United States Senate. The American legation at Buenos Ayres was instructed to exchange the ratification of the articles as amended. (Mr. Bayard, Sec. of State, to Mr. Hanna, No. 62, April 5, 1888, MS. Inst. Argentine Repub. XVI. 432; Mr. Blaine, Sec. of State, to Mr. Pitkin, No. 7, Oct. 7, 1889, id. 494.)

October 23, 1875, the chargé d'affaires of Sweden and Norway inquired whether, under Article XIV. of the treaty of July 4, 1827, an American seaman deserting from a Swedish vessel would be delivered up by the authorities of the United States. On the same day, the Acting Secretary of State replied that the Department was not aware of any provision in the treaty limiting the right to demand the return of deserters to those of any particular nationality. The Government of Sweden accepted "with some hesitation" this construction of the treaty, but on the strength of it held that the master of an American vessel was entitled to the return of a Swede who had deserted in a Swedish port.

Mr. Fish, Sec. of State, to Mr. Andrews, No. 208, Dec. 2, 1875, MS. Inst. Sweden, XIV. 305, enclosing copies of Mr. Grip, Swedish chargé, to Mr. Fish, Sec. of State, Oct. 23, 1875, and Mr. Cadwalader, Act. Sec. of State, to Mr. Grip, Oct. 23, 1875.

See, also, Mr. Bayard, Sec. of State, to dist. attorney of city courts of New Orleans, June 27, 1887, 164 MS. Dom. Let. 491.

In 1899 the American consul at Newcastle, New South Wales, reported that the authorities there, acting under the then recent "alien act," which prohibited the landing of any colored person who was unable to read and write some one of the European languages, had refused a clearance to the American ship *Carrollton* and fined the master 300 pounds, because three Mauritius blacks deserted from her, but that the ship was afterwards cleared and the fine remitted. As it had not been the practice of the United States to treat deserters from British vessels as coming within the provisions of sec. 10 of the immigration act of March 3, 1891, and as such a practice would seem to be contrary to the intent of the treaty of June 1, 1892, providing for the recovery of deserters, the American ambassador at London was instructed to lay the facts before the British Government and inquire whether it was its purpose to regard deserters from American

vessels as immigrants and to refuse clearance to American vessels from which seamen might desert in New South Wales, and if such was not the British Government's purpose to ask that the necessary instructions be issued to the government of New South Wales.

Mr. Hay, Sec. of State, to Mr. Choate, ambass. to Great Britain, No. 159, June 19, 1899, MS. Inst. Great Britain, XXXIII. 196.

Neither sec. 5280, Revised Statutes, nor the British Merchant Shipping Act of 1894, nor the treaty stipulations between the United States on the one hand and Great Britain and Sweden and Norway on the other, appear to impose any obligation on the part of the master of a foreign vessel, or on the consuls of the foreign governments, to make arrests or reclamations of deserters for the protection of the country in which the desertions are made. The provisions in question seem to be designed to aid the shipmaster, who may make reclamation or not, in his own discretion.

Mr. Day, Sec. of State, to Sec. of Treas., June 18, 1898, 229 MS. Dom. Let. 421.

See, to the same effect, as to Art. XIV. of the convention with the German Empire of 1871, Mr. Olney, Sec. of State, to Sec. of Treas., April 27, 1896, 209 MS. Dom. Let. 581.

In 1899 the American consul at Rosario, in the Argentine Republic, caused one Keats to be arrested and imprisoned on the charge of having deserted from the U. S. S. *Castine* in 1897. The Department of State was unable to approve the consul's action, and cabled to the American minister at Buenos Ayres to procure Keats' discharge from imprisonment. This action was taken by the Department on the ground "that, in the absence of a treaty providing for and authorizing it, this Government could not arrest Argentine seamen as deserters from Argentine ships, on the request of that Government to do so;" and that the United States therefore could not give an assurance of reciprocity.

Mr. Hay, Sec. of State, to Mr. Buchanan, min. to Argentine Republic, No. 476, April 4, 1899, MS. Inst. Argentine Repub. XVII. 453, approving the views which Mr. Buchanan had expressed in his No. 638, of Feb. 18, 1899, reporting the case.

Although it was stated by Chief Justice Marshall, *arguendo*, in the case of the *Exchange*, 7 Cranch, 116, that a grant of free passage to the military force of a foreign state would imply "a waiver of all jurisdiction over the troops during their passage," and permit "the foreign general to use that discipline, and to inflict those punishments which the government of his army may require;" and although it was held by him in the same case that public armed vessels of a foreign nation are exempt from the jurisdiction of the local courts, yet the case "is not authority for the proposition that, if the crews of such vessels, or the members of such military force, actually desert

and scatter themselves through the country, their officers are, in the absence of treaty stipulation, authorized to call upon the local authorities for their reclamation. While we have no doubt that, under the case above cited, the foreign officer may exercise his accustomed authority for the maintenance of discipline, and perhaps arrest a deserter *dum fervet opus*, and to that extent this country waives its jurisdiction over the foreign crew or command, yet if a member of that crew actually escapes from the custody of his officers, he commits no crime against the local government, and it is a grave question whether the local courts can be called upon to enforce what is in reality the law of a foreign sovereign."

Tucker *v.* Alexandroff (1902), 183 U. S. 424, 432–434.

Leo Alexandroff, a conscript in the Russian naval service, was sent in October, 1899, as one of a detail of 53 men, under command of an officer, from Russia to Philadelphia, to take possession of and man the Russian cruiser *Variag*, then under construction by the firm of Cramp & Sons, in that city. By the contract between the Russian Government and the builders, it was agreed that the vessel to be built, whether finished or unfinished, and all materials intended for her construction and brought upon the premises of the contractors, should immediately become the exclusive property of the Russian ministry of marine; that the flag of the Imperial Russian Government should be hoisted on the ship, whenever desired by the board of inspection, as evidence that it was the Government's exclusive property; and that the Russian ministry of marine might at any time appoint an officer to take possession of the ship or materials, whether finished or unfinished, subject to the lien of the contractors for any part of the value remaining unpaid. The construction of the vessel was to be paid for in instalments, but a percentage of each instalment was to be withheld, and the final payment was not to be made, till the ship had had a successful trial trip and had been turned over to the Imperial Russian Government; and that Government was at liberty, unless the vessel should fulfill certain requirements as to draft and speed, to reject her. The *Variag* was still on the stocks when the detail of men arrived in Philadelphia. She was launched in October or November, 1899, and was lying in the stream still under construction, not yet having been accepted by the Russian Government, when on April 20, 1900, Alexandroff went to New York and declared his intention to become a citizen of the United States. He was subsequently arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed on a charge of desertion. By Art. IX. of the treaty between the United States and Russia of 1832, the consular representatives of the contracting parties were authorized to require the assistance of the local authorities for the recovery of "deserters from the ships of war and merchant

vessels of their country;" and it was stipulated that for this purpose they should apply to the competent tribunals and "in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews." Alexandroff was committed under section 5280, Rev. Stat. of the U. S., which provides, in language similar to that just quoted, for the recovery of deserters from vessels of governments having treaties with the United States on the subject. It was contended that the treaty and statute were inapplicable to Alexandroff for the reasons (1) that the *Variag* was not yet a Russian ship of war, (2) that he was not a deserter from such ship, and (3) that his membership of the crew was not proved by the exhibition of the register of the vessel, her crew roll, or by any official document. It was held that the *Variag*, inasmuch as she had been launched and was lying in the stream when Alexandroff deserted, was a ship within the meaning of the treaty; that she was also a Russian ship of war within the meaning of the treaty, notwithstanding that she had not been finally accepted and taken possession of by the Russian Government, and that the Russian flag had never been hoisted upon her; that Alexandroff consequently was a deserter from a Russian ship of war within the meaning of the treaty; and that, as it was admitted, and appeared by the record in the case, that Alexandroff came to the United States as a member of the Russian navy for the express purpose of becoming one of the crew of the *Variag*, it could not properly be objected in his behalf that no official documents were produced, especially as it appeared that on the trial of the case below, Alexandroff, through his counsel, waived the production of the passport issued by the Russian Government to the men detailed to man the vessel.

Tucker *v.* Alexandroff (1902), 183 U. S. 424.

In 1901, and again in 1903, the German Government complained that the object of Art. XIV. of the consular convention of Dec. 11, 1871, was defeated by shipping commissioners, particularly at Portland, Oregon, and San Francisco, by requiring it to be shown not only that the person claimed as a deserter was a member of the crew, but also that the offence stated by the consul in his application for arrest had actually been committed, as was done in extradition cases. The complaint was referred to the Attorney-General, who advised that the course complained of was authorized by section 5280, R. S., which was designed to carry into effect treaty stipulations for the return of deserters, and that it certainly was not clearly at variance with the article of the German treaty. He therefore advised that the consul should seek a decision of the question by a competent court.

For. Rel. 1903, 411–417.

CHAPTER XV.

INTERCOURSE OF STATES.

I. *AGENTS OF THE STATE.*

§ 623.

Hall classifies the agents of the state, in its international relations, as follows:

I. The person or persons to whom the management of foreign affairs is committed.

II. Agents subordinate to these, who are—

1. Public diplomatic agents;

2. Officers in command of the armed forces of the state;

3. Persons charged with diplomatic functions, but without publicly acknowledged character;

4. Commissioners employed for special objects, such as the settlement of frontiers, supervision of the execution of a treaty, etc.

With international agents of the state may be classed consuls, but they are only international state agents in a qualified sense.

Hall, Int. Law (4th ed. 1895), § 96, p. 310.

"A diplomatic agent secretly accredited to a foreign government is necessarily debarred by the mere fact of the secrecy with which his mission is enveloped from the full enjoyment of the privileges and immunities of a publicly accredited agent. He has the advantage of those only which are consistent with the maintenance of secrecy; that is to say, he enjoys inviolability and the various immunities attendant on the diplomatic character in so far as the direct action of the government is concerned. Thus his political inviolability is complete; as between him and the government his house has the same immunities as are possessed by the house of a publicly accredited minister; and it may be presumed that no criminal process would be instituted against him where the state charges itself with the duty of commencing criminal proceedings. On the other hand, in all civil and criminal cases in which the initiative can be taken by a private person he remains exposed to the action of the courts; though it would no doubt be the duty of the government to prevent a criminal sentence from being executed upon him by any means which may be at their disposal, consistently with the state constitution."

Hall, Int. Law (4th ed. 1895), § 103, p. 329, citing De Martens, Précis, § 249; Heffter, § 222; and De Garden, Traité de Dip. II.

"Commissioners for special objects are not considered so to represent their government, or to be employed in such functions, as to acquire diplomatic immunities. They are, however, held to have a right to special protection, and courtesy may sometimes demand something more. It would probably not be incorrect to say that no very distinct practice has been formed as to their treatment, contentious cases not having sufficiently arisen."

Hall, Int. Law (4th ed. 1895), § 104, p. 330, citing De Garden, Traité de Dip. II. 13; Bluntschli, § 243.

The commissioners here referred to are not to be confounded with commissioners appointed to act in a diplomatic capacity and invested with diplomatic rights and privileges. (See infra, § 627.)

Heffter (§ 222) considers that commissioners have a right to the "prerogatives that belong to public ministers."

As to the privileges of foreign military and naval officers, see supra, §§ 213, 251, 256.

One of the commissioners under Article VI. of the treaty between the United States and Great Britain of 1794, commonly called the Jay treaty, was prosecuted before a court in Philadelphia on a criminal charge, and took his trial before a jury thereon. "The Government of England did not complain of the proceeding."

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

In 1796 a question arose as to the immunities of Messrs. Gore and Pinkney, American commissioners, under Art. VII. of the Jay treaty. The commissioners claimed "the essential immunities attached to public ministers." The law officers of the Crown, in an opinion dated December 22, 1796, held that the act of 7 Anne, ch. 12, applied only to ambassadors or other public ministers of a foreign state received as such by the King, and therefore did not apply to Messrs. Gore and Pinkney; but they expressed a desire to be informed of the grounds on which the claim of privilege made by the commissioners was based. Messrs. Gore and Pinkney responded in a letter of February 7, 1797, elaborately setting forth their views on the subject. They particularly claimed "an exemption from the jurisdiction of the country and from the payment of those taxes to which public ministers are not liable." They contended that if a person had a commission from his sovereign to transact public business between nation and nation, and if he was acknowledged and allowed to act by the sovereign of the country to which he was sent in the character communicated by his commission, he was a public minister, although he had no letter of credence to such sovereign and was not received by him with any particular formalities. It appears that Messrs. Gore and Pinkney continued to pay the taxes which were

assessed upon them; but they suggested to their Government that, in any arrangements of a similar kind, it would be advisable expressly to communicate the character and privileges of public ministers to the commissioners.

In the United States it has been the practice to extend to persons acting in such a capacity as Messrs. Gore and Pinkney the free entry of articles belonging to them; but this has been done as a matter of courtesy and not of right. Whether such persons would be accorded all the privileges and immunities of diplomatic agents has perhaps never been determined, and may be doubted. In many cases the foreign members of claims commissions in the United States have been diplomatic officers; and in at least one case, that of the commission under the treaty with Mexico of 1839, the foreign government has specially invested its commissioners with a diplomatic character in order that they might possess the immunities of public ministers.

Moore, Int. Arbitrations, I. 345–349.

An injunction was granted against two persons named Castaneda and Field, restraining the former from paying to the latter and the latter from receiving a certain sum of money. Castaneda (the injunction having been obtained *ex parte*) moved that it might be dissolved as to him, alleging that he was the agent of the Queen of Spain for the discharge of certain claims and, as such, was attached to the Spanish embassy and under the control and direction of the Spanish ambassador. Sir J. L. Knight Bruce, V. C., held that, even if Castaneda did not bring himself within sec. 3 of the statute of Anne (a point on which he gave no opinion), he brought himself within a class or description to which the law of England afforded protection from the particular proceeding by injunction. He therefore said: "I dissolve the injunction against this gentleman (which leaves him still a party to the suit) without giving any opinion on the merits of the case. As to Field, the injunction remains."

Service *v.* Castaneda (1845), 2 Collyer, 56.

On August 3, 1904, diplomatic and consular officers of the United States were directed, in printing official stationery and in having new seals cut for the service, to use the adjective "American" instead of "United States." On Nov. 28, 1904, however, they were instructed, when acting in a notarial capacity, to describe themselves as officers "of the United States of America," as required by the statutes, and not as "American" officers.

Mr. Adee, Acting Sec. of State, to Am. dip. & consular officers, circular, Aug. 3, 1904, For. Rel. 1904, 7; Mr. Hay, Sec. of State, to Am. dip. & consular officers, Nov. 28, 1904, ibid.

II. *DIPLOMATIC MISSIONS.*

1. Classification of Ministers.

§ 624.

"*18. Rules of Congress of Vienna.*—For the sake of convenience and uniformity in determining the relative rank and precedence of diplomatic representatives, the Department of State has adopted and prescribed the seven rules of the Congress of Vienna, found in the protocol of the session of March 9, 1815, and the supplementary or eighth rule of the Congress of Aix-la-Chapelle of November 21, 1818. They are as follows:

"'In order to prevent the inconveniences which have frequently occurred, and which might again arise, from claims of precedence among different diplomatic agents, the plenipotentiaries of the powers who signed the Treaty of Paris have agreed on the following articles, and they think it their duty to invite the plenipotentiaries of other crowned heads to adopt the same regulations:

"'Article I. Diplomatic agents are divided into three classes: That of ambassadors, legates, or nuncios; that of envoys, ministers, or other persons accredited to sovereigns; that of chargés d'affaires accredited to ministers for foreign affairs.

"'Art. II. Ambassadors, legates, or nuncios only have the representative character.

"'Art. III. Diplomatic agents on an extraordinary mission have not, on that account, any superiority of rank.

"'Art. IV. Diplomatic agents shall take precedence in their respective classes according to the date of the official notification of their arrival. The present regulation shall not cause any innovation with regard to the representative of the Pope.

"'Art. V. A uniform mode shall be determined in each state for the reception of diplomatic agents of each class.

"'Art. VI. Relations of consanguinity or of family alliance between courts confer no precedence on their diplomatic agents. The same rule also applies to political alliances.

"'Art. VII. In acts or treaties between several powers which grant alternate precedence, the order which is to be observed in the signatures shall be decided by lot between the ministers.

"'Art. VIII. It is agreed that ministers resident accredited to them shall form, with respect to their precedence, an intermediate class between ministers of the second class and chargés d'affaires.'

"*19. Grade of diplomatic representatives.*—The diplomatic representatives of the United States are of the first, the second, the intermediate, and the third classes, as follows:

"(*a*) Ambassadors extraordinary and plenipotentiary.

"(*b*) Envoys extraordinary and ministers plenipotentiary, and special commissioners, when styled as having the rank of envoy extraordinary and minister plenipotentiary.

"(*c*) Ministers resident.

"These grades of representatives are accredited by the President.

"(*d*) Chargés d'affaires, commissioned by the President as such, and accredited by the Secretary of State to the minister for foreign affairs of the government to which they are sent.

"In the absence of the head of the mission the secretary acts ex officio as chargé d'affaires ad interim, and needs no special letter of credence. In the absence, however, of a secretary and second secretary, the Secretary of State may designate any competent person to act ad interim, in which case he is specifically accredited by letter to the minister for foreign affairs.

"*20. Superadded consular office.*—When the office of consul-general is added to that of envoy extraordinary and minister plenipotentiary, minister resident, chargé d'affaires, or secretary of legation, the diplomatic rank is regarded as superior to and independent of the consular rank. The officer will follow the Consular Regulations in regard to his consular duties and official accounts, keeping correspondence in one capacity separate from correspondence in the other."

Instructions to Diplomatic Officers of the United States (1897), §§ 18–20.

"The rules of the Congress of Vienna are understood to be accepted by all nations . . . except the Porte, which has a system of its own, only differing from the Vienna rules by classing ministers resident and ministers plenipotentiary together." (Mr. John Davis, Act. Sec. of State, to Mr. Wallace, min. to Turkey, No. 83, May 22, 1883, MS. Inst. Turkey, IV. 24.)

As seen above, the rules of the Congress of Vienna, as amended by the Congress of Aix-la-Chapelle, recognize four grades of diplomatic officers: (1) Ambassadors, legates, and nuncios; (2) ministers plenipotentiary and envoys; (3) ministers resident; (4) chargés d'affaires.

As to the rules of precedence of the Congress of Vienna, see Blackwood's Magazine (Dec., 1873), vol. 114, p. 681.

As to the office of chargé d'affaires, see report of Mr. Clay, Sec. of State, Jan. 31, 1827, H. Doc. 73, 19 Cong. 2 sess.; 6 Am. State Papers, For. Rel. 554.

As to the proposed reorganization of the diplomatic and consular service of the United States, see report of Mr. Lodge, Com. on For. Rel., May 3, 1900, S. Rep. 1202, 56 Cong. 1 sess.

For a report by Mr. Patterson, of New Hampshire, July 2, 1868, on the character of the foreign service, see S. Rep. 154, 40 Cong. 2 sess.

"It is necessary for America to have agents in different parts of Europe, give some information concerning our affairs, and to refute the abominable lies that the hired emissaries of Great Britain circulate in every corner of Europe, by which they keep up their own credit and ruin ours. I have been more convinced of this since my peregrinations in this country than ever. The universal and profound igno-

rance of America here has astonished me. It will require time and a great deal of prudence and delicacy to undeceive them." (Mr. J. Adams to Mr. Franklin, Oct. 14, 1780, 7 John Adams' Works, 317.)

"In the same manner, or at least for similar reasons, as long as we have any one minister abroad at any European court, I think we ought to have one at every one to which we are most essentially related, whether in commerce or policy; and, therefore, while we have any minister at Versailles, The Hague, or London, I think it clear we ought to have one at each, though I confess I have sometimes thought that after a very few years it will be the best thing we can do to recall every minister from Europe, and send embassies only on special occasions." (Mr. J. Adams to Mr. Livingston, Feb. 5, 1783, 8 John Adams' Works, 37.)

"The undersigned, Secretary of State of the United States, has the honor to acknowledge the receipt of the note of the Chevalier Aguiar d'Andrada, chargé d'affaires ad interim of His Brazilian Majesty, of the 26th instant, enclosing an autograph letter from His Majesty to the President of the United States.

"The undersigned entirely appreciates the force of the precedents referred to by the Chevalier d'Andrada as a warrant for requesting an audience of the President. It is believed, however, that those precedents occurred through inadvertence and without due consideration of the rule that, as a chargé d'affaires is accredited to the minister for foreign affairs, his communications to the executive head of the government should be made through that medium. The observance of this rule is required of the chargés d'affaires of the United States in foreign countries, and it is deemed expedient that the requirement should be reciprocated.

"The Chevalier d'Andrada will therefore comprehend that in recurring to the recognized practice in this respect the undersigned could not have intended any disrespect to the very estimable and accomplished representative of His Brazilian Majesty."

Mr. Marcy, Sec. of State, to the Chev. d'Andrada, Nov. 29, 1855, MS. Notes to Brazilian Leg. VI. 121.

"Your notes of the 12th and 14th instant have been received. In the latter it is stated that as your abode here as chargé d'affaires ad interim of His Majesty, the King of the Netherlands, will be unexpectedly prolonged, you deem it your duty to solicit a presentation to the President of the United States, arrangements for which you request may be made.

"In reply I have the honor to state that, although there is the best disposition to grant any proper request of a representative of His Netherlands Majesty as promptly and cheerfully as that of a similar representative of any other power, it is conceived that there is a necessity to decline a compliance with yours. In the punctilios attending intercourse with foreign states, this Government, which is comparatively among the most youthful, has always deemed it safest

to be guided by the rules on such subjects understood to be followed by the experienced governments of Europe. Among these is supposed to be the one that, as a chargé d'affaires is accredited to the minister for foreign affairs of the country where he is to reside, he can not regularly claim an official presentation to the executive head of the nation.

"If, however, it should be my good fortune to meet you at the President's on any social occasion, I will take pleasure in presenting you to him, or there would be no objection to such a presentation by any friend of yours on a similar occasion."

Mr. Fish, Sec. of State, to Mr. de Stuers, Nov. 16, 1874, MS. Notes to Netherlands Leg. VII. 328.

2. Secretaries of Embassy or Legation.

§ 625.

"A secretary of a mission is, according to the admitted principles of international law, a 'public minister.' His personal privileges, immunities, domiciliary privileges, and exemptions are generally those of the diplomatic representative of whose official household he forms a part."

Instructions to Diplomatic Officers of the United States (1897), § 52, p. 20. See, to the same effect, Respublica *v.* De Longchamps, 1 Dallas, 111.

"As long as the head of the mission is present, the secretary is not recognized by any foreign government as being authorized to perform a single official act other than as directed by the head of the mission."

Instructions to Diplomatic Officers of the United States (1897), § 31, p. 13. This passage, in substantially the same form, has long stood in the formal instructions to secretaries of legation.

"Whilst in the official and private intercourse between a minister and his secretaries it is undoubtedly among the first of his duties to observe a frank, courteous, and kindly demeanor towards them, on the other hand, it is no less incumbent on the secretaries to fulfil with alacrity and dispatch, in the best manner they are able, the general and occasional instructions of the minister touching the affairs of the legation, and to maintain in their intercourse with him an unvarying due observance of all that deference which characterizes the gentleman, and which is prescribed by the rules of good breeding. No servility, however, on their part, or any compromise of that self-respect which they owe to themselves, is expected."

Mr. Fish, Sec. of State, to Mr. Vignaud, Sec. of Legation, Jan. 18, 1876, MS. Inst. France, XIX. 335.

This passage formerly occupied a place in the printed personal instructions to the diplomatic agents of the United States.

"I have received your No. 175 of the 25th and No. 176 of the 27th ultimo, relating to the designation in the Russian official diplomatic list of the secretary of our legation at St. Petersburg as conseiller.

Title of "conseiller."

"The title *conseiller* is understood to be a special designation applied to the secretary of an embassy or legation by the governments of certain countries only. Martens says: 'Some governments give to the first secretaries of their higher missions the title of conseiller of embassy or of legation.' (Guide Diplomatique, chap. v.) In the last edition of the Almanach de Gotha, a semiofficial publication, the missions maintained at St. Petersburg by Germany, Austria, Belguim, China, France, and Turkey are accredited with conseillers, the rest having secretaries.

"In the foreign list at this capital—a copy of which I enclose—conseillers are found in the diplomatic representation of Austria, Belgium, Germany, and Japan. The corresponding officer of the Russian legation here is styled 'first secretary of legation.'

"The Department was not aware, until your present report, that the United States secretary of legation at St. Petersburg had been styled *conseiller*, and in the Almanach de Gotha he is styled *secretaire*.

"The functions of conseiller and secretary are understood to be in fact identical, differing only in name, and although the French word is equivalent to our *counsel* or *counsellor*, no legal office or character is supposed to be intended. The local counsel or law-adviser of a mission is not a recognized diplomatic officer.

"Although the application of different names to the same office and functions appears merely to be involved, it is preferable that the corresponding officer in the diplomatic service of the United States should bear only the title prescribed by our statutes. Your inquiry and action are therefore approved."

Mr. Olney, Sec. of State, to Mr. Breckinridge, min. to Russia, No. 153, Dec. 16, 1895, MS. Inst. Russia, XVII. 397.

See, also, Mr. Olney to Mr. Peirce, Jan. 8, 1896, MS. Inst. Russia, XVII. 401.

"I have received your No. 218 of the 8th instant, in further relation to the title to be borne in the Russian foreign list by the secretary of your legation.

"The title of first secretary is not prescribed by existing statute. The current appropriation act provides for secretaries of embassies at London, Paris, and Berlin, and for a secretary of legation at St. Petersburg. The junior officers at the embassies named are styled second secretaries, which raises a presumption that the senior is intended to rank as 'first secretary.' At those embassies there would be no objection to styling the officer in question first secretary for official and ceremonial intercourse.

"The question remains as to the proper ceremonial title at the embassy or legation where there is but one secretary. The salary of the secretary of legation at St. Petersburg is the same as fixed for the like offices at the embassies, and I am inclined to think that, the equality of grade being thus established, there could be no reasonable objection to the local use of the term first secretary as the convenient designation of a virtual fact. The usage, however, at St. Petersburg would appear to be merely local. The British foreign office list shows seven secretaries of embassies and sixteen of legation (not *first* secretaries), with thirty-seven *second* secretaries and nineteen *third* secretaries; so that, as in our own service, there is no 'first' secretary in the British organization.

"You are therefore authorized to permit the local designation of the secretary of your legation as first secretary."

Mr. Olney, Sec. of State, to Mr. Breckinridge, min. to Russia, No. 186, Feb. 25, 1896, MS. Inst. Russia, XVII. 419.

"During the coming month a new list of the diplomatic corps at this capital is to be issued by the department of ceremonies of the court at this capital, and inquiries have been made by the officials whose duty it is to prepare it, as to the designations of the members of the embassy. The official who requested this information considers that it would be anomalous should the first secretary of an embassy not be designated as conseiller. In view, however, of the Department's No. 153, of December 16, 1895, to my predecessor, I do not feel justified in sanctioning this designation without authority from the Department.

"In referring to the dispatch above mentioned, it is but fair to say that the ruling of the Department appears to have been given upon a somewhat incomplete understanding of the premises. The diplomatic list here does not emanate from the ministry of foreign affairs, to which the secretary of embassy is accredited, but is a list of the officers of the various missions accredited here, with their families, including ladies, published by a bureau of the court as a social convenience, the names being communicated to an officer of that bureau informally and only semiofficially.

"I regard it as highly desirable that the first secretary of our embassy here should be designated as conseiller, in conformity with the almost universal usage at this court and in support of the dignity of the mission. The French and British Governments have, with this policy in view, given their first secretaries here the rank of 'minister plenipotentiary performing the duties of conseiller,' with advantage to their missions both when the ambassador is present and when abroad on leave of absence. While the rank of conseiller does not exist in the British service, the first secretary of that embassy here

has for many years been so designated upon the diplomatic list until the present change was instituted last winter.

"As, in addition to all the embassies, four of the legations at this court designate their secretaries as conseillers, not to so designate our own would be socially disadvantageous both to the secretary and myself.

"As pointed out in the Department's No. 153, the title of conseiller is a special designation applied to a secretary of embassy or legation by certain governments only. Martens says (Guide Diplomatique, Chapter V): 'Some governments give to the first secretaries of their higher missions the title of conseiller of embassy or legation.' The functions of conseiller and secretary are identical, differing only in name, and no legal character or office is implied by the former term.

"I trust, therefore, that in this first list in which this mission appears as an embassy it may be found permissible for the first secretary to be termed conseiller."

Mr. Hitchcock, ambassador to Russia, to Mr. Sherman, Sec. of State, April 30, 1898, For. Rel. 1898, 531.

"I have to acknowledge the receipt of your No. 54 of the 30th ultimo, recommending that the first secretary of your embassy may be styled conseiller in the list of the diplomatic corps issued by the imperial department of ceremonies.

"Calvo, in his Dictionary of International Law, states that—

"'The conseiller of embassy or of legation is an agent whom governments attach sometimes to diplomatic missions in order to assist with his advice the public minister in affairs of certain importance, or which demand special knowledge which the minister is not deemed to possess.

"'No diplomatic usage has fixed the attributes of the conseiller of legation. They are ordinarily determined by his government, and are merged into those of secretary of legation. It is the rule to-day, in the absence of formal instructions to the contrary, for the conseiller to supply the place of the chief of the mission, disabled or absent; and it is only in succession to the former, or in his absence, that this task is devolved upon the first secretary. The conseiller shares the privileges and immunities recognized in secretaries. Like the latter, he is named and appointed by the government itself, which gives notice of his nomination to the ministers of foreign affairs of the country where he is to reside. He is presented to the sovereign of this country by the chief of the post to which he is attached. He is clothed with a certain representative character; enjoys immunities of his own, independently of the ambassador, or of the chief of legation, but has no right to any ceremonial. In Germany the title of conseiller of legation is conferred upon the conseiller of the department of foreign affairs.'

"The above definition shows that the conseiller is virtually a secretary of legation.

"Clause 5 of section 1674 of the Revised Statutes enumerates the list of diplomatic officers of the United States, and excludes all others. In this list the office of conseiller is not mentioned.

"Section 37 of Instructions to Diplomatic Officers, which is based upon the law above referred to, prohibits in spirit, if not in letter, the designation of the first secretary as conseiller. The Department is, therefore, of opinion that this can not be done except by statutory authority."

Mr. Day, Sec. of State, to Mr. Hitchcock, May 23, 1898, For. Rel. 1898, 532; MS. Inst. Russia, XVIII. 47.

3. Attachés.

§ 626.

In the diplomatic list at Washington, corrected to Feb. 28, 1903, there appear, besides the heads of missions, the offices of "secretary" of embassy, or of legation, as the case may be: "first secretary," "second secretary," "third secretary," and "secretary interpreter" (China); "counselor of legation and first secretary of embassy" (Germany), "counselor of legation," and "chancellor;" "attaché," "military attaché," "naval attaché," "interpreter attaché," "technical attaché," "commercial attaché," "honorary attaché," "financial attaché," "student attaché," and "expert for agriculture and forestry." In the list dated April, 1906, most of these titles appear, and we also find "legal counselor" and "commercial delegate."

In January, 1894, the Department of State dropped from the diplomatic list of officers bearing the title of "chancellor," but stated that their names would be restored on the announcement that they were in fact diplomatic officers, although it was thought that some other designation than "chancellor," which was thought to denote a purely clerical relation, would be desirable. (Memorandum, Aug. 11, 1894, MS. Notes to France, X. 356.)

Military attachés.

"At the instance of the Secretary of War, whose letter is dated the 8th instant, I have to inform you of the following decision of his Department in regard to the official status and duties of military attachés.

"'Each military attaché is, in a sense, an aide-de-camp to the ambassador or minister to whose embassy or legation he is appointed. The orders of the ambassador or minister will be obeyed, unless they manifestly conflict with orders or instructions given by the Secretary of War. In the latter case, the military attaché will respectfully notify the ambassador or minister of the circumstances which prevent a compliance with his orders, in which event the full partic-

ulars of the case must be at once forwarded to the Adjutant-General. It is the earnest wish of the War Department that the most harmonious relations should exist between the military attachés and their chiefs in the diplomatic service. Any military attaché whose relations with the chief of the embassy or legation to which he is assigned are not most cordial will request a recall. A dignified appreciation of his own position and courteous respect for his diplomatic chief will be expected of each attaché.'"

Mr. Sherman, Sec. of State, to Mr. Hay, amb. to England, No. 259, October 14, 1897, MS. Inst. Great Britain, XXXII, 251.

Naval attachés.

"The United States Navy Department desiring to establish reciprocity in the matter of visits by foreign naval attachés or by other persons to the Government navy-yards and stations, as well as to the yards of private firms engaged in Government work, the Secretary of the Navy requests me to inform you of the adoption of the following rules which correspond to the facilities afforded by the Government of France to United States naval attachés and other officials in the same direction.

"For visits by the naval attaché a written request is to be made by the attaché to the Secretary of the Navy and presented by the attaché to the Office of Naval Intelligence for transmission to the Bureau of Navigation. Subsequently, letters are to be prepared by the Office of Naval Intelligence according to departmental decision, as heretofore.

"But commandants of yards and stations are to be directed not to show any new developments or special machinery until specifically authorized, and not to show any drawings or printed matter. For such matter the attaché is to be referred to the Office of Naval Intelligence; and the attaché is to be accompanied by an officer with these restrictions in mind.

"For visits by other persons, the request is to be made through the Department of State by the ambassador or chargé d'affaires ad interim, and the scope of the visits to be restricted by direction to commandants, as in the case of the naval attaché."

Mr. Hay, Sec. of State, to Mr. Thiebaut, chargé, No. 365, Nov. 20, 1900, MS. Notes to French Leg. XI. 97.

A similar note, mutatis mutandis, was sent to the Japanese legation. (Mr. Hay, Sec. of State, to Mr. Takahira, No. 10, Nov. 20, 1900, MS. Notes to Jap. Leg. II. 47.)

A note was also addressed, on the same day, to the German embassy. This note, after stating that the rules adopted by the United States corresponded to the facilities afforded by the German Government, read as follows: "For visits by naval attachés, and by all others as well, the requests are to be made through the Department of State by the ambassador or chargé d'affaires ad interim. Subsequently letters are to be prepared by the office of Naval Intelligence accord-

ing to the decision of the Navy Department, made known to the Bureau of Navigation. Commandants of stations are to be directed to afford as liberal opportunities as the interests of the United States will admit." (Mr. Hay, Sec. of State, to Count Quadt, chargé, No. 498, Nov. 20, 1900, MS. Notes to German Leg. XII. 513.)

It is the custom of the United States to designate as naval attachés officers whose services may be styled strictly naval rather than medical or otherwise. (Mr. Frelinghuysen, Sec. of State, to Mr. Chandler, Sec. of Navy, Dec. 27, 1884, 153 MS. Dom. Let. 516.)

Scientific attachés.

"Replying to your oral inquiry of the 29th ultimo, as to whether Mr. Stiles, the agricultural and scientific expert attached to the United States embassy in Berlin, has diplomatic rank, I beg to say that it is understood that the relation of Mr. Stiles to the embassy is similar to that of a military or naval attaché, who, while he does not hold diplomatic rank in the sense of being in the line of representative succession, so as to act as chargé de affaires ad interim, is regarded as being attached to the mission. As an illustration of my meaning, I may refer to the case, as understood by the Department, of Baron von Herman, the agricultural and forestal expert of the imperial German embassy. While Baron von Herman does not, as the Department is advised, stand in the line of representative succession, his name appears in the diplomatic list, and is certified to the authorities of this city as that of a member of the embassy.

Mr. Moore, Act. Sec. of State, to Freiherr Speck von Sternburg, June 2, 1898, MS. Notes to German Legation, XII. 139.

Local counsel.

The Department of State sees no objection to a person who acts as counsel to an embassy or legation so designating himself in his general practice, provided that it be distinctly understood that his acts are not officially representative or in any way conclusive upon the embassy or legation or upon the United States Government.

Mr. Rockhill, Assist. Sec. of State, to Mr. Coudert, June 17, 1896, 210 MS. Dom. Let. 666, inclosing copy of instruction to Mr. Eustis, amb. to France, No. 610, April 30, 1896.

See Mr. Olney, Sec. of State, to the Messrs. Coudert Brothers, June 26, 1896, 211 MS. Dom Let. 103.

The person thus referred to as acting as counsel to the embassy was not an attaché of the embassy and neither claimed nor possessed diplomatic privileges.

4. Commissioners and Special Envoys.

§ 627.

The expression "ambassadors and other public ministers," in the Constitution, must be understood as comprehending all officers having diplomatic functions, whatever their title or designation.

The commissioner of the United States in China is a diplomatic officer by the law of nations, and a judicial officer by treaty and statute.

Cushing, At. Gen., 1855, 7 Op. 186.

Spanish viceroys, governors, and captains-general have generally been invested with the *jus legationis*.

Cushing, At. Gen., 1855, 7 Op. 551.

"The rank of 'commissaire' (commissioner) is not mentioned in the Rules of Vienna and Aix la Chapelle (see printed Personal Instructions, sect. 33). In the practice of this Government commissioners have often, from the foundation of the Government, borne commissions signed by the head of the Government, and have been accredited and received as full envoys. Other commissioners, however, have been at times appointed on the certification of the Secretary of State and without diplomatic capacity. The title is vague, and only the language and purport of the incumbent's commission and credential letters can determine whether it possesses a diplomatic character; and the government to which he is accredited usually assigns his rank by the formality of acceptance."

Mr. Foster, Sec. of State, to Mr. Heard, No. 151, Dip. Series, Oct. 31, 1892, MS. Inst. Corea, I. 414.

In 1900 the President appointed Mr. William Woodville Rockhill as "commissioner of the United States to China, with diplomatic privileges and immunities." The Secretary of the Navy was requested to instruct the naval authorities in Chinese waters, by telegraph if necessary, of this fact, so that the usual courtesies might be accorded to Mr. Rockhill.

Mr. Hay, Sec. of State, to Sec. of Navy, July 20, 1900, 246 MS. Dom. Let. 485.

A delegate to the International Conference of American States at the City of Mexico is not an "officer" of the United States, but he comes within the description of a "person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States," under sec. 5498, Rev. Stat., which forbids such a person to prosecute or aid or assist in prosecuting claims against the United States.

Knox, At. Gen., Oct. 1, 1901, 23 Op. 533.

Section 5498, Rev. Stat., which forbids any "person holding any place of trust or profit, or discharging any official function under, or

in connection with, any Executive Department of the Government of the United States" to prosecute or aid or assist in prosecuting claims against the United States, would not subject to the penalties therein prescribed a person who accepted an office or place while engaged in the prosecution of claims against the United States, but would subject him to such penalties if, while holding such office or place, he should engage in the prosecution of claims against the United States before the Spanish Treaty Claims Commission or other tribunal.

Knox, At. Gen., Oct. 1, 1901, 23 Op. 533.

"Under the provisions of the act of Congress approved March 3, 1897, for the promotion of an international agreement respecting bimetallism, I appointed on the 14th day of April, 1897, Hon. Edward O. Wolcott, of Colorado; Hon. Adlai E. Stevenson, of Illinois, and Hon. Charles J. Paine, of Massachusetts, as special envoys to represent the United States. They have been diligent in their efforts to secure the concurrence and cooperation of European countries in the international settlement of the question, but up to this time have not been able to secure an agreement contemplated by their mission. . . . The British Government has published a résumé of the steps taken jointly by the French ambassador in London and the special envoys of the United States, with whom our ambassador at London actively cooperated in the presentation of this subject to Her Majesty's Government. This will be laid before Congress."

President McKinley, annual message, Dec. 6, 1897, For. Rel. 1897, xxiii.

5. "AGENTS."

§ 628.

"No person has ever presented himself from your Government [Buenos Ayres] with the credentials or commission of a public minister. Those which you have exhibited give you the express character of agent only, which neither by the laws of nations nor by those of the United States confers the privilege of exemption from personal arrest."

Mr. Adams, Sec. of State, to Mr. Aguirre, Aug. 27, 1818, MS. Notes to For. Legs. II. 337.

It may be observed that at this time the independence of Buenos Ayres had not been recognized by the United States. Mr. Adams particularly adverted to this fact in other parts of his communication.

See, also, Mr. Adams, Sec. of State, to Mr. Rush, No. 15, Jan. 1, 1819, MS. Inst. U. States Mins. VIII. 296.

As has been seen, the title of "agent" is used in the case of the representative to a semisovereign state. (Supra, § 14.)

In 1868 Mr. John Hitz, then Swiss consul-general at Washington, was appointed "political agent" of the Swiss Confederation at that

capital. In his letter of credence of February 28, 1868, which was addressed to Mr. Seward, as Secretary of State, he was described as "political agent of the Swiss Confederation near the Government of the United States of America" (*agent politique de la Confédération Suisse prés le Gouvernement des Etats-Unis d'Amerique*). On the 30th of March Mr. Hitz communicated a copy of this letter to Mr. Seward, and requested the appointment of a time to present the original. Mr. Seward replied, on March 31, appointing Thursday, the 2nd of April, on which day he received Mr. Hitz with an exchange of brief formal addresses. In the register of the Department of State for 1869 Mr. Hitz's name appeared in the diplomatic list as "political agent and consul-general." In 1870, however, his name was stricken from the diplomatic list and did not afterwards appear in it, though he retained his office of consul-general. In 1873, when the President of Switzerland intimated that the Federal Council had under consideration the subject of appointing a diplomatic representative to reside at Washington, and that there was a disposition to appoint Mr. Hitz as such representative, the Department of State caused the Swiss Government to be informed that, while Mr. Hitz, if appointed, would be received, yet his appointment would not be agreeable. About 1879 Mr. Hitz became involved in certain civil, and afterwards became defendant in certain criminal, proceedings. It appeared that his name had been printed in the Swiss *Staats-Kalender*, with those of the envoys extraordinary and ministers plenipotentiary of Switzerland, as "*General Consul und politischer Agent;*" but the Department of State did not consider that this "isolated" circumstance could outweigh the fact that for years it had not recognized Mr. Hitz as possessing any diplomatic character, or the declarations made by the Federal Council, and accepted by the United States, that a diplomatic representation at Washington, if decided upon, would be specifically created. The Department of State therefore declined to give a certificate showing that Mr. Hitz had been and still was recognized as "political agent." The Department pronounced this title to be "one of a class unusual in public intercourse between independent states," and "not referable to any of the recognized grades of diplomatic intercourse," and stated that, if Mr. Hitz had performed any functions as political agent, the Department was unable to distinguish them from his functions as consul-general, in which capacity he was recognized in 1864 and was still recognized. "Under these circumstances," said Mr. Blaine, in a letter of April 12, 1881, "and especially in view of the unusual and undefined title of 'political agent,' being strange to international law and unknown to our domestic usage, I can not admit that the right is conceded to Mr. Hitz to perform any international act toward this Government which he is not equally competent to perform as

a consul-general in a country where there is no diplomatic representative of his Government; and therefore I do not feel justified in giving a certificate that he still is recognized by this Government as a political agent."

The consideration of the matter was terminated by Mr. Hitz's resigning and vacating his office. The Swiss Government then appointed an envoy extraordinary and minister plenipotentiary to the United States.

Mr. Blaine, Sec. of State, to Mr. Totten, April 12, 1881, 137 MS. Dom. Let. 114; Mr. Blaine, Sec. of State, to Mr. Fish, chargé d'affaires, No. 206, April 15, 1881, MS. Inst. Switzerland, II. 87.

In the instruction to Mr. Nicholas Fish of April 15, 1881, here cited, Mr. Blaine remarks that, notwithstanding the anomalous nature of Mr. Hitz's appointment as "political agent," a representative function seemed at first to have been "mistakenly" conceded to him, and then refers to the entry in the register of the Department of State for 1869 and its omission from the diplomatic list of 1870. It appears that Mr. Fish, for a certain time after he succeeded Mr. Seward as Secretary of State, continued the recognition in Mr. Hitz of a certain representative character. Thus, in a letter to Mr. Boutwell, Secretary of the Treasury, December 2, 1869, Mr. Fish asked for the free entry of a case of wine for "Mr. Hitz, political agent and consul-general of Switzerland." (82 MS. Dom. Let. 427.) A similar request was made June 25, 1870. (85 MS. Dom. Let. 171.) In a letter to Mr. Early, June 16, 1871, Mr. J. C. B. Davis, Acting Secretary of State, conveyed the information "that Mr. Hitz is the political agent and consul-general of Switzerland at Washington, and that Horace Rublee, Esq., is the minister of the United States at Berne, Switzerland." (89 MS. Dom. Let. 561.) Such references, however, afterwards ceased to appear. In a letter to Mr. Belknap, Secretary of War, April 23, 1875, Mr. Fish requested some information for "the consul-general of Switzerland," the consul-general being Mr. Hitz. (107 MS. Dom. Let. 544.)

That Mr. Hitz, prior to his resignation, was entitled to immunities from criminal proceedings, was maintained in a pamphlet published in Washington in 1882, under the title: "Was the Political Agent of Switzerland a Diplomatic Officer? A Study in International Law. By a Member of the Bar." The author of the pamphlet was the late General R. D. Mussey. In the course of his argument he cited Wisconsin *v.* Duluth, 2 Dillon, 406; Moreuil, Manuel des Agents Consulaires (Paris, 1853), Introduction, and Part 3, title 1; De Clercq and De Vallet, Guide Pratique des Consulats (Paris, 1858), I. 4, 41, 170; Garden, Traité Complet de Diplomatie (Paris, 1833), I. 3; Beschérelle's Dictionary, art. Agent Diplomatique; De Cussy, Dictionnaire, etc., art. Agents Politiques; Cushing, At. Gen., 7 Op. 190–191; Wicquefort, The Ambassador and His Functions (London, 1716), 3, 38, 39; Vattel, Book IV. chap. vi. sec. 75.

Congress, in providing for the diplomatic representation of the United States in Roumania, made an appropriation for "a diplomatic agent and consul-general."[a] Had Roumania remained under

[a] 21 Stat. 134.

its ancient suzerainty, this title might have been "held to conform to the anomalous designation observed in Egypt." But, as the principality had become an independent power, the Department of State, perceiving that the designation might raise delicate questions, suggested that as Mr. Schuyler, who had been appointed to the new post, was accredited directly to the sovereign of Roumania, his mission would be deemed a legation, and that he would be considered by the United States, according to Art. I., act 17, of the Congress of Vienna, as coming within the second class of public ministers, defined therein as "envoys, ministers, or *other persons accredited to sovereigns*." Should this rank be questioned by the Roumanian Government, he was to leave with the minister of foreign affairs a copy of his instructions, and say that the United States "would accord like rank to any diplomatic agent accredited to the President by the head of the Roumanian State."[a] When Mr. Schuyler arrived at Bucharest, though he was provisionally recognized as a diplomatic officer, objection was made to his title; but he expressed to his government the opinion that, if the word "legation" should be mentioned in his letters of credence and he should be entrusted in them with a special mission, to present a letter from the President in reply to the letter of the Prince announcing the independence of the country, and perhaps also to negotiate a treaty, the Roumanian minister of foreign affairs would for the moment be satisfied, it being understood that an application would be made to Congress for a more regular title, in case the President should deem it inexpedient to confer it at once. No action was taken on this suggestion pending the arrival of Colonel Voinesco, the Roumanian special envoy, sent abroad to announce officially the independence of the country and the assumption by the Prince of the title of "Royal Highness."[b] After the reception of Colonel Voinesco by the President, and the consideration of the representations which he made, it was decided, as the Department of State advised Mr. Schuyler, that it comported "alike with the counsels of national dignity and international good will to waive insistence upon a point which is after all merely one of technical form, and to defer courteously to the wish of the Roumanian Government, as a further token of the good will we bear it. To this end," continued the Department, "the subject will be brought to the attention of Congress. . . . The precise grade of your mission is necessarily one for the determination of Congress. Inasmuch, however, as the representation of the United States at several of the older courts which have

[a] Mr. Evarts, Sec. of State, to Mr. Schuyler, June 28, 1880, MS. Inst. Roumania, I. 1, 5–6; also, Mr. Hay, Act. Sec. of State, to Mr. Schuyler, July 7, 1880, id. 9.

[b] Mr. Evarts, Sec. of State, to Mr. Schuyler, Sept. 11, 1880, MS. Inst. Roumania, I. 12.

long maintained full missions in this country is conducted through the medium of chargés d'affaires, it is hardly likely that Congress will find it needful to give to the legation at Bucharest a higher grade than this; especially as it does not appear that the Government of His R. H. proposes to maintain any resident diplomatic agent, of whatever grade, in Washington." [a] Congress, by the act of February 24, 1881, appropriated for a "chargé d'affaires and consul-general of the United States in Roumania.[b]

6. Union of Diplomatic and Consular Functions.

§ 629.

"Some foreign governments do not recognize the union of consular with diplomatic functions. Italy and Venezuela will only receive the appointee in one of his two capacities, but this does not prevent the requirement of a bond and submission to the responsibilities of an office whose duties he cannot discharge. The superadded title of consul-general should be abandoned at all missions."

President Cleveland, annual message, Dec. 8, 1885, For. Rel. 1885, xvii.

As to the refusal of Italy to recognize an officer in the dual capacity of secretary of legation and consul-general, see Mr. Frelinghuysen, Sec. of State, to Mr. Astor, min. to Italy, No. 8, Dec. 18, 1882, MS. Inst. Italy, II. 232.

As to the refusal of the Venezuelan Government to receive a person in the dual capacity of minister resident and consul-general, see Mr. Frelinghuysen, Sec. of State, to Mr. Baker, No. 12, Sept. 30, 1884, MS. Inst. Venezuela, III. 410; Mr. Hunter, Act. Sec. of State, to Mr. Baker, No. 13, Oct. 10, 1884, id. 412; Mr. Bayard, Sec. of State, to Mr. Scott, No. 11, July 16, 1885, id. 484.

To attach the consular function to the "plenipotentiary office" would be "anomalous in international intercourse." (Mr. Uhl, Act. Sec. of State, to Mr. Smythe, No. 13, dip. series, Dec. 28, 1893, MS. Inst. Hayti, III. 367.)

See Instructions to the Dip. Officers of the United States (1897), § 20.

"So far as the rule of this government is concerned, the diplomatic function of a consular officer is only recognized when he bears a special letter of credence addressed to the Secretary of State; and conversely a consular officer of the United States, even when left in custody of a legation, has no diplomatic rank, functions or immunities, unless he be expressly accredited to the minister for foreign affairs."

---

[a] Mr. Evarts, Sec. of State, to Mr. Schuyler, Dec. 3, 1880, MS. Inst. Roumania, I. 23–25.

[b] 21 Stat. 340. For instructions as to the negotiation of a consular convention, see Mr. Blaine, Sec. of State, to Mr. Schuyler, March 23, 1881, MS. Inst. Roumania, I. 36.

Mr. Foster, Sec. of State, to Mr. Heard, No. 151, Dip. Series, Oct. 31, 1892, MS. Inst. Corea, I. 414.

See, to the same effect, Mr. Fish, Sec. of State, to Mr. Squier, Nov. 4, 1869, MS. Notes to Honduras, II. 6; Mr. Fish, Sec. of State, to Mr. Botassi, Greek consul-general, Nov. 26, 1873, MS. Notes to Turkey and Greece, I. 380; Mr. Evarts, Sec. of State, to Mr. Smyth, No. 57, Oct. 18, 1880, MS. Inst. Liberia, II. 108; Mr. Bayard, Sec. of State, to Mr. Lothrop, min to Russia, No. 131, June 26, 1888, MS. Inst. Russia, XVI. 547; Mr. Hay, Sec. of State, to Mr. Sampson, min. to Ecuador, March 22, 1900, Ecuador, II. 33.

See, also, Instructions to the Dip. Officers of the United States (1897), § 24.

"In the possible case of objection, by the government of the country of residence, to a diplomatic officer who is also a consular officer performing the functions of both offices, the vice-consul-general or vice-consul, if there be one, may be put in charge of the business of the consulate-general or consulate.—R. S., sec. 1738."

Instructions to the Dip. Officers of the United States (1897), § 21.

7. Nondiplomatic Missions.

§ 630.

In October, 1861, Mr. Seward, with the approval of the President and the Cabinet, determined to send to Europe, on a confidential and secret mission, for the purpose of acting, so far as possible, on public sentiment in respect to the Civil War, certain eminent citizens who, however, were to receive no compensation beyond payment of their expenses, and were not to deal distinctively with any foreign government nor to assume in any way diplomatic functions. The gentlemen selected for the purpose were Archbishop Hughes, Bishop McIlvaine, Mr. Everett, Mr. Winthrop, and Mr. J. P. Kennedy. The two first named proceeded at once on the mission. The others were ready to follow, if this was thought necessary by the Government, asking for a few days' delay for preparation. In the meantime, more favorable advices from England having arrived, they were relieved by Mr. Seward from the duty. Archbishop Hughes and Bishop McIlvaine, however, entered on the service.

See Thurlow Weed's Autobiography, 634; and fuller statement as to details, in 4 Winthrop's Addresses, 500.

Wharton, in his Int. Law Digest, states that "no letters to or from" Archbishop Hughes or Bishop McIlvaine "are on file in the State Department, nor is any record of their appointment to be found."

The instructions to Archbishop Hughes, which appear to have been his only commission, are duly recorded. He was furnished with a "dispatch" to Mr. Dayton, American minister at Paris, and was requested to ascertain "in the most confidential manner" the disposition of the French Government, "deferring in all cases to Mr. Dayton's judgment and acting as auxiliary to him only;" and he was while in Paris to

"study how, in cooperation with Mr. Dayton," he could "promote healthful opinions concerning the great cause for which our country is now engaged in arms." He was also to "extend" his "visit" to "any part of Europe" he might think proper, and to consider himself at liberty to stay until recalled. (Mr. Seward, Sec. of State, to His Grace Archbishop Hughes, Nov. 2, 1861, MS. Inst. France, XVI. 81.)

As to the confidential mission of J. M. Forbes and W. H. Aspinwall to England, in 1863, chiefly with a view to preventing Lairds' rams from going into the hands of the Confederates, see Hughes, Letters and Recollections of John Murray Forbes, and Political Science Quarterly (March, 1900), XV. 137.

The United States Commission in the Philippines having recommended, as a means of allaying certain native discontents of long standing, the purchase by the Government of the lands of the religious orders in the islands, it was deemed essential definitely to ascertain the attitude of the Vatican on the subject. To that end it was decided to send to Rome Governor Taft, the head of the Philippine Commission, who was then in Washington. His commission, which was dated May 9, 1902, was a letter of instructions, addressed to "Hon. William H. Taft, Civil Governor of the Philippines," and signed by "Elihu Root, Secretary of War." After adverting to the apparent impossibility of arranging a purchase directly with the friars, it authorized Governor Taft to ascertain what "church authorities" had the power to negotiate for and determine upon a sale of the lands; and if he should find, as the information at hand indicated, that "the officers of the church at Rome" possessed such power, he was to endeavor to reach at least a basis of negotiation along lines which would be satisfactory to them and to the Philippine government. Certain rules were laid down for his guidance, and it was expressly declared that his errand would "not be in any sense or degree diplomatic in its nature," but would be "purely a business matter of negotiation" by him "as governor of the Philippines for the purchase of property from the owners thereof, and the settlement of land titles, in such manner as to contribute to the best interests of the people of the islands." In conclusion he was assured of any assistance which he might desire to enable him to perform his duties in a manner satisfactory to himself; and he called to his aid Judge James S. Smith, then a member of the supreme court of the Philippines, and Major Porter, of the Judge Advocate's bureau in the United States Army.

Governor Taft bore with him a friendly letter from President Roosevelt to the Pope, asking him to accept a set of the President's works; and an American bishop of the Catholic Church arranged for an audience. Governor Taft was duly received by His Holiness; and he then entered into communication with Cardinal Rampolla, papal secretary of state, Major Porter acting as his bearer of dispatches. Each step in the correspondence was duly reported to the Secretary of War, who gave fresh instructions as they were needed. The nego-

tiations at Rome were concluded late in July, 1902, with the understanding that the Holy See would send, as afterwards was done, an apostolic delegate to Manila to treat with the local government.

The foregoing facts are taken from a paper entitled "The Mission of Gov. Taft to the Vatican," by the Hon. Simeon E. Baldwin, in the *Yale Law Journal*, Nov., 1902. See this article for fuller information. Judge Baldwin in conclusion says:

"The whole proceeding which has been the subject of this article will rank in the history of international law as an anomalous one. The agent of the United States bore no credentials addressed to those with whom he was to negotiate. He was charged with certain affairs, but he was not a *chargé d'affaires*, for he was not accredited to the papal secretary of state, and his commission declared that his errand was in no sense diplomatic in its nature. He was not an agent to smooth the way toward a future treaty, for here, again, his commission declared that any negotiations which he might enter upon would be 'subject to granting of power by Congress to follow the negotiations by binding action.' Nor could he properly be regarded as an agent to negotiate a *concordat*. A *concordat*, it is true, is an agreement to which the Pope becomes a party purely as the head of the Roman Catholic Church and not at all in the character of a political sovereign. It is true, also, that agreements of this character may properly extend to the settlement of land titles affecting the interests of religious orders, as in the case of the French *concordat* of July 15, 1801, or that with Spain of March 16, 1851. (See Calvo, 'Droit International,' III. secs. 1607, 1609.) But a *concordat* is, in substance, a treaty in which the Pope treats with the treaty-making power of the sovereignty which is the other contracting party. Cardinal Rampolla's reception of Gov. Taft's overtures as coming from a political agent of the United States did not amount to recognition of him as a diplomatic agent (see Wharton, 'International Law Digest,' I. 549, sec. 70), nor was he sent out in that capacity. It was, from first to last, to be classed in form as a military incident of a temporary state of hostilities; and yet it was, from first to last, at bottom, the attempt of the civil authorities of the United States on the one hand and the Pope on the other to make a permanent settlement of a matter essentially pertaining to affairs of civil government."

By the act of Congress of July 1, 1902, power was given to the Philippine Commission to buy any lands which were on August 13, 1898, owned or held in such large parcels and in such manner as in its opinion "injuriously to affect the peace and welfare of the people of the Philippine Islands," and for this purpose to issue bonds. (32 Stat. I. 706.)

8. Self-Constituted Missions.

§ 631.

In 1798, after the rupture of diplomatic relations between the United States and France, Dr. George Logan, of Philadelphia, a gentleman of fortune and education, a member of the Society of Friends, and a Democrat in politics, who had served in the legislature

of Pennsylvania, and who was afterwards a United States Senator, made a journey to France with the ostensible object of pursuing certain scientific investigations, but mainly, it seems, with a view to improve the relations between the two countries and prevent an open war. He had numerous interviews with Talleyrand and with members of the Directory, and was "hailed by the French newspapers as a messenger of peace;" but in the United States, although the benevolence of his motives was generally recognized, his unauthorized interference in international affairs was unfavorably received. By Washington his course was strongly condemned, while by Pickering, who was then Secretary of State, it was keenly resented. Congress at its next session passed, under Pickering's inspiration, a statute, which was approved January 30, 1799, and which was commonly known as the "Logan Act," for the purpose of rendering such self-constituted missions in the future illegal. This statute, as it now appears in the Revised Statutes, reads as follows:

"SEC. 5335. Every citizen of the United States, whether actually resident or abiding within the same, or in any foreign country, who, without the permission or authority of the government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the government of the United States; and every person, being a citizen of, or resident within, the United States, and not duly authorized, who counsels, advises, or assists in any such correspondence, with such intent, shall be punished by a fine of not more than five thousand dollars, and by imprisonment during a term not less than six months, nor more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects."

As to the mission of Dr. Logan, see Foster, A Century of American Diplomacy, 226–231; Lawrence's Wheaton (1863), 1003; 8 John Adams's Works, 615; 9 id. 243, 244, 265, 293, 307; Randall's Life of Jefferson, II. 467; Wharton's State Trials, 20, 21; 1 Wharton's Crim. Law, § 274; Am. State Papers, For. Rel. II. 242.

As to Pickering's subsequent violation, when out of power and in opposition, of the statute the enactment of which he had inspired, see Adams's History of the United States, IV. 236 et seq.

No conviction or prosecution is known to have taken place under this act, although it has on various occasions been invoked, officially or unofficially, as a possible ground of action against individuals who were supposed to have infringed it.

It was even once intimated that it rendered illegal the action of five of the most eminent American lawyers, Messrs. Jared Ingersoll, William Rawle, J. B. McKean, and P. S. Duponceau, of Philadelphia, and Edward Livingston, of New York, in giving an opinion to the Spanish minister in the United States on a question of law, the opinion being adverse to the contention of the United States concerning certain pending claims. "It was probably unknown to the Spanish Government," said Mr. Madison, "that the lawyers, in giving the opinion to which it attaches so much value, violated a positive statute of their own country forbidding communications of any sort with foreign governments or agents on subjects to which their own Government is a party." (Mr. Madison, Sec. of State, to Mr. C. Pinckney, min. to Spain, Feb. 6, 1804, MS. Inst. U. States Ministers, VI. 196.) A resolution was reported to the Senate directing the President to proceed against them under the act, but no action on the resolution was taken. (Foster's Century of Am. Dip. 229.)

The last clause of the statute was appealed to by Mr. Seward in 1861, to stop certain proceedings of Mr. Bunch, British consul at Charleston, S. C., in urging the British government to recognize Confederate independence. (Bernard's Neutrality of Great Britain, 185, and infra, § 700.)

See, in relation to the Sackville case, and the "Murchison correspondence," the report of Mr. Bayard, Sec. of State, to the President, Oct. 29, 1888, For. Rel. 1888, II. 1670; infra, § 640.

III. *BEGINNING AND END OF MISSION.*

1. Appointments.

(1) power of appointment.

§ 632.

"The Constitution having declared that the President shall *nominate* and, by and with the advice and consent of the Senate, shall *appoint* ambassadors, other public ministers, and consuls, the President desired my opinion whether the Senate has a right to negative the *grade* he may think it expedient to use in a foreign mission as well as the *person* to be appointed.

"I think the Senate has no right to negative the *grade*."

Opinion of Mr. Jefferson, Apr. 24, 1790, 7 Jeff. Works, 465.

President Washington's message to the Senate of February 18, 1791, relative to the institution of a mission to Portugal, and nominating Mr. Humphreys thereto, will be found in 1 Am. State Papers, For. Rel. 127.

President John Adams's action, in sending, on February 18, 1798, without consulting his Cabinet, the nomination of Mr. William Vans Murray to the Senate, is told in 1 Schouler's History of the United States, 430.

"The Attorney-General is of opinion that the President alone and without the advice of the Senate can not appoint a commissioner to hold or make a treaty with an Indian tribe for the purpose of purchasing and extinguishing their title to land within the limits of the

United States. The 12th section of the act to regulate trade with the Indians, passed the 19th instant, prohibits every person who is not *employed under the authority of the United States* from negotiating any such treaty or convention, directly or indirectly.

"The expression, under the authority of the United States, cannot mean any other thing than the constitutional authority of the United States, which it is considered can not be bestowed on any person but by the President with the advice of the Senate."

Opinion of Charles Lee, At. Gen., to the Secretary of State, and communicated by Mr. Pickering, Sec. of State, to Mr. Morris, Aug. 27, 1796, 9 MS. Dom. Let. 277.

"It appears that the Senate have been discussing the precedents relating to the appointment of public ministers. One question is, whether a public minister be an officer in the strict constitutional sense. If he is, the appointment of him must be authorized by *law*, not by the President and Senate. If, on the other hand, the appointment creates the office, the office must expire with the appointment, as an office created by law expires with the law; and there can be no difference between courts to which a public minister had been sent, and those to which one was sent for the first time. According to my recollection, this subject was on some occasion carefully searched into; and it was found that the practice of the government had, from the beginning, been regulated by the idea that the places or offices of public ministers and consuls existed under the law and usages of nations, and were always open to receive appointments as they might be made by competent authorities."

Mr. Madison to Mr. Monroe, President, May 6, 1882, 3 Madison's Works, 267, 268.

The President, under the Constitution, has power to appoint diplomatic agents of any rank, at any place, and at any time, subject to the constitutional limitations in respect to the Senate. The authority to make such appointments is not derived from, and cannot be limited by, any act of Congress, except in so far as appropriations of money are required to provide for the expenses of this branch of the public service. During the early administrations of the government, the appropriations made for the expenses of foreign intercourse were to be expended in the discretion of the President, and from this general fund ministers whom the President saw fit to name were paid. Congress, in any view, cannot require that the President shall make removals or reappointments or new appointments of public ministers at a particular time, nor that he shall appoint or maintain ministers of a prescribed rank, at particular courts. It was therefore held that where the act of March 1, 1855 (10 Stat. 619), declared that from and

after the end of the present fiscal year the President shall appoint envoys, &c., this was not to be construed to mean that the President was required to make any such appointments, but only to determine what should be the salaries of the officers in case they have been or shall be appointed.

Cushing, At. Gen., 1855, 7 Op. 186.

As to power of appointment in place of suspended diplomatic agents, under the tenure of office act, see Revised Statutes, §§ 1767 et seq.

The question of the right of the Senate to require, in reference to diplomatic nominations, documents which the Executive holds it inconsistent with public policy to disclose, was presented in various shapes in the proceedings of the Senate in 1826 in reference to the Panama mission. (See 5 Am. State Pap. (For. Rel.), 834–870.) The same question was acted on in the first session of the Forty-ninth Congress (1886), President Cleveland declining to acknowledge the Senate's right to require such production.

As to the duties and need of ministers to foreign countries, see 7 John Adams's Works, 208, 257, 263, 317; 8 id. 37, 96, 150, 381, 499; 9 id. 513, 521.

The change of name from "interpreter to legation to China" to "Chinese secretary" in the diplomatic and consular appropriation act of April 4, 1900, 31 Stat. 60, did not create a new office, but merely gave a new name to an existing office, and this being so it was advised that a commission might issue without confirmation by the Senate, since interpreters were not so confirmed.

Griggs, At. Gen., May 11, 1900, 23 Op. 136.

The power of the President, without the advice and consent of the Senate, to appoint agents for the purpose of conducting negotiations or investigations has often been the subject of discussion. The following examples of such appointments may be noticed:

By a letter of October 13, 1789, President Washington requested Gouverneur Morris, who was then in Paris, to go to London as a private agent, and "on the authority and credit" of the letter to "converse with His Britannic Majesty's ministers" as to certain matters affecting the relations between the two countries. At this time neither country was represented in the other by a minister. On the authority of Washington's letter, Morris went to London and remained there for some months in conference with the British ministers.

10 Washington's Writings, Spark's ed. 43; Am. St. Papers, For. Rel. I. 124.

In June 1792, Paul Jones, then an admiral in the United States Navy, was appointed by the President as a commissioner to treat with Algiers.

In 1816 President Monroe sent three commissioners, Cæsar A. Rodney, Theoderick Bland, and John Graham, on a man-of-war to the revolted Spanish colonies, to investigate affairs with a view to recognizing the independence of those colonies should their situation be found to warrant it. Though the Senate was in session when the commissioners sailed, their nominations were not sent in. On March 24, 1818, when the diplomatic appropriation bill came up in the House of Representatives, Mr. Clay objected to the insertion in it of an item of $30,000 for their expenses, insisting that if they were *diplomatic* agents they should have been nominated to the Senate. The objection, however, was met by placing the appropriation under the head of incidental expenses.[a]

In the same year President Monroe associated Isaac Chauncey, a captain in the United States Navy, with William Shaler, consul general at Algiers, to conclude a treaty with that country.

May 12, 1825, John James Appleton was appointed by the Secretary of State to arrange a settlement of claims against Naples.

September 12, 1829, the President associated Charles Rhind, who held no office, and Commodore James Biddle, of the United States Navy, with David Offley, consul at Smyrna, to negotiate a treaty with Turkey. They did not conclude their negotiations till May 7, 1830.

January 26, 1832, President Jackson appointed Edmund Roberts, a sea captain, as a special agent to conclude treaties with Cochin China, Siam, and Muscat. Roberts concluded treaties which were afterwards ratified.

March 28, 1846, A. Dudley Mann was appointed by President Polk special agent to Hanover, Oldenburg, and other German States, to conclude treaties.

April 17, 1847, Nicholas P. Trist, who was then chief clerk of the Department of State, was appointed a commissioner to conclude a treaty of peace with Mexico, which he did on February 2, 1848.

March 22, 1848, Ambrose H. Sevier and Nathan Clifford were appointed by the President as special commissioners to negotiate certain explanations of the Trist treaty.

June 13, 1849, Benjamin E. Green was appointed by the President as special agent to negotiate treaties with Hayti and Santo Domingo.

June 18, 1849, A. Dudley Mann was appointed by President Taylor as a special and confidential agent to Hungary, which was then in revolt against Austria. The United States had at the time a diplomatic representative at Vienna.

June 15, 1850, Mann was appointed a special agent to Switzerland to conclude a treaty.

[a] See annual message of President Monroe, 1817; Schouler's History of the United States, III. 28; Annals of Cong., March 24, 1818.

May 30, 1851, Commodore Aulick, of the United States Navy, was appointed by the President to conclude a treaty with Japan.

November 11, 1852, Aulick's powers were transferred to Commodore Perry.

January 31, 1853, Thomas J. Page, a lieutenant in the United States Navy, was associated with the United States minister to Brazil and the Argentine Republic to conclude a treaty with Paraguay.

December 2, 1856, Isaas E. Morse was appointed a special commissioner to New Grenada to negotiate a treaty, in conjunction with the American minister at Bogotá.

In 1861 Archbishop Hughes and Bishop McIlvaine were sent to Europe by Mr. Seward, with the approval of the President and his Cabinet, as confidential agents in relation to questions growing out of the civil war.

In 1871 President Grant appointed B. F. Wade, Andrew D. White, and S. G. Howe as commissioners to go to Santo Domingo and make certain inquiries. These commissioners were appointed by the President under a resolution of Congress of January 12, 1871, which did not require their appointment to be made by and with the advice and consent of the Senate.

A. B. Steinberger was appointed by the Secretary of State, under direction of the President, March 29, 1873, as a special agent to Samoa. December 11, 1874, Steinberger was again appointed by the President as a special agent to Samoa, which a special passport and a description of his official character. Steinberger bore a former letter from the President to their highnesses the chiefs of Samoa, who were formally addressed as great and good friends. He was invested with various important functions.[a]

Commodore R. W. Shufeldt, U. S. N., November 15, 1881, was appointed by the President as special envoy to conclude a treaty with Corea, which he did May 22, 1882. The Senate, in ratifying the treaty, passed a resolution questioning the regularity of Shufeldt's appointment.

William Henry Trescot, November 28, 1881, was appointed by the President and commissioned as a special envoy, with the rank of minister plenipotentiary, to the Republics of Chile, Peru, and Bolivia, "until this authority shall be revoked by the President of the United States." In instructions of November 30, 1881, to Mr. Trescot, Mr. Blaine said: "This commission will not supersede the ordinary duties of the ministers, plenipotentiary and resident, now accredited to those governments. But, as they will be duly informed, all communications and negotiations connected with the settlement of the

[a] H. Ex. Doc. 161, 44 Cong., 1st sess.

pending difficulties between Chile and Peru and Bolivia, so far as this government may deem it judicious to take action, will be transferred to your charge."[a] On Dec. 19, 1881, however, Mr. Trescot's nomination was sent to the Senate, and on his confirmation he was recommissioned, Dec. 21, 1881, "during the pleasure of the President of the United States."

Gen. U. S. Grant and William Henry Trescot were on August 5, 1882, nominated to the Senate as commissioners on the part of the United States to negotiate a commercial treaty with Mexico; they were duly confirmed, and on Aug. 7, 1882, were commissioned.

Reference is here made to the two foregoing cases, as they are sometimes given as examples of Executive appointment without nomination to the Senate.

George H. Bates, in July, 1886, was appointed a special commissioner to Samoa and was empowered to conclude a treaty with Tonga, which he did. The treaty was duly ratified.

Nov. 18, 1887, Thomas F. Bayard, Secretary of State; William L. Putnam, of Maine, and James B. Angell, of Michigan, were invested by the President "with full power, jointly and severally, for and in the name of the United States, to meet and confer with plenipotentiaries representing the Government of Her Britannic Majesty," for the purpose of adjusting questions relating to the northeastern fisheries, and any other questions which might be submitted to them, and to conclude treaties in the premises, subject to the final ratification of such treaties by the President, by and with the advice and consent of the Senate. A treaty was concluded Feb. 15, 1888. In an adverse report upon it, May 7, 1888, Mr. Edmunds, from the Committee on Foreign Relations, referring to the appointment by the President, without the advice and consent of the Senate, of the American plenipotentiaries, held "in reserve, for the time being, these grave questions touching usurpations of unconstitutional powers or the abuse of those that may be thought to exist on the part of the Executive."[b] In a minority report, on the other hand, the power of the President to select special agents for the conduct of negotiations without submitting them to the Senate was maintained on the strength of precedents.[c] In the debates on the treaty Mr. Sherman, who was then chairman of the Committee on Foreign Relations, and who had concurred in the adverse report, expressed his dissent from its suggestion of a want of constitutional power in the President to appoint agents to conduct negotiations. "The President of the United States," said Mr. Sherman, "has the power to propose treaties, subject to ratification by the Senate, and he may use

[a] MS. Inst. Chile, XVI. 347.

[b] Confid. Report, No. 3, 50 Cong. 1 sess. 16–17.

[c] Id. 103–134.

such agencies as he chooses to employ, except that he can not take any money from the Treasury to pay those agents without an appropriation by law. He can use such instruments as he pleases. . . . In my judgment, he has a right to use such means as are necessary to bring about any treaty. I suppose precedents have been quoted by the Senator from Alabama [Mr. Morgan, who prepared the minority report] to sustain that position. I do not disagree with him, nor does this controversy turn upon that point." [a]

March 11, 1893, James H. Blount was appointed by President Cleveland as a special commissioner to investigate and report upon the revolution by which the Queen's government in the Hawaiian Islands was overthrown, and upon the sentiment of the people toward the existing authority. Mr. Blount was furnished with a letter of credence to Mr. Dole, the president of the provisional government; and in this letter, as well as in his instructions, Mr. Blount's authority was declared to be "paramount" in all matters affecting the relations of the United States to the islands, while Mr. Stevens, the American minister at Honolulu, was requested to continue till further notice in the performance of his functions as regarded "the conduct of the usual business of the legation." The investing of Mr. Blount with paramount authority was made the subject of special criticism in discussions in Congress.[b] In a report from the Committee on Foreign Relations of the Senate, Feb. 26, 1894, Mr. Morgan, chairman, expressed the opinion that there was no irregularity in Mr. Blount's appointment. Messrs. Sherman, Frye, Dolph, and Davis, however, while generally concurring in Mr. Morgan's majority report, expressed the opinion that the appointment of Mr. Blount as "special commissioner" to the Hawaiian government, under letters of credence and of instruction, which declared that "in all matters affecting relations with the government of the Hawaiian Islands, his authority is paramount," was an unconstitutional act, since his appointment was not submitted to the Senate, which was then in session.[c]

April 12, 1899, Bartlett Tripp was appointed by President McKinley commissioner to the Samoan Islands, for the purpose of reaching, in conference with commissioners of Germany and Great Britain, a satisfactory adjustment of pending questions.[d]

July 19, 1900, during the siege of the foreign legations in Peking, the President appointed William Woodville Rockhill as "commissioner of the United States to China, with diplomatic privileges and immunities." [e] Mr. Rockhill afterwards acted as counselor and ad-

[a] Cong. Record, Aug. 7, 1888, pp. 7285, 7287.

[b] See, for instructions, etc., For. Rel. 1894, App. II. 467–470. See also, Cong. Record, Dec. 13, 1893, p. 199; Dec. 20, p. 431; Jan. 11, 1894, p. 699.

[c] S. Report 227, 53 Cong. 2 sess. xxv., xxxiii., xxxv.

[d] For. Rel. 1899, 615.

[e] Supra, p. 440.

viser of Mr. Conger, the American minister to China, in the negotiations, and on Feb. 23, 1901, when Mr. Conger left Peking on leave of absence, with permission to visit the United States, was appointed by telegraph as plenipotentiary to continue the negotiations on the part of the United States, which he did till the signature of the final protocol, Sept. 7, 1901.[a]

(2) CONDITIONS AND QUALIFICATIONS.

§ 633.

"No compensation provided for any officer" mentioned in sec. 1675, fixing the salaries of diplomatic officers, "or for any assistant secretary of legation, or any appropriation therefor, shall be applicable to the payment of the compensation of any person appointed to or holding any such office who shall not be a citizen of the United States; nor shall any other compensation be allowed in any such case."

Rev. Stats. of the United States, sec. 1744.

The appointment of a foreign minister is not complete, and the Secretary of State is not bound to issue his instructions and order him to his post, until he has executed such bond as is required of him by law.

Williams *v.* United States, 23 Ct. Cl. 46.

---

[a] S. Doc. 67, 57 Cong. 1 sess.; For. Rel. 1901, App. 3–4. Feb. 25, 1901, there was issued to Mr. Rockhill the following full power:

WILLIAM McKINLEY,

PRESIDENT OF THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

KNOW YE, that reposing special trust and confidence in the integrity, prudence, and ability of William Woodville Rockhill, Commissioner of the United States to China, I have invested him with full and all manner of power and authority, for and in the name of the United States to meet and confer with any person or persons duly authorized thereto by the Government of His Majesty the Emperor of China, and with the Plenipotentiaries of the Powers, they being invested with like power and authority, and with him or them to conduct on the part of the United States, the negotiations for a settlement of the pending questions between the Powers and China.

IN WITNESS WHEREOF I have caused the seal of the United States to be hereunto affixed.

GIVEN under my hand at the city of Washington the twenty-fifth day of February, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

WILLIAM McKINLEY.

By the President:

JOHN HAY,

Secretary of State.

[SEAL.]

"As a general rule, no government sends to, or at least continues in, another country a minister of a higher grade than that country may reciprocate. This rule, however, is by no means invariable, and for various reasons it seems to be proper to leave it to the President to determine the cases in which exceptions ought to be made. There are not sufficient advantages in having ministers of the highest grade accredited to all governments—the most inconsiderable as well as the most important—to justify a departure from a long prevalent and common usage, with many good reasons to sustain it."

Mr. Marcy, Sec. of State, to Mr. Pennington, chairman of the Committee on Foreign Affairs, House of Representatives, May 23, 1856, 7 MS. Report Book, 274.

"In ancient and more barbarous times, when nations had been inflamed by long wars, and the people wrought up to a degree of fury on both sides, so as to excite apprehensions that ambassadors would be insulted or massacred by the populace, or even imprisoned, as in Turkey, sovereigns had insisted that ambassadors should be exchanged, and that one should be held as a hostage for the other. It had even been insisted that a French ambassador should embark at Calais at the same hour that an English ambassador embarked at Dover. But these times were passed. Nations sent ambassadors now as they pleased. Franklin and his associates had been sent to France; Mr. Jay had been sent to Spain; I had been sent to Holland; Mr. Izard had been commissioned to Tuscany; Mr. W. Lee to Vienna and Berlin, without any stipulation for sending ministers in return. We had a minister in London three years, without any minister from England in return. We have had a minister at Berlin without any from Prussia." (Patriot Letters, No. 10, 9 John Adams's Works, 271.)

"The Chevalier de Pinto informs me that he has written to his court for explanations upon some points, and expects an answer in a few days. When it arrives, he will call upon me. In the meantime, he says, his court is solicitous to send a minister to America, but that etiquette forbids it, unless Congress will agree to send one to Lisbon. They would send a minister to New York, if Congress would return the compliment; but, if Congress will not send a minister plenipotentiary, they wish to send a resident, or even a chargé d'affaires; but etiquette will not permit this, unless Congress will send a resident or chargé d'affaires to Portugal." (Mr. J. Adams to Mr. Jefferson, Jan. 19, 1786, 8 John Adam's Works, 366.)

"Negotiation, in the present state of things, is attended with peculiar difficulties. As the King of Great Britain twice proposed to the United States an exchange of ministers, once through Mr. Hartley, and once through the Duke of Dorset, and when the United States agreed to the proposition, flew from it; to send a minister again to St. James's till that court explicitly promises to send one to America, is a humiliation to which the United States ought never to submit. A remonstrance from sovereign to sovereign cannot be sent but by an ambassador of some order or other; from minister of state to minister of state it might be transmitted in many other ways. A remonstrance, in the form of a letter from the American minister of state to the Duke

of Leeds, or whoever may be secretary of state for foreign affairs, might be transmitted through an envoy, minister plenipotentiary, or ambassador of the President of the United States at Paris, Madrid, or The Hague, and through the British ambassador at either of those courts. The utmost length that can now be gone, with dignity, would be to send a minister to the court of London, with instructions to present his credentials, demand an audience, make his remonstrance; but to make no establishment, and demand his audience of leave, and quit the Kingdom in one, two, or three months, if a minister of equal degree were not appointed, and actually sent, to the President of the United States from the King of Great Britain." (Vice-President Adams to President Washington, Aug. 29, 1790, 8 John Adams's Works, 499.)

See also 7 John Adams's Works, 451, 452; 8 id. 4.

Mr. Jackson, British minister at Washington, having been dismissed by the United States for cause, and the British government having for some time left the legation at Washington in the custody of a chargé d'affaires, Mr. Pinkney, the American minister in London, was instructed to turn the legation over to a chargé d'affaires and come away on leave, unless the British government should appoint another minister to the United States. (See infra, § 640, p. 513.)

In President Monroe's Cabinet, on January 2, 1819, the question of sending ministers to the new South American states coming up, Mr. J. Q. Adams argued that "it is not consistent with our national dignity to be the first in sending a minister to a new power. It had not been done by any European power to ourselves." But receiving ministers was, "by our Constitution, an act of the Executive's authority. General Washington had exercised it in recognizing the French Republic by the reception of Mr. Genest [Genet]. Mr. Madison had exercised it by declining several years to receive, and by finally receiving, Mr. Onis." (4 J. Q. Adams' Mem. 206.)

In a note of March 18, 1798, to Messrs. Pinckney, Marshall, and Gerry, American envoys to France, Talleyrand, after reviewing the questions pending between the two countries, declared that the Executive Directory, of whom the envoys had not yet had an audience, was "disposed to treat with that one of the three whose opinions, presumed to be more impartial, promise, in the course of the explanations, more of that reciprocal confidence which is indispensable." The envoy thus referred to was Gerry. Early in April Pinckney and Marshall left Paris, Gerry remained behind, but was rebuked and recalled.

In a message to Congress of June 21, 1798, President Adams declared that he would never send another minister to France without assurances that he would be "received, respected, and honored as the representative of a great, free, powerful, and independent nation."

And in his second annual message President Adams, referring to the circumstance that the French Government had "in a qualified manner declared itself willing to receive a minister from the United States for the purpose of restoring a good understanding," said: "It

is unfortunate for professions of this kind that they should be expressed in terms which may countenance the inadmissible pretension of a right to prescribe the qualifications which a minister from the United States should possess."

Subsequently, on receiving an assurance that "whatever plenipotentiary" the United States might send "in order to terminate the existing differences between the two countries" would "undoubtedly be received with the respect due to the representative of a free, independent, and powerful nation," President Adams appointed new envoys.

Am. State Papers, For. Rel. II. 158, 164, 166, 185, 210, 229; Moore, Int. Arbitrations, V. 4423–4427.

"Very soon, therefore, after entering on the office of Secretary of State, I recommended to General Washington to establish, as a rule of practice, that no person should be continued on foreign mission beyond an absence of six, seven, or eight years. He approved it. On the only subsequent missions which took place in my time, the persons appointed were notified that they could not be continued beyond that period. All returned within it except Humphreys. His term was not quite out when General Washington went out of office. The succeeding administration had no rule for anything; so he continued. Immediately on my coming to the administration, I wrote to him myself, reminded him of the rule I had communicated to him on his departure; that he had then been absent about eleven years, and consequently must return. On this ground solely he was superseded. Under these circumstances, your appointment was impossible after an absence of seventeen years. Under any others, I should never fail to give to yourself and the world proofs of my friendship for you, and of my confidence in you. Whenever you shall return, you will be sensible in a greater, of what I was in a smaller, degree, of the change in this nation from what it was when we both left it in 1784. We return like foreigners, and, like them, require a considerable residence here to become Americanized.

"There is no point in which an American, long absent from his country, wanders so widely from its sentiments as on the subject of its foreign affairs. We have a perfect horror at anything like connecting ourselves with the politics of Europe. It would indeed be advantageous to us to have neutral rights established on a broad ground; but no dependence can be placed in any European coalition for that. They have so many other by-interests of greater weight that some one or other will always be bought off."

President Jefferson to Mr. Short, Oct. 3, 1801, 2 Randall's Life of Jefferson, 672.

See 3 Schouler's Hist. U. S. 122, instancing illustrations of Mr. Jefferson's position above stated.

2. Credentials and Reception.

(1) letters of credence, and of recall.

§ 634.

"7. In most cases, a mission of the United States will be found already established at the seat of government and still in charge of the outgoing representative or of a chargé d'affaires ad interim. In either case, the newly-arrived representative should seek, through the actual incumbent of the mission, an informal conference with the minister for foreign affairs, or such other officer of the government to which he is accredited as may be found authorized to act in the premises, and arrange with him for his official reception. He should at the same time, in his own name, address a formal note to the minister for foreign affairs, communicating the fact of his appointment and his rank and requesting the designation of a time and place for presenting his letter of credence.

"8. Should the representative be of the grade of ambassador extraordinary and plenipotentiary, envoy extraordinary and minister plenipotentiary, or minister resident—in any of which cases he will bear a letter of credence signed by the President and addressed to the chief of the government—he should, on asking audience for the purpose of presenting the original in person, communicate to the minister for foreign affairs the open office copy which accompanies his original instructions. He will also, for the completion of the archives of his mission, prepare and retain on file a copy of his letter of credence.

"9. If the diplomatic representative be of the rank of chargé d'affaires, bearing a letter of credence addressed to the minister for foreign affairs, he should, on addressing to the minister the formal note prescribed in paragraph 7, communicate to him the office copy of his letter of credence and await the minister's pleasure as to receiving the original in a personal interview.

"10. On the occasion of presenting ceremonial letters of credence or of recall to the head of the government, it is usual at most capitals for the retiring or incoming diplomatic representative to make a brief address pertinent to the occasion. This address should be written and spoken in English by the representative of the United States. Before the day fixed for his audience of reception or of leave-taking, the diplomatic representative should furnish to the minister for foreign affairs a copy of his proposed remarks, in order that a suitable reply thereto may be prepared. A copy of the address and of the reply must be sent to the Department of State."

Instructions to Diplomatic Officers of the United States (1897), secs. 7–10. See, as to "letters of credence," J. Q. Adams' Mem. IV. 231.

"I had the honor of receiving your letter of 11 March, enclosing a letter from the King of Sweden, Charles John, and addressed to the President and Senate of the United States, announcing the decease of the late King. The President's answer is herewith enclosed; which you will deliver in person to the King, together with your own letter of credence. A copy of it also is transmitted, which, according to the usage, you will communicate to the minister of foreign affairs before you deliver the original.

"By the third section of the second article of the Constitution of the United States, it is provided that the President 'shall receive ambassadors and other public ministers.' It is therefore to him that their credential letters and all public letters of foreign sovereigns to the Government of the United States should be addressed. Neither the House of Representatives nor the Senate, nor the two Houses in Congress assembled, hold correspondence with foreign princes, or states. The European sovereigns, none of whom appear to understand or to have attended to this part of our Constitution, have addressed their letters sometimes to the Congress of the United States, sometimes to the President and Congress, and sometimes to the 'United States.' This is the first letter which has been addressed to the President and Senate; a formula probably suggested to the Swedish Government by the occasion which they have had to observe the agency attributed to the Senate by our Constitution with regard to the ratification of treaties, and to the appointment of our own public ministers abroad. This conclusion is, however, incorrect, because, as I have noticed, the authority to receive foreign ministers is vested exclusively in the President, and in practice all the letters from foreign sovereigns, however addressed, are opened and answered only by him. You may take occasion to state this to the Swedish minister of foreign affairs, as a reason why the King's letter, though addressed to the President and Senate, is answered only by the President. At the same time you may intimate that, although its address should have been to the President alone, he was disinclined to be punctilious on a mere point of form, and received it without hesitation, not doubting that the style of address conformable to our Constitution, when known to the Swedish Government, will in the case of any future correspondence be observed."

Mr. Adams, Sec. of State, to Mr. Russell, chargé d'affaires to Sweden, No. 2, May 24, 1818, MS. Inst. U. States Ministers, VIII. 182.

See, also, Mr. Randolph, Sec. of State, to the President, Oct. 14, 1794, 8 MS. Dom. Let. 339.

"According to usual precedent among western nations new letters would be forwarded accrediting the minister to the new sovereign, and for many reasons of propriety and general convenience foreign representatives would in general be required to provide themselves

with new credentials upon the accession of a new sovereign, or on the occurrence of a change in the head of the Government."

Mr. Fish, Sec. of State, to Gen. Schenck, min. to England, No. 719, April 27, 1875, MS. Inst. Gr. Br. XXIV. 59.

June 4, 1885, Mr. Denby, American minister at Peking, was given a letter of credence to "His Imperial Majesty the Emperor of China." This letter was signed by President Cleveland. The original was retained by Mr. Denby after his arrival at Peking, as the Emperor was not then granting audiences to foreign ministers. In 1891, when, on the termination of the regency, the foreign ministers were received by the Emperor on his assuming the imperial power, Mr. Denby requested a new letter of credence, President Cleveland having been succeeded by President Harrison. The Department of State sent the letter, but explained: "You will by this time have seen that it is sent to you by way of fitly marking the termination of the regency and the assumption of the reins of government by the Emperor. It is not customary to issue new credential letters here on the inauguration of a President, the commissions signed by the outgoing President continuing in full force until a successor is named." (Mr. Blaine, Sec. of State, to Mr. Denby, min. to China, No. 603, March 30, 1891, For. Rel. 1891, 392, 393. See, also, same to same, No. 584, Jan. 27, 1891, id. 363.)

With reference to the assumption by the King of Corea, on October 12, 1897, of the title of Emperor, the Department of State said: "The Department . . . understands . . . that it is not a change of government, but merely a change of style on the part of 'the chief ruler of the country,' and as such needs no formal entrance upon new relations, as in the case of a revolutionary government assuming power, or a dynastic or constitutional change in the organization and function of a state."

Mr. Sherman, Sec. of State, to Mr. Allen, chargé d'affaires, Nov. 30, 1897, For. Rel. 1898, 485.

The phrase "chief ruler of the country" was used in describing the Corean King in the Chinese text of the treaty between the United States and Corea.

It appears that no government reaccredited its envoy, but the representatives of Russia, Japan, and the United States, and perhaps of other powers, recognized His Majesty's new rank and congratulated him upon it. (Mr. Allen, chargé d'affaires, to Mr. Sherman, Sec. of State, Feb. 12, 1898, For. Rel. 1898, 486, 487, 490.)

"I have the honor to acknowledge the receipt of your note of the 20th instant, enclosing a copy of an autograph letter from the President of Costa Rica to the President of the United States accrediting Mr. Manuel Aragon as the delegate of Costa Rica to the conference of American States, and asking the designation of a day for the formal presentation to the President by Mr. Aragon of his original letter.

"I beg to inform you, in reply, that the Congress being an independent body, of equal delegates, the credentials of its members are

not necessarily addressed to any one of the governments taking part therein, but, following the usual procedure in such cases, are exhibited by the delegates to each other, as their plenipotentiary powers to meet and discuss the objects of their mutual conference. This will be done, of course, when the delegates meet on Tuesday, the 2d proximo, at 12 o'clock noon, in the diplomatic audience room of the Department of State. Immediately thereafter the members of the conference will be presented in a body to the President of the United States."

Mr. Adee, Act. Sec. of State, to Señor Don Pedro Perez y Zeledon, Sept. 24, 1889, MS. Notes to Costa Rica, II. 115.

A diplomatic officer, on ending his mission, presents to the sovereign or government to which he is accredited a letter of recall. Unless he should be obliged to leave sooner, it is customary for him to present it in the same audience in which his successor presents his letter of credence. If the retiring officer should not receive his letter of recall in season to present it prior to his departure, his successor, or (under special instructions) the chargé d'affaires ad interim, may deliver it in such manner as may be indicated by the minister for foreign affairs.

Instructions to the Diplomatic Officers of the United States (1897), secs. 11, 12.

In 1868 Mr. George Bancroft, while minister to Prussia, was specially accredited to Bavaria, Würtemberg, Baden, and Hesse, for the purpose of concluding naturalization treaties, and was received at those courts. In 1871 he was furnished with new credentials as minister to the German Empire. On his retirement, in 1874, he suggested that he should be furnished with letters of recall, not only to the German Emperor, but also to the South German courts, to which he was in 1868 specially accredited. The Department of State, April 21, 1874, replied: "On examination of the precedent established in the case of Mr. Wheaton, who while minister at Berlin was empowered to conclude treaties with other German states, it is found that it was not deemed expedient at that time to authorize Mr. Wheaton to present special letters of recall. The Department regards the decision then made as correct, and adheres to it in the present case." Mr. Bancroft therefore was furnished with letters of recall only to the German Emperor.

It transpired in 1895, some years after Mr. Bancroft's death, that he still officially stood as the diplomatic representative of the United States to Bavaria.

Mr. Fish, Sec. of State, to Mr. Bancroft, April 21, 1874, For. Rel. 1874, 444; Mr. Runyon, amb. to Germany, to Mr. Olney, Sec. of State, Oct. 2, 1895, For. Rel. 1895, I. 479–480.

(2) PRESENTATION OF.

§ 635.

"*The ceremonies observed with respect to Mr. Fauchet, the minister plenipotentiary of the French Republic, upon his arrival at Philadelphia, in February, 1794.*

"Immediately on his arrival he waited on the Secretary of State and communicated to him a copy of his letters of credence.

"The Secretary informed him that he would impart them to the President and let him know the President's pleasure.

"On the same day the copy of the letters was laid before the President, who, having examined them, appointed the succeeding day at 12 o'clock for the presentation of the minister.

"This was announced to the minister in a note from the Secretary, in which he informed him that he should return his visit at eleven o'clock, and would then proceed with him in his carriage, at the appointed hour, to the President.

"Accordingly, a few minutes before twelve, the Secretary reminded the minister of the approach of the hour, and they both went to the President's in the Secretary's carriage.

"The President's private secretary received them, and they were shewn into a room, where the President was sitting alone.

"Upon their entering and bowing he arose and bowed, and the Secretary, who preceded the minister, said to the President 'that he begged leave to present to him M. Fauchet, who had been nominated as the minister plenipotentiary of the French Republic.'

"The minister then presented to the President his sealed credentials, adding such complimentary expressions as the occasion suggested.

"The President, having received them, retired to his seat and desired the minister and the Secretary to sit, two chairs being prepared for this purpose.

"He then opened the sealed credentials and delivered them to the Secretary, who rose and read them standing.

"After this, the President said that he received M. Fauchet as the minister plenipotentiary of the French Republic, subjoining some friendly expressions towards the French nation.

"The minister replied in a complimentary style of thanks.

"The President, minister, and Secretary being again seated, after some ordinary discourse, and a convenient pause, the two last retired, taking leave.

"The Secretary then carried the minister into another room, where Mrs. Washington was, and introduced him to her.

"He afterwards accompanied him to the President's public room on Tuesday and Mrs. Washington's on Friday.

"The President invited him to dinner on the fourth day after presentation, together with the Vice-President, governor of Pennsylvania, a member of the Senate from each State, the heads of Departments, and the Attorney-General of the United States."

6 MS. Dom. Let. 70. See, also, Mr. Randolph, Sec. of State, to M. Fauchet, Feb. 22, 1794, id. 69.

For John Adams' account of his presentation to Geo. III. and the Queen, see 1 Lyman's Dip. of the U. S. 159.

For the details of the reception of Gerard, the first French minister to the United States, by Congress, in July, 1778, see id. 57.

See Mr. Jay, Sec. for For. Aff., to Mr. Van Berckel, Feb. 25, 1788, 3 Am. Let. 332.

As to China, see infra, § 687.

"Yesterday Mr. Freire presented to me his credentials from the Queen of Portugal, as her minister resident. He is styled the Chevalier Cyprian Ribeiro Freire. They are in substance correct, tho', from an ignorance of our Constitution, he is said to be sent to reside *near the Congress*. Being satisfied that he would be received, I interchanged the usual civility of language. He expressed a desire to visit Mrs. Washington. I remarked that he must be sensible that I could not absolutely recognize him as minister until he was accepted by the President. He answered that he was aware of it. I then told him that, as gentlemen not in public character waited on Mrs. Washington on a Friday night, I would accompany him then, and introduce him as Mr. Freire, but must reserve my annunciation of him to her in the quality of minister until you had received him. So this etiquette stands, and, I believe, on grounds of propriety."

Mr. Randolph, Sec. of State, to the President, Oct. 14, 1794, 7 MS. Dom. Let. 339.

"Some misunderstanding having taken place, in former instances, in the intercourse between the Government of the United States and the members of the diplomatic corps, it is proper that certain rules should be adopted to prevent the like in future.

"The augmentation which has already taken place in the diplomatic corps in the United States, and the probability that it will still further augment, is a strong argument in favor of such rules.

"In adopting these rules, attention is due to the usage of European governments in their intercourse with each other. Some attention is also due to that which is applied to the ministers of the United States by the several European governments at which they have been represented.

"The following is believed to be a correct statement of the rules practised in certain European governments:

"When a foreign minister arrives at London, Paris, St. Petersburg, or other European court, he obtains an interview of the secretary of state for foreign affairs, and delivers to him a copy of his letter of credence. The secretary of state afterwards, on a day fixed, presents him to the sovereign, to whom he delivers the original. On that day, or as soon as convenient, he visits all the secretaries, or heads of the government.

"The foreign minister's wife, who has claims incident to the station of her husband, makes a visit at the same time to the wives of the secretaries, or heads of the government.

"When foreign ministers leave the seat of government, to travel in the interior, they give notice of it to the secretary of state for foreign affairs. They likewise give notice of their return home."

Informal paper transmitted by Mr. Monroe, Sec. of State, to Mr. Serurier, French min., May 5, 1814, MS. Notes to For. Leg. II. 129.

"At these audiences [those of President Monroe with foreign ministers at Washington] the President observes the usual forms practiced by European sovereigns on similar occasions. That is, he receives them standing, dressed in a half military uniform or a full suit of black. The ministers are in full court dress. He stands in the center of the drawing-room, and I accompany them, keeping the right hand. On receiving the letter the President hands it, unopened, to me. . . . The President has a general answer to the short addresses which the ministers make in delivering these letters, namely, 'that the United States takes a great interest in everything that concerns the happiness of their sovereign,' with very little variation adapted to each particular case. He makes no other conversation."

4 Memoirs of J. Q. Adams, 314.

"The diplomatic agents who are accredited to the President usually transmit to the Department a copy of their letter of credence, with a note requesting the appointment of a time for them to present the original. A copy of the remarks which they may think proper to make on the occasion, frequently accompanies their note asking for a presentation, and is submitted to the President in order that he may prepare a suitable reply. It has not of late been deemed necessary to write out this answer. The Secretary of State usually accompanies the diplomatic agent to the President on his first presentation, but this is not deemed necessary on subsequent occasions."

Mr. Marcy, Sec. of State, to Mr. Almonte, Jan. 27, 1855, MS. Notes to Mex. VII. 14.

"As the presentation of an envoy's credentials, when they are addressed to the President by the chief of the foreign state which sends him, is performed in private audience, the ceremonial is simple.

Upon the receipt of the appointed envoy's note submitting an office copy of his letter of credence and requesting the assignment of a day and hour for his reception, the President's directions in the premises are sought, and the Secretary of State informs the envoy of the time designated, adding that if he will visit the Department of State a few moments before the hour fixed, it will afford him pleasure to accompany him to the Executive Mansion and present him to the President.

"Upon the envoy's responding to this invitation, the Secretary of State accompanies him in person and presents him by name and title to the President, who receives him in one of the private reception rooms of the Executive Mansion. The envoy pronounces a written address, of which a copy has previously been furnished to the Secretary of State, and delivers his sealed letter of credence, whereupon the President in turn reads the reply which has been prepared in advance. After a few moments of informal conversation the envoy withdraws.

"The audience is entirely private, no one but the Secretary of State being present. No formalities of military parade accompany the envoy's visit either to the Department of State or to the Executive Mansion."

Mr. Bayard, Sec. of State, to Mr. Varas, Feb. 7, 1889, MS. Notes to Chile, VI. 361.

"There is no maxim more clearly settled in all courts, and in all negotiations between nations, than that sovereign should always speak to sovereign and minister to minister. I am not at all surprised, therefore, although I am much mortified, at having my memorials to their High Mightinesses, and to his Most Serene Highness, returned to me, with the letter inclosed from Mr. Fagel. I should have had a letter of recall, signed by the President of Congress, by their order, and addressed to their High Mightinesses. There is a similar irregularity in my recall from the British court; for, although my commission is limited to three years, yet my letter of credence to his Majesty has no limits at all. If the omission of a letter from Congress to the King, upon this occasion, should not be taken as an offense, it will not be because it is not observed; but from motives too humiliating to Congress, as well as their minister here, to be explained."

Mr. Adams to Mr. Jay, Feb. 16, 1788, 8 John Adams's Works, 478.

"I have this morning had the honor of submitting to the President your letter of yesterday.

"As I am much pressed for time at this moment, I shall only answer so much of it as relates to your request of presenting your successor, Mr. Adet, to the President of the United States.

"The usage which has been established on this occasion by our Government is, that a new foreign minister be presented to the Presi-

dent by the Secretary of State, no person being present but the President, the new minister, and the Secretary; that the preceding minister, having letters of recall to be delivered to the President, is entitled to a formal audience; but, this case not now existing, the arrangements concerning it need not be mentioned; that, generally speaking, if the preceding minister who is withdrawn, having no letters of recall to be delivered, wishes to pay a respectful civility to the Chief Magistrate, by a visit for taking leave, he will be received with pleasure, but without the formality of an audience. If, therefore, this last mode be one which you desire, I will with great cheerfulness attend you to the President's to-morrow, or at any other time more agreeable to you."

Mr. Randolph, Sec. of State, to Mr. Fauchet, French min., June 16, 1795, 8 MS. Dom. Let. 259.

"On arriving at his post the minister's first duty is to inform the minister for foreign affairs of his arrival, and of his character, and to request an interview for the purpose of asking an audience for the purpose of presenting his credentials to the head of the state. He is usually received at once by the minister, and by the sovereign as soon as an interview can be arranged, though in case of absence or illness there may be a delay of weeks, if not of months. Etiquette, however, demands that the audience for presenting credentials should take place as early as possible. These audiences are either public or private. In the first the minister is accompanied by the minister of foreign affairs, generally followed by his own secretaries, and goes to the palace in more or less state, according to the customs of the place; for these vary greatly in different capitals. For an ambassador a state carriage is always sent. This is not always the case with the minister in a capital where ambassadors also reside, it being considered desirable to draw distinctions of ceremony between the two. In small countries, where there are no ambassadors, a state carriage is usually sent for the minister, in some cases accompanied by an escort. At a formal audience all parties are standing: the minister enters, is introduced to the sovereign by the minister of foreign affairs, addresses a few words to him stating his character, and presents his letters of credence. These the sovereign takes, sometimes goes through the formality of reading them, and replies briefly to the minister. After the formal part of the audience is over, there is generally a friendly conversation of a few moments, and the ceremony ends in much the same way as it began. In some countries it is expected that a formal speech will be made by the minister to the sovereign, and a formal reply made. In such cases the speech is written out in advance and given to the minister of foreign affairs, who returns a copy of the reply before the audience takes place.

This is in order to prevent embarrassment, as well as to see that nothing unpleasant be said. In some countries, as in Russia, a minister is nearly always received in private audience. He goes to the palace alone, is met by the Grand Master of Ceremonies, conducted to the Emperor, introduced into his room, and is left alone with him. After a word or two the Emperor requests the minister to be seated; and the conversation is informal."

Schuyler's Am. Dip. 136–138.

3. End of Mission.

§ 636.

A civil officer has a right to resign his office at pleasure, and, to take effect, it is only necessary that the resignation should be received by the President;[a] but it is customary, in the case of diplomatic officers, to fix a date when the resignation shall be deemed to take effect. Resignation while at one's post is, unless otherwise specified, understood to take effect on the officer's being relieved by his successor; but, resignation while on leave in the United States, is understood to take effect from the date of its acceptance.

If the diplomatic agent tender his resignation while absent from his post on leave, but not in the United States, it is understood, unless otherwise stated, that he will return to his mission on the termination of his allotted leave and await the arrival of his successor; but if his successor reach the seat of his mission before the termination of the agent's leave of absence, his resignation and his leave of absence take effect and determine on the entrance of his successor upon the duties of his office by presentation of his credentials.

If a diplomatic agent, having received leave of absence (with or without permission to return to the United States), tender his resignation to take effect at the expiration of his leave of absence, it may be so accepted, provided the demands of the public service do not require that the vacancy be sooner filled; and if so filled, the retiring officer's leave shall be held to terminate thereby.

A recall is usually accomplished at the pleasure of the President, during a session of the Senate, by sending to that body the nomination of the officer's successor. Upon the confirmation and commission of his successor the original incumbent's office ceases. He is, however, expected to remain at his post until duly relieved. If circumstances require otherwise, the case must be governed by the special instructions of the Secretary of State. In any case his official func-

[a] United States *v.* Wright, 1 McLean, 509.

tions do not cease until he has received notification of the appointment of his successor, either by specific instruction of the Department of State or by the exhibition of his successor's commission.

A diplomatic officer may be recalled while on leave of absence, and his successor appointed, as above. In such case, his office, and with it his leave of absence, ceases on the receipt by him of official notification of the fact.

Instructions to Diplomatic Officers of the United States (1897), secs. 272–280.

As to the recall of Mr. Motley from London, see S. Ex. Doc. 11, 41 Cong. 3 sess. See, also, S. Ex. Doc. 1, 40 Cong. 2 sess.

Although the mission of a minister ordinarily terminates with his delivery of a letter of recall, this is open to many exceptions. "The more usual practice has been for the succeeding minister to present the letter recalling his predecessor." Hence an omission to send the retiring minister a letter of recall does not in itself sustain a minister in remaining at his post after the period fixed for his return.

Mr. Forsyth, Sec. of State, to 5th Auditor, July 5, 1840, 31 MS. Dom. Let. 134.

A foreign minister of the United States is not ordinarily displaced by the appointment of a successor until the latter enters upon his duties.

Akerman, At. Gen., 1870, 13 Op. 300.

General Schenck on the 17th of February, 1876, tendered his resignation as minister to London, to take effect on the arrival of his successor. Before his letter of resignation arrived, and on the 21st of February, 1876, he sent a telegram asking leave of absence to repair to Washington, which leave was given on 23d of February. On March 6 the Secretary of State wrote to General Schenck that his resignation was accepted. Before this letter reached London, General Schenck was on his way to Washington. On the 17th of February the name of Mr. Dana was sent to the Senate as successor to General Schenck, the message stating that the nomination was in place of General Schenck, "resigned." It was held that when the resignation was tendered, and the time at which it was to take effect was specifically named in the resignation, the acceptance of the resignation without qualification was an acceptance with the condition attached. It was at the same time held that if General Schenck had remained in England he would have continued to be minister until the arrival of his successor; but having subsequently obtained leave of absence, and having returned in pursuance of that leave, he ceased to be minister on the nomination and confirmation of his successor.

Pierrepont, At. Gen., 1876, 15 Op. 90

In consequence of the failure of Congress, in 1878, to make an appropriation for the expenses of a mission to Athens, Mr. J. Meredith Read, chargé d'affaires at that capital, was directed to close the legation. Subsequently, however, Mr. Read having intimated that he was willing to continue in the discharge of his duties and take the chances of an appropriation being made, the Department of State, holding that the office was not necessarily abolished by the failure of Congress to make an appropriation for its maintenance, instructed Mr. Read that he might continue in the discharge of his duties, relying for his compensation upon the possibility of a future appropriation, and thus continue diplomatic relations with Greece without a formal break, if Congress should at its next session decide to do so.

Mr. Evarts, Sec. of State, to Mr. Read, No. 126, June 18, 1876, and No. 131, Aug. 5, 1878, MS. Inst. Greece, I. 179, 183.

A change in the government of the country to which a minister is sent, although it involves the furnishing him with new credentials to the ruling authorities, does not terminate his mission.

Supra, § 44, I. 128–129.

As between the American Republics in which the executive power is permanent and continuous, the functions of a public minister do not cease on a mere change of President. *A fortiori* the Mexican commissioner, Mr. Salazar, appointed by President Santa Anna to act on behalf of Mexico in defining the cession of territory to the United States, under the Mesilla treaty of December 30, 1853, is not deprived of his authority by the resignation of President Santa Anna and the installment of a successor.

Cushing, At. Gen., 1855, 7 Op. 582.

"On communicating to Mr. Foster the declaration of war, immediately after it took place, he intimated that he should leave Mr. Baker here, for the purpose first above mentioned; and that he expected that he would enjoy the protection of the law of nations while performing that service. In an interview which afterwards took place I informed him that altho' Mr. Baker could not be recognized in any public character he would be treated with respect, which assurance I gave in full confidence that he would merit it. As Mr. Foster's functions had ceased by the war, it was impossible for him to delegate to another a character which did not belong to himself. His claim to the protection of the law of nations in favor of Mr. Baker was little regarded, because it was thought to be of little importance. It was considered more as an evidence of singular refinement than as dictated by any motive of interest. What afterwards occurred has

given cause to suspect that the motive was mistaken. Mr. Baker, while here, committed acts against which it would be dishonorable in his government, even if the pretension to a public character had been well founded, to attempt to protect him. It appears by evidence under his own hand that he gave intelligence to the British admiral off our coast of the movement of our naval force in order to expose it to attack, and that he clandestinely granted licenses to vessels for the supply of the British squadron, dating them before the declaration of war, to secure the offenders from the punishment due to their crimes. The evidence of these acts, coming into possession of the attorney for this District by the seizure of the vessels engaged in this illicit trade, was laid before a grand jury, by whom Mr. Baker was indicted for high treason. He would have been arrested, confined, and tried, and probably condemned on this charge had not the government interposed its authority."

Mr. Monroe, Sec. of State, to Mr. Beasley, Jan. 25, 1813, MS. Inst. U. States Ministers, VIII. 34.

4. Question of Personal Acceptability.

(1) Minister must be personally acceptable.

§ 637.

"It is a general rule that no nation has a right to keep an agent within the limits of another without the consent of that other."

Mr. Jefferson, Sec. of State, to Mr. Carmichael, Oct. 14, 1792, MS. Inst. Ministers, I. 201.

See, to the same effect, Mr. Fish, Sec. of State, to Mr. Jones, min. to Belgium, No. 72, June 21, 1871, MS. Inst. Belg. II. 9; Mr. Blaine, Sec. of State, to Mr. Douglass, min. to Hayti, No. 22, Jan. 3, 1890, and No. 25, Jan. 7, 1890, MS. Inst. Hayti, III. 106, 110. See, also, Liszt, Völkerrecht, 109–118.

"Your letter of the 22d August, relating to Mr. Noah, was received while I was in the country, and since my return here much business of the most urgent nature has pressed upon me, or it would have been sooner answered. I beg you to be assured that the religion of Mr. Noah, so far as relates to this government, formed no part of the motive to his recall. His appointment, with a knowledge of his religion, is alone a full proof of this fact. At the time of Mr. Noah's appointment, it was not known that the prejudice of the Mahometans and Moors was so great against his religion. Information was, however, afterwards received that such was the prejudice, and even possibly of those people who professed the Jewish faith, that, if it should become known to the government of Tunis that he was of that sect, it would be impossible for him to discharge the duties of his office

with advantage to the United States. It appearing also from the publicity given to it at Gibraltar that it was or would be known, prudence dictated the appointment of another to whom that objection did not apply. A difficulty arose likewise in the settlement of Mr. Noah's account under an agency confided to him for the ransom of some of our citizens, who were prisoners at Algiers. His conduct in that affair, as it appeared to the Government, not being satisfactory, required explanation, which formed an additional reason for his recall. His account has not yet been finally settled, owing to particular circumstances the detail of which, it is presumed, is not necessary to the object of your inquiry. In the settlement of his account you may be satisfied that every circumstance in his favor will be duly and liberally considered and full justice rendered to him."

Mr. Monroe, Sec. of State, to Mr. Phillips, Oct. 26, 1816, 16 MS. Dom. Let. 340.

Where a foreign diplomatic representative, by reason of being persona non grata, is not asked to an official entertainment to which the other members of the diplomatic corps are invited, his colleagues, in receiving and accepting the invitation, can not be considered as becoming parties to an international affront. "It must be borne in mind that an envoy is a *person* as well as the abstract representative of his government, and that it is the prerogative of every government to require that those with whom it deals be *persona grata*, and to decide the question for itself. This government has on several occasions availed itself of this personal right, without thereby being supposed to reflect on the representative character of the person himself, and still less upon the collective representative character of his associates."

Mr. Frelinghuysen, Sec. of State, to Mr. Morgan, Dec. 30, 1884, MS. Inst. Mexico, XXI. 217.

With regard to the request of a foreign government for the recall of a naval attaché, against whom charges of hostility to such government were made, the Department of State said: "International comity is opposed to any appearance of forcing a government to retain a foreign representative declared by it to be *persona non grata*, as well as to any discussion of the motives it may allege beyond such controversion of the immediate charges" against the attaché as the American minister had already made. The Department added that the usefulness of the attaché in that capacity was "unquestionably impaired" by the hostility exhibited towards him by the government in question, and that his retention could not fail to be per-

sonally embarrassing to him. It had therefore been determined to recall him.

Mr. Bayard, Sec. of State, to Mr. Whitney, Sec. of Navy, June 8, 1887. 164 MS. Dom. Let. 353; Mr. Bayard, Sec of State, to Mr. Denby, min. to China, No. 208 (confidential), June 18, 1887. MS. Inst. China, IV. 283.

"This Government does not require other powers to ask, in advance, if contemplated appointments of ministers will or will not be acceptable." But when such an inquiry is put, it is competent for this Department to answer, "that unless certain prevalent impressions were unfounded, the proposed appointment could not prove acceptable."

Mr. Fish, Sec. of State, to Mr. Neal, Mar. 11, 1870. MS. Inst. Portugal, XV. 26.

The President of Switzerland having expressed a desire to learn whether the appointment of a certain person as the diplomatic representative of the Confederation at Washington would be acceptable to the government of the United States, the Department of State replied that it was "not the custom of this government, as a general rule, to express, in advance, an opinion as to the nonacceptability or nonacceptance of a proposed representative from a foreign government," and that it usually confined itself, when asked, "to a reference to this habit of abstinence from expression of wish and an assurance that the person selected . . . will be received;" but that, as the President of Switzerland had expressed some apprehension that, for certain reasons, the person in question would not be "the most acceptable and useful representative that could be found," it was due to candor to say that while he would, if appointed, be received, yet he would not, in the judgment of the Department, "prove a useful representative to either government."

Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Rublee, chargé d'affaires to Switz. No. 116, July 29, 1873. MS. Inst. Switz. I. 303.

For a discussion of the subject of inquiring in advance as to a minister's acceptability, see Keiley's case, infra, § 638.

Since the United States began to appoint ambassadors, it has observed the practice of inquiring in advance as to the personal acceptability of its representatives of that grade.

(2) REFUSAL TO RECEIVE.

§ 638.

Envoys to France, 1798.

In the crisis of the relations between the United States and France, growing out of the conclusion and ratification of the Jay treaty, Mr. Monroe was recalled from the position of minister to France, and in his place was sent Charles Cotesworth

Pinckney, a brother of Thomas Pinckney, who was then minister to England. Pinckney was particularly charged to press the claims of the United States for spoliations. He arrived in Paris early in December, 1796; but, just as the arrangements made by Monroe for his reception seemed to be complete, the minister of foreign affairs informed Monroe that the Executive Directory had decided that it would no longer recognize or receive a minister plenipotentiary from the United States until after the redress of the grievances of France against the American Government. Monroe took his formal leave on December 30, 1796. At that time no foreigner could remain in France without police permission, and the French Government, besides refusing to recognize Pinckney as minister, declined, on January 25, 1797, to give him such permission, and on February 3 informed him that by remaining in France he made himself liable to arrest. He accordingly obtained his passports and retired to Amsterdam to await developments. At the opening of the first session of the 5th Congress, May 16, 1797, President Adams referred to the state of the relations with France and recommended the consideration of effectual measures of defence. In particular, he adverted to the depredations on American commerce under French decrees, and to the speech made by Barras, the President of the Directory, when Mr. Monroe took his leave. Desirous, however, of trying all possible means of conciliation, President Adams, on May 31, 1797, nominated to the Senate Francis Dana and John Marshall, as associate envoys with Pinckney, in a new mission to France. Dana declined the appointment, and Elbridge Gerry was nominated in his place. The three envoys arrived in Paris on the evening of October 4, 1797. On the 8th they were unofficially received by Talleyrand, as 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; and he subsequently intimated through his private secretary that they could not have a public audience of the Directory till their negotiations were concluded. There subsequently took place the well known X, Y, Z negotiations. On March 2, 1798, the American envoys, who were still officially unrecognized, intimated to Talleyrand that it would be improper for them to remain longer in France under existing conditions. They were then admitted by him to an interview, but it was of an unsatisfactory nature; and on March 18, 1798, Talleyrand wrote them that the Executive Directory, of whom they had not yet had an audience, was "disposed to treat with that one of the three whose opinions, presumed to be more impartial, promise . . . more of that reciprocal confidence which is indispensable." The envoy thus referred to was Gerry. Early in April,

Pinckney and Marshall left Paris. Gerry remained till the end of July, 1798, but he was rebuked by his Government and directed to consider himself as positively recalled. In a message to Congress, June 21, 1798, President Adams declared that he would never send another minister to France without assurances that he would be "received, respected, and honored, as the representative of a great, free, powerful, and independent nation." Subsequently, Talleyrand caused an intimation to be made by the French secretary of legation at The Hague to Mr. Vans Murray, then American minister at that capital, 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 be undoubtedly received with the respect due to the representative of a free, independent, and powerful nation." On receiving this overture, President Adams, on February 25, 1799, nominated Chief Justice Ellsworth, Patrick Henry, and Mr. Murray, as envoys to the French Republic. 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. They were duly received, and their negotiations resulted in the conclusion of the convention of September 30, 1800.

Trescot's American Diplomatic History, 162–171; Monroe's View of the Conduct of the Executive in Foreign Affairs; Am. St. Papers, For. Rel. I. 742, 746; id. II. 10, 12, 30, 180, 199, 242; Davis' Notes Treaty Vol. (1776–1887), 1302; Schouler's History of the United States, I. 347; Hildreth's History of the United States, V. 46; Moore, Int. Arbitrations, V. 4420–4431. See infra, § 821.

For Barras' speech, see Am. State Papers, For. Rel. II. 12; Davis's Treaty Notes, Treaty Vol. (1776–1887), 1302.

For the X, Y, Z negotiations, see Am. State Papers, For. Rel. II. 158 et seq.

"In Mr. Ticknor's Life (vol. 2, 413), we are told that Baron Pichon when attempting, in 1837, to explain the conduct of the Directory, intimated that Mr. Monroe had spoken of Mr. Pinckney as of aristocratic tendencies. Memory after the lapse of forty years can not be relied on, and it is not unlikely that Mr. Pichon confused Mr. Monroe's statements with his own prejudices. It is certain that Mr. Pinckney's letters to the Department speak in the highest terms of the generous and delicate assistance he received from Mr. Monroe while they were together in France. Mr. Pinckney was too discerning and unimpassioned to have been imposed on by mere professions of support; Mr. Monroe too honorable to profess a support he did not give." (Wharton, Int. Law Dig., § 85.)

Case of Chev. de Onis.

During the contest over the Spanish monarchy, growing out of the Napoleonic wars, the United States, in order to preserve an attitude of noninterference, declined to send a minister to or receive a minister from either of the contestants. Meanwhile the United States had sent to Spain Anthony Morris, as an informal and confidential agent, and the Cen-

tral Junta had appointed the Chevalier de Onis as Spanish minister to the United States. For the reason above stated, he was not received in that capacity, but he took up and maintained an American residence. When the contest in Spain appeared to be ended and Ferdinand was recognized and received by the nation, the President appointed George W. Erving as minister to Spain, but declined to receive the Chevalier de Onis as minister from Spain, on the ground of "personal objections . . . of a very serious nature." In a confidential message to Congress of January 10, 1811, Onis had been charged with "misrepresentations and suggestions," in correspondence with foreign authorities, "adverse to the peace and to the best interests of the United States," and in an instruction to Mr. Erving of October 6, 1814, Mr. Monroe said: "Should you find that the misrepresentations of the conduct of this Government through M. Onis and others have made any unfavorable impression on the Spanish ministers, you will take proper occasions to correct misstatements of facts, and generally to explain the principles upon which we acted, and the dispositions we have maintained. . . . You will take the first favorable opportunity of intimating that Mr. Onis has made himself personally objectionable, as well in the way above alluded to as otherwise, and that another person would be more acceptable to the President as the representative of Spain in the United States. Should you find, however, that it is particularly desired that he should remain here, you will let it be understood that the objections will be waived as an act of courtesy to his Government."

A similar statement, as to the willingness of the United States to receive de Onis, if the King of Spain should request it, was made by Mr. Dallas, as Acting Secretary of State, in a note to the former of June, 1815. In this note it is stated that de Onis admitted that it was "a right inseparable from the sovereignty of every nation to accept or to refuse accepting upon sufficient cause the minister of a foreign power," and Mr. Dallas freely admitted, on the other hand, that it "would be derogatory to the character of the United States to exercise that right upon motives of a trivial or capricious nature. The objections," added Mr. Dallas, "to the reception of a minister of a friendly power ought to be such as may reasonably and sincerely be made; but whether they are reasonably made must obviously depend, in the first instance, upon the judgment and feelings of the complaining party."

In consequence of the refusal to receive de Onis without a request of the King of Spain, there was a delay in the reception of Erving in Madrid.

The situation thus created was fully discussed by Mr. Monroe in a note addressed directly to Señor Cevallos, Spanish minister of state,

July 17, 1815. In this note Mr. Monroe said that the objections to the reception of de Onis were such that, if he had been previously received, his recall would have been requested of his Government. "The interchange of ministers," said Mr. Monroe, "between friendly powers is intended for mutual advantage, and particularly for the important purpose of preserving the relations of amity between them. Each has a right to object to any person who has given just cause of offence, and to decline receiving him as a minister, or to demand his recall in case he has been received. Neither power has a right to force on the other a person so circumstanced as minister. Such an attempt would be incompatible with the independence of the power on whom it might be made. Self-respect forbids a presumption that the idea was ever entertained by your sovereign." Mr. Monroe added, however, that the President, desirous of reestablishing the friendly relations between the countries, had instructed Mr. Erving to state, after explaining the objections to the Chevalier de Onis, that, if His Majesty was desirous of continuing him as his minister in the United States, and would regard his recognition as a mark of attention to him, the President would willingly comply.

Messrs. de Onis and Erving were afterwards received as the ministers of their respective countries, and diplomatic relations were thus restored.

Mr. Monroe, Sec. of State, to Mr. Erving, Oct. 6, 1814, MS. Inst. U. States Mins. VII. 384; Mr. Dallas, Act. Sec. of State, to the Chevalier de Onis, June, 1815, MS. Notes to For. Leg. II. 98; Mr. Monroe, Sec. of State, to Mr. Morris, July 18, 1815, MS. Inst. U. States Mins. VII. 412; Mr. Monroe, Sec. of State, to Mr. Cevallos, min. of state, July 17, 1815, MS. Notes to For. Leg. II. 106.

For the confidential message to Congress, of Jan. 10, 1811, containing de Onis' intercepted correspondence, see Am. State Papers, For. Rel. III. 404.

Clemente case.

"In the month of December last Don Lino de Clemente announced himself to the Department of State as the representative of the Republic of Venezuela, and requested an interview with the Secretary of State. As the term representative is not an official designation of any diplomatic agent, customary between different nations, and as Mr. Clemente sent no copy of his commission or credential letter, it is not known in what character or capacity he was authorized to act, nor from what authority he came. He had some time before, with the name of deputy from Venezuela, joined in issuing, at Philadelphia, in direct and positive violation of our law, a commission to a foreign officer to organize an expedition against Amelia Island and the Floridas. The first object of this expedition, that of taking possession of Amelia Island, had been accomplished, and it immediately became a receptacle for privateers

and pirates, slave traders and smugglers, who soon destroyed all safety of peaceful and commercial navigation in the Gulf of Mexico, and made it indispensably necessary that the Government of the United States should themselves take military possession of the island, which was accordingly done. Mr. Irvine [who was sent in 1818 as agent to Venezuela] was instructed to give the proper explanation to the Government of Venezuela concerning the transaction, and to expose the impropriety of proceedings on the part of the persons who had assumed upon themselves, within the jurisdiction of the United States, to authorize the expedition of General McGregor. General Bolivar disavowed it in the most explicit manner and declared that the Government of Venezuela had never authorized any expedition against Amelia Island whatever. Under those circumstances the President of the United States judged it improper that any official communication should be held with Mr. Clemente, and it was accordingly declined. Instructions were despatched to Mr. Irvine to make known to the Government of Venezuela the reasons upon which this determination was founded, and to give the assurance that such communication would be freely held with any other person, not obnoxious to the same objection."

Mr. Adams, Sec. of State, to Mr. Thompson, Sec. of Navy, May 20, 1819, 17 MS. Dom. Let. 304.

Keiley case.

In 1885 the Italian Government objected to receiving as minister from the United States Mr. A. M. Keiley. Its objection was based upon a speech made by Mr. Keiley at a public meeting of Roman Catholics, held in Richmond, Va., January 12, 1871, in support of certain resolutions prepared by the bishops of the diocese, one of which protested "against the invasion and spoliation of the states of the church by King Victor Emmanuel as a crime against solemn treaties and against the independence of the head of the church on earth, which must always be imperilled while he is the subject of any temporal prince or government." When the objection of the Italian Government was brought to Mr. Keiley's attention he resigned his commission. The Government of the United States, in the correspondence with the Italian Government, recognized "the full and independent right" of the King of Italy to decide the question of the "personal acceptability to him" of an envoy from another government.

Baron Fava, Italian min., to Mr. Bayard, Sec. of State, April 13, 1885; Mr. Bayard to Baron Fava, April 13, 1885; Mr. Keiley to Mr. Bayard, April 18, 1885; Baron Fava to Mr. Bayard, April 20, 1885; Mr. Keiley to the President, April 28, 1885; Mr. Bayard to Baron Fava, April 30, 1885; For. Rel. 1885, 549–552.

May 4, 1885, Mr. Bayard, as Secretary of State, informed Baron Schaeffer, minister of Austria-Hungary at Washington, that the

President had appointed Mr. Anthony M. Keiley, of Virginia, as envoy extraordinary and minister plenipotentiary of the United States at Vienna.

On the 9th of May Baron Schaeffer handed to Mr. Bayard a translation of a telegram of the previous day from Count Kalnoky, in which it was stated that there existed at Vienna, as at Rome, "*scruples against this choice*," and in which Baron Schaeffer was instructed to "direct *in the most friendly way* the attention of the American Government to the generally existing diplomatic practice to ask previously to any nomination of a foreign minister the *agrément* (consent) of the government to which he is accredited," and to "*earnestly entreat* them that the newly nominated minister may not reach Vienna before our confidential consent to his nomination has taken place." The telegram added that "the position of a foreign envoy wedded to a Jewess by civil marriage would be untenable and even impossible in Vienna."

Mr. Bayard, in a note to Baron Schaeffer of the 18th of May, said that the President had instructed him to say that the objection to an envoy, that his wife was alleged or supposed to entertain a certain religious faith or to be a member of a certain religious sect, could not be assented to, but must be "emphatically and promptly denied;" that the Constitution expressly declared that "no religious test shall ever be required as a qualification to any office or public trust under the United States," and that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;" that it was not within the power of the President, nor of any other organ of the Government, to inquire into or decide upon the religious belief of any official; and that the proposition to allow this to be done by any foreign government was *a fortiori* inadmissible. In harmony with this essential law, added Mr. Bayard, was "the almost equally potential unwritten law of American society that awards respect and delicate consideration to the women of the United States, and exacts deference in the treatment at home and abroad of the mothers, wives, and daughters of the Republic." An objection to an envoy on the sole ground that his wife was alleged to entertain a certain religious faith was, declared Mr. Bayard, in the opinion of the President a doctrine "so destructive of religious liberty and freedom of conscience, so devoid of catholicity, and so opposed to the spirit of the age," that it could not be accepted by the great family of civilized nations, nor by the people of the United States or any administration which represented their sentiments. Mr. Bayard therefore asked that the objection to Mr. Keiley, as stated in the telegram, might be reconsidered. In conclusion, however, Mr. Bayard, referring to the right of a government to refuse to receive

a minister, said: "While thus making reply to the only reason stated by your Government as to the cause of its unreadiness to receive Mr. Keiley, permit me also to remark that the President fully recognizes the highly important and undoubted right of every government to decide for itself whether the individual presented as the envoy of another state is or is not an acceptable person, and in the exercise of its own high and friendly discretion, to receive or not the persons so presented. This right so freely accorded by the United States to all other nations, its Government would insist upon should an occasion deemed to be proper arise."

In a subsequent note of the 20th of May, referring to the question of diplomatic practice touching the nomination of ministers, Mr. Bayard said that no case could be found in the records of the Department of State in which the acceptability of an envoy was inquired about or ascertained in advance of his appointment to the mission for which he was chosen, and that there were reasons, growing out of the frequent recurrence of elections and changes of administration in the United States, why the practice should not be adopted. It might, for example, be difficult to procure the consent of a foreign government to the appointment of agents whose views were in harmony with the latest and prevailing expression of public opinion as the result of popular election.

In a note to Mr. Bayard of June 11, 1885, Baron Schaeffer stated that he was instructed to say that his Government "must absolutely decline to make your deductions the basis of a discussion with the Government of the United States, upon religious liberty and diplomatic law," and added: "In Austria-Hungary, as well as in the United States, the constitution grants entire liberty to all forms of religious worship. *Our objections to Mr. Keiley's appointment as minister of the United States to the Imperial Court are founded upon want of political tact evinced on his part on a former occasion, in consequence of which a friendly power declined to receive him; and upon the certainty that his domestic relations preclude that reception of him by Vienna society which we judge desirable for the representative of the United States, with which power we wish to continue the friendly relations existing between the two Governments.*"

Replying on the 15th of June, Mr. Bayard said that the objection founded on Mr. Keiley's "want of political tact," which objection was first made known on the 11th instant, he did not feel called upon to discuss, because it seemed "difficult to imagine the basis for such an objection to a gentleman who has as yet never been in Europe nor held official relations to any foreign state;" and that the somewhat obscure allusion to Mr. Keiley's "domestic relations" was supposed to refer to the objection previously stated. And in conclusion Mr. Bayard, calling attention to "the full recognition by the Government

of the United States," in his note of the 18th of May, "of the right of a foreign power to exercise its own high and honorable discretion as to the reception of an envoy from this Government," he inquired whether Baron Schaeffer's note of the 11th instant was to be taken as a final refusal to receive Mr. Keiley.

August 4, 1885, Mr. Lee, chargé d'affaires ad interim at Vienna, telegraphed that the minister of foreign affairs had declared that he could not receive Mr. Keiley, and had asked that the United States appoint another minister. Mr. Keiley, on being advised of the action of the Austro-Hungarian Government, resigned the mission.

Mr. Bayard, Sec. of State, to Baron Schaeffer, Austro-Hungarian min., May 4, 1885, For. Rel. 1885, 48; same to same, May 18, 1885, and May 20, 1885, id. 48, 51; Baron Schaeffer to Mr. Bayard, June 11, 1885, id. 55; Mr. Bayard to Baron Schaeffer, June 15, 1885, id. 56; Mr. Francis, min. to Austria-Hungary, to Mr. Bayard, June 17, June 24, and June 30, 1885, id. 28–32; Mr. Bayard to Mr. Francis, July 1, 1885, id. 32; Mr. Francis to Mr. Bayard, July 28, 1885, id. 35; Mr. Lee, chargé to Mr. Bayard, tel., Aug. 4, 1885, id. 36; same to same, No. 127, Aug. 6, and No. 131, Aug. 17, 1885, id. 36, 37; Mr. Bayard to Mr. Lee, No. 4, Aug. 31, 1885, id. 38; Mr. Keiley to Mr. Bayard, Sept. 1, 1885, id. 41; Mr. Bayard to Mr. Keiley, No. 2, Sept. 15, 1885, id. 45; Mr. Lee to Mr. Bayard, No. 147, Oct. 9, 1885, id. 46.

The correspondence is also printed in S. Ex. Doc. 4, 49 Cong. 1 sess. See supra, § 637.

As to the practice of asking the acceptance of a minister in advance, see Schuyler's American Diplomacy, 134 et seq.

The United States has observed the practice of inquiring in advance as to the acceptability of persons whom it has desired to nominate as *ambassadors* since the Government began to appoint diplomatic agents of that grade.

"Question has arisen with the Government of Austria-Hungary touching the representation of the United States at Vienna. Having, under my constitutional prerogative, appointed an estimable citizen of unimpeached probity and competence as minister at that court, the Government of Austria-Hungary invited this Government to take cognizance of certain exceptions, based upon allegations against the personal acceptability of Mr. Keiley, the appointed envoy, asking that, in view thereof, the appointment should be withdrawn. The reasons advanced were such as could not be acquiesced in, without violation of my oath of office and the precepts of the Constitution, since they necessarily involved a limitation in favor of a foreign Government upon the right of selection by the Executive, and required such an application of a religious test as a qualification for office under the United States as would have resulted in the practical disfranchisement of a large class of our citizens and the abandonment of a vital principle in our Government. The Austro-Hungarian Government finally decided not to receive Mr. Keiley as the envoy

of the United States, and that gentleman has since resigned his commission, leaving the post vacant. I have made no new nomination, and the interests of this Government at Vienna are now in the care of the secretary of legation, acting as chargé d'affaires ad interim."

President Cleveland, annual message, Dec. 8, 1885, For. Rel. 1885, iv.

Mr. A. R. Lawton was commissioned envoy extraordinary and minister plenipotentiary to Austria-Hungary, April 14, 1887; Chev. de Tavera was received as Austro-Hungarian minister at Washington April 5, 1887.

Mr. Keiley became in 1886 a member of the International Tribunal of Egypt, in the court of first instance at Cairo; and in 1894 was promoted to the court of appeals of Alexandria.

As to the withdrawal of the Chev. Hülsemann from Washington in 1852, see S. Ex. Doc. 92, 32 Cong. 1 sess.; Polit. Science Quarterly, X. 286–289; Mr. Everett, Sec. of State, to Mr. Foote, chargé d'affaires at Vienna, private, No. 12, 1852 MS. Inst. Austria, I. 76.

Blair's case.

"The Chinese Government has declined to receive Mr. Blair as the minister of the United States on the ground that, as a participant, while a Senator, in the enactment of the existing legislation against the introduction of Chinese laborers, he has become unfriendly and objectionable to China. I have felt constrained to point out to the Chinese Government the untenableness of this position, which seems to rest as much on the unacceptability of our legislation as on that of the person chosen, and which, if admitted, would practically debar the selection of any representative so long as existing laws remain in force."

President Harrison, annual message, Dec. 9, 1891, For. Rel. 1891, x.

(3) REQUEST FOR RECALL.

§ 639.

Moustier's case.

Early in January, 1788, the Count de Moustier arrived in the United States, as successor to the Chevalier de la Luzerne, as minister of France. Something unpleasant appears soon to have taken place, since Jefferson, who then represented the United States at Paris, in a letter of May 27, 1788, said to a correspondent: "There has been some dispute of etiquette with the new French minister, which has disgusted him." Complaints concerning Count de Moustier were some time afterwards sent to Jefferson, who made use of the mediation of the Marquis de Lafayette in communicating them to the French Government. Although the Count was represented as being "politically and morally offensive," his Government, as "no particular fact" was alleged against him, felt that he could not be recalled without giving him another

post; but it was eventually decided to take advantage of "a loose expression" in one of his letters, which might be construed into a petition for leave of absence, and give him permission to return to France. The complaints against the Count seem, however, to have been subsequently modified, if not altogether removed. Madison, in a letter to Jefferson of May 23, 1789, said: "It is with much pleasure I inform you that Moustier begins to make himself acceptable; and with still more, that Madame Brehan begins to be viewed in the light which I hope she merits." Four days later Madison again wrote to Jefferson: "I have already informed you that Madame Brehan is every day recovering from the disesteem and neglect into which reports had thrown her, and that Moustier has also become more and more acceptable, or at least less and less otherwise. His commercial ideas are probably neither illiberal nor unfriendly to this country. The contrary has been supposed. When the truth is ascertained and known, unfavorable impressions will be still more removed." November 6, 1790, Moustier wrote to Jefferson, who had then become Secretary of State of the United States, that the King had transferred him to the Court of Prussia, and Jefferson replied: "The President, in a letter to the King, has expressed his sense of your merit, and his entire approbation of your conduct while here, and has charged me to convey to yourself the same sentiments on his part;" and a medal and a chain were given to the Count "as a testimony of these sentiments."

The Diplomatic Correspondence of the United States, 1783–1789, II. 164, 272, 294; Madison's Works (1884), I. 369, 471, 472–3; The Recall of Ministers, by Dr. J. B. Angell, *The Forum*, Jan. 1889, 486.

Genet.

In the latter part of 1792 the French Government appointed as minister to the United States M. Edmond C. Genet. Genet once spoke of himself as having spent seven years at the head of a bureau at Versailles, under the direction of Vergennes, and of having passed one year at London, two at Vienna, one at Berlin, and five in Russia. Gouverneur Morris, who then represented the United States in France, reported, as the result of inquiries, that Genet was a man of good parts and very good education, brother to the Queen's first woman, from whence his fortune originated; that he was, through the Queen's influence, appointed as chargé d'affaires at St. Petersburg, where, in consequence of dispatches from M. de Montmorin, which were written in the sense of the revolution, but which he interpreted too literally, he made some representations in a much higher tone than was wished or expected; that as it was not convenient under the circumstances either to approve or to disapprove his conduct, his communications lay unnoticed; that, being a young man of ardent temper, he felt himself

insulted, and wrote some petulant dispatches, believing that if the royal party prevailed his sister would make fair weather for him at court; that on the overthrow of the monarchy, these dispatches operated as credentials to the new government, and, in the dearth of competent men, opened the way to his preferment, and that in this situation he chose America as the best harbor during the storm, and would not put to sea again until it was fair weather.[a]

In reporting Genet's departure for the United States, Morris observed that "the pompousness of this embassy could not but excite the attention of England;" and he had scarcely left France when Morris reported that the executive council had sent out by him three hundred 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.

Genet arrived at Charleston, S. C., April 8, 1793, and at once proceeded to fit out and commission privateers; and when he had got a number ready for sea he set out on his journey to the seat of the national government by land. 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 success of the course on which he had entered.

When Genet arrived in Philadelphia he was duly received by the President, but the administration was at the same time obliged to take measures for the vindication of the neutrality proclamation of April 22, 1793, which was constantly violated by the fitting out of privateers, the condemnation of prizes by French consuls sitting as courts of admiralty, and even by the capture of vessels within the jurisdiction 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. When Jefferson, who was then Secretary of State, cited the utterances of writers on the law of nations, Genet repelled them as "diplomatic subtleties," and as "aphorisms of Vattel and others." The United States, however, 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 or 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 refused to admit these demands. "I wish, sir," he replied, "that the Federal Government

[a] Morris to Washington, December 28, 1792, Am. State Papers, For. Rel. I. 392.

should observe, as far as in their power, the public engagements contrated by both nations; and that by this generous and prudent conduct, they will give at least to the world the example of a true neutrality, which does not consist in the cowardly abandonment of their friends in the moment when danger menaces them, but in adhering strictly, if they can do no better, to the obligations they have contracted with them."[a] He also expressed contempt for the opinions of the President, and questioned his authority.

Genet's recall.

On the 16th of August, 1793, Morris was instructed to ask for Genet's recall.[b] A request to this effect was made in an interview with M. Deforgues, then minister of foreign affairs, on the 8th of October. It was immediately granted; and on the 10th of October, M. Deforgues in a formal note, confirming what he had previously promised, declared that measures would be taken to show that "the proceedings and criminal maneuvers (*les démarches et les manœuvres criminelles*) of the citizen Genet" were not authorized by his instructions.[c] His successor, M. Fauchet, demanded his arrest for punishment. This the United States refused "upon reasons of law and magnanimity."[d]

See, more fully, Moore, Int. Arbitration, V. 4404–4412. See, also, Moore's American Diplomacy, 38–41, 43–48.

Genet maintained that he had acted in conformity with his instructions, and demanded that the President should lay the whole matter before Congress for consideration on its reassembling. His letters of recall did not reach the United States till February, 1794. Toward the close of the year 1793 the Government became cognizant of the fact that he had been engaged in promoting enterprises against the dominions of Spain. (Am. State Pap. For. Rel. I. 172, 309, 311, 425; Pitkin's Political and Civil History of the United States, II. 377–385.)

In some remarks made at a meeting of the New York Historical Society, December 13, 1870, William Cullen Bryant, referring to Genet, said: "I knew the man, and remember him very vividly. Some forty-five years since he came occasionally to New York, where I saw him. He was a tall man, with a reddish wig and a full round voice, speaking English in a sort of oratorical manner, like a man making a speech, but very well for a Frenchman. He was a dreamer in some respects, and, I remember, had a plan for navigating the air in balloons. A pamphlet of his was published a little before the time I knew him entitled 'Aerial Navigation,' illustrated by an engraving of a balloon shaped like a fish, propelled by sails and guided by a rudder, in which he maintained that man could navigate the air as well as he could navigate the ocean in a ship." It seems that at the time of which Mr. Bryant spoke Genet was living in Troy, in the State of New York. (The Struggle for Neutrality in America, an Address by Charles Francis Adams, p. 51.)

---

[a] Genet to Jefferson, June 8, 1793, Am. State Papers, For. Rel. I. 151.

[b] Am. State Papers, For. Rel. I. 167.

[c] Id. 372, 373, 375.

[d] Id. 709.

Genet's note of September 18, 1793, to Jefferson, giving his complaints of his treatment by the administration, is in 1 Am. St. Papers, For. Rel. 172. With reference to this note, Wharton, in his Int. Law Digest, says: "Of his treatment by President Washington he [Genet] complains as follows: 'I will tell you, then, without ceremony, that I have been extremely wounded, sir: 1st. That the President of the United States was in a hurry, before knowing what I had to transmit to him, on the part of the French Republic, to proclaim sentiments, on which decency and friendship should at least have drawn a veil. 2d. That he did not speak to me at my first audience but of the friendship of the United States towards France, without saying a word to me, without enouncing a single sentiment, on our revolution; while all the towns, from Charleston to Philadelphia, had made the air resound with their most ardent wishes for the French Republic. 3d. That he had received and admitted to a private audience, before my arrival, Noailles and Talon, known agents of the French counter-revolutionists, who have since had intimate relations with two members of the Federal Government. 4th. That this first magistrate of a free people, decorated his parlor with certain medallions of Capet and his family, which served at Paris as signals of rallying.' A series of other specifications followed, relative to the international rulings of the Administration.

"As to the medallion of 'Capet,' it may be noticed that full length pictures of Louis XVI. and Marie Antoinette, presented to Congress at the close of the American Revolution, remained hung on the walls of Congress at Philadelphia until after the French Revolution. They were then, according to a letter of Mr. E. Thornton, an attaché of the British legation (Bland-Burgess papers, 238), dated March 6, 1792, probably from complaints such as those made above, 'covered with a curtain.' Mr. Thornton goes on to say: 'I don't know whether I mentioned to you formerly that the key of the Bastile, given to a certain great man here (Washington) by Lafayette, is hung up in a glass frame in the principal room of the great man's house, with an engraving of Louis XVI., *Le patriote Roi des Français*, opposite. In the drawing-room of Mr. Jefferson there are three busts—of Franklin, Paul Jones, and Lafayette—three gentlemen, the first of whom had talents without virtue, the second deserved hanging, and the last, not improbably, may meet the same fate." No doubt the picture of 'Capet' in Washington's parlor, which gave offense to the Frenchman in September because it was there at all, was a companion to that which gave offense to the Englishman in June because the inscription was 'patriot king.' Such incidents as these show the difficult position of Washington in trying to steer a just course between the two rival missions." (Wharton, Int. Law Digest, § 107, vol. 1, pp. 702, 703.)

The letter of Thornton, cited by Wharton, is not in the Bland-Burgess Papers. The citation evidently is erroneous.

See, as to Genet's case, Hildreth's History of the United States, IV. 439.

Morris.

January 12, 1792, Washington appointed Gouverneur Morris minister plenipotentiary to France. The appointment was made by Washington not without misgivings, for while entertaining absolute confidence in Morris's integrity, he

recognized, in the opposition which the nomination excited in the Senate, the fact that the possession of a "lively and brilliant imagination" and a "gift of ridicule" would require of Morris, in the delicate situation in which he was placed, the exercise of unusual caution.[a] There was, however, another ground of opposition to Morris's appointment. "It was urged," said Washington, in an admonitory letter, "that in France you were considered as a favorer of the aristocracy and unfriendly to its revolution." In what sense this was true no one understood better than Washington, with whom Morris had for three years been in correspondence in regard to events in France. In his own country Morris had been a supporter of the Revolution, a member of the Continental Congress, assistant to Robert Morris in the management of the public finances,[b] and a member of the Constitutional Convention of 1787. To mental gifts of a high order he united a capacity for public business. In his views of government he belonged to the same school as Washington. He regarded the maintenance of a just public authority not as a menace to liberty, but as its essential safeguard. In the first stages of the French Revolution he could see "every reason to wish that the patriots may be successful," though he apprehended that the "crumbling matter" on which the edifice of freedom was to be erected would, when exposed to the air, "fall and crush the builders."[c] He instinctively recoiled from the excesses that were committed when his apprehensions came to be fulfilled. Before he became minister of the United States he offered his counsel to Louis XVI. He afterward sought to effect that monarch's escape; and having witnessed the execution both of the King and the Queen, and the destruction of all public authority, he prophesied that, whatever might be the lot of France in remote futurity, she must soon come, probably through the medium of a triumvirate or other small body of men, to be "governed by a single despot."[d]

Morris's recall.

In a letter to Washington, of February 14, 1793, Morris said: "I will not speak of my own situation; you will judge that it is far from pleasant. I could be popular, but that would be wrong. The different parties pass away like the shadows in a magic lantern, and to be well with any one of them would, in a very short period, become the cause of unquenchable hatred with the others."[e] With the progress of events Morris's situation did not become more agreeable, and at length he purchased a residence at Saintport, about thirty miles from Paris, where he

[a] Writings of Washington, ed. by Sparks, X. 216–218.

[b] Wharton's Dip. Cor. Am. Rev. IV. 622.

[c] Letter to Washington, April 29, 1789, Am. State Papers, For. Rel. I. 379.

[d] Letter to Washington, October 18, 1793, Am. State Papers, For. Rel. I. 398.

[e] Am. State Papers, For. Rel. I. 396.

remained till his recall, paying such visits to Paris as the duties of his office rendered necessary. The authorities of the Republic, to whom he had never been personally grateful,[a] took advantage of the request for Genet's recall to ask for his withdrawal. Under the circumstances this act of reciprocity was ungrudgingly conceded, although Washington did not fail to assure Morris that his confidence in and friendship and regard for him remained undiminished.[b]

For a fuller discussion of the situation in France, and Morris' relation to the revolution, see Moore, Int. Arbitrations, V. 4401–4414.

"During the two or three years previous to his appointment, in which he had resided in Paris, he [Morris] had identified himself, as completely as it was possible for a stranger, with the King's friends. He expressed openly his conviction that the new constitution was a failure; and, through those connected with the court, had submitted to his Majesty the draft of an address to be made when accepting the constitution. . . . Accompanying this strange paper was a still stranger memoir. . . . Speaking of the King in the third person, Mr. Morris says: 'But it is important for him to show that he has acted consistently. And yet this should be accomplished in such a manner as to produce the effect, without appearing to intend it, because such appearance would place him in the situation of one who defends himself before his judges; *and a King should never forget that he is accountable only to God.*' . . . Anyone holding such opinions, and so connected, could be of no possible service either to France or the United States, in a diplomatic capacity, at that time. But Mr. Morris' interference did not end when his public character began. As minister of the United States he contrived, and very nearly accomplished, the escape of Louis XVI. from Paris. He became that monarch's agent, by receiving and disbursing a large amount of money; and the unexpected balance of that fund he preserved and accounted for, after the termination of his mission. While it is impossible to attach any moral blame to this conduct, while it is impossible not to sympathize with Mr. Morris' righteous indignation at the horrors with which he was surrounded, while every instinct of common humanity would rejoice at the success of his earnest endeavor, it is impossible to justify his conduct as the diplomatic representative of the United States." (Trescot, American Diplomatic History, 131–135.)

C. Pinckney.

"There is reason to believe that Yrujo has worked against us with all his might, seeking to advance himself by flattering the prejudices of his Government, instead of consulting its obligations or its true interest. He behaved so badly as to require the recall signified in my public letter. [Charles] Pinckney's recall has been asked by the Spanish Government, and a letter of leave goes to him. I suspect he will not return in good humor. I could

[a] Am. State Papers, For. Rel. I. 173.

[b] Am. State Papers, For. Rel. I. 409, 410, 412.

not permit myself to flatter him, and truth would not permit me to praise him."

Mr. Madison, Sec. of State, to Mr. Monroe, min. to Spain, Nov. 9, 1804, 2 Madison's Works, 208, 209.

Pinckney's recall was requested because of the threatening tone which he assumed in a letter to the Spanish minister of state, Cevallos. As above appears, a letter of recall was sent to him, but he was afterwards permitted by the Spanish Government to act in association with Monroe in the ineffectual negotiations that subsequently took place for the adjustment of questions between the two governments. See Adams' History of the United States, II. 279, 280, 281, 284, 286, 315; III. 23, 37.

The threat to which objection was made was an intimation by Pinckney that he would inform the American consuls on the Mediterranean and the commander of the American squadron in that quarter as to the critical situation between the two countries, and direct them to notify American citizens to be ready to withdraw with their property.

Poinsett.

"It becomes my duty to inform you that prejudices long indulged by a portion of the inhabitants of Mexico against the envoy extraordinary and minister plenipotentiary of the United States have had an unfortunate influence upon the affairs of the two countries, and have diminished that usefulness to his own which was justly to be expected from his talents and zeal. To this cause, in a great degree, is to be imputed the failure of several measures equally interesting to both parties, but particularly that of the Mexican Government to ratify a treaty negotiated and concluded in its own capital and under its own eye. Under these circumstances it appeared expedient to give to Mr. Poinsett the option either to return or not, as in his judgment the interest of his country might require, and instructions to that end were prepared, but before they could be dispatched a communication was received from the Government of Mexico, through its chargé d'affaires here, requesting the recall of our minister. This was promptly complied with, and a representative of a rank corresponding with that of the Mexican diplomatic agent near this Government was appointed. Our conduct toward that Republic has been uniformly of the most friendly character, and having thus removed the only alleged obstacle to harmonious intercourse, I can not but hope that an advantageous change will occur in our affairs.

"In justice to Mr. Poinsett it is proper to say that my immediate compliance with the application for his recall and the appointment of a successor are not to be ascribed to any evidence that the imputation of an improper interference by him in the local politics of Mexico was well founded, nor to a want of confidence in his talents or integrity, and to add that the truth of that charge has never been

affirmed by the Federal Government of Mexico in its communications with this."

President Jackson, annual message, Dec. 8, 1829, Richardson's Messages, II. 446.

That a government has the right under international law to request the recall of a minister who is personally unacceptable, and that the United States will acquiesce in such a request, see Mr. Van Buren, Sec. of State, to Mr. Poinsett, min. to Mexico, Oct. 16 and 17, 1829, MS. Inst. Am. States, XIV. 141, 148.

The publication by a foreign minister, during his official term, of a document charging the United States with bad faith, will be ground to demand his recall; and if it be subsequently sustained by his Government, this will be regarded by the United States as a gross indignity.

Mr. Forsyth, Sec. of State, report to President of Dec. 2, 1837, 5 MS. Report Book, 264. This refers to the case of Mr. Gorostiza, the Mexican representative at Washington, as to which see Moore, Int. Arbitrations, II. 1213.

Jewett's case.

April 24, 1846, Mr. Soldan, Peruvian minister of foreign affairs, enclosed to Mr. Jewett, the American chargé d'affaires at Lima, a copy of the official paper, *Peruano*, containing a decree of the 17th of that month, the object of which was to restrict the intervention of foreign powers in respect to the claims of their citizens.

Mr. Jewett acknowledged the receipt of this note on the 23rd of May. In his reply he stated that, although he entertained the conviction that the decree violated the principles of national duty, national honor and moral obligation as defined by international law, he would send a copy of it to his Government; but that, until instructed by his government to that effect, he could not acquiesce in its application to citizens of the United States.

In acknowledging, on June 9, 1846, the receipt of Mr. Jewett's note, Mr. Soldan referred to Mr. Jewett's "assurance" that he would comply with the decree till he should receive instructions from his government.

In a note to Mr. Soldan, June 15, 1846, Mr. Jewett not only denied that he had given such an assurance, but commended to Mr. Soldan the consideration of "that rule of diplomatic 'etiquette,' founded in moral obligation, which enjoins upon the minister the duty of making impartial, accurate, and honorable translations of the notes of public ministers, and pronounces any misrepresentation in these respects in a diplomatic correspondence as unjustifiable and offensive as misrepresentations in other respects, whether that misrepresentation originates in carelessness, want of sufficient knowledge

of the languages, or a deliberate purpose." Mr. Jewett also referred to the decree as "a compound of legal and moral deformities presenting to the vision no commendable lineament, but only gross and perverse obliquities."

"The President regrets that you appear to be on such unfriendly terms with the Government of Peru. It is a primary duty of a diplomatic agent to cultivate the good will of the authorities of the country to which he is accredited. Without this his usefulness must be very much impaired. It is impossible that you can reform either the morals or the politics of Peru, and as this is no part of your mission, prudence requires that you should not condemn them in public conversations. You ought to take its institutions and its people just as you find them and endeavor to make the best of them for the benefit of your own country, so far as this can be done consistently with the national interest and honor.

"The Peruvian minister complains that you have not, according to custom, given him the title of excellency or honorable in communications to him. If such be the fact, I regret it. This you may consider a small matter in itself, but yet such breaches of established etiquette often give greater offence than real injuries. This is emphatically the case in regard to the Spanish race. They have ever been peculiarly tenacious in requiring the observance of such forms. However ridiculous this may appear to us, it is with them a matter of substance.

"The United States sloop of war *Dale*, Captain McKean, will carry you this despatch. She will sail to-morrow from New York to join our fleet on the northwest coast of America, and will remain at Callao for a few days. I received this information at so late a period that I have not time before her departure to prepare despatches for you on other subjects. This I shall do by the next more direct opportunity.

"In the meantime permit me to express the earnest hope of the President that you will so conduct yourself in your highly responsible position as to give no offence to the Peruvian Government which can be avoided. In pursuing this course you will best promote the interests of your country as well as your own usefulness."

Mr. Buchanan, Sec. of State, to Mr. Jewett, chargé d'affaires to Peru, June 1, 1846, MS. Inst. Peru, XV. 48.

"I have to inform you that the President, by and with the advice and consent of the Senate, has appointed Mr. J. R. Clay your successor as chargé d'affaires of the United States to Peru. A letter to the minister for foreign affairs of that Republic announcing your recall is accordingly herewith transmitted, which you will embrace an early opportunity to deliver. Prior to your departure from Peru

you will lodge the archives of the legation with Mr. Prevost, the consul of the United States at Lima.

"Your recall has been made in consequence of a request to this effect by the minister of foreign relations of Peru to myself, in a despatch dated April 11th, 1846, and received at this Department on the 2nd June, following. The President, reluctant to comply with this request, instructed me not to answer it immediately, in the hope that your relations with that Government might change and that you might again be placed in a position to serve your country with effect. In this hope he regrets that he has been disappointed. Mr. Osma, since his arrival in this city, has personally reiterated the request and the President has finally felt himself obliged to comply with it, although no answer has yet been returned to the note of the Peruvian minister.

"In the intercourse between friendly nations, when the diplomatic representative of the one has rendered himself so unacceptable to the authorities of the other as to impair or destroy his usefulness, it has ever been the custom, unless under extraordinary circumstances, to yield to such a request when made in respectful and friendly terms. This practice is founded upon the principle that the great interests of nations ought not to be jeoparded merely for the sake of retaining any individual in a diplomatic station. If diplomatic agents render themselves so unacceptable as to produce a request for their recall from the government to which they are accredited, the instances must be rare indeed in which such a request ought not to be granted. To refuse it would be to defeat the very purpose for which they are sent abroad, that of cultivating friendly relations between independent nations. Perhaps no circumstance would justify such a refusal unless the national honor were involved in the question, and this can not be pretended on the present occasion.

"The principle to which I have adverted applies with peculiar force in our relations with Peru, especially during the continuance of the Mexican war. From the situation of that Republic on the west coast of America, from the number of our vessels, both national and commercial, which frequent the harbor of Callao and other Peruvian ports, from the facilities for fitting out privateers along that coast, and from the vast amount of the property of our citizens afloat on the Pacific Ocean, it is essential that we should have a chargé d'affaires at Lima who possesses the confidence and regard of the Peruvian Government. It is of great importance that the duties of neutrality and friendship should be faithfully performed by that Government to the United States, and these cannot be successfully enforced by the agency of a minister against whom the Peruvian authorities have conceived so strong a prejudice, whether well or ill founded, as to induce them to make reiterated requests for his recall."

Mr. Buchanan, Sec. of State, to Mr. Jewett, chargé d'affaires to Peru, No. 8, March 19, 1847, MS. Inst. Peru, XV. 52.

A government to whom a diplomatic agent is sent may, without giving just cause of offense to the government sending him, refuse to receive him, and ordinarily a request for his recall will be at once granted by the latter government. (Mr. Buchanan, Sec. of State, to Mr. Carr, Nov. 18, 1848, MS. Inst. Barb. Powers, XIV. 76.)

Wise's case.

"In regard to Mr. Wise's conduct, subsequently to the 31st October last, in justice to Mr. Lisboa, I have already stated, that this subject was not embraced in the settlement between that gentleman and myself. On the contrary, in all our conferences, he obeyed the instructions of his Government; and with a zeal, perseverance, and ability which have rendered him an eminently successful minister in sustaining the interests of his country in the United States; he persisted in urging the recall of Mr. Wise on account of his conduct, especially on the occasion of the baptism of the imperial princess, and the fête of the Emperor's birthday. The question, at Mr. Lisboa's request, was submitted to the President, who, after careful deliberation, directed me to return the following answer, which I read to him on the 10th February last, twenty days after the date of his note to me, by which the affair of Lieutenant Davis and the three sailors was adjusted.

"'After a mature consideration of all the circumstances arising from the imprisonment of Lieutenant Davis and the American sailors by the local authorities at Rio de Janeiro, the President does not believe that he could recall Mr. Wise without, by implication at least, subjecting him to a censure, which, in the President's opinion, he does not deserve, for his conduct on that occasion. The President has arrived at this determination, notwithstanding his anxious desire to cultivate the most friendly relations with the Government of Brazil. He trusts that any unpleasant impressions produced by this affair may speedily pass away and be forgotten; and that during the remainder of Mr. Wise's residence at the imperial court nothing may occur to interrupt the harmony which ought ever to subsist between the two nations.

"'In answer to your inquiry, when it is expected Mr. Wise will return from his mission: I am instructed to inform you, that some time ago, and long before the imprisonment of Lieutenant Davis, that gentleman had asked to be recalled, and the President had determined to accede to his request. This affair having been happily adjusted between the two Governments, the President will not change his original determination. A vessel of war will, therefore, proceed from the United States to Rio during the next spring (probably in April or May) and will carry out a new minister to Brazil. Soon after his arrival, Mr. Wise will return to the United States in the

Columbia with Commodore Rousseau, whose term of service will then have expired.'

"Mr. Lisboa expressed much regret and dissatisfaction with this answer. He urged, among other arguments, as he had done before in conversation, and continued to urge afterwards, that the purpose of keeping up diplomatic intercourse between nations was to preserve and strengthen their friendly relations with each other; and that whenever, from any cause, a particular minister did not or could not accomplish this object, it was the custom of nations to recall him, on the request of the power to which he had been accredited. He cited some cases to prove that ministers had been recalled for this reason alone, although particularly agreeable to the governments by which they had been appointed.

"Without contesting this general principle, I always answered him in the same manner. I observed that there must necessarily be exceptions to this rule arising out of special circumstances, and that the present was a case of that kind. That it would be impossible to recall Mr. Wise without involving an admission that the Brazilian authorities had acted correctly in imprisoning Lieutenant Davis and the American sailors and a disapprobation of his efforts to obtain their release; and that the President would never, by his conduct, afford any ground for such an inference. After the settlement between Lisboa and myself, I said, in addition, that the object which the Brazilian Government had sought would now be accomplished, as Mr. Wise would leave that country early in the next summer; and with this they ought to be satisfied.

"The instructions of the minister for foreign affairs render it necessary that I should advert more particularly to the conduct of Mr. Wise and Commodore Rousseau on the 15th November and 2d of December last.

"On the first of these occasions, which was the celebration of the baptism of the imperial infant Isabella, Mr. Wise, although invited, did not appear at court, nor did Commodore Rousseau fire a salute from the *Columbia*.

"On the second occasion, which was the fête of the Emperor's birthday, Mr. Wise, not being invited, did not, of course, appear at court, nor did Commodore Rousseau fire a salute or hoist the flags of the *Columbia*.

"In justice to Mr. Wise it ought to be observed, that the Imperial Government are mistaken in supposing that it was through his advice or agency Commodore Rousseau omitted these ceremonies on either occasion. That gallant officer acted upon his own responsibility, and from a sense of what he thought due to the honor of the American flag.

"Whilst the President is anxious that our public functionaries in Brazil should pay all due honors to His Imperial Majesty and his august family, he can not, under the peculiar circumstances, condemn either the minister or the commodore for this mere omission to perform acts of customary ceremony. They were both at the time smarting under the recent insult and indignity which had been offered to the flag of their country by the Brazilian authorities in the affair of Lieutenant Davis and the three sailors, and which had been just approved and justified by the Government of His Imperial Majesty, and they embraced these occasions to manifest the sense which they felt of this insult and indignity. But after all, they only omitted to perform acts of courtesy from a deep conviction of what was due to their country; and this ought never to form a subject of grave complaint, or endanger the peaceful relations between two friendly governments.

"Soon after these events, however, our vessels of war at Rio, greatly to the satisfaction of the President, commenced again, under the advice of Mr. Wise, to fire the customary salutes on festal occasions in honor of Brazil, and have, I believe, ever since continued this very proper and respectful practice.

"In regard to the speech said to have been delivered by Mr. Wise on the occasion of a baptism on board of an American ship in the harbor of Rio, I can say nothing, that gentleman having never adverted to the subject in any of his communications; and I have not seen any account of it, except one which appeared in a very few American newspapers some six or seven months ago. As this speech has never been referred to by the Brazilian Government until the date of the instructions on the 31st May last, I presume they must, also, have derived their information from the same newspapers. Whilst in entire ignorance of the whole transaction from any other source, I yet venture to hazard the assertion that its publication was never sanctioned by Mr. Wise, as the minister for foreign affairs supposes."

Mr. Buchanan, Sec. of State, to Mr. Leal, Brazilian chargé, Aug. 30, 1847, S. Ex. Doc. 35, 30 Cong. 1 sess. 38–40.

The facts in the case of Lieutenant Davis, referred to above, were much controverted, but the United States maintained that that officer, who was attached to the U. S. S. *Saratoga*, was, while taking a drunken sailor back to the ship, improperly interferred with and afterwards, together with certain sailors, maltreated and unjustly arrested by the Brazilian police.

See, as to the case of the *Porpoise*, supra, § 175, vol. 2, pp. 4–5.

Marcoleta case.

September 1, 1852, Mr. Kerr, American minister to Central America, was instructed by Mr. Webster "to signify to the Government of Nicaragua that the good understanding between the two Governments is not, in the Presi-

dent's opinion, likely to be promoted or strengthened by the continuance here of the present minister of Nicaragua. He consequently hopes that the Government of that country will accredit some other person to this Government as its diplomatic representative." The minister thus referred to was Mr. Marcoleta. The Government of Nicaragua declined to comply with the request for his recall and expressed a wish that the reasons on which it was founded should be set forth, in order that they might be submitted to the Nicaraguan Congress.

On receiving this refusal, Mr. Everett, who had succeeded Mr. Webster as Secretary of State, addressed to Mr. Marcoleta a note in which, with reference to the request for reasons, he said: "It can not be necessary to say that this course would be followed by discussions of the most disagreeable and unprofitable character; besides, that the President can not consent that any condition whatever should be attached to the compliance of the Nicaraguan Government with a request warranted by the most familiar principles of the public law and the practice of civilized states. He has therefore directed Mr. Kerr to renew the request for your recall and the appointment of another minister, and in the meantime I am instructed to inform you that no communication can hereafter be received from you as the Nicaraguan envoy."

The instructions to Mr. Kerr to renew the request for Mr. Marcoleta's recall bear date January 5, 1853. They disclosed the fact that the chief cause of complaint against Mr. Marcoleta was his conduct with reference to the proposition to Costa Rica and Nicaragua, signed by Mr. Webster and Mr. Crampton on April 30, 1852, for the settlement of questions relating to the construction of an interoceanic canal. It was stated that the proposition was shown to Mr. Marcoleta unofficially and in confidence; that soon afterwards it became the subject of a resolution in the secret session of the Senate, and a synopsis or copy of it was published in the New York *Courier and Inquirer*, over the signature of its Washington correspondent, who was known to be personally intimate with Mr. Marcoleta; that Mr. Marcoleta, while denying that he had had any agency in the publication, admitted that he had taken a copy of certain articles of the proposition, which he was not authorized to do; and that his efforts to defeat the negotiations which were in progress were rendered doubly offensive, not only by the ostentatious manner in which they were made, but also by his boasts of his influence with Senators and his threats to use it. "These were," said Mr. Everett, "a portion of the causes which led Mr. Webster, by express direction of the President and in the mildest terms in which it could be done, to express the wish that some person should be accredited to this Government in the place of Mr. Marcoleta. Had

he not been the representative of a feeble power a more summary course would have been pursued. Such a request can never be refused between governments that desire to preserve amicable relations with each other; for a minister whose recall has been asked loses, by that fact alone, all capacity for usefulness. If previously unacceptable, he must become doubly so by being retained in office in opposition to a distinct wish expressed for his recall . . . The most approved authorities on the public law mention as adequate causes of the dismissal of a minister that he is even suspected of misconduct or otherwise disagreeable. These, of course, stand in no need of statement or discussion. The gravity of the step is a sufficient safeguard against its being rashly taken. It is a possible case that the objections to a minister may be in whole or in part of a personal character and wholly disconnected with politics. They may involve the feelings and confidence of third parties. They may be of a nature not to be divulged without public and private scandal. Can it be thought for a moment that an obnoxious minister must be retained unless the government which desires his recall will make itself the agent of disclosures which are never uttered but in the most secret whispers of personal confidence?" Mr. Everett added that Mr. Marcoleta had never been in Nicaragua and was not personally known there, and that the President and Mr. Webster, in asking for his recall, proceeded on better information as to his fitness for high office than was possessed by the Nicaraguan Government. Mr. Kerr was therefore instructed in respectful terms to renew the request that another minister should be sent in Mr. Marcoleta's place. Without stating why his recall was asked, he was at liberty to explain why such a statement could not with propriety be made, and to "point out the insuperable objections to engaging in a controversy between the two Governments on the qualifications of a minister." Should the request not be complied with within ten days, Mr. Kerr was to ask for his passports and return to the United States.

So far as the administration of President Fillmore was concerned, Mr. Everett's refusal of December 30, 1852, to hold further official communication with Mr. Marcoleta suspended his official relations. It appears that on December 17, 1853, Franklin Pierce being President and William L. Marcy Secretary of State, Mr. Marcoleta presented new credentials as minister from Nicaragua, in which capacity he continued to serve till April, 1856.

Mr. Webster, Sec. of State, to Mr. Kerr, min. to Central America, No. 15, Sept. 1, 1852, MS. Inst. Am. States, XV. 138; Mr. Everett, Sec. of State, to Mr. Marcoleta, Nicaraguan min. Dec. 30, 1852, MS. Notes to Cent. Am. I. 37; Mr. Everett, Sec. of State, to Mr. Kerr, min. to Cent. Am. No. 19, Jan. 5, 1853, MS. Inst. Am. St. XV. 152.

Mr. Everett's note to Mr. Marcoleta of Dec. 30, 1852, appeared in the Washington *Union* of Wednesday, Jan. 5, 1853.

Segur case.

June 17, 1863, Mr. Henry Segur presented his credentials to the President and was received as envoy extraordinary and minister plenipotentiary of the Republic of Salvador near the Government of the United States. On the 12th of the following August Mr. Seward wrote to Mr. Partridge, American minister to the Central American States, that facts in regard to Mr. Segur had come to the knowledge of the President which induced him to believe that the continuance of that person in the character of minister of Salvador could not strengthen the relations of concord which the United States was desirous of maintaining with that Republic. Mr. Partridge was therefore instructed in a discreet way to intimate to the Salvadorean Government that it would be agreeable if Mr. Segur could at once be relieved from his official functions in the United States, and an unobjectionable person appointed in his place. On receiving these instructions Mr. Partridge at once sought an interview with the President of Salvador and intimated the desire of the United States for Mr. Segur's recall, and, as the President did not at first seem inclined to yield, Mr. Partridge stated that certain matters had come to the knowledge of the President of the United States which rendered Mr. Segur's recall "necessary in the highest degree." On the 26th of September the minister of foreign relations of Salvador sent to Mr. Partridge a note addressed to "the Minister of Relations of the United States," saying that "the presence of Dr. Henry Segur being required" in Salvador, the President had been pleased to authorize his recall in order that he might "render important services" at San Salvador. An instruction to Mr. Segur recalling him was also enclosed to Mr. Partridge. On the 19th of October Mr. Partridge was instructed to make known to the President of Salvador the acknowledgments of the Government of the United States for its prompt compliance with the request for Mr. Segur's recall.

Although the grounds of objection to Mr. Segur were not stated in the request for his recall, they related to certain alleged attempts on his part to violate the neutrality laws of the United States in respect of a conflict between Salvador on the one side and Guatemala and Nicaragua on the other. Subsequently to his recall, Mr. Segur and certain other persons were arrested in New York and committed to Fort Lafayette, on the ground that they were endeavoring to procure a war steamer, and to purchase arms and enlist men in the United States to be employed in the war in question. The papers in the case were submitted to the Attorney-General, who gave an opinion to the effect that the acts charged did not constitute an indictable offense.

Mr. Seward, Sec. of State, to Mr. Partridge, min. to Central America, No. 13, Aug. 12, 1863, MS. Inst. Am. States, XVI. 354; Mr. Seward,

Sec. of State, to Mr. Chase, Sec. of Treas., Sept. 3, 1863, MS. Dom. Let. 501; Mr. Partridge, min. to Cent. Am., to Mr. Seward, Sec. of State, Sept. 26, 1863, MS. Desp. from Salvador; Mr. Seward to Mr. Partridge, Oct. 19, 1863, MS. Inst. Am. St. —; Mr. Seward, Sec. of State, to Mr. Crosby, min. to Salvador, No. 56, Nov. 10, 1863, MS. Inst. Am. St. XVI. 386; Mr. Seward, Sec. of State, to Mr. Watson, Assist. Sec. of War, 62 MS. Dom. Let. 457; Mr. Seward, Sec. of State, to Mr. Bates, At. Gen., Jan. 23, 1864, 63 MS. Dom. Let. 80; Mr. Seward, Sec. of State, to Mr. Franklin, Jan. 28, 1864, 63 MS. Dom. Let. 105; Mr. Seward, Sec. of State, to Mr. Stanton, Sec. of War, March 9, 1864, 63 MS. Dom. Let. 399.

See, also, for a reference to Dr. Segur's case, Mr. Bayard, Sec. of State, to Messrs. Morris and Fillette, July 28, 1888, 169 MS. Dom. Let. 263.

"Referring to the conversation which lately took place between you and me at this Department, and to the documents which you left for file relating to the difficulty which has occurred between Mr. Burton and your Government, I have the honor to inform you that the consular officer of the United States at Bogotá has been instructed to express to your Government the desire of the President that Mr. Burton be furnished with the necessary passports, and his intention to fill the place vacated by that gentleman's recall." (Mr. Seward, Sec. of State, to Mr. Salgar, Colombian min., Feb. 19, 1867, MS. Notes to Colombia, VI. 221.)

Catacazy case.

June 16, 1871, Mr. Fish instructed Mr. Curtin, then American minister at St. Petersburg, that the conduct of Mr. Catacazy, Russian minister at Washington, both officially and personally, had for some time past been such as "materially to impair his usefulness to his own Government, and to render intercourse with him, for either business or social purposes, highly disagreeable;" that, under these circumstances, the President was of opinion that the interests of both countries would be promoted if the head of the Russian legation should be changed; and that it was hoped that an intimation to this effect would be sufficient for the purpose. When Mr. Curtin received these instructions, Prince Gortchakoff, chancellor of the Empire, was absent from St. Petersburg. Mr. de Westmann, the assistant chancellor, treated the matter as very serious, especially in view of the fact that the Grand Duke Alexis was then about to visit the United States. Mr. de Westmann seemed to be under the impression that the request for Mr. Catacazy's recall was due, directly or indirectly, to the intrigues of persons who desired to mar the good relations between the two countries, and he declined to mention the subject to the Emperor in the absence of Prince Gortchakoff.

August 18, 1871, Mr. Fish telegraphed to Mr. Curtin, expressing disappointment at the course things had taken, and saying that a decision was important before the advent of the prince, as the President could not be expected to receive, as the principal attendant of his highness, "one who has been abusive of him and is personally

unacceptable;" and again, on Sept. 5, Mr. Fish telegraphed: "Catacazy has, through the press and in conversation, endeavored to give it [the claim of the estate of Benjamin Perkins against Russia] undue importance, and to make it the cause of trouble between the Governments, and of annoyance. He has made himself personally offensive in conversation, and by publications abusive of the President, and it is for this cause that his recall is asked."

As the fleet with the grand duke was then about to sail, the Emperor, when the matter was brought to his attention, requested that action on the case be suspended. Mr. Fish, on September 20, 1871, replied that the President had decided, under the circumstances, to tolerate Mr. Catacazy until after the visit of the prince; that the President would not, however, formally receive Mr. Catacazy, except when he accompanied the prince, and would hold no conversation with him; and that, after the prince's visit, he would be dismissed if he had not then been recalled.

On the 16th of November Mr. Fish wrote to Mr. Catacazy that information of continued and recurring acts of "interference and impropriety" on his part was conceived to require that his passports should be sent him at an earlier period than had been designated; but the precise time when they would be sent was not specified. In an instruction to Mr. Curtin on the same day Mr. Fish reviewed at length the grounds of complaint against Mr. Catacazy, which embraced attempts at officious interference in matters of legislation, the use of the newspaper press for the purpose of influencing pending questions and denouncing measures and individuals, the employment in conversation of abusive and vituperative language toward very many persons, including several in public positions, and efforts to defeat the late negotiations with Great Britain and prevent the execution of the treaty of May 8, 1871. The proofs of the charges were duly set forth. In the course of the instruction Mr. Fish laid down this rule:

"The official or authorized statement that a minister has made himself unacceptable, or even that he has ceased to be *persona grata*, to the government to which he is accredited, is sufficient to invoke the deference to a friendly power and the observance of the courtesy and the practice regulating the diplomatic intercourse of the powers of Christendom for the recall of an objectionable minister. The declaration of the authorized representative of the power to which an offending minister is accredited is all that can properly be asked, and all that a self-respecting power could give."

On November 27, 1871, Mr. Catacazy informed Mr. Fish that, having been directed to wait upon the grand duke on the journey which his imperial highness was about to make in the United States, and having received orders to sail immediately afterwards for Rus-

sia, he had that day transferred the management of the business of the legation to General Gorloff. Mr. Fish, on the same day, replied that, as this transfer was understood to be a practical compliance with the request for his recall, to relieve him from all further diplomatic duties and to assign him to attendance upon the person of the grand duke, and also to relieve the Government from further personal intercourse with him, the President would suspend the transmission of his passports, although they were ready for him at any time, till the conclusion of the visit of his imperial highness, unless a recurrence of the causes which had led to the decision to send him his passports should compel their earlier transmission.

Mr. Fish, Sec. of State, to Mr. Curtin, min. to Russia, No. 88, June 16, 1871, S. Ex. Doc. 5, 42 Cong. 2 sess. 2; Mr. Curtin to Mr. Fish, No. 120, July 7–19, 1871, id. 3; Mr. Fish to Mr. Curtin, tel., Aug. 18, 1871, id. 4; Mr. Davis, Act. Sec. of State, to Mr. Curtin, No. 98, Aug. 18, 1871, id. 4; Mr. Fish to Mr. Curtin, tel., Sept. 5, 1871, id. 5; Mr. Curtin to Mr. Fish, No. 120, Sept. 10, 1871, id. 6; Mr. Fish to Mr. Curtin, tel., Sept. 20, 1871, id. 8; Mr. Curtin to Mr. Fish, No. 125, Sept. 13–25, 1871, id. 9; Mr. Fish to Mr. Catacazy, Sept. 22, 1871, id. 10; same to same, Nov. 10 and 16, 1871, id. 11; Mr. Fish to Mr. Curtin, No. 110, Nov. 16, 1871, id. 12; Mr. Catacazy to Mr. Fish, Nov. 12–24, 1871, id. 25; Mr. Fish to Mr. Catacazy, Nov. 24, 1871, ibid.

See, also, Mr. Fish, Sec. of State, to Mr. Boker, min. to Russia, Nos. 74 and 76, March 7 and 9, 1877, MS. Inst. Russia, XV. 586, 597.

"I have the honor to acknowledge the receipt of your communication of the 3d instant, transmitting a list of the members of the legation of Russia at this capital, and to inform you that the names of Mr. and Madame Catacazy, appearing on that list, will not be published in the list of foreign ministers to be issued by this Department, as Mr. Catacazy stated in a note to the Department of the 31st ultimo that he had been definitively called to Russia, and that he had been directed to leave the Russian legation in your charge until the arrival of a special officer from St. Petersburg."

Mr. Fish, Sec. of State, to Mr. Schirkoff, Jan. 6, 1872, MS. Notes to Russ. Leg. VII. 63.

Thurston's case.

"I regret to be constrained to bring to your attention, and through you to the knowledge of the Hawaiian Government, certain acts of its representative in the United States of which this Government has just ground to complain.

"In order to set forth the facts with desirable clearness it becomes necessary to recite fully what occurred at two interviews which I had with Mr. Thurston at this Department, on the 16th and 18th instant.

"The recent seizure of a ship at San Diego, Cal., for alleged violation of our neutrality laws in carrying arms to Hawaii was the occa-

sion of his first call. After a brief conversation on this subject, I took occasion to remark that I had information that he was not pleased with your action in connection with recent events at Honolulu. Mr. Thurston desired to know why that view was entertained here, whereupon I handed him a clipping from a New York newspaper of the 13th instant, of which a full copy is hereto appended.

"After he had read this article, I asked him if he had furnished the matter to the paper for publication. He at once said he had furnished the paragraph which he pointed out, reading as follows:

"There has been a great reaction among the more prominent royalists who were not concerned in and did not approve of the late insurrection, and a number of them have taken the oath of allegiance to the Republic. Others had stated that as long as the Queen claimed that she could be reinstated, and there was hope of receiving help from the United States Government to reinstate her, they felt in duty bound to support restoration. Now that the Queen has abdicated, and further action on the part of the United States looking to restoration is hopeless, they propose to accept the situation and work for annexation, which many of them say they have all along considered the best course for all concerned, but have been prevented from advocating it by what they considered their duty to the Queen.

"I then desired to know if Mr. Thurston had also furnished to the same paper the concluding paragraphs, purporting to be extracts from a letter written by 'a prominent lawyer in Honolulu,' and reading thus:

"Mr. Hawes, the British representative, has confined his action to a diplomatic request to the Government, if not inconsistent with the interests of the Government, that capital punishment proposed to be inflicted on any British subjects may be postponed until he can communicate with his Government, while his whole manner is friendly to the Government. Upon the publication of the instructions of Secretary Herbert to Admiral Beardslee in the local papers, declaring that no protection would be given to Americans who either opposed or supported the Government, a number of Englishmen applied to Hawes to know whether his course would be similar to that of the American Government. He immediately replied that, on the contrary, he considered it highly proper for all English citizens to do all in their power to support the Government, and by so doing they violated no international law and would forfeit none of their rights as English citizens.

"Had the insurrectionists not been discovered at the time they were, and had they once succeeded in getting into the city, there would have been savage butchery, as they were well supplied with dynamite bombs, and the evidence which has been developed shows that their plans were to march into town at 2 o'clock in the morning along the main avenue leading to the city, blowing up the residences of the principal supporters of the Government as they advanced, regardless of the women and children therein, in order to prevent support reaching the Government. Their plans also were for an uprising of the natives in the city, attacks simultaneously to be made on the palace, the Government buildings and station house, and the telephone station. The arms and dynamite bombs stored at the Queen's residence were to play an important part in the plans. A marked feature of the situation is the large number of natives who rallied to the support of the Government. They volunteered to the number

of nearly three hundred to go to the front. The final capture of most of the rebels who remained in the mountains was effected through the thorough search made by Capt. Robert Parker, a three-quarters native, and 50 native police, who, with their thorough knowledge of the country, scouted the hills from Honolulu to the east end of the island.

"Mr. Thurston answered that he had furnished nothing to that or any other paper, but that he had permitted an employee or agent of one of the press associations to copy at his legation a private letter or letters which he had received, and added that the published paragraphs did not contain all that was in the private letter or letters. I thereupon said that I was aware this was so, and that I knew the private letter or letters did not appear in full in the last paragraphs as printed. Handing him a typewritten paper, I asked if the omitted parts were not contained in the following passages:

"There is intense feeling being manifested by the people at what is looked upon as Mr. Willis's unwarranted interference in connection with the present trials.

"He is doing everything that he can to protect the royalists and harass the Government. Many of our best men feel it imperative for our future safety that some examples should be made. While the Government is master of the situation for the present, the danger is not entirely over. Much indignation is also felt from the fact that, although direct information was given to Minister Willis last November, before the shipment of arms was made at San Francisco, that such shipment was intended, nothing appears to have been done to stop the shipment. It is felt that the Hawaiian Government has strong ground for complaint against the United States Government on the score of its indifference, if not at its active conniving at this flagrant breach of neutrality. Whether or not the Hawaiian Government will make a claim by reason of the breach of the neutrality laws it is not yet known, but there is strong feeling here that it should be done.

"The action of Mr. Hawes, the British representative, is in marked contrast to that of Mr. Willis. . . .

"An analysis of the growth of the feeling and facts leading up to the insurrection showed that it is based almost wholly on the encouragement given to the royalists by President Cleveland and his announced and constantly reiterated opinion that the Queen ought to be restored, and a feeling which, rightly or wrongly, was disseminated throughout the royalist sympathizers that upon the slightest opportunity Cleveland would take occasion to assist the royalists if they could get control to a sufficient extent to give him an excuse for so doing. . . .

"Another letter received here from Honolulu says:

"'The most serious feature is the attitude of Willis and Hawes; they are in constant attendance at the trials. Neumann, the attorney defending the insurrectionists, is constantly in close consultation with them.'

"Having read this paper, and after some apparent hesitation, Mr. Thurston said he did not know what right I had to thus interrogate him. I replied that he had already admitted he had allowed the published matter to be copied from letters at his legation, but that the publication was not full, and I did not suppose he would deny that

the paper I showed him contained a correct copy of the omitted parts. He said the letters containing the omitted passages were submitted by him to the representative of the press association to be copied for publication, not as expressing his official or personal views, but as showing the state of feeling in Honolulu.

"I then remarked that all I desired to know was whether he had furnished the matter for publication, and he repeated that he had not furnished it in his representative capacity, or as expressing his personal views, but merely as information, and that in doing so it was not his purpose to injure the administration, the President, or Mr. Willis. I remarked that he had permitted the letters, including the omitted parts, to be copied for publication, and that he, no doubt, was disappointed that the omitted parts did not appear, and I asked him if he thought he could with propriety, as the representative of a foreign government at this capital, furnish newspapers with such matter. His reply was that he had simply furnished it as news or information which the public might like to hear from Honolulu, and that Senator Kyle had received a letter even more severe in its terms, which had been given to the public; to which I rejoined that Senator Kyle was a citizen of the United States, and as such might say and do things which a foreign minister could not say or do with propriety. Here the interview ended.

"When Mr. Thurston called at the Department two days later he informed me that there was a further statement he desired to make. After being told that if he wished to say anything more on the subject it should be in writing, he at once proceeded: 'I simply desire to say, Mr. Secretary, that I realize I was guilty of official impropriety in furnishing for publication the matter mentioned in our former interview. I did not realize this at the time, but do now. I regret what I did, and apologize for it.'

"I replied that, in order to avoid any possible misunderstanding, the minister's statement should be in official form, and requested that he prepare and submit such a communication. He declined to do this, saying he did not feel called upon to make a written apology, and that he would trust to my fairness in reducing to writing what he had said.

"You are instructed to make this incident known to the minister for foreign affairs by reading this instruction to him, and should he so desire, giving him a copy. You will express the surprise and dissatisfaction with which this Government naturally regards the conduct of a foreign envoy who thus covertly uses his influence through the press to bias public opinion in the country whose hospitality he enjoys. And you will add that the President would be pleased were Mr. Thurston replaced by another minister from Hawaii in whom he

may feel that confidence which is essential to frank and cordial intercourse."

Mr. Gresham, Sec. of State, to Mr. Willis, min. to Hawaii, Feb. 21, 1895, For. Rel. 1895, II. 876.

The foregoing instruction, the receipt of which at Honolulu was greatly delayed by a mistake in the post, was read by Mr. Willis to the Hawaiian minister of foreign affairs, Mr. Hatch, April 30, 1895. Subsequently Mr. Hatch, in a note referring to the interview, spoke of Mr. Willis as having "intimated that the President of the United States would be pleased if the Hawaiian minister at Washington should be recalled for personal reasons." Mr. Willis, in reply, pointed out that he had limited himself in the interview to reading the despatch and stating that he shared the regret which it expressed at the incident narrated in it; he disclaimed having made any separate intimation as to the wishes of the President.

His course was approved, in the following terms:

"The circumstances which made Mr. Thurston no longer an acceptable representative of the Hawaiian Republic at this capital having been fully set forth in the instruction aforesaid, of which you gave Mr. Hatch a copy after reading it to him, as you were directed to do, and no other intimation in this regard having been made, it is clear that the 'personal reasons' mentioned by Mr. Hatch could only be those stated in Mr. Gresham's communication as having rendered Mr. Thurston personally unacceptable; and it was quite proper for you to make this point plain in order that Mr. Hatch's statement might not lead to any misconception of what had occurred between you and him." (Mr. Uhl, Act. Sec. of State, to Mr. Willis, June 1, 1895, For. Rel. 1895, II. 881.)

June 3, 1895, Mr. Willis telegraphed that a successor to Mr. Thurston had on that day been commissioned. (For. Rel. 1895, II. 881.)

"Mr. Thurston, the Hawaiian minister, having furnished this Government abundant reason for asking that he be recalled, that course was pursued, and his successor has lately been received."

President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, I. xxix.

Dupuy de Lôme's case.

February 8, 1898, there was published in a newspaper in New York a private letter which Señor Dupuy de Lôme, Spanish minister at Washington, had written to Señor Canalejas, a Spanish journalist, who, after visiting the United States, had gone to Cuba. This letter, it seems, was abstracted from the mails at Havana by a Cuban sympathizer. From internal evidence it appeared to have been written about the middle of December, 1897. It contained, among other things, certain comments on the annual message then lately sent to Congress by President McKinley, whom it described as "weak and a bidder for the admiration of the crowd, besides being a would-be politician (*politicastro*), who tries to leave a door open behind himself while keeping on good terms with the jingoes of his party:" and it intimated that it would be

advantageous for Spain to take up, "even if only for effect," the question of commercial relations. When the letter was published such a negotiation had been initiated. Señor Dupuy de Lôme having acknowledged his authorship of the letter, the minister of the United States at Madrid was instructed to ask for his immediate recall, on the ground that the letter contained "expressions concerning the President of the United States of such character as to end the minister's utility as a medium for frank and sincere intercourse between this country and Spain;" and in a subsequent telegram attention was also drawn to the intimation concerning commercial relations. Before the matter could be laid before the Spanish Government, Señor Dupuy de Lôme had offered his resignation as minister, and it was accepted. On the 15th of February the Spanish Government disclaimed any participation in his sentiments, either as regarded the President or the negotiations for reciprocity; and on February 14th the incident was officially declared by the United States to be closed.

Mr. Day, Act. Sec. of State, to Mr. Woodford, min. to Spain, tel., Feb. 9, 1898; same to same, tel., Feb. 12, 1898; Mr. Woodford to Mr. Sherman, Sec. of State, tel., Feb. 12, 1898; Mr. Woodford to Señor Gullon, Feb. 14, 1898; Señor Gullon to Mr. Woodford, Feb. 15, 1898; Mr. Day to Mr. Woodford, tel., Feb. 18, 1898; For. Rel. 1898, 1008, 1010, 1011, 1012, 1015, 1016.

For a translation of the letter to Señor Canalejas, see For. Rel. 1898, 1007.

(4) DISMISSAL.

§ 640.

Yrujo's case.

In April, 1805, a request was made of the Spanish Government for the recall of the Marquis of Casa Yrujo, then its envoy extraordinary and minister plenipotentiary to the United States. The marquis had for some years filled the mission, and had married in the United States, his wife being a daughter of Governor McKean, of Pennsylvania.

In an extended memorandum, apparently drawn up by Mr. G. W. Erving, when American minister to Spain, a copy of which was transmitted to the Department of State by Dr. J. L. M. Curry, one of Mr. Erving's successors, in 1887, it is stated that the first cause of complaint against the marquis was a note written by him in February, 1804, in which he was understood to intimate that a demand which he made for the prohibition of trade between the United States and St. Domingo would, unless the United States conceded it, be backed up by the principal nations of Europe. He disclaimed this import of his declaration, but the Department of State objected to the tone and style of his communications.

Immediately afterwards he became involved in another controversy touching an act of Congress which extended, but, as the President

construed it, only contingently extended, the operation of the revenue laws of the United States to the territory between the Mississippi and Perdido. The marquis, however, maintaining that the act was positive in its terms, denounced it in a note of March 7, 1804, as "an atrocious libel," an insulting usurpation of the unquestionable rights of his sovereign, and "a direct contradiction of the assurances given by the President." The correspondence was brought to the attention of the Spanish Government, but without any request for the marquis's recall, and nothing came of the complaint.

In September, 1804, the marquis addressed himself to the editor of a newspaper in Philadelphia for the purposes of engaging him, for a pecuniary consideration, to oppose certain measures and views of the Government of the United States and advocate those of Spain. The Government of the United States strongly censured his action, especially on the ground that it constituted a violation of the act of Congress commonly known as the "Logan statute."[a] The marquis defended his conduct, asserting that it was the right of a public minister to employ the press in vindicating the measures of his own Government; and he also caused the note in which he justified his course to be published in the newspapers. It was on this ground of an attempt to tamper with the press that the recall of the marquis was asked for. A request to this effect was presented to the Spanish Government by the American minister at Madrid April 13, 1805. The Spanish Government, on the 16th of April, replied that the marquis had obtained permission to return to Spain "at the season which would be convenient for making a passage with the most probable safety," and that it was hoped that this would be considered by the United States a proper mode of accomplishing its object, with the respect due to the minister of Spain. The President acquiesced in the overture for the removal of the marquis by "a permitted return instead of a recall." The marquis, however, did not take his departure. On the contrary, prior to the meeting of Congress in the winter of 1805, the Government of the United States learned, with no little surprise, that he intended to return to Washington, as usual, for official purposes. Under these circumstances a friendly and formal intimation was given to him that "prudence and delicacy equally recommended a change of his intention." This intimation was disregarded, and on January 15, 1806, he arrived at Washington. On the same evening he received from Mr. Madison a note, in which he was informed that his remaining at Washington was "dissatisfactory" to the President, and that the latter, although he would not insist on his departure from the United States during an inclement season, expected that it would not be unnecessarily postponed after

[a] See supra, § 631.

that obstacle should have ceased. Next day the marquis answered that as he had not come to Washington "to form plots, to excite conspiracies, or to promote any attempts against the Government of the United States," and as he had "not directly or indirectly committed acts of that tendency," he remained in possession of all of his rights and privileges, both as a public man and a private individual, and that he intended to remain in Washington as long as it might suit "the interests of the King" and his own "personal convenience." This note the marquis followed up on the 19th of January with a protest, in which he declared that he received no orders but from his sovereign, and objected to the "style and tenor" of Mr. Madison's note, a copy of which he said he should, together with a copy of his protest, transmit to the other members of the diplomatic corps, in order that it might appear that if there had existed on the part of the administration "an arbitrary determination to violate the rights of embassy, respected by all civilized nations," there had likewise existed in himself "the just resolution of repelling such an attempt."

Not only did the marquis communicate this correspondence to his colleagues, but he also caused it to be published in the newspapers. The printed copies of the documents, with a statement of the facts, were sent by the United States to its diplomatic representative in Madrid, with an instruction to lay them before the Spanish Government without comment. This was done on May 6, 1806, with results obviously contrary to what were expected by the United States, since the Spanish minister for foreign affairs, Señor Cevallos, not only defended the marquis, but declared that the communication of the 6th of May, without an explanation of the reasons which supported it, was a disrespectful mode of addressing the Spanish Government. Señor Cevallos, indeed, espousing the marquis's view, asserted that Mr. Madison's note to the latter of January 15 was a violation of the rights of embassy, and could have been justified solely by the minister's taking part in a conspiracy against the President or against the security of the nation or its government, and that in such case a specification of the crime and exhibition of the proofs ought to have been made, instead of a silent transmission of copies of the correspondence.

No note of Yrujo of a date later than February 6, 1806, is on file of the Department of State; but, although his official relations with the Department ceased, he remained in the United States. Mr. J. Q. Adams introduced in the Senate a bill giving the President authority to order foreign ministers to leave the country at his discretion, but the measure was not pressed to a vote. On January 20, 1807, Mr. Madison wrote to Mr. Erving that unless Yrujo should leave the country extreme measures would be necessary to remove him, and a detailed statement of his misconduct, which can not now be found, was

enclosed. May 1, 1807, Mr. Madison wrote Mr. Erving that Yrujo had announced his departure, but had made no preparations to leave, and on October 18, 1807, his continued stay, with its incidents of annoyance to the administration, was announced by Mr. Madison to Mr. Erving, though it was mentioned that Foronda was then received as chargé d'affaires.

See, as to Yrujo's case, Adams' History of the United States, III. 184–189; Schouler's History of the United States, II. 108.

"For another year he [Yrujo] defied his enemy by remaining as Spanish minister in America; but he held no more relations with government, and at his own request was then sent to represent Don Carlos IV. at the court of Eugène Beauharnais, at Milan." (Adams' History of the United States, III. 196.)

As to the connection of Yrujo with Miranda, and also with Burr, see Adams' History of the United States, III. 194, 236, 264.

See, also, as to the connection between Yrujo and Burr, and the lack of evidence of it available for judicial purposes, Mr. Madison, Sec. of State, to Col. William Duane, Nov. 21, 1807, 15 MS. Dom. Let. 328.

About the time when the discussion took place as to Yrujo's demands concerning the prohibition of trade with Santo Domingo, it appears that his situation was complicated by his siding with Merry, the British minister, in the dispute concerning precedence at the White House. "The Marquis d'Yrujo joined with Merry in refusing an invitation from the President, and has, throughout, made a common cause with him." (Mr. Madison to Mr. Monroe, Feb. 16, 1804, Madison's Writings, II. 195, 197.)

As to a spirited correspondence between the Department of State and the Marquis d'Yrujo, early in 1798, concerning the execution of the boundary provisions of the treaty of 1795, see Mr. Pickering, Sec. of State, to the Marquis d'Yrujo, Feb. 13, 1798, 10 MS. Dom. Let. 348.

As to Cobbett's attack on Yrujo, see Wharton's State Trials, 322.

As to the publication by Mr. Gorostiza, Mexican minister to the United States, in a pamphlet printed in Spanish and communicated to the members of the diplomatic corps in Washington, of injurious charges affecting the course of the United States with regard to Texas, see the message of President Van Buren to Congress, Feb. 26, 1838, H. Ex. Doc. 190, 25 Cong. 2 sess.; Moore, Int. Arbitrations, II. 1213 et seq.; Von Holst's History of the United States (ed. 1888), II. 594.

Case of F. J. Jackson.

In October, 1809, a correspondence took place between Mr. R. Smith, Secretary of State, and Mr. F. J. Jackson, then British minister at Washington, concerning the repudiation by the British Government of the agreement entered into by the administration with Mr. Erskine, Mr. Jackson's predecessor, for the settlement of the various questions of difference pending between the two Governments, including the case of the *Chesapeake* and the subject of the British orders in council. In a note of October 11, Mr. Jackson, in a defense of his Government's action in repudiating the agreement, intimated that, when the agreement was concluded, the fact was known to the Government of the

United States that Mr. Erskine had exceeded his instructions. This intimation was repeated in another note of the 23rd of October. In a note to Mr. Jackson of November 8, 1809, Mr. Smith said:

"In my letter of the 1st instant, adverting to the repetition in your letter of the 23d ultimo, of a language implying a knowledge in this Government that the instructions of your predecessor did not authorize the arrangement formed by him, an intimation was distinctly given to you that, after the explicit and peremptory asservation that this Government had not any such knowledge, and that with such a knowledge such an arrangement would not have been made, no such insinuation could be admitted by this Government.

"Finding that in your reply of the 4th instant, you have used a language which can not be understood but as reiterating and even aggravating the same gross insinuation, it only remains, in order to preclude opportunities which are thus abused, to inform you that no further communications will be received from you, and that the necessity of this determination will, without delay, be made known to your Government. In the meantime a ready attention will be given to any communicationss affecting the interests of the two nations, through any other channel that may be substituted."

Mr. Jackson immediately withdrew with the members of his mission from Washington, and established his residence in New York.

In an instruction of November 23, 1809, Mr. Pinkney, then American minister in London, was instructed to ask for Mr. Jackson's recall. This request was made by Mr. Pinkney in a note to Lord Wellesley of January 2, 1810, and was afterwards the subject of conferences between them. On the 14th of March, 1810, Lord Wellesley formally replied that, as the expressions and conduct of Mr. Jackson, although the latter had given positive assurances that it was not his purpose to give offense, appeared to the Government of the United States to be exceptionable, the usual course would have been to convey in the first instance to His Majesty a formal complaint against the minister, a course of proceeding which would have enabled His Majesty to avoid the suspension of official communication; but that His Majesty, who was disposed to pay the utmost attention to the wishes and sentiments of states in amity with him, had directed the return of Mr. Jackson to England. Lord Wellesley added, however, that His Majesty had "not marked, with any expression of his displeasure, the conduct of Mr. Jackson, whose integrity, zeal, and ability have long been distinguished in His Majesty's service, and who does not appear, on the present occasion, to have committed any intentional offense against the Government of the United States." Lord Wellesley also stated that Mr. Jackson was ordered to deliver over "the charge of His Majesty's affairs" in America to "a person

properly qualified to carry on the ordinary intercourse between the two Governments."

As the mission was thus practically reduced to that of a chargé d'affaires, Mr. Pinkney was instructed to leave his post as envoy extraordinary and minister plenipotentiary on leave of absence, unless the British Government should decide to send another minister to the United States. On January 14, 1811, Mr. Pinkney wrote Lord Wellesley that, as the British Government continued to be represented at Washington by a chargé d'affaires, the Government of the United States could not continue to be represented in London by a minister plenipotentiary; and he therefore asked for an audience in order that he might take his leave of absence and return to the United States, committing the affairs of the legation to the charge of a fit person. On the 15th of February, Lord Wellesley, in a private note to Mr. Pinkney, stated that the delay in appointing a successor to Mr. Jackson had been occasioned, in the first instance, by an earnest desire of rendering the appointment satisfactory to the United States, and that His Royal Highness the Prince Regent had been pleased to appoint as envoy extraordinary and minister plenipotentiary to the United States Mr. Foster, lately British chargé d'affaires in Sweden.

This communication caused Mr. Pinkney, before finally acting on his request for an audience of leave, to inquire whether it was the intention of the British Government to arrange the questions of the orders in council and the *Chesapeake*, and other matters essential to amity between the two countries, and on receiving from Lord Wellesley a statement that the appointment of Mr. Foster was not to be interpreted as an indication of the intention of the British Government to relinquish any of the principles on which it had been acting, he took his leave and returned to the United States. His departure from London, therefore, was not the result of the delay in the appointment of a successor to Mr. Jackson. Mr. Foster was duly sent out as minister to the United States, where he remained till the outbreak of the war of 1812.

Mr. Smith, Sec. of State, to Mr. Jackson, British min., Oct. 9, 1809, Am. St. Papers, For. Rel. III. 308; Mr. Jackson to Mr. Smith, Oct. 11, 1809, id. 308; Mr. Smith to Mr. Jackson, Oct. 19, 1809, id. 311; Mr. Jackson to Mr. Smith, Oct. 23, 1809, id. 315; Mr. Smith to Mr. Jackson, Nov. 1, 1809, id. 317; Mr. Jackson to Mr. Smith, Nov. 4, 1809, ibid.; Mr. Smith to Mr. Jackson, Nov. 8, 1809, id. 318; Mr. Smith to Mr. Pinkney, Nov. 23, 1809, id. 319; Mr. Pinkney to Lord Wellesley, Jan. 2, 1810, id. 352; Lord Wellesley to Mr. Pinkney, March 14, 1810, id. 355; Mr. Pinkney to Mr. Smith, Nov. 14, 1810, id. 374; Mr. Smith to Mr. Pinkney, Nov. 15, 1810, id. 375; Mr. Pinkney to Lord Wellesley, Jan. 14, 1811, id. 411; Lord Wellesley to Mr. Pinkney, Feb. 15, 1811, id. 413; Mr. Pinkney to Lord Wellesley, Feb. 17, 1811, id. 414; Lord Wellesley to Mr. Pinkney, Feb. 23, 1811, id. 415.

"In the cases of Erskine and Jackson, the correspondence on his [Mr. Smith's] part had, in a manner, fallen entirely on my hands." (Statement of President Madison on Mr. Smith's resignation in April, 1811, 2 Madison's Writings, 495, 499.)

With regard to this correspondence, as conducted by President Madison, see Adams's History of the United States, V. 123 et seq.; and see, generally, as to the Jackson episode, the same volume, pp. 109–132.

As to Pinkney's "inamicable leave," see Adams's History of the United States, VI. 1–24.

See, further, as to the Jackson case, 2 Madison's Writings, 444, 449, 451, 453, 468, 469, 474; 2 Lyman's Diplomacy of the United States, Chap. I.; Quincy's Speeches, 157 et seq.; 10 Alison's History of Europe, 650; 7 Wait's State Papers, 283, 295; Lawrence's Wheaton (1863), 437.

As to the intimation made in Smith's note to Jackson of Oct. 9, 1809, that the further discussions between them should be in writing, see Adams's History of the United States, V. 123–124, 126.

"My letters to you of the 11th Nov. and of the 20th January authorized you to assure the British Government of the cordial disposition of the United States to facilitate an amicable adjustment of the existing differences between the two countries. If the British Government should advert to the spirit and language of the resolutions in relation to Mr. Jackson as indicating a hostile policy, or as at variance with the conciliatory assurances which you have been authorized to make on the part of the Executive, I am desired to refer you for an explanation to the indignant feelings excited by the conduct of Mr. Jackson and especially by his attempt through his printed circular to the British consuls to produce a popular current against this Government. These feelings against the minister you will represent as not at all inconsistent with the desire to maintain peace with his nation. Of this desire sufficient evidence has been and probably will be given in the course of our legislative proceedings. If the tone of the State legislatures on this subject should have attracted the notice of the British Government, you will in a like course find an explanation which, it is believed, will be satisfactory. As a precedent that cannot fail to be respected by that Government you will remind it of the case of Palm, which though different in some respects is analogous in the appeal to the people against the Executive authority and in the sentiments and language of Parliament on the offensive outrage."

Mr. Smith, Sec. of State, to Mr. Pinkney, min. to England, Feb. 16, 1810, MS. Inst., U. States Ministers, VII. 85. For the joint resolution of Congress of January 12, 1810, above referred to, censuring the conduct of Jackson and sustaining the course of the administration, see 2 Stat. 612.

Wharton, in his Int. Law Digest, published with regard to the Jackson case the following note:

"The negotiations in 1807–'09 with the British legation at Washington are striking illustrations of the importance of courtesy and of sincerity in diplomatic action. The circumstances of the attack on the *Chesapeake* by the *Leopard*, in 1807, are elsewhere narrated, and it will be remembered that President Jefferson, immediately after the occurrence, demanded reparation and apology from Great Britain, and simultaneously interdicted all British armed vessels from entering the territorial waters of the United States. The Fox-Grenville ministry was then in power in England, and Mr. David Montague Erskine, son of Lord Erskine, then chancellor, and a grandson of the Earl of Buchan, was sent as minister to the United States for the purpose of settling not merely the complications connected with the outrage on the *Chesapeake*, but those arising from the order of council of 1807, by which the British ministry had placed the whole northern coast of Europe under a paper blockade, and had prohibited all neutral coasting trade and colonial trade between belligerent ports. Mr. Erskine's selection was peculiarly fortunate. He had no little skill as a diplomatist (see Lord Erskine's pamphlet in his defense, published in 1807); his wife was a member of a Philadelphia family of high social position; he inherited his father's kindly manners and sweet temper without his father's occasional tendency to dissipation; and he was sincerely desirous of carrying out his original instructions of restoring the friendly relations between the two countries. It is true that on the fall of the Fox-Grenville ministry his instructions were less conciliatory; but still, taking them in their whole scope, he conceived he was only carrying out their spirit when on April 18, 1809, he concluded with Mr. Madison's administration, which had just come into power, a convention providing that on the repeal of the orders of council of 1807 and reparation for the aggression on the *Chesapeake* the President's proclamation excluding British men-of-war from American waters should be recalled, and commercial intercourse with Great Britain restored. On April 19 Mr. Smith, Secretary of State, received a note from Mr. Erskine stating that the orders of council in question were to be withdrawn on June 10. On the same day the President issued a proclamation declaring that trade with Great Britain was to be resumed on June 10, and this was followed not merely by a series of public meetings expressing joy at the peace thus to be firmly established, but by the introduction in the House (May 3, 1809), by Mr. John Randolph, of a resolution declaring 'that the promptitude and frankness with which the President has met the overtures of the Government of Great Britain towards a restoration of harmony and freer commercial intercourse between the two nations meet the approval of this House.' But before this resolution could be acted on, intimations from England led to a doubt whether the British ministry would ratify Mr. Erskine's convention; and on July 31 Mr. Erskine was himself compelled to announce to the Secretary of State not merely his own recall, but the repudiation of the convention by his Government. This recall and disavowal were the result, as we now know, of a belief, partly that the party divisions in New England would paralyze the administration, and partly that the tone of brutal dictation a short time before assumed toward Denmark might with a like success be assumed towards the United States, and that the United States might, by such dictation, be forced into alliance with Great Britain and war with France. But whatever

might be the cause, the result, as is stated by Sir A. Alison, in his review of this period of British history, was peculiarly unfortunate for Great Britain, as it prevented a settlement by which Great Britain would have been saved from the war of 1812, and, as a counterpoise, led to closer relations between the United States and France.

"The recollection of the attack on Denmark, to which reference has just been made, had, no doubt, something to do with Mr. Canning's selection, as the successor of Mr. Erskine, of Mr. Francis J. Jackson, who had been British envoy to Denmark at the time of the projected attack on Copenhagen, and who, from his agency in that outrage, went by the name of 'Copenhagen Jackson.' In a remarkable work, published in London in 1872 (The Diaries and Letters of Sir G. Jackson; in two volumes, London, 1872; second series, under title of the 'Bath Archives,' London, 1873) by a member of Mr. F. J. Jackson's family, we have a series of letters from Mr. F. J. Jackson, narrating the temper in which he visited Denmark, and in which he afterwards visited the United States. In a letter of August 7, 1807, when he was on the first mission, he thus speaks: 'I had an interview yesterday with the Prince Regent, to whom I stated that I was ordered to demand the junction of the Danish fleet with that of Great Britain, and that in case of refusal it was the determination of His Majesty to enforce it. He replied that "such a proposal was utterly opposed to every principle of honor, and that the menace by which it was accompanied made it still more offensive."' The 'surrender' being refused, the British fleet, coming down suddenly in overpowering strength, made the attack. The Danes resisted to their utmost. 'They have already,' so Mr. Jackson writes on September 1, 1807, 'burnt their suburbs and destroyed every house that was likely to afford shelter to our people.' The result was, to follow Mr. Jackson's narrative (Sept. 14, 1807), because Denmark refused, as a neutral, to give up her fleet to Great Britain, the 'burning a capital city, the residence of a court, and destroying a great commercial depot.' And the upshot of this 'negotiation' was the seizure by Great Britain, without declaration of war, of the Danish fleet, Denmark being at the time at peace with Great Britain, and utterly unaware that such an attack was even dreamed of. Mr. F. J. Jackson was therefore familiar with the tone adopted by British diplomatists to minor European States. His subsequent public dispatches to his Government, during his mission to the United States, show that he was not without pride in having adopted that tone with Denmark. Even more transparently is this temper exhibited in the series of letters above noticed, in which his private correspondence with his family at the time is given. According to the appendix to Volume I of the second series the matter principally before the new envoy was the arrangement of the difficulties caused by the attack on the *Chesapeake* and 'the issuing, by President Jefferson, of a proclamation, dated July 2, 1807, interdicting the entry of all the American ports to the whole of the British navy. This produced fresh orders in council, intended to support British maritime rights and commerce, and to counteract Bonaparte's continental system. America's wrath,' so the editor proceeds to say, 'was kindled against England for resorting to measures of self-defense, and in the month of December, 1807, Mr. Jefferson succeeded in carrying a resolution in Congress that all trade and intercourse with foreign nations should be suspended. Bickerings and contentions at sea, mutual manifestoes, em-

bargoes, stoppages to trade, and much angry diplomacy followed. In this state matters remained down to the declaration of war in June, 1812, when Mr. Madison, who passionately desired that his term of office should be distinguished by the annexation of Canada to the United States, was President.'

'As to this statement, giving, no doubt, Mr. F. J. Jackson's after views of the object and nature of his mission, the following observations may be made:

"First. The private correspondence of the parties on file in the Department of State, as well as the official correspondence of the Department, shows that neither Mr. Jefferson nor Mr. Madison desired war with Great Britain, and that if they erred, it was in their extreme solicitude for peace. It may be safely averred that the consideration which drew them finally to the adoption of warlike measures was the fact that the grievances which the United States suffered were those of the maritime and commercial interests, which both Mr. Jefferson and Mr. Madison felt, from their own personal association with the agricultural classes, and from their wish to subdue sectional and class rivalries, a peculiar desire to protect.

"Second. Mr. Madison, as his correspondence shows, had not only no desire for the 'annexation of Canada,' but such an annexation, coupled as it would be with a protracted and deadly war with Great Britain, was to his peaceful and unaggressive temper a contingency peculiarly dreaded.

"Third. With instructions on their face friendly, Mr. F. J. Jackson, as we now learn from his private letters, was under orders to grant nothing, but simply to 'temporize' and to 'postpone' actual concession. But while thus putting off the granting of reparation for the outrages to which the United States had been subjected, he felt that he was playing the part to which he was assigned, and for which his prior diplomatic achievements fitted him, when, repudiating Mr. Erskine's course of kindly and courteous treatment of the Government at Washington, he began by exhibiting to that Government an attitude of arrogance.

"His first letter in the American series is dated at Washington on October 7, 1809. He begins with a slur at Mr. Erskine, whom he describes as a 'Scotchman with an American wife, who would be a fine lady, who left his house in such a state of ruin and dirt that it will be several weeks before we can attempt to move in it.' He is ready at the outset to plunge into party politics. 'Many of the Democrats who were his (Erskine's) intimates do not come to me, and I am well pleased and somewhat flattered by the distinction.'

"Of his first interview with Mr. Madison he thus proceeds to speak:

"'Madison, the President, is a plain and rather mean looking little man, of great simplicity of manners, and an inveterate enemy to form and ceremony, so much so that I was officially informed that my introduction to him was to be considered as nothing more than the reception of one gentleman by another, and that no particular dress was to be worn on the occasion, all of which I was very willing to acquiesce in. Accordingly, I went in an afternoon frock, and found the President in similar attire. Smith, the Secretary of State, who had walked from his office to join me, had on a pair of dusty boots, and his round hat in his hand. When he had introduced us, he retired, and the President then asked me to take a chair.

"'While we were talking a negro servant brought in some glasses of punch and a seed cake. The former, as I had been in conference the whole morning, served very agreeably to wet, or whet, my whistle, and still more strongly to contrast this audience with others I had had with most of the sovereigns of Europe.'

"Of Mrs. Madison he declares (having Miss Austen in mind) that she 'is fat and forty, but not fair,' and he proceeds to make some disparaging and untrue statements as to her early training, which it is not worth while here to repeat, but which he qualifies by intimating that the same peculiarities attached to Mrs. Merry, the wife of one of his predecessors, whose social pretensions, as we will see, caused so much difficulty at Washington. On October 20 he writes to his brother that 'Erskine is really a greater fool than I could have thought it possible to be, and it is charity to give him that name. . . . Now that I have gone through all this correspondence, more than ever am I at a loss to comprehend how he could have been allowed to remain here for the last two years. To be obliged to wade through such a mass of folly and stupidity, and to observe how our country has been made, through Erskine's means, the instrument of these people's cunning, is not the least part of my annoyance. Between them our cause is vilified. . . . In the same spirit they began with me by saying they would only negotiate upon paper. But they have gained nothing by this mode, in which I was obliged to acquiesce, for I took it up in a style that brought them, in some degree, to their senses.' 'Madison is now as obstinate as a mule. . . . If after this we give them any satisfaction at all we had better send it wrapped up in a British ensign, and desire them to make what use of it they please. You see I keep to Lord Malmsbury's maxim, "*bas en haut.*" . . . A bad effect is produced by the minister of the junta remaining here even till he can receive fresh orders. It will encourage these people in their insolence.' 'At bottom they (Democrats and Federalists) are all alike, except that some few are less knaves than others.' 'I came,' he writes on November 14, 1809, after he found his tone of menace and of insult, as adopted by him in his correspondence, had failed, 'prepared to treat with a regular Government, and have had to do with a mob and mob leaders.' 'Do not imagine' (he being by this time notified that his recall would be asked, on the ground that it would be impossible to correspond with him after he had charged the Secretary with duplicity and falsehood), 'that this is a personal affair. I have taken high ground for my country, and it was highly necessary. . . . I have my passports. . . . My object was to secure safety and inviolability for my own person, for my family, and the other members of the mission, on removing from Washington, in consequence of the outrageous and threatening language of the Democrats and the papers that express their opinions and feelings.' On November 21 Mrs. Jackson thus states her husband's position, he having retired to Baltimore, out of the reach of the 'threats:' 'We passed the first two months at Washington, the seat of government, but Francis being accustomed to treat with the civilized courts and governments of Europe, and not with savage Democrats, half of them sold to France, has not succeeded in his negotiation.' 'It would be an absolute disgrace to the country,' he writes on May 1, 1810, from New York, which was his

next retreat, . . . 'if another minister were to be sent here without some sort of satisfaction being taken or received for the treatment I received.' 'A more despicable set' (the administration) 'I never met with before, and they can do neither England nor any other country any harm. They are as deficient in talent as in principle,' and he goes on to detail 'a disgraceful outrage that took place in that dirty nest of philosophy, Philadelphia.' 'We have repeated opportunities' (so he writes on August 24, 1812, three years after his return to England), 'of doing what is right to the Yankees, but still hold back. I do hope that before this business (negotiation) is ended we may fall in with one of their frigates. Sawyer, with his force, ought to show their whole navy across the Atlantic.' But on December 22, 1812, after the war had begun, he writes: 'As to the conduct of the naval war against the Americans, it would disgrace the sixth form of Eton or Westminster.' This, and the disasters of the war, with the scars it left behind, might have been spared, had Mr. Erskine's course been sustained by the British ministry, or, if that were impracticable, if he had been succeeded by a minister with whom the Government of the United States could have negotiated without loss of self-respect. There was no course, under the circumstances, but to request Mr. Jackson's recall, and the increase of ill feeling between the Governments which this request caused, coupled with the persistent pressure of the grievances of which the United States complained, led, after the intermediate failure of Mr. Foster's mission, to war.

"Sir A. Alison thus notices Mr. Jackson's dismissal, which he regards as a provocation to war, and as a chief incident in the chain of events by which the war of 1812 was forced:

"'It may well be imagined what a storm of indignation was raised in the United States when the intelligence of the refusal of the British Government to ratify Mr. Erskine's convention was received, and how prodigiously it strengthened the hands of the party already in power and supported by a decided majority of the nation, which was resolved at all hazards, and against their most obvious interests, to involve the country in a war with Great Britain. Mr. Erskine, as a matter of course, was recalled, and Mr. Jackson succeeded him as British envoy at Washington; but his reception was such, from the very outset, as left little hope of an amicable termination of the differences. From the President's table, where the English minister was treated with marked indifference, if not studied insult, to the lowest ale-house in the United States, there was nothing but one storm of indignation against the monstrous arrogance of the British maritime pretensions and the duplicity and bad faith of their Government. Unhappily the elections for Congress took place during this whirlwind of passion, and such was the ascendency which the Democratic party acquired in the legislature from this circumstance that it was plain that all hopes of accommodation were at an end. Mr. Jackson continued, however, at the American capital, striving to allay the prevailing indignation and renew the negotiation where Mr. Erskine had left it off; but it was all in vain, and, after a stormy discussion of twenty-five days in the House of Representatives, it was determined, by a great majority, to break off all communication with the British envoy; and Mr. Pinkney, the American envoy in London, was directed

to request the recall of Mr. Jackson, whose firmness the American Government found themselves unable to overcome; and this was at once acceded to by the British administration.' (10 Alison's History of Europe, 651 et seq.)

"As to this statement it may be remarked:

"(1) Mr. Jackson's reception was one of peculiar consideration. Mr. Madison was then at Montpelier, his country residence; but he directed that a barge, duly manned, should be sent from Washington down the Potomac to bring Mr. Jackson to the city more expeditiously than could be done by the packet by which he was to have come up from Norfolk. Mr. Madison, as we learn from the private correspondence on file at the Department of State, transmitted, through Mr. Smith, Secretary of State, to Mr. Jackson, cordial expressions of regret that he was obliged to be absent from Washington at the time of Mr. Jackson's arrival, inviting, in terms of great friendliness, Mr. Jackson to visit Montpelier. Mr. Jackson acknowledges this in one of those singular letters he wrote to his family shortly after his arrival—letters of vainglorious satisfaction at the attention paid him and of condescending contempt for the Government by whom those attentions were paid. It was not unnatural it should have been so. The desire on the part of Mr. Madison, always placable and gentle, to avoid a rupture with Great Britain was then, as we now know, very strong. Mr. Smith, Secretary of State, was, as connected with a large commercial house, enlisted by interest in the same policy; and Mr. Gallatin, whose influence in the Cabinet far transcended that of his associates, was devoted to the maintenance of peace, which was at once a part of his political philosophy and essential to his financial schemes. But while the zeal shown to conciliate Mr. Jackson was not unnatural, it is not surprising that he should have detailed to his family the exhibition of this zeal with self-complimentary complacency. Ministers from the United States of no little eminence had visited London prior to Mr. Jackson's mission. Mr. John Adams, at the time the leading statesman of his country, had gone there as its first envoy, and had been received with surly neglect, and placed, as he tells us, in social ostracism. Mr. Jay, Mr. T. Pinckney, Mr. Monroe, and Mr. William Pinkney, men of singular courtesy, cultivation, and dignity, were certainly not met in advance with barges on the Thames to make more comfortable their passage over that river, nor do their letters tell us of any marked social courtesies bestowed on them by members of the Government. Part of the remembrance of this may have led Mr. Jackson, familiar as he was with the annals of British diplomacy, to narrate to his family with peculiar zest the honors, almost obsequious as he describes them, which were showered on him when he reached Washington. While this, however, need not surprise us, we would be entitled, from what we now know of the facts, to be surprised that, after his 'Copenhagen' menaces had provoked the rebuff due them, and after the charge, made by him against the administration, of falsehood and duplicity, had been met by a refusal to hold further intercourse with him, even he should have had the audacity to tell his Government that he had been received at Washington with rudeness and insult; that he was in danger from the Washington 'mob,' and that the tone of society there was so low that he and his wife could no longer abide it, but must move the legation to New York.

" (2) The 'President's table' is referred to by Sir A. Alison as the scene 'of marked indifference, if not of studied insult,' to Mr. Jackson, and from this table 'to the lowest ale-house in the United States,' we are told, 'there was nothing but one storm of indignation,' &c. No doubt this is what Mr. Jackson told his Government after his dismissal; but his letters, written to his family at the time of his reception, and before his misconduct led to his dismissal, show that this statement was untrue. In the next section will be given Mr. Jackson's contemporaneous account of his reception at the 'President's table,' and of the contemptuous conceit with which he received on his first visit to Mr. Madison the simple hospitalities which it was natural for Mr. Madison, as a quiet, unostentatious, and unaffected Virginia gentleman, to pay. Mrs. Madison's singular grace and dignity, of which few observers but Mr. Jackson were unconscious, he indeed does not notice in the letter written by him immediately on his first visit; but he regales his family with a statement about her early life, which, false as it is, is too base to be here repeated. He goes with his wife, however, to dine with Mr. and Mrs. Madison, and the honors there paid him he dilates on in a detail which shows how without foundation are his subsequent fabrications about insults at the 'President's table.' When the equally famous dinner invitation was tendered Mr. Merry, Mr. Jefferson's daughters were absent, and Mr. Jefferson gave only informal dinners, following the French usage under such circumstances which prevailed when he was at Paris. There was no 'lady,' therefore, 'at the table' for Mr. Merry to 'take in.' When Mr. Merry demanded that the attention of precedence should be paid him it was impossible to accede to his demand, as otherwise he would have had to walk in advance with Mr. Jefferson, leaving his own wife behind. Aside from this, it was impossible for Mr. Jefferson, either as President or as a gentleman in his own house, giving an informal entertainment, to admit a claim to arrange the order of his table, made by the British minister as a matter of right. So it was that the request to give Mr. and Mrs. Merry precedence at Mr. Jefferson's table was declined, as will be presently noticed more fully, and this was reported to the British Government, and dwelt upon by English writers, as a mark of disrespect and a cause of grievance. Mr. Madison recollected this well, and, Mrs. Madison being at his side to help him, he took pains, in his own simple and kindly way, to arrange matters so as to avoid the prior difficulties. The second 'dinner arrangement,' which was to take so conspicuous a part in our diplomatic relations with Great Britain, was then made in such a way as to give Mr. and Mrs. Jackson the position they claimed—Mrs. Madison leading Mr. Jackson, Mr. Madison Mrs. Jackson; which distinction Mr. Jackson dwells on with satisfaction in a letter written to his family immediately after the event, not refraining from mentioning how much more successful his 'diplomacy' had been in this respect than that of Mr. Merry, nor from intimating that Mrs. Merry's origin was such as to place her under some sort of stigma, which may have been the cause, he may have desired to suggest, why, even at Washington, precedence was not allowed to her. But however this may be, Mr. Jackson's subsequent statements of 'insults at the President's table,' sent by him to the British Government and adopted by British historians, are shown to be untrue by his own family letters contemporaneous with the

event. That they were from the nature of things untrue, no one ever has doubted who is familiar with the simple but gracious and uniformly considerate manners of Mr. and Mrs. Madison and the refined and studied courtesy of Mr. Gallatin, who was Mr. Madison's chief friend and adviser, and who from his gentle birth and training at Geneva was at least as competent as Mr. Jackson to decide questions of social bearing.

"(3) The personal indignities at Washington claimed by Mr. Jackson to have been received by him, have been already noticed. The upshot of these was that Mr. Jackson attempted to bully and browbeat the Government, that he was told that after such an insult no further intercourse could be held with him, and that he at once announced that he would move the legation to New York. It is not true that he met with any indignities at Washington beyond this merited refusal by the members of the administration, and of its leading supporters, to associate with him personally, or to receive any further communications from him. There was no complaint whatever made by him of such indignities until after this repulse. There is no country in which diplomatic immunities are so highly regarded as in the United States. There are no courts which place so strong a guard on these immunities as the courts of the United States, Federal and State. No rulers have ever lent a more attentive ear and extended a prompter arm to bring offenders in such cases before the courts than the successive Presidents of the United States. Mr. Jackson, as an experienced diplomatist, must have been aware how often foreign ministers in London had appealed, sometimes ineffectively, for the protection of the British authorities. He could not, also, have been unconscious of the masterly skill as well as quiet courage with which, as the highest English authorities on international law now concede, had been discharged the international duties of the successive administrations of the United States down to the period of his arrival. He must have known that if any indignities had been offered to him or his legation it was only necessary for him to state the fact to the Secretary of State in order to obtain redress. He made no such statement, because there was no such indignity offered to him. He withdrew from Washington when his intolerable insolence made it impossible for the Government to deal officially with him, and when, incensed as were the publicists and statesmen of the continent of Europe at his overbearing conduct at Copenhagen, as well as at the arbitrary and arrogant tone assumed by his Government even to those European powers with which it was at peace, he found at Washington no defenders among the diplomatic corps. He left his post partly because in a place consisting almost entirely of official society he thus isolated himself and terminated his relations with the Government, and partly because, to his peculiar comprehension, such a departure was to be regarded, as his departure under similar circumstances from Copenhagen had been, as a final threat of the swift punishment he expected his Government to inflict. But the falsity of the pretext he afterwards set up of indignities offered to him by Washington 'mobs' is shown, not merely by the circumstances of the case which made, as we will presently see, such 'mobs' impossible, but by the fact that at the time he neither mentioned them to his family, in the copious

correspondence he maintained with them, nor asked of this Government protection from them. The only complaint bearing on the subject that is discoverable is the following:

"'As Mr. Jackson has been already once most grossly insulted by the inhabitants of the town of Hampton, in the unprovoked language of abuse held by them to several officers bearing the King's uniform, when those officers were themselves violently assaulted and put in imminent danger,' he requests a passport for himself and family. (Mr. Oakley, British Sec. of Legation, to Mr. Smith, Sec. of State, undated (received Nov. 11, 1809). 3 Am. St. Pap. (For. Rel.), 319.)

"If the anecdotes told in Mr. Jackson's family letters of Mr. Oakley's inefficiency and absurdity are to be relied on, Mr. Oakley's statements are not to be regarded as high authority. But giving this solitary complaint which was made by the British legation of insults to Mr. Jackson (sent, also, after Mr. Jackson's dismissal), its utmost signification, it reduces the insults to 'unprovoked language of abuse' held by 'several' 'of the inhabitants of the town of Hampton' (a little fishing village in Virginia near the mouth of the James River) 'to several officers bearing the King's uniform,' abuse of these officers being by construction abuse of Mr. Jackson, who was not within an hundred miles of the place. Mr. Jackson, having previously been dismissed from Washington, asked, upon this 'insult,' 'his passport.' But what for? To leave the country? To do this he had no intention. His 'passport' was to take him to Philadelphia or New York, there to set up his legation as a center of hostile operations by acting on parties whom he supposed disaffected to the Government.

"So far as Washington is concerned, the pretense set up afterwards by Mr. Jackson to cover his retreat, that it was governed by a 'mob,' who threatened him with personal violence, is absurdly untrue. Washington was at the time, as he himself in his family letters declares, a mere hamlet, and in such a hamlet, a day's long journey even from Baltimore, no mob could be collected for any purpose whatsoever. Nor, if 'mobbing' was to be done, would anything be more unlikely than that the British minister should have been selected as its victim. The Federalists in Congress, though not numerous in those days, attacked the administration with a virulence almost without parallel in our history; and it is sufficient to read Mr. Quincy's speech on Mr. Jackson's mission to see that if there had been any danger of insult to be feared, that danger was to have been feared by Mr. Quincy and those who sustained him in his vehement assaults on the administration, and not by Mr. Jackson, whose misdeeds were covered by the veil of diplomatic confidence. But there was no danger of personal insult to anyone. The fault of the administration was not undue belligerent animosity, but undue pacific tendencies toward Great Britain, and so Mr. Quincy admitted, when he declared in Congress, in words which show how tolerant was public sentiments, that the submissiveness of the administration to Great Britain was such that it could not 'even be kicked into a war.' It is not necessary to ascribe Mr. Jackson's flight from Washington to fear. It was probably partly in anger, partly in conformity with the 'Copenhagen' precedent, as above noticed. But a hasty and angry departure there was, and a removal 'of the legation to New York,' preceded by a sort of political progress through Baltimore and Phila-

delphia, where, according to his own account and that of his wife, so far from being met with insults (though there at least he was in cities where mobs were possible), he and his family were overwhelmed with even oppressive hospitalities. After these alleged ovations he moved to New York and Boston, where similar receptions he declared awaited him. When he arrived at Boston he was entertained by the extreme Federalists, then, according to Mr. J. Q. Adams, brooding over schemes of disunion, at a dinner in which he gave a toast so flagitiously insolent to the Government that Mr. Madison was compelled to direct that his recall should be immediately demanded. Sir A. Alison thinks that this was one of the causes of the war of 1812. The dismissal by itself was not such a cause, for it was justly merited. But the announcement of the British Government that it saw no reason to be displeased with Mr. Jackson's conduct should have been met by the Government of the United States with a demand for a retraction, the refusal of which to have been followed by a declaration of war, anticipating by three years that of 1812. Had a minister, accredited by the United States to the British Government, begun his work by dictating to the head of that Government in what way he was to be socially entertained; had he started off on his diplomatic career by charging that Government with falsehood and duplicity in its prior negotiations; had he admitted, when this was gravely pointed out to him, that such was his intention, and repeated the offense; had he declared, when further intercourse with him was refused, that he would no longer remain at the seat of government, and, supposing the seat of government was then at some secluded village, announced that he left from fear of 'the mob;' if, after such a departure, and after being requested to leave the country, instead of doing so he had gone on a progress through a series of cities, in which alone 'mobs' could have been collected, exciting opposition to the administration and giving 'toasts' insulting it; if, after the Government of the United States had been informed of this conduct, it had indeed recalled the minister, but announced that it saw nothing in his proceedings to disapprove of; if such should have been the course taken by the United States to Great Britain, the reply would have been 'you must apologize for insults so flagrant and for actions so derogatory to our position as a great power, claiming at least equality with any power on the globe. You must not only recall your minister but you must disavow his proceedings.'

"That this course was not taken by Mr. Madison is to be explained by his constitutional aversion to war, strengthened by the conviction which he had inherited from Mr. Jefferson, and which was shared by Mr. Gallatin, his chief adviser, that war, in itself, a great evil, would be peculiarly so when waged by the United States, with resources as yet imperfectly developed, with a coast as yet unfortified, with a navy as yet in embryo, against Great Britain, then unchallenged sovereign of the seas, to whom, in spite of the hardness and arrogance of her treatment of her colonies, which Burke had so vividly described, and which continued to mark her demeanor to the United States, a large portion of the country still looked with an affection which even two wars have not been able yet to extinguish. But more than any purely personal affair since the Revolution did Mr. Jackson's conduct in his mission and its approval by the British Government tend to

render the preservation of peace difficult, and this detailed notice of his mission may be of service in this place for the purpose of illustrating the importance in diplomatic intercourse of courtesy, of candor, of truthfulness, of manly courage and dignity, and of scrupulous avoidance of interference in the domestic politics of the country of residence. It is fortunate that the recent ingenuous publication of Mr. Jackson's family correspondence, and the possession by the Department of State of the private papers of Mr. Jefferson, Mr. Madison, and Mr. Monroe have brought to light the true circumstances of Mr. Jackson's dismissal—a dismissal which was made by the British administration at the time, as well as by British historians subsequently, a ground for grave complaint against the United States. The dismissal was a necessity; the approval of his conduct by Great Britain was an insult which no high-spirited nation should have tamely borne.

"The change produced by the war of 1812 in the tone of the British ministers at Washington is very marked. 'Their first war with England,' said the London *Times* in April, 1817, speaking of the United States, 'made them independent; their second made them formidable.' (3 Schouler, U. S., 22.) With this consciousness on the part of England, the English attitude to the United States underwent a change. Bagot, who was the first permanent minister after the war, was not merely an experienced practical diplomatist, but a man of kindly temper, of considerate manners, and of a social position at home so high as not to make him think it necessary to set up pretensions to superiority when abroad. He was assisted also by a wife whose attractiveness and good sense added greatly to his popularity in all quarters. Under the era of ministers which thus began the diplomatic relations between the countries were freed from those irritating elements by which they had been disturbed prior to the war.

"Of the ministers who served the United States in London in those troubled days it may at least be said that they were not only well versed in that system of international law in relation to neutral rights, in formulating which the United States is now universally acknowledged to have taken the lead, but that they were men of marked dignity and courtesy, on whom even the most supercilious critic could make no personal criticism and to whom no one of the British secretaries with whom they did business imputed any personal fault. Of Mr. Jay and of Mr. Thomas Pinckney it is scarcely necessary to say that men of higher tone, of more simple truthfulness, of more delicate sense of honor, could not be found. Of Mr. Monroe and Mr. William Pinkney, whose misfortune it was to negotiate a treaty with Great Britain which Mr. Jefferson when President declined to accept, on the ground that it left the chief causes of difference still open, a few words may be here hazarded. Mr. Monroe has had a singular place in the opinion of his countrymen. He has always been regarded as a man of marked simplicity, exact truthfulness, great generosity, and a high sense of honor. He was the last officer of the Revolutionary war to fill a high civil station; he was the last of the illustrious line of the Virginia Presidents; he closed this lineage by a career distinguished, like that of his predecessors, by dignity, by official purity, by unsectional patriotism, and by unflinching fidelity to duty. He had not, like Washington, the opportunity to exhibit that majestic fortitude and wise leadership which

enabled Washington to overthrow an old government by which order and liberty were imperiled, and to establish a new government in which order and liberty were to be established. He had not that political genius which enabled Jefferson to forestall the future, nor, while accepting Jefferson's principles, could he present them with Jefferson's buoyant and fascinating enthusiasm; he had not Madison's power of calm judicial statement; but he combined, as became the last of that remarkable series of statesmen, some of the best qualities of each. It is true that when in the Senate during Washington's administration he opposed that administration in its foreign policy, and incurred Washington's displeasure. But in his old age his earlier affection towards his former chief revived. With Washington, in fact, he had much in common. Like Washington, and unlike Jefferson, he did not, by his personal genius, impress his views on his Cabinet, but, collecting statesmen of ability of different schools, he sought not merely to harmonize their counsels, but by patiently weighing these counsels when conflicting to arrive at a just and wise conclusion of his own. To Jefferson's distinctive principles of liberalism he always remained faithful as a disciple, though it would not have been his nature to have originated them as a chief. His style in his political papers was unassuming and plain, and sometimes, like that of Washington, inelegant and labored, wanting Jefferson's felicity and Madison's exact lucidity. In his bearing and social usages as President he followed Washington much more closely than he followed Jefferson or Madison; his manner became, as he grew older, more formal and reserved; his diplomatic experience, in particular, as well as the difficulties of his immediate predecessors, taught him how great were the embarrassments arising from familiar conversation between the Chief Executive and foreign ministers. This dignified reticence he gradually applied to his intercourse with all public men, outside of his Cabinet. Not a cloud ever fell on his fair fame. Of him, as well as of his predecessors in that illustrious succession, it could be said that with the opportunities of wealth showered on them, public life was to them the cause of pecuniary loss, not of gain; and in his own particular case it is well known that his hospitality when minister abroad, and afterwards at Washington, involved him in expenses so much in excess of his salary as to absorb his modest patrimony. Of neither him or them, also, could it be said that political patronage was used to favor relatives or to pay personal services.

During Washington's administration Monroe's affections were known to turn strongly toward France, which his conduct toward that Government when minister at Paris was supposed to have unduly displayed; negotiations into which he had entered with France were disavowed, and he was recalled in a manner marking strong disapprobation. That this was in a large measure undeserved subsequent developments have shown; but be this as it may, his next appearance in the diplomatic field was marked by a singular triumph. Upon the question of the comparative efficiency of Mr. Monroe and of Mr. R. Livingston in the Louisiana negotiation—a question afterwards so much debated—it is not necessary now to enter; it is enough to say that the negotiation faltered until Monroe's arrival at Paris, and that it was under the finishing touch given by him, at a period when Napoleon was forced to cede Louisiana or to run the

risk of losing it altogether in the war about to reopen, that the purchase of that splendid province was effected. Before this Mr. Monroe had been looked upon as a destructive, and on him the peculiar enmity of the opposition had been poured. The Louisiana treaty showed in him great constructive powers; in his negotiations with Great Britain, so far from indicating undue prejudice against that haughty power, his course was marked not only by the courtesy and simplicity which under no circumstances did he lose, but by concessions to Great Britain which, as has been said, wise as they may have been, went as far in some respects as did Mr. Jay's treaty, and went too far to be accepted by Mr. Jefferson. During the greater part of Mr. Madison's Administration he was Secretary of State; during the whole of his own Administration he revised every important dispatch sent out by Mr. Adams, Secretary of State, and, as we learn from Mr. Adams's diary and from the drafts still existing in the Department of State, modified them so as to adapt them to his own scheme of foreign policy. He conducted the foreign affairs of the United States, therefore, for a longer period than has any other of our statesmen, and he conducted them with great success through great vicissitudes.

"At the beginning of his political career he was looked upon by the more sober part of the community as a reckless revolutionist. During his Presidency he was regarded by men of bold thought as a cautious conservative. He was the only President except Washington whose reelection was unopposed. Since his death it has been the fashion to speak of him as destitute of force; but as to the ability and strength of will shown by him it is only necessary to repeat what was said of him by both Mr. Calhoun and Mr. Adams, that among all the public men with whom they had dealt he most perfectly united conscientiousness, courtesy, thorough knowledge of foreign political conditions, high patriotism, national spirit, sound judgment, patient industry in mastering details, with resolute maintenance of purpose. So far as concerns the negotiations with England while he was minister there, it may be truly said, after an examination of the large correspondence relating to that era, now accessible, that not only is there not one word coming from either side in those heated controversies which should lead a citizen of the United States to look on him otherwise than with pride, but that in ability, candor, and fairness, Mr. Monroe's papers stand in the front rank of diplomatic documents.

"These remarks in respect to Mr. Monroe may not appear too discursive when it is recollected that of the servants of the public he is to be looked back upon as the one who was longest, as minister, Secretary, and President, connected with this Department, and that in it, in the shape of the papers left by him, still exists, unveiled, his monument; and it may thus not be out of place to say how fully, in connection with the documents published in these volumes, these papers testify to his high honor, his wise statesmanship, his steady faith in liberal institutions, his devotion to his country as a whole, and his perfect disinteredness and purity as a public man.

"Mr. Pinkney, who bore, first with Mr. Monroe and then alone, the difficult and ungracious burden of those eventful negotiations, was, as a lawyer, recognized, not merely by the body of the bar but by

Chief Justice Marshall and Judge Story, as at the head of his profession, both as an orator and a jurist; and international law had been regarded as the field in which he was peculiarly master. He was well fitted, by his courtesy and tact, for diplomatic intercourse. So far from being embarrassed by any national antagonism to England, the only criticism made by him in this respect was that sometimes suggested by his countrymen, that he was so thoroughly English in his habits as to yield too much socially to English pretensions. But he yielded nothing in his public relations. Scrupulously courteous he always was; but nowhere are the arguments for the positions taken by the United States on the pending issues more forcibly put than in those emanating from his pen.

"It may be said that in this notice of the diplomatic treatment of the United States by Great Britain prior to the war of 1812 the ungracious attitude of Great Britain is brought out in undue prominence, while the ungracious attitude of France is left out of sight. But there is this material difference. France wished the United States to become a great nation. Great Britain, not yet recovered from the humiliation of the Revolutionary war, would gladly have reduced the United States to the servility of a dependent. France took with us the liberties of an affectionate but somewhat extravagant friend. Great Britain, not yet convinced of the permanence of our independence, maintained towards us the attitude of an offended guardian, whose title to obedience remained although his power was temporarily thrown off. France looked on the United States with pride, as a nation which she had aided in bringing into existence; Great Britain looked on the United States with anger and aversion, as a colony which had ungratefully flung off her protecting hand, and aided in inflicting on her a crushing defeat. Undoubtedly Genet was absurdly disrespectful, but his disrespect was of a character utterly different from the sulky repulsiveness of Hammond, the random impertinence of Merry, the calculated insolence of Jackson. Genet rushed into the country with his arms open for an embrace, ready to enter into any alliance we might propose, no matter how close; Hammond stood moodily with his hands behind him, refusing even to answer the most conciliatory business notes. Genet was offended because the nation did not exist in a continuous fête devoted to liberty; Hammond was offended because the nation existed at all. Genet would have adorned the nation with liberty caps and with floral symbols of emancipation that might have appeared absurd. Hammond would have subjected it once more, at least in its foreign politics, to the yoke of Great Britain. Genet, when the guarantee by the United States of France's West India possessions was brought to his notice by Jefferson, with the statement that this guarantee was one the United States had not the means to execute, said at once that it would be released by France. When Hammond was remonstrated with for the detention by Great Britain of Niagara, of Oswego, of Fort Erie, of Michilimachinaw, of Detroit, and the adjacent territory, in defiance of treaty, and for the incitement by British emissaries to prey on our settlements, he remained defiantly silent. Genet was sometimes ridiculously annoying and familiar, but this was amply atoned for by his recall, and by the statement of the French directory that if he remained in the country we might punish him as we chose. Hammond

retained to the end his contemptuous seclusion, rejecting hospitality and refusing to explain grievances, and in this course, directed by his Government, his Government sustained him. Revolutionary France treated us with the ardor and freedom with which one nation, not a little demonstrative, just liberated from a heavy yoke, would be likely to treat another a little its senior in the work of emancipation. To reactionary Great Britain we still appeared as a rebellious dependent, to whom the attitude of domineering superiority was to be maintained. It is true that afterwards, when the French Government progressed in its tremendous conflict with Great Britain, it authorized outrageous spoliations on our commerce and treated with no little disrespect our ministers whom we sent to call for redress. Great Britain also did the same. But there was this difference. The spoliations of France were paid for, those before 1800 in the cession of Louisiana, those afterwards very tardily, it is true, but at last satisfactorily by treaty under Louis Phillippe. Those of Great Britain after 1798 were never paid for, and the claims were wiped out in the war of 1812. France, also, under the directory, withdraw from her isolation, and proposed to receive our ministers with the respect due the envoys of a great and independent nation. Whatever may have been the insults offered to us by British ministers, Great Britain, while, as in the case of Jackson, accepting a dismissal, approved of the misconduct which required it. Even when in the Napoleonic wars we were exposed to almost equal aggression from the two great contending powers, there was the same contrast in diplomatic tone. The selfish greed of Talleyrand was veiled in courtesy and respect; advances from Great Britain, equally selfish, though meant to be friendly, were embittered by Wellesley's nonchalant supercilliousness or Canning's elaborate sneers. Nor was it unnatural that it should have been so. The peace policy of Jefferson and Madison, necessary as it may have been at the time, had nothing in it to break the illusion of Great Britain that her old colonies were still more or less subject at least to her overwhelming supremacy on the sea. It took the war of 1812 to destroy this last pretense of retention of her old authority, and to place the diplomatic relations of the two powers on that basis of mutual respect and courtesy on which they have ever since remained."

"During the Presidency of Mr. Madison, when the language of a British minister, Mr. Jackson, residing in this country, had proved offensive to this Government, that minister was promptly informed, without even first submitting his correspondence to his own Government, that no further communications would be received from him, and the reason for the step was afterwards made known to his Government. Mr. Jackson himself, in defending the positions he had taken, accompanied his observations with the remark that '*beyond this it suffices that I do not deviate from the respect due to the Government to which I am accredited.*' How, then, was this matter regarded at the British foreign office, at the head of which, at that time, was Lord Wellesley? His lordship, to whom the correspond-

ence had been submitted, expressed the concern of His Majesty that the interruption of the intercourse had taken place by the command of this Government before it had been possible for His Majesty, by any interposition of his authority, to manifest his invariable disposition to maintain the relations of amity with the United States. He conveyed the most positive assurances from Mr. Jackson that it had not been his purpose to give offense to the United States Government by any expression contained in his letters, or by any part of his conduct. He suggested, indeed, that a better and more usual course would have been to convey to his Government a formal complaint against the minister with a view to suitable redress. And although he said His Majesty had not marked with any expression of displeasure the conduct of Mr. Jackson, who had not appeared to him on the occasion to have committed any intentional offense against the Government of the United States, yet, as he was always disposed to pay the utmost attention to the wishes and sentiments of states in amity with him, he had directed the return of Mr. Jackson to England. And in further testimony of a sincere desire to cultivate an intercourse with the United States on the most friendly terms, his lordship added, that he was authorized to assure this Government that His Majesty was ready to receive, with sentiments of undiminished amity and good will, any communication which the Government of the United States might deem beneficial to the mutual interests of both countries, through any channel which might appear advantageous to the Government of the United States."

Mr. Clayton, Sec. of State, to Mr. Rives, min. to France, Sept. 14, 1849, MS. Inst. France, XV. 94, 109.

Poussin's case.

On February 7, 1849, M. Poussin, French minister at Washington, presented to the Department of State a claim of Mr. A. Port, a French citizen domiciled in Mexico, for the value of certain bales of tobacco, of which he alleged that he had been unjustly deprived by the general in command of the American forces at Puebla. It appears that Port had purchased the tobacco at a public sale held under the authority of the American military officer who had previously been in command at Puebla; that the sale was made under the mistaken impression that the tobacco was public property, and that when the discovery was made that it was private property the sale was rescinded and Port's money returned to him with interest. On these facts, as reported by the Secretary of War, Mr. Clayton informed M. Poussin, March 28, 1849, that he had come to the conclusion that Port had no just claim. In the course of a reply, dated April, 1849, M. Poussin said: "The Government of the United States must be convinced that it is more honorable to acquit, fairly, a debt contracted during war, under the

pressure of necessity, than to avoid its payment by endeavoring to brand the character of an honest man." On receiving this reply Mr. Clayton requested M. Poussin, who was then in New York, to repair to Washington without unnecessary delay. M. Poussin duly appeared at the Department of State, where, after a conference with Mr. Clayton, he was permitted to substitute for his previous communication a note omitting the sentence above quoted.

Immediately afterwards a correspondence took place between Mr. Clayton and M. Poussin with reference to the case of Commander Carpenter, U. S. N., of the U. S. S. *Iris*, and his claim of salvage for the rescue of the French ship *Eugénie*, of Havre, which had run upon the bank of Piso, near the anchorage of Anton Lizardo. In the correspondence M. Poussin complained of the action of Commander Carpenter in retaining possession of the *Eugénie* till his claim of salvage was satisfied, and asked the Government of the United States to disavow his conduct and reprove him. In a note of May 28, 1849, Mr. Clayton declined to comply with these demands, and transmitted to M. Poussin certain explanations given by Commander Carpenter. In answering this communication, M. Poussin, in a note of May 30, 1849, said:

"His [Commander Carpenter's] opinions have little interest in our eyes, when we have to condemn his conduct.

"I called on the Cabinet of Washington, Mr. Secretary of State, in the name of the French Government, to address a severe reproof to that officer of the American Navy, in order that the error he has committed, on a point involving the dignity of your national marine, might not be repeated hereafter.

"From your answer, Mr. Secretary of State, I am unfortunately induced to believe that your Government subscribes to the strange doctrines professed by Commander Carpenter . . . ; and I have only to protest, in the name of my Government, against these doctrines."

In a note of June 5, 1849, Mr. Clayton informed M. Poussin that his note of the 30th of May, together with the rest of the correspondence between him and the Department on the case of Commander Carpenter, had been transmitted to the American minister at Paris, with instructions to submit it to the consideration of the French Government.

As the French Government did not consider that the correspondence afforded a sufficient ground for M. Poussin's recall, Mr. Clayton addressed to him, September 14, 1849, the following letter:

"The President has devolved upon me the duty of announcing to you that the Government of the United States will hold no further correspondence with you as the minister of France; and that the necessity which has impelled him to take this step at the present

moment has been made known to your Government. In communicating the President's determination in regard to yourself personally, I avail myself of the occasion to add, that due attention will be cheerfully given to any communication from the Government of France affecting the interests of our respective Republics, which may reach this Department through any other channel. Your own Government will be able to explain to you the reasons which have influenced the American Executive in delaying the present communication until this period.

"The President has instructed me to say that every proper facility for quitting the United States will be promptly given at any moment when you may be pleased to signify that it is your desire to return to France."

In an instruction to Mr. Rives, of September 14, 1849, Mr. Clayton said that, when a foreign minister used in his correspondence with the Department language offensive to the Government of the United States, no further correspondence with him would be maintained.

MSS. Dept. of State.

"In 1849, an exciting diplomatic correspondence took place between Mr. Clayton, Secretary of State, and M. Poussin, minister plenipotentiary of France, named by the provisional government. Though this occurrence occasioned some delay in the reception of the letters of credence of the American minister, Mr. Rives, the French Government disavowed and recalled its minister. Lesur, Annuaire, 1849, 665." (Lawrence's Wheaton (1863), 438.)

Mr. Rives arrived in London September 26, 1849, on his way to France. He was received by the President of France on the 8th of November, as he reported, with great cordiality, and M. Boislecombe was sent as minister to the United States. M. de Tocqueville, who had conducted the correspondence with Mr. Clayton in reference to the request for M. Poussin's recall, had left the ministry of foreign affairs, and the matter was simply dropped by his successor.

"The President still maintains the position advanced in my first note to Mr. de Tocqueville, that this Government is the guardian of its own honor, and, of course, the sole judge of what is due to it. He has refused to hold further correspondence with Mr. Poussin, and he will refuse to hold it with any other minister from any country who shall use similar language, or prove himself equally disrespectful to this Government. He accords to all other governments the same rights, in this respect, which he demands for his own. If the French Government would not hold such language disrespectful when applied to itself, we shall not question its right to decide as it shall think fit. The law of nations has wisely given to each the right to maintain its own honor in such cases, by placing the remedies for insult in its own power. One of these remedies is to refuse to correspond any longer with the offender, and the right can not be denied without incur-

ring the risk of involving the world in wars about the meaning of words and the forms of diplomatic etiquette."

Mr. Clayton, Sec. of State, to Mr. Rives, min. to France, Nov. 12, 1849, MS. Inst. France, XV. 112.

Crampton's case.

In March, 1855, during the Crimean war, an office was opened in Halifax for the enlistment of recruits for the British army. On July 6, 1855, Mr. Buchanan, American minister in London, acting under instructions, advised Lord Clarendon that the Government of the United States was constantly receiving information that persons were leaving the country under engagements, contracted within its limits, to enlist as soldiers in the British army on their arrival in Nova Scotia; that there was good reason to believe that an extensive plan had been organized by British functionaries and agents, and was in successful operation in different parts of the Union, to furnish recruits for the British army; that these acts had been performed in violation of the neutrality laws of the United States, and that the President desired to ascertain how far persons in official station, under the British Government, who had been concerned in the proceedings in question, had acted with or without its approbation, and what measures, if any, had been taken to restrain their unjustifiable conduct. Lord Clarendon disclaimed any intention of violating the neutrality laws of the United States, and declared that the British agents were instructed to observe them; but it appeared by his statements that his views as to what might be done in the way of making enlistments in the United States, without violating the law, were different from those of the Government of the United States. Meanwhile, prosecutions had been begun against some of the recruiting agents, and the evidence elicited at their trial deeply implicated Mr. Crampton, the British minister at Washington, and Messrs. Barclay, Mathew, and Rowcroft, British consuls, respectively, at New York, Philadelphia, and Cincinnati, as conspicuous participants in the organization and execution of the scheme of recruitment, the operation of which, as it appeared, began in January, 1855, and continued till August, when it was abandoned by order of the British Government. On December 28, 1855, Mr. Buchanan was instructed by Mr. Marcy, who was then Secretary of State, to inform the British Government that Mr. Crampton's connection with the affair had rendered him an unacceptable representative of Her Britannic Majesty, and to ask for his recall as well as for the removal of the three implicated consuls. In a note of April 30, 1856, to Mr. Dallas, who had succeeded Mr. Buchanan as minister to England, Lord Clarendon disclaimed any intention to infringe the laws or violate the sovereignty of the United States, and, as an answer to the charges made against the British minister and consuls, communicated their declarations that

they had not committed any of the acts imputed to them, and expressed the hope that this response would prove satisfactory to the United States and put an end to the difference between the two Governments.

As the United States was unable to accept this conclusion, Mr. Marcy, on May 28, 1856, announced to Mr. Crampton the determination of the President to "discontinue further intercourse" with him, and stated that the reasons which had compelled the President to take this step had been communicated to Mr. Crampton's Government. Mr. Marcy stated at the same time that due attention would be cheerfully given to any communications from the British Government which might be forwarded through any other channel, and that if Mr. Crampton should desire to retire from the United States he would be furnished with the usual facilities for that purpose. A passport was also enclosed to him. On the same day the President revoked the exequaturs of the three consuls.

In instructions to Mr. Dallas of May 27, 1856, which were communicated to Lord Clarendon on the 11th of the following month, Mr. Marcy showed that Mr. Crampton, with the support of the consuls, continued to carry on the plan of recruitment for several months after he was admonished that, whatever might have been his intention, it constituted a violation of the laws of the United States, so that his moral and legal responsibility were, as Mr. Marcy maintained, fully established.

Message of President Pierce, May 29, 1856, H. Ex. Doc. 107, 34 Cong. 1 sess.; 47 Brit. & For. State Papers, 358–474; 48 id. 189–300.

Lord Clarendon, in a note to Mr. Dallas of June 26, 1856, stated that if Her Majesty's Government had been convinced, like that of the United States, that the British representatives had, in defiance of their instructions, violated the laws of the United States, Her Majesty's Government would have removed them, and that if a foreign government were capriciously, and without any apparent belief that it had good grounds for doing so, to break off diplomatic relations with the British minister accredited to it, Her Majesty's Government could not hesitate to advise Her Majesty equally to break off diplomatic intercourse with the minister of such Government; but that, in the present case, Her Majesty's Government were bound to accept the formal and repeated declaration of the President of his belief that the British officials in question had violated the laws of the Union, and could not deny to the United States a right similar to that which, in a parallel case, Her Majesty's Government would claim for themselves, "the right, namely, of forming their own judgment as to the bearings of the laws of the Union upon transactions which have taken place within the Union." However much, therefore, said Lord Clarendon, Her Majesty's Government might regret a proceeding which could not but be considered as of an unfriendly character, they had not deemed it their duty on that account to advise Her Majesty to suspend diplomatic intercourse with the American minister in London. (48 Brit. & For. St. Papers, 298–300.)

On June 30, 1856, a motion was made in the House of Commons to the effect that the conduct of Her Majesty's Government in the Crampton affair had "not entitled them to the approbation of this House." The motion was lost by a vote of 274 to 80. The reinforcement of the British North American squadron soon after Crampton's dismissal gave rise to rumors of war. Crampton was soon knighted, and in March, 1857, was sent as minister to Hanover. He afterwards served as the representative of his Government at St. Petersburg and at Madrid. (Dr. Angell, The Recall of Ministers, The Forum (Jan., 1889), VI. 495–496.)

Attorney-General Cushing, on being consulted as to the action that should be taken in the case of Crampton, advised that a foreign minister who engaged in the enlistment of troops in the United States for his government was subject to be summarily expelled from the country, or, after a demand for his recall, to be dismissed by the President. (Aug. 9, 1855, 7 Op. 367.)

Russell's case.

January 28, 1877, Dr. Calcaño, Venezuelan minister of foreign affairs, addressed to Mr. Thomas Russell, then United States minister at Caracas, a note breaking off official relations with him, and advising him that the ground for this action was that in his despatch No. 65, of May 8, 1875, which had lately been published by his Government, "an opinion is advanced and statements are made which constitute a most violent attack (*una agresion violentisima*), because they insult the administration most grievously, besides involving a notorious falsehood." Dr. Calcaño added that the Venezuelan Government at the same time was addressing itself to the Government of the United States for the purpose of informing it of the circumstances. Mr. Russell's passports were sent to him on February 12, 1877. He left Venezuela on the 17th of February, and after a visit to the Danish West Indies returned to the United States in March.

Mr. Russell's No. 65, of May 8, 1875, to which Dr. Calcaño had referred, was communicated to the House of Representatives, together with other correspondence, in response to a resolution of May 10, 1876, and was printed, with the rest of the correspondence, under an order of July 31, 1876, in House Report 787, 44th Congress, 1st session. The despatch doubtless was not written by Mr. Russell for publication. In the course of it he said: "I feel bound to add that there are, in my opinion, only two ways in which the payment of so large an amount can be obtained. The first is by sharing the proceeds with some of the chief officers of this Government; the second, by a display, or, at least, a threat, of force. The first course, which has been pursued by one or more nations, will, of course, never be followed by the United States. The expediency of the second it is not my province to discuss."[a]

[a] H. Report 787, 44 Cong. 1 sess. 54.

Dr. Caleaño's note to Mr. Russell of January 28, 1877, was enclosed by the latter to the Department of State, with a despatch of January 29, which was received at the Department on the 3rd of March.

April 2, 1877, Mr. Evarts, as Secretary of State, addressed to Mr. Dalla Costa, Venezuelan minister at Washington, a note referring to Mr. Russell's dismissal, and saying: "As yet we have not been furnished with any explanation by the Venezuelan Government in regard to this abrupt and extraordinary step. Unless, therefore, you shall have been authorized to make one which may be regarded as satisfactory, the dignity of this Government will require that your relations with it shall also terminate, and your passports will be sent to you accordingly." Mr. Dalla Costa, on the 9th of April, replied that he was instructed to make the explanation required by the Department, but that he was obliged to postpone doing so because of the loss of important papers by shipwreck. This postponement was acquiesced in by the Department of State by a note of the 10th of April.

July 9, 1877, Mr. Dalla Costa informed the Department that he was instructed to "withdraw and cancel" Dr. Caleaño's note to Mr. Russell of the 28th of January. The Department on the same day expressed its satisfaction with this communication. During the ensuing autumn, however, Mr. Dalla Costa submitted to the Department of State instructions from his government, dated September 5, 1877, in which it was intimated that Mr. Russell would no longer be *persona grata* at Caracas. On January 8, 1878, a copy of these instructions was communicated by the Department of State to Mr. Russell. He resigned on the 24th of the same month, but expressed a desire to return to Venezuela to present his letter of recall. In compliance with this wish he was instructed, January 29, 1878, to proceed to Caracas and present his letter of recall and then to return immediately to the United States. He reached Caracas on March 17, 1878. On the 19th of March the Venezuelan minister for foreign affairs declined to receive from him, "directly or indirectly," any communication, and he thereupon returned to the United States.

MSS. Dept. of State, and particularly a memorandum of April 2, 1877, MS. Inst. Venezuela, III. 11. That a government will resent attacks made upon its minister on account of his faithful execution of his instructions, see Mr. Hay, Sec. of State, to Señor Blanco, March 23, 1901, MS. Notes to Venez. Leg. II. 53.

Lord Sackville's case.

"Near the close of the month of October last, occurrences of a deeply regrettable nature were brought to my knowledge, which made it my painful but imperative duty to obtain, with as little delay as possible, a new personal channel of diplomatic intercourse in this country with the Government of Great Britain.

"The correspondence in relation to this incident will in due course be laid before you, and will disclose the unpardonable conduct of the official referred to in his interference by advice and counsel with the suffrages of American citizens in the very crisis of the presidential election then near at hand, and also in his subsequent public declarations to justify his actions, superadding impugnment of the Executive and Senate of the United States in connection with important questions now pending in controversy between the two Governments.

"The offense thus committed was most grave, involving disastrous possibilities to the good relations of the United States and Great Britain, constituting a gross breach of diplomatic privilege and an invasion of the purely domestic affairs and essential sovereignty of the Government to which the envoy was accredited.

"Having first fulfilled the just demands of international comity, by affording full opportunity for Her Majesty's Government to act in relief of the situation, I considered prolongation of discussion to be unwarranted and thereupon declined to further recognize the diplomatic character of the person, whose continuance in such function would destroy that mutual confidence which is essential to the good understanding of the two Governments, and was inconsistent with the welfare and self-respect of the Government of the United States.

"The usual interchange of communication has since continued through Her Majesty's legation in this city."

President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, I. xi.

For the report of Mr. Bayard, Secretary of State, of Oct. 29, 1888, to the President, concerning the foregoing case of Lord Sackville, see For. Rel. 1888, II. 1670.

Oct. 30, 1888, Mr. Bayard addressed to Lord Sackville the following note:

"My Lord: The President of the United States has instructed me to inform you that for good and sufficient causes, which are known to yourself, and have been duly brought to the knowledge of your Government, he has with great regret become convinced that it would be incompatible with the best interests and detrimental to the good relations of both Governments that you should any longer hold your present official position in the United States, and that accordingly the Government of Her Britannic Majesty will without delay be informed of this determination, in order that another channel may be established for the transmission of such communications as may be found desirable by the two Governments in the transaction of their business.

"Whenever it is your pleasure to depart from the United States, I am instructed to furnish you with the usual facilities, and with that view I now beg leave to inclose a passport in the customary form." (For. Rel. 1888, II. 1672.)

For telegraphic correspondence between Mr. Bayard and Mr. Phelps, then American minister in London, from Oct. 25 to Oct. 28, see For. Rel. 1888, II. 1669–1673.

See, also, Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, No 990, Oct. 31, 1888, For. Rel. 1888, II. 1673; Mr. Phelps to Mr. Bayard, No. 842, Nov. 2, 1888, Id. 1676.

"I have the honor to acknowledge the receipt of your letter of the 4th instant, enclosing the reported conversations upon which, on the 27th October last, you principally based the request preferred by the President of the United States that Lord Sackville, Her Majesty's minister at Washington, should be recalled. That letter, with its enclosures, has been referred to Lord Sackville, and I have now the honor to transmit to you a copy of his reply so far as it relates to them.

"The request in answer to which you have been good enough to forward these papers was made in order that Her Majesty's Government might be enabled to form a judgment on the complaint against Lord Sackville which was based upon them. But it has ceased to be of any practical importance, inasmuch as on the following Tuesday morning, the 30th October, the President of the United States terminated all diplomatic intercourse with Lord Sackville and forwarded his passports to him.

"In your letter under reply you explain the course thus pursued by observing:

"'In asking from Her Majesty's Government the recall or withdrawal of its minister, upon a representation of the general purport of the letter and statements above mentioned, the Government of the United States assumed that such request would be sufficient for that purpose, whatever consideration the reasons for it might afterwards demand or receive.

"'It was believed that the acceptance or retention of a minister was a question solely to be determined, either with or without the assignment of reasons, by the Government to which he was accredited.'

"The general principles admitted by the practice of nations upon this matter are of more importance than the particular case in reference to which the above doctrine is laid down. Her Majesty's Government are unable to assent to the view of international usage which you have here laid down. It is, of course, open to any government, on its own responsibility, suddenly to terminate its diplomatic relations with any other state, or with any particular minister of any other state. But it has no claim to demand that the other state shall make itself the instrument of that proceeding, or concur in it, unless that state is satisfied by reasons, duly produced, of the justice of the grounds on which the demand is made.

"The principles which govern international relations on this subject appear to Her Majesty's Government to have been accurately laid down by Lord Palmerston on the occasion of Sir Henry Bulwer's sudden dismissal from the court of Madrid in 1848:

"'The Duke of Sotomayor, in treating of that matter, seems to argue as if every government was entitled to obtain the recall of any

foreign minister whenever, for reasons of its own, it might wish that he should be removed; but this is a doctrine to which I can by no means assent.

"'It is quite true, as said by the Duke of Sotomayor, that the law of nations and international usage may permit a government to make such a demand; but the law of nations and international usage also entitle the government to whom such a request may be preferred to decline to comply with it. I do not mean to say that if a foreign government is able to state to the Government of Her Majesty grave and weighty reasons why the British minister accredited to such government should be removed, Her Majesty's Government would not feel it to be their duty to take such representations into their serious consideration, and to weigh them with all the attention which they might deserve. But it must rest with the British Government in such a case to determine whether there is or is not any just cause of complaint against the British diplomatic agent, and whether the dignity and interests of Great Britain would be best consulted by withdrawing him, or by maintaining him at his post.' (Viscount Palmerston to Señor Isturiz, 12th June, 1848.)

"What view Her Majesty's Government would have taken of Lord Sackville's action if the President of the United States had laid before them 'grave and weighty reasons' for his removal, it would be superfluous now to consider. Private communications made by an ambassador in good faith have never, I believe, before been made the subject of international complaints, and considerable doubt seems to rest upon the precise purport of the more public statements made by Lord Sackville to the newspaper reporters. But these were fair matters for examination and discussion, if any such discussion had been desired. It is sufficient under existing circumstances to say that there was nothing in Lord Sackville's conduct to justify so striking a departure from the circumspect and deliberate procedure by which in such cases it is the usage of friendly states to mark their consideration for each other.

"I will abstain from comment upon the considerations, not of an international character, to which you refer as having dictated the action of the President. I will only join with the Government of the United States in expressing my regret that a personal incident of this character should have in any degree qualified the harmony which for a long time past the enduring sympathy of the two nations has impressed upon the mutual relations of their Governments."

Lord Salisbury, Sec. for For. Aff., to Mr. Phelps, Am. min., Dec. 24, 1888, enclosed with Mr. Phelps to Mr. Bayard, No. 874, Dec. 29, 1888, For. Rel. 1888, II. 1710.

"I have received your dispatch No. 874, of the 29th of December last, in which you transmit the reply of the Marquis of Salisbury,

bearing date the 24th of the same month, to your note of the 4th of December, in relation to the case of Lord Sackville. While I concur in his lordship's opinion that 'the general principles admitted by the practice of nations upon this matter are of more importance than the particular case,' yet before proceeding to consider his lordship's position thereon I deem it essential to state to Her Majesty's Government, more fully than heretofore, the views of this Government in respect to the grounds of Lord Sackville's dismissal. It is true that the Marquis of Salisbury, in the note to which I have now the honor to reply, has observed that the action of this Government has rendered it no longer necessary for that of Her Majesty to consider the merits of the complaint against Lord Sackville. It is not now, however, and has not been my purpose, in stating to Her Majesty's Government these reasons, to invite a discussion of their sufficiency. On this subject this Government has entertained no doubt. But it is my desire, in a friendly way, to acquaint Her Majesty's Government with the views of this Government in regard to the misconduct of their envoy; and this is rendered the more important in the light of certain expressions contained in Lord Salisbury's note and its enclosure.

"The offense of Lord Sackville, as heretofore stated, consisted in what this Government was compelled to regard as his intentional interference in our domestic politics, in assuming by his advice to control the political action of persons who, though formerly his countrymen and fellow-subjects, had renounced their allegiance to the British Government, and, in obtaining naturalization as American citizens, had assumed its duties and sworn to support and bear true faith and allegiance to the Government of the United States alone.

"On the 12th of September last, Lord Sackville, being then at Beverly, in the State of Massachusetts, received a letter dated September 4 at Pomona, Cal., and signed 'Charles F. Murchison,' wherein the writer was described to be a naturalized American citizen of English birth, who yet regarded the interests of 'England, the motherland,' as paramount, and made this preference his 'apology' for applying to the British minister for counsel as to the course he should pursue to further British interests in the affairs of his adopted country. He stated that many English citizens had for years refrained from being naturalized, since they thought 'no good would accrue from the act;' but that the policy of 'Mr. Cleveland's administration' had been so 'favorable and friendly towards England, so kind in not enforcing the retaliatory act passed by Congress, so sound on the free-trade question, and so hostile to the dynamite school of Ireland, that by the hundreds—yes, by the thousands—they had (have) become naturalized for the express purpose of helping to elect him over again, the one above all of American politicians they consider their own and their country's best friend.' The writer

declared himself to be one of those 'unfortunates' who had become so naturalized, and whom 'Mr. Cleveland's message to Congress on the fishery question' had 'alarmed' and compelled to 'seek further knowledge' before 'finally casting their (our) votes for him, as they (we) had intended to do.' 'If,' continued the writer, 'Cleveland was pursuing a new policy toward Canada temporarily only, and for the sake of obtaining popularity and continuation of his office four years more, but intends to cease his policy when his reelection is secured in November and again favor England's interests, then I should have no further doubts, but go forward and vote for him.' The opposing candidate, Mr. Harrison, was further declared to be 'a high-tariff man, a believer on the American side of all questions, and undoubtedly an enemy to British interests generally.' With such statements the writer applied to Lord Sackville for advice, and concluded as follows: 'As you are at the fountain head of knowledge on the question, and know whether Mr. Cleveland's present policy is temporary only, and whether he will, as soon as he secures another term of four years in the Presidency, suspend it for one of friendship and free trade, I apply to you, privately and confidentially, for information which shall in turn be treated as entirely secret. Such information would put me at rest myself, and if favorable to Mr. Cleveland would enable me, on my own responsibility, to assure many of our countrymen that they would do England a service by voting for Cleveland and against the Republican system of tariff. As I before observed, we know not what to do, but look for more light on a mysterious subject, which the sooner it comes will better serve true Englishmen in casting their votes.'

"Such was the letter addressed to and received by Lord Sackville as the representative of Her Brittanic Majesty. Whether it was obviously fraudulent, or a thinly veiled fraudulent scheme, is now a question of minor significance. But whether fictitious and fraudulent or no, there are certain facts indubitably and indelibly stamped upon its face. It declared the writer to be actuated by motives of manifest perfidy to the United States. It grossly impugned and aspersed the motives of the President. It solicited from the official to whom it was addressed an authoritative confirmation or denial of those impugnments and aspersions, upon information which his official relations to this Government were supposed to supply, and thus to abuse the confidence he enjoyed.

"To this application Lord Sackville promptly responded on the 13th of September, that 'any political party which openly favored the mother country at the present moment would lose popularity, and that the party in power is fully aware of this fact;' and that in respect to the 'questions with Canada, which have been unfortunately reopened since the rejection of the (fisheries) treaty by the

Republican majority in the Senate, and by the President's message to which you allude, allowance must therefore be made for the political situation as regards the Presidential election.' And, to give additional emphasis to his views, he enclosed an extract from a newspaper in which electors were distinctly advised to vote for Mr. Cleveland's reelection.

"It is true that the letter of Lord Sackville was marked 'private,' and that his correspondent stated that it would be kept secret. In relation to this the Marquis of Salisbury observes: 'Private communications, made by an ambassador in good faith, have never, I believe, before been made the subject of international complaint.'

"The precise force or applicability of this observation in the present case is not perceived. Lord Sackville has stated that his correspondent was unknown to him. The request for his advice could not, therefore, rest upon personal relations of intimacy, duty, or confidence. The sole basis of the appeal for his counsel was declared by the correspondent to be his preference, as a native Englishman, for the interests of England as against those of the United States. On behalf of the 'motherland' he made his appeal. His assurance of secrecy was palpably an invitation to the representative of that country to commit an act of impropriety, inconsistent with his duty and wholly outside of the scope of his functions. He plainly informed Lord Sackville that he sought his advice not only in order to determine how to cast his own vote, but also in order to influence the political course of 'many of our countrymen' in an election which he averred to be critical; referring, by that designation, to persons who, like himself, had 'by the hundreds—yes, by the thousands'—become American citizens with the intent to 'favor England's interests.'

"Lord Sackville was thus applied to in unmistakable terms to interfere in the political affairs of the United States, and at a time of intense public feeling, when issues of deep moment were awaiting popular decision. And while the conditions then existing did not create the offense of Lord Sackville, they must be taken into account in estimating its gravity. He was invited to assist his correspondent 'and many others' to abuse and betray the privileges of their citizenship at an important election involving the control of the Government itself, not in the interest of that Government, but wholly in the interest of a foreign government.

"The character of Lord Sackville's act is not altered by the fact that another purpose than the one avowed may have been and probably was contained in the application. Nor am I able to perceive that any diminution of his offense can be argued from the supposition that his reply 'would be treated as entirely secret.'

"Even as to this assurance of his unknown correspondent, the comment of Lord Sackville, in his interview published in the *New York Herald* of the 23d of October, is noticeable. 'He understood, from what was said in the letter to which he was replying, that his answer would be shown to other people than the recipient.'

"The case can not be altered by the consideration that, by reason of a breach of confidence on the part of his correspondent, the minister's letter did not affect only the class for whom it was professedly sought, but that it was solicited and used to influence another and different class of voters. The fact of the offense must be determined by the principles which it violated, and without respect to any particular direction in which its injurious effects operated. In this aspect of the case, the question is simply whether a foreign diplomatic representative shall assume the function of influencing elections in this country. Such an usurpation is of itself an intolerable offense.

"The correspondence now under consideration not only constituted an unprecedented interference in our domestic politics, but it contained gross impugnments of the President's public action. Hence, had the objectionable conduct of Lord Sackville ended with his reply to the Murchison letter, the situation would have been sufficiently serious; but in various statements made by him to representatives of the public press the impugnments of the action of this Government were emphasized. In regard to these statements, I shall only say that, as Lord Sackville has in a general way questioned their accuracy, and has excused himself from failing to make any public contradiction or explanation of them on the ground that it could only have led 'to unseemly and undignified controversy,' it is greatly to be regretted that his lordship should originally have resorted to such channels of communication in order to comment upon the serious questions raised by the publication of his correspondence. That the situation was rendered more difficult by his lordship's utterances through the public press is manifest.

"I advert, however, to a passage in Lord Sackville's letter to the Marquis of Salisbury of the 13th of December last, wherein he comments upon your note of the 4th of the same month, saying: 'That the statement that no contradiction or explanation of them (his newspaper utterances) had ever been published by me is true, but that all mention of my letter to Mr. Bayard, copy of which was enclosed in my dispatch of the 31st October, is omitted; and in this connection I beg to refer your lordship to my statement forwarded in Mr. Herbert's dispatch of the 9th of November.'

"As this forms part of the reply of Lord Salisbury to your note, it should be noticed.

"It is true that on the 26th of October, before writing the letter to me of that date, Lord Sackville called upon me and exhibited the Murchison letter. I then drew his attention very seriously to his statements in the *Tribune*, but, as he states, made no expression of personal resentment towards him. Yet, it is also true that in the most emphatic language I expressed to him my amazement at and reprobation of his conduct and avowed my sense of the gravity of the situation he had created. Personal displeasure was outside the case. His letter to me, as published by him, will be found upon examination to contain not a denial coextensive with the offensive language published in the *Tribune*, but merely a disavowal of intent to offend and of the use of special words attributed to him in other newspapers than the *Tribune*.

"This imperfect denial, which did not meet the language to which his attention had been directed, was contained in a personal note to me, as if the issue was personal in its nature between his lordship and myself; a view which is without justification, and never can be accepted.

"It may also be observed that in his explanatory statement of November 8 to his own Government, to which I should not advert if it were not referred to in the enclosure in Lord Salisbury's note, Lord Sackville continued his impugnments of the President, saying 'that party exigencies overruled international comity,' and referring to 'telegrams received at the White House,' etc.

"I now proceed to consider that part of the Marquis of Salisbury's note laying down the rule which, in his opinion, governs the dismissal of diplomatic agents.

"In your note of December 4, you had stated the position of this Government, as follows:

"'In asking from Her Majesty's Government the recall or withdrawal of its minister upon a representation of the general purport of the letter and statement above mentioned, the Government of the United States assumed that such request would be sufficient for that purpose, whatever consideration the reasons for it might afterwards demand or receive.

"'It was believed that the acceptance or retention of a minister was a question solely to be determined, either with or without the assignment of reasons, by the Government to which he was accredited.'

"Replying to this, the Marquis of Salisbury observes:

"'Her Majesty's Government are unable to assent to the view of international usage which you have here expressed. It is, of course, open to any government, on its own responsibility, suddenly to terminate its diplomatic relations with any other state or with any particular minister of any other state. But it has no claim to demand that the other state shall make itself the instrument of that proceed-

ing, or concur in it, unless that state is satisfied by reasons, duly produced, of the justice of the grounds on which the demand is made.

"'The principles which govern international relations on this subject appear to Her Majesty's Government to have been accurately laid down by Lord Palmerston on the occasion of Sir Henry Bulwer's sudden dismissal from the court of Madrid in 1848: [Here follows the passage quoted by Lord Salisbury, supra, pp. 538–539, from Lord Palmerston's note to Señor Isturiz of June 12, 1848.]

"The case of Lord Stratford de Redcliffe, then Mr. Stratford Canning, who was rejected without assignment of reasons by the Russian Government, and the acceptance of that decision by Lord Palmerston, might be cited to show that the rule laid down by him a few years later in Sir Henry Bulwer's case is by no means inflexible, and can be applicable only to that very peculiar case.

"The circumstances of that case, briefly stated, are that on the 10th of March, 1848, Lord Palmerston instructed Her Majesty's representative at Madrid 'to recommend earnestly to the Spanish Government, and to the Queen Mother, if you have an opportunity of doing so, the adoption of a legal and constitutional course of government in Spain,' and his lordship concluded his instructions with the following observations:

"'It would then be wise for the Queen of Spain, in the present critical state of affairs to strengthen the executive government by enlarging the basis upon which the administration is founded, and by calling to her councils some of those men who possess the confidence of the liberal party.'

"These instructions were duly made known by Sir Henry, then Mr. Bulwer, who, on the 8th of April, 1848, transmitted a copy to the Duke of Sotomayor.

"On the 10th of the same month the Duke of Sotomayor returned these communications with bitter and indignant comments, which I forbear to reproduce, and in regard to which I desire merely to observe that they were expressly directed against 'Her Britannic Majesty's minister for foreign affairs,' and condemned 'the unheard-of pretensions of Lord Palmerston thus to mix himself up in the internal affairs of Spain.'

"It is true that when the step of summarily dismissing Her Majesty's minister was shortly afterwards taken, objections to his personal conduct were included in the explanations of the Spanish Government. But in this relation it is pertinent to quote from the letter of Sir H. Bulwer to Lord Palmerston of the 30th of May, 1848, which statements were fully accepted by Her Majesty's Government:

"'I did not fly from slander; I was less likely to fly from menace: but a triumph was to be gained in some way or other at my expense,

and not at mine individually. Let this always be remembered: Your lordship's name—and your lordship's name is in foreign affairs the Government's name—was continually connected with my own, and through me it was meant to strike at the Government itself.'

"The account of the episode given in the 'Life of Lord Palmerston,' by the Hon. Evelyn Ashley, is as follows:

"'The "Spanish marriages" have been sufficiently discussed in recent histories to warrant their omission without further notice. General Narvaez had, as will be remembered, caused Sir Henry Bulwer to quit Madrid, and the English Government had been compelled by this open affront to send the Spanish ambassador his passport. I say compelled, because the recall of ambassadors was a form of protest which Lord Palmerston, as a rule, disliked. In a letter to Lord Howden (September 1, 1850) he says: "The rupture of diplomatic relations seems to me one of the worst ways of showing displeasure, unless it is meant to be an immediate forerunner of war. The nonintercourse situation as between two states which have political and commercial interests in common is exceedingly inconvenient to both parties, and probably as much to the one as to the other."' (Vol. 1, p. 16, ed. 1876.)

"If applied to the case of the dismissal of a minister for misconduct, I hold the position of Lord Palmerston, for reasons already stated, to be obviously unsound. But, in fact, the condition of affairs Lord Palmerston was then discussing did not constitute such a case. The complaint of the Spanish Government was, in fact, against his lordship rather than against his envoy, and in the consequences which ensued Sir H. Bulwer became a vicarious sacrifice for his lordship, which naturally the latter was indisposed to permit. So that the case was, in reality, as stated by Lord Palmerston in his letter to Lord Howden, a suspension of diplomatic intercourse.

"The case of Lord Sackville is wholly dissimilar. In the former the objection of Spain was to the action of Lord Palmerston and presumptively of the ministry of Great Britain, of which Sir Henry Bulwer was but the channel of communication, and throughout the entire transaction Sir Henry Bulwer received the entire approval of his lordship.

"The offense of Lord Sackville consisted in personal misconduct, wholly inconsistent with his official duty and relations, of which no suggestion of approval by his Government has yet been intimated.

"Thus the present issue is not whether it is requisite that a sovereign asking the recall of a foreign minister should give the reasons for the application, but whether, when, as in the present case, such recall has been asked on the ground of interference in the politics of the country to which he is accredited, the question of the culpability or degree of such interference is to be left not to the decision of the

offended sovereign but to the determination of the sovereign by whom the offending minister was accredited. It is not understood how the latter view can be held by Her Majesty's Government to be a principle of the law of nations, for it would be equivalent to saying that, by such law, that Government is entitled to determine how far it will interfere in the politics of foreign states, and what degree of interference by its ministers in the internal affairs of such states it may see proper to sustain. It would be far better to suspend diplomatic relations entirely than to continue them on the basis of such a right of interference in the domestic politics of other states as would appear to be assumed, and under which, if admitted, the independence and dignity of the injured nation would perish.

"What I deem to be the true international rule on this subject I find stated under the high authority of Calvo:

"'When the government near which a diplomatic agent resides thinks fit to dismiss him for conduct considered improper, it is customary to notify the government which accredited him that its representative is no longer acceptable, and to ask for his recall. If the offense committed by the agent is of a grave character, he may be dismissed without waiting the recall of his own government. The government which asks for the recall may or may not, at its pleasure, communicate the reasons on which it bases its request; but such an explanation can not be required. It is sufficient that the representative is no longer acceptable. In this case international courtesy prescribes his immediate recall; and if, notwithstanding, the other government does not comply with the request, the dismissal of the agent follows as a necessary consequence, it is effected by a simple notification and the sending of his passport. The dismissal of a diplomatic agent for improper conduct, either in his individual capacity or in the discharge of his official duties, is not an act of discourtesy or hostility toward the government which accredited him, and, consequently, can not be a reason for declaring war.' (Int. Law, vol. 3, p. 213, 4th ed. 1888.)

"The point of time at which this exclusive discretion is to be exercised—whether before the departure of the envoy for his post, or at his entrance upon his duties, or at any period during their continuance—would not apparently affect the claim put forward by the Marquis of Salisbury.

"Under the rule adopted by him the receiving government must take whoever may be sent; and, in case by misbehavior the envoy should render himself unacceptable, its rights are to be restricted to a submission of the reasons, which, if 'grave and weighty,' would be taken into serious consideration and weighed by Her Majesty's Government 'with all the attention they might deserve.'

"To accept such a proposition as a rule of international intercourse would be absolutely inconsistent with national independence. I have,

therefore, forborne to cite from Calvo the numerous cases from which he deduces the rule laid down by him.

"An envoy is intended to be a confidential intermediary between two governments professing friendly relations, and in reliance upon his good faith the best assurance of continued amity and good understanding will be found.

"It can not, therefore, be justly regarded as a cause of international offense to request the recall of an envoy whenever it is discovered that his conduct has been such as to unsettle the confidence of the receiving government; nor for that government to dismiss him whenever in its judgment circumstances have arisen, owing to his misconduct, which endanger its own safety and welfare or tend to jeopardize the good relations of the two governments.

"I renew my expressions of sincere regret that what Lord Salisbury has correctly termed a 'personal incident' should have been thought by Her Majesty's Government in any degree to qualify the harmony of intercourse between two nations, for whose amicable relations none can be more sincerely desirous than the President and those who, together with him, are charged with the administration of the affairs of the Government and people of the United States.

"You are authorized to communicate a copy of this paper to Her Majesty's Government."

Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, No. 1054, Jan. 30, 1889, For. Rel. 1888, II. 1718.

For the text of the "Murchison" correspondence, see For. Rel. 1888, II. 1667–1669.

Belgian and French ministers at Caracas.

In 1895 there was published by the Italian Government a protocol signed by the diplomatic representatives of Belgium, France, Germany, and Spain, at Caracas, which was thought by the Venezuelan Government to contain matter insulting to it. Two of the signers afterwards left the country, and their places were filled. The representative of Belgium, Mr. Ledeganck, and of France, the Marquis of Monclar, remained, and the President of Venezuela sent them their passports. This dismissal was asserted by the Venezuelan Government to be "a purely personal act, due alone to the circumstance that those individuals had joined with certain other foreign representatives not now accredited to Venezuela in signing a certain protocol of conference containing gratuitous and defamatory statements reflecting upon the honor of the State and the integrity of its executive, which protocol was subsequently made public by the Italian Government in the annual Green Book." The Venezuelan Government sent an explanation of its action to the Belgian and French Governments on the day on which it sent their ministers

their passports. It alleged, in justification of its course, that, on account of the statements made by the representatives in question, "the public excitement had reached such an extreme . . . that the most energetic measures were absolutely necessary to prevent a serious conflict." It seems that, while France broke off diplomatic relations, Belgium made no "demonstration." This meant that Belgium had not in terms broken off diplomatic relations, but they were in fact suspended, so that the good offices of the United States were invoked by Venezuela to try to bring about the restoration of such relations with both countries. The Venezuelan Government declared that "Venezuela intended no affront to France or Belgium, whose flags she had conspicuously saluted on the same day that she dismissed their personally objectionable agents."

Mr. Uhl, Act. Sec. of State, to Mr. Ewing, min. to Belgium, No. 130, May 23, 1895, For. Rel. 1895, I. 40; Mr. Ewing to Mr. Uhl, No. 128, June 14, 1895, id. 41; Mr. Uhl to Mr. Ewing, No. 146, July 3, 1895, id. 42; Mr. Uhl, Act. Sec. of State, to Mr. Eustis, amb. to France, May 23, 1895, id. 422.

See, also, For. Rel. 1895, II. 1474, 1480.

"The Government has used its good offices toward composing the differences between Venezuela on the one hand and France and Belgium on the other, growing out of the dismissal of the representatives of those powers on the ground of a publication deemed offensive to Venezuela. Although that dismissal was coupled with a cordial request that other more personally agreeable envoys be sent in their stead, a rupture of intercourse ensued, and still continues." (President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, I. xxxvi.)

5. Citizenship as Obstacle to Reception.

§ 641.

"I regret the delay which has taken place in answering the questions on Mr. Sarmiento's case which you have done me the honor to submit for my opinion; but this delay has been rendered unavoidable by my duties in the Supreme Court, whose session has just closed, and by my solicitude to come to a correct conclusion on the very delicate and important rights which Mr. Sarmiento asserts.

"Your first question is this: 'Is the Government of the United States, by the laws or usages of nations, bound to admit or acknowledge a naturalized citizen of the United States, as the secretary of a foreign legation to the United States?'

"I am not aware of any principle or practice in the laws and usages of nations which prohibits a citizen of the United States from entering into the service of a foreign minister. In Europe, notwithstanding the principle of 'once a subject always a subject,' this is continually done and the books abound with cases in which the

courts of that country have protected British subjects against arrests on account of the privilege annexed by the laws of nations to such service. I will cite two cases only, out of many, of English subjects protected in the very office which Mr. Sarmiento professes to hold, that of secretary of legation to a foreign embassy: The first is the case of Evans *v.* Higgs, reported in Strange, 797; the second is the case of Triquet and others versus Bath, reported in 3rd Burrow 1478. These cases are decided upon the law of nations and establish both the legality of the employment and the privilege which is annexed to it. Indeed, I consider both these principles to have been settled, by unavoidable implication, in the same way, by the 25th, 26th, and 27th sections of the act of Congress of the 30th April, 1790, entitled 'An act for the punishment of certain crimes against the United States,' to which I shall have occasion to advert more particularly in answer to your second question, and to which, therefore, for the present, I shall barely refer. It would be extremely inconvenient to that intercourse between nations which embassies were instituted to subserve, to deny to a foreign minister this right of employing the services of the people among whom he is sent to reside: for the privilege of exemption from arrest extends to all his domestics; hence to deny him the right of employing our citizens in this character would be to require him to bring his whole retinue of servants from home; and in regard to his immediate intercourse with our Government, to subject him to all the delays and embarrassments which would arise from a difference between the language of his nation and ours; it is for this reason, I presume, that the practise has become general.

"I perceive nothing, therefore, in the laws or usages of nations by which the President would stand justified in refusing to admit or acknowledge a naturalized citizen of the United States as the secretary of a foreign legation to the United States on the mere ground of his being a citizen."

Opinion of Wm. Wirt, At. Gen., to Mr. Adams, Sec. of State, March 17, 1818, MS. Misc. Let., in response to an inquiry made by Mr. Adams, March 2, 1818.

"With regard to your claim to be received in the character of chargé d'affaires from that country [Buenos Ayres], the President does not think proper to receive as invested with the privilege peculiar to the diplomatic agents of foreign powers any person being a native citizen of the United States and domiciliated in them."

Mr. Adams, Sec. of State, to Mr. De Forest, May 23, 1822, MS. Notes to For. Leg. III. 104.

In November, 1867, Mr. Anson Burlingame resigned his commission as envoy extraordinary and minister plenipotentiary of the

United States to China, and accepted from the Chinese Government an appointment as envoy to the treaty powers. Associated with Mr. Burlingame in the mission were two Chinese subjects. They announced their arrival in Washington to Mr. Seward, June 2, 1868, and were duly presented to and received by the President as diplomatic representatives of the Chinese Government. After concluding with Mr. Seward, July 2, 1868, a new treaty between the United States and China, they departed for Europe.

Dip. Cor. 1868, I. 461, 493–495, 601–604.

December 31, 1869, Mr. John W. Caldwell, who had then lately been minister resident of the United States to Bolivia, addressed to the Department of State, from La Paz, Bolivia, a letter stating that he had been commissioned as chargé d'affaires of that country to the United States. In reply Mr. Fish said: "It is regarded as inexpedient to receive a citizen of the United States as a resident diplomatic agent of a foreign power. If, however, any merely special service in the character of a chargé d'affaires should be required of you, such as would not lead to a protracted, continuous residence in this country, there would be no objection to receive you."

This reply was written February 12, 1870. Mr. Caldwell, when he received it, was on his way to the United States. He duly arrived in Washington, and on April 8, 1870, presented himself as chargé d'affaires. In the course of an interview, Mr. Fish informed him that his reception would be subject to the conditions previously set forth; and on Mr. Caldwell's stating that he had no special or temporary mission, but desired to be recognized as resident chargé d'affaires, Mr. Fish informed him that his application could not be granted, and that he could not be so recognized. This decision was communicated to the Bolivian Government, with the explanation that it was not to be regarded as unfriendly either towards that Government or towards Mr. Caldwell, but that it had been "deliberately adopted as necessary for the occasion, in view of his being a citizen of the United States, and that a similar decision was made in a previous case, when a citizen of the United States had been accredited as the diplomatic representative of a foreign power."

Mr. Fish, Sec. of State, to Mr. Caldwell, Feb. 12, 1870, MS. Notes to Ecuador, I. 14; Mr. Fish, Sec. of State, to Mr. Markbreit, min. to Bolivia, No. 17, April 8, 1870, MS. Inst. Bolivia, I. 121.

For the "similar decision" in "a previous case," see Mr. Fish, Sec. of State, to Mr. Squier, March 5, 1870, MS. Notes to Honduras, II. 7.

In acknowledging the receipt of a letter from Mr. H. M. Schieffelin of June 3, 1874, which stated that he had resigned the position of chargé d'affaires of Liberia to the United States, Mr. Fish said: "With reference to the appointment of Mr. Coppinger to be your

successor, I have to observe that it is understood that the gentleman adverted to is a citizen of the United States, in which case, under the rules of this Department, he could not be received in a diplomatic capacity; but he can be recognized as consul-general or political agent, should the Government of Liberia see fit to approve him as such."

Mr. Fish, Sec. of State, to Mr. Schieffelin, June 6, 1874, MS. Notes to Liberia, I. 21.

"This Government objects to receiving a citizen of the United States as a diplomatic representative of a foreign power. Such citizens, however, are frequently recognized as consular officers of other nations, and this policy is not known to have hitherto occasioned any inconvenience."

Mr. Evarts, Sec. of State, to Mr. Logan, Sept. 19, 1879, MS. Inst. Cent. Am. XVIII. 36.

In 1884 the Government of the United States declined to recognize Mr. Bassett, Haytian consul at New York, as chargé d'affaires ad interim of Hayti, on the ground that such recognition would not be "consistent with established usage, he being an American citizen." (Mr. Frelinghuysen, Sec. of State, to Mr. Langston, min. to Hayti, No. 268, March 21, 1884, MS. Inst. Hayti, II. 399, enclosing copies of Mr. Frelinghuysen, Sec. of State, to Mr. Preston, Haytian min., Feb. 1 and 11, 1884, and Mr. Preston to Mr. Frelinghuysen, Feb. 29, 1884, MS.)

In April, 1880, Señor Comacho, a native of Venezuela, but a naturalized American citizen, was received by the United States as chargé d'affaires of Venezuela. "Being a naturalized citizen of the United States, his recognition in a diplomatic, and therefore extra-territorial, capacity, departed from the custom ordinarily observed, yet it was deemed inexpedient to interpose any technical obstacle, however sound, to the immediate resumption of official relations between the two republics."

Mr. Evarts, Sec. of State, to Mr. Baker, min. to Venezuela, April 27, 1880, MS. Inst. Venezuela, III. 99.

See, as to the suspension of official relations between the two countries, supra, I. § 52, pp. 149–152.

"Although the usage of diplomatic intercourse between nations is averse to the acceptance, in the representative capacity, of a person who, while native-born in the country which sends him, has yet acquired lawful status as a citizen by naturalization of the country to which he is sent, as is understood to be the case with your worthy self, I am not disposed to interpose any technical obstacle, however sound, to the immediate renewal of diplomatic relations with Venezuela, and it will give me much pleasure to receive from your hands the original letters of credence you bear, at such time to-morrow, the 21st instant, between 12 and 3 o'clock, as may be most convenient to you." (Mr. Evarts, Sec. of State, to Mr. Comacho, Apr. 20, 1880, MS. Notes to Venezuela, I. 197.)

"In October last Gen. James R. O'Beirne, a distinguished citizen of New York, visited the Department of State, intimating that he was the accredited representative of the South African Republic. He was courteously received and informed that is was not the practice of the Department of State to recognize a citizen of the United States as the representative of a foreign power. No government and no representative of any government objected or protested against the official recognition by the Government of the United States of General O'Beirne, or of anyone else, as the representative of the South African Republic."

Mr. Hay, Sec. of State, to the President, Jan. 22, 1900, S. Doc. 113, 56 Cong. 1 sess.

Replying to an inquiry whether the Government of the United States would object to the appointment of Mr. E. Spencer Pratt as Persian minister at Washington, the Department of State said: "The unbroken rule of this Government forbids the extension of diplomatic immunities and extraterritorial rights to one of its own citizens by recognizing him as resident envoy of another sovereign power." (Mr. Blaine, Sec. of State, to Mr. Conger, March 16, 1891, 181 MS. Dom. Let. 244.)

The Government of the United States declined to accept Mr. W. P. Clyde as envoy extraordinary and minister plenipotentiary from the Dominican Republic, on the ground of his American citizenship. (Mr. Gresham, Sec. of State, to Mr. Smythe, Dec. 26, 1893, MS. Inst. Hayti, III. 365.)

IV. *RIGHTS AND DUTIES OF MINISTERS.*

1. Privileges.

§ 642.

Discharge of official duties.

Jan. 24, 1900, the Argentine Government issued a decree in relation to sanitary matters. Art. 5 reads: "Until an official declaration has been made of the existence of an exotic disease in Argentine territory, no national or provincial functionary, nor any foreign agent accredited to the national government, may affirm in any document the existence of such disease, whatever may be the data or reports which are thought to justify the assertion." Art. 8 provided that national officials who, before the existence of exotic disease had been declared by the President, should affirm its existence in the press or in any official document should be dismissed, and that "the functionaries or agents of foreign nations who commit a similar transgression against the sanitary regulations of the country will be denounced to the government in whose service they are in the manner prescribed by international law."

After a consultation of the diplomatic corps at Buenos Ayres, the British and Brazilian ministers made oral representations to the government concerning the unusual and objectionable clauses of the decree. The United States approved this remonstrance, and, calling attention to the act of Congress of Feb. 15, 1893, which subjects to a fine of $5,000 a vessel arriving in the United States from a foreign port without a bill of health from the American consular officer at the port of departure, said that a consul who failed to notify his government and the vessel of the existence of an epidemic, "no matter what conditions a foreign government may impose," would incur a "severe reprimand."

Mr. Hay, Sec. of State, to Mr. Lord, min. to Argentine Rep., May 8, 1900, For. Rel. 1900, 6.

Flying of flag.

"A mission is not under the same necessity of displaying a coat of arms and raising a flag as a consulate; but it is in most capitals customary to place an official shield above the principal entrance of the diplomatic representative's residence, or the offices of the mission, when these are separate from his residence, with a short flagstaff set above the shield, on which to display the flag of the United States on occasions of special ceremony."

Inst. to Dip. Off. (1897), sec. 64, p. 24.

Replying to an inquiry whether diplomatic agents, residing near the Government of the United States, were permitted to hoist a flag of their country, the Department of State said: "It has not been customary here for diplomatic agents to avail themselves of that privilege, nor is the utility of its exercise perceived, except in the event of civil commotion, or of war raging in the bosom of the country; but if any diplomatic agent thinks proper to hoist the flag of his country, no law is believed to exist which would prohibit him from so doing."

Mr. Clay, Sec. of State, to Mr. Obregon, Mexican min., Oct. 24, 1827, MS. Notes to For. Leg. III. 393.

Liberty of worship.

"In respect to your employment, conjointly with the British minister, of a Protestant clergyman, at your own expense as chaplain to the American and British legations, I can see no possible reason why it should not be done, for I am sure that while you would not conduct your religious services in a surreptitious or undignified manner, you would on the other hand be careful not needlessly to bring your religion into disrepute, nor to deprive yourself of the comfort you anticipate in its exercises by making it in any manner offensive to the prevailing creed of the inhabitants."

Mr. Seward, Sec. of State, to Mr. Crosby, min. to Guatemala, June 19, 1862, MS. Inst. Am. States, XVI. 219.

"The liberty of worship is very generally conceded to foreign legations in countries which maintain a religious establishment different from that of the diplomatic agent's country. If any diplomatic agent should assert the right of worship, within his legation, for himself and those of his fellow-countrymen who profess the same faith as he does, he would be upheld, within the limits of the like privilege conceded in the country of his sojourn to other foreign legations."

Printed Personal Instructions to Dip. Agents (1885), sec. 49.

Limits of authority.

About 1887 a Chinaman, named Sun Yat Sen, being in trouble with his government, went to London and entered upon the study of medicine. On or about October 17, 1896, he was, according to the statement of his friends, kidnapped while passing the Chinese legation in London, and was held a prisoner in the legation on the charge of having been engaged in a conspiracy against the Manchu dynasty. It was stated that he was held with a view to be sent to China. After he had been detained upwards of a week, the facts were submitted on affidavits to Lord Salisbury, who immediately sent a note to the Chinese envoy pointing out that the method employed of arresting the prisoner was unnecessary, as the courts were open to the Chinese officials to obtain criminal or other legal process, and that his detention was an act savoring of unfriendliness as a seeming violation of the right of asylum to which England was committed by tradition and belief. Lord Salisbury therefore demanded the immediate release of the prisoner. Detectives formed a cordon around the Chinese legation, under orders to take the prisoner and release him if he should be brought out. Later in the day the counsellor of the legation called at the foreign office and stated that the prisoner would be released without prejudice to the rights of the legation, and he was accordingly set at liberty.

New York *Evening Post*, Oct. 23, 1896, containing a despatch from London of the same date, setting forth the facts above narrated.

An extract from a public letter of Professor Holland on the foregoing case is printed in the New York *Sun*, of November 8, 1896, as follows:

"A refusal on the part of the Chinese minister to release his prisoner would have been a sufficient ground for requesting him to leave the country. If this mode of proceeding would have been too dilatory for the exigencies of the case, it can hardly be doubted that the circumstances would have justified an entry upon the legation premises by the London police. An ambassador's hotel is said to be 'extraterritorial,' but this too compendious phrase means no more than that the hotel is for certain purposes inaccessible to the ordinary jurisdiction of the country in which it stands. The exemptions thus enjoyed are, however, strictly defined by usage, and new exemptions cannot be deduced from a metaphor. The case of Gyllenburg,

in 1717, showed that if a minister is suspected of conspiring against the government to which he is accredited he may be arrested and his cabinets may be ransacked. The case of the coachman of Mr. Gallatin, in 1827, establishes that, after courteous notice, the police may enter a legation in order to take into custody one of its servants who has been guilty of an offence elsewhere. There is also a general agreement that, except possibly in Spain and in the South American republics, the hotel is no longer an asylum for even political offenders. Still less can it be supposed that an illegal imprisonment in a minister's residence will not be put an end to by such action of the local police as may be necessary."

"As Venezuela is an independent nation, the exercise of quasi-judicial functions by the representative of a foreign power on its territory would scarcely have been in accordance with any known principle of international law." (Mr. Wharton, Act. Sec. of State, to Mr. Scruggs, min. to Venezuela, No. 305, Oct. 27, 1892, MS. Inst. Venezuela, IV. 195.)

2. Transit.

(1) by land.

§ 643.

"The opinion of public jurists appears to be somewhat divided upon the question of the respect and protection to which a public minister is entitled, in passing through the territories of a state other than that to which he is accredited. . . . The inviolability of a public minister in this case depends upon the same principle with that of his sovereign, coming into the territory of a friendly state, by the permission, express or implied, of the local government. Both are equally entitled to the protection of that government against every act of violence and every species of restraint inconsistent with their sacred character. We have used the term *permission*, *express* or *implied;* because a public minister accredited to one country who enters the territory of another, making known his official character in the usual manner, is as much entitled to avail himself of the permission which is implied from the absence of any prohibition, as would be the sovereign himself in a similar case."

Wheaton's Int. Law, Dana's ed., §§ 244, 247, pp. 321, 323.

A diplomatic agent, traveling on his way to the country to which he is accredited, through a third country, pursuing for this purpose a natural and proper route, is entitled to the same privilege as when traveling through the country to which he is accredited. It may be that such country is in a state of war with the third power. This does not destroy his right of transit; but if a convenient route is pointed out to him which will not embarrass an occupying army, he

must take this route, and can not be permitted to insist on carving out a route of his own.

Whart. Com. Am. Law, § 168.

A person coming into the United States as the diplomatic representative of a foreign state, with credentials from governing powers not recognized by this Government, is accorded diplomatic privileges merely of transit, and this of courtesy, not of right, and such privileges may be withdrawn whenever there shall be cause to believe that he is engaged in, or contemplates, any act not consonant with the laws, peace, and public honor of the United States.

Cushing, At. Gen., 1855, 8 Op. 471.

Such a person, being charged with unlawful recruiting, was saved from prosecution on condition of not becoming chargeable with any further offense and of departing from the country within a reasonable time. (Cushing, At. Gen., 1855, 8 Op. 473.)

General Henderson, minister from Texas to France (before the annexation of Texas), was arrested in New York, on his return from France to Texas, on an alleged debt. The court discharged him from arrest, and held that the want of a passport made no difference in the case.

Holbrook *v.* Henderson, 4 Sandf. 619.

A foreign minister passing through this country on his way to his station is exempt from service of process in a civil suit.

Wilson *v.* Blanco, 4 N. Y. S. 714, 56 N. Y. Super. Ct. 582.

Soulé's case.

In October, 1854, Mr. Soulé, American minister at Madrid, who had been attending the Ostend conference, arrived at Calais, in France, intending to return to his post by way of Paris. On his arrival at Calais he was provisionally stopped under an order of the minister of the interior that he should not be allowed to "penetrate into France" without the knowledge of the Government. Mr. Mason, American minister at Paris, on hearing of the action of the authorities at Calais, immediately addressed a protest to the French Government, not only against the interruption of Mr. Soulé's journey, but also against the refusal, as he supposed, of the French Government to permit Mr. Soulé to pass through that country. Mr. Drouyn de l'Huys, then minister of foreign affairs, replied that the Government of the Emperor had "not wished . . . to prevent an envoy of the United States crossing French territory to go to his post in order to acquit himself of the commission with which he was charged by his Government," but that "between this simple passage and the sojourn of a foreigner, whose

antecedents have awakened, I regret to say, the attention of the authorities invested with the duty of securing the public order of the country, there exists a difference, which the minister of the interior had to appreciate;" that "if Mr. Soulé was going immediately and directly to Madrid the route of France was open to him;" that if, on the contrary, he "intended to go to Paris with a view of tarrying there, that privilege was not accorded to him. It was, therefore, necessary to consult him as to his intentions, and it was he who did not give the time for doing this."

This last statement refers to the fact that Mr. Soulé, on being stopped at Calais, immediately left and returned to his post by way of England and Portugal.

Mr. Mason, min. to France, to Mr. Marcy, Sec. of State, No. 37, Oct. 30, 1854, H. Ex. Doc. 1, 33 Cong. 2 sess. 22; Mr. Mason to Mr. Drouyn de l'Huys, Oct. 27, 1854, id. 23; Mr. Drouyn de l'Huys to Mr. Mason, Nov. 1, 1854, id. 24–27; Lawrence's Wheaton (1863), 422; Calvo, Droit Int. (3rd ed.), I. 603.

With regard to the action of the French Government in detaining Mr. Soulé, it should be explained that Mr. Soulé, who was a native of France and a naturalized citizen of the United States, was currently reported to have made speeches adverse to the Government of Louis Napoleon and to have held communication with some of its adversaries.

In concluding his note to Mr. Mason, November 1, 1854, M. Drouyn de l'Huys said: "The minister of the United States in Spain is free, I repeat it, to pass through France. Mr. Soulé, who has no mission to fulfil near the Emperor, and who, conformably with a doctrine sanctioned by the law of nations, would need, on account of his origin, a special agreement to enable him to represent, in his native land, the country of his adoption,—Mr. Soulé, as a simple private individual, comes within the pale of the common law which has been applied to him, and he can not lay claim to any privilege."

Mr. Mason, replying on November 6, 1854, said: "I have not failed to observe the declaration that Mr. Soulé's residence in France will not be authorized by the Emperor's Government. As his public duties require him to reside in Spain, he has no intention, as far as I am informed, of remaining or residing in France. I therefore forbear entering into any examination of the reasons suggested for the determination to deny to him the privilege, or of the manner in which he has been notified of the purpose of the Imperial Government. . . . I have much satisfaction in receiving the assurance given in the emphatic declaration of your excellency 'that the minister of the United States to Spain is at liberty to traverse France' towards his post, and obeying the commission with which he is charged by his Government. The recognition of this right is all that I have to ask of the Emperor's Government in the premises." (H. Ex. Doc. 1, 33 Cong. 2 sess. 27–28.)

As to the case of Mr. Soulé and a diplomatic agent's rights of innocent passage, see Hall, Int. Law (4th ed.), 322–324.

That the nation through whose territory the minister passes, may at its option prescribe his line of transit, is stated in Field's Code of Int. Law, § 136. See 2 Philimore's Int. Law, 186–189.

As to the transmission through a third country of packages addressed by a foreign office to its ministers, without examination by customs officers of such third country, see Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, No. 947, Aug. 8, 1888, MS. Inst. Great Britain, XXVIII. 580, enclosing a copy of Mr. Bayard to Mr. Tree, min. to Belgium, No. 371, July 24, 1888.

Exemption from customs duties is usually conceded to a diplomatic representative in transit through a third state; but his status in such state "lacks the extraterritorial element of immunity belonging to him in the country to which he is accredited." (Inst. to Dip. Off. (1897), secs. 6, 61.

(2) BY SEA.

§ 644.

"I received your letter of the 14th, suggesting the idea of asking open letters from the French and British ministers addressed to the commanders of their armed vessels, to insure to you an uninterrupted passage, leaving me to determine on the propriety of asking. On reflection, I am persuaded they can not be necessary, and I exceedingly doubt the propriety of asking for them. The armed vessels of neither nation would violate the rights of a *public minister;* and no passport to *him* could afford security to the *merchant* vessel in which he takes his passage. She must at all events be subjected to the usual examinations. If a public minister going to his place of destination must pass through the territories of the belligerent powers, passports for him though a neutral would be expedient; but the ocean being the highway of all nations, it would seem to me to derogate from our equal rights as a sovereign power, to seek protection there under any passport but our own."

Mr. Pickering, Sec. of State, to Mr. King, min. to England, June 17, 1796, MS. Inst. U. States Ministers, III. 178.

A belligerent has no right to stop the passage of a minister from a neutral state to the other belligerent, unless the mission of such minister be one hostile to the first belligerent.

Mr. J. Q. Adams, Sec. of State, to Mr. Brown, Dec. 23, 1823, MS. Inst. U. States Ministers, X. 140.

Washburn's case.

By a despatch of February 8, 1866, Mr. Charles A. Washburn, minister resident of the United States to Paraguay, informed the Department of State that he had been hindered and delayed in the military lines of the allies who were then at war with Paraguay on his return to Asuncion. On April 16, 1866, Mr. Seward wrote to Mr. Washburn that the President considered this action to be "inconvenient" and "not altogether courteous," although he desired "to regard it as a not unfriendly proceeding."

Should the hindrance on receipt of this instruction continue, Mr. Washburn was to address himself to the commander of the allied forces and to the President of the Argentine Republic, and, while informing them that he was charged with no duties "inconsistent with the neutrality" which the United States had maintained in the war, to ask them, in the name of his Government, to give him, together with his family and domestics, "safe conduct through their military lines." Should the hindrance then now cease within a reasonable time, Mr. Washburn was to apply to Admiral Godon, then in command of the United States naval forces in that quarter, "for pasage on a ship of war with sufficient naval escort to convey him to his destination."

By another despatch of April 27, 1866, written of course before the foregoing instruction was received, Mr. Washburn stated that the hindrance not only continued but was renewed at the time by direct action of the President of the Argentine Republic and of the commander of the allied fleet in the river Parana.

On receiving this despatch, Mr. Seward addressed identic instructions to Mr. Webb, American minister at Rio de Janeiro, and Mr. Asboth, American minister at Buenos Ayres, June 27, 1866, in which it was stated that the sovereignty and honor of the United States would admit of no hesitation and delay in the matter, and that Mr. Washburn was therefore directed to return at once to the United States if the hindrance in question should not have ceased through some proceeding of the governments concerned; and both ministers were directed, unless they should have received satisfactory explanations which they had previously been instructed to request, to demand such explanations peremptorily, and if they should not be given within six or eight days to ask for their passports and return to the United States.

September 23, 1866, Mr. Seward acknowledged the receipt of a "confidential" despatch from Mr. Webb, reporting the settlement of the question of Mr. Washburn's detention. Mr. Seward stated, however, that he could not allow the despatch to maintain that character; that he inferred that all obstructions had been removed, but that the opposition to Mr. Washburn's passage was at length withdrawn under protest; and that the United States could not consent to consider the question of Mr. Washburn's right of passage to his destination debatable. Mr. Webb was instructed to inform the Brazilian Government of this fact, as well as to say that the sensibilities of the American people had been wounded by the transaction.

Mr. Seward, Sec. of State, to Mr. Washburn, min. to Paraguay, April 16, 1866, MS. Inst. Paraguay, I. 79; Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, April 16, 1866, 72 MS. Dom. Let. 499; Mr. Seward, Sec. of State, to Mr. Webb, No. 171, June 27, 1866, MS. Inst.

Brazil, XVI. 144; Mr. Seward, Sec. of State, to Mr. Asboth, No. 3, June 27, 1866, MS. Inst. Argentine Republic, XV. 252; Mr. Seward, Sec. of State, to Mr. Washburn, No. 47, June 27, 1866, MS. Inst. Paraguay, I. 83; Mr. Seward, Sec. of State, to Mr. Webb, No. 180, Sept. 23, 1866, MS. Inst. Brazil, XVI. 153.

After the objection of the allies to Mr. Washburn's passage was removed, there was further delay in his proceeding to his post. This delay was understood by the Department of State to be due to questions of *punctilio* which were raised by Mr. Washburn, who also made charges against Admiral Godon. October 23, 1866, Mr. Washburn was instructed that the President expected him "to overlook all points of ceremony and of past offence, real or imaginary, on the part of the allied governments or any of them, and of past neglect, real or imaginary, on the part of Admiral Godon, and adopt whatever course in your discretion may seem best to reach Asuncion." (MS. Inst. Paraguay, I. 90.)

In a later instruction Mr. Seward said: "The allies have at length yielded to the final and more positive demand that you should be allowed to pass; and you have thus safely arrived at Asuncion. After this, it would be as inconvenient as it is unusual for the United States to prefer any retrospective complaints against either Brazil, the Argentine Republic, or that of Urugnay, more especially as with each of those Governments we have friendly relations, and as each of them, and especially Brazil, has made concessions to us in relinquishing objections both to the fact and the manner of your passing their fleets and lines on the rivers Parana and Paraguay." (Mr. Seward, Sec. of State, to Mr. Washburn, No. 67, May 24, 1867, MS. Inst. Paraguay, I. 101.)

See H. Ex. Doc. 79, 40 Cong. 3 sess.; H. Ex. Doc. 5, 41 Cong. 1 sess.; H. Misc. Doc. 8, 41 Cong. 1 sess.; H. Report 65, 41 Cong. 2 sess.

In the spring of 1868 Admiral Davis, who was then in command of the South Atlantic squadron, sent the U. S. S. *Wasp* to the seat of war in Paraguay for the purpose of taking Mr. Washburn out of Paraguay, in compliance with Mr. Seward's request that he be relieved from the embarrassing and probably dangerous situation in which he then stood at Asuncion. The *Wasp* arrived at Curupaiti, the headquarters of the allies, on the 25th of April, and remained there till the 11th of June, when her commander returned to Montevideo without accomplishing the object of his visit, in consequence of the refusal of the Brazilian admiral, the Marquis of Caxias, who commanded the allied fleet, to permit the vessel to pass up to Asuncion. His refusal was based on "military reasons," and he suggested other modes of exit for Mr. Washburn, which the latter did not consider desirable or feasible. Admiral Davis laid the matter before Mr. Webb, the American minister at Rio de Janeiro, with a suggestion that he procure an order from the Brazilian Government to allow the *Wasp* to proceed up the Paraguay to a convenient point of embarkation.

Mr. Webb, on July 1, 1868, accordingly addressed himself to Mr. Silveira de Souza, Brazilian minister of foreign affairs; and as the latter sustained the position of the Brazilian admiral, a discussion ensued in which Mr. Webb quoted from his instructions of 1866, as given above, and demanded that the *Wasp* be allowed to pass.

In advising the Department of State of his request to the Brazilian Government for permission for the *Wasp* to pass, Mr. Webb, referring to the instructions of 1866, intimated that in the event of an unfavorable reply he would ask for his passports and retire from Brazil. In an instruction of August 17, 1868, Mr. Seward said that he was not then authorized nor did he deem it necessary, with such information as he possessed, to pronounce the sense of the Government of the United States concerning Mr. Webb's contemplated close of his mission; but that, with regard to the other matters, it was not thought to be premature to say that the United States held that it had a lawful right to send a ship of war up the Parana to Asuncion for the purpose of receiving the American minister and his family and conveying them from the scene of siege and war to neutral territorial waters; that the refusal of the Brazilian admiral to permit the *Wasp* to pass up to Asuncion "violates becoming comity on the part of Brazil and the allies towards the United States, and is in contravention of the law of nations;" and that the alternative modes of exit suggested for Mr. Washburn were properly declined.

During the discussion at Rio de Janeiro, a change in the Brazilian cabinet took place; and on August 5, 1868, the new minister of foreign affairs, in a note to Mr. Webb, stated that, if the other modes of relieving Mr. Washburn should be declined, the allies would agree that a United States man-of-war should proceed to Asuncion, "subject only to such trifling delay as may arise from the active execution of any military operation which may transpire at the time; the allies being well assured that the assertions of General Webb (which they have never doubted) with regard to the observance of the duties of a strict neutrality on the part of the vessel and of the representative of the Union shall most rigorously be carried out."

September 15, 1868, Mr. Webb, who had accepted the foregoing note as a settlement of the question, was instructed to express the appreciation of the Government of the United States of "the just and friendly manner in which the transaction has been brought to a satisfactory end on the part of the Government of Brazil."

Mr. Webb, min. to Brazil, to Mr. Seward, Sec. of State, No. 68, July 7, 1868, Dip. Cor. 1868, II. 273; Mr. Webb to Mr. Silveira de Souza, min. of for. aff., July 1, 1868, id. 275; Mr. Silveira de Souza to Mr. Webb, July 9, 1868, id. 287; Mr. Webb to Mr. Silveira de Souza, July 13, 1868, id. 289–294, with extracts from the instructions of 1866;

Viscount Paranhos, min. of for. aff., to Mr. Webb, Aug. 5, 1868, id 295; Mr. Seward, Sec. of State, to Mr. Webb, No. 233, Aug. 17, 1868, and No. 235, Sept. 15, 1868, id. 298, 299.

That safe conducts should be granted to neutral diplomatic representatives through a blockading squadron, and that this privilege is secured by the law of nations, see Mr. Fish, Sec. of State, to Mr. Kirk, min. to Argentine Republic, June 17, 1869, MS. Inst. Argentine Republic, XV. 317.

In relation to the incident of the *Wasp*, see Davis's Life of Charles Henry Davis, 321 et seq.

3. Residence at Capital.

§ 645.

In 1816, with a view to facilitate communication and the transaction of public business, a circular was issued to the foreign ministers in the United States requesting them to reside at the seat of government.

A similar circular was issued in 1833.

Mr. McLane, Sec. of State, to for. mins. residing in the U. S., circular, July 13, 1833. MS. Notes to For. Legs. V. 134. See, also, Mr. Van Buren, Sec. of State, to Mr. Billé, Danish chargé d'affaires, Oct. 23, 1830, MS. Notes to For. Legs. IV. 312.

"If the President has, in one or two instances, acquiesced in the residence of foreign ministers in a distant city of the Union, it has been because they have but little business to transact with this government, and because their residence there has given rise to no complaint of breach of privileges on the one hand or of personal injury to American citizens on the other."

Mr. Clay, Sec. of State, to Chev. de Tacon, Dec. 10, 1828, MS. Notes to For. Legs. IV. 98.

See, also, Chev. de Tacon to Mr. Clay, Dec. 20, 1828, MS. Notes from Spanish Leg., and Mr. Clay to Chev. de Tacon, Feb. 7, 1829, MS. Notes to For. Legs. IV. 139.

In December, 1886, the American minister at La Paz, Bolivia, reported that the President and his cabinet had for some time been at Sucre, and that, as the President was a resident of that place, it was feared that he would keep the government there during the remaining two years of his term. The government, however, had not communicated with the diplomatic corps on the subject. In the absence of any definite information as to what was to be the permanent seat of the legation, the minister was instructed that, as the utility of diplomatic intercourse depended on the facilities of an envoy for communicating with his own government, as well as on his presence at the actual seat of the government to which he was

accredited, it was probable that he would find it inexpedient to remove from La Paz, unless the permanency of some other seat of government should be reasonably certain.

Mr. Bayard, Sec. of State, to Mr. Seay, min. to Bollvia, No. 23, Jan. 21, 1887, For. Rel. 1887, 46.

As to certain cases in which the minister to Bolivia was permitted to reside temporarily at Arequipa, in Peru, for the reestablishment of his health, Arequipa being apparently the nearest accessible spot for the purpose, and the office at La Paz being kept open and the minister continuing in constant communication with it, see Mr. Adee, Act. Sec. of State, to Mr. Bridgman, min. to Bolivia, Aug., 1899, MS. Inst. Bolivia, II. 125.

In July, 1893, the minister of foreign affairs of Nicaragua, in consequence of the bombardment of Managua, the capital of the country, by revolutionists, on the same day wrote to the American minister urging him to take up his temporary residence at Granada, where the legation would be safe from such dangers. The minister replied that his official duty seemed to require his presence during the existing troubles at the seat of the American legation, in the capital of the country, at the same time intimating that the Government seemed to be able to protect the city. This reply was commended by the Department of State, which said: "The first test of an organized government being its ability to maintain public order at the seat of its capital, your intimation that your post of duty is at Managua was timely and proper."

Mr. Adee, Acting Sec. of State, to Mr. Baker, min. at Nicaragua, Sept. 7, 1893, For. Rel. 1893, 213. See Mr. Baker's despatch, id. 205.

The Department of State does not regard sec. 1742, Revised Statutes, forbidding diplomatic officers to be absent from their posts beyond a certain time, as requiring them to reside throughout the year at the seat of government. There are long periods in every year when, by reason of the departure of the principal members of the government from the capital or of other causes, the public interests will not suffer in consequence of the temporary residence of a minister at some other place. In such case, however, the office of the mission is to be opened as usual for the transaction of business by a secretary thereof, and the diplomatic representative is expected to fix his residence at some point within the territories of the power to which he is accredited, from which he can visit the office without delay and can be reached by telegraph; and he must report to the Department of State where he thus establishes himself, the day of his departure from the seat of government, and the day of his return thereto. With this exception, a diplomatic representative will be regarded as at his post only when he is at the seat of government.

Inst. to Dip. Off. (1897), sec. 266; see, also, sec. 267.

4. Instructions.

§ 646.

"If amidst the inevitable convulsions personal danger be apprehended, no line can be chalked out by us for your guidance, and your own judgment and discretion must decide. But, without the most unequivocal necessity, it is thought best that you should not quit the country, until you shall be so instructed."

Mr. Randolph, Sec. of State, to Mr. Adams, min. to the Netherlands, Feb. 27, 1795, MS. Inst. U. S. Ministers, II. 323.

See Mr. Jefferson, Sec. of State, to Mr. Morris, min. to France, March 12, 1793, supra, § 43, I. 120.

A diplomatic representative should not break off international intercourse "without the authority of his government, except perhaps in an extraordinary case of an indignity offered to him in his character as an individual or minister. Even in such a case he proceeds upon the presumption that, when the facts are made known to his government, it will approve of his conduct."

Mr. Marcy, Sec. of State, to Mr. Jackson, chargé at Vienna, April 8, 1856, MS. Inst. Austria, I. 117.

5. Support of Private Interests.

§ 647.

A public minister can not act as agent for the collection of private claims without injury to the dignity and decorum of the public service.

Mr. J. Q. Adams, as reported in 4 Mem. J. Q. Adams, 347.

"It is not within the province of a minister of the United States abroad to present private claims unless they are the result of a violation of international law by the government addressed."

Mr. Fish, Sec. of State, to Mr. Eliot, May 12, 1869, 80 MS. Dom. Let. 94.

"The aid of the diplomatic representatives of the Government is frequently requested for the prosecution of private investigations, but this Department does not feel justified in being the medium of conveying requests of that character, which necessarily involve much labor and investigation, and occasionally considerable expense,—and when sometimes an official sanction may be inferred from the source through which certain facts are obtained, to the private and individual theories of the author who may use the information thus obtained through official channels. . . .

"In the present case it is believed, from the nature of the information sought, that Mr. Burt will find little difficulty in obtaining it through other agencies. There will be no objection to his making an *individual* application in his own name to the minister at Vienna, who will be at liberty, if he is thus inclined, to undertake the labor. But this Department can not impose the task upon him."

Mr. Fish, Sec. of State, to Mr. Richardson, Nov. 1, 1873, 100 MS. Dom. Let. 323.

"A standing rule of the service prevents ministers from acting as claim agents or bankers for citizens at home in their dealings with the foreign government to which they are accredited, unless the Department gives them permission to do so."

Mr. Frelinghuysen, Sec. of State, to Mr. Wright, Apr. 5, 1884, 150 MS. Dom. Let. 494. See Mr. Evarts, Sec. of State, to Mr. Yoder, May 24, 1880, 133 MS. Dom. Let. 146.

"It is no part of the business of a legation to act as a safe deposit institution, and no responsibility (of insurance) can attach to the minister if he yield to the request and take such property into his keeping without valuable consideration."

Mr. Bayard, Sec. of State, to Mr. Cox, min. to Turkey, Dec. 23, 1885, MS. Inst. Turkey, IV. 336.

"It is no part of the duty of this Department or of the diplomatic or consular officers of the United States abroad to attend to the prosecution of the private claims of American citizens in foreign states, especially in countries like Great Britain, where the courts of justice are open to them."

Mr. Bayard, Sec. of State, to Miss Heald, July 9, 1886, 160 MS. Dom. Let. 666.

"The interposition of diplomatic representatives is often asked by their countrymen to aid in the collection of claims against the government to which they are accredited. If the claim is founded in contract, they must not interfere without specific instructions to do so. If it is founded in tort, they will, as a general rule, in like manner, seek previous instructions before interfering, unless the person of the claimant be assailed or there be pressing necessity for action in his behalf before they can communicate with the Department of State; in which event they will communicate in full the reasons for their action."

Instructions to Dip. Officers (1897), § 174, p. 68.

The Department of State could not properly request the American minister at Madrid to procure an affidavit of a Spanish gentleman

there in a matter connected with the settlement of an estate, since such a request would be outside the legitimate business of the legation.

Mr. Bayard, Sec. of State, to Mr. Friend, March 25, 1885, 154 MS. Dom. Let. 581.

That it is no part of the duty of the Department of State or of a diplomatic or consular officer to attend to the claims of American citizens to property in foreign countries, and especially in countries where the courts of justice are open, see Mr. Bayard, Sec. of State, to Mr. Wettengel, March 18, 1885, 154 MS. Dom. Let. 516.

Persons desiring to collect the money due on bonds of a foreign government should resort for the purpose to a reputable banker. (Mr. Bayard, Sec. of State, to Mr. Hiscock, May 11, 1887, 164 MS. Dom. Let. 143.)

The rule that a diplomatic agent is not expected to attend to private professional matters, such as taking testimony, does not apply to the usual official action to facilitate the taking of testimony by letters rogatory.

Mr. Olney, Sec. of State, to Mr. Thomas, No. 37, Jan. 10, 1896, MS. Inst. Venezuela, IV. 377.

A legation of the United States is not authorized to testify, or certify, to the accuracy of a statement of law made by attorneys in the United States for use as evidence in the courts of the country in which the legation is situated.

Mr. Hill, Act. Sec. of State, to Mr. Herdliska, chargé, No. 105, Sept. 10, 1900, MS. Inst. Austria, IV. 513.

"Fully desirous as I am of extension of our commercial interests with China and having relations of mutual benefit, yet, at the basis of all just influence, confidence in the honor and integrity of our people and their Government must be found.

"Responsible citizens whose enterprises have the practical guaranty of pecuniary ability and personal character and standing will, at all times, receive whatever of aid it may be possible and practicable for the Department to lend, but such action should originate in this Department, where the opportunity for estimating the nature of the proposed enterprise and the character and responsibility of the parties proposing to embark in it can be better formed.

"Our representatives abroad will be less embarrassed by following this rule and abstaining from the furtherance of individual plans and contracts connected with foreign governments, until they have been submitted to this Department and received its approval."

Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, No. 274, Dec. 15, 1887, MS. Inst. China, IV. 334.

For an instruction to the American legation at Constantinople, authorizing it to use unofficially proper good offices to secure for an American company a full opportunity to submit bids and obtain contracts for the manufacture of military supplies on an equal footing with other competitors, see Mr. Bayard, Sec. of State, to Mr. King, chargé at Constantinople, No. 185, Jan. 29, 1887, MS. Inst. Turkey, IV. 493.

"I have to acknowledge the receipt of your No. 2632, of November 5, 1896, concerning American enterprises in China, and to say that while agreeing with you that you should not assume, directly or impliedly, in the name of this Government, any responsibility for or guarantee of any American commercial or industrial enterprise trying to establish itself in China, the Department thinks that you should use your personal and official influence and lend all proper countenance to secure to reputable representatives of such concerns the same facilities for submitting proposals, tendering bids, or obtaining commercial enterprise in the country. It is not practicable to strictly define your duties in this connection, nor is it desirable that any instructions which may have been given should be too literally followed; your own judgment and experience, the standing of the firms who seek your assistance, and of their agents, must all be given due weight and your action shaped accordingly. Broadly speaking, you should employ all proper methods for the extension of American commercial interests in China, while refraining from advocating the projects of any one firm to the exclusion of others.

"In this connection it is proper to remark that the Department does not consider it any part of your duty or that of the staff of your legation to devote so much time and labor as you state they do to writing and translating papers for Americans desirous of submitting them to the Chinese Government.

"The Department trusts that you will keep it thoroughly advised as to all American enterprises of which you may hear in China."

Mr. Olney, Sec. of State, to Mr. Denby, min. to China, No. 1376, Dec. 19, 1896, MS. Inst. China, V. 398; For. Rel. 1897, 56.

See Mr. Uhl, Act. Sec. of State, to Mr. Denby, tel., May 14, 1895, id. 183.

With reference to a despatch of Mr. Denby, American minister at Peking, reporting an interview with the Tsung-li yamên, in which he urged upon them the making of contracts with Americans to build a railway from Hankow to Peking, the Department of State, while commending his advancement of American enterprises in China, cautioned him against giving what might be understood as an official endorsement of the financial standing of the persons seeking contracts with the Chinese Government. (Mr. Sherman, Sec. of State, to Mr. Denby, min. to China, No. 1404, March 8, 1897, For. Rel. 1897, 59.)

January 3, 1897, the Department of State enclosed to Mr. Denby a letter from the president of the Columbia Iron Works and Dry Dock Co., of Baltimore, Md., by which it appeared that a certain person had

been appointed its agent in China to negotiate contracts with the government for the construction of ships of war. It was understood that the person in question was possessed of the necessary documents to demonstrate the financial ability of his principals, and Mr. Denby was instructed that his duty would end with the simple statement that such person was the accredited agent of the corporation under his letter of appointment. Mr. Denby was further instructed that, in case he should find it necessary to take any action in the matter, it should appear that the government of the United States did not make itself responsible for any statement the company's agent might make. (Mr. Sherman, Sec. of State, to Mr. Denby, min. to China, No. 1527, Jan. 3, 1897, MS. Inst. China, V. 506.)

"In using your good offices to obtain for the American Iron and Steel Association of Philadelphia, or any other reputable and responsible enterprise, an opportunity to compete in the Netherlands with foreign bidders, you will, of course, understand that the favoring of Dutch bidders by their own government might not be an appropriate case for remonstrance, but that your representations may now be confined to obtaining for American enterprises opportunity to compete on an equal footing with competitors of any third nationality." (Mr. Sherman, Sec. of State, to Mr. Newel, No. 33, Oct. 21, 1897, MS. Inst. Netherlands, XVI. 312.)

It being represented that opposition was made by the Dutch Government to the inclusion of valuable American interests in a Dutch company to be formed for producing and refining petroleum in Sumatra, it was considered proper, as citizens of other countries were reported to have previously been permitted to acquire such interests, that the American minister, if the alleged discrimination against citizens of the United States should be found to exist, should make suitable representations and discreetly remonstrate. (Mr. Sherman, Sec. of State, to Mr. Newel, tel., Feb. 28, 1898, MS. Inst. Netherlands, XVI. 339.)

With reference to a Haytian loan which American capitalists were said to be willing to take, the American minister at Port au Prince was authorized to endeavor to secure for them an opportunity to compete equally with others. The United States, it was said, did not stand sponsor for the ability of its citizens to make good any financial promises to foreign governments, but expected that, other things being equal, they might have an equal opportunity to compete with the capitalists of other countries.

Mr. Hay, Sec. of State, to Mr. Powell, min. to Hayti, tel., Nov. 28, 1898, MS. Inst. Hayti, IV. 89; Mr. Hill, Act. Sec. of State, to Mr. Powell, No. 286, Dec. 21, 1898, id. 101.

Under § 5498, R. S. [U. S. Comp. Stats. 1901, p. 3707], prohibiting a person holding a place of trust or profit under the government from acting as agent for the prosecution of a claim against the United States, a person who, after making a contract with a city for the prosecution of a claim against the United States, accepted the post of

minister to a foreign country, and held such post during the prosecution and collection of the claim, can not recover any fee for services in such prosecution, though he may recover from an associate any attorney's fees and costs advanced for the latter's benefit.

Fox *v.* Willis (1903), 72 S. W. 330, 24 Ky. Law Rep. 1773.

6. Presentations at Court.

§ 648.

"I very freely confess to the opinions, first, that an audience or presentation of any but diplomatic persons at court, is to be regarded not in any degree as a right of the person received, but as a courtesy extended to him. Secondly, that the imperial court is entirely at liberty to define and prescribe the qualifications, conditions, and terms on which strangers shall be admitted into its society. Thirdly, if American citizens request you to present their wishes for admission at court, you can only present them by complying with the terms and conditions prescribed. Fourthly, referring to the questions which have actually arisen, I think that you can properly, in all cases, give the occupation or profession of any person whose wishes you present. You can not, indeed, undertake to assign the social position of each person, for that would be to discriminate, or to seem to discriminate, by European rules, between persons who, being all alike citizens, may justly claim to be equals in social position at home, and, therefore, equals, in the consideration of this Government itself, when they are abroad. It seems to me, however, that in many cases, there are circumstances belonging to the persons you propose to present which may be properly stated, such as official positions held by individuals at the time, or even at some previous time; distinctions arising from personal merit, such as military, scientific, or literary, or of a political character, and distinctions as founders of scientific, literary, or humane institutions. But, even when these suggestions are made in compliance with the rules of the court, it is not to be claimed as a matter of right, or even as a matter of national comity, that the presentations or audiences shall therefore be granted.

"I have dwelt on the subject longer than was due to any importance that it can claim. It is peculiarly uncomfortable at this moment to find American citizens leaving their country, a prey to faction and civil war, disturbing the court of a friendly power, and embarrassing our representative there with questions of personal interest and pretension. Let the Emperor and Empress of France receive whom they will, and as many or few as they will, and let all others, as well as those who are admitted, turn their attention to the question how they can serve their country abroad; and if they find no better way to do it than by making their attendance in the

saloons of the Tuileries, let them return home to a country that now, for the first time, needs the active efforts of every one of its loyal children to save itself from destruction.

"Finally, above all things, have no question with the Government of France on this subject. Rather introduce nobody, however justly distinguished, than let a question of fashion or ceremony appear in the records of the important period in which we are acting for the highest interests of our country and of humanity."

Mr. Seward, Sec. of State, to Mr. Dayton, Feb. 3, 1862, S. Ex. Doc. 19, 37 Cong. 2 sess.

Adopted in Mr. Bayard, Sec. of State, to Mr. Magee, min. to Sweden and Norway, No. 120, Jan. 12, 1889, MS. Inst. Sw. & Nor. XV. 189.

John Quincy Adams, while minister to Russia, received a note from a fellow-countryman, in which the latter, referring to a report that there was to be a ball in the evening at the French ambassador's, asked to be presented to the ambassador and to be allowed to accompany Mr. Adams to the ball. Mr. Adams replied that he could not present any American at the French ambassador's unless he had previously been presented at court. Commenting on the incident, Mr. Adams said: "I had adopted as rules which experience had rendered necessary: 1. To present no gentleman at court without first obtaining permission from Count Romanzoff. 2. To present in person no one to Count Romanzoff, to the foreign minister, or to anybody, except at court. 3. To solicit no letters from any one to persons in other countries. The ambition of young Americans to crowd themselves upon European courts and into the company of nobility is a very ridiculous and not very proud feature of their character. There is nothing, in my estimate of things, meaner than courting society where, if admitted, it is only to be despised. Yet such is this vicious appetite for great acquaintance, and so little delicacy has it, that an American minister abroad can preserve himself from sharing in the scorn which it excites only by adopting some such general rules as these." (J. Q. Adams, Sept. 19, 1811, 2 Memoirs, 305–306.)

The line to be adopted by foreign ministers as to presentation of Americans at court must be settled by such ministers, and can not be determined by the Department of State. But "it would certainly be preferable to refuse to present any one not belonging to the legation than to incur the risk of offending by introducing persons of questionable character and antecedents, or to make such invidious distinctions as would be unavoidable by extending the list."

Mr. Fish, Sec. of State, to Mr. Jay, Jan. 29, 1872, MS. Inst. Austria, II. 56.

Adopted in Mr. Bayard, Sec. of State, to Mr. Magee, min. to Sweden & Norway, No. 120, Jan. 12, 1889, MS. Inst. Sw. & Nor. XV. 189.

"Presentations to members of reigning families cannot be made by private citizens through the diplomatic agency of the Government. They should be made through the diplomatic representative of the foreign Government." (Mr. Fish, Sec. of State, to Mr. Montgomery, Dec. 5, 1871, 91 MS. Dom. Let. 487.)

The Department of State is not aware that any instruction was ever given by Mr. Fish or Mr. Evarts that no presentations at court were to be made by an American diplomatic representative without the Department's advice. Such presentations have, on the contrary, been uniformly regarded as a social privilege "to be regulated by the custom of the local court and subjected to the personal discretion of the minister." A government founded, as is that of the United States, on the equality of the rights of its citizens, can not prescribe or countenance any invidious social distinctions among them, and the Department has therefore uniformly declined to express any judgment upon such personal applications as have been brought to its notice. "The minister is regarded as best able to determine for himself the extent to which he is willing to stand as the sponsor for the personal good repute of such of our citizens as may come within the usual prescriptions of etiquette at the court of his residence. The social right to choose one's own company is obvious and pertains no less to courts than to individuals."

Mr. Bayard, Sec. of State, to Mr. Magee, No. 120, Jan. 12, 1889, MS. Inst. Sweden and Norway, XV. 189.

Replying to a request that the American ambassador at London be advised to procure for certain persons a presentation at the Queen's drawing room, Mr. Olney said: "The Department . . . has uniformly replied that the ceremonial presentation of American citizens at the court of St. James is a matter wholly within the discretion of the United States ambassador, who arranges therefor in consultation with the chamberlain, taking into account the very limited number of introductions permitted to each embassy and mission on such occasions. I will have pleasure in sending a copy of your letter to Mr. Bayard for such action as he may be able to take." (Mr. Olney, Sec. of State, to Mr. Johnson, March 6, 1896, 208 MS. Dom. Let. 358.)

As to presentations at the Italian court, see Mr. Draper, ambass. to Italy, to Mr. Sherman, Sec. of State, Feb. 3, 1898, For. Rel. 1898, 410.

7. Noninterference in Politics.

§ 649.

The alleged course of Gouverneur Morris, when in France, in rendering advice and support to the reactionary party, was the cause of much embarrassment to President Washington.

"He [the President] said he considered the extracts from Ternant very serious, in short, as decisive; that he saw that Gouverneur Morris could be no longer continued there consistent with the public good; that the moment was critical in our favor, and ought not to be lost; that he was extremely at a loss what arrangement to make. I asked him whether Gouverneur Morris and Pinckney might not change places. He said that would be a sort of remedy, but not a radical one."

That if the French ministry conceived Gouverneur Morris to be hostile to them; if they would be jealous merely on his proposing to visit London, they would never be satisfied with us at placing him at London permanently."

Conversation between Mr. Jefferson, Sec. of State, and President Washington, Feb. 20, 1793, 2 Randall's Life of Jefferson, 116. See further, for criticisms on Morris's course, 1 John Adams's Works, 500; 3 id. 219, 320; 9 id. 307.

As to embarrassments arising from Mr. Gouverneur Morris's active participation when abroad in European politics, see Mr. Vaughan, in Monroe MSS., Mem. of 1826.

For Gouverneur Morris's correspondence in Paris, in 1792–93, see 1 Am. St. Pap. For. Rel. 312, 329.

The policy of the United States precludes, as a rule, the appointment of special diplomatic agents to confer with those concerned in political movements abroad.

Mr. Forsyth, Sec. of State, to Mr. Kaufman, April 30, 1840, 31 MS. Dom. Let. 53.

"The plain duty of the diplomatic agents of the United States is scrupulously to abstain from interfering in the domestic politics of the countries where they reside. This duty is specially incumbent on those who are accredited to governments mutable in form and in the persons by whom they are administered. By taking any open part in the domestic affairs of such a foreign country they must, sooner or later, render themselves obnoxious to the executive authority, which can not fail to impair their usefulness."

Mr. Buchanan, Sec. of State, to Mr. Shields, Aug. 7, 1848, MS. Inst. Venez. I. 73.

The duty of diplomatic representatives of the United States in foreign countries in times of insurrection is scrupulously to avoid interference in the struggle, and to refuse to acknowledge insurgent authorities until permanently established.

Mr. Marcy, Sec. of State, to Mr. Wheeler, Nov. 8, 1855, MS. Inst., Am. St. XV. 246.

Mr. Seward's report of Dec. 29, 1862, on the "alleged interference of our minister to Mexico in favor of the French," is given in House Ex. Doc. No. 23, 37 Cong. 3 sess.

In January, 1877, the Turkish minister at Washington, by direction of his government, brought to the notice of Mr. Fish, Secretary of State, certain reports concerning Bulgarian affairs which were alleged to have been published by Mr. Eugene Schuyler, then secretary of legation at Constantinople. The Turkish minister also complained that at a dinner at Adrianople Mr. Schuyler had openly

expressed himself as hostile or unfriendly to Turkey. Mr. Fish brought the complaints to Mr. Schuyler's notice, with a view to an explanation.

A year later further representations made by the Turkish minister, in relation to Mr. Schuyler's alleged acts of unfriendliness by expressions of opinion through public channels against the Turkish government, constrained the Department of State to request from him explanations, and to that end to instruct him to report at Washington as soon as practicable.

Mr. Fish, Sec. of State, to Mr. Schuyler, Jan. 26, 1877, MS. Inst. Turkey, III. 213; Mr. Evarts, Sec. of State, to Mr. Schuyler, Jan. 22, 1878, id. 269.

Soon after bringing the original complaint of the Turkish minister to Mr. Schuyler's attention, Mr. Fish stated that the latter's unauthorized correspondence with the press and with private persons about public affairs in Turkey was a just cause of offense against Turkey, a violation of sec. 1751 of the Revised Statutes and of the standing instructions to diplomatic agents, and a sufficient cause for removal; and that Mr. Gladstone had lately adduced a new instance of such violation. (Mr. Fish, Sec. of State, to Mr. Maynard, min. to Turkey, tel., Jan. 30, 1877, MS. Inst. Turkey, III. 217.)

In 1894 the minister of the United States at La Paz, Bolivia, requested the Bolivian government, "if consistent with the views of the government and the custom in like cases," to promote a certain officer of the army for courtesies and kindnesses extended to the minister on his arrival and reception. The minister took this step on the assurance, as he stated, that it "was according to custom and was expected." The Department of State replied that, however usual such a proceeding might be in Bolivia, it was so entirely contrary to § 1751 of the Revised Statutes that it could not be approved; and an explanation to this effect was made to the Bolivian government.

Mr. Gresham, Sec. of State, to Mr. Moonlight, min. to Bolivia, June 4, 1894, For. Rel. 1894, 55–56.

See, to the same effect, in a similar case, Mr. Wharton, Act. Sec. of State, to Mr. Hidden, March 25, 1891, 181 MS. Dom. Let. 315.

8. Speeches.

§ 650.

"By standing instruction of this Department, the diplomatic and consular officers of the United States abroad have, for some time past, been prohibited from corresponding with newspapers. As a sequel to that regulation, it is deemed advisable to extend a similar prohibition against their making addresses to the public anywhere, except upon those festal occasions to which they may be invited in the country which may be the scene of their official duties. Even upon

such occasions, however, the utmost caution must be observed in touching upon political matters. In no event is a minister or consul to make an address to the public, or which may be published, in any other country than that where he may officially reside."

Mr. Seward, Sec. of State, to Dip. and Consular Officers, circular, Oct. 1, 1862, MS. Circulars, I. 212.

See Rev. Stats. § 1751; Instructions to Dip. Officers (1897), § 68, p. 26.

For comments by Mr. Seward on speeches of Mr. Reverdy Johnson, in England, see Moore, Int. Arbitrations, I. 506.

In December, 1895, a motion was made in the House of Representatives to impeach Mr. Bayard, then ambassador to Great Britain, on account of language used by him in two public speeches in that country. One of the cited passages, contained in a report of a speech made by him August 2, 1895, on the occasion of the distribution of prizes at the grammar school at Boston, in Lincolnshire, was as follows: "The President stood in the midst of a strong, self-confident, and oftentimes violent people; men who sought to have their own way. It took a real man to govern the people of the United States." The other cited passage, contained in an address read before the Philosophical Institution of Edinburgh, Nov. 7, 1895, on the "Law of the Land," read thus: "In my own country I have witnessed the insatiable growth of a form of socialism styled protection, which has done more to corrupt public life, to banish men of independent mind from public councils, and to lower the tone of national representation than any other single cause. Protection, now controlling the sovereign power of taxation, has been perverted from its proper functions of creating revenue to support the government into an engine for selfish profit, allied with combinations called trusts. It thus has sapped the popular conscience by giving corrupting largesse to special classes, and it throws legislation into the political market, where jobbers and chafferers take the place of statesmen."

On the recommendation of the Committee on Foreign Affairs, a milder form of action than that of impeachment was employed; and on March 20, 1896, by a vote of 180 to 71, a resolution of censure was adopted by the House.

H. Ex. Doc. 152, 54 Cong. 1 sess.; For. Rel. 1895, I. 581; Polit. Science Quarterly (1896), XI. 375.

For statements of Mr. Bayard concerning the utterances in question, see For. Rel. 1895, I. 581–584.

Public addresses by diplomatic officers of the United States are prohibited, "unless upon exceptional festal occasions, in the country of official residence. Even upon such occasions any reference to political issues, pending in the United States or elsewhere, should be carefully avoided."

Instructions to Dip. Officers of the United States (1897), § 69, p. 26.

9. PRESENTS.

§ 651.

"I have to acknowledge the receipt of your No. 80, of the 3d of January last, in which you ask instructions on the subject of receiving from the Japanese Government medals and other gifts for American citizens, commemorative of events in which they may have been participants, or of services of a humane or other character which they may have rendered.

"By section 9, article 1, of the Constitution of the United States it is provided that 'no person holding any office of profit or trust under them [the United States] shall, without the consent of the Congress, accept any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.'

"This provision applies to the acceptance by officials of the United States of presents, emoluments, offices, or titles for themselves. By section 1751 of the Revised Statutes of the United States it is provided that 'no diplomatic or consular officer shall . . . ask or accept, for himself or any other person, any present, emolument, pecuniary favor, office, or title of any kind,' from any foreign government. To the constitutional prohibition against the acceptance by any officer of the United States for himself of a present from a foreign government, this statute adds the inhibition that diplomatic and consular officers shall not even receive such a present for anyone else. This provision is absolute, and the words 'present, emolument, pecuniary favor, office, or title of any kind' seem to comprehend everything that can be the subject of a gift.

"The course generally observed in such matters is for the foreign government to transmit the present (if it be to a person competent to receive it) through its own officials. Where the present is intended for an officer of the United States who is precluded by the Constitution from receiving it, unless authorized by Congress so to do, the course to be followed is prescribed by section 3 of the act of January 31, 1881 (Stats. at Large, vol. 21, p. 604), which provides that 'Any present, decoration, or other thing which shall be conferred or presented by any foreign government to any officer of the United States, civil, naval, or military, shall be tendered through the Department of State, and not to the individual in person; but such present, decoration, or other thing shall not be delivered by the Department of State unless so authorized by act of Congress.'"

Mr. Blaine, Sec. of State, to Mr. Swift, min. to Japan, No. 61, March 20, 1890, For. Rel. 1890, 598.

See Instructioins to Dip. Officers of the United States (1897), §§ 71, 72, pp. 27–28.

A decoration conferred by Queen Liliuokalani, of the Hawaiian Islands, in 1891, can not be accepted without the consent of Congress, notwithstanding the fact that the Queen has since been deposed and a republican form of government established in the Hawaiian Islands. (Mr. Uhl, Act. Sec. of State, to Mr. Woods, U. S. N., March 23, 1895, 201 MS. Dom. Let. 264.)

A delegate of the United States to the Eighth Pharmaceutical Congress at Brussels in 1897, not being a person holding an office of trust or profit under the United States, does not come within the inhibition of the Constitution. (Mr. Moore, Act. Sec. of State, to Mr. Pennington, July 9, 1898, 230 MS. Dom. Let. 109.)

In 1876 the Government of the Netherlands desired to make presents to Mr. Alfred T. Goshorn, director-general of the Centennial Exhibition, Gen. Joseph R. Hawley, president of the Centennial Commission, and Mr. Myer Ash, secretary of the executive committee. The Attorney General held that the constitutional prohibition applied to Mr. Goshorn and General Hawley, since they held appointments from the President as commissioners and were to be considered as officers holding positions of trust under the United States; but that this did not apply to Mr. Ash, since he held his appointment from the commission itself and not from the President nor from any Department of the National Government. (Mr. Fish, Sec. of State, to Gen. Hawley, Jan. 25, 1877, 116 MS. Dom. Let. 624.)

For a report in favor of General Hawley's acceptance of decorations from the Governments of the Netherlands and Japan, July 15, 1882, see H. Report 1652, 47 Cong. 1 sess.

By § 1751, R. S., the Department of State is debarred from taking any steps toward securing for a citizen of the United States a decoration from a foreign government, even after the decoration has been awarded to him. (Mr. Hill, Assist. Sec. of State, to Mr. Howe, Oct. 19, 1899, 240 MS. Dom. Let. 561.)

The provisions of the Constitution "neither prevent nor authorize persons who may hold office under any one of the States from accepting an appointment under a foreign government." (Mr. Hale, Assist. Sec. of State, to Mr. Rosenberg, May 22, 1872, 94 MS. Dom. Let. 163.) A simple photograph of the German Emperor, given by the German minister at Tokio to an American naval officer on a chance acquaintance, in personal recognition of courtesies which the officer had shown him, is not in any sense a "present" from "any king, prince, or foreign state" or from "any foreign government," so as to fall within the constitutional inhibition or within that of section 3 of the act of 1881. (Mr. Hay, Sec. of State, to Mr. Houston, March 20, 1899, 235 MS. Dom. Let. 541.)

Before the adoption of the Constitution diplomatic representatives of the United States received from foreign governments the presents then usually given to a retiring minister. In a letter to Mr. W. T. Franklin, April 20, 1790, Mr. Jefferson, who was then Secretary of State, with the remark, "We are now about making up our minds as to the presents which it would be proper for us to give to diplomatic characters which take leave of us," inquired as to the practice of other nations, and particularly as to the form and esti-

mated value of the present given to Dr. Franklin on his departure from France. In his reply, April 27, 1790, Mr. Franklin stated that, so far as he could learn when in Europe, the retiring minister, after he had had his audience of leave, received a testimonial according to his rank, the estimation in which he was held, or the consideration entertained for his sovereign, and sometimes according to the importance of the business which he had transacted. These presents, said Mr. Franklin, consisted either of jewels, plate, tapestry, or porcelain, or sometimes of money. The present received by Dr. Franklin was, as he understood, more valuable than was generally given to a minister plenipotentiary, the King having expressly told Count Vergennes that he desired Dr. Franklin to be well treated. Mr. Franklin did not recollect the value of the present usually given by the court of France to an ambassador, but it was his recollection that the value of the present given to a minister plenipotentiary was about 1,000 louis d'ors. The present to Dr. Franklin "was supposed to be worth 1,500 louis d'ors, and consisted in a large miniature of the King set with 480 diamonds of a beautiful water, forming a wreath round the picture and a crown on the top." The presents to Messrs. Lee and Deane, who were commissioners, consisted, according to Mr. Franklin's recollection, of gold snuffboxes, curiously enamelled, with a miniature of the King or Queen set round with diamonds, and were each estimated at about 300 louis d'ors. Mr. Franklin added: "It is the custom when a diplomatic character has received his present, to make a present to the introductor and his assistant; and he is guided therein by the value of the present he receives. My grandfather, I think, gave the introductor a gold enamelled snuffbox of about 150 louis d'ors value; and understanding that it would be more agreeable to his assistant . . . to receive his present in money he sent him a rouleau of 50 louis d'ors."

Mr. Jefferson, Sec. for for. aff., to Mr. Franklin, April 20, 1790, 4 MS. Am. Let. 129; Mr. Franklin to Mr. Jefferson, April 27, 1790, id. 132. According to the practice at the Court of St. James's in 1817, presents were given to ambassadors of the value of 1,000 pounds, and to ministers of the second order, of 500 pounds. (3 J. Q. Adams's Memoirs, 527).

The first case brought before Congress under the Constitution was that of General Thomas Pinckney, of South Carolina, who, on leaving London and Madrid, respectively, where he had served as American minister, received a tender of the usual presents. He replied that he could not accept them without the consent of Congress, for which he would, however, in due time apply. In 1798 a resolution authorizing him to receive them passed the Senate, but it was rejected in the House, which unanimously adopted, however, a resolution declaring that the ground of the rejection was public policy.

5 Hildreth's History of the United States, 237.

See, also, the Hon. John W. Foster, in the *Washington Post*, Dec. 7, 1902, citing Annals of Cong. 5 Cong. Vol. II. pp. 1570, 1583, 1775.

The practice of making presents was adopted as a relief from the burdensome custom, which at one time prevailed, for the monarch to whom an embassy was sent to defray the cost of its living. It seems that the first state to oppose the practice of making presents was the United Provinces of the Netherlands, or Dutch Republic, which adopted in 1651 a regulation by which their ministers in foreign parts were forbidden "to take any presents, directly or indirectly, in any manner or way whatever"—a regulation severely censured by Wicquefort in his treatise on "The Embassador and his Functions," as implying on the part of its authors a disposition to "condemn the sentiments of all the other kings and potentates of the universe," as well as a "Pretension to found a Republick of Plato in their fens and marshes." (J. B. Moore, The Old Diplomacy and the New: The Alumni Bulletin of the University of Virginia, Aug. 1899, pp. 46, 50.)

"As the Constitution of the United States has left with Congress the exclusive authority to permit the acceptance of presents from foreign governments by persons holding offices under the United States, the President has thought it most proper that the ornaments addressed to Mrs. Humphreys by the Queen of Spain should be returned into your hands, without deciding how far the Constitution may or may not be applicable to this particular case. The casket will accordingly be herewith delivered."

Mr. Madison, Sec. of State, to Mr. Humphreys, Jan. 5, 1803, 14 MS. Dom. Let. 116.

Prior to 1801 it was the practice of Congress to make appropriations to defray the contingent expenses of Barbary intercourse. In that year, however, it became necessary to make an additional appropriation of $200,000 in order to fulfill engagements with the Mediterranean powers. It was afterwards deemed expedient annually to appropriate $50,000 to meet contingent demands. These demands comprised, (1) biennial presents, which custom required of all Christian powers maintaining consuls in the regencies; (2) presents on the change of any of the principal officers of government; (3) presents to the minister of marine and other principal officers to ensure favorable prices of naval or military stores sent out in payment of the stipulated annuities; (4) presents on the presentation of new consuls; (5) expenses of dragomans; (6) expenses of secretaries of consuls; (7) outfits of consuls.

When Mr. Hodgson was sent as consul to Tunis, he was allowed $3,000 for presents; but the allowance was accompanied with a notice that it would never again be renewed. It was in fact found to be unnecessary, "the usage in this respect which had been so long acqui-

esced in having been entirely done away with since the treaty between Tunis and France of 1830."

Mr. R. Smith, Sec. of State, to Gen. S. Smith, M. C., 15 MS. Dom. Let. 414; Mr. Fletcher Webster, Act. Sec. of State, to John Howard Payne, consul for Tunis, Sept. 8, 1842, MS. Inst. Barbary Powers, XIV. 29.

"The acceptance of . . . presents by ministers of the United States is expressly prohibited by the Constitution; and even if it were not, while the United States have not adopted the custom of *making* such presents to the diplomatic agents of foreign powers, it can scarcely be consistent with the delicacy and reciprocity of intercourse between them, for the ministers of the United States to receive such favors from foreign princes as the ministers of those princes never can receive from this government in return. The usage, exceptionable in itself, can be tolerated 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. J. Q. Adams, Sec. of State, to Mr. Rush, minister at London, Nov. 6, 1817, House Report 302, 23 Cong. 1 sess. 3.

"The practice of interchanging presents of jewelry or other articles of pecuniary value, which is likewise customary among European sovereigns upon the conclusion of treaties, would probably be considered as applicable to this occasion also. The Constitution of the United States does not admit that their minister should accept of any such presents, but as the minister of the Emperor, and the subordinate officers employed in drawing or copying papers, will be charged by this transaction with certain duties for which they have no compensation in their ordinary appointments, and as they usually consider these gratuities as perquisites of office, if after the conclusion of the business you should think it advisable to make any such customary present either to the minister or to the subalterns, you are authorized to make them. You will understand that the presents hereby meant are customary presents made and accepted with the knowledge and consent of the Emperor. It is known to him and to his government that the ministers of the United States can receive none."

Mr. Adams, Sec. of State, to Mr. Middleton, min. to Russia, No. 1, July 5, 1820, MS. Inst. U. States Mins. IX. 18.

In 1830 Charles Rhind, who had acted as one of the commissioners of the United States in concluding the treaty of commerce and navigation with Turkey of the 7th of May in that year, obtained permission from the Ottoman authorities to export to the United States two Arabian horses. Subsequently the Sultan, hearing that Mr. Rhind was on the eve of making a purchase, directed that four horses be sent him as a gift. Mr. Rhind being advised, as he stated, that a

refusal of the horses would be considered an insult by the Sultan, but being desirous of avoiding any appearance of an unlawful acceptance of presents from a foreign ruler, shipped the horses to the United States as a commercial adventure, in the name and for account of the owners of the vessel. On arriving in the United States, Mr. Rhind addressed a letter on the subject to President Jackson. The horses were then in the possession of the owners of the vessel, but Mr. Rhind stated in his letter that if the United States had a claim for their value he presumed that the owners would pay it over should the horses sell for more than the expenses attending their transportation. As for himself, he said that he was ready to transfer to the United States any interest he might have in the horses, should it be required. On February 22, 1831, President Jackson communicated Mr. Rhind's letter to Congress without making any recommendation. Congress took no action on the matter, and Mr. Rhind, apparently feeling that he had been badly treated, manifested a disposition to assert his individual interests. President Jackson, however, sternly discountenanced such action, and at his request Mr. Rhind executed a release of all his interests to the owners of the vessel and requested them to unite in the sale of the horses, and after deducting the expenses to pay over the balance to the order of the President. The horses were sold at New York by public auction for the aggregate sum of $1,990, which seems not to have been enough to defray the expenses.

Message of President Jackson, Feb. 22, 1831, transmitting to Congress Mr. Rhind's letter of Dec. 10, 1830, Cong. Debates (1830–31), VII. 782; Reminiscences of James A. Hamilton, 212, 213, 216–219, 233–234.

November 7, 1833, Mr. Leib, United States consul at Tangier, reported that the Emperor of Morocco had presented him with "an enormous lion and two fine horses"—the lion being intended for the government of the United States and the horses for himself—which he was keeping at the consulate, at considerable expense, as the property of the United States. He "earnestly" requested instructions concerning them. President Jackson, January 6, 1834, communicated the letter to Congress for its consideration, and in so doing invited attention to the presents which had previously been made to public officers of the United States, and which had been deposited, by order of the government, in the Department of State, the constitutional provision having been considered as satisfied by the surrender of the articles to the government. President Jackson also stated that he had directed instructions to be given to all American representatives abroad, requiring that in future, unless previously authorized by Congress, they should not, under any circumstances, accept presents of any description from any foreign state.

Congress, by a joint resolution of Feb. 13, 1835, authorized the President to cause the two horses to be sold at public auction and the

proceeds paid into the Treasury, and the lion to be presented "to such suitable institution, person, or persons" as he might designate.

Message of President Jackson, Jan. 6, 1834, H. Ex. Doc. 28, 23 Cong. 1 sess.; Joint Res., 4 Stat. 792. See, also, joint resolution, July 20, 1840, 5 Stat. 409.

"I am directed by the President to instruct the ministers, consuls, and other diplomatic and commercial agents of the United States, that it is required of them that, in future, they will not, unless the consent of Congress shall have been previously obtained, accept, under any circumstances, presents of any kind whatever, from any king, prince, or foreign state." (Circular, Mr. McLane, Sec. of State, Jan. 6, 1834, H. Report 302, 23 Cong. 1 sess. 4.)

See report of Mr. Archer, Com. on For. Aff., March 4, 1834, H. Report 302, 23 Cong. 1 sess.

See, also, Mr. Forsyth, Sec. of State, to Mr. Swartwout, collector at New York, Sept. 20, 1834, 27 MS. Dom. Let. 45; Mr. Forsyth to Capt. Riley, Nov. 4, 1834, id. 97; Mr. Forsyth to Mr. Swartwout, Nov. 15, 1834, id. 114.

May 2, 1840, a firm of merchants in New York advised the President that the ship *Sultanee* and cargo, belonging to the Imaum of Muscat, had just arrived from Zanzibar, and that the commander, Ahmet Ben Haman, was charged to deliver to him two Arabian horses, one case of ottar of roses, five demijohns of rose water, one package of cashmere shawls, a Persian rug, a box of pearls, and a sword. The merchants, in reply, were requested to inform Ahmet Ben Haman that the President was precluded by the Constitution from accepting the presents for his own use, but that he would make such other disposition of them as would best comport with the wishes of the Sultan. Under the circumstances the commander of the ship thought that he could best carry out the Imaum's intentions by asking that the presents be considered as intended for the Government of the United States. May 21, 1840, President Van Buren communicated the correspondence to the Senate. By a joint resolution of July 20, 1840, he was authorized to dispose, in such manner as seemed fit, of such of the presents as could not be conveniently deposited or kept in the Department of State and to cause the proceeds to be placed in the Treasury.

Subsequently, in 1843, the Imaum presented to the President, through the American consul at Zanzibar, two more Arabian horses. The disposition of this gift was submitted to Congress; and by a joint resolution of March 1, 1845, the President was authorized to cause the horses to be sold by public auction and the proceeds to be placed in the Treasury.

Message of President Van Buren, May 21, 1840, S. Doc. 488, 26 Cong. 1 sess.; joint resolution, July 20, 1840, 5 Stat. 409.

Message of President Tyler, May 10, 1844, H. Ex. Doc. 256, 28 Cong. 1 sess.; joint resolution, March 1, 1845, 5 Stat. 730.

"While recognizing to the fullest extent the eminent services of Captain Martinez, of the Chilian ship of war 'Meteor,' in rescuing the survivors of the crew of the United States merchant ship 'Manchester,' under circumstances of extreme distress, the uniform practice of this government forbids the presentation to that officer, in its own name, of any tangible token of this recognition. As all officers of the United States are forbidden to receive such rewards from foreign governments for actions or services of striking merit, it is deemed delicate not to confer obligations in this respect upon foreign officers, which their governments could not, under similar circumstances, be permitted to reciprocate.

"In the mercantile marine no such difficulty exists, and Congress, as you are aware, has placed a liberal fund at the disposal of the President for the purpose of enabling him to offer suitable testimonials to those brave men who so often imperil their own lives in behalf of others."

Mr. Marcy, Sec. of State, to Mr. Starkweather, Sept. 1, 1855, MS. Inst. Chili, XV. 125.

10. JOINT ACTION.

§ 652.

See, infra, § 917.

"The policy of this Government is distinctly opposed to *joint* action with other powers in the presentation of claims, even when they may arise from an act equally invading the common rights of American citizens and the subjects of another state residing in the country to whose government complaint is made. While this Government is ready to secure any advantage which may be derived from a coincident, and even identical representation with other powers whose cause of complaint may be common with our own, it is averse to joint presentation, as the term is strictly understood. A sufficient reason for this is found in the consideration that a truly joint demand for redress in a given case might involve a joint enforcement of whatever remedy might become imperative in the event of denial; and this Government is indisposed to contemplate such entanglement of its duties and interests with those of another power."

Mr. Bayard, Sec. of State, to Mr. Scott, Oct. 14, 1886, MS. Inst. Venezuela, III. 540.

See Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, No. 428, confid., Oct. 15, 1886, MS. Inst. Gr. Br. XXVIII. 142, citing Mr. Fish, Sec. of State, to Gen. Schenck, min. to England, No. 5, confid., June 2, 1871.

For an invitation of coincident action in Venezuela, in 1899, to put an end to the practice of the Venezuelan Government in requiring ship's papers to be delivered to the local authorities, see Mr. Hay, Sec. of State, to Mr. Loomis, Am. min., tel., Nov. 18, 1899, For. Rel. 1899, 791.

With reference to a joint note to the Ecuadorian government signed by the American minister at Quito, in concert with his British and German colleagues, representing to the Ecuadorian government the necessity of so amending its laws as to recognize the validity of non-Catholic marriages, the Department of State said: "As a general thing the Department discourages the united action of its representatives with those of other powers in the form of a joint note, except when such a course is specially instructed, preferring the device of similar but independent notes of equal date, each to be presented by the minister whose signature it bears."

Mr. Day, Sec. of State, to Mr. Sampson, min. to Ecuador, No. 28, June 13, 1898, MS. Inst. Ecuador, I. 535.

As to the action of Mr. Jones, American minister to Colombia, in uniting with the representatives of France, Great Britain, and Peru in a joint formal protest to the Colombian Government against a decree of the governor of Cauca of December 31, 1860, see Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, No. 19, Feb. 19, 1862, MS. Inst. Colombia, XVI. 28. See, also, infra, § 917.

11. Good Offices for Citizens of Third Countries.

(1) General Principles.

§ 653.

The Government of the United States has from time to time, upon the request of friendly powers, authorized its diplomatic and consular officers voluntarily to extend, with the consent of the government of the country in which they reside, their protection to the citizens of third powers at places where the latter had no official representatives. Ordinarily such an arrangement has been exigent and temporary; but, whether temporary or, as in the case of Swiss citizens, more or less permanent, it has been understood by the United States simply to authorize its representatives, with their own consent, to employ their services and good offices. 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 which he may perform for its citizens. He is responsible to it for the discharge of such duties, and it 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.

See Inst. to Dip. Off. of the U. S. (1897), sec. 172, p. 66.

For the performance of such services diplomatic and consular officers of the United States are forbidden to accept, without the previous authority of Congress, any compensation, present, or favor from the foreign government. (Inst. to Dip. Off., secs. 71, 72, p. 27, citing Constitution, Art. I., sec. 9, cl. 8, and Rev. Stat. sec. 1751.)

See Mr. Wharton, Act. Sec. of State, to Count Crenneville, Aust. chargé, July 29, 1889, MS. Notes to Austria, VIII. 598.

A minister plenipotentiary of the United States can not, without the consent of Congress, accept a similar commission from another power, though he is not prohibited from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer thereof.

Akerman, At. Gen., 1871, 13 Op. 537.

The protection here referred to is not to be confused with the system that prevails in Mohammedan countries in the East. The latter subject has already been discussed, and although the United States has endeavored to confine the operation of the system, so far as its own representatives were concerned, to the narrowest possible limits, yet even this Government has on various occasions asserted the special privileges which custom has sanctioned in the countries in question. As a rule, however, the Government of the United States has enjoined upon its representatives in Turkey, as well as in other countries in which similar conditions prevail, the refusal to extend protection and immunity to persons other than citizens of the United States, and official dependents or employees of the respective legations and consulates.

Mr. Cass, Sec. of State, to Mr. Williams, Feb. 20, 1858, MS. Inst. Turkey, I. 408; Mr. Seward, Sec. of State, to Mr. Morris, Dec. 23, 1867, id. II. 202; Mr. Fish, Sec. of State, to Mr. MacVeagh, April 18, 1871, id. II. 329.

For the full discussion of this subject, see supra, §§ 287–290.

"A very important and useful feature of the status of foreigners in Turkey is the solidarity among them. Foreigners have for centuries been classed under the generic name of Franks. Their rights and privileges are analogous, and the protection of the representatives of one great power has been not infrequently extended to the citizens resident in Turkey of another. The files of your legation will afford many instances of recourse to the good offices of British consuls in Turkish dominions for the protection of our citizens in quarters where no consular representation of the United States has been established. This friendly aid is cheerfully given whenever sought. The exercise of such protection is an inherent Frankish right, and resort to Frankish protection is in like manner the prerogative of every Frank. Indeed, the rule in Turkey recognizes the right of any Frank to be enrolled in the protected list of any Frankish consulate, whether of his own nationality or not."

Mr. Foster, Sec. of State, to Mr. Thompson, min. to Turkey, Nov. 29, 1892, For. Rel. 1892, 609, 612.

With reference to the application of a Mexican citizen in Peru for protection, Mr. J. Randolph Clay, American minister at Lima,

inquired how far United States ministers should use their friendly offices with the governments to which they were accredited in favor of foreigners whose nation was not represented by a diplomatic agent or consul. Mr. Marcy replied: "Any good offices which a minister may undertake to render under such circumstances must be entirely of a personal character, or such as may be demanded by humanity or the pressing urgency of the case; but in rendering such services the minister must exercise very great prudence, lest he give offence to the government near which he resides, or compromise his own immunities by seeming to interfere with the administration of the internal affairs of that government."

Mr. Marcy, Sec. of State, to Mr. Clay, min. to Peru, No. 23, Dec. 28, 1854, MS. Inst. Peru, XV. 150.

"In countries in a state of revolution, and during periods of public excitement, it is the practice of modern times for the foreign representatives residing there to interpose by the exertion of their influence for the protection of the citizens of friendly powers, exposed to injury or danger, and left without any minister of their own country to watch over them. It is a commendable procedure, humane indeed, to which it is difficult to discover any well-founded objection. . . . The President would not hesitate to visit with marks of his displeasure any American minister who should have it in his power to afford protection to the persons or property of the citizens of a friendly nation, placed in peril by revolutionary commotions, and having no national representative to appeal to, and should fail to exert his influence in their behalf."

Mr. Cass, Sec. of State, to Mr. Dallas, May 12, 1859, MS. Inst. Gr. Britain, XVII. 190.

See, also, Mr. Cass, Sec. of State, to Mr. de Ealo, Jan. 15, 1859, 49 MS. Dom. Let. 502.

The instruction to Mr. Dallas, supra, related to the action of the British minister in Mexico in declining to interpose for the protection of the persons and property of American citizens against the acts of the Miramon Government, which had revoked the exequatur of the American consul at the city of Mexico because the United States had recognized the Juarez Government. (Lawrence's Wheaton (1863), 373–374.)

In 1868 the American minister at Constantinople, having been requested by the departing Greek minister to protect Greek interests, consented to do so, subject to the sanction of the Department of State. Mr. Seward replied: "During the suspension of diplomatic relations between Turkey and Greece, you may informally lend your good offices to either government for communicating with the other, in no case, however, committing or compromising the United States. You will adhere to my former instructions concerning protection and

asylum in Turkey, so as to avoid entangling complications, and you will fully report every proceeding on your part."

Mr. Seward, Sec. of State, to Mr. Morris, min. to Turkey, No. 202, Dec. 31, 1868, MS. Inst. Turkey, II. 242.

During the Russo-Turkish war, Russian interests in Turkey were committed to the German embassy. See, in this relation, Mr. Evarts, Sec. of State, to Mr. Maynard, min. to Turkey, No. 133, June 18, 1877, MS. Inst. Turkey, III. 246.

As to the war between Greece and Turkey in 1897, see Mr. Sherman, Sec. of State, to Mr. Terrell, min. to Turkey, tel., April 20, 1897, MS. Inst. Turkey, VII. 79.

With reference to an order of the Ottoman Porte requiring all subjects of Greece to depart from the Empire in fifteen days, Mr. Terrell, United States minister at Constantinople, on April 24, 1897, expressed the hope that the time would be extended for the departure of a number of peaceful Greeks who were in the employ of American citizens. It was represented that their abrupt expulsion would result in serious pecuniary loss, as in the case of the Stamford Manufacturing Company, among whose employees at Alexandretta were three Greeks, one of whom had $40,000 of the company's property in his hands unaccounted for, and two were engineers whose departure would cause the factory to be closed.

May 7, 1897, Mr. Terrell reported to the Department of State that permission had been given for the Greek agent of the Stamford Manufacturing Company to remain for a time to settle his accounts, and that a general order for further extension of time for Greeks to depart had been issued by the Porte. A disposition was shown to make special exemptions for individuals on the application of diplomatic representatives. (For. Rel. 1897, 585–588.)

"With reference to your repeated suggestion as to the advisability of concerted action between British and American consulates throughout the Ottoman Empire, I have to say that the usual rule of this Department in authorizing one of its diplomatic or consular representatives abroad to take charge of the interests of unrepresented citizens or subjects of another nation, is to make acceptance of the friendly trust conditional on the acquiescence of the government or authority to which our agent is accredited. If the consent of the government of the country be necessary to enable one of our consuls to use his good offices in behalf of the citizens or subjects of another nation, it is expected that such consent will be sought, just as it is when our consul takes temporary charge of the affairs of a consulate of another country which may for any cause become vacant for the time being.

"Inasmuch as the consul temporarily acting does not become the official representative of another government, recognition of his competency to exert his friendly offices does not involve application for or issuance of an exequatur, but merely the usual courteous acquiescence of the government of the country, followed by appropriate notification to its local officers.

"You will communicate these views to your British colleague and confer with him further upon the subject."

Mr. Adee, Acting Sec. of State, to Mr. Leishman, min. to Turkey, Aug. 7, 1901, For. Rel. 1901, 523.

This instruction was in reply to Mr. Leishman's No. 60, of July 22, 1901, enclosing copy of a letter of the 17th of July, from Mr. Gilbertson, British consul at Broussa, who stated "that although the British Government authorized its consuls to give friendly assistance and support to American citizens in places where there is no United States representative, and which they have done for the last twenty years, the local authorities have lately, under the pretext that they have no order from the minister of foreign affairs to recognize us as being in charge of American interests, commenced not only to contest our right to assist American citizens, but insist upon the latter applying directly to them for any assistance they may need. Under these circumstances your excellency will no doubt see the necessity of instructions being sent to the vali in the sense required." (For. Rel. 1901, 522.)

As to the protection of American interests by the British consular representatives at Tabriz and Van, in 1898, see For. Rel. 1898, 355–356, 356–358.

As to the exercise by the British agent and consul-general in Bulgaria of good offices in behalf of American citizens, see For. Rel. 1894, 247. See, also, Mr. Uhl, Act. Sec. of State, to Mr. Bayard, amb. to England, No. 223, Nov. 29, 1893, 30 MS. Inst. Gr. Br. 412.

"Your No. 154, dated at Guatemala, May 17th, is accompanied by a copy of correspondence with Mr. Friedrich Augener, consul of Germany, and with the minister of foreign affairs, in regard to the extension of protection to German subjects in Guatemala until the arrival of the gentleman who is to assume the charge of that consulate.

"Mr. Augener's note to you says that you have 'consented to watch over the interests of the German subjects during the interval mentioned,' &c. In your letter to the minister of foreign affairs, referring to Mr. Augener's request, you speak of it as a 'request that the citizens of his country in Guatemala may be taken under the protection of (your) this legation,' while the minister of foreign affairs considers that you have been 'desired to take charge of the German subjects residing,' &c.

"The nature of the duties which you are to assume with regard to these German residents in Guatemala is best defined in the expression used by Mr. Augener in his request addressed to you. It is understood to amount to the granting, during the interval referred to, to such Germans as may have occsaion to seek your aid, and with the consent of the Government of Guatemala, of your good services in their behalf. In the discharge of such duties as may devolve upon you, in this relation, you are to be responsible to the Government of

Germany, and that Government, and not the Government of the United States, is responsible for your acts relative thereto.

"In view of the probability that there was not sufficient time to consult your Government and obtain its assent before answering the request made of you, your acceptance of the charge as above explained is approved."

Mr. Fish, Sec. of State, to Mr. Williamson, min. to Guatemala, No. 83, June 18, 1874, MS. Costa Rica, XVII. 179.

See, also, Mr. Fish, Sec. of State, to Mr. Peirce, min. to Hawaii, No. 54, Nov. 18, 1871, MS. Inst. Hawaii, II. 219.

When diplomatic intercourse between Brazil and Portugal was suspended, in 1894, by the former Government's recalling its minister from Lisbon and giving passports to the chargé d'affaires of Portugal, the Government of the United States, on being requested to authorize its minister at Lisbon to protect citizens of Brazil during the suspension of diplomatic relations, cabled to its minister at Lisbon "to use his friendly offices, with the acquiescence of the Portuguese Government, for the protection of Brazilian citizens in Portugal or the Portuguese dependencies during the present suspension of diplomatic relations between those countries."

Mr. Gresham, Sec. of State, to Mr. Mendonça, May 31, 1894, For. Rel. 1894, 64.

The minister of the United States at Lisbon subsequently reported that the minister of foreign affairs had told him that in case of need during the suspension of diplomatic relations, it would be entirely agreeable to the Government to have Brazilian citizens, resident in Portugal, placed under the protection of the American minister. (For. Rel. 1894, 72.)

"A serious tension of relations having arisen at the close of the war between Brazil and Portugal by reason of the escape of the insurgent Admiral da Gama and his followers, the friendly offices of our representatives to those countries were exerted for the protection of the subjects of either within the territory of the other." (President Cleveland, annual message, Dec. 3, 1894, For. Rel. 1894, viii.)

"I have to inclose a copy of a note from the Chinese minister, of the 16th instant, concerning the petition addressed to him by Chinese subjects residing in Guatemala.

"He asks, in consequence of the absence of any treaty relations with that Republic permitting Chinese to appoint consular representatives therein, that you may be allowed to exercise your good offices in behalf of the Chinese subjects living in Guatemala.

"This is not an unusual request, and the good offices of the diplomatic and consular representatives of the United States have been employed for the protection of Chinese elsewhere, as well as other foreigners. The interests of our own people in parts of Turkey,

where no United States consular officer resided, have been looked after by British consular officers.

"In the present instance your efforts are to be confined to the friendly intervention in case of need for the protection of the Chinese in their person and property from unjust and harsh treatment. You are not to hold any representative character or function as respects the Chinese Government, and are to act informally. Before taking any steps in the matter, however, you should represent to the Guatemalan Government the wish of the Chinese minister, and the willingness of your Government to accede thereto, as herein indicated, provided the assent of the Guatemalan authorities is entirely favorable."

Mr. Gresham, Sec. of State, to Mr. Young, min. to Guatemala, Aug. 18, 1894, For. Rel. 1896, 377.

See, also, For. Rel. 1894, 175, 331, 332.

A similar request was made in behalf of Chinese subjects residing in Nicaragua, Salvador, and Costa Rica. Costa Rica declined to accede to it, on the ground that the number of Chinese there was small, and that the immigration of Chinese was forbidden by law. (Mr. Olney, Sec. of State, to Chinese Leg. No. 46, Nov. 3, 1896, MS. Notes to China, I. 519.)

The minister for foreign affairs of Guatemala having considered it due to his Government that the request should, as a matter of courtesy, be made by the Chinese Government or by its representative in Washington, the latter addressed to him a sealed communication, which was transmitted through United States diplomatic channels, conveying such a request. It appears, however, that the good offices of the United States were previously recognized. (For. Rel. 1896, 377–379.)

See, as to a certificate to be given to Chinese in Guatemala, in conformity with the laws of the Republic, For. Rel. 1896, 379–380.

In protecting Chinese subjects in Guatemala, the minister of the United States was instructed to endeavor, "by way of good offices," "to secure for them the same degree of protection from tort" as he "could demand of right for an American citizen similarly circumstanced." His discretion did not extend to the "presentation of claims;" and, if any were preferred, he was to report them to the Department of State, which would bring them to the knowledge of the Chinese Government.

Mr. Loomis, Acting Sec. of State, to Mr. Combs, No. 16, March 16, 1903, For. Rel. 1903, 573.

As to protection of Chinese in Nicaragua and Salvador, see For. Rel. 1897, 94–97, 425–426.

Mr. Olney, Secretary of State, in an instruction to Mr. Baker, United States minister to Nicaragua and Salvador, of February 6, 1897, suggested that a certificate for the Chinese might be prepared

in consultation with the Salvadorian minister of foreign affairs, and that a form like this probably would suffice:

"I, ——— ———, of the United States of America, certify: That ——— ——— claims to be a subject of the Emperor of China, resident in Salvador, and that upon proving his status as such Chinese subject he is under the protection of the Government of the United States and entitled to the good offices of the diplomatic and consular officers thereof in case of need, in pursuance of an understanding between the Governments of Salvador and China to that end."

For. Rel. 1897, 426.

As to the protection of Swedish and Norwegian vessels in Nicaraguan ports, see Memorandum, April 14, 1899, MS. Notes to Swedish Leg. VIII. 125.

March 12, 1895, the United States instructed its ambassador at Paris as follows: "At the request of the Venezuelan Government you will, with the acquiescence of the Government of France, upon the retirement of the Venezuelan minister and upon application by him, afford your friendly good offices for the protection of Venezuelan citizens in France; but you will not represent Venezuela diplomatically, nor will consuls under you act in official representation of Venezuela." The French Government "acquiesced in the proposed arrangement, provided, however, that the pending diplomatic questions would have to be settled between France and Venezuela themselves." This proviso was in accord with the instruction that the embassy was not to represent Venezuela diplomatically.

Mr. Uhl, Act. Sec. of State, to Mr. Vignaud, chargé, tel., March 12, 1895, For. Rel. 1895, I. 424; Mr. Vignaud, chargé, to Mr. Gresham, Sec. of State, March 22, 1895, For. Rel. 1895, I. 424.

December 2, 1871, Mr. Pile, the American minister at Caracas, was instructed that he might, with the consent of the Venezuelan Government, present certain claims of Italian subjects. The Venezuelan Government consented to his acting in that capacity. (Mr. Fish, Sec. of State, to Baron Blanc, Feb. 1, 1876, MS. Notes to Italy, VII. 281.)

August 5, 1901, hostilities between China and Venezuela seeming to impend, Mr. Russell, United States chargé at Caracas, was authorized "to take charge of Colombian interests by way of good offices, without assuming any representative character," if the Colombian minister requested him to do so and Venezuela acquiesced. The Colombian minister left Caracas a few days later, after delivering the keys of the legation building to Mr. Russell and leaving in his care the archives, which were sealed up in boxes or parcels, and the legation seals, official newspapers, and books. Mr. Russell, who was charged by the minister with no other function, assumed this custo-

dial duty, and so informed the Venezuelan Government, which acknowledged his communication, without express assent or dissent.

For. Rel. 1901, 551–553.

In the civil war in Chile in 1891, the British Government, on the request of that of Germany, directed that the protection of British ships of war in Chilean waters be extended to German subjects. (Parl. Papers, Chile, No. 1 (1892), pp. 8–9.)

In May, 1897, the minister of the United States at Teheran interposed unofficially his good offices in behalf of the Jews in that city, who were then being subjected to mob violence at the hands of the Mohammedans. His course was approved with the statement that his "good offices in this somewhat delicate question seem to have been discreetly used in the interest of common humanity and in accordance with the precepts of civilization."

Mr. Sherman, Sec. of State, to Mr. McDonald, min. to Persia, July 8, 1897, For. Rel. 1897, 431.

See, also, Mr. Rives, Act. Sec. of State, to Mr. Pratt, min. to Persia, No. 147, dip. series, Oct. 24, 1888, MS. Inst. Persia, I. 236.

In April, 1899, during a revolution in Bolivia, Mr. Bridgman, United States minister at La Paz, was, on the request of the British Government, instructed to protect British subjects and interests if necessary, and to notify the Bolivian authorities accordingly. In notifying the Bolivian authorities, Mr. Bridgman, as he stated, "was careful to explain that, with my secretary, Mr. Zalles (also United States consul), we were asked to temporarily assume the duties of chargé d'affaires, I as diplomatic interests might require and Mr. Zalles as consular interests might require, . . . until English consular officers were appointed." The Bolivian secretary of foreign relations replied: "It will be very satisfactory to me to receive the usual documents which will accredit your excellency and Mr. Zalles in this new character, and that will procure me the pleasure to cultivate with your excellency double diplomatic relations." Concerning this correspondence, the Department of State wrote: "It is somewhat unfortunate that in your request to the Bolivian Government you announced your temporary assumption of the duties of British chargé, and also Mr. Zalles's temporary assumption of British consular representation. So presented, the Bolivian Government may not unnaturally have attached a formality to your official position which would not have been the case had you followed the general rule of stating that you had been asked to continue your good offices in behalf of British subjects and interests pending the designation of British officers. The object was, not to invite your recognition in the character of British chargé d'affaires ad interim, but to ask that in the absence of any British representative you, as the United States min-

ister, might be permitted to speak, unofficially and by way of good offices, in favor of any British interests which might appear to deserve that kind of mediation on your part. The latter is the usual way of proceeding when unrepresented foreign interests are provisionally intrusted to a representative of the United States in a foreign country. The officer whose good offices are thus permitted is in no sense an officer of the unrepresented government—he does not report to it nor take its orders. His communication with it is indirectly effected through his own government. Upon your making this clear to the Bolivian government it is thought there can be no difficulty in the way of your exerting your good offices in the manner asked by the British government and contemplated by the instruction sent you."

Mr. Hay, Sec. of State, to Mr. Bridgman, min. to Bolivia, Jan. 4, 1900, For. Rel. 1899, 109.

See, also, For. Rel. 1899, 342–344.

See further, Mr. Hay, Sec. of State, to Lord Pauncefote, British amb., No. 1649, Jan. 4, 1900, MS. Notes to Br. Leg. XXV. 43; Mr. Hay, Sec. of State, to Mr. Bridgman, May 21, 1900, MS. Inst. Bolivia, II. 146.

As to the use of good offices by the United States minister in Bolivia, in behalf of George Melville, a British subject imprisoned in that country, see For. Rel. 1901, 24.

As to the protection of Italian subjects on the west coast of South America, during the Chile-Peruvian war, see Mr. Evarts, Sec. of State, to Mr. Thompson, Sec. of Navy, Oct. 18, 1880, 134 MS. Dom. Let. 649.

(2) CASE OF SWISS CITIZENS.

§ 654.

"The undersigned, minister of the Swiss Confederation, has repeatedly had the honor to have verbal conferences with you relative to the question of the protection of Swiss citizens by the representatives of the United States in those countries in which the Confederation has no diplomatic or consular representative, and the undersigned has not failed to inform his Government, on each of these occasions, of the kindness with which you have expressed yourself.

"The President of the Confederation has instructed the undersigned to convey to you his warmest thanks for the readiness with which you have been pleased to comply with our wishes in this matter, and to avail himself, at the same time, of this occasion to express to you the thanks of the federal council for the valuable services which have been rendered since 1871 by your representatives to Swiss citizens. The undersigned assures you that the federal council fully appreciates the good will and the friendly sentiments which have been manifested by the United States Government in this matter.

"With regard to the scope of the protection hereafter to be extended to our citizens by your representatives, I have, however, the honor, in obedience to the instructions of the President of the Confederation, to remark that the views expressed by you on this subject do not appear to accord in all respects with those of the federal council, nor, as we think, with the position taken in relation to this matter by the United States Government in the year 1871.

"In the opinion of the President of the Confederation, protégés should be treated in all respects as if they were citizens of the protecting country. A Swiss, by placing himself under the protection of the United States, becomes assimilated, in the opinion of the President of the Confederation, while he is under that protection, to a citizen of the United States; his character as a Swiss is for the time being not to be considered, and, so far as the foreign state is concerned, he is covered by the United States flag. Diplomatic protection, if it is to have any real meaning, must not be conditional or limited; it must be more than an unofficial mediation in behalf of such claims for indemnity as may arise; otherwise it would be of no avail when most needed—that is to say, at the time when the violated rights of the protégé are to be asserted.

"This view of the scope of the protection to be afforded by no means involves any direct intercourse of the federal council with the diplomatic or consular officers of the protecting state, and there consequently seems to be no ground for the assumption that those officers by protecting Swiss citizens assume the rôle of officers of the Swiss Confederation. It might rather be assumed that a contrary state of things took place, since a Swiss, who places himself under foreign protection, loses, to a certain extent, the outward characteristics of his nationality.

"The President of the Confederation does not, of course, absolutely decline to accept the view that we can not, by any means, claim the protection of our citizens by the representatives of the United States as a right. He must, however, regard it as his duty to inform himself concerning the nature and scope of the protection of Swiss citizens which has been guaranteed to us."

Col. Frey, Swiss min., to Mr. Bayard, Sec. of State, April 15, 1887, For. Rel. 1887, 1074.

"I have the honor to acknowledge the receipt of Colonel Frey's note of April 15, last, on the question of the protection of Swiss citizens by the representatives of the United States in those countries where the Confederation has no diplomatic or consular representative, and conveying the thanks and appreciation of the President of the Confederation and of the federal council for the services which have been rendered in this way by our representatives since 1871. . . .

"As regards the scope of such past or future protection, a study of the instructions issued to our foreign representatives does not suggest any difference in the assistance rendered to the Swiss nation over and above any other which might stand in need of similar services, nor does it appear that such services or protection went beyond the authority given to the minister in his discretion to use his good offices for Swiss citizens when in trouble. I do not find myself in a position to altogether accept the view, if I correctly understand it, of your President that 'protégés should in all respects be treated as if they were citizens of the protecting country; that a Swiss under such circumstances becomes assimilated to a citizen of the United States; that his character as a Swiss is for the time not to be considered; that diplomatic protection must not be conditioned or limited, and must be something more than an unofficial mediation on behalf of such claims for indemnity as may arise.' All this is to be accomplished, you also suggest, without any direct correspondence between our representatives and the Swiss federal council, the more especially as those of your citizens who are thus protected are supposed by your Government to a certain extent to 'lose the outward characteristics of their nationality.'

"The practice as regards this question in the past appears to be based on a circular addressed to our foreign representative by this Department on the 15th of December, 1871, explanatory of one of June, 1871, as follows:

"'You are informed that you are not expected to become a diplomatic or consular officer of the Swiss Republic, which is prohibited by the Constitution to officers of the United States who are citizens.

"'The intention is that you should merely use your good offices in behalf of any Swiss in your vicinity who might request them in the absence of a diplomatic or consular representative of Switzerland, and with the consent of the authorities where you reside.'

"This was repeated in a circular issued by Mr. Secretary Evarts, dated the 28th June, 1877, during the hostilities between Russia and Turkey, as follows:

"'You are consequently authorized to continue the exercise of your good offices in behalf of Swiss citizens under the limitations prescribed by my predecessor of June 16 and December 15, 1871.'

"Another circular, dated March 17, 1882, authorized our diplomatic and consular agents to draw on this Department for any expenses incurred in protecting Swiss citizens.

"Instructions to our minister in China, dated July 25, 1872, stated:

"'The protection referred to must necessarily be confined to the personal and unofficial good offices of such functionaries; although, when exercised to this extent merely, this can properly be done only with the consent of the Chinese Government. . . . Protection of

Swiss citizens in China, such as was contemplated by the circular adverted to, by no means necessarily implies official interposition in their behalf. They may have efficient protection by personal application in their favor to Chinese or other authorities in that country.'

"I find that on August 26, 1885, our consul-general at Panama was instructed to use the same good offices for the protection of Chinese subjects on the Isthmus as were covered by the conditions and rules for the use of good offices by our agents in behalf of Swiss citizens in the above-named circular, it being distinctly understood that the United States consular officer should not thereby become a consular officer of the Chinese Government, and that the consent of the Colombian Government should first be obtained.

"On November 9, 1885, in the case of a claim of a Turkish citizen against the Government of Colombia, this Department instructed our consul-general at Panama:

"'It must be distinctly understood that your friendly negotiation is only an act of courtesy and an exercise of good offices, which may or may not meet with a satisfactory response on the part of the Colombian Government. The failure of any response or action on the part of that Government could not be regarded by you as a ground of offense, or be followed by more rigorous measures. Your services in the case should be limited to the simple transmission of the claim or request for information, without any examination or discussion of its justness or presentation of reasons why it should be paid.'

"A case more directly in point is the note to your own legation of October 8 last, in which I had the honor to inform you that our minister at Bogota would be instructed to present the claim of J. Bauer, a Swiss citizen residing at Colon, to the Colombian Government, with the understanding that in so doing the minister is to act as the agent to hand over the papers, and not as the representative of Switzerland. Essentially the same instructions were given on the same subject to the same minister on October 19, 1886.

"It is evident that anything further than this, on behalf of other nations, might involve this government in great complications with the government to which the protecting minister or consul was accredited, and on which, as regarded our own affairs, we had no disputed claims, and might eventually be of as little benefit to the Swiss nation as to the United States."

Mr. Bayard, Sec. of State, to Maj. Kloss, Swiss chargé, July 1, 1887, For. Rel. 1887, 1076.

"I have received instructions from my government to convey to you its warmest thanks for your aforesaid note of July 1 and for the friendly sentiments therein expressed. Although the Federal Council is unable fully to share the view stated in your note with regard to the nature and scope of the relation between the protecting state and persons commended to its protection, it has nevertheless been glad to be in-

formed, in a definite manner, by your note what your interpretation of the relation in question is. While the Federal Council now considers this matter as settled, it desires to return its thanks for your kindness in expressing your willingness to authorize the consular representatives of the United States to use their good offices in future in behalf of Swiss citizens, of which kindness the Federal Council proposes to avail itself, if there shall be any necessity therefor." (Col. Frey, Swiss min., to Mr. Bayard, Sec. of State, Oct. 24, 1887, id. 1077, 1078.)

As American consuls are not authorized to incur expense in relieving destitute American citizens (not being seamen), neither are they authorized to incur expense in relieving citizens of Switzerland. (Mr. Hunter, Act. Sec. of State, to Mr. Springer, act. cons. gen. at Havana, No. 101, Nov. 6, 1883, 108 MS. Inst. Consuls, 618. The matter was, however, brought to the attention of the Swiss Government, with a view to the possibility of reimbursing Mr. Springer.)

The consul at Guayaquil was instructed to use his good offices in behalf of Swiss citizens who were called on for military service in Ecuador. (Mr. Frelinghuysen, Sec. of State, to Col. Frey, MS. Notes to Switz., I. 59.)

As to the declination of the Chilean government to accept the good offices of the American minister in the presentation of claims of Swiss citizens against Chile, except on the basis of a formal agreement, see Mr. Frelinghuysen, Sec. of State, to Col. Frey, Swiss min., Dec. 18, 1883, MS. Notes to Switz., I. 58; Mr. Hunter, Act. Sec. of State, to Col. Frey, Sept. 24, 1884, id. 86; Mr. Frelinghuysen to Col. Frey, Dec. 11, 1884, id. 91; Mr. Bayard, Sec. of State, to Col. Frey, June 13, 1885, id. 103.

For subsequent conventions between Switzerland and Chile concerning claims, see Moore, Int. Arbitrations, V. 4857.

As to the presentation of Swiss claims against Colombia through the American minister at Bogota, see Mr. Porter, Act. Sec. of State, to Maj. Kloss, chargé, Aug. 11, 1885, MS. Notes to Switz. I. 107.

As to an explanation to the Guatemalan Government of the limits of the protection extended to Swiss citizens, see Mr. Hall, min. to Cent. Am., to Mr. Bayard, Sec. of State, No. 717, Oct. 7, 1887, For. Rel. 1888, I. 82.

As to the case of a Swiss citizen in Brazil, see For. Rel. 1894, 675-677.

"As to the protection from violence of Swiss citizens now sojourning at treaty ports in China, the ships of war of the United States will, whenever necessity arises, grant them the same protection as they would to any other citizens or subjects of a neutral foreign power residing in the same port." (Mr. Uhl, Act. Sec. of State, to Mr. Travel, Swiss Leg., Nov. 13, 1894, For. Rel. 1894, 677.

In 1899 a Swiss citizen, who had for some years been engaged in business in Morocco, having become the agent of the Philadelphia Commercial Museums, at Mazagan, renounced the French protection, under which he had been living, and applied to the consul-general of the United States at Tangier for American protection, and for three certificates for semsars and mahalats in his employ. The consul-general declined to issue the certificates, since it would be an

official act. His action was approved, the Department of State holding that the issuance of the certificates "would involve not merely protection to a Swiss citizen, but would be an unwarranted attempt to extend to persons who are citizens of neither the United States nor Switzerland the rights guaranteed by a treaty to which Switzerland is not a party."

Mr. Hay, Sec. of State, to Mr. Deucher, No. 250, Nov. 3, 1899, MS. Notes to Switz. I. 573.

See, also, Mr. Adee, Second Assist. Sec. of State, to Mr. Gummeré, No. 143, Nov. 7, 1899, 169, MS. Inst. Consuls, 654.

See Mr. Adee, Second Assist. Sec. of State, to Mr. Partridge, consul-general at Tangier, No. 20, March 19, 1898, 160 MS. Inst. Consuls, 624, referring to Department's No. 44, May 6, 1895, to the Tangier consulate, as containing copies of all the circulars relating to the protection of Swiss citizens.

"The Federal Council leaves each one of its citizens who may settle in a country where the Confederation has no diplomatic or consular agent entirely free to place himself under the protection of such power as he sees fit, and has therefore no objection to the representatives of the United States at Cairo and at Alexandria being instructed to comply with the request of Dr. E. Cérésole and A. du Souchet and to enter their names in their list of protégés.

"Yet, as the protection afforded by the United States of America to Swiss citizens is confined, when granted, to extending to them their unofficial good offices, while Germany and other powers make absolutely no distinction, in this connection, between the Swiss protégés and their own people, it would be desirable that in each individual case Swiss citizens who apply for the protection of the United States of America be expressly warned of the fact that the protection of representatives of the United States is limited, and particularly that the latter are under no circumstances permitted to intervene officially in their behalf with the authorities of the country to which they are accredited."

Mr. Lardy, Swiss chargé, to Mr. Hill, Act. Sec. of State, July 25, 1901, For. Rel. 1901, 507.

Mr. Adee, Acting Secretary of State, replying to Mr. Lardy, August 5, 1901, stated that a translation of his note had been sent to the consul-general at Cairo, with instructions to follow the suggestion to inform such Swiss citizens as might put themselves under his protection that he would be able only to extend unofficially his good offices in their behalf in case of need. (For. Rel. 1901, 508.)

See, also, For. Rel. 1901, 504, 505, 506.

See Mr. Fish, Sec. of State, to Mr. Cubisol, June 27, 1876; to Mr. Heap, Oct. 12, and Dec. 11, 1877; MS. Inst. Barbary Powers, XV. 479, 484, 487.

(3) CITIZENS OF BELLIGERENTS.

§ 655.

War in Mexico.

In 1867, on the execution of Maximilian, the diplomatic and consular representatives of various European powers were withdrawn from Mexico, so that those powers were left without representation near the Government of President Juarez. Under these circumstances requests were made by the powers in question for the protection of their citizens or subjects by the representatives of the United States. On August 10, 1867, Mr. Seward instructed the minister of the United States at Mexico that the United States, in conformity with a political custom which had long obtained and was sanctioned by the general interests of civilization, had consented to allow its diplomatic and consular representatives in Mexico to take charge of the interests of citizens of the states in question and of any other states whose governments were found in the same condition of nonrepresentation. Mr. Seward added that this could be done, however, only with the consent and acquiescence of the Government of Mexico, and that no proceedings should be taken by the representatives of the United States in behalf of the citizens of such foreign states "different from the course prescribed by this Government, for its representatives, for the protection of the interests of citizens of the United States."

The Mexican Government, September 7, 1867, when the matter was brought to its attention, particularly in respect of French and Belgian subjects, replied: "The Government of Mexico, desiring to avoid all danger of differences in its friendly relations with the United States, does not think it desirable that you should interpose any mediation of an official character in the affairs that may be presented by French and Belgian subjects. Without the necessity of a mediation of an official character, if you should desire to interpose in some cases your private good offices, the Government will attend to the same with all possible consideration."

With reference to this response, Mr. Seward, October 25, 1867, said: "You will respect the wishes of the Government of Mexico in this matter, and will lend your good offices to the subjects of France and Belgium in that country under the instructions heretofore given you, in such manner, whether public and official or private and unofficial, as shall be most acceptable to the Government of the Republic." Subsequently, on November 19, 1867, Mr. Seward, referring to this instruction, said: "You will be able to bring to the notice of the Government of Mexico any grave complaint made to you without transcending the proprieties of unofficial and confidential communications."

Mr. Seward, Sec. of State, to Mr. Otterbourg, min. to Mexico, Aug. 10, 1867, Dip. Cor. 1867, II. 447; Mr. Lerdo de Tejada, min. of for. aff., to Mr. Otterbourg, Sept. 7, 1867, id. 459, 463; Mr. Seward, Sec. of State, to Mr. Plumb, chargé, No. 13, Oct. 25, 1867, id. 465, 466; same to same, No. 20, Nov. 19, 1867, id. 479, 480.

Franco-German war.

"North German Government asks United States to exert good offices through their legation at Paris during war, for protection of North Germans in France. President directs you to notify the Duke de Gramont of this request, and say that if the French Government consents thereto, the United States will extend to North Germans same care which they extended to subjects of the Emperor in Mexico."

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, tel., July 19, 1870, For. Rel. 1870, 65.

"Soon after the existing war broke out in Europe, the protection of the United States minister in Paris was invoked in favor of North Germans domiciled in French territory. Instructions were issued to grant the protection. This has been followed by an extension of American protection to citizens of Saxony, Hesse, and Saxe-Coburg, Gotha, Colombia, Portugal, Uruguay, the Dominican Republic, Ecuador, Chili, Paraguay, and Venezuela, in Paris. The charge was an onerous one, requiring constant and severe labor, as well as the exercise of patience, prudence, and good judgment. It has been performed to the entire satisfaction of this Government, and, as I am officially informed, equally so to the satisfaction of the Government of North Germany."

President Grant, annual message, Dec. 5, 1870, For. Rel. 1870, p. 3.

For details of aid rendered through Mr. Washburne, minister of the United States in Paris, to Germans in Paris in August, 1870, see Mr. Washburne to Mr. Fish, Aug. 15 and Aug. 22, 1870, and other papers forwarded with President Hayes's message of Feb. 6, 1878, S. Ex. Doc. 24, 45 Cong. 2 sess.

As to Mr. Washburne's exercise of good offices in behalf of the Archbishop of Paris, who was imprisoned and afterwards executed by order of the Commune, see message of President Hayes, Feb. 6, 1878, and accompanying documents, id. 187, 209.

"I was glad to know that the Department coincided with Mr. Bancroft and myself in the opinion that all these expenses [those for the relief of Germans in Paris during the siege] should be paid by the United States. It would certainly have been unworthy of a great government like ours to permit itself to be paid for hospitalities extended to the subjects of other nations for whom our protection had been sought."

Mr. Washburne, minister at Paris, to Mr. Fish, Nov. 18, 1870, Franco-German War, President Hayes's message of Feb. 6, 1878, S. Ex. Doc. 24, 45 Cong. 2 sess. 97, 98.

Chinese-Japanese war.

"Have received a telegram from the United States minister in Japan with reference to taking Japanese citizens under the protection of the United States in case of war. Chinese Government has given consent and asks the United States to protect Chinese in Japan. A reply is requested."

Mr. Denby, chargé, to Mr. Gresham, Sec. of State, July 24, 1894, For. Rel. 1894, 95.

"China acceding, you may act as custodian Japanese legation and afford friendly offices for protection Japanese subjects in China, either directly or through consuls acting under your instructions, but you will not represent Japan diplomatically."

Mr. Gresham, Sec. of State, to Mr. Denby, jr., chargé, tel., July 26, 1894, For. Rel. 1894, 95. The same, *mutatis mutandis*, was cabled to Mr. Dun, min. to Japan, July 26, 1894, For. Rel. 1894, 372, in response to China's request that the United States undertake the protection of Chinese in Japan.

"The action of the Government of Japan, in committing the interests of its subjects in China to the care of the diplomatic representative of the United States during the existence of hostilities between China and Japan, renders it expedient that you should be instructed as to the nature of your duties in the delicate situation in which you are thus placed.

"The Japanese Government, when it solicited the interposition of our diplomatic representative in China in behalf of Japanese subjects during hostilities, was informed that such interposition would be permitted with the consent of the Chinese Government. Such consent has been given. Moreover, the diplomatic representative of the United States at Tokyo has, at the request of the Chinese Government, and with the consent of the Government of Japan, been charged with the care of the interests of Chinese subjects in the latter country pending hostilities.

"The function with which you are thus charged, with the consent of the Government to which you are accredited, is one that calls for the exercise of personal judgment and discretion. It is an unofficial, not an official, function. A minister of the United States can not act officially as the diplomatic representative of another power, such an official relation being prohibited by the Constitution of the United States. But, apart from this fact, the circumstances under which the function in question is to be discharged imply personal and unofficial

action. The state of war into which China and Japan have entered is inconsistent with the continuance of diplomatic intercourse between them. Your position is that of the representative of a neutral power, whose attitude toward the parties to the conflict is that of impartial amity. Your interposition in behalf of the subjects of one of them is not to be considered as an act of partisanship, but as a friendly office performed in accordance with the wishes of both parties. This principle you are constantly to bear in mind, in order that, while doing what you can consistently with international law for the protection of the interests of Japanese subjects in China, you may not compromise our position as a neutral.

"By consenting to lend its good offices in behalf of Japanese subjects in China, this Government can not assume to assimilate such subjects to citizens of the United States, and to invest them with an extraterritoriality which they do not enjoy as subjects of the Emperor of Japan. It can not assume to hold them amenable to the laws of the United States nor to the jurisdiction of our minister or consuls; nor can it permit our legation or our consulates to be made an asylum for offenders against the laws from the pursuit of the legitimate agents of justice. In a word, Japanese subjects in China continue to be the subjects of their own sovereign, and answerable to the local law to the same extent as heretofore. The employment of good offices in their behalf by another power can not alter their situation in this regard.

"On several proper occasions the Government of the United States has permitted its diplomatic and consular representatives to exercise their good offices in behalf of the citizens or subjects of a third power, as in Mexico in 1867 and in the Franco-German war in 1870. For many years good offices have been exercised by our diplomatic and consular representatives in behalf of citizens of Switzerland in China, as well as in other countries, where the Swiss Republic is without such representatives. In this relation it is proper to refer to an instruction of this Department to its diplomatic representative in China, of July 25, 1872, in which the protection to be extended by our minister and consuls to Swiss citizens in that country is defined as follows:

"'The protection referred to must necessarily be confined to the personal and unofficial good offices of such functionaries. Although when exercised to this extent merely, this can properly be done only with the consent of the Chinese Government, that consent must not be allowed to imply an obligation on the part of a diplomatic or consular officer of the United States in that country to assume criminal or civil jurisdiction over Swiss citizens, or to make himself or his government accountable for their acts.'

"But, while you are to act unofficially, you will carefully examine any complaints that may be laid before you in behalf of Japanese subjects, and make such representations to the Chinese Government as the circumstances may be found to warrant; and in all ways you will do what you can, consistently with the principles heretofore stated, for the protection of Japanese subjects in China, and their interests."

Mr. Gresham, Sec. of State, to Mr. Denby, jr., chargé at Peking, Aug. 29, 1894, For. Rel. 1894, 106. The same instruction, *mutatis mutandis*, was sent on the same day to Mr. Dun, min at Tokyo, in relation to the protection of Chinese in Japan.

"Referring to my instructions of the 29th ultimo, in relation to the exercise by our diplomatic and consular representatives in China of good offices in behalf of Japanese subjects in that country, I inclose herewith for your information a copy of an imperial ordinance promulgated at Tokyo on the 4th of August last, touching the status of Chinese subjects in Japan.

"By the treaty between China and Japan, signed at Tientsin September 13, 1871, it is provided in article 13, which relates to the trial and punishment of offenses committed in the jurisdiction of one of the contracting parties by subjects of the other, that 'when arrested and brought up for trial, the offender, if at a port, shall be tried by the local authority and the consul together. In the interior he shall be tried and dealt with by the local authority, who will officially communicate the facts of the case to the consul.'

"The treaties between China and Japan being abrogated by the state of war now existing between the two countries, the consuls of the one country no longer exercise the powers and the qualified jurisdictional intervention with which they were invested by the treaties in the territory of the other in time of peace. The Japanese Government, therefore, in the first article of the imperial ordinance, declares that Chinese subjects in Japan shall be wholly subject to the jurisdiction of the Japanese courts. The abrogation of the treaties is necessarily attended with the same effect upon the status of Japanese subjects in China as upon that of Chinese subjects in Japan; and this Government, as has heretofore been stated, can not invest Japanese subjects in China, or Chinese subjects in Japan, with an extraterritoriality which they do not possess as the subjects of their own sovereign.

"The good offices, however, which this Government has granted are to be exercised on all proper occasions and to the full extent allowed by international law."

Mr. Gresham, Sec. of State, to Mr. Denby, jr., chargé at Peking, Sept. 18, 1894, For. Rel. 1894, 117. See, also, 375.

[Inclosure.—The Japan Daily Mail.—Yokohama, Thursday, August 9, 1894.]

"*Imperial ordinance.*

"We publish below an authorized translation of the important imperial ordinance of the 4th instant.

"We hereby sanction the present regulations relating to Chinese subjects residing in Japan, and order the same to be promulgated.

"(Privy seal.)

"(H. I. M's Sign Manual.)

"The 4th day, the 8th month, the 27th year of *Meiji*.

"(Countersigned)

"Count Ito Hirobumi,
"*Minister President of State.*
"Count Inouye Kaoru,
"*Minister of State for Home Affairs.*
"Mutsu Munemitsu,
"*Minister of State for Foreign Affairs.*
"Yoshikawa Akimasa,
"*Minister of State for Justice.*

"*Imperial ordinance, No. 137.*

"Art. 1. Chinese subjects are authorized, subject to the provisions of this ordinance, to continue to reside in those places in Japan where they have hitherto been permitted to reside and there to engage in all peaceful and lawful occupations with due protection of life and property, and subject to the jurisdiction of Japanese courts.

"Art. 2. Chinese subjects residing in Japan in accordance with the preceding article shall, within twenty days after the promulgation of this ordinance, apply to the governor of the prefecture where they reside to register their residences, occupations, and names.

"Art. 3. Certificates of registration will be issued by the governors of prefectures to Chinese subjects who register themselves in pursuance of the preceding article.

"Art. 4. Chinese subjects who register themselves according to article 2 shall be entitled to change their places of residence, provided they obtain from the governor of the prefecture where they are registered visés upon the certificates of registration and apply to the governor of the prefecture of their new residence within three days after arrival to be reregistered as prescribed by article 2.

"Art. 5. The governors of prefectures may expel from the territories of Japan Chinese subjects who fail to register themselves as required by this ordinance.

"Art. 6. Chinese subjects who injure the interests of Japan commit offenses, or disturb order, or are suspected of any of the above acts, shall, in addition to the penalties denounced for such acts, be liable to expulsion by the governors of prefectures from the territories of Japan.

"Art. 7. The present ordinance applies to Chinese subjects employed by the Japanese Government or subjects.

"ART. 8. The present ordinance does not affect the orders and measures of the imperial military authorities which may be issued against Chinese subjects residing in Japan in connection with warlike matters.

"ART. 9. Permissions to Chinese subjects to enter the territories of Japan after the promulgation of this ordinance shall be limited to those specially granted by the minister of home affairs through governors of prefectures.

"ART. 10. The present ordinance shall be enforced from the date of promulgation."

See, also, President Cleveland, annual message, Dec. 3, 1894.

Mr. Charles Denby, jr., chargé d'affaires ad interim, sent to the consuls of the United States in China, July 31, 1894, a confidential circular, in which he instructed them that while they were to exert their good offices for the protection of Japanese subjects in their vicinity, they were to act as consuls of the United States and not as representatives of Japan, and were to confine themselves strictly to such acts as might be performed by the consul of a power friendly to and at peace with China. They might, if requested so to do, become the custodian of the Japanese consulate and take charge of the archives, but it would not be proper to raise the American flag on the buildings. Their duty would be confined to the protection of Japanese subjects only, and they would not be charged with any Japanese consular functions or authority. (For. Rel. 1894, 97.) The Japanese chargé d'affaires turned over his legation to Mr. Denby, August 1, 1894, and left Peking on the afternoon of the next day.

"The governments of both China and Japan have in special dispatches transmitted through their respective diplomatic representatives expressed in a most pleasing manner their grateful appreciation of our assistance to their citizens during the unhappy struggle and of the value of our aid in paving the way to their resumption of peaceful relations." (President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, I. xxiii.)

For the thanks of the Emperor of Japan, see For. Rel. 1895, II. 969.

"As a friendly recognition of the assistance rendered by the diplomatic and consular officers of the United States to Japanese subjects during the war of 1895 between Japan and China, the Japanese Government tendered, through the representative channel, valuable gifts to those officers. Inasmuch as the friendly offices so exerted by the agents of the United States in that quarter were in pursuance of formal instructions, and were impartially given, as well to Chinese in Japan as to Japanese in China, at the request of each government and as a usual act of international consideration, motives of delicacy prompted avoidance of all appearance of personal service on the part of officers who only discharged a simple duty imposed by their own government. The Japanese minister at Washington was therefore requested to make known to the Japanese Government the sentiments of this Government in the matter, expressing due appreciation of its amicable desires with equal regret at being unable to permit acceptance of the proffered gifts." (Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, I. xxvii.)

In instructing the American minister at St. Petersburg, concerning the request of the Korean minister there, that he discharge diplomatic functions temporarily in behalf of the latter's country, the Department of State said:

"You will of course understand that the authority vested in you, subject to the consent of the Russian Government, is intended to mean that you may exercise your good offices in behalf of Korean subjects. It is not expected that you will act as the responsible diplomatic agent of Korea, neither can you perform representative functions under instruction from the Korean foreign office." (Mr. Sherman, Sec. of State, to Mr. Breckinridge, No. 419, June 4, 1897, MS. Inst. Russia, XVII. 579.)

Case of Japanese spies.

August 6, 1894, the Tsung-li-Yamên informed the diplomatic representative of the United States at Peking, who was then charged with the protection of Japanese subjects in China, that it was reported that Japanese spies had been sent into the interior of China in disguise and that they would be severely dealt with if apprehended.[a] The minister of China at Washington subsequently complained that the United States consul at Shanghai was protecting Japanese spies. The legation at Peking was instructed to report immediately and fully.[b] Mr. Charles Denby, jr., then chargé d'affaires ad interim, replied that, according to the statement of the Yamên, the prefect of Shanghai saw in the French concession two Japanese wearing Chinese clothing and secured their arrest by the French consul. The latter delivered them over to the consul-general of the United States, who refused to give them up without definite instructions from the United States legation. The Chinese Government demanded their delivery. Mr. Denby suspended action and requested instructions. He did this, as he stated, for two reasons. One was that the exclusive jurisdiction of the Chinese authorities over subjects of a power at war with China, resident in the foreign settlements at Shanghai, was sufficiently in doubt to justify the foreign authorities in demanding proof of guilt and stipulating for a fair trial before giving up such subjects when accused. The custom in time of peace as to foreigners residing in Shanghai, who were subjects of a foreign power having no treaty with China and hence not enjoying the privileges of extraterritoriality, was to be tried when arrested for crime by the "mixed court," namely, a Chinese magistrate sitting with a foreign "assessor." The foreigners at Shanghai wished to establish the principle that this procedure should be followed in time of war against subjects of a belligerent power. They were strongly averse to establishing the precedent that China should have exclusive jurisdiction over such persons. During the Franco-Chinese war, Russia, said Mr. Denby, used her good offices for the protection of the French in China, and French subjects arrested at Shanghai were actually brought before the Russian consul for hear-

[a] For. Rel. 1894, 100.

[b] Mr. Gresham, Sec. of State, to Mr. Denby, jr., chargé d'affaires ad.int. at Peking, Aug. 18, 1894, For. Rel. 1894, 103.

ing, and China had made no effort to interfere with them. The second reason for suspending action was stated to be that of humanity. It was suggested that the consuls of the United States should act as arbitrators in the matter.[a] The Government of the United States replied that the nature of the protection to be rendered to Japanese in China seemed to be misapprehended; that lending good offices did not invest Japanese with extraterritoriality, nor should the legation or consulates be made an asylum for Japanese who violated the local laws or committed belligerent acts; that the protection was to be exercised unofficially and consistently with neutrality; that the consul-general should not have received the two Japanese and was not authorized to hold them; and that the suggestion that the American consuls act as arbitrators was not entertained.[b] Instructions were given to surrender them unconditionally.[c]

Mr. Denby accordingly instructed the consul-general at Shanghai that he was not authorized to hold the alleged spies and directed him to deliver them over to the taotai. They were thereupon delivered over.[d] They were decapitated at Nanking on the 8th of October. The Japanese minister at Washington stated that, in the opinion of his Government, the consul of the United States at Shanghai could not under the circumstances have held the men against the demand of the authorities. It appears, however, that the Chinese minister at Washington, when advised of the decision to give the men up, was requested that they might not be tried till the return of Mr. Denby, senior, the minister of the United States, who was then absent on leave, to Peking. The request was made, not with a view to exact a condition, but with a view to prevent any precipitate or aggravated action, and it was afterwards understood that the Chinese Government had acceded to it. Mr. Denby, however, had not reached his post when the execution took place.[e]

"I have to acknowledge the receipt of dispatch of the 1st of September from our chargé at Peking, in relation to the delivery

[a] For. Rel. 1894, 109.

[b] Mr. Gresham, Sec. of State, to Mr. Denby, chargé d'affaires, tel., Aug. 29, 1894, For. Rel. 1894, 106.

[c] For. Rel. 1894, 108. It seems that the two Japanese were arrested by the French police on the French concession at the instance of the Chinese authorities, and that the French consul-general then sent them to the consul-general of the United States. The action of the French consul-general appears to have been approved by the French minister at Peking, who stated to the chargé d'affaires of the United States that the French consul-general not only was not required to surrender the men to China, but that he had not the right to do so. (For. Rel. 1894, 112.)

[d] For. Rel. 1894, 115.

[e] For. Rel. 1894, 124–127.

of the two alleged Japanese spies at Shanghai into the custody of the Chinese authorities.

"As it is probable that you have already received the formal instructions of the Department in regard to the exercise of good offices in behalf of Japanese subjects in China, pending the war between that country and Japan, it is not necessary, in replying to the present dispatch, to amplify the views previously expressed on that subject.

" In dealing with the case of the alleged spies at Shanghai, it has not been the purpose of the Department to prejudge any question that might arise in any other war than that now existing between China and Japan. The stipulations in the treaties between those countries on the subject of jurisdiction are reciprocal. As you will learn by the instructions of the Department heretofore sent to your legation, the Japanese Government, on the 4th of August, two days after the publication in the official gazette of its declaration of war against China, issued an imperial ordinance in which it was declared, as one of the first results of the state of war, that Chinese subjects in Japan should be wholly subject to the jurisdiction of the Japanese courts.

"After the alleged spies at Shanghai were delivered over to the Chinese authorities, a report was published in the newspapers to the effect that they had been immediately beheaded. Refering to this report, the secretary of legation and chargé d'affaires ad interim of Japan in this city made, on the 5th of September, a statement which was published by the press on the following day, in which it was declared that the delivery of the two suspected Japanese into the hands of the Chinese authorities was entriely in conformity with the Japanese interpretation of the authority and power of neutral consuls. A copy of this statement is herewith inclosed. On the 10th of September a further statement from the same quarter, on the same subject, was published; a copy of this statement is also enclosed.

" While holding that under the particular circumstances the alleged spies were not subject to the jurisdiction of the consul-general of the United States, and could not be given asylum by him, I took proper measures to prevent any summary action by the Chinese authorities, and, as the Department is at present advised, no such action was taken. When I informed the Chinese minister of the views of the Department touching the authority of the consul-general, I requested that the prisoners should not be tried until the return of the minister of the United States to his post. This specific time was suggested, as it afforded ample opportunity for investigation and deliberation. The Chinese minister agreed to my suggestion, and at once telegraphed to his Government in regard to our understanding.

" I have no reason to suppose that this understanding has not been kept. On the 9th of October, more than a month after the first report of the execution of the alleged spies, the consul-general at Shanghai

telegraphed to the Department that they were alive and had been well treated. I had already been assured by the Chinese minister of this fact, and he has also given me an assurance within the last few days of the groundlessness of the more recent report of their execution. The Department observes the statement made by our chargé that it never was his intention ultimately to refuse to give up the alleged spies, and appreciates the solicitude he felt to secure every possible guarantee of just and humane treatment for them; and it is gratifying to believe that the Chinese authorities have exhibited due appreciation of the circumstances.

"This Government would be glad to see an arrangement made between China and other interested powers which should define the jurisdictional rights of the foreign settlement at Shanghai, with respect to crimes charged to have been committed therein in time of war, as well as in time of peace. Whether China would be willing to yield her jurisdiction in respect to subjects of a belligerent charged with offenses against the laws of war, may be doubtful. It is not supposed that any of the French subjects to whom the dispatch of our legation refers as having been brought before the Russian consul at Shanghai for hearing, during the Tonquin war, were charged with offenses of that character. However this may be, the consuls of the United States in China, as has been pointed out in prior instructions of the Departemnt, have never been invested with power to exercise jurisdiction over the citizens or subjects of another nation.

"The Department had repeatedly so held, even in respect to citizens of Switzerland, who have for many years been under the protection of our ministers and consuls. It may also be noticed that Hall, in his recent work on Extraterritoriality in the East, adverts to the fact that, while what is known as the doctrine of assimilation has prevailed in Turkey and certain other countries, the British orders in council touching consular jurisdiction in China do not purport to authorize the exercise of such jurisdiction by British consuls except in the case of British subjects."

Mr. Gresham, Sec. of State, to Mr. Denby, chargé in China, Oct. 30, 1894, For. Rel. 1894, 119.

"[Inclosure 1. United Press Dispatch.]

"*Statement of Japanese legation, September 5, 1894.*

"WASHINGTON, *September 5.*

"Mr. Tsunejiro Miyaoka, Japanese secretary of legation, said this morning in relation to the reported action of United States Consul-General Jernigan at Shanghai, in delivering the two suspected Japanese into the hands of the Chinese authorities, that it was entirely in conformity with the Japanese interpretation of the authority and power of neutral consuls in a belligerent country, and that should Japan

suspect any Chinese subject, resident in Japan, of being openly hostile to the Japanese Government, or believe that justice warranted their arrest, Japan would not recognize the jurisdiction of any neutral consul over the suspect.

"The neutral consuls, while expected to exert their friendly offices to prevent as far as possible any injustice or undue severity being done the natives of one country while in the land of the other, had no actual jurisdiction whatever. Neither our consul's action nor the summary punishment meted out to the unfortunate Japanese by Chinese authorities, it was said, occasioned any surprise at the Japanese legation."

"[Inclosure 2.]

"*Statement of Japanese secretary of legation and chargé d'affaires ad interim, New York Herald, September 10, 1894.*

"Speaking of the status of the Japanese and Chinese in their respective countries he said:

"'One of the results of war between the Chinese and the Japanese was the abrogation of all treaties between the two Governments. One of these was in relation to the jurisdiction held by consular courts over the subjects of the two Governments in their respective jurisdictions.

"'CONSULAR COURT JURISDICTION ABROGATED.

"'Knowing what would be the result of a formal declaration of war, the Japanese Government, before making it, informed its consular officers in China of its intended action. The formal declaration of war, which it made in the imperial rescript of August 1, was published in the official gazette of the Japanese Government on August 2. On August 4 an imperial ordinance was issued relating to the status of Chinese subjects residing within the territory of Japan. The ordinance prescribes regulations for the protection of the Chinese in my country, and consists of ten articles. The first article provides that Chinese subjects shall enjoy the protection of their persons and property, and shall continue to reside in those localities to which, under treaty stipulations, they have been permitted to come. The article also sets forth that they shall be permitted to continue their avocations which they were pursuing before the declaration of war, but shall be subject to the jurisdiction of the Japanese courts.

"'From this article you can see that Japan claims, in spite of the treaty stipulations, the right to exercise jurisdiction over all Chinese residing in her territory, and allows them to remain only under condition that they shall be amenable to our courts, giving them in return the entire protection of the law and administrative authority.

"'So far as the United States is concerned, this much of its attitude toward the two countries is clear. The protection which the United States consular and diplomatic officers shall extend to Chinese in Japan and Japanese in China can not include consular jurisdiction.'"

"When I arrived at Yokohama I intended to leave on the first ship that was bound for Shanghai. I was induced to delay my departure three days in order to see Viscount Mutsu, secretary for foreign affairs, who proposed to come up from Hiroshima to see me. My interview with the secretary was not important.

"It soon appeared that he emphatically repudiated the idea that American consuls could exercise jurisdiction over Chinese in Japan. The whole question, therefore, both in China and Japan, remains exactly as ordered by you." (Mr. Denby, min. to China, to Mr. Gresham, Sec. of State, Oct. 30, 1894, For. Rel. 1894, 122.)

Spanish-American war.

April 5, 1898, the Department of State made to the British ambassador at Washington a confidential request that in case of trouble between Spain and the United States, the British consul-general at Havana might take charge of the property and papers belonging to the American consulate there.

April 5, 1898, a telegraphic instruction was sent to the American ambassador in London accepting the offer of the British ambassador at Madrid to take charge of the American legation there in case of necessity. Coupled with this acceptance, the hope was expressed that the British consuls might be authorized to extend a like courtesy should any American consuls in Spanish territory request them to take charge of the consular archives. Authority for the purpose was given by the British Government.

For. Rel. 1898, 966–967.

In July, 1898, relief in money was extended by the United States through the acting British consul-general at Havana to a number of Americans who were reported to be in danger of starving in that city. (For. Rel. 1898, 998–1000.)

See, as to the exercise by the British consular representative at Havana during the war of good offices in behalf of the interests of the Missionary Society of the Southern Baptist Convention, For. Rel. 1898, 987–989.

See, as to the death of Mr. Rawson-Walker, British consul at Manila, who had charge of American interests in Manila during the war with Spain, For. Rel. 1898, 375–379.

See, as to the protection of British interests by the American consul at La Guayra, in Venezuela, For. Rel. 1898, 379.

See, as to the death of Mr. Ramsden, formerly British consul at Santiago de Cuba, who rendered services in guarding American interests during the war with Spain, For. Rel. 1898, 380–382.

"Our relations with Great Britain have continued on the most friendly footing. Assenting to our request, the protection of Americans and their interests in Spanish jurisdiction was assumed by the diplomatic and consular representatives of Great Britain, who fulfilled their delicate and arduous trust with tact and zeal, eliciting high commendation. I may be allowed to make fitting allusion to the instance of Mr. Ramsden, Her Majesty's consul at Santiago de Cuba, whose untimely death after distinguished service and untiring effort during the siege of that city was sincerely lamented." (President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, lxxvi.)

As to the thanks of the Government of the United States extended through the British foreign office to the diplomatic and consular representatives of Great Britain, and especially to Sir H. Drummond Wolff,

British ambassador at Madrid, for their friendly offices to the United States and its citizens during the suspension of diplomatic relations between the United States and Spain, see Mr. Hay, Sec. of State, to Mr. Choate, ambass. to England, June 27, 1899, For. Rel. 1899, 348–350.

"I have the honor to inform you that before leaving Washington, and in fulfillment of the instructions of his Government, Mr. Polo y Bernabé confided to me and at the same time to the minister of Austria-Hungary the protection of Spanish subjects and interests in the United States.

"With a view to simplify in practice the accomplishment of the mission which our respective governments have accepted, the minister of Austria-Hungary and I have made in common accord the following arrangements:

"First. The archives of the Spanish legation in Washington will remain stored in the legation of Austria-Hungary.

"Second. The care of the consular archives and the protection of Spanish interests will be confided to the consulates-general of Austria-Hungary in New York and Chicago and the consulates of France in New Orleans, San Francisco, and Philadelphia.

"Third. In those localities where only one of the two countries has a representative, he will assume the protection of Spanish interests; in those places where the two countries are only represented by consular agents, such protection will be exercised by the French agent.

"Fourth. Questions the adjustment of which may necessitate representations to the Department of State will be dealt with either by the minister of Austria-Hungary or by me, accordingly as the Austrian or French consul shall have had the initiative therein.

"Fifth. In all other cases I shall charge myself alone with the steps to be taken with respect to the Government of the United States.

"I to-day send instructions in this sense to the French consuls, and I will be grateful to you to be pleased to invite the competent authorities to extend to them, the case arising, all the needful facilities."

M. Cambon, French amb., to Mr. Sherman, Sec. of State, April 22, 1898, For. Rel. 1898, 785.

An identic note, mutatis mutandis, was sent to the Secretary of State on the same day by Mr. Hengelmüller, minister of Austria-Hungary. (For. Rel. 1898, 785.)

"I beg to inform you that the Government of the United States admits your friendly action in assuming charge of the protection of Spanish subjects and interests in the United States, and that the scheme which you and the Austro-Hungarian minister have devised for the practical division of the charge you have simultaneously assumed is provisionally accepted so long as experience shall show its convenience in practice. It is, of course, understood, in conformity

with the international usage which obtains in circumstances like the present, that the arrangement contemplates only the friendly offices of yourself or of your esteemed colleague, as well as of the consular representatives of your respective nations, should occasion therefor arise, with regard to Spanish subjects and their interests actually within the jurisdiction of the United States, and embraces no representative office by either of you on behalf of the Government of Spain, between which and the Government of the United States a condition of war unhappily exists.

"I shall communicate to the competent authorities copies of the notes thus addressed to me by yourself and the Austro-Hungarian minister, to the end that they may give all due heed to such representations as the agents of either country may feel called upon to make in behalf of Spanish subjects and interests in fulfillment of the friendly office of protection thus assumed and admitted. In order, however, that no confusion may exist as to the distribution of protective functions among the respective consulates, I beg that you will favor me with a list of the French consular officers who have been designated to act in the manner stated in your note."

Mr. Sherman, Sec. of State, to M. Cambon, French amb., April 25, 1898, For. Rel. 1898, 786, 787.

A similar communication was also sent to Mr. Hengelmüller, minister of Austria-Hungary. (For. Rel. 1898, 787.)

April 26, 1898, M. Cambon and Mr. Hengelmüller transmitted to the Department of State, in compliance with its request, lists of the consular officers of their respective countries charged at various places in the United States with the care of Spanish interests. (For. Rel. 1898, 788–789.)

At the request of the Spanish minister in Mexico, the Mexican consuls at Laredo, Texas, and Nogales, Arizona, where there were no French or Austrian consuls, were permitted, with the consent of the United States, to extend their friendly protection in case of need to Spanish interests in those quarters, with the understanding that such correspondence as the Mexican minister at Washington might receive from the consuls in question would be turned over to M. Cambon for action. (For. Rel. 1898, 791–792.)

See Mr. Moore, Assist. Sec. of State, to Governor of Arizona, May 12, 1898, 228 MS. Dom. Let. 423.

Aug. 12, 1898, M. Cambon, the French ambassador, acting under special authority from the Spanish Government, concluded with the Secretary of State the preliminary peace protocol of that date.

"I have the honor to acknowledge the receipt of your note of the 17th instant, in which you state that the Spanish Government, not wishing to make use any longer of the good offices which the Government of France has rendered it in its diplomatic communications with the United States, wishes to send to Washington one of its consuls from Canada, who would be authorized to attend to all the questions of detail the settlement of which the cessation of hostilities

will naturally permit or necessitate. You therefore inquire, by order of your Government, whether the Government of the United States is disposed to permit such a consul to be sent to Washington in the capacity of an unofficial agent.

"The general terms in which the Spanish Government has caused its suggestion to be conveyed leave the Department in some doubt as to the precise object with which it is made or as to the precise capacity in which the proposed unofficial agent is to act, but the statement that the Spanish Government does not wish any longer to make use of the good offices which your Government has rendered it in its diplomatic communications with the United States indicates that such agent, who, although a consul accredited to another Government, would have no official standing with reference to this Government, would be expected to discharge in some sense diplomatic functions.

"To such a measure there are, it is conceived, two objections. In the first place, although hostilities have been suspended, the state of war between the United States and Spain still continues.

"In the second place, the Department is not informed as to the questions of detail to which the suggestion of the Spanish Government refers. Arrangements have already been made for the treatment of the particular matters with reference to which the suspension of hostilities was proclaimed. The immediate evacuation of Cuba, Porto Rico, and other Spanish islands in the West Indies is to be carried out by commissioners specially appointed for that purpose, and the question of peace is to be treated of by specially appointed commissioners who are to meet in Paris.

"Under these circumstances, it seems to this Government to be desirable that diplomatic communications between the United States and Spain in relation to any questions other than those above mentioned should for the present continue to be conducted through the very acceptable channel through which they have heretofore been made since the beginning of the war."

Mr. Moore, Acting Sec. of State, to M. Cambon, French amb., Aug. 19, 1898, For. Rel. 1898, 803. See, also, 804, 805, 806.

Boer war.

On the request of the British Government the United States consul at Pretoria was instructed, in the event of the necessary withdrawal from Pretoria of the British agent, to afford to British interests, with the assent of the South African Government, "the friendly protective offices usual in such contingencies." In another place the phrase "friendly and neutral protective offices" was employed.

Mr. Hill, Act. Sec. of State, to Mr. Tower, British chargé, Oct. 11, 1899, For. Rel. 1899, 350; Mr. Adee, Act. Sec. of State, to Mr. Tower, British chargé, Oct. 13, 1899, id. 351.

In January, 1896, it being represented that the American consul at Pretoria was disabled by fever, and that the case was urgent, the United States unofficially requested that the necessary measures for the protection of John Hays Hammond and other American citizens, then under arrest in the Transvaal for alleged complicity in the Jameson raid, might be taken through the British representative at Pretoria. On this request the British Government instructed its high commissioner in South Africa to extend the same protection in behalf of the American citizens involved in the charge of rebellion as would be taken in the interest of British subjects under like circumstances. (For. Rel. 1896, 562–569.)

Subsequently Hammond and other leaders pleaded guilty, and were sentenced to death. The sentences were subsequently commuted to a fine of £25,000 each, and this amount having been paid, the prisoners were released. (For. Rel. 1896, 569–581.)

Russo-Japanese war.

On the eve of the war with Russia, the Japanese Government, referring to the action of the United States in the Chinese-Japanese war, asked that the diplomatic and consular representatives of the United States should be permitted to assume charge of Japanese interests in Russia upon the withdrawal of the diplomatic and consular representatives of Japan. The United States granted this request, with the assent of Russia, and the American ambassador at St. Petersburg was directed to instruct the American consuls that they might take charge of Japanese consulates and archives, but that they had no Japanese functions or authority, and could use their good offices only for the protection of Japanese subjects and their interests.

For. Rel. 1904, 430, 714.

12. Relations with the Navy.

§ 656.

"Your despatch of the 25th of March, No. 18, has been received. I learn from it that the Argentine Government has not given you an answer to the tender of good offices which the United States have made to the belligerents in the Paraguayan war. While the delay is regretted, your proceedings in regard to that matter are approved.

"You have informed me of the proposition which you submitted to Admiral Godon, that he should furnish you facilities to secure a personal interview with Mr. Washburn, our representative at Paraguay, with a view to the same propositions of peace, and of the decision of the admiral that he could convey despatches only, thus virtually declining to convey yourself to the vicinity of Mr. Washburn's residence. You have also informed me that the admiral thought it not inconsistent with his duty to hold such communica-

tion with the Brazilian minister at Buenos Ayres as to afford ground for a report that he had so arranged with them that you should not hold the personal interview with Mr. Washburn which you desired.

"Mr. Washburn in a recent despatch has brought the same facts to the notice of this Department.

"In connection with this subject it seems to be expected by yourself as well as by Mr. Washburn that this Department will define the proper relations subsisting between the political representatives of the United States and the naval officer commanding the United States squadron in the South Atlantic.

"I think proper, therefore, to say on this occasion that in regard to so distant a theatre as that in which the Paraguayan war is carried on, it is not possible for the Government of the United States to foresee distinctly at any time the future course of military or political events, and so to anticipate possible emergencies. For these reasons it is inconvenient to give specific instructions for the government of either its political representatives or its naval agents in regard to many possible contingencies. Powers concerning political questions distinguished from naval affairs are entrusted to the care of the ministers of the United States, and the President's instructions are communicated by this Department. Responsibilities of a peculiar character are devolved upon the commander of the squadron and the President's instructions are conveyed through the Navy Department. It seldom happens that political and naval instructions which may bear upon such mere contingencies are, in fact, or practically can be, harmonized between the two Departments, each of which generally holds under survey a peculiar and limited field, and knows of no special occasion to look beyond that field. If in any case it is foreseen that cooperation between a minister and a naval commander will be practicable and useful, that cooperation is distinctly commanded by the President. If, however, it is not foreseen that such cooperation would be practicable and necessary or useful, the agent of each class is necessarily left to proceed according to his own discretion within the range of the general instructions he has received from the Department under which he is employed. It is expected that, in the absence of instructions, the agents of the two classes, if practicable, will confer together and agree in any unforeseen emergencies which may arise and in regard to which no specific instructions for the common direction of both may have been given by the President.

"There is no subordination of the ministers to the commanders of a squadron, and no subordination of the commander of the squadron to a minister. It is always unfortunate that agents of the two classes are not able to agree upon a course to be adopted in an unforeseen emergency. But that inconvenience is less than the inconveniences

which must result from giving authority to a minister in one state to control the proceedings of a fleet of whose condition he is not necessarily well informed and whose prescribed services are required to be performed not only in the vicinity of the minister, but also in distant fields over which he has no supervision. Nor would it be more expedient to give a general authority to the commanding officer of a squadron to control or supersede the proceedings of political representatives of the United States in the several States which he might have occasion to visit.

"You had no special instructions from this Department to seek or hold an interview with the minister at Paraguay. Such a proceeding would have been exceptional, and Admiral Godon seems to have regarded it in that light. Your effort, however, is regarded as judicious and is approved as an exceptional proceeding not within the customary range of your diplomatic duties, but altogether outside of that range. On the other hand, the President sees no reason to doubt that Admiral Godon's proceedings in declining to favor such a personal interview was loyal and patriotic, nor does he perceive any reason for thinking it injudicious or unwise on his part, before deciding upon that matter to confer with the Brazilian agents at Buenos Ayres. It is not every sinister misconstruction of a public officer's proceedings that is to be received and entertained by the Government. It is even now impossible, with all the information of which the Government is possessed, to determine which party, yourself or the admiral, practiced the wisest and soundest discretion in the matter referred to. Meantime the emergency has passed and the question has become an abstraction.

"While, therefore, your own proceedings are approved, those of Admiral Godon are not disapproved. In all such cases it is eminently desirable that mutual confidence shall be maintained between the ministers and the naval authorities; that they cooperate where they can agree and that they suffer no difference of honest and loyal judgment to produce alienation.

"I have now to inform you that, without any reference to the subject which I have thus considered, Rear-Admiral Charles H. Davis has been heretofore ordered to sail from Boston in the *Guerrière* to relieve Rear-Admiral Godon in command of the South Atlantic Station. The *Guerrière* is expected to sail on the first of June or within a few days thereafter, and the transfer of flags will be made at Rio early in July. Rear-Admiral Godon will return to the United States in the *Brooklyn*, his present flagship."

Mr. Seward, Sec. of State, to Mr. Asboth, min. to Arg. Rep., No. 34, May 18, 1867, MS. Inst. Arg. Rep. XV. 281.

"A menacing rupture between Costa Rica and Nicaragua was happily composed by the signature of a convention between the parties, with the concurrence of the Guatemalan representative as a mediator, the act being negotiated and signed on board the United States steamer *Alert*, then lying in Central American waters. It is believed that the good offices of our envoy and of the commander of that vessel contributed toward this gratifying outcome." (President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, lxix.)

Referring to a dispatch from the American consul at Teneriffe relating to the omission of Admiral Case, U. S. N., to salute the Spanish flag there, Mr. Fish said that, although the admiral had no express orders to make such a salute, his impression was that it would have been preferable to have taken that course, and added: "A salute to the flag of a country in a foreign port is not conceived to imply a recognition of any particular party which for the time being may be in the ascendant. There may be reasons for omitting or delaying to acknowledge such a government, and sometimes for saluting the national flag. The omission of such a courtesy, however, may be regarded as an act the responsibility for which a naval commander should rarely assume without express orders."

Mr. Fish, Sec. of State, to Mr. Robeson, Sec. of Navy, April 7, 1875, 107 MS. Dom. Let. 373.

As to the censure of Commodore Stanton, U. S. N., for saluting the national flag when borne by an insurgent ship, see supra, § 73, 240–241.

April 7, 1895, the Turkish minister at Washington, referring to a report in the press that two United States men-of-war were to be sent into Turkish waters on account of rumors that the safety of Christians was menaced, inquired whether it was true, as was publicly asserted, "that the American naval authorities have been instructed to confer with your diplomatic and consular authorities with a view to the examination of certain matters which come within the exclusive province of the latter."

The Department of State replied that the intended visit of the ships was "without any unfriendly purpose," and that their presence on the coasts of Asia Minor would "afford an opportunity to learn whether there is just ground for the apprehensions of insecurity of life and property," which American citizens in that region had expressed and which had called forth assurances of protection from the Porte.

The instructions to the naval officers directed them to visit certain places on the coast of Asia Minor and ascertain, by conference with the United States consuls and citizens there, what foundation existed for the rumors that Christians were in danger, and, in case they should discover ground for anxiety, to intimate to the Turkish officials

that it was the intention of the United States to afford protection to its citizens.

Mavroyeni Bey, Turkish min., to Mr. Gresham, Sec. of State, April 7, 1895, For. Rel. 1895, II. 1249; Mr. Uhl, Act. Sec. of State, to Mavroyeni Bey, April 8, 1895, id. 1250; Instructions to naval officers, id. 1247 et seq.

"It is proper for me to recur to that part of your . . . note of April 7 last, in which you asked to be informed whether the American naval authorities had been instructed to confer with the diplomatic and consular authorities touching matters which you deem to be 'within the exclusive province of the latter.'

"I can not suppose you thereby intended to question the right of this Government to use its several agencies in its own discretion for the purpose of gaining information or carrying out its determined policies, and I assume you had in view merely the performance of the usual formalities of international representation. Our naval commanders, carrying neither diplomatic credentials nor consular commissions, discharge no representative duty save in conformity with the ordinary etiquette of the naval intercourse of nations. This mission, I am pleased to learn, has been fulfilled with friendly cordiality by Admiral Kirkland and his commanders, consistently with the instructions given to them as stated in my note to you, No. 10, of April 8, 1895."

Mr. Uhl, Acting Sec. of State, to Mavroyeni Bey, June 6, 1895, For. Rel. 1895, II. 1251.

Mr. Terrell, United States minister at Constantinople, December 10, 1895, enclosed a copy of a letter which he had received from Admiral Selfridge, dated November 30, 1895, conveying a copy of a letter which the admiral had on the same day addressed to the vali of Aleppo. This letter referred to the burning of buildings belonging to the American mission at Marash, affirmed the peaceable disposition and charitable work of the American missionaries, called attention to the fact that their persons and property were "guaranteed by solemn treaty between the United States of America and Turkey," and stated that it was the admiral's duty, as commander in chief of the United States naval forces, to remind the vali "of the fact that the United States will hold your Government to a strict responsibility for all infractions of the treaty between it and Turkey." It concluded with an expression of confidence that the vali would "take all necessary measures to give immediate and efficient protection to all Americans" residing within his jurisdiction.

Mr. Terrell, in acknowledging the receipt of the admiral's letter, observed that the notice that Turkey would be held responsible for

the safety of the missionaries doubtless would have a good effect, and that a similar notice had been given to the Government at Constantinople on several occasions since the preceding February.

In his despatch communicating this correspondence to the Department of State, Mr. Terrell remarked that he supposed that the admiral's action was only intended to emphasize that already taken by the Department of State, and added: "The vali of Aleppo had already been removed on my demand. If it has been deemed best for the Department of the Navy to secure American interests by opening correspondence with provincial governors through its admirals, it would seem but proper that the representatives of your Department here should be informed of the scope and limits of his authority."

It appears that Admiral Selfridge, on receiving information of a more favorable character from Marash, recalled his letter of the 30th of November to the vali of Aleppo, which had not yet been forwarded from Alexandretta, and substituted for it another letter, dated December 2, 1895, in which he stated that his Government would hold to a strict accountability those who were responsible for injury done to American citizens and their property, and expressed the expectation that the vali would, in accordance with the orders of the Sultan, at once arrest and punish those who were concerned in the outrage at Marash, and also make strenuous efforts to protect in the future Americans and their property within his vilayet.

With reference to this correspondence Mr. Olney, Secretary of State, in a letter to the Secretary of the Navy, January 2, 1896, said:

"As to the substance of the two letters written by the admiral to the vali, the later communication appears, on several accounts, to be the more preferable, in that it more correctly recites the injury done to the establishments of the American mission at Marash and omits reference to treaty guarantees, which might have opened the way to unnecessary discussion of a diplomatic question between himself and a subordinate official of the Turkish Government.

"Without being aware how far the instructions given to the admiral contemplate direct correspondence by him with provincial governors, it may be observed that independent local treatment of diplomatic questions, which are necessarily the subject of direct correspondence through the accredited channels of international communication, may be as a general thing undesirable in dealing with a government like that of the Ottoman Empire, in which power and responsibility are centralized at the capital; and that it would seem preferable that correspondence affecting the international rights of our citizens in Turkey, or of this Government as their protector, should be conducted through diplomatic channels, unless some emergency should render that course impossible and make immediate action on the spot necessary to avert imminent peril.

"This Government had already through the minister at Constantinople notified the Government of the Porte that it would be held to strict accountability for injury to American citizens and their property, and a suitable demand in the premises, through the same channel, only awaits ascertainment of the measure of reparation to be asked.

"I highly appreciate the zeal and energy shown by Admiral Selfridge in his efforts to further the interests of American citizens in that locality; and I doubt not that, occasion arising, his cooperation toward the attainments of the ends in view by this Government will be energetic and effective."

Mr. Herbert, Secretary of the Navy, acknowledging, on January 14, 1896, Mr. Olney's letter of the 2d of that month, stated that a copy had been "transmitted to the commander in chief of the United States naval force on the European station for his guidance."

For. Rel. 1895, II, 1385–1386, 1440, 1441, 1459.

On the night of December 4, 1898, the U. S. S. *Bancroft* was entering the harbor of Smyrna, Turkey, when there was fired from the fort and across her bows a blank shot, which was followed by a volley of musketry. Subsequently another volley was fired at a boat which was lowered and ordered to communicate with the officer in command of the fort, one of the bullets falling upon the deck of the *Bancroft*. Orders had been given prohibiting the entrance of the harbor at night, but of this the *Bancroft* was unaware. The governor-general expressed his regrets at the occurrence. Subsequently the legation of the United States at Constantinople brought the case to the attention of the Turkish Government, representing that as the lights showed that the vessel was a man-of-war, and as there was no reason to suppose that it belonged to any but a friendly power, the firing of the volleys of musketry was an unjustifiable and reckless act, unwarranted by military usage and violative of international courtesy, for which amends should be made by the removal of the responsible officers and an expression of regret. The Turkish Government, while observing that the "attitude" of the men on duty at the fort in firing blank shots to warn the *Bancroft* was "according to the regulations," affirmed that the musket shots were fired to warn a sailboat which was endeavoring to enter the harbor, but stated that, as the falling of one of the balls on the *Bancroft* "denoted a lack of attention," the two officers on duty had been ordered under eight days' arrest and would be replaced. To this statement was added an expression of regret for the incident, which was then treated, on both sides, as closed.

For. Rel. 1898, 1113–1117.

"Referring to your No. 390 of November 12 last, relative to Rear-Admiral Schley's application in the first instance to the United States consul at Montevideo to obtain mitigation of quarantine, I quote for your information the Navy Department's regulation on the subject: 'He will as a general rule, when in foreign ports, communicate with local civil officials and foreign diplomatic and consular authorities through the diplomatic or consular representative of the United States on the spot.' The Department has advised the Navy Department that it thinks that Rear-Admiral Schley's course was proper."

Mr. Hill, Act. Sec. of State, to Mr. Finch, min. to Uruguay, No. 180, January 7, 1901, MS. Inst. Uruguay, II. 71.

V. *RIGHT TO PROTECTION.*

1. Of Person.

§ 657.

"As in war, the bearers of flags of truce are sacred, or else wars would be interminable; so in peace, embassadors, 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, H. Ex. Doc. 2, 32 Cong. 1 sess. 7.

Mr. Webster, Sec. of State, to Mr. Calderon de la Barca, Span. min., Nov. 13, 1851, 6 Webster's Works, 507.

See, infra, § 704.

"The *person* of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world. . . .

"The *comites* of a minister, or those of his *train*, partake also of his inviolability. The independency of a minister extends to all his household; *these* are so connected with him, that they enjoy his privileges and follow his fate. The *secretary* to the embassy has his commission from the sovereign himself; he is the most distinguished character in the suite of a public minister, and is in some instances considered as a kind of public minister himself."

McKean, Chief Justice, Respublica *v.* De Longchamps, Court of Oyer and Terminer at Philadelphia, 1784 (1 Dallas, 111, 116).

It is said that in the case of the Russian ambassador, when Lord Holt sat in the King's Bench, the offenders were, after conviction,

detained in prison, from term to term, without judgment, till the Czar Peter was satisfied, the reason for this procedure being that the Czar would not have considered any sentence adequate short of death, which the court could not pronounce.

McKean, Ch. Justice, Respublica, *v.* De Longchamps, Court of Oyer and Terminer at Philadelphia, 1784, 1 Dallas 111, 117.

In the course of his opinion, Chief Justice McKean remarked, parenthetically, that the house of a public minister was "to be considered as a *foreign domicil*, where the minister resides in full representation of his sovereign, and where the laws of the state do not extend." He appears, however, not to have meant this language to be understood literally, since he in the same breath charged the jury that the defendant, a citizen of France, might be convicted and punished by fine and imprisonment for an assault on the secretary of legation of France in the dwelling of the French minister; and the defendant was accordingly convicted and sentenced. His sentence probably was made severe for the reason that France had demanded his surrender, which was not granted.

By the act of April 30, 1790, now incorporated into the Revised Statutes of the United States, every person who "violates any safe conduct or passport duly obtained and issued under authority of the United States," or who "assaults, strikes, wounds, imprisons, or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court."

Revised Statutes, § 4062; act of April 30, 1790, 1 Stat. 118.

A riot before the house of a foreign consul by a tumultuous assembly, requiring him to give up certain persons supposed to be resident with him, and insulting him with improper language, is not an offense within the act of the 30th of April, 1790, which prescribes the punishment "for any infraction of the law of nations, by offering violence to the person of an ambassador *or other public minister*."

Bradford, At. Gen., 1794, 1 Op. 41.

General Alvear, the Argentine minister in the United States, having complained of an assault committed in the city of New York on the person of his son, who was also secretary of the Argentine legation, the Department of State, in the name of the President, expressed regret for the occurrence and sympathy for its victim, and added that, while the assailant was understood to have been held to bail by a court of the State of New York, the United States attorney for the southern district of New York would be "instructed to proceed against him also and to commence such process as the laws of nations and of the United States authorize."

Mr. Webster, Sec. of State, to Gen. Alvear, Sept. 16, 1841, MS. Notes to Argentine Leg. VI. 8.

For requests for proceedings against persons annoying the Spanish minister's carriage and servants, see Mr. Hunter, Act. Sec. of State, to Mr. Fendall, U. S. attorney, May 3, 1852, 40 MS. Dom. Let. 101; Mr. Hunter, Act. Sec. of State, to Mr. Lennox, mayor, May 8, 1852, id. 112.

Where a certain person wrote to the French minister, Count Sartiges, letters intended to provoke the latter to challenge him to fight a duel, and it seemed probable that, when he found that his provocations had failed, he would assault the minister, it was advised that he should be held to bail to keep the peace.

Mr. Hunter, Act. Sec. of State, to Mr. Fendall, U. S. attorney for the District of Columbia, May 25, 1852, 40 MS. Dom. Let. 151.

As to a complaint of Mr. Hollister, American minister to Hayti, which seems, however, not to have been well founded, of his detention on board the Haytian man-of-war *Maratanzas* while it apparently was bombarding the town of Jeremie, see Mr. Seward, Sec. of State, to Mr. Hollister, No. 20, Feb. 3, 1869, MS. Inst. Hayti, I. 124.

Proof that a person assaulted is received and recognized by the Executive of the United States is conclusive as to his public character, and that he is entitled to all the immunities of a foreign minister. But if a foreign minister commits the first assault he forfeits his immunity so far as to excuse the defendant for returning it.

United States *v.* Ortega, 4 Wash. C. C. 531.

A note of Baron von Gerolt, Prussian minister, of June 18, 1852, relative to the violence threatened or committed on him or his household by a German named Duplessis, "having been referred to the Attorney-General of the United States for his opinion as to the right of a justice of the peace to issue a warrant for the arrest of an individual upon the mere declaration, unaccompanied by an oath, of a member of the diplomatic body," the Attorney-General gave an opinion justifying the magistrate, to whom the minister had applied, "in refusing to issue a warrant without an oath of some person against the aggressor complained of." The Department of State, in communicating a copy of this opinion to the minister, said: "If, however, a diplomatic agent should be the only person who may have witnessed the acts of an aggressor in such a case, and therefore the only one capable of testifying in regard to them, it can not be perceived why it should be considered incompatible with either his dignity, or the exemption from the jurisdiction of the country to which he is entitled, for him voluntarily to offer his testimony in the usual form."

Mr. Hunter, Act. Sec. of State, to Baron Von Gerolt, Prussian min., Aug. 2, 1852, MS. Notes to German States, VI. 310.

For injuries done by private persons to foreign ministers, redress is to be had through the regular judicial tribunals.

Black, At. Gen., 1857, 9 Op. 7.

An indictment charging one with offering violence to the person of a public minister, contrary to the law of nations and the act of Congress in such case provided, is not a case "affecting ambassadors, other public ministers, and consuls," within section 2, Article III., of the Constitution.

United States *v.* Ortega, 11 Wheat. 467.
The act of Congress referred to is that of 1790, 1 Stat. 118, now R. S. § 4062 et seq.

"In the case of all offenses against the law, committed in this country, no arrest can be made, nor can any judicial proceedings be instituted, except upon complaint sustained by the oath of a credible witness. The mere allegations in notes of a diplomatic representative, although they may command the entire confidence of the executive branch of the Government, are not such proof as the law requires or as the judicial tribunals of the country can recognize."

Mr. Fish, Sec. of State, to Mr. Mantilla, Span. min., Sept. 27, MS. Notes to Spain, IX. 386.

The Haytian minister having complained of the failure of the local authorities of the United States to institute criminal proceedings against a person who was alleged to have assaulted his son, who was stated to be an officer of his legation, he was advised that the Constitution guaranteed to every person accused of crime the right to be tried by jury, to be informed of the nature and cause of the accusation, and "to be confronted with the witnesses against him," and that criminal proceedings could not be instituted against the person charged with assault unless upon the complaint of the person assaulted or of a witness to the assault.

Mr. Frelinghuysen, Sec. of State, to Mr. Preston, Haytian min., July 10, 1883, MS. Notes to Hayti, I. 301.

"I have received and considered your dispatches numbered 2064 and 2065, of December 18 and 20, 1894, in relation to bringing foreign troops to Peking as guards for the legations established there, and in particular to your claim that such a guard or 'escort' for the United States legation is a specific treaty right.

"I do not find that article 5 of the treaty of 1858, to which you appeal, secures to the United States a right to maintain at Peking a military or other guard of 20 men. That article relates to the privilege, then stipulated, of making diplomatic visits to the Chinese

capital for the transaction of business, not exceeding one visit each year; and the 'entire suite' of the minister (exclusive of Chinese servants) on such journeys is limited to 20 persons. This is quite different from a military guard of 20 soldiers in addition to the personnel of the legation.

"Moreover, the provisions of article 5 of the treaty of 1858 are virtually obsolete, since by the Anglo-Chinese treaty of June 26, 1858, the Franco-Chinese treaty of June 27, 1858, and subsequent treaties of China with other countries, the right of maintaining permanent legations at Peking has been granted to certain powers, and enjoyed by the United States as a favored-nation privilege.

"I do not find in any of the treaties with China provisions authorizing the protection of the legations by foreign troops. You state in your dispatch that 'The question of the right of the legations to have escorts here [Peking] is abstract and independent of the probability of its exercise.' If this Government has the right, independently of treaty, to keep its own troops at Peking for the service of the legation, then it necessarily is the judge as to the character and strength or number of the guard. But, as a recognized principle of international intercourse, no government would, if it could prevent it, permit the introduction into its territory of such a foreign military force. China, like any other government, is bound to afford adequate protection to our legation. On the occasion of Mr. Burlingame's visit to Peking in 1862, a Chinese escort was furnished to him.

"The President sees no reason why the legation should court danger by remaining at Peking in the face of imminent or threatening peril: and you would have the right to an adequate escort to assist you in avoiding it by removal to a place of safety where you would be under the immediate and legitimate protection of your own flag. Nevertheless, in view of your telegram of the 18th instant, reporting that other legations are bringing military guards to Peking with the consent of the Chinese Government, I telegraphed the 19th instant, as follows:

"'You say troops have arrived with China's consent to protect other legations. In cooperation with Carpenter you are authorized to bring up marines under similar conditions.'"

Mr. Gresham, Sec. of State, to Mr. Denby, min. to China, Feb. 28, 1895, For. Rel. 1895, 1. 198.

As to the murder of Baron von Kettler, German minister at Peking, and the guarding of the legations there, see infra, §§ 808–810.

By an imperial decree of Sept. 25, 1900, funeral sacrifices were granted in Baron von Kettler's honor. (For. Rel. 1900, 209–210.)

2. Of Domicile and Property.

§ 658.

"All the reasons, which establish the independency and inviolability of the *person* of a minister, apply likewise to secure the immunities of his *house*. It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade its freedom is a crime against the state and all other nations."

McKean, C. J., Resp. *v.* De Longchamps (Court of Oyer and Terminer, at Philadelphia, 1784), 1 Dallas, 111, 117.

The invasion of the freedom of the minister's house in this case was the commission of an assault on the secretary of legation therein.

The immunities of the domicile do not extend to an annexed garden.

London, At. Gen., 1804, 1 Op. 141.

The tearing down, in a riot in the city of Philadelphia, in 1802, of the flag of the Spanish minister, "with the most aggravating insults," was held to be cognizable in the State courts of Pennsylvania.

Mr. Madison, Sec. of State, to Governor McKean, May 11, 1802, 14 MS. Dom. Let. 18.

As to the case of the Spanish consul at New Orleans, see infra, § § 704, 1023.

The chargé d'affaires of Russia, having a large party at his house, had a transparent painting at his window, at which a mob, which had collected, took offense; the defendant fired two pistols at the window, his intention being to destroy the painting without doing injury to the person of the minister or of any one. The defendant was indicted for an assault upon the chargé d'affaires and for infracting the laws of nations by offering violence to the person of the minister. It was held that the law of nations identified the property of a foreign minister, attached to his person or in his use, with his person, so that an attack upon it was equivalent to an attack on the minister and his sovereign; and that it appeared to have been the intention of the act of Congress to punish offenses of this kind. But it was said that to constitute such an offense against a foreign minister the defendant must have known that the house on which the attack was made was the domicile of a minister; otherwise it was only an offense against the municipal laws of the State.

United States *v.* Hand, 2 Wash. C. C. 435.

"We had a grand imperial fête last night in our neighborhood, which had like to have been turned into a republican auto-da-fé—M. & Mde. de Daschkoff, to do honor to the anniversary of their master's coronation, invited one-third of Philadelphia to a ball, and to give the greater éclat, the front of the house was illuminated and an emblem-

atic transparency exhibited from one of the windows, on which, among other things, one of the most prominent was a crown. A crowd of vagabond boys were collected about the door the whole evening, but the constables who mounted guard—our gens d'armes—easily kept them in order. Just, however, as the company were descending to supper, word was brought that a mob of more magnitude, with a naval officer at their head, in full uniform and armed cap-a-pie, were making regular advances and demanded that the crown should be pulled down—à bas la couronne. Mr. Alleyne Smith, of Russian memory, and several others went out and endeavoured to explain to the gentlemen in the mud that the transparency was intended to do them honor—that one ship was sailing into Petersburg, another into Archangel and so on—but all in vain—the crown must come down, and it was not true that the ship was going into port, for her sails were aback—a mistake, it seems, the painter very innocently, ignorant of setting sails, had made in the drawing. In the meanwhile the ladies were seated to a very good supper, the door was kept fast, and we did as well as it was possible in a besieged place, with plenty of provisions. The result of the parley was that finding the beleaguerers inexorable the odious diadem should be removed. Accordingly M. Daschkoff himself, with four others, clambered up into the window and were surrendering as fast as they could, when an officer, who to the disgrace of the country proves to be a son of Gen. Hand of Lancaster and a doctor in the Navy, fired two pistols in quick succession, the ball from one of which passed thro' the window where there were five persons, by great good fortune without doing any personal harm. The ball was found and handed about the rooms afterwards; among the rest I had it in my hands. The mob shouted victory and marched off. This was, I think, a scene at the same time the most disgraceful & ridiculous that ever occurred in this peaceable town. Our police is so extremely bad, that I have no doubt if the mayor of the city had been acquainted with the affair he would have been the principal rioter." (Mr. Ingersoll to Mr. Rufus King, March 27, 1810, Meigs's Life of Charles Jared Ingersoll, 59.)

3. Of Reputation.

§ 659.

"The minister plenipotentiary of France has inclosed to me the copy of a letter of the 16th instant, which he addressed to you, stating that some libellous publications had been made against him by Mr. Jay, Chief Justice of the United States, and Mr. King, one of the Senators for the State of New York, and desiring that they might be prosecuted. This letter has been laid before the President, according to the request of the minister; and the President, never doubting your readiness on all occasions to perform the functions of your office, yet thinks it incumbent on him to recommend it specially on the present occasion, as it concerns a public character peculiarly entitled to the protection of the laws. On the other hand, as our

citizens ought not to be vexed with groundless prosecutions, duty to them requires it to be added, that if you judge the prosecution in question to be of that nature, you consider this recommendation as not extending to it; its only object being to engage you to proceed in this case according to the duties of your office, the laws of the land and the privileges of the parties concerned."

Mr. Jefferson, Sec. of State, to the Attorney-General, Dec. 18, 1793, 5 MS. Dom. Let. 399.

An article in Greenleaf's *New York Journal and Patriotic Register*, of Sept. 13, 1794, on "The British Solomon," by which title the British minister at Philadelphia, Mr. Hammond, was understood to be designated, represented him as a contemptible person, an incendiary jack-in-office, who had deceived the nation that sent him, and inspired another foreign minister with the fear of being killed by certain citizens of the United States. The article having been brought by Mr. Hammond to the notice of the Government of the United States, Mr. Randolph, who was then Secretary of State, submitted it to the Attorney-General, who advised that it was prima facie libellous, and might, if that course was deemed prudent, be made the subject of a criminal prosecution; that the law of libel, which protected the citizen, was, in the case of a foreign minister, "strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence, but also from insult." Mr. Randolph then sent the article to the United States district attorney at New York, and said: "You will be pleased to proceed upon it as the law directs, and I presume that any testimony which may be necessary on the part of Mr. Hammond he will readily supply; as I shall write him to this effect."

Opinion of Bradford, At. Gen., Sept. 17, 1794, 1 Op. 52; Mr. Randolph to Mr. Harrison, Sept. 18, 1794, 7 MS. Dom. Let. 271.

See 7 John Adams's Works, 421, 495; 10 id. 33.

For the submission to the United States attorney for the District of Columbia of certain letters written by a private individual to Count Sartiges, French minister, with a view to the institution against the individual in question of a prosecution for criminal libel, see Mr. Hunter, Act. Sec. of State, to Mr. Fendall, May 25, 1852, 40 MS. Dom. Let. 151.

For an account of the trial of William Cobbett for libel on the Spanish minister, Yrujo, see Wharton's State Trials, 322; 3 Life of Pickering, 396 et seq.

"The Attorney-General of the United States having determined the publication in Greenleaf's paper of the 13th instant, to which you alluded in your letter of the 13th instant, libellous, so far as it respects the minister of His Britannic Majesty near the United

States, the attorney of the district of New York is instructed to proceed therein according to law. I have therefore to request you to furnish him with such proofs as may be in your power."

Mr. Randolph, Sec. of State, to Mr. Hammond, British min., Sept. 20, 1894, 7 MS. Dom. Let. 276.

An ambassador or other representative of one foreign nation residing in another is entitled to be treated with respect so long as he is permitted to continue in the country to which he is sent, and especially ought not to be libeled by any of the citizens. If he commits any offense, it belongs, in our country, to the President to take notice of it, and not to any individual citizen. The President may dismiss him or desire his recall, or complain to his sovereign and require satisfaction.

Lee, At. Gen., 1797, 1 Op. 71.

An affront to an ambassador is just cause for national displeasure, and, if offered by an individual citizen, satisfaction is demandable of his nation. It is not usual for nations to take serious notice of publications in one nation containing injurious and defamatory observations upon the other, but it is usual to complain of insults to their ambassadors, and to require the parties to be brought to punishment. (Ibid.)

A publication charging the diplomatic representative of one country with "operating a spy system" in the interest of another country, is a proper subject for consideration with a view to the institution of a criminal prosecution for libel.

Mr. Day, Sec. of State, to the Attorney-General, June 8, 1898, 229 MS. Dom. Let. 214.

In a note to Mr. Hay of June 20, 1899, Count Vinci, Italian chargé d'affaires ad interim, referred to certain testimony of Mr. Powderly, Commissioner-General of Immigration, before the Industrial Commission, as having been given on the authority of "one Celso Cesare Moreno, who, as your excellency is aware, was prosecuted three years ago at the instance of the Federal Government and sentenced to three months' imprisonment for defaming His Excellency Baron Fava, his Majesty's ambassador."

For. Rel. 1899, 413.

VI. *JURISDICTIONAL IMMUNITIES.*

1. Exemption from Judicial Process.

The exemption of diplomatic officers from the local jurisdiction is often described as "extraterritoriality." The word, however, is in this relation peculiarly metaphorical and misleading. It is admitted

that if the government of the country which the minister represents waives his immunity he may be tried or prosecuted, criminally or civilly, in the local tribunals. His immunity is therefore in reality merely an exemption from process so long as he retains the diplomatic character.

(1) CRIMINAL PROCESS.

§ 660.

By section 4063 of the Revised Statutes of the United States any judicial process whereby "the person of any public minister of any foreign prince or state authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached," is declared to be void; and by section 4064 every person suing out or executing such process is declared to be "a violator of the laws of nations, and a disturber of the public repose," and is to be imprisoned for not more than three years and fined at the discretion of the court.

Revised Statutes, §§ 4063, 4064; Act of April 30, 1790, 1 Stat. 117.
See Wharton's Com. on Am. Law, § 167.

"A diplomatic representative possesses immunity from the criminal and civil jurisdiction of the country of his sojourn, and can not be sued, arrested, or punished by the law of that country. (R. S., secs. 4063, 4064.) Neither can he waive his privilege, except by the consent of his government; for it belongs to his office, not to himself. It is not to be supposed that any representative of this country would intentionally avail himself of this right to evade just obligations."

Instructions to Diplomatic Officers of the United States (1897), § 46, p. 18.

If a minister's crimes be such as to render him amenable to local jurisdiction it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

Exchange *v.* McFaddon, 7 Cranch, 116.

The laws of the United States which punish those who violate the privileges of a foreign minister are equally obligatory on the State courts as upon those of the United States, and it is equally the duty of each to quash the proceedings against anyone having such privileges. In such cases the injured party may seek redress in either

court against the aggressor, or he may prosecute in Federal courts under Federal statutes. (1 Stat. 117; R. S. § 4064.) And the circuit court can not quash proceedings against a public minister pending in a State court; nor can the court in any way interfere with the jurisdiction of the courts of a State.

Ex parte Cabrera, 1 Wash. C. C. 232.

"The result of the President's reflections respecting the right you [Mr. Cabrera, who claimed exemption from criminal prosecution on the ground of being connected with the Spanish legation] assert of being exempted from the ordinary jurisdiction of the country is that so far as the diplomatic quality, which is made the support of this privilege, has been conferred by the envoy of Spain, its attributes must be claimed only through him; but if you have been invested by His Catholic Majesty directly with a public character entitling you to exemption from the cognizance of our tribunals, all the means in the competency of the Executive will be used to assure to you the privilege on your forwarding to me the evidence of your appointment, authenticated by his said Majesty or his minister of foreign affairs." (Mr. Madison, Sec. of State, to Mr. Cabrera, October 17, 1804, 14 MS. Dom. Let. 393.)

"Mr. Joseph Cabrera, who was introduced to me by the Spanish minister as a gentleman attached to his mission, and who has exhibited, among their original documents, his instructions from Mr. Cevallos, minister of state of His Catholic Majesty, as an adjunct to the secretary of his legation to the United States, is detained under the circumstances disclosed by the communication from Mr. Dallas, which I have the honor herewith to transmit to you; and I request the favor of your opinion, whether any step is incumbent on the Executive in order to legalize his imprisonment, or to cause it to cease, and also whether, and in what manner, he may be sent to Spain for trial." (Mr. Madison, Sec. of State, to the Attorney-General, Nov. 23, 1804, 14 MS. Dom. Let. 410.)

See, also, Mr. Madison, Sec. of State, to Mr. Dallas, Oct. 30, 1804, 14 MS. Dom. Let. 400.

See United States *v.* Benner, Baldwin's Rep. 234.

In an instruction to a diplomatic representative of the United States, Dec. 23, 1815, Mr. Monroe, referring to the arrest of a foreign consul on a charge of rape, said: "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."

Later, Mr. Monroe modified his statement with regard to ministers, as follows: "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."

Mr. Monroe, Sec. of State, to Mr. Harris, chargé d'affaires at St. Petersburg, Dec. 23, 1815, and July 31, 1816, MS. Inst. U. States Ministers, VIII. 17, 89.

The Spanish minister in the United States complained of a breach of the privilege of his secretary of legation, Mr. Rivas y Salmon, who resided at Philadelphia, at the hands of a Mr. Kirk. The matter was brought to the attention of Mr. Ingersoll, United States district attorney at Philadelphia, who instituted a prosecution against Mr. Kirk, who, as it appeared, had sued out a warrant for the arrest of Mr. Salmon for an assault and battery committed on his son. On the trial Mr. Kirk was acquitted. He alleged that when he swore out the warrant he was ignorant of Mr. Salmon's public character; but it appeared in any event that the warrant was not actually executed, and on this ground the court decided that the act of Congress had not been violated.

Mr. Clay, Sec. of State, to Chev. de Tacon, Span. min., Dec. 10, 1828, MS. Notes to For. Legs. IV. 98.

"Whilst the President is anxious that every member of the diplomatic corps should constantly enjoy all the security and immunities which are guaranteed by the public law, it is no less his duty to exercise, if necessary, all the authority which he possesses to prevent any wrongs from being committed upon American citizens by any member of that corps. Nothing can justify any functionary of a foreign legation in taking the law into his own hands, and carving out the measure of his own redress. The President therefore expects that you will be able to make out for Mr. Salmon [secretary of legation] a satisfactory explanation or justification of the assault and battery committed by him . . . , of the indignity offered to the process issued by a public magistrate [by tearing up a writ]," and of the forcible taking from the possession of another person of certain movable property claimed by the latter.

Mr. Clay, Sec. of State, to Chev. de Tacon, Dec. 10, 1828, MS. Notes to For. Legs. IV. 98.

See, also, Mr. Clay, Sec. of State, to Chev. de Tacon, Feb. 7, 1829, MS. Notes to For. Legs. IV. 139.

See, also, Chev. de Tacon to Mr. Clay, Nov. 19, 1828, and Dec. 20, 1828, MS. Notes from Spanish Leg.

If the crime committed by a public minister affect individuals only, the government of the country is to demand his recall; and if his government refuses to recall him, he may be expelled by force or brought to trial, as no longer entitled to the immunities of a minister. If the crime affects the public safety of the country, its government may, for urgent cause, either seize and hold his person till the danger be passed, or expel him from the country by force; for the safety of the state, which is superior to other considerations, is not to be periled by overstrained regard for the privileges of an ambassador.

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

If the offense be grave, but not such as to compromise the public safety, the course is to demand the recall of the minister, and meanwhile to refuse or not all further intercourse with him, according to the circumstances. For implication in attempts to enlist troops in the United States, it was held that the President might send his passports to the British minister, with an intimation to leave the country without delay; or, in his discretion, adopt the milder course, as President Washington did in the case of M. Genet, of affording the minister opportunity for explanation through the Secretary of State; and then, if his explanation should be unsatisfactory, to demand his recall.

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

In May, 1868, Mr. Seward brought to the attention of Baron von Gerolt the statement that two persons connected with the Prussian legation, one the secretary and the other an attaché, had been, respectively as principal and second, guilty of violating the act of Congress of February 20, 1839, to prohibit duelling in the District of Columbia, and asked, in the name of the President, that, as the persons in question were "protected by the law of nations from judicial prosecution for a violation of the statute aforesaid," the matter be brought to the attention of their Government, in order that they might "in a proper manner be made sensible of its displeasure."

Mr. Seward, Sec. of State, to Baron von Gerolt, May 11, 1868, MS. Notes to Prussian Leg. VIII. 58.

The immunity of diplomatic representatives abroad is sanctioned by public law.

Mr. Fish, Sec. of State, to Mr. Partridge, Dec. 31, 1869, MS. Inst. Venez. II. 150.

See, also, Mr. Fish, Sec. of State, to Count Colobiano, March 25, 1870, MS. Notes to Italy, VII. 57.

"The executive department of this government can take no proceedings against persons who have the immunity attached to the diplomatic character except to ask their own government to recall them from this country."

Mr. Fish, Sec. of State, to Mr. Darr, 2, 1871, 88 MS. Dom. Let. 173.

Ignorance of the official character of a person entitled to diplomatic immunities (in this case, the military attaché of the French legation) does not excuse an officer who violates such immunities by arresting the person possessing them.

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, No. 873, Jan. 11, 1877, MS. Inst. France, XIX. 436.

"The statutes of the United States provide severe punishment for all such violation of the diplomatic immunities of the representatives of foreign states, and the courts of the United States, acting in harmony with the principles of public law, as recognized by the Government, have in more than one instance held that the law does not make knowledge an ingredient in an offense against the diplomatic immunities of a minister, and that it is not necessary to support an indictment against a person who executes a process against such minister that the defendant should know the person arrested to be a foreign minister." (Mr. Fish, Sec. of State, to Mr. de Vaugelas, chargé, Dec. 28, 1876, MS. Notes to France, IX. 173.)

See, also, Mr. Fish to Mr. de Vaugelas, Dec. 16, 1876, MS. Notes to French Leg. IX. 169.

In July, 1892, an attaché of the Swiss legation at Washington was arrested at Bay Ridge, Md., by a deputy sheriff, on the complaint of a woman who, having lost her pocketbook, which was afterwards found, charged the attaché with having taken it. The deputy sheriff, though advised by the attaché of his official character, took him before a magistrate for examination, and, besides searching his pockets and examining their contents, declined to send to the Department of State at Washington a telegram which the attaché gave him with the money to pay the necessary charges. The Department of State, on being acquainted with the facts, expressed its regret and submitted the matter to the governor of Maryland, who caused the deputy sheriff to be discharged and expressed regret at the occurrence. The Swiss Government treated this action as a satisfactory termination of the incident.

For. Rel. 1892, 521–526.

(2) CIVIL PROCESS.

§ 661.

The Danish chargé d'affaires having represented that a notice had been served upon him of his enrollment in a company of the Pennsylvania militia, Mr. Madison wrote to the governor of Pennsylvania that the exemption of public ministers from personal service or imposition of the kind in question having been uniformly admitted in the United States, it was probable that a mistake had been made which would readily be rectified.

Mr. Madison, Sec. of State, to Gov. McKean, May 6, 1805, 14 MS. Dom. Let. 461.

In 1873, Mr. Jay, American minister at Vienna, hearing that the apartment in which he lived, and which he had leased for a certain term, had been offered for sale, desired for this and other reasons to ascertain whether he could terminate his tenancy at an earlier day.

By the Austrian law, as it appears, a special court was established for certain classes of persons, including those who possessed extraterritorial privileges, of which court a Mr. Lesta was grand marshal. Mr. Jay, understanding that Mr. Lesta was appointed to advise the diplomatic representatives in respect of their rights and procedure, and being desirous "of observing carefully the usages and laws of the Empire," consulted him and was advised that he had a right to give a notice of termination of the lease and was informed of the time and manner of giving it. Notice was accordingly given on Mr. Jay's behalf through the proper court on the blank forms used for the purpose; and, in accordance with the Austrian law, the notice was accompanied with an order of the court to the landlord to file objections within eight days, in default of which the notice "would enter into force." The landlord, on being served with the notice, filed objections, and an order was then issued by the court directing both parties to appear pursuant to law under penalty of the appointed legal consequences. When this order was sought to be served on Mr. Jay, he asserted his diplomatic immunities and declined to appear in the court, and appealed to the foreign office for protection against its jurisdiction. The Department of State, when acquainted by Mr. Jay, at this stage of the proceedings, with what he had done, instructed him, March 9, 1874, that if he was plaintiff in the case, it would seem to be impracticable to avoid the inference that he had consented to the jurisdiction of the court; but that, if he was defendant, such jurisdiction might be resisted on grounds of international law; but the Department added that the facts before it did not enable it to form a correct decision. The Department, in using the terms "plaintiff" and "defendant," intended to convey the meaning that if Mr. Jay had invoked the process or aid of an Austrian court to enforce a right or to repair an injury, or to determine a doubtful question as to his legal rights under a contract, he would be regarded as plaintiff and as having consented to the jurisdiction of the tribunal.

Mr. Jay contended, however, that he did not and could not, within the rules of international law, enter into the litigation in question without the assent of the authorities of the United States. The Department of State replied that, while it doubtless might have been proper to have abstained from all proceedings till he had consulted his Government, it was equally clear that the rule was "one of propriety, affecting the minister in his relations to his own Government," and that a minister might "subject himself to the proceedings of a court, without the knowledge and against the will of his own Government." "Your liability," said the Department, "under your lease and your reasons for desiring to be released from it were matters

which affected you and you alone. . . . It was yourself who requested the issue of the notice to your landlord and the aid of the court, and invited the filing of objections; and it was to your demand, signified formally through the court, that your landlord replied. No proceedings had been commenced against you, and none were attempted." This conclusion, said the Department, was not altered by the fact that the court, in an opinion of April 29, 1874, while stating that Mr. Jay had acknowledged the competency of the jurisdiction by filing his notice, also expressed an opinion that envoys were subject to the provisions of the Austrian law concerning landlord and tenant. It was not possible to say which particular ground was deemed more conclusive by the court, but it was evident, said the Department, that the court held that the filing of the notice was a submission to the jurisdiction. It seems, that at one stage of the controversy, the foreign office informed Mr. Jay that it admitted his right to decline the jurisdiction of the court, and that the court had been so advised, but this information was coupled with the statement by the foreign office, that it could not control the action of the court; and the result showed, said the Department, that the opinion of the foreign office, as to Mr. Jay's right to decline the jurisdiction of the court, was not concurred in by the latter. In conclusion, the Department said:

"The tendency of opinion in regard to immunities of diplomatic agents is believed to be strongly toward restricting them to whatever may be indispensable to enable the agents to discharge their duties with convenience and safety. The extreme doctrine of immunity, which was the necessity of an age of barbarism and of the intercourse of uncivilized nations, has happily yielded to the progress of Christianity and of modern civilization. The practical application of the doctrine, as among Christian peoples, should be confined to cases of the greatest importance.

"An envoy is not clothed with diplomatic immunity to enable him to indulge with impunity in personal controversies, or to escape from liabilities to which he otherwise might be subjected.

"The assertion of these immunities should be reserved for more important and delicate occasions, and should never be made use of when the facts of the particular case can expose the envoy to the suspicion that private interest or a desire to escape personal or pecuniary liability is the motive which induced it. . . .

"In reply to your request for further instructions, the Department enjoins upon you to abstain from further efforts to make your litigation the cause, the question, or the occasion of diplomatic controversy, or for the assertion of diplomatic immunities. The suit having been inaugurated by your appeal to the court, is regarded as a case of contentious litigation, and it and the consequences from it are to be

treated by you as other purely personal matters are to be treated, and must be adjusted accordingly."

Mr. Fish, Sec. of State, to Mr. Jay, min. to Austria-Hungary, No. 457, Dec. 29, 1874, MS. Inst. Austria, II. 289, 290.

"Mr Wheaton's case (in Prussia) was a much stronger one than yours. It had the appearance at least of involving the question of diplomatic immunities; his effects had been seized and detained, not for rent but for indemnity for alleged injury to the house; but the controversy was terminated, the landlord restoring the effects on payment of compensation for the injury alleged to have been done." (Mr. Fish, Sec. of State, to Mr. Jay, private and unofficial, Oct. 26, 1874, MS. Inst. Austria, 288.)

Mr. Jay subsequently reported that a new suit or proceeding had been commenced by his late landlord for the recovery of rent alleged to be due, which suit, though the parties were the same, was a distinct proceeding resting on different grounds from the previous one; that he had declined to appear in the proceeding, and had been notified that a curator had been appointed for him; that he had transmitted the papers to the foreign office, and invoked its protection; and that the foreign office, by a note of December 12, 1874, had advised him that it had taken steps "to make valid in legal form the incompetency of the district court for the adjudication of a personal suit directed against the envoy." The Department of State replied that if the new suit was entirely independent of the previous one, and Mr. Jay had done nothing to submit himself to the jurisdiction of the court, it was believed to be his right, in case he chose to avail himself of his immunity as minister of the United States, to claim exemption from the jurisdiction or the process of the court, and that in this view it was permissible that he should inform the foreign office of the facts and request its interposition. The Department, however, added: "It was not advisable that you should enter into a lengthy correspondence on the general questions already discussed or other kindred subjects; and so much of your correspondence as is reported in your No. 838 concerning your former suit, is in violation of the instructions of the Department. It is anticipated, from the declarations of the foreign office, that steps have been taken to arrest the proceedings and that the question may now be disposed of."

Mr. Fish, Sec. of State, to Mr. Jay, min. to Austria-Hungary, No. 463, Jan. 13, 1875, MS. Inst. Austria, II. 316.

"It is understood that the litigation in which you have been involved with your landlord is now disposed of, and therefore it is deemed advisable that you abstain from any further correspondence with the foreign office on the subject of that litigation." (Mr. Fish, Sec. of State, to Mr. Jay, min. to Austria-Hungary, No. 476, Feb. 26, 1875, MS. Inst. Austria, II. 328.)

In replying to an inquiry of Mr. Jay, after his return from the mission to Vienna, as to what "protection" the Department of State would give in case he should in future visit Austria-Hungary as a private citizen, Mr. Fish said that on complying with the requirements of law he would be "entitled to a passport as a private citizen and to such protection as it carries with it." (Mr. Fish, Sec. of State, to Mr. Jay, April 5, 1876, 112 MS. Dom. Let. 561.)

August 5, 1878, Mr. Barrett, a justice of the peace of Saratoga County, N. Y., issued a summons in debt at the suit of one Sailor, a livery stable keeper, for a small amount, against the Marquis Mantilla, the Spanish minister in the United States, requiring the latter to appear on the 7th of the same month to answer. The minister at once admitted the service and returned the summons to the justice with a communication calling his attention to sections 687, 688, 4063, and 4064, R. S., which the minister transcribed. On the papers thus forwarded, the justice endorsed: "The Court decides that a Spanish minister is just as liable to answer in this court for the payment of his debts as any other person.—William C. Barrett, Justice of the Peace." It does not appear, however, that any further proceedings were taken. Mr. Evarts sent the papers to the Attorney-General, referring to Barrett's persistence in exercising his judicial functions after having been informed of the laws of the United States on the subject, and said that, upon the matter being brought to the attention of the governor of New York, measures doubtless would be taken to stay further proceedings and to prevent the recurrence of like proceedings in the future; but that, should the authorities of New York fail to act on this suggestion, it might be necessary to determine what course it would be proper to pursue towards the justice of the peace and other parties to the proceedings, under the laws of the United States.

Mr. F. W. Seward, Acting Sec. of State, to Mr. Devens, Aug. 22, 1878, 124 MS. Dom. Let. 504.

The Department of State having been officially informed that the sheriff of Newport County, R. I., had made personal service of judicial process upon Mr. Bartholomei, Russian minister in the United States, in a civil action, Mr. Blaine declared that the service in question was clearly a violation of diplomatic privilege and suggested to the governor of Rhode Island that, if the suit should be followed up, the attorney-general of the State should be instructed to appear, not as the representative of the Russian minister, but ex officio, and call the court's attention to the minister's privilege and move for the termination of the proceedings. Mr. Blaine added that, while the provisions of the act of 1790 in terms related to the extreme case of an attempt to arrest the person or attach the property of a foreign

minister, yet it was clear that the service of any process on such a minister was "an infringement of his privilege and an abuse of the process of the court."

Mr. Blaine, Sec. of State, to the gov. of R. I., Oct. 31, 1881, and Nov. 21, 1881, 139 MS. Dom. Let. 442, 634.

The governor of Rhode Island referred Mr. Blaine's letter of the 31st of October to the attorney-general of the State, and assured Mr. Blaine that proper steps would be taken to call the attention of the court to the alleged abuses of privilege, in case the process should be entered at the term of court to which it was made returnable. Mr. Blaine sent a certificate of the official character of the Russian minister to the governor for use before the court. (Mr. Blaine, Sec. of State, to Mr. Bartholomei, Russian min., Nov. 23, 1881, MS. Notes to Russia, VII. 375. See, also, Mr. Hitt, Act. Sec. of State, to Mr. Bartholomei, tel., Oct. 3, 1881, id. 370.)

The offense described in secs. 4063 and 4064, Revised Statutes, is not complete until execution of the writ. The mere issuance of a writ without anything more would not, under the law of nations, be deemed an invasion of diplomatic rights. A letter informing the minister that the writ has been issued may be an affront, but is not more so than a dunning letter or a threat to sue. In such a case, the writ not having been served, the annulment of the execution and judgment exhausts the power of the court, and the statutes of the United States do not afford any further redress.

Mr. Brewster, At. Gen., to Mr. Frelinghuysen, Sec. of State, July 3, 1883, MS. Misc. Let.

See Mr. Frelinghuysen, Sec. of State, to Mr. Brewster, At. Gen., June 21, 1883, 147 MS. Dom. Let. 306. Mr. Brewster's opinion was written in reply to this letter which propounded several questions, one of which was whether the marshal, in whose hands a writ issued on a judgment was placed for execution, was an "officer concerned in executing it," in the sense of sec. 4064, Rev. Stat., when in fact it was not executed, but only an attempt was made to execute it by the marshal's serving notice on the minister.

"If the marshal of the court had seized your person or seized your goods, he would, as such an officer, have been liable; but to make the offence cognizable and punishable under the sections referred to (Rev. Stat., secs. 4063 and 4064), the writ must be in fact executed." (Mr. Frelinghuysen, Sec. of State, to Mr. Preston, Haytian min., July 10, 1883, MS. Notes to Hayti, I. 301.)

Secs. 4063 and 4064, Revised Statutes, do "not in any case impose a penalty on the judge who may hear a suit to which a foreign minister is defendant. The penalties prescribed are solely applicable to every person by whom a writ of execution is sued out, whether as party or as attorney or solicitor, and to every officer concerned in executing it."

Mr. Frelinghuysen, Sec. of State, to Mr. Preston, Haytian min., July 10, 1883, MS. Notes to Hayti, I. 301.

As diplomatic officers are exempt from process in civil suits by a statute which neither the courts nor the executive can dispense with, the Department of State can not aid the courts in enforcing the payment of debts by diplomatic officers. The only way the Department can intervene is by asking for the officer's recall. "In order, however, to warrant such a step, the person involved would have to be shown to be guilty of such misconduct as to make his presence in this country in a representative capacity undesirable. His failure to discharge a debt at a particular time would not, it is thought, be alone a sufficient ground for such serious international action."

Mr. Rives, Assis. Sec. of State, to Messrs. Merrill & Rogers, July 19, 1888, 169 MS. Dom. Let. 190.

The statement in Lawrence's Principles of International Law, p. 283, that, in case of the misconduct of a diplomatic officer, "the remedy by diplomatic complaint, or an appeal to the courts of the ambassador's own country, will generally be sufficient," "obviously relates to such grounds of complaint, in the case of an envoy actually accredited to and received by the complaining State, as would suffice to make him *persona non grata* to the government which has to transact business with him." Where the person complained of is no longer envoy, there exists "no diplomatic right to complain of his personal conduct."

Mr. Hay, Sec. of State, to Mr. Renick, Feb. 26, 1900, 243 MS. Dom. Let. 224.

The clause in the Constitution (second section, third article) that the judicial power of the United States extends to all cases affecting ambassadors, other public ministers, and consuls, confers a public, not a personal, privilege, and is not waived by an omission to plead it in a State court of the first instance.

Davis *v.* Packard, 7 Pet. 276.

The President will not interfere with judicial proceedings between an individual and the commissioner of a foreign nation where the controversy may have a legal trial, unless the suit grew out of acts done by the commissioner in pursuance of his commission.

Lee, At. Gen. 1797, 1 Op. 81.

Any person who executes process on a foreign minister is to be deemed an officer under section 26 of the act of 1790 (1 Stat. 117; R. S. § 4064), and in such case *scienter* need not be proved, nor is submission of the minister any defense.

United States *v.* Benner, Baldwin, 234.

Where a public minister is a partner in a firm, an action can not be brought against the firm on a firm debt in a State court. An intentional nonservice of summons on such minister will not give jurisdiction, and he can take advantage of the want of jurisdiction, in such a case, by a petition on his part for an order dismissing the complaint.

Re Tracy, 46 N. Y. Super. Ct. 48.

A writ of summons in an action can not be issued against, and therefore the statute of limitations does not commence to run in favor of, the ambassador of a foreign state while he is accredited to Great Britain, or during such time after his recall as is reasonably occupied by him in winding up the affairs of his embassy and leaving the country.

Musurus Bey *v.* Gadban, L. R. (1894) 1 Q. B. 533.

(3) GIVING OF TESTIMONY.

§ 662.

"A diplomatic representative can not be compelled to testify, in the country of his sojourn, before any tribunal whatsoever. This right is regarded as appertaining to his office, not to his person, and is one of which he can not divest himself except by the consent of his government. Therefore, even if a diplomatic representative of the United States be called upon to give testimony under circumstances which do not concern the business of his mission, and which are of a nature to counsel him to respond in the interest of justice, he should not do so without the consent of the President, obtained through the Secretary of State, which in any such case would probably be granted."

Instructions to Diplomatic Officers (1897), § 48, p. 19.
See Mr. Fish, Sec. of State, to Mr. Turner, min. to Liberia, No. 16, April 2, 1872, MS. Inst. Liberia, I. 92.

An attaché of the Danish legation in the United States instituted in the United States district court at Philadelphia a criminal prosecution against a local officer for the violation of his diplomatic privilege, in the service upon him of legal process in an action for debt. The Danish chargé d'affaires subsequently asked that the United States district attorney at Philadelphia be instructed not to require the personal attendance of the attaché to give testimony in the case. The Department of State, in reply, adverted to the circumstance that the prosecution was instituted at the instance and upon the information of the attaché himself to vindicate and estab-

lish the rights which he claimed by reason of his official station, and expressed the opinion that it was competent for the court and was "its exclusive right and province to dispense or not, according to its view of the grounds upon which the exemption is claimed, with the personal attendance" of the attaché. The Department therefore declined to instruct the district attorney as requested, and added that it must necessarily be left to the court and jury to decide upon the sufficiency of the proof which that officer should furnish if he should decide to dispense with the personal attendance of the attaché.

Mr. Van Buren, Sec. of State, to Mr. Bille, Danish chargé d'affaires, Oct. 23, 1830. MS. Notes to For. Legs. IV. 312.

"A case of homicide having occurred at Washington, in 1856, in the presence of the Dutch minister, whose testimony was deemed altogether material for the trial, 'and inasmuch as he was exempt from the ordinary process to compel the attendance of witnesses,' an application was made by the district attorney, through the Secretary of State, to M. Dubois to appear and testify. The minister having refused, by the unanimous advice of his colleagues, in a note of the 11th of May, 1856, to the Secretary of State, to appear as a witness, Mr. Marcy instructed, May 15, 1856, Mr. Belmont, minister of the United States at The Hague, to bring the matter to the attention of the Netherlands Government. He says, that 'it is not doubted that both by the usage of nations and the laws of the United States, M. Dubois has the legal right to decline to give his testimony; but he is at perfect liberty to exercise this privilege to the extent requested, and by doing so he does not subject himself to the jurisdiction of the country. The circumstances of this case are such as to appeal strongly to the universal sense of justice. In the event of M. Van Hall's suggesting that M. Dubois might give his deposition out of court in the case, you will not omit to state that by our Constitution, in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him, and hence, in order that the testimony should be legal, it must be given before the court.' M. Van Hall, June 9, 1856, in a note to Mr. Belmont, declined authorizing the minister to appear in court. He said that, 'availing himself of a prerogative generally conceded to the members of the diplomatic body, and recognized also by the laws of the Republic, as adverted to by Mr. Marcy, M. Dubois refused to appear before a court of justice; but being desirous to at once reconcile that prerogative with the requirements of justice, he suggested a middle course of action, and proposed to Mr. Marcy to give his declaration under oath, should he be authorized to that effect by the Government of the Netherlands. After taking the King's orders on the subject, I did not hesitate to give such authority to M. Dubois, approving at the same time,

and formally, the line of conduct which he pursued on that occasion.' M. Dubois addressed a note to Mr. Marcy, on the 21st of June, stating that he was authorized to make his declaration under oath at the Department of State, adding, 'it is understood that, on such an occasion, no mention is to be made of a cross-examination, to which I could not subject myself.' The declaration was not taken, as the district attorney stated that it would not be admitted as evidence."

Lawrence's Wheaton (1863), 393, 394.

The correspondence of the government of the Netherlands, in refusing to allow its diplomatic agent to testify in the criminal courts of the United States, is given in S. Ex. Doc. 21, 34 Cong. 3 sess.

See, also, Dana's Wheaton, § 225, note 125.

"No objection is seen to your giving your testimony of your own accord in the case referred to [pending in a court of justice at Florence], or in any other place where it might be necessary for the purposes of justice. If, however, there should be any attempt, directly or indirectly, at compulsion in the matter, you would be expected to assert your privilege as a diplomatic agent, and in that you would be sustained by this Government."

Mr. Fish, Sec. of State, to Mr. Marsh, min. to Italy, No. 547, Nov. 1, 1876, MS. Inst. Italy, II. 1.

Baron von Gerolt, Prussian minister, having complained of the refusal of a justice of the peace in the District of Columbia to issue a warrant for the arrest of a German named Duplessis, who was alleged to have threatened or committed violence on the minister or his household, the matter was referred to the Attorney-General of the United States for his opinion as to the right of a justice of the peace to issue a warrant for the arrest of an individual upon a mere declaration, unaccompanied by any oath, of a member of the diplomatic body. The Attorney-General held that the justice of the peace was justified in his refusal to issue a warrant without an oath of some person against the alleged aggressor. The Department of State, in communicating this opinion to the Prussian minister, observed that if a diplomatic agent should be the only person who had witnessed the acts of an aggressor in such a case, and therefore the only person capable of testifying in regard to them, it could not be perceived "why it should be considered incompatible with either his dignity, or the exemption from the jurisdiction of the country to which he is entitled, for him voluntarily to offer his testimony in the usual form." (Mr. Hunter, Act. Sec. of State, to Baron von Gerolt, Aug. 2, 1852, MS. Notes to German States, VI. 310.)

On the trial of Guiteau, Señor Comancho, minister from Venezuela, who was present at President Garfield's assassination, was called as a witness for the prosecution. Before he was sworn the following statement was made by the district attorney:

"If your honor please, before the gentleman is sworn, I desire to state, or rather I think it due to the witness to state, that he is the min-

ister from Venezuela to this Government, and entitled under the law governing diplomatic relations to be relieved from service by subpœna or sworn as a witness in any case. Under the instructions of his Government, owing to the friendship of that Government for the United States, and the great respect for the memory of the man who was assassinated, they have instructed him to waive his rights and appear as a witness in the case, the same as any witness who is a citizen of this country."

Guiteau's Trial, I. 136.

Early in the morning of December 31, 1886, a robbery was committed in the house of the Chilean minister at Washington. Later in the day the minister addressed a note to the Department of State expressing his appreciation of the action of the police in promptly effecting the arrest of the culprit, who proved to be a person formerly in the minister's employ as a servant. In acknowledging the receipt of the minister's note, the Department said: "Although fully aware of the immunity from judicial citation which pertains to your position as the envoy of a foreign government, yet inasmuch as our constitutional procedure requires that a person accused of crime shall be confronted with the witnesses against him, and as yourself and the members of your household are best qualified to give the evidence necessary to prevent a possible miscarriage of justice, I may be permitted to express the hope that you will courteously offer your aid toward the vindication of the laws in this case."

Mr. Porter, Acting Sec. of State, to Mr. Gana, Chilean min., Jan. 3, 1887, MS. Notes to Chilean Leg. VI. 352.

See Mr. Brent, chief clerk, to Mr. Williams, U. S. attorney at Baltimore, July 22, 1828, 22 MS. Dom. Let. 248.

November 16, 1893, the judge of the second civil court at the City of Mexico addressed certain interrogatories to the minister of the United States in a civil suit then pending. One of the inquiries was whether the Congress of the United States had on a certain day passed an act imposing a certain duty on imported ores, and another was whether the minister had authority from his government to testify in the case. The chargé d'affaires ad interim of the United States answered the various interrogatories, giving the information that was sought by them: but the inquiry whether he was authorized by his government to testify he answered in the negative. The Department of State declined to approve his action, saying: "It is a well-established rule that no public minister can testify in a civil or criminal case without the authorization of his government. Moreover, he can not even testify as a private individual, for he may not

waive his official character and immunities without express authorization of his government."

Mr. Gresham, Sec. of State, to Mr. Gray, min. to Mexico, Jan. 12, 1894, For. Rel. 1894, 426.

Mr. Iddings, secretary of the American embassy at Rome, having inquired whether he should give testimony against a pickpocket, as desired by an Italian court, Mr. Adee, Acting Secretary of State, replied that his testimony might be given on terms consistent with his representative dignity, and that, unless an examination in open court was indispensable, the giving of his personal deposition at the embassy was preferable. Mr. Iddings subsequently reported that his deposition was to be taken at the embassy by the judge before whom the case was pending.

For. Rel. 1901, 302–303.

(4) PROPERTY.

§ 663.

"Immunity from local jurisdiction extends to a diplomatic representative's dwelling house and goods, and the archives of the mission. These can not be entered, searched, or detained under process of local law or by the local authorities."

Instructions to Diplomatic Officers of the United States (1897), § 49, p. 19. See Mr. Hunter, Act. Sec. of State, to Mr. Addison, July 31, 1852, 40 MS. Dom. Let. 261; Mr. Webster, Sec. of State, to Mr. Fendall, 40 MS. Dom. Let. 304; Mr. Seward, Sec. of State, to Gen. Scott, July 10, 1861, 54 MS. Dom. Let. 277.

"If a diplomatic representative holds, in a foreign country, real or personal property aside from that which pertains to him as a minister, it is subject to the local laws."

Instructions to Diplomatic Officers of the United States (1897), § 47, p. 19.

The persons and personal effects of foreign ministers, of their families and attachés, are exempt from seizure, arrest, or molestation, both by the law of nations and by act of Congress. A hotel keeper therefore can not prevent an attaché from removing his personal effects from the premises; and any attempt to do so would be punished by the courts.

Toucey, At. Gen. 1849, 5 Op. 69.

While Mr. Wheaton was minister to Prussia the owner of the house in which he lived claimed the right to detain his goods found on the premises at the expiration of his lease, in order to secure the payment of damages alleged to be due on account of injuries done to

the house during the contract. The landlord claimed this right under the Prussian civil code, which gave the lessor, as a security for the rent and other demands arising under the contract, the right of a *pfandgläubiger* upon the goods brought by the tenant upon the premises and there remaining at the expiration of the lease. By the same code "a real right, as to a thing belonging to another, assigned to any person as security for a debt, and in virtue of which he may demand to be satisfied out of the substance of the thing itself, is called *Unterpfandsrecht.*"

The Prussian Government decided that the general exemption of the personal property of a foreign minister from the local jurisdiction did not extend to the case in question, where, it was contended, the right of detention was created by the contract itself and by the legal effect given to it by the local law. This position was combatted by Mr. Wheaton, on the ground that it placed members of the diplomatic corps on the same footing with the subjects of the country, as to the right which the Prussian code conferred on the lessor of distraining the goods of a tenant to enforce the performance of a contract; and that it violated the immunities to which diplomatic officers were entitled. The Prussian Government replied that no Prussian authority had pretended to exercise a right of jurisdiction over the property of the minister; that the question at issue was that of the legal rights established by the contract of hiring between the landlord and the tenant, and that to determine this question there could be no other rule than that of the civil law of the country where the contract was made.

The controversy was ended as between the parties by the landlord restoring the minister's effects on payment of a reasonable compensation for the injury done to the premises. The Prussian Government, however, proposed to submit to the Government of the United States the question whether, if a foreign minister in the United States should enter into a contract with an American citizen under which, by the laws of the land, such citizen acquired a *real right* (*droit réel*) over personal property (*biens mobiliers*) belonging to the minister, the American Government would undertake to deprive such citizen of his "real right" at the instance of the minister. The Government of the United States answered that, if there was only an implied contract, growing out of the relation of landlord and tenant, by which, under a municipal law, a tacit lien upon the furniture was given, and no express hypothecation, still less any giving in pledge, which implied a transfer of possession by way of security for a debt, the view taken by Mr. Wheaton was deemed correct, and was in accordance with the rule laid down in the act of Congress of 1790. The Prussian Government rejoined that its opinion upon the point in controversy remained unchanged by the authorities that had been

cited; that the question was not one of the exercise of jurisdiction over a diplomatic representative, but whether a lessor, by exerting his right of retention, had committed a breach of the minister's privileges for which he might be brought before the competent judge and compelled to restore the effects retained by him.

Wheaton's Elements of Int. Law, Dana's ed., secs. 228–241, pp. 307–319.

"If Mr. Wheaton had pledged the articles to the landlord by a contract, he might be considered as having waived his official privilege in respect to them. But if the landlord had only a lien by force of general law, and that lien was only a right, to enforce which he was obliged to invoke the aid of a court and use its process, the question was not an abstract one of civil law on the existence of the lien, but a question of public law, whether compulsory process shall be permitted by a state against property *in that predicament*, whatever be the nature of the claim." (Note by Mr. Dana, Dana's Wheaton, sec. 241, p. 319.)

See Grotius, De Jure Belli ac Pacis, lib. II., cap. 18, § 9; Bynkershoek, De Foro Legatorum, cap. 9, §§ 9, 10; Vattel, Droit de Gens, liv. IV., ch. 8, § 114; Foelix, Revue du Droit Français et Étranger, tom. II. 31.

That a municipal law, giving a landlord a "real right" (*droit réel*) as to personal property belonging to a diplomatic agent, can not abridge the immunities of the latter under the law of nations, is maintained in Mr. Legaré, Sec. of State, to Mr. Wheaton, min. to Prussia, No. 43, June 9, 1843, MS. Inst. Prussia, XIV. 52.

The Venezuelan minister in the United States having inquired whether the deed for a house, which he had purchased in New York for a residence during his diplomatic mission, could be recorded in his name as minister of Venezuela in the United States, the Department of State replied that the acquisition and sale of real property in the United States was governed by the laws of the respective States, and that the domicil of a diplomatic representative was safe from intrusion, whether occupied by him as owner or tenant.

Mr. Seward, Sec. of State, to Mr. Bruzual, Sept. 24, 1864, MS. Notes to Venezuela, I. 91.

See, also, Mr. Seward, Sec. of State, to Commander de Figanière, June 20, 1865, MS. Notes to Portugal, VI. 218.

2. Persons Entitled to Exemptions.

(1) The minister and his household.

§ 664.

"The personal immunity of a diplomatic representative extends to his household, and especially to his secretaries (R. S. secs. 4063, 4064)."

Instructions to Diplomatic Officers of the United States (1897), § 53, p. 21.

See, also, United States *v.* Benner, Baldwin, 234; Ex parte Cabrera, 1 Wash. C. C. 232.

"It is customary for a diplomatic representative to furnish to the local government a list of the members of his household, including his hired servants, with a statement of the age and nationality of each. When this is requested, it should always be given."

Instructions to Diplomatic Officers of the United States (1897), § 55, p. 21. See, as to Mohammedan countries, id. § 56, p. 21.

"§ 8. The secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps in respect to their exemption from local jurisdiction. 'The ambassador's secretary,' says Vattel, 'is one of his domestics; but the secretary of the embassy has his commission from the sovereign himself, which makes him a kind of public minister, and he, in himself, is protected by the law of nations, and enjoys immunities independent of the ambassador, to whose orders he is indeed but imperfectly subjected, sometimes not at all, and always according to the determination of their common master.'"

Halleck, Int. Law (3d ed.), by Baker, I. ch. 10, p. 329, citing Vattel, Droit des Gens, liv. iv. ch. ix. § 122.

"§ 9. The attachés, and the wife and family of a minister, participate in the inviolability attached to his public character. 'The persons in an ambassador's retinue,' says Vattel, 'partake of his inviolability; his independency extends to all his household; these persons are so connected with him that they follow his fate. They depend immediately on him only, and are exempt from the jurisdiction of the country into which they would not have come, but with this reserve. The ambassador is to protect them, and whenever they are insulted it is an insult to himself. . . . The ambassador's consort is intimately united to him, and more particularly belongs to him than any other person of his household. Accordingly, she shares his independency and inviolability; even distinguished honours are paid her, which in some measures could not be denied her without affronting the ambassador. For these, most courts have a fixed ceremonial. The regard due to the ambassador communicates itself likewise to his children, who also partake of his immunities.'"

Halleck, Int. Law (3d ed.), by Baker, I. 329, citing Toucey, At. Gen., 5 Op. 69; Merlin, Répertoire, verb. "Ministre Public," sec. vi.; Vattel, Droit des Gens, liv. iv. ch. ix. § 122.

"*An agent* has not the privilege of legation unless he be accredited." (Ibid. Baker's note.)

The late governor of Guadaloupe, who had caused a vessel to be seized and condemned, is not exempt from suit and arrest in the courts of Pennsylvania whilst here as a prisoner to the British forces

on parole; and if the circumstances attending the seizure were such as will constitute a defense, they must be pleaded.

If the seizure was an official act—done under color of the powers vested in him as governor—that will be an answer, as the extent of his authority could be determined only by the constituted authorities of his own nation; but it is not a case for the interposition of the government.

Bradford, At. Gen., 1794, 1 Op. 45.

A foreign naval officer is not privileged from arrest.

Bradford, At. Gen., 1794, 1 Op. 49.

The Supreme Court, in the exercise of its discretion, will refuse a writ of certiorari to the supreme court of the District of Columbia, to bring up the proceedings under an indictment there preferred against one who was consul-general of the Swiss Confederation and its political agent for the United States, but who has resigned his office at the request of his government, it not appearing what his duties were as a political agent.

Ex parte Hitz, 111 U. S. 766.

In February, 1886, the minister of foreign affairs of Honduras transmitted to Mr. Jacob Baiz, a citizen of the United States, then holding the office of Honduranean consul-general at New York, an appointment as chargé d'affaires of the Republic to the Government of the United States. The Secretary of State refused to receive Mr. Baiz in the latter capacity, on the ground that the immunities and privileges of a foreign minister made it inconvenient that a citizen of the country should enjoy "so anomalous a position;" but permitted him to correspond with the Department of State on whatever diplomatic business might arise, in view of the circumstance that the office of minister was for the time being unfilled. Mr. Baiz then asked to be recognized as "chargé d'affaires *ad hoc*, or as diplomatic agent of Honduras, for all practical as well as official purposes," but without relief from the "duties and responsibilities incumbent on a citizen of the United States." The Secretary of State replied that the Department could not recognize his agency as conferring upon him any diplomatic status, and therefore declined to recognize him as chargé d'affaires *ad hoc*, which would imply that diplomatic representation was renewed in his person.

In 1887 Mr. Baiz became consul-general of Guatemala at New York, continuing also to hold the same office for Honduras.

In January, 1889, the diplomatic representative of Guatemala, Salvador, and Honduras, who was appointed subsequently to the correspondence between the Department of State and Mr. Baiz in 1886,

informed the Department of State that he was about to go to Guatemala for a short time and requested the Department to allow "the consul-general of Guatemala and Honduras in New York," Mr. Baiz, to "communicate to the office of the Secretary of State any matter whatever relating to the peace of Central America, which should without delay be presented." The Secretary of State granted this request; and in the following March information of the appointment of Mr. Blaine as Secretary of State was conveyed to Mr. Baiz in a communication addressed to him as "Señor Don Jacob Baiz, in charge of the legations of Guatemala, Salvador, and Honduras." Mr. Baiz acknowledged the receipt of this note, subscribing himself as "Jacob Baiz, consul-general." Mr. Baiz was subsequently informed in a similar manner of the appointment of a new minister from the United States to Guatemala, Salvador, and Honduras. In the list of legations in the United States issued by the Department of State in June, 1889, mention was made under the heads of Guatemala, Salvador, and Honduras of the absence of their minister, and in a footnote there was the statement: "Jacob Baiz, consul-general, in charge of business of legation, New York City." In other cases where the minister was absent the name of the chargé d'affaires ad interim was given with the fact and date of his presentation.

June 29, 1889, a suit was brought against Mr. Baiz in New York by a private individual. The Department of State subsequently declined to certify that Mr. Baiz was at the time the suit was brought invested with a diplomatic character.

Held, that the defendant did not upon the facts presented possess a diplomatic character and that, in the absence of a certificate from the Secretary of State that he possessed such a character, he was not entitled to the immunities of a diplomatic officer in respect of judicial process.

In re Baiz (1890), 135 U. S. 403, 10 S. Ct. 854.

This was an application by Baiz for a writ of prohibition to restrain the district court from proceeding in the suit. The court admitted official papers with reference to his public character which were not before the district court.

See Hollander *v.* Baiz, 41 Fed. Rep. 732.

The debtor was a British subject who up to July, 1890, had carried on business in London. In January, 1891, he was appointed by the Persian ambassador an honorary attaché of the embassy, having previously been consul-general for Persia in London, and his name was sent into the foreign office as a member of the ambassador's suite. His appointment was in no way recognized by the British Government. In March, 1891, a judgment was obtained against him, by consent in an action commenced in July, 1890, in respect of transactions connected with the business he carried on. A petition in

bankruptcy was presented against him in May, 1891, founded upon that judgment debt, and the debtor claimed immunity from all civil process as a member of the Persian embassy. Held, that he was not entitled to the privilege claimed, his appointment having been obtained for the purpose of protecting him against his creditors, and having been inadvertently made by the Persian ambassador.

Ex parte Cloete, 65 Law T. 102.

The wife of a secretary of a foreign legation in this country is, while with him in his official capacity, subject, in respect to her personal estate, to the laws of the country he represents.

Mr. Frelinghuysen, Sec. of State, to Mr. Lawrence, Mar. 31, 1883, 146 MS. Dom. Let. 287, citing Wheat. Int. Law, 300–1 (Dana's ed.); 4 Phillimore, Int. Law, 122–3.

A British subject, accredited to Great Britain by a foreign government as a member of its embassy, is, unless he has been received by the British Government upon the express condition that he shall be subject thereto, exempt from the local jurisdiction of his own country, and his household furniture is privileged from seizure for nonpayment of parochial rates.

Macartney *v.* Garbutt, 24 Q. B. D. (1890), 368.

The certificate of the Secretary of State is the best evidence to prove the diplomatic character of a person accredited as a minister by the Government of the United States. But parol evidence can be admitted to prove the period when a person was considered by the Government of the United States as a minister.

United States *v.* Liddle, 2 Wash. C. C. 205.

(2) PERSONS IN MINISTER'S SERVICE.

§ 665.

Generally, a minister's servants share in his immunity: "but this does not always apply when they are citizens or subjects of the country of his sojourn. R. S., sec. 4065."

Instructions to Diplomatic Officers of the United States (1897), § 53, p. 21.

December 18, 1787, Mr. Van Berckel, minister of the Netherlands, complained to Mr. Jay, the Secretary of Foreign Affairs, that his privileges as a diplomatic representative had been violated by one John Wessels, a constable, who entered his dwelling at New York and endeavored to arrest and carry away one of his domestics, and who, although finally obliged to desist, acted in a violent manner and used abusive and insolent expressions. Mr. Van Berckel complained

of the action of the constable as "a most atrocious injury" and "a most notorious and direct violation of the rights of nations."

Mr. Jay communicated Mr. Van Berckel's letter to Mr. Duane, mayor of the city of New York, with the statement that the aggression of which Mr. Van Berckel complained was not the first of the kind which that minister had experienced during his residence in the United States, and asked that proper measures might be taken to satisfy the minister and prevent the like improprieties in the future.

Wessels was subsequently indicted in the court of general sessions of the peace for an unlawful attempt to arrest the domestic in question and with breaking and entering the dwelling house of the Dutch minister, in violation of the latter's privileges and "contrary to the laws of nations and the laws of the State aforesaid [New York], and against the peace of the people of the State of New York and their dignity." At that time there was no statute either of Congress or of New York respecting a breach of the privileges of ambassadors, and the indictment was found under the common law.

Wessels, on being arraigned, pleaded not guilty, but he subsequently withdrew this plea and substituted a plea of guilty and invoked the mercy of the court. He was sentenced to be imprisoned for three months.

Dip. Cor. 1783–1789, III. 443–453.

On June 25, 1792, Mr. Van Berckel again complained of the entry of his house by an officer for the purpose of serving process on one of his servants. The Attorney-General advised that, by secs. 25 and 26 of the act of Congress of 1790, the arrest of the domestic of a public minister was illegal, although if the domestic was an inhabitant of the United States and had contracted debts prior to entering the service of the minister he was not entitled to the benefit of the act in respect of them. The Attorney-General at the same time called attention to the fact that no one could be proceeded against for such an arrest unless the name of the domestic was registered in the office of the Secretary of State and transmitted to the marshal of the district in which Congress sat. The Attorney-General further advised that, if the arrest should be found to be lawful, yet the entry into the minister's house and executing a process would probably sustain a prosecution. (Randolph, At. Gen., June 26, 1792, 1 Op. 26.)

See, also, Mr. Jefferson, Sec. of State, to Mr. Van Berckel, July 2 and July 12, 1792, 4 MS. Am. Let. 398, 407.

A slave or other person subject to the authority and control of another is not privileged from being retaken by his or her superior by engaging in the service of a foreign minister.

Lincoln, At. Gen., 1804, 1 Op. 141.

The entry into a minister's garden by the agent of the owner of a slave, and there seizing and carrying away to the owner such slave, is not such a violation of the domicile of the minister as constitutes

a punishable offense under the crimes act of 1790. (1 Stat. 118; R. S. § 4064.)

Lincoln, At. Gen., 1804, 1 Op. 141.

"I have had the honor to receive your letter of the 11th of this month, in which you state that one of your domestics, a native of Russia, had left your service, and request the aid of the civil authority to restore him to it.

"Having referred that letter to the Attorney-General of the United States, I have now the honor to communicate to you his answer. You will find by it, that the best disposition exists to preserve to you the domestics attached to your household, and that the Attorney-General is of opinion it may be done under the existing laws. An enclosed note from him suggests the measures necessary to be taken for the purpose."

Mr. Monroe, Sec. of State, to Mr. Daschkoff, Russian chargé d'affaires, April 13, 1814, MS. Notes to For. Legs. II. 63.

Sarmiento's case.

"Your second question is this: 'Can the appointment as secretary to a foreign legation of a person whether citizen or foreigner, residing in the United States, and under an existing *judgment* against him, whether as principal or surety, for the violation of a law of the United States, confer upon him a privilege of exemption from personal arrest in execution, upon the judgment, made up before such appointment?'

"The 25th section of the act of Congress, before referred to (of April 30, 1790), declares *void* any writ or other process sued forth against a foreign minister, *or any domestic or domestic servant of such minister;* which words have been uniformly expounded by the courts of England (under the Statute of 7th Ann., c. 12, from which ours is borrowed) to include the case of secretaries.

"The 26th section of the same act punishes with fine and imprisonment any person who shall be concerned in suing forth or executing such writ.

"The 27th section qualifies the two former sections by this proviso: 'Provided, nevertheless, that no citizen or inhabitant of the United States, who shall have contracted debts prior to his entering into the service of any ambassador or other public minister, which debts shall be still due and unpaid, shall have, take, or receive any benefit of this act.'

"It is true that Congress has no power to change the law of nations with regard to foreigners; but I understand this provision of the act to be in strict conformity with the law of nations. In the case of Lockwood versus Dr. Coysgarne, 3 Bur. 1676 (a case which in many of its circumstances bears a strong resemblance to that under consideration), Lord Mansfield cites a passage from Bynkershoek which

is directly in point. His lordship's words, as given by the Reporter, are these: 'Bynkershoek, *de Foro Legatorum*, says "That a person in debt can not be taken into the service of a foreign minister in order to protect him," and indeed this would give the foreign minister a power to dispense with the private debts of the subject of this country.'

"The mischief to which Lord Mansfield points is not ideal. As little as it might have been expected from the dignity of the office, the English books abound with instances of attempts on the part of foreign ministers to screen debtors from their creditors by the abuse of this privilege, and some of those cases are marked with an audacity equalled only by their absurdity. Thus, in one case, an attempt was made to protect a debtor on the ground of his being ostler to a foreign minister, who, it was proven, never kept horses; in another, on the ground of the defendant's being coachman to a foreign minister, who kept no coach; in a third, of his being cook to one who kept no kitchen nor culinary implements; in a fourth, of his being gardener to one who had no garden; in a fifth, of his being a physician, although there was no proof that he had ever prescribed in his life; and in a sixth, on the ground of his being English chaplain to the ambassador from Morocco, who was a Mahometan.

"While the mischief of extending this privilege to one who was previously a debtor is palpable, there is, on the other hand, no necessity for it in relation to the honest interests of foreign nations; for there is certainly no fair necessity that the person employed either as secretary or domestic by a foreign minister should be a debtor.

"From these considerations, I am very clearly of the opinion that Mr. Sarmiento remains subject to arrest for the judgment debt to the U. S. contracted previous to his appointment, notwithstanding such appointment.

"Your third question is this: 'Is there any principle in the laws or usages of nations by which the President would be warranted in granting a pardon to F. C. Sarmiento in consideration of his appointment, subsequent to the judgment against him, as secretary to the Spanish legation?'

"Mr. Sarmiento's appointment, in my opinion, imposes on the President no obligation at all to discharge from the previous judgment; and if this appointment is the only consideration for the discharge (as your question puts the case) the President would not, in my opinion, be warranted towards this nation in granting the discharge."

Opinion of Mr. Wirt, At. Gen., to Mr. Adams, Sec. of State, March 17, 1818. MS. Misc. Let.

In reply to a letter from Mr. Adams, of March 2, 1818. 17 MS. Dom. Let. 128.

October 30, 1825, Baron Maltitz, secretary of the Russian legation at Washington, called at the Department of State and complained of a violation of his diplomatic privileges by a constable of Georgetown, who attempted to enter his dwelling for the purpose of executing a warrant against one of his domestics named John Moore. Mr. Clay at once wrote to the marshal of the District of Columbia, and requested him to see the mayor of Georgetown, and the constable, if necessary, and prevent any further proceedings to enforce the warrant till the circumstances of the case could be ascertained and the question determined whether the case was "one falling within the ordinary administration of justice or to which diplomatic privileges appertain." It subsequently transpired that Moore was charged with assaulting and beating another person, and Baron Maltitz agreed that he might surrender himself to the marshal of the District, who was to deliver him to the mayor of Georgetown to be dealt with according to law.

Mr. Clay, Sec. of State, to Mr. Ringgold, marshal, Oct. 30 and Nov. 2, 1825, 21 MS. Dom. Let. 180, 181.

"In answer to the question proposed in your letter of this day to the Secretary, whether you can with propriety serve a writ upon William McGinty, the coachman of the minister from the Netherlands, for an assault and battery stated to have been committed upon the person of a constable of this city, while in the exercise of the duties of his office, antecedent to the period of the said coachman's entering into the service in which he is now engaged, I have the honor to state, by the Secretary's directions, that the writ may be served elsewhere than on the premises of the minister, which must on no account be entered for that purpose, or at any time and place other than that in which the coachman may be employed in the service of the minister."

Mr. Brent, chief clerk, to Mr. Ringgold, U. S. marshal, Dec. 10, 1825, 21 MS. Dom. Let. 210.

Case of Mr. Gallatin's coachman.

"During Mr. Gallatin's mission at London, in 1827, an incident occurred involving a question of diplomatic privileges, which led to an exposition of the British views on the rights of embassy. His coachman was arrested in his stable on a charge of assault, by a warrant from a magistrate. The subject having been informally brought to the notice of the foreign office, a communication was addressed to the secretary of the American legation by the under secretary of state, Mr. Backhouse, May 18, 1827, in which he informed Mr. Lawrence of the result of a reference made by order of Lord Dudley, to the law officers of the Crown. In it it is said that 'the statute of the

7th Anne, chap. 16, has been considered in all but the penal parts of it nothing more than a declaration of the law of nations; and it is held that neither that law, nor any construction that can properly be put upon the statute, extends to protect the mere servants of ambassadors from arrest upon criminal charges, although the ambassador himself, and probably those who may be named in his mission are, by the best opinions, though not by the uniform practice of this country, exempt from every sort of prosecution, criminal and civil. His lordship will take care that the magistrates are apprised, through the proper channel, of the disapprobation of His Majesty's Government of the mode in which the warrant was executed in the present instance, and are further informed of the expectation of His Majesty's Government that, whenever the servant of a foreign minister is charged with a misdemeanor, the magistrate shall take proper measures for apprising the minister, either by personal communication with him or through the foreign office, of the fact of a warrant being issued, before any attempt is made to execute it, in order that the minister's convenience may be consulted as to the time and manner in which such warrant shall be put in execution.'

"An official character was given to the preceding communication by a note from Earl Dudley, secretary of state for foreign affairs, June 2, 1827, in which he says that it is only necessary for him to 'confirm the statement contained in the private note of Mr. Backhouse, referred to by Mr. Gallatin, as to the law and practice of this country upon the questions of privilege arising out of the arrest of Mr. Gallatin's coachman, and to supply an omission in that statement, with respect to the question of the supposed inviolability of the premises occupied by a foreign minister. He is not aware of any instance, since the abolition of sanctuary in England, where it has been held that the premises occupied by an ambassador are entitled to such a privilege by the law of nations.'

"He adds that courtesy requires that their houses should not be entered without permission being first solicited in cases where no urgent necessity presses for the immediate capture of an offender."

Lawrence's Wheaton (ed. 1863), 1006, 1007.

"In a recent case [Taylor *v.* Best] the true position and liability of a secretary of legation accredited to the court of England by a foreign sovereign, and acting in the absence of his ambassador as chargé d'affaires, were most elaborately discussed, and it was held, 1st, that such an official was entitled to all the privileges of an ambassador; 2ndly, that he did not forfeit his privilege by engaging in mercantile pursuits here; and 3rdly, that if a foreign minister voluntarily attorns to the jurisdiction of the courts of this country,

he is estopped from applying to the courts to stay proceedings on the ground of his privilege; but it seems to have been doubted, in the course of the arguments, whether the privileges of an ambassador or foreign minister extend to prevent his being sued in the courts of this country, or only to protect him from process which may affect the sanctity of his person or his comfort or dignity. In the course of the case the question as to the liability of a domestic servant of an ambassador; for, as Mr. J. Maule said, 'the privilege is not that of it was held that the same privilege does not extend to them as to the ambassador, for, as Mr. J. Maule said, 'the privilege is not that of the servant, but of the ambassador; it is based on the assumption that by the arrest of any of his household retinue his personal comfort and state may be affected.'"

Abdy's Kent (2 ed.), 121.

"The undersigned, Secretary of State of the United States, has the honor to communicate to Mr. Calderon de la Barca, envoy extraordinary and minister plenipotentiary of Spain, the copy of a letter with documents accompanying it, from the attorney of the United States for the District of Columbia in relation to the presentment by the grand jury for the county of Washington of a coloured man named Griffin Ball, alleged to be a servant in the employment of the secretary of the Spanish legation, for assault upon several citizens of Washington, and other misdemeanors against the laws and the peace of the city. This individual not having been made known to the Department of State as one of the persons in the service of the Spanish legation, a question might well arise as to his claim to exemption from arrest and punishment for the crimes of which he is accused, under the privileges and immunities secured to diplomatic agents and the persons of their household; but the undersigned, confiding in Mr. Calderon's sense of justice and respect for the laws of the country in which he is accredited, thinks it more consistent with the friendly character of the relations subsisting between the United States and Spain to leave the adjustment of this unpleasant subject to his own judgment and discretion. The enclosed papers are therefore submitted to Mr. Calderon with a confident hope that, on being thus satisfied of the necessity of an investigation of the complaint, he will either cause the accused to be surrendered to the magistracy to be tried according to the laws of the country, or order him to be forthwith discharged from the service of the legation."

Mr. Forsyth, Sec. of State, to Mr. Calderon de la Barca, Span. min., Sept. 18, 1838, MS. Notes to Span. Leg. VI. 34.

"I have the honor to acknowledge the receipt of your note March 19, which circumstances known to you have prevented me from

answering at an earlier day, and to inform you that, agreeably to your request, I have laid it before the President. I am instructed by him to express his regret that anything should have occurred in relation to your immunities as a foreign minister to give you uneasiness, and he has also directed me to assure you that the laws of this country afford the most ample protection to the representatives of independent powers, and that during his term of service those laws shall be faithfully executed.

"As the servant, whose arrest forms the subject of your note, was redeemed from slavery partly by your exertion and contribution, and as you disclaim any wish to have legal proceedings instituted against the persons implicated by which the transaction might be investigated and the offenders punished, if guilty of an outrage, the President is not aware that he can interfere in any other manner than by giving the assurances I have already conveyed to you that, if necessary, the whole power of this Government will at any time be employed to insure to yourself and to any other foreign representative the protection and immunities guaranteed by the law of nations.

"There is one allusion in your note to which the attention of the President has been directed, and which he thinks of sufficient importance to bring to your notice. It seems to be implied by a reference to a possible collision between the local law of this District and the international law, when taken in connection with the known circumstances of this case, that a foreign minister has a right to employ a slave as a servant without the consent of the owner. Such, it appears, was the nature of the employment in this instance. This privilege, however, if it was intended to be claimed by your note, you will not be inclined, it is believed, upon a full view of the subject, to insist upon, since it could not be exercised without a violation of the fundamental rights of property. It is cheerfully admitted that, under the law of nations, the servants of a foreign minister are protected from arrest, and if the woman employed by you had been free, and capable of entering into a contract for hire, you would have had good reason to complain. But it is admitted that she was a slave, and her master, therefore, had a right to her service. Under these circumstances, inasmuch as the reclamation was not made at your domicile, but without outcry in the public street, and since no practical intervention of this Government is requested, it is confidently hoped that, with the strong assurances already given of the disposition of the President to secure to foreign ministers all their just immunities in this country, you will be of the opinion that the purposes of your note have been sufficiently answered."

Mr. Cass, Sec. of State, to Chev. Hülsemann, Austrian chargé d'affaires, April 8, 1857, MS. Notes to Aust. Leg. VII. 81.

In June, 1860, Mr. Cass unofficially informed Mr. Zegarra, the Peruvian minister, that the attorney for the District of Columbia had represented that a person named John Smith, alleged to be a coachman in Mr. Zegarra's service, had been charged with the offence of assault and battery during the recent election in Washington. Mr. Cass added that, as it was desirable that the charge should be judicially investigated, he would thank Mr. Zegarra to discharge Smith, for a time at least, in order that justice might have its course. Mr. Zegarra replied that he had given orders that Smith be at once dismissed from his service, in order that justice might be done.

Mr. Cass, Sec. of State, to Mr. Zegarra, Peruvian min., June 13, 1860, MS. Inst. Peru, I. 213; Mr. Zegarra to Mr. Cass, June 15, 1860, MS. Notes from Peruvian Leg.

Liability to military service.

"Your No. 143, of the 21st ultimo, has been received. It relates to the liability of the messenger of your legation, a Spanish subject, to do military service and refers to the proceedings and correspondence in April, 1874, when a like issue was presented, complicated by the actual arrest of the messenger while in the discharge of his duties as an employé of the legation.

"The point made by Mr. Adee, and reported in his despatches, Nos. 204 and 210, that those proceedings should have been conducted through diplomatic means, and not through the unrecognizable channel of the subordinate municipal authorities, was amply conceded by the Spanish Government. The further question, as to the actual liability of Trigueros to perform the military service for which he had been conscripted, did not reach a definite conclusion, or even a full discussion. The concluding passage of Mr. Sagasta's note to Mr. Adee, of April 23, by which it was left to Trigueros to consider himself diplomatically cited, and voluntarily respond for duty, was regarded as a practical termination of the whole matter, without a formal yielding of the question of actual liability, and this view of the case was strengthened by the circumstance that the matter then and there rested, and remained without further result for nearly five years. The Department shares your reluctance, as well as that shown by Mr. Adee in his No. 210, to take the ground that the position of Trigueros in the legation *ipso facto* relieved him of all obligation to perform the duties of a Spaniard. While it is very doubtful whether, had a native servant of a foreign minister been conscripted in this capital during our late war, actual service would have been exacted, it is not thought necessary to set up any thesis of hypothetical reciprocity of exemption. Many of the privileges of legation rest on no written agreement between nations, but have grown up by long usage, and this question of the exemption of a

public servant comes under the head of a courteous favor rather than of a right.

"In view of the great inconvenience which would be occasioned by the sudden withdrawal from service of a tried and trusty dependent of the legation, now employed in his present capacity for over six years, it is not improbable that some understanding can be reached, which, without denying his liabilty to bear arms, would yet practically operate to relieve him from that duty. If, in 1874, Trigueros was actually conscripted, being therefore technically a "deserter," and yet was suffered to remain unmolested, after the incidental disrespect shown to the legation in the proceedings against him had been atoned for, it would not seem difficult to attain a favorable result now, when the question is merely one of presenting himself for a revision of his papers.

"The citation for that purpose, after what seems to be the usual preliminary ignorance of the etiquette due by usage to a legation, on the part of subordinate municipal officers, now comes through the legitimate channels, and may properly be respected. This being conceded, it is probable that Mr. Silvela may find some convenient method to discontinue any further proceedings."

Mr. Evarts, Sec. of State, to Mr. Lowell, min. to Spain, No. 132, Feb. 25, 1879. MS. Inst. Spain, XVIII. 370.

The right of a diplomatic representative to claim "for a native servant exemption from military service . . . is not clear;" and, while it is expected that the claim of the native's government to such service "will be presented courteously to the head of the mission," diplomatic representatives of the United States "are advised against questioning" it. (Instructions to Dip. Officers of the United States (1897), § 54, p. 21; continued from the Printed Personal Inst. Dip. Agents of 1885.)

"Mr. Fish, November 29, 1874, instructed Mr. Jay, at Vienna, that—

"'The tendency of opinion in regard to immunities of diplomatic agents is believed to be strongly toward restricting them to whatever may be indispensable to enable the agents to discharge their duties with convenience and safety' (Int. Law Digest, vol. 1, p. 642), and no broader criterion than this could well be claimed as applicable to a servant of a consulate more than to the servant of a diplomatic agent. In several recent instances where the foreign servant of a legation has been claimed to be liable to military duty—as at Madrid in 1874, and at Berlin in 1879 (see Foreign Relations, 1879, pp. 371 et seq.)—the ground of complaint has been that the service of the mission was interfered with by the abrupt action of the authorities in enforcing the alleged liability of the employé, rather than that any right of a

legation to withdraw a native of the country from his national subjection had been infringed,"

Mr. Bayard, Sec. of State, to Mr. Straus, min. to Turkey, March 17, 1888, For. Rel. 1888, II. 1568.

The American legation at Seoul having complained of the arbitrary arrest and punishment of some of its servants, the Corean Government dismissed the officer who was responsible and apologized. The Department of State expressed gratification with this result. (Mr. Frelinghuysen, Sec. of State, to Mr. Foote, No. 12, Nov. 5, 1884, MS. Inst. Corea, I. 71.)

By article 5 of the Turkish Regulations of 1883, or, at any rate by the Turkish text of the article, it was provided that during a period of five years from the date of the regulations the Ottoman cavasses and dragomans, employed in the foreign consulates, should be exempt from military service. On February 3, 1889, the Turkish Government informed the foreign legations that, the period mentioned in the article having expired, the persons in question were to be considered as liable to military service if their names were drawn, and that any Christian subjects of the Sultan who were similarly employed would be subject to the exoneration tax. The legations admitted the rights of the Turkish Government in the matter, but requested that military service of dragomans and cavasses then employed by the consuls might be dispensed with.

For. Rel 1889, 724–728.

A servant of French nationality in the employ of the Spanish ambassador in Berlin was charged with assaulting another servant, who was a German. So long as the Frenchman remained in the ambassador's service, it was held that he was not subject to German jurisdiction, and no proceedings were taken against him. On his discharge from the ambassador's service, however, he was arrested and brought before a local court and the proper proceedings were taken for his punishment.

Mr. Jackson, chargé at Berlin, to Mr. Hay, Sec. of State, July 5, 1899, For. Rel. 1899, 318.

(3) MINISTERS RECALLED, OR NOT RECEIVED.

§ 666.

Case of M. Pichon.

M. Pichon, commissary-general of commercial relations and chargé d'affaires of France in the United States, was, towards the close of February, 1805, served with a capias in a suit brought against him on certain bills of exchange. He claimed his privilege as chargé d'affaires. By his credentials, which his counsel produced, his continuance in the character of

chargé d'affaires was limited to the arrival of a French minister plenipotentiary in the United States. A deposition by Mr. Pichon was filed, by which it appeared that the minister, General Turreau, arrived in the United States about November 12, 1804; that since that time M. Pichon had, under the instructions of his government, been making necessary arrangements to return with his family to France; that his detention in the United States since the arrival of General Turreau had been exclusively due to the business of closing his official transactions as chargé d'affaires, to delay in receiving his public papers and documents, which, having been shipped by vessel from Alexandria to Philadelphia, had, because of ice in the Delaware, been carried to New York, and to the impracticability of obtaining a passage for Europe at Philadelphia for some time past; and that he had never abandoned or suspended his intention to return to France, but was, on the contrary, determined to return thither as soon as practicable. He further deposed that the bills of exchange on which the suit was brought were given by him as a public agent of France for the equipment and supply of certain French frigates, and not on his private account.

Counsel for M. Pichon insisted on his immediate discharge on the ground of diplomatic privilege, maintaining that "he was not bound to produce any testimonials of his public character, the notoriety of his reception by the President being all that the nature of the case, or uniform usage, required;" and that a day's delay in recognizing his privilege to obtain a certificate from the United States Government must either compel him to give bail or to submit to actual imprisonment.

Counsel for the plaintiff disputed the extent of the privilege claimed and the sufficiency of the excuse for M. Pichon's protracted residence in the United States. They insisted that his appointment as chargé d'affaires was limited by its own terms; that his arrival and continuance were chiefly on account of his consular functions, and that at least proof should be produced from the Secretary of State of the United States of his reception as a minister.

"The court were decidedly of opinion that Mr. Pichon would be entitled to privilege as chargé d'affaires till his return to France; but Chief Justice Shippen seemed inclined to wait for information, from the Department of State, as to his actual reception by the President in that character. On its being intimated, however, that the attorney of the district had become responsible to the sheriff for Mr. Pichon's appearance, only till the sense of the court could be obtained; and that Mr. Pichon must now, probably, submit to imprisonment under the capias; the judges concurred in discharging him absolutely from the process."

After this decision the plaintiff obtained another *capias* from the United States circuit court, but, before it was served, the bills were paid by the French Government, and the proceedings were suspended after a motion to quash the writ on the ground of privilege.

Dupont *v.* Pichon (1805), Supreme Court of Pennsylvania, 4 Dallas, 321.

"Far would it be from the intention of the American Government to draw within its rigorous limits the exemption from ordinary legal process of a foreign public officer. It would extend to them a liberal measure of time, and a full portion of indulgence for the execution of the trust, and for departure after its completion. But it can not perceive the justice of extending these privileges beyond their limits as sanctioned by custom for purposes of injustice and wrong."

Mr. Adams, Sec. of State, to Mr. d'Anduaga, Nov. 2, 1821, MS. Notes to For. Legs. III. 29.

Case of Mr. Barrozo.

June 9, 1826, Mr. Barrozo Pereira presented his credentials as chargé d'affaires of Portugal to the United States under appointment of the Princess Isabel Maria, as president of the regency constituted by John VI. to administer the government during his illness, and was subsequently recognized as chargé d'affaires by the Infante Dom Miguel, on the latter's accession to the regency in the name of his brother Dom Pedro IV. Subsequently, on July 18, 1828, Mr. Barrozo informed the Department of State that, in consequence of the direct usurpation of the royal power by Dom Miguel, in derogation of the rights of Dom Pedro IV. and in violation of the constitution of the kingdom, he deemed it to be his duty to cease his functions as diplomatic agent of Dom Miguel's government, and that he would submit his action to Dom Pedro IV., whose authority alone, or that of persons acting in his name, he could recognize. Mr. Barrozo was informed that his letter was laid before the President and placed upon the files of the Department of State as evidence of the important step which he had taken. On August 25, 1828, however, Mr. Barrozo advised the Secretary of State that a provisional junta had been installed at Oporto for the purpose of maintaining the constitutional authority of Dom Pedro IV.; that, by previously ceasing to discharge his diplomatic functions, he did not consider himself as ceasing to be chargé d'affaires of his Most Faithful Majesty; and that he believed it to be his duty to resume his diplomatic functions as representative of the legitimate king. This note was received at the Department of State during the absence of the Secretary, and was answered by the statement that it would be laid before him on his return. On November 6, 1828, Mr. Barrozo, as chargé d'affaires, informed the Secretary

of State of the arrival in England of the young Queen of Portugal, Dona Maria de Gloria, and later, in the same month, he announced the abdication by Dom Pedro of the Crown of Portugal in her favor. These notes remained unanswered, and the only communication subsequently addressed to Mr. Barrozo, during the administration of President Adams, was a circular sent out by the chief clerk to members of the diplomatic corps inviting them to attend the inauguration of President Jackson.

On August 30, 1828, Mr. Torlade d'Azambuja presented to the Department of State his credentials, bearing date March 31, 1828, as chargé d'affaires of Portugal, under appointment of Dom Miguel, as regent. No action was then taken, and the information soon afterwards received of the change that had taken place in the government of Portugal having rendered it necessary that he should present new credentials, his recognition was delayed. On April 18, 1829, he communicated to the Secretary of State a copy of new credentials, and asked that a time should be designated for the presentation of the original. This note remained unanswered, as did several other communications from Mr. Torlade. The United States was then awaiting the course of events in Portugal, till the result should enable it to decide whether to recognize the governmental authorities by whom Mr. Torlade was accredited. On October 1, 1829, however, he was informed by the Secretary of State that he would be received on the following day, when he appeared and delivered his original letter of credence and was recognized as chargé d'affaires of the Portuguese Government.

After his reception as chargé d'affaires, Mr. Torlade demanded of Mr. Barrozo the surrender of the archives of the Portuguese legation; and when the latter refused to deliver them up had him arrested and confined upon his refusal to give bail in the sum of $100,000 for his appearance at the trial, which was to decide the rights of the respective parties. Under these circumstances, Mr. Barrozo, on October 30, 1829, applied to the Department of State for a certificate of his recognition by the President as chargé d'affaires of Portugal, and he, at the same time, communicated to the Department an application which he had made to Mr. Dallas, United States attorney for the eastern district of Pennsylvania, where the suit was pending, for his interference in the case. Mr. Dallas had declined to interfere, and had advised Mr. Barrozo to employ counsel.

The Department of State submitted the matter to Mr. Berrien, the Attorney-General, for an opinion on the question whether Mr. Barrozo was, on October 30, 1829, "entitled to the enjoyment, within the United States, of the privileges and immunities which the law of nations attaches to the public character of diplomatic agents regularly

accredited by a foreign government." Mr. Berrien advised that the assumption of regal power by Dom Miguel, in exclusion of the authority of his brother, Dom Pedro IV., whose rights he had before recognized through the agency of Mr. Barrozo, did not ipso facto extinguish the latter's letter of credence; that, in order to produce this result, two things were necesary—(1) the exercise of the will of Dom Miguel in the selection of another representative, and (2) the recognition of his authority by the United States.

A copy of the opinion of the Attorney-General, together with a statement of the facts, was communicated to Mr. Dallas, with directions to lay the papers before the court and to permit the parties to the suit to have the full benefit of them; and both Mr. Barrozo and Mr. Torlade were informed by the Department of State of what had been done.

November 19, 1829, Mr. Torlade, alluding to the protracted delay of the court in deciding the matter in controversy, again invoked the interference of the United States in obtaining the archives from Mr. Barrozo, either by persuasion or by proceedings in the United States Supreme Court. On the 29th of the same month the Secretary of State addressed a note to Mr. Barrozo, requesting him to deliver the archives to Mr. Torlade. Mr. Barrozo, on January 6, 1830, declined to comply with this request, on the ground that it would imply a recognition on his part of the usurpation of Dom Miguel, whom Mr. Torlade represented, but promised to refer the question to the decision of the Emperor of Brazil, as guardian of the Queen of Portugal.

On March 13, 1830, the district court of Philadelphia, before which the suit against Mr. Barrozo was pending, decided that the writ against Mr. Barrozo was irregular and void, and discharged his bail. The court based its opinion upon the ground (1) that an outgoing minister was privileged from suit; (2) that the Executive was the best source of information as to the immunities of public ministers, and (3) that the opinion of the Attorney-General prepared for the Department of State ought to be received as the sense of the Government on the subject. The views expressed in Mr. Berrien's opinion were, indeed, fully adopted by the court.

Upon the rendition of this decision both Mr. Barrozo and Mr. Torlade appealed to the Department of State, the former demanding the prosecution of the persons concerned in his arrest, and the latter protesting against the decision and announcing his intention to carry the matter to the Supreme Court of the United States, unless the Executive should otherwise afford him relief. On April 7, 1830, Mr. Barrozo was informed by the Department of State that instructions had been given to the United States district attorney at Philadelphia to institute a prosecution against the persons concerned in his arrest, with directions, however, to suspend action if it should appear to be

Mr. Torlade's intention to carry the case to the Supreme Court. Information to the same effect was given to Mr. Torlade.

In April, 1830, Mr. Dallas presented to the grand jury indictments against the attorney who sued out and the bailiff who executed the writ by virtue of which Mr. Barrozo was arrested and imprisoned. The case went to the Supreme Court of the United States on a difference of opinion, and a nolle prosequi was entered by direction of the President.

Mr. Van Buren, Sec. of State, to Mr. Brown, chargé d'affaires to Brazil, No. 2, Oct. 20, 1830, MS. Inst. Am. States, XIV. 101; Berrien, At. Gen., Nov. 3, 1829, 2 Op. 290; Mr. Van Buren, Sec. of State, to Mr. Dallas, Nov. 4, 1829, 23 MS. Dom. Let. 168; same to same, March 31, 1830, Id. 305; Mr. Van Buren, Sec. of State, to Mr. Barrozo, April 7, 1830, MS. Notes to For. Legs. IV. 261; Torlade *v.* Barrozo, 1 Miles (Phil.), 366; United States *v.* Phillips, 6 Pet. 776; 8 J. Q. Adams's Memoirs, 221 et seq.

See, also, Mr. Van Buren, Sec. of State, to Mr. Berrien, At. Gen., May 5, 1830, 23 MS. Dom. Let. 339; Mr. Brent, Act. Sec. of State, to Mr. Dallas, Aug. 23, 1831, 24 MS. Dom. Let. 205, directing a nolle pros. to be entered.

Case of Dr. Segur.

In 1864 Dr. Segur, who had been recalled by the Salvadorean government as its minister to the United States, on the request of the latter government, was, after the cessation of his diplomatic functions, imprisoned at Fort Lafayette in connection with certain alleged violations of the neutrality laws of the United States.

Mr. Rives, Act. Sec. of State, to Attorney-General, May 14, 1888, 168 MS. Dom. Let. 374; Mr. Bayard, Sec. of State, to Mr. Walker, U. S. attorney at New York, July 7, 1888, 169 MS. Dom. Let. 97. See supra, § 639.

It seems that there is no record in the courts at New York of any judicial prosecution of Dr. Segur on account of his purchases of arms and munitions of war, or of an armed vessel. The armed vessel which he was alleged to have purchased probably was the *T. Swann*, which the newspapers of Jan. 26, 1864, announced to be a total wreck at Fort Kapc. (Mr. Walker, U. S. attorney at New York, to Sec. of State, July 10, 1888, MS. Misc. Let.)

Case of Catacazy.

November 15–27, 1871, Mr. Catacazy, in acknowledging the receipt of a note from Mr. Fish with regard to the transmission of his passports, stated that in retiring from the Russian mission to the United States he reserved to himself "the maintenance of the diplomatic immunities which are granted by international law to every representative of a foreign power until the presentation of his letters of recall and his departure from the country where he exercised his diplomatic functions." Mr. Fish thought that the rule of public law was stated by Mr. Catacazy too

broadly, since intercourse between a diplomatic agent and the government to which he was accredited was not always terminated "only by the presentation of the letters of recall of such agent." There were, said Mr. Fish, several other ways in which such intercourse might be concluded, and while in any event the diplomatic immunities of the retiring agent might be claimed "for a reasonable time after his official functions shall be at an end," the length of this period "must depend upon circumstances, of which the government to which he had been accredited is to be the judge. The main object for which the privilege is allowed is to enable the diplomatic representative to adjust his private affairs and to depart the country without annoyance. If, however, the privilege shall be abused by an undue lingering in the country by such agent after his official functions are at an end, the government of that country is justified in regarding the immunities as forfeited."

Mr. Fish, Sec. of State, to Gen. Gorloff, Dec. 1, 1871, S. Ex. Doc. 5, 42 Cong. 2 sess. 26–27. See further, as to Mr. Catacazy's case, supra, § 639.

Case of minister not received.

December 19, 1855, Mr. Parker H. French communicated by letter to the Secretary of State a copy of what purported to be credential letters from Don Patricio Rivas, as provisory president of the Republic of Nicaragua, accrediting him as minister plenipotentiary of that Republic to the United States, and requested an interview preparatory to the formal presentation of his credentials to the President. The Secretary of State replied by letter on the 21st of December that the President did not yet see cause to establish diplomatic intercourse with the persons at that time claiming to exercise political power in the State of Nicaragua, and that he did not deem it proper at the moment to receive anyone as minister to the United States duly appointed by that Republic. Almost immediately afterwards it was reported that Mr. French was concerned in the engagemnet at New York of men and of arms for transmission to Nicaragua. With reference to this report Mr. Cushing, then Attorney-General of the United States, instructed the United States district attorney at New York as follows:

"Colonel French is entitled to diplomatic privilege in the United States only in a very qualified degree. He is not an accredited minister, but simply a person coming to this country to present himself as such, and not received, by reason of its failing to appear that he represents any lawful government. Under such circumstances, any diplomatic privilege accorded to him is of mere transit and of courtesy, not full right; and that courtesy will be withdrawn from him so soon as there shall be cause to believe that he is engaged in here, or contemplates, any act not consonant with the laws, the peace,

or the public honor of the United States. The President . . . desires you to make distinctly known to the principal party the precise relations of the case."

Subsequently the district attorney wrote that a warrant for French's arrest had been issued, and inquired whether it should be executed. Mr. Cushing in reply quoted from his previous letter, and added: "He [the President] directs me to say . . . that, proceeding in the spirit of the fullest consideration for the diplomatic character, he desires you to notify Mr. French of the present charge, and to inform him that no process in behalf of the United States will be served upon him, provided he shall not become chargeable with any further offense and shall depart from the country within a reasonable time."

Mr. Cushing, At. Gen., to Mr. McKeon, Dec. 24, 1855, H. Ex. Doc. 103, 34 Cong. 1 sess. 13; same to same, Dec. 27, 1855, id. 14.
See, also, Cushing, At. Gen., 1855, 8 Op. 473.

3. Taxation.

(1) property, and person.

§ 667.

"There is nothing in the treaty between the United States and Portugal which exempts real estate from taxes when belonging to the wife of a diplomatic agent of either party, even when the husband may occupy the estate."

Mr. Seward, Sec. of State, to Commander de Figanière, June 20, 1865, MS. Notes to Portugal, VI. 218.

Baron von Gerolt, Prussian minister at Washington, having communicated to the Department of State an extract from a despatch from his Government, stating that members of foreign legations at Berlin were exempt from duties of any kind upon their residences there, which were their own property or that of their Government, and having requested that the proper authorities of the city of Washington be informed that the house in which he lived had become his property, Mr. Seward transmitted a copy of the note to the mayor of Washington, and requested that the Baron's wishes be complied with.

Mr. Seward, Sec. of State, to Mr. Wallach, July 5, 1867, 76 MS. Dom. Let. 432.

On the strength of a despatch from the Berlin foreign office of August 6, 1866, which stated that the residences of all members of foreign legations in Berlin were exempt from taxation, the Imperial German legation in Washington in 1873 requested a similar exemp-

tion for a house owned and occupied by the chancellor of the legation in that city. Mr. Fish replied that upon the foundation of Washington certain lots were reserved and freely offered by the Government of the United States to enable other governments to build abodes for their representatives, but that no government had availed itself of the franchise, which in time lapsed. About 1866, Baron Gerolt, then Prussian minister, purchased an official residence in Washington, and, as there was no municipal law exempting it from taxation, paid taxes upon it in the first instance. Subsequently, on his producing proof of the exemption of the residences of foreign ministers in Berlin from taxation, the Department of State recommended that the tax be refunded, and this recommendation was complied with. This course was adopted because the house in question was the abode of the head of the mission for the time being. Serious doubts were entertained whether the recommendation would have been extended to similar property of a subordinate officer of the legation, and the Department of State in the present instance declined to recommend the exemption requested.

Mr. Fish, Sec. of State, to Mr. Stumm, May 28, 1873, MS. Notes to Prussian Leg. VIII. 484.

Mr. Fish added that it was presumed that the regulation at Berlin was intended to be restricted to the abodes of heads of missions or was so practically, since few or no subordinate officers of legations owned houses there. "This Government," said Mr. Fish, "desires to be and believes that it is liberal in the dispensation of immunities to the members of foreign legations here. It is proper, however, that there should be some discrimination in this respect, as is shown by the fact that heads of missions only were allowed to import articles for their use free from duties. A similar discrimination seems to be properly applicable to the exemption of houses from taxation." (Ibid.)

"In reply to your letter of the 23d ultimo, I have to say that the rule observed by this Government with respect to the taxation of property owned by a foreign government and occupied as its legation, is to accord reciprocity in regard to general taxation but not to specially exempt it from local assessments, such as water rent and the like, unless it were definitely understood that these taxes would also be exempted by the foreign government upon a piece of property belonging to the United States and used for a like purpose by our minister. Our diplomatic representatives abroad either personally contract for the premises occupied by them and are granted a maximum allowance for rent for that portion of the premises actually set apart for legation purposes, or else they rent a piece of property to be used exclusively for official business, charging therefor in their contingent quarterly accounts as allowed by the Department.

"When a foreign legation occupies rented property in this country, the owner of the premises is not exempted from the payment of all lawful taxes.

"It is of course impracticable to do more than state the general and equitable usage prevailing in such matters. The Government of the United States is not the owner of real estate abroad except at Tangier, Africa, which is a specially donated property, and the only differences to be noted in the way of leasing or renting property from the general rule stated above are to be found in China and Japan. In those countries contracts for legation premises are authorized by an act of Congress."

Mr. Bayard, Sec. of State, to Mr. Woolsey, Apr. 15, 1886, 159 MS. Dom. Let. 622.

"You will find on the files of the embassy the record of Mr. Lincoln's despatches Nos. 747, of August 18, 1892, and 966 of April 7, 1893, in relation to a proposal of the British Government that a portion of the parochial rates leviable on the residence of the representative of the United States and on those of bona fide members of the legation shall be hereafter assumed by her Majesty's Government on condition that her Majesty's diplomatic servants in the United States shall not be called upon to make any payments in respect of such matters of taxation as shall be so assumed by her Majesty's Government.

"Consideration of this gratifying proposal has been impeded by the fact that such a separation of items of municipal and parochial taxation as is suggested by her Majesty's Government is impracticable in this city, and by the further circumstance that no provision of law here exists whereby the exemption from taxation enjoyed by the British embassy in Washington can be extended to the premises rented and occupied as dwellings by her Majesty's diplomatic servants other than the ambassador.

"In fact, the property of the British embassy in Washington stands in fee in the name of 'The Commissioner of Works and Public Buildings of her Majesty the Queen of the United Kingdom of Great Britain and Ireland,' and, while assessed with the buildings thereon at $143,417, is noted on the books of the assessor of the District of Columbia as exempt from the payment of all general taxes amounting at the statutory rate of taxation to $2,151.26.

"While an arrangement on the basis proposed by her Majesty's Government is in terms impracticable as regards all the members of the respective embassies, the circumstance that the real property of the British embassy here is relieved from all local municipal taxation makes it proper to suggest that the ambassador of the United

States in England be likewise relieved from taxation to at least the extent suggested in the British proposal.

"I have, therefore, to instruct you to make such a proposal in the proper quarter, as an equitable relief and as a measure of international comity, involving reciprocity in fact so far as may be practicable in view of the difference between the systems in vogue in the two countries in respect to tenure and occupancy of property employed in international service."

Mr. Gresham, Sec. of State, to Mr. Bayard, ambass. to England, No. 2, May 29, 1893, MS. Inst. Great Britain, XXX. 250.

The Dutch minister having informally brought to the notice of the Department of State a claim which Mr. J. J. Helsdon Rix, who was said to be a British subject and a teacher of languages, was understood to have made a claim for exemption from taxes at The Hague, on account of some relation to the American minister or legation at that capital, the Department, after inquiry of the American minister, stated that Mr. Rix had for some years been employed by the legation in clerical work, including the making of translations, but that it had not been his intention to make on that ground any demand or formal claim for exemption from taxes, and that he had desired only to lay the facts before the authorities for their consideration and judgment.

Mr. Day, Sec. of State, to Mr. Newel, min. to the Netherlands, No. 124, MS. Inst. Neth. XVI. 362; Mr. Day, Sec. of State, to Mr. de Weckherlin, Dutch min., July 14, 1898, MS. Notes to Neth. Leg. VIII. 405.

By the German law, relating to insurance against disability and old age, all persons working in a dependent position, on regular wages which 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 the insurance cards, one half the cost of the stamps being paid by the employer and the other half by the employee. The members of the American mission at Berlin submitted themselves and their households, domestic servants alone being concerned, to the provisions of the law at the time of its going into force, and the same course of action seems to have been pursued by those who joined the mission subsequently.

Mr. Jackson, chargé at Berlin, to Mr. Hay, Sec. of State, Apr. 13, 1901, For. Rel. 1901, 172, citing despatches of Mr. Coleman, chargé, No. 182, of Oct. 7, 1890, and Mr. Phelps, min. to Germany, No. 220, of Jan. 13, 1891.

"The Navy Department entertains the view that, on general principles, officers and men of the army and navy of one government,

while performing active duty, can not properly be regarded as subject to ordinary taxation by a foreign power."

Mr. Hay, Sec. of State, to Herr von Hollehen, German amb., April 12, 1901, No. 586, MS. Notes to German Leg. XII. 578.

This position was maintained by the United States with regard to the exemption from the Japanese income tax of the persons employed in the United States Marine Hospital at Yokohama. The Japanese government assented to the continuance of the exemption, with the statement that, in case Japan should desire to establish a naval hospital in the United States, a reciprocal exemption would be expected.

The United States Navy Department holds that the "naval personnel" on duty at the hospital at Yokohama are entitled to "extraterritorial rights" on the ground (1) that they were under orders and liable to be sent away at any time; (2) that the element of volition essential to the acquisition of a legal residence was wanting; (3) that their situation was substantially the same as that of the officers and crew of a vessel of war; (4) that they were assigned to duty with Japan's assent; (5) that the right to impose taxes imparted the right to enforce their collection, which might result in embarrassment in the case of persons subject to the discipline and obligations of the naval service; (6) that the appointment or enlistment of the officers and men was made in contemplation of a fixed rate of pay, the reduction of which by subjecting them to an income tax would occasion just complaint.

(2) CUSTOMS DUTIES.

§ 668.

"All applications to this Department for free entry of articles imported for the use of ministers and chargés d'affaires, and which they desire shall be delivered free of duty, must be made through the Department of State, accompanied by a bill of lading and by a statement of the number of packages, and their marks and numbers, with a general description of their contents, naming the vessel or other vehicle in which the same were imported, and the person to whom they wish the delivery to be made. When the request of the minister or chargé, with the bill of lading and statement aforesaid shall have been communicated to this Department by the Secretary of State, instructions will be given to the collector of the customs to deliver, free of duty, such packages as may be found to correspond with the bill of lading and statement aforesaid."

Treasury Regulations of 1857, Art. 247, quoted in Mr. Trescot, Acting Sec. of State, to Mr. van Limburg, June 29, 1860, MS. Notes to Netherlands, VI. 155.

Baron Lederer, though only Austrian consul, having been invested by his Government with diplomatic powers, by virtue of which he negotiated a treaty of amity and commerce, the Department of State, when he received his diplomatic powers, informed him that he was

entitled to remission of duties on certain articles for his private use. (Mr. Van Buren, Sec. of State, to Mr. Ingham, Sec. of Treas., Oct. 19, 1829, 23 MS. Dom. Let. 163.)

On the other hand, the Department of State, in 1855, advised the Treasury Department that Mr. Samson, consul of the Duke of Brunswick, although he had received from his Government a power to negotiate a treaty, and had as an act of courtesy been introduced by the Secretary of State to the President, was not entitled to the privilege of free importation, that privilege being properly limited, as the Department of State conceived, "to public ministers of a specific grade, accredited to this Government in the usual form." Mr. Samson's full power referred to him as consul. (Mr. Marcy, Sec. of State, to Act. Sec. of Treas., May 30, 1855, 44 MS. Dom. Let. 91.)

In 1865, it was suggested that the Treasury amend its regulations so as to extend the privilege of free importation "to the ministers of such governments as extend like privileges to our own representatives. (Mr. Seward, Sec. of State, to Mr. McCulloch, Sec. of Treas., Nov. 25, 1865, 71 MS. Dom. Let. 189.)

Mr. Burlingame, a citizen of the United States, was not, while acting as "the representative of China in Europe," entitled to the "privilege of nonpayment of duties on importations into the United States." (Mr. Fish, Sec. of State, to Mr. Livermore, Dec. 9, 1869, 82 MS. Dom. Let. 470.)

See Mr. Fish, Sec. of State, to Sec. of Treas., Aug. 9, 1876, 114 MS. Dom. Let. 546.

While the regulations do not limit the amount or value of the articles which a minister or chargé may import free of duty, yet "the importation of an amount so large as to be excessive for the representative's personal use (which it is not presumed could occur) would call for remark and possibly occasion a departure from the established regulations." (Mr. Fish, Sec. of State, to Chev. von Tavera, July 20, 1875, MS. Notes to Austria, VIII. 73. See, also, Mr. Blaine, Sec. of State, to Aristarchi Bey, Nov. 14, 1881, MS. Notes to Turkey, I. 292.)

The privilege of free importation can not be continued to one of whose withdrawal from the post of minister the President has been formally notified by the head of the foreign government. (Mr. Cadwalader, Act. Sec. of State, to Mr. Peralta, Oct. 25, 1876, MS. Notes to Costa Rica, II. 18.)

In this instance, however, upon receipt of explanations, the goods in question were afterwards ordered to be admitted free of duty. (Mr. Fish, Sec. of State, to Mr. Peralta, Nov. 18, 1876, MS. Notes to Costa Rica, II. 21.)

If a foreign government refuses the privilege of free entry to a chargé d'affaires ad interim of the United States, the United States will, after waiting a reasonable time for the foreign government to liberalize its rules, be obliged to deny the privilege to the chargé d'affaires ad interim in this country. (Mr. F. W. Seward, Act. Sec. of State, to Mr. Hoffman, chargé, No. 68, Aug. 21, 1879, MS. Inst. Russia, XVI. 94; Mr Brown, chief clerk, to Mr. Williamov, Russian chargé, June 9, 1880, MS. Notes to Russia, VII. 312; Mr. Evarts, Sec. of State, to Mr. Foster, No. 12, June 11, 1880, MS. Inst. Russia, XVI. 140; Mr. Hunter, Act. Sec. of State, to Mr. Foster, No. 31, Oct. 5, 1880, id. 161; Mr. Evarts, Sec. of State, to Mr. Foster, No. 42, Dec. 13, 1880, id. 171.)

An order was given for the free entry at New Orleans of the effects of the German minister to Mexico. (Mr. Frelinghuysen, Sec. of State, to Mr. von Eisendecher, March 16, 1883, MS. Notes to Germany, X. 221.)

The privilege of free importation is not extended to secretaries of legation, attachés, or consuls. (Mr. John Davis, Act. Sec. of State, to Mr. Eisendecher, Aug. 30, 1883, MS. Notes to Germany, X. 248. See, also, Mr. Sherman, Sec. of State, to Mr. Adam, No. 792, Oct. 4, 1897, MS. Notes to British Leg. XXIV. 30.)

With reference to the question whether Mr. Planten, Dutch consul-general at New York, who had "been temporarily placed in charge of the legation of the Netherlands by the minister, Mr. Weckherlin, during the latter's absence in Europe," was entitled to the benefits of free entry, the Department of State said: "In the opinion of this Department the courtesy extended by the Treasury Department is broad enough, and should not include a consular officer in temporary charge." (Mr. John Davis, Act. Sec. of State, to Sec. of Treas., July 29, 1884, 152 MS. Dom. Let. 96.)

Diplomatic representatives were requested to see that each application for free entry was "accompanied by the invoice of the articles for which the request is made, and that it is distinctly stated that such articles are for the personal use of themselves or their families." (Circular, Mr. Bayard, Sec. of State, March 11, 1885, MS. Circulars, III. 212.)

The phrase "for the use of" signifies that the articles imported must be "for the personal use of the foreign minister or of his personal family as distinguished from his *official* household." (Mr. Bayard, Sec. of State, to Baron von Schaeffer, April 4, 1885, MS. Notes to Austria, VIII. 468.)

As to the Mexican regulations touching the free entry of effects of diplomatic representatives, see Mr. Blaine, Sec. of State, to Mr. Bragg, min. to Mexico, April 23, 1889, MS. Inst. Mex., XXII. 384.

See, as to Great Britain, and the transit of diplomatic representatives on their way from one country to another, Mr. Blaine, Sec. of State, to Sir Julian Pauncefote, British min., May 6, 1889, MS. Notes to Gr. Br., XXI. 73.

The right of free entry, which is accorded in the United States to foreign secretaries of legation, and attachés, only when the articles accompany them to this country, is, in some countries, extended to articles imported for the personal or family use of all members of foreign embassies and legations. In England, for instance, it is enjoyed by all the members of the American embassy, without their even being obliged to make application through the head of the mission. (Mr. Hay, Sec. of State, to Sec. of Treas., Jan. 18, 1901, 250 MS. Dom. Let. 290. See, also, same to same, Jan. 17, 1901, id. 271.)

As to a doll show sent by the Queen of Roumania to an agent in New York for charitable exhibition, see Mr. Hay, Sec. of State, to Sec. of Treas., Jan. 21, 1901, 250 MS. Dom. Let. 321.

"58. It is a common usage of international intercourse that to a diplomatic representative shall be conceded the privilege of importation of effects for his personal or official use, or for the use of his immediate family, without payment of customs duties thereon. The application of this privilege varies in different countries, but as a rule

is restricted to the head of the mission. It is the duty of the representative to acquaint himself with the formalities and limitations prescribed in such case by the local law or regulations and to conform therewith. The privilege is one of usage and tradition, rather than an inherent right, and is one which the Government of the United States gives to the foreign representatives it receives.

"59. Where a diplomatic representative has ground to believe that reciprocal courtesy is limited or denied to him abroad, he should refrain from questioning the local rule on the subject, but await such instructions as the Department of State may give him after receiving full information as to the circumstances.

"60. In most countries the privilege of importation is accorded to a chargé d'affaires ad interim. Where the exception exists, the fact should not be made the occasion of remonstrance or argument with the local government without the express directions of the Department of State.

"61. Transit free of customs dues is usually conceded by a third state through whose territories a diplomatic representative passes on his way to or from his post. His status, however, while in the third country lacks the extraterritorial element of immunity belonging to him in the country to which he is accredited."

Instructions to Diplomatic Officers of the United States (1897), pp. 22–23.

That customs courtesies are shown to diplomatic officers of the United States on their return from their missions, see id., § 287, p. 116; and Mr. Gallatin to Mr. Clay, Nov. 23, 1815.

The right of exemption from custom-house duties of articles required for personal use is restricted to the person who is the head of a foreign mission. (Mr. Fish, Sec. of State, to Mr. Yano, Jan. 9, 1874, MS. Notes to Japan, I. 37.)

Municipal *octroi* duties imposed in some countries on articles of consumption, such as food, fuel, illuminants, and the like, and in other countries on all wares and products entering the city, are not understood to fall in the class of charges from which diplomatic exemption may be claimed by way of usage and reciprocity.

Mr. Olney, Sec. of State, to Mr. MacVeagh, No. 144, Jan. 20, 1896, MS. Inst. Italy, III. 102.

"*To collectors and other officers of the customs:*

"Hereafter, all packages imported through the mails, addressed to ambassadors, ministers, and chargés d'affaires representing foreign governments at Washington, will be delivered to the addresses by postmasters without submission to or the intervention of customs officials, and article 458 of the Customs Regulations of 1899 is modified accordingly."

Mr. Taylor, Act. Sec. of Treasury, circular, No. 72, June 28, 1902.

"*To collectors and other officers of the customs:*

"A practice has existed for many years under which this Department has issued instructions to collectors to extend special courtesies to persons duly named, upon their arrival from foreign ports, such instructions having been based upon reasons set forth in applications made directly to the Department.

"This privilege was originally granted only to principal members of the diplomatic corps and other high officials of foreign nations, and to invalids and other persons entitled, under some peculiar conditions, to special consideration.

"The demand for such courtesies has frequently been made by and sometimes granted to those not entitled thereto, and the practice has afforded justifiable ground for protest because of its discrimination between private citizens. The Department has also received information which shows that the safety of the revenue requires a return to the original purposes of the usage.

"The chief officers of customs are hereby instructed that the extension of special courtesies to arriving passengers will hereafter be limited as follows:

"1. To foreign ambassadors, ministers, chargés d'affaires, secretaries, naval, military, and other attachés of embassies and legations, and high commissioners.

"2. To similar representatives of this Government abroad returning from their missions.

"NOTE.—All the above officers are entitled by international usage to the free entry of the baggage and effects of themselves, their families, and suites, without examination.

"3. To such high officials of this and foreign Governments as shall be the subjects of special instructions from this Department.

"In the case of invalids and their companions, and of persons arriving in charge of their dead, or summoned home in haste by news of affliction or disaster, instructions will be issued to facilitate the landing and examination of their baggage, but such instructions will be construed as only relieving such persons from waiting their turn in line. Their baggage will be carefully examined and duties in full collected as though no favor had been shown. The word 'courtesy' has grown to have a meaning never intended and its use must be avoided in the issuance of personal consideration cards.

"No requests for special courtesies will hereafter be granted except under the above conditions.

"It is also found imperatively necessary, in the interest of the revenue, to withhold the issuance of passes on the revenue vessels which carry the boarding officers to their assigned vessels, and such passes will no longer be furnished except under the restrictions above

set forth, regarding courtesies, and by the special authority of this Department."

Mr. Spaulding, Act. Sec. of Treasury, No. 141, Dec. 22, 1902.
See Mr. Moore, Act. Sec. of State, to Sec. of Treas., June 30, 1898, 229 MS. Dom. Let. 655.

An alien head tax of two dollars having been collected at El Paso, Texas, from the Japanese secretary of legation in Mexico who was en route through the United States to Japan, it was held that the collection of the tax from the diplomatic and consular officers of foreign countries seeking admission to the United States was an error.

For. Rel. 1903, 661–664.

4. Police Regulations.

§ 669.

In considering the immunities of diplomatic officers, it is important to draw a distinction, which, it is believed, has not usually been noticed, between measures of punishment and measures of prevention. The theory of diplomatic immunity is not that the diplomatic officer is freed from the restraints of the law and exempt from the duty of observing them, but only that he can not be punished for his failure to respect them. The punitive power of the state can not be directly enforced against him. It will hardly be denied, however, that it is his duty to respect the laws of the country in which he resides, and that he may in many conceivable cases be prevented from doing unlawful acts, for which, if he were allowed to commit them, he could not be punished. This distinction is peculiarly applicable to police regulations, made for the purpose of assuring the public health and safety. Take, for example, the case of regulations with regard to the use of the public highways. Immunity from punishment for the violation of such regulations by no means implies that actual coercion might not be employed in protecting the public from injury, as by running down persons in the street. Foreign men-of-war, in spite of their extraterritoriality, are, as has been seen, required to observe harbor and sanitary regulations. The immunity from judicial process can not be perverted into a license to disregard the health and safety of the public, nor can it be construed as precluding the actual prevention of injuries to person or property, where, but for the exercise of immediate restraint, irreparable damage is threatened.

A citizen of Washington having complained to the Department of State, in 1888, that there was a flock of barnyard fowls on the

premises of the British minister, which gave much annoyance to persons living in the neighborhood, the Department in reply referred to the act of Congress of January 26, 1887, 24 Stat. 368, which authorized the commissioners of the District of Columbia to make and enforce police regulations in regard to various matters, including "the keeping or running at large of dogs and fowls." The Department added that, while it was not informed as to what regulations, if any, the commissioners had adopted under the act in question, the proper course for its correspondent would be, in the first instance, to bring the complaint to the notice of the local authorities, who could investigate the matter, and determine whether there had been any violation of the police regulations established for the District.

Mr. Rives, Assist. Sec. of State, to Mr. Childs, June 21, 1888, 168 MS. Dom. Let. 651.

The primary object of the diplomatic coachman's badge is "to identify the equipage as that of a foreign ambassador or minister in actual use for the envoy's personal behoof. Its second purpose is to establish the right of the equipage to invoke the aid of the police to assist in obtaining for the envoy all the usual and proper courtesies which should properly be shown to his high office. It does not . . . carry with it any privilege of disregarding the ordinary rules of circulation and traffic, or doing anything calculated to impair public order or to imperil life or property. In ordinary conditions of street travel, where the envoy's equipage is exposed to no interruption or delay, it may be presumed to follow its course to its own discretion within the ordinary rules of the road the same as any private equipage, without needing any assistance from the badge to enable it to do so. The principal application of the badge is on occasions of extraordinary concourse or unusual congestion of travel, where the control of the police is necessary to keep order and prevent a deadlock. On all such occasions it is expected that, upon exhibition of the envoy's permit, the efforts of the police will be promptly and courteously rendered to facilitate passage through the obstruction and access to his destination, especially if the occasion be one of a public ceremony or large entertainment to which the envoy is presumably an invited guest."

Mr. Hay, Sec. of State, to Mr. Wight, Feb. 17, 1900, 243 MS. Dom. Let. 104.

While there are United States statutes prohibiting hunting, shooting, or capturing game in certain public parks and reservations, there is none that forbids generally hunting or shooting within the United States, or that imposes license taxes for hunting or shooting in territory subject to United States jurisdiction; and "as no license taxes

are required, no exception from their payment is made in favor of diplomatic or consular representatives of foreign governments residing here."

Knox, At. Gen., Jan. 2, 1902, 23 Op. 608.

VII. *OFFICIAL CORRESPONDENCE.*

1. The Executive as National Spokesman.

§ 670.

The French minister having, in 1793, requested an exequatur for a consul whose commission was addressed to the Congress of the United States, Mr. Jefferson replied that, as the President was the only channel of communication between the United States and foreign nations, it was from him alone "that foreign nations or their agents are to learn what is or has been the will of the nation;" that whatever he communicated as such, they had a right and were bound to consider "as the expression of the nation;" and that no foreign agent could be "allowed to question it," or "to interpose between him and any other branch of government, under the pretext of either's transgressing their functions." Mr. Jefferson therefore declined to enter into any discussion of the question as to whether it belonged to the President under the Constitution to admit or exclude foreign agents. "I inform you of the fact," he said, "by authority from the President." Mr. Jefferson therefore returned the consul's commission and declared that the President would issue no exequatur to a consul except upon a commission correctly addressed.

Mr. Jefferson, Sec. of State, to M. Genet, Nov. 22, 1793, Am. State Papers, For. Rel. I. 184; 1 Waite's State Papers, 198; 5 MS. Dom. Let. 368.

"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. By what member of the government the right of giving or withdrawing permission is to be exercised here, is a question on which no foreign agent can be permitted to make himself the umpire. It is sufficient for him, under our government, that he is informed of it by the executive." (Mr. Jefferson, Sec. of State, to M. Genet, minister of France, Dec. 9, 1793, 4 Jeff. Works, 90.)

"Minutes of a conversation between Mr. Jefferson, Secretary of State, and M. Genet:

"July 10, 1793.

* * * "He asked if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the execu-

tive was sovereign in executing them, and the judiciary in construing them where they related to their department. 'But,' said he, 'at least, Congress are bound to see that the treaties are observed.' I told him no; there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. 'If he decides against the treaty, to whom is a nation to appeal?' I told him the Constitution had made the President the last appeal. He made me a bow, and said, that indeed he would not make me his compliments on such a Constitution, expressed the utmost astonishment at it, and seemed never before to have had such an idea.

"He was now come into perfect good humor and coolness, in which state he may with the greatest freedom be spoken with. I observed to him the impropriety of his conduct in persevering in measures contrary to the will of the Government, and that too within its limits, wherein unquestionably they had a right to be obeyed. 'But,' said he, 'I have a right to expound the treaty on our side.' 'Certainly,' said I, 'each party has an equal right to expound their treaties. You, as the agent of your nation, have a right to bring forward your exposition, to support it by reasons, to insist on it, to be answered with the reasons for our exposition where it is contrary; but when, after hearing and considering your reasons, the highest authority in the nation has decided, it is your duty to say you think the decision wrong, that you can not take upon yourself to admit it, and will represent it to your Government to do as they think proper; but, in the meantime, you ought to acquiesce in it, and to do nothing within our limits contrary to it.'"

10 Washington's Writings, 536, 537.

"A foreign minister has a right to remonstrate *with the Executive* to whom he is accredited upon any of those measures affecting his country. But it will ever be denied as a right of a foreign minister that he should endeavor, by an address to the people, oral or written, to forestall a depending measure, or to defeat one which has been decided."

Mr. Randolph, Sec. of State, to M. Fauchet, French min., June 13, 1795, 8 MS. Dom. Let. 262.

That it is an impropriety for foreign ministers to publish criticisms on the government to which they are accredited, see 1 J. Q. Adams, Memoirs, 410.

In August, 1796, there appeared in the Paris newspapers, under date of Basle, July 15, 1796, a note from the French minister for foreign affairs to Mr. Barthelmy, charging the political agents of the Directory to inform the governments to which they were accred-

ited that the ships of war and privateers of the Republic would act against the vessels of every country in the same manner as those governments suffered the English to act towards them. On October 28, 1796, Mr. Pickering received from the French minister, Adet, a note to that effect, of which Adet, on October 31, caused a translation to be published in the *Aurora*. Pickering thought this publication improper, thinking that it belonged to the Government of the United States to give to its citizens such information on the subject of the note as their interest and safety required. "This irregular act of the French minister rendered a publication of the answer to his note indispensable; although it was extremely unpleasant to commence a newspaper discussion with the minister of a foreign power."

Mr. Pickering, Sec. of State, to Mr. C. C. Pinckney, Nov. 5, 1796, MS. Inst. U. States Ministers, III. 288.

A foreign minister here is to correspond with the Secretary of State on matters which interest his nation, and ought not to be permitted to resort to the press. He has no authority to communicate his sentiments to the people by publications, either in manuscript or in print, and any attempt to do so is contempt of this Government. His intercourse is to be with the Executive of the United States only, upon matters that concern his mission or trust.

Lee, At. Gen., 1797, 1 Op. 74. See the case of Yrujo, supra, § 640.

The Chevalier Correa de Serra, having published in the *National Intelligencer*, of Washington, a notification of the blockade of Pernambuco and the adjacent coast, he was informed by the Department of State that settled and approved usage required that whatever communication he had to make relative to the alleged blockade should have been made, if at all, to the government of the United States, and not promulgated without its knowledge through the medium of newspapers. It was obvious, said the Department of State, that if the minister of a foreign power could pass by the government and address himself to the country in such a case as the present, he might do it in any other.

Mr. Rush, Sec. of State, to the Chev. Correa de Serra, Portuguese chargé, May 28, 1817. MS. Notes to For. Legs. II. 229.

"This government can not with propriety apply to the authorities of Yucatan for redress, that province constituting only a part of the Republic of Mexico, which is responsible in the last resort for all injuries which the judicial tribunals may have neglected or may have been incompetent to redress."

Mr. Calhoun, Sec. of State, to Mr. Holmes, Nov. 20, 1844, 35 MS. Dom. Let. 22.

The government of the United States, when seeking redress for citizens of the United States from residents in Italy, is limited to diplomatic appeals to the King of Italy; nor can a minister of the United States press upon any tribunal, ecclesiastic or lay, of the government to which he is accredited the collection of private debts.

Mr. Bayard, Sec. of State, to Mr. Dwyer, Jan. 31, 1887, 163 MS. Dom. Let. 4.

For the full text of the letter see For Rel. 1887, 642, and supra, § 19, I. 40, where the date of the letter is erroneously given as Nov. 7, 1887.

2. Communications of the President to Congress.

§ 671.

December 20, 1793, the French minister at Philadelphia communicated to the Department of State translations of the instructions given him by the executive council of France, in order that they might be distributed among the members of Congress, and, besides requesting that the President would lay them officially before both Houses, proposed to transmit subsequently other papers to be laid before Congress in like manner. Mr. Jefferson, after consulting the President, informed the minister that his functions as the representative of a foreign nation were confined to the transaction of the affairs of his nation with the Executive of the United States: that the communications which were to pass between the executive and legislative branches could not be a subject for his "interference;" and that the President "must be left to judge for himself what matters his duty or the public good may require him to propose to the deliberations of Congress."

Mr. Jefferson, Sec. of State, to the French min., Dec. 31, 1793, 5 MS. Dom. Let. 412.

"The first reflection produced by Mr. Serurier's note is that it brings into discussion the propriety of a message of the President to Congress, for the contents of which, until the recommendations it contains are adopted by Congress, the United States are not responsible to foreign governments. If, in the performance of his constitutional duty, the President had recommended a declaration of war against France, it is to be presumed that France would not have made war upon the United States, until Congress, to whom exclusively belongs the power, had decided to declare war against her: and however prudence would have required a preparation, or even action, on her part, the French Government would scarcely have expected to make it a subject of diplomatic discussion. As one of its branches the Chief Magistrate, in his messages, commits the Government to foreign nations no more than two Houses of Congress can by their

separate action: and it would be a most extraordinary movement of the foreign power to discuss the resolutions of either House of Congress, or of both, if passed by less than two-thirds, and not approved by the President, as if those resolutions were causes of complaint against the United States, to be subjects of discussion with the Executive. The President corresponds with foreign governments, through their diplomatic agents, as the organ of the nation. As such he speaks for the nation. In his messages to Congress he speaks only for the Executive to the legislature. He recommends, and his recommendations are powerless, unless followed by legislative action. No discussion of them can be permitted. All allusions to them, made with a design to mark an anticipated or actual difference of opinion between the Executive and legislature, are indelicate in themselves, and if made to prejudice public opinion will immediately recoil upon those who are so indiscreet as to indulge them. If they contain anything injurious to foreign nations, the means of self-justification are in their own power without interposing between the different branches of this government, an interposition which can never be made, even by those who do not comprehend the true character of the Government and the people of the United States, without forfeiting the respect of both."

Mr. Forsyth, Sec. of State, to Mr. Livingston, min. to France, Mar. 5, 1835, MS. Inst. France, XIV. 191, 193.

The foregoing instruction referred to a note of Mr. Serurier, French minister at Washington, complaining of that part of President Jackson's message to Congress of Dec. 1, 1834, which related to the convention with France of 1831 and its nonexecution. (Mr. Serurier to Mr. Forsyth, Feb. 23, 1835, 23 Br. & For. State Papers, 1316.)

See, also, Hunt's Life of Livingston, 401, 402.

"A foreign minister accredited to the United States has no right to ask explanations from the President concerning the debates or proceedings of Congress, or any message which he may transmit to either House in the exercise of his constitutional power and duty. In a note to M. de la Rosa, minister of MeMxico, from Mr. Buchanan, Secretary of State, February 15, 1849, it is said: 'So far as regards the debates or proceedings of Congress, this is the first occasion on which it has become necessary to address the representative of any foreign government. Not so in relation to the messages of the President to Congress. Mr. Castillo, one of your predecessors, in a note, of the 11th of December, 1835, to Mr. Forsyth, the Secretary of State, called upon him for an explanation of the meaning of a paragraph, relating to Mexico, contained in President Jackson's annual message to Congress, of December, 1835. Mr. Forsyth, in his answer of 16th December, 1835, told Mr. Castillo that 'remarks made by the President in a message to Congress are not deemed a proper subject upon

which to enter into explanation with the representative of a foreign government.' Mr. Livingston, then our minister to France, on 13th of January, 1835, informed the French minister of foreign affairs that in the message of President Jackson to Congress, of the previous December, 'there was nothing addressed to the French nation;' and he likened it very properly 'to a proceeding well known in the French law—a family council, in which their concerns and interests are discussed, but of which, in our case, the debates were necessarily public.' (Annual message of the President, &c., 1849–50, part 1, p. 71.)

"Mr. Webster, Secretary of State, wrote to the same Mexican minister, February 21, 1851: 'The undersigned flattered himself that after the expression of the sentiments of the Government contained in the note of Mr. Buchanan to M. de la Rosa, of 15th February, 1849, M. de la Rosa would have abstained from making a message of the President to either House of Congress a subject of diplomatic representation.'"

Lawrence's Wheaton (ed. 1863), 385.

See, also, Mr. Webster, Sec. of State, to Mr. Hülsemann, Austrian chargé, Dec. 21, 1850, supra, § 72, I. 223. See, however, Mr. Clay's comments, supra, I. 234.

"The President's annual message is a communication from the executive to the legislative branch of the Government; an internal transaction, with which it is not deemed proper or respectful for foreign powers or their representatives to interfere, or even to resort to it as the basis of a diplomatic correspondence. It is not a document addressed to foreign governments."

Mr. Marcy, Sec. of State, to Mr. Herran, Colombian min., Dec. 22, 1856, MS. Notes to Colombia, VI. 57.

To the same effect see Mr. Fish, Sec. of State, to Mr. Preston, Haytian min., Dec. 12, 1870. MS. Notes to Hayti, I. 106.

"It is neither convenient nor customary with the executive department to discuss or give explanations concerning the expressions of opinions which are made in incidental debates and resolutions from time to time in either or both of the legislative bodies, at least until they assume the practical form of a law. When they assume that form they are constitutionally submitted to the President for his consideration, and he is not only entitled, but he is obliged to announce his concurrence or non-concurrence with the will of the legislature."

"It would not be becoming for me to entertain correspondence with a foreign state concerning incidental debates and resolutions in regard to the treaty for the two Danish islands while it is undergoing constitutional consideration in the Senate and in Congress."

Mr. Seward, Sec. of State, to Mr. Yeaman, min. to Denmark, Jan. 2, 1868, MS. Inst. Denmark, XIV. 312.

Communications to the Government of the United States by its foreign ministers are so far privileged that, though published by order of Congress, the Government can not sanction criticisms of them by other foreign powers.

Mr. Fish, Sec. of State, to Mr. Jay, min. to Austria-Hungary, No. 53, July 11, 1870, MS. Inst. Austria, I. 407.

The Turkish minister having produced a volume of Foreign Relations of the United States, and commented on the circumstance that the correspondence of the Department of State with its consular officers in Tripoli and Tunis was arranged under the head of "Barbary States" instead of "Turkey," his attention was called to the fact "that the volume to which he referred . . . was a communication addressed by the President to Congress, and not one addressed to foreign governments (although we furnish them with copies of this, as we do of all or nearly all of our public documents)," and "that the arrangement to which he had referred was not intended to convey any special political significance, but was one of usage and of domestic convenience; that we do regard both Tunis and Tripoli as Barbary States, that they are so regarded and spoken of by geographers, historians and lexicographers; that we have separate and independent treaties with each of them, for the execution and observance of which we hold them responsible."

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

3. Secretary of State, as Organ of Correspondence.

§ 672.

The French minister having, on August 13, 1793, addressed a letter to the President of the United States, Mr. Jefferson, in answering it, said that he desired to observe that it was "not the established course for the diplomatic characters residing here to have any direct correspondence with him [the President]. The Secretary of State is the organ through which their communications should pass.

Mr. Jefferson, Sec. of State, to M. Genet, French min., Aug. 16, 1793, 5 MS. Dom. Let. 231.

"Before Mr. Briceno [Venezuelan minister at Washington] received the notice of his recall, he found it necessary to make an explanation to the Department of his conduct in publishing a memoir upon the subject of the 'Aves' [Aves Islands] case, which was manifestly a violation of diplomatic usage, and not in accordance with that respect which is due to the United States from the representative of a friendly power. This explanation was received with the greater satisfaction because it was believed that the course of Mr. Briceno was

without authority from his Government, and because it was not desired to do anything which might embarrass the new administration which had just been organized in Venezuela. Mr. Briceno accordingly was granted an audience of leave in the usual manner."

Mr. Cass, Sec. of State, to Mr. Eames, min. to Venezuela, May 10, 1858, S. Ex. Doc. 10, 36 Cong. 2 sess. 425, 426. The explanation of Mr. Briceno, which was accepted by Mr. Cass, consisted of an expression of regret that his conduct had "given just cause of complaint" to the Government, and an assurance that there had not been on his part "the slightest intention to forget for a single instant the courteous demeanor or the respect which two friendly governments owe to each other." (Id. 423.)

"It has always been regarded as inadvisable for a diplomatic agent accredited to this Government to appeal to the public through the press over his own signature . . . If the Argentine legation should have cause of complaint against this Government or any person in its service, this Department and not the public may most properly be addressed upon the subject."

Mr. Fish, Sec. of State, to Mr. Garcia, Argentine min., Nov. 5, 1869, MS. Notes to Argentine Leg. VI. 78.

The minister of the Shah of Persia having expressed his desire for a "private audience" with the President, the Acting Secretary of State, observing that the rule at Washington was that the official communications of foreign envoys were made through the Secretary of State and not directly to the President, except as to formal ceremonial acts the nature of which was first indicated, named a time at which the minister would be received at the Department of State. A time was, however, afterwards fixed for an audience with the President, and the minister was requested to call at the Department of State at a quarter of an hour before the time set.

Mr. Rives, Act. Sec. of State, to Hadji Hossein Ghooly Khan, Oct. 10, 1888, MS. Notes to Persia, I. 1; Mr. Bayard, Sec. of State, to same, Oct. 26, 1888, id. 2.

The Department of State "transmits no communications to the sovereigns of foreign states, except letters of ceremony addressed by the President to such sovereigns."

Mr. Bayard, Sec. of State, to Mr. Lopas, May 19, 1887, 164 MS. Dom. Let. 212.

As to the transmission of the autograph ceremonial letter of the President in reply to the letter of H. R. H. Alexander, announcing his accession to the throne of the principality of Bulgaria, see Mr. Hunter, Act. Sec. of State, to Mr. Maynard, min. to Turkey, No. 231, Jan. 6, 1880, MS. Inst. Turkey, III. 324.

"Under our system the President does not occupy the personal position of a titular sovereign. His relations with such sovereigns

are official and in representation of the people of the United States, and not of the directly personal character usual in the intercourse of monarchs among themselves.

"Hence all the acts of the President, in his official capacity, pass through the constitutional and statutory channel of the Secretary of State. This is true of even the most important communications—his autograph letters are countersigned by the Secretary of State, who transmits them—and even on the recent occasion of the death of the German Emperor the President's cable message of condolence took the form of a telegraphic dispatch from the Secretary of State to the United States minister at Berlin, who in turn communicated it through the imperial foreign office. When the administrative methods of the United States—inseparable from a popular representative form of government—are understood, the difficulty in the way of adopting the suggestion now made, especially in respect of merely routine ceremonial courtesies on stated festivals, will be evident."

Mr. Bayard, Sec. of State, to Mr. Pratt, min. to Persia, No. 104, dip. series, April 5, 1888, MS. Inst. Persia, I. 208.

See, also, same to same, No. 102, dip. ser., March 26, 1888, MS. Inst. Persia, I. 207.

It was long the custom to send, on special occasions, through the diplomatic representatives of the United States, messages of congratulation or of condolence, as the case might be.

For congratulations of the President to the Emperor of Brazil on his escape from assassination, see For. Rel. 1889, 58.

For an expression of condolence of the President and people of the United States with the Emperor of Austria on the death of the Crown Prince, see For. Rel. 1889, 20.

"The recent cruel assassination of the President of this sister Republic called forth such universal expressions of sorrow and condolence from our people and Government as to leave no doubt of the depth and sincerity of our attachment. The resolutions passed by the Senate and House of Representatives on the occasion have been communicated to the widow of President Carnot." (President Cleveland, annual message, Dec. 3, 1894, For. Rel. 1894, ix.)

'The recent death of the Czar of Russia called forth appropriate expressions of sorrow and sympathy on the part of our Government with his bereaved family and the Russian people. As a further demonstration of respect and friendship our minister at St. Petersburg was directed to represent our Government at the funeral ceremonies." (President Cleveland, annual message, Dec. 3, 1894, id. xiii.)

For expressions of condolence from abroad, on the assassination of President Lincoln, see Dip. Cor. 1865, Appendix.

As to the action of Guatemala in sending a special envoy on learning of the attack on President Garfield, and the sending of Gen. Butterfield as special envoy to express the appreciation of the United States, see Mr. Frelinghuysen, Sec. of State, to Mr. Logan, min. to Cent. Am., No. 193, March 3, 1882, MS. Inst. Cent. Am. XVIII. 224.

As the President of the United States does not occupy a dynastic position, and does not share in the personal relations which characterize the monarchical system, "he is not in a position to keep pace with the frequent ceremonial exchanges of personal compliments usual among reigning princes. To do so, in scattered instances, unless of exceptional importance, might cause neglect to be imputed to him in the event of an oversight or omission with regard to some recurring anniversary like that which gives rise to your present despatch. Hence it is found more expedient to prescribe to the resident representatives of the United States abroad standing discretion to express in the name of the Government and people of the United States, as well as of the President, their congratulations on fitting occasions when such expressions are usual at a foreign capital." (Mr. Adee, Act. Sec. of State, to Mr. Sperry, min. to Persia, No. 28, April 27, 1893, MS. Inst. Persia, I. 347.)

See, also, Mr. Blaine, Sec. of State, to Mr. Pratt, min. to Persia, No. 173, March 28, 1889, MS. Inst. Persia, I. 252; Mr. Adee, Act. Sec. of State, to Mr. Ryan, min. to Mexico, No. 78, Sept. 14, 1889, MS. Inst. Mexico, XXII. 252.

After the introduction of the system of sending and receiving ambassadors, the United States for a time adhered to the practice of exchanging communications between the President and the heads of other states through the usual diplomatic channels. For example, the ambassador of the United States at London was instructed, June 24, 1893, to convey to Her Britannic Majesty an expression of the sorrow of the President and people of the United States by reason of the catastrophe to H. B. M. S. *Victoria*. Gradually, however, the practice has become common of a direct exchange of communications between the President and the heads of foreign governments on such occasions as they deem proper.

For the instructions to the ambassador at London in the case of H. B. M. S. *Victoria*, see Mr. Gresham, Sec. of State, to Mr. Bayard, tel., June 24, 1893, For. Rel. 1893, 322. At the same place will be found the reply of the Queen, which was addressed by Her Majesty directly to Mr. Bayard.

As an example of direct communication, see the messages that passed between President McKinley and the German Emperor, on the occasion of the disaster at Galveston, and the loss of the German training ship *Gneisenau* at Malaga, see For. Rel. 1900, 527–528.

"Whereas the publication of alleged charges and criticisms against officers of the diplomatic and consular service, without an opportunity being given for due consideration of both sides of the questions at issue, has led to injustice to the persons attacked and to embarrassment to the Department of State in its disposition of the public business:

"It is hereby ordered that hereafter no officer of the diplomatic or consular service of the United States shall attack, or prefer charges

against, or publicly criticise, any other officer in either service, except in a communication to the Department of State.

"Whenever any such officer deems that his duty compels him to prefer charges against any other officer in either service, he shall communicate such charges confidentially to the Department of State, which will, upon due consideration of all the circumstances, make such disposition of the case as in its discretion seems wise in the interest of the public business."

Executive Order, April 25, 1902, communicated to the diplomatic and consular officers of the United States, April 26, 1902, For. Rel. 1902, 5; MS. Inst. Arg. Rep. XVII. 579.

4. Official Communications.

§ 673.

Even though the *Globe*, as published during the administration of President Jackson, should be regarded as a government paper, the government "is and can be from the nature of our institutions only answerable for official articles; in all the rest the *Globe* is as independent of the executive as any other gazette." Hence, the government, as such, can not be properly called on by Russia to explain the insertion of articles in the *Globe* injurious to Russia in relation to Poland, or the publication of what Russia may consider inaccurate and unjust reports from France or England of Russian affairs.

Mr. Livingston, Sec. of State, to Mr. Buchanan, Jan. 2, 1833, MS. Inst. Russia, XIV. 1. See, also, 1 Curtis's Buchanan, 175.

"No foreign government or its representative can take just offense at anything which an officer of this government may say in his private capacity. Official communications only are to be regarded as indicating the sentiments and views of the government of the United States."

Mr. Webster, Sec. of State, to Mr. McCurdy, June 8, 1852, S. Ex. Doc. No. 92, 32 Cong. 1 sess. 4, 5. See, however, Political Science Quarterly, X. 286–288; and infra, § 905.

"Although it is usual for this Department to forward letters to persons abroad, which may be sent hither by members of Congress for that purpose, the punctilio required in Europe in communication with crowned heads renders it necessary to make letters to such personages an exception. The rule there is that no communication intended for the sovereign, even a letter accrediting a foreign minister, can be presented to the person to whom it is addressed, unless a copy shall previously be communicated to the proper minister of the sovereign. The reason for this rule is understood to be to prevent

any letters of an improper character from being received by the sovereign."

Mr. Seward, Sec. of State, to Mr. Rice, M. C., July 16, 1861, 54 MS. Dom. Let. 302.

This letter of Mr. Seward's related to a letter to the King of Bavaria, which Mr. Rice had sent to the Department of State with the request that it be forwarded to its destination. Mr. Seward closed his letter as follows: "Under these circumstances, and especially as we have no diplomatic agent, but only a consul, at Munich, who has no official right to communicate with the court, I feel obliged to decline a compliance with your request. The letter to the King of Bavaria is consequently herewith returned."

"Your dispatch No. 14, of the 8th ultimo, has been received. The view is correct which it takes of the absurd newspaper report of a letter from President Grant to the Emperor of Russia, congratulating the latter upon his denunciation of the clause of the treaty of Paris which restricts liberty of navigation in the Black Sea. The occasions are rare which are conceived to warrant or require a deviation on the part of the President from the rule which limits his communications to foreign sovereigns to mere letters of ceremony."

Mr. Fish, Sec. of State, to Mr. MacVeagh, min. to Turkey, Jan. 5, 1871, For. Rel. 1871, 890.

In 1871 Mr. Fish declined to transmit to the Russian minister a letter from a private citizen of Philadelphia offering the use of his house for the Grand Duke Alexis during the latter's stay in that city. Mr. Fish said that, if the letter were sent directly to the Russian minister, he should, if oral inquiries were made of him, take pleasure in recommending the acceptance of the offer.

Mr. Fish, Sec. of State, to Mr. Borie, July 27, 1871, 90 MS. Dom. Let. 212.

No officer, civil, military, or naval, can properly carry on an official correspondence with a foreign government, except through the Department of State, or its diplomatic representative at the seat of such government.

Mr. Fish, Sec. of State, to Mr. Wines, Jan. 25, 1872, 92 MS. Dom. Let. 299.

"I am directed by the Secretary of State to inform you that the usages of foreign intercourse require that communications from citizens or subjects of foreign governments to the President should be addressed through the ministry of the nation of which the writer is a subject or citizen. Moreover, it is not the province of the executive branch of this government, as a general rule, to give attention to a claim or interest involving private rights only."

Mr. Hale, Asst. Sec. of State, to Mr. Kuhlmann, May 21, 1872, 91 MS. Dom. Let. 152.

"The policy of the law is to prohibit all communication with private and unofficial persons on subjects under discussion between this government and another. Such communication can be made verbally by trusted messengers, as much to the detriment of the public service and the public interest, and in as complete disregard of the policy and the letter of the statute, as it can by written correspondence. It may even be more dangerous to intrust it to the memory or even the fidelity of a messenger than to the exact words of a written communication."

Mr. Fish, Sec. of State, to Mr. Bassett, min. to Hayti, Nov. 20, 1875, MS. Inst. Hayti, II. 66.

Prince Bismarck, having declined to be "the medium of communication between the House of Representatives of the United States and the Reichstag of a resolution on the subject of the death of Mr. Lasker" (a late member of that body who died in New York), Mr. Frelinghuysen, Secretary of State, in a telegram to Mr. Sargent, American minister at Berlin, after explaining the friendly intent of the resolution, stated that "its non-transmission officially, as it was intended and claimed on its face to be of friendly intent, while a matter of regret, is not one of concern to either branch of the government of the United States."

Mr. Frelinghuysen to Mr. Sargent, min. to Germany, Mar. 10, 1884, MS. Inst. Germ. XVII. 337.

In 1894 Señor Bonilla, who had become, as the result of a revolution, the chief executive of Honduras, addressed as provisional president an autograph letter to the head of each of the governments represented in that country, and sent it to the proper legation for transmission. The Spanish and Italian ministers, considering it contrary to diplomatic usages for President Bonilla to address an autograph letter to their sovereigns till he had been elected constitutional President, refrained from transmitting it to their governments. The German minister, while sharing their views as to diplomatic usage, considered that he was not authorized to withhold the letter, and forwarded it. The diplomatic representative of the United States took the same course. The Department of State instructed him that he "did right to forward a communication so received from the de facto head of the government with which intercourse is held."

Mr. Uhl, Acting Sec. of State, to Mr. Young, min. to Honduras, May 12, 1894, For. Rel. 1894, 302.

In 1895 the German minister at Washington, having declined to receive a complaint touching the treatment of an American citizen in Bavaria, Mr. Olney said: "All usage and precedent make it entirely

competent and proper for this government to present a diplomatic claim to the German government, either here through . . . the ambassador thereof, or at Berlin through its own ambassador to Germany, as this government may elect." The German ambassador replied: "The imperial government receives complaints or suggestions from friendly governments only when they are presented by the diplomatic representatives of such governments accredited to it. It does this as a matter of principle, and in accordance with a practice which generally prevails."

Mr. Olney, Sec. of State, to Baron Thielmann, German ambass., Oct. 7, 1895, For. Rel. 1895, I. 480, 481; Baron Thielmann to Mr. Olney, Oct. 14, 1895, id. 486.

5. Communications from Aliens.

§ 674.

General Washington, when President, declined to receive publicly Messrs. Talleyrand, Beaumetz, and Liancourt, who were then refugees from France, on the ground that "the French Republic would have learnt with disgust that they had been received by the President. He having resolved not to receive them, I held it to be my duty to do violence to my individual regard for their characters by merging it in political considerations."

Mr. Randolph, Sec. of State, to Mr. Jay, Dec. 23, 1794, MS. Inst. U. States Ministers, II. 293. They had letters of introduction from Messrs. Pinckney and Jay.

The Department of State can receive no communication from subjects of another country on international matters, except through the minister of such country.

Mr. Monroe, Sec. of State, to Admiral Cochrane, Apr. 5, 1815, MS. Notes to For. Legs. II. 80.

"Several days ago I received information through a confidential channel that Joseph Bonaparte, with several companions, had arrived *incog.* at New York. . . . And yesterday I received the further information that he was on his way, accompanied by Lewis, to report himself to me personally, still under his disguise. . . . Whatever motives may have produced this step, the palpable impropriety of it, especially as its success would involve my participation in a clandestine transaction, determined me at once to guard against it. I have accordingly written to Mr. Rush to have the travelers diverted from their purpose on their arrival at Washington."

Mr. Madison, President, unofficial, to Mr. Monroe, Sec. of State, Montpelier, Sept. 12, 1815, MS. Monroe Papers.

In 1866, General Santa Anna, formerly President of Mexico, in expectation of visiting Washington, inquired whether Mr. Seward would receive him as a private gentleman. Mr. Seward informed General Santa Anna that, inasmuch as his attitude toward the republic and government of Mexico, with which the United States maintained diplomatic relations, was pronounced by the President of Mexico to be unfriendly, a reception of him in any character at that time by the Secretary of State would be incompatible with the settled practice and habits of the executive department of the United States.

Mr. Seward, Sec. of State, to General Santa Anna, Aug. 16, 1866, 74 MS. Dom. Let. 27.

A foreigner abroad, desiring to communicate with this government, must do so through the accredited representative of his government at Washington.

Mr. Fish, Sec. of State, to Mr. Mantilla, Span. min., Feb. 16, 1875, MS. Notes to Spain, IX. 345.

"I have the pleasure to acknowledge the receipt of your letter of the 29th ultimo, in which, pursuant to a suggestion I made to you on Wednesday last, you state the purposes of the proposed memorial from the Peace Association of Friends of Philadelphia, to the Czar of Russia, in the interest of universal peace and disarmament; and you also communicate to me an explanatory letter of Mr. Charles Emory Smith, and an extract from a letter addressed to you by Mr. Andrew D. White, upon the same subject.

"You refer, in conclusion, to the kindly acknowledgment received by your association, through the imperial German ambassador in Washington, to an address to William II. dated January 9th, 1894, in the interest of peace and disarmament of the nations in Europe.

"I find that the address to the German Emperor was transmitted directly by the memorialists in 1894, after the failure of an application to have the same presented by our ambassador at Berlin in the fall of 1893. It appears that the petition was sent in the first place to Mr. Runyon, with the request that he should present it. This he declined to do, for reasons stated by him, and reported the incident to the Department. Mr. Runyon's course was approved by an instruction dated November 22, 1893, in which among other things I said: 'The agencies of this government are not open for the presentation of memorials of our citizens to foreign governments, especially when they deal with questions of national and international policy not affecting the United States, even in cases where the rights or interests of an American citizen are concerned. It is a very general rule among governments that the individual's privilege to memorialize the crown is to be availed of directly, not through a

diplomatic channel, and a tender through the latter course may be and frequently is declined.'

"In view of this now uniform ruling of the Department in such matters, I could not instruct Mr. Breckinridge to present the proposed memorial to the Czar; but in view of the high standing of the persons composing the Peace Association of Friends, I can not suppose that there would be any difficulty in presenting it to His Majesty in the ordinary way."

Mr. Gresham, Sec. of State, to Mr. Garrett, April 2, 1895, 201 MS. Dom. Let. 361.

As to resolutions of the general assembly of Connecticut, passed in January, 1885, expressing abhorrence at the attempt to destroy the House f Parliament and other public buildings, see Mr. Bayard, Sec. of State, to Mr. Colyer, March 7, 1885, saying: "The legislature of Connecticut having taken no action towards communicating the resolution to Her Majesty's government, this department can not with propriety be the medium of communicating the resolutions upon your individual request." (154 MS. Dom. Let. 397.)

6. Right of Official Communication.

§ 675.

The right of legation, as it exists between civilized states, necessarily implies the right of diplomatic representatives to correspond with their own government, as well as with the consular representatives of that government in the country to which they are accredited. The general right of communication in such cases is not denied, but it has sometimes been interfered with and abridged in times of war or of civil disturbance. The interference or disturbance in such instances has given rise to discussions of an interesting nature.

Bearers of despatches.

"Your predecessor also raised a question with the government concerning its refusal of a passport to Mr. Valeri as a bearer of despatches. This question was elaborately discussed between Mr. Jones and the Secretary of State for New Granada. We think that in the first instance Mr. Jones had the right in the controversy, but that the Secretary subsequently gave explanations which might well have been accepted as satisfactory. The right to send despatches of a minister, secured by the law of nations, certainly involves the right to designate the messengers and the inviolability of his person when executing the commission. But when a country is in a revolutionary state this absolute right ought to be exercised with due regard to the safety of the state where the minister resides, and temporary inconveniences which do not go to the defeat of the right itself may well

be submitted to in such a time without a compromise of the dignity or honor of a just and friendly nation. The public safety is in every country the first consideration of the government. The government of the United States will not be either exacting of extreme rights in revolutionary states, nor remiss in reasonably maintaining all its rights under all circumstances."

Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, No. 1, May 29, 1861, MS. Inst. Colombia, XVI. 1. See infra, §§ 678, 679.

For a request to the Secretary of War that a paper from Earl Russell be sent through the military lines to Gen. Lee by flag of truce, see Mr. Seward, Sec. of State, to Mr. Stanton, March 8, 1865, 68 MS. Dom. Let. 362.

Blockades.

In 1869 the Argentine military commander at Asuncion declined to obey the order of his government granting a safe conduct for a messenger from the commander of the U. S. S. *Wasp* to communicate with the American minister to Paraguay, who was within the military lines of President Lopez. June 17, 1869, Mr. Fish instructed the American minister at Buenos Ayres that this refusal was, "under the circumstances, regarded as specially unfriendly to this government and wholly without any substantial reason;" that blockade, naval or military, was a belligerent measure designed to prevent commercial intercourse with the enemy, and that he was aware of no instance in which it had been invoked for the purpose of preventing the government of a neutral and friendly state from communicating with the diplomatic agent accredited to the government of the blockaded territory; that safe conducts, it was believed, were rarely, if ever, refused under such circumstances, and that when refused the aggrieved party had a right to expect sufficient reasons therefor. The American minister was therefore instructed to protest against the act of disobedience of the Argentine military commander, and to say that the United States expected not only that he would be held accountable therefor, but that "no further obstacles will be interposed to communication with the United States minister to Paraguay unless adequate grounds for a denial of intercourse shall be assigned."

Mr. Fish, Sec. of State, to Mr. Kirk, No. 3, June 17, 1869, MS. Inst. Argentine Repub. XV. 317.

Siege of Paris.

In September, 1870, M. Jules Favre, as minister of foreign affairs of France, referring to the siege of Paris, informed Count Bismarck that the diplomatic corps desired to be allowed once a week to despatch correspondence—exclusively diplomatic—"accepting all the precautions" which Count Bismarck might think proper to take. On the 26th of September Bismarck replied that "permission of correspondence from and with a be-

sieged fortress is not usual according to the rules of warfare;" that the interior of the fortifications of Paris during a siege was not "a proper central point of diplomatic intercourse," but that he would permit the transmission of "open letters" of diplomatic agents. On the 6th of October the diplomatic representatives at Paris addressed to Bismarck a protest against his decision, and declared that their duties towards their governments did not permit them to accept the condition that they address to them only "open" despatches. In a reply of the 10th of October Bismarck stated that, if members of the diplomatic corps had decided to share with the government of the National Defence the inconveniences which were inseparable from a residence in a besieged fortress, the government of the King of Prussia was not responsible therefor; that, conceding every confidence to the members of the diplomatic corps, it was necessary to consider the possibility that important information concerning military facts might escape them, and that they could not in any event guarantee the discretion and good faith of the messengers whom they should see fit to employ. Bismarck added that the state of things created in Paris was not, from the point of view of international law, analogous to any other situation in modern history; that a government, at war with a power which had not yet recognized it, had shut itself up in a besieged fortress and was there surrounded by a part of the diplomatic representatives who were accredited to the government whose place it had taken; and that it would be difficult to establish rules which should be incontrovertible from every point of view. He expressed his willingness to examine any question of international law relating to the abnormal situation that existed.

November 11, 1870, Mr. Fish instructed Mr. Bancroft, who was then American minister at Berlin, that the refusal of the German authorities to allow the American minister in Paris to send a messenger to London with a pouch with despatches from his legation, unless the contents of the pouch be unsealed, must be regarded as an "uncourteous proceeding," which could not be acquiesced in by the United States; that the right of a blockading force, whether by sea or by land, to cut off the diplomatic representative of a neutral state from all intercourse by letter with the outer world was neither "expressly recognized by public law" nor "even alluded to in any treatise on the subject;" that the right of legation, which comprehended the privilege of sending and receiving messages was, however, fully acknowledged, and that, as writers on the law of nations had made no exception in case of hostilities, the rights of legation under such circumstances "must be regarded as paramount to any belligerent right," and should not be questioned or curtailed unless the attacking party had "good

reason to believe" that they would be "abused," or "unless some military necessity, which upon proper statement must be regarded as obvious, shall require the curtailment;" and that the condition of sending messengers with open despatches was humiliating and could not be accepted. Mr. Bancroft was therefore directed to remonstrate against the action of the German authorities; and in this relation it was observed that the United States had successfully asserted "an analogous privilege of legation" upon several occasions during the Paraguayan war.[a]

November 21, 1870, Mr. Fish addressed a note in a similar sense to Baron Gerolt, the Prussian minister at Washington.

In a despatch of December 17, 1870, Mr. Bancroft stated that he had made inquiries among his colleagues at Berlin, and had found that the Swiss Republic had presented a remonstrance which in tone and argument was very similar to that which Mr. Fish had directed to be made, but that no other power had taken any further notice of the matter. Mr. Bancroft added that, as a practical question, it was much discussed, and that there were not wanting those who thought the German view would be maintained.

December 6, 1870, Count Bismarck called the attention of Mr. Washburne, American minister at Paris, to a report that he received the English papers regularly by the despatch bag which was sent him each week by the American legation in London, and that the contents of these papers were reproduced in the Paris journals. Bismarck declared that the military authorities could not consent that foreign papers of recent date should reach the besieged city without having been previously examined; that, in obtaining for the United States legation the "privilege of receiving closed despatches within a besieged fortress," he was influenced by the conviction that no inconvenience would result; and that the privilege was intended to apply only to official communications from the government at Washington to the American legation. Mr. Washburne, on the 12th of December, replied that a few numbers of London papers of an old date, which he had supposed could do neither good nor harm to any interest, had been permitted to lie on his table where people might read them, but that he should decline to receive any more and had written to London asking that no more be sent him; and he expressed the hope that no objection would be found to his receiving through the bag papers from his own country, with the understanding that they were particularly for his own perusal. On the 15th of December Bismarck answered that he had desired only to call Mr. Washburne's attention to the report which had been published in London, and that he had no intention of depriving him personally of any English or

[a] See supra, § 644.

American papers, which he was entirely free to receive for his own private use.

By a special arrangement Mr. Washburne was permitted to send out his despatch bags to London for transmission to Washington, as well as to receive despatch bags made up and sealed in London. It was discovered by the Germans, from letters captured in a balloon sent up from Paris, that when the privilege became known certain persons sought to abuse the facilities which it afforded for conducting a clandestine correspondence. This incident gave rise to correspondence between Mr. Washburne and Count Bismarck, in the course of which the latter, in a note of January 28, 1871, stated that a delay which had occurred now and then in the transmission of Mr. Washburne's despatch bags was "not occasioned by any doubt as to the right of your government to correspond with you, but by obstacles it was out of my power to remove." In an instruction to Mr. Washburne of February 24, 1871, Mr. Fish said: "It is satisfactory to notice that although Count Bismarck, in his note addressed to you on the 6th December last, speaks of 'obtaining for the legation of the United States the privilege of receiving closed despatches;' in his note of January 28 from Versailles he recognizes the principle asserted by me in a note addressed to Baron Gerolt on 21st November last . . . and admits of 'no doubt as to the right of your government to correspond with you.' The delays and interruptions to that right are, I trust, wholly of the past, and may have been, and it is hoped were, the unavoidable accidents of the then pending military strife. In the absence of any recurrence we are content with the recognition so fully made by Count Bismarck of the right which we claimed."

M. Favre to Count Bismarck (Sept., 1870), For. Rel. 1871, 363; Count Bismarck to M. Favre, Sept. 26, 1870, ibid; Dip. Corps to Count Bismarck, Oct. 6, 1870, ibid; Count Bismarck to Dip. Corps, Oct. 10, 1870, id. 364; Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Prussia, No. 264, Nov. 11, 1870, For. Rel. 1870, 195; Mr. Bancroft to Mr. Fish, No. 169, Dec. 17, 1870, For. Rel. 1871, 362; Count Bismarck to Mr. Washburne, Dec. 6, 1870, S. Ex. Doc. 24, 45 Cong. 2 sess. 127; Mr. Washburne to Count Bismarck, Dec. 12, 1870, id. 128; Count Bismarck to Mr. Washburne, Dec. 15, 1870, ibid; same to same, Jan. 15, 1871, id. 129–130; Mr. Washburne to Count Bismarck, Jan. 19, 1871, id. 130; Count Bismarck to Mr. Washburne, Jan. 28, 1871, id. 136; Mr. Fish, Sec. of State, to Mr. Washburne, No. 239, Feb. 24, 1871, id. 145.

"The undersigned, after a careful consideration of the subject, and with every disposition to acknowledge the just and necessary belligerent rights of the blockading force, can not acquiesce in the pretension set up on behalf of that force. It is true that, when such a force

invests a fortified place with a view to its reduction, one of the means usually relied upon for that purpose is the interruption of ordinary communication by messengers or by letters. This is acknowledged to be not only a belligerent right, but also one incident to the actual sovereignty over the enemy's territory occupied by the assailant adjacent to the blockaded place. Paris, however, is the capital of France. There the diplomatic representatives of neutral states had their official residence prior to the investment. If they think proper to stay there while it lasts, they must expect to put up with the inconveniences necessarily incident to their choice. Among these, however, the stopping of communication with their governments can not be recognized. The right of embassy to a belligerent state is one which it is both the duty and the interest of its enemies to acknowledge, and to permit the exercise of, in every usual or proper way. If this right should be denied or unduly curtailed, wars might be indefinitely prolonged, and general peace would be impracticable.

"The privilege of embassy necessarily carries with it that of employing messengers between the embassy and its government. This is a privilege universally recognized by publicists. There is no exception or reservation made for the case of an embassy having its abode in a blockaded place. Indeed, the denial of the right of correspondence between a diplomatic agent in such a place and his government seems tantamount to insisting that he can not elect to be a neutral, but must be regarded as an adversary if he continues to stay there, especially when the legitimacy of the authority of those directing the resistance is denied by the other assailant.

"The opposite course, which it has suited the convenience of some neutral government to adopt, is obviously liable to be construed, partly, at least, as the occasion of withholding the privilege of correspondence. Should this be a correct view of the case no independent state claiming to be a free agent in all things could in self-respect acquiesce in a proceeding actuated by such a motive. The undersigned does not charge the government of the North German Union with being so actuated, but deems himself warranted in thus referring to the point as it is adverted to by the representative of that government both at Berlin and before Paris.

"The undersigned is consequently directed to claim that the right of correspondence between the representatives of neutral powers at Paris and their governments is a right sanctioned by public law, which can not justly be withheld without assigning other reasons therefor than those which have hitherto been advanced. The burden of proof of the sufficiency of those reasons, in furtherance of the belligerent rights of the assailant, must be borne by him.

"While, however, the undersigned is directed to claim the right as due to all neutrals, he will not omit to acknowledge the partial

exception made in favor of the minister of the United States for the reasons assigned."

Mr. Fish, Sec. of State, to Baron Gerolt, Nov. 21, 1870, For. Rel. 1870, 196.

Telegraphic communication.

In 1885, on representations by the minister of Salvador that freedom of telegraphic intercourse between that government and Mr. Hall, the minister of the United States to the Central American States, was supposed to be interfered with by the authorities of Guatemala, the Department of State promptly remonstrated with the Guatemalan government and received from it the fullest assurances that no such interference existed or would be permitted.

Later in the year, the Department of State complained to the government of Salvador that a member of the United States Commission to Central and South America had, while in Salvador, been prevented from communicating by telegraph either with Mr. Hall or directly with the government of the United States. The Department of State declared that any attempt on the part of any one of the republics of Central America "to limit Mr. Hall's communication with his own government, or with the governments of any States to which he is accredited," or to restrict "the right of the agents of the United States in Central America to communicate officially with each other," called for "immediate and earnest protest as a violation of international law."

Mr. Bayard, Sec. of State, to Mr. Peralta, Salvadorian min., April 25, 1885, MS. Notes to Costa Rica, II. 34.

See, also, Mr. Bayard, Sec. of State, to Mr. Peralta, April 30, 1885, MS. Notes to Costa Rica, II. 37; Mr. Porter, Act. Sec. of State, to Mr. Scrymser, June 11, 1885, 155 MS. Dom. Let. 657; Mr. Bayard, Sec. of State, to Mr. Peralta, June 12, 1885, MS. Notes to Costa Rica, II. 40.

For further correspondence and protests concerning the interruption of telegraphic communication in Central American States during 1890, see For. Rel. 1890, 34, 39, 41, 62, 63, 79, 100, 113, 114, 118, 119, 121, 121, 122, 123, 645–648.

The action of the American minister at Rio de Janeiro in protesting against the interruption of telegraphic communication between the legation and the government of the United States during the days of the revolution of 1889 and on a subsequent occasion by prohibiting the sending of cipher telegrams and requiring others to be submitted to censorship, was approved by the Department of State. (Mr. Blaine, Sec. of State, to Mr. Adams, min. to Brazil, No. 48, Jan. 3, 1890, MS. Inst. Brazil, XVII. 435.)

"Mr. Kimberly's dispatch numbered 239, of the 26th ultimo, makes the suggestion that upon your arrival at your post you may find the time propitious for some positive arrangement among the Central American governments by which the safety and uninterrupted trans-

mission of telegraphic correspondence may be secured in time of disturbance in that quarter. This suggestion has my cordial approval.

"On several recent occasions this government has had good ground to complain of the insecurity of its official correspondence by telegraph with your legation.

"In the early part of 1885, during Gen. Barrios's movement, the difficulties in the way of communication were very great, and inexplicable delays and even suppressions occurred, greatly to the detriment of the interests of this government. An attempt to cut the coastwise cable, an American enterprise, appeared to be so imminent as to call for urgent remonstrance and precautionary measures toward the protection of the property of citizens of the United States then threatened. Again, in July and August of last year the legation at Guatemala City was almost cut off from communication with this government during the hostilities between Guatemala and Salvador, although the disturbances and alleged interruption only existed on the common frontier of those states.

"Efforts to ascertain the cause of such interruptions and to suggest a remedy have been comparatively fruitless, little having resulted beyond mutual recriminations on the part of the states within whose territories the interruptions occurred, each throwing responsibility upon the other. This outcome was, naturally, quite contrary to the policy and wish of the United States, which, seeking only the effective means of interposing its good offices and showing its friendship to both contestants alike, could not purpose to cast further causes of contention and ill will among them.

"It appears to be unquestioned that the coastwise cables touching at Central American points are entitled to protection from interference. The land lines connecting with those cables are under the responsible control of the government in each of the states. While it may not be possible to prevent their injury during actual war, their willful interruption should be guarded against, and their use, when in working order, should be opened to the diplomatic and consular officers of the United States for official communications with their government, or with each other, without hindrance or censorship of any kind.

"You will endeavor to come to a friendly understanding in this regard with the governments of the several Central American states, none of which, it is supposed, will question the justice or necessity of settling in advance the important question of inviolability of official diplomatic correspondence which is involved."

Mr. Blaine, Sec. of State, to Mr. Pacheco, min. to Central America, Feb. 20, 1891, For. Rel. 1891, 57–58. See, also, id. 54, 64–66.

March 30, 1899, during the existence of martial law, the Nicaraguan authorities at Bluefields refused to allow the American consular agent there to use the wires to send a telegram to the American minister concerning the prevailing disorders. The reason given for this action was the refusal of the consul to reply to certain questions propounded by Colonel Torres, the "executive delegate," as to the aid and support alleged to have been given by certain Americans to a recent revolutionary movement. Complaints were subsequently made by other American officials, civil and naval, of the interception and detention of their official telegrams in Nicaragua. They were instructed, should their telegrams be interfered with, "to ask instant permission to send and receive official telegrams." Subsequently, on the representation of the Navy Department that the commander of the U. S. S. *Detroit*, then at Bluefields, had reported the sending of a cipher telegram of which that Department derived its first knowledge from the confirmation of the message by mail, the following instruction, May 6, 1899, was sent: "You will bring the matter to the attention of the Nicaraguan government and insist on unrestricted telegraphic communication between yourself and this Department and between Captain Dayton and the Navy Department."

Mr. Hay, Sec. of State, to Mr. Merry, min. to Nicaragua, May 6, 1899, For. Rel. 1899, 579. See, also, pp. 559, 560, 563, 565, 576, 578.

Siege of legations at Peking.

In the latter part of July, 1900, while the foreign legations at Peking were besieged, the Viceroy Li, being at Shanghai, inquired whether it was possible, if the foreign ministers were escorted to Tientsin safely, to stop military operations, with a view to negotiations. The United States, July 30, 1900, replied: "This government will not enter into any arrangement regarding disposition or treatment of legation without first having free communication with [United States] Minister Conger. Responsibility for their protection rests upon Chinese government. Power to deliver Tientsin presupposes power to protect and to open communication. This is insisted on."

When Earl Li received this answer, he dictated this question: "If free communication is established between ministers and their governments, will America arrange that allies will not advance on Peking pending negotiations?" The United States, Aug. 1, 1900, replied: "I do not think it expedient to submit the proposition of Earl Li to the other powers. Free communication with our representative in Peking is demanded as a matter of absolute right, not as a favor. Since the Chinese government admits that it possesses the power to give communication, it puts itself in an unfriendly attitude by denying it. No negotiations seem advisable until the Chinese government shall

have put the diplomatic representatives of the powers in full and free communication with their respective governments and removed all danger to their lives and liberty. We would urge Earl Li earnestly to advise the imperial authorities of China to place themselves in friendly communication and cooperation with the relief expedition. They are assuming a heavy responsibility in acting otherwise."

Again, on August 5, 1900, the United States protested "against any limitations of right of full and free communication with Minister Conger."

Mr. Hay, Sec. of State, to Mr. Goodnow, consul at Shanghai, tel., July 30, 1900, For. Rel. 1900, 260; same to same, tel., Aug. 1, 1900, id. 260; Mr. Adee, Act. Sec. of State, to Mr. Goodnow, tel., Aug. 5, 1900, id. 264.

7. Language of Correspondence.

§ 676.

In formal written communications to the governments to which they are accredited, diplomatic representatives of the United States are directed to employ the English language. In countries in the East, and in urgent cases in European and American countries, the English communications may be accompanied by a translation into the language of the country, but in any event the English text is to be resorted to as the standard in the ascertainment of the precise meaning of the American diplomatic representative, should a question be raised.

Inst. to Dip. Off. of the U. S. (1897), secs. 94, 95, 96, pp. 35–36.

The substance of these instructions may be found in a communication of Mr. Forsyth, Sec. of State, to Mr. Cass, min. to France, No. 42, Jan. 21, 1840, MS. Inst. France, XIV. 259.

See, also, to the same effect, Mr. Frelinghuysen, Sec. of State, to Mr. Benjamin, min. to Persia, No. 15, May 31, 1884, MS. Inst. Persia, I. 54. This instruction of Mr. Frelinghuysen to Mr. Benjamin related to the action of the Russian minister at Teheran in returning to Mr. Benjamin two letters on the ground that the circumstance that they were written in English deprived him of the possibility of ascertaining their contents and replying to them. Mr. Frelinghuysen, with reference to this incident, rehearsed and reaffirmed the standing instructions of the Department of State, and added: "Where, however, a general usage at any post gives rise to a reasonable expectation that a particular tongue will be employed, it may be proper and agreeable to conform to such request or usage, *but the signed English original of all official communications should be attached to translations.*" In the course of the instruction Mr. Frelinghuysen observed that the United States, in requiring its representatives to use the English language in their official communications, adhered to the precedent set in the early days of the republic; that England had uniformly followed the same rule since the beginning of the century; and that the first general enunciation of a standard rule on

the subject was found in an article adopted in 1815 by the Congress of Vienna, at the end of its final act, to the effect that each of the participating powers reserved the right to use in future negotiations and conventions the language usually employed by it in its diplomatic relations.

"It is the custom of diplomatic intercourse for a foreign representative to address communications in his own tongue to the government to which he is accredited. . . . The request, however, for a French version (in Tripoli) to accompany English communications is regarded as reasonable."

Mr. Frelinghuysen, Sec. of State, to Mr. Robeson, Feb. 28, 1882, MS. Inst. Barb. Powers, XVI. 80.

"There is one difference in the correspondence of all the foreign ministers here from that which is usual in Europe, they write letters, instead of notes, in the first person instead of the third. The effect of this difference upon style is greater than anyone not habituated to both modes would imagine. . . . Another difference is that we here always use our own language. Onis, in return, always writes, even to the most trivial note of compliment, in Spanish. Bagot, of course, writes in English, and the other foreign ministers, excepting Correa, write in French: he always writes in English."

4 Memoirs of J. Q. Adams, 327.

S. TONE.

§ 677.

The *Edinburgh Review*, commenting on the outbreak of war between Great Britain and the United States in 1812, declared that the dispute had been "embittered from the first, and wantonly urged to its present fatal issue, by the insolent, petulant and preposterous tone" of those who insisted on the enforcement of the orders in council.

Edinburgh Review, Nov. 1812, XX. 459.

"I am afraid you will again think my draft unnecessarily harsh, and if so (I) request of you to strike out everything which may be justly esteemed of that character. But I think you will observe little delicacy towards the American government in the tone of his (Canning's) note. I believe it to be important to hold up constantly on our part of the correspondence the *nature* of our objections to the proposals of Great Britain; and there is so much of a *scolding* in the remarks upon our declining their proposals, and upon our offered substitute, that I thought a spirited notice of them due in justice to ourselves."

Mr. Adams, Sec. of State, to President Monroe, confid., Aug. 3, 1821, MS. Monroe Papers.

"Our disposition to discuss seems to have augmented, and the spirit of conciliation has manifestly been abandoned by our councils. We are determined to say harsher things than are said to us, and to have the last word. Where this temper will lead us can not be distinctly foreseen. We are now upon bad terms with the principal maritime states, and perhaps on the brink of a rupture with Russia. . . . I have labored to restrain this predominant disposition of the Government, but have succeeded only partially in softening the asperities which invariably predominate in the official notes of the State Department. If these notes had been permitted to remain as originally drafted, we should, I believe, have before this time been unembarrassed by diplomatic relations with more than one power. The tendency to estrange us from all foreign powers, which the style of the notes of the State Department has uniformly had, has been so often demonstrated, yet so often permitted, that I have almost given up the idea of maintaining friendly relations with those powers."

Mr. Crawford, Sec. of the Treasury, to Mr. Gallatin, min. to France, May 13, 1822, 2 Gallatin's Writings, 241.

On the foregoing passage, Wharton, in his Int. Law Digest, commented: "Mr. Crawford's antagonism to Mr. Adams, both being candidates for succession to Mr. Monroe, in whose cabinet they were, was at this time avowed. It is certain, however, that Mr. Adams's negotiations with Great Britain and France failed on points as to which the administration of General Jackson subsequently succeeded. That this, notwithstanding Mr. Adams's high public spirit and matchless dialectic skill, may be attributed to want of tact and of suitable recognition of the characteristics of those with whom he had to deal, is illustrated by the success of the subsequent negotiations. Participation in the West Indian commerce was refused by Great Britain when demanded by Mr. Adams as a right; it was granted to General Jackson when asked as an equivalent. Payment of Napoleon's spoliations was refused to Mr. Adams by Louis XVIII. when it was made the subject of continuous diplomatic irritation; it was granted to General Jackson by Louis Philippe when it was the subject of peremptory through courteous demand." (Wharton, Int. Law Digest, § 107, I. 707.)

See, however, Mr. Serurier, French min., to Mr. Forsyth, Sec. of State, Feb. 23, 1835, complaining of President Jackson's message to Congress of Dec. 1, 1834. (23 Br. & For. State Papers, 1316.)

As to reported "great dissatisfaction" of a member of the British government at "the language of the government of the United States in their diplomatic intercourse with Great Britain," and the comments of J. Q. Adams thereon, see Mr. Gallatin, min. to England, to Mr. Clay, Sec. of State, Nov. 27, 1826, and President Adams to Mr. Gallatin, March 20, 1827, 2 Gallatin's Writings, 342, 367.

"The United States may in their diplomatic intercourse have been guilty of much cold argumentation, never to my knowledge (excepting Pickering versus Adet), of any want of the usual courtesy and civility.

The charge is quite untrue as to the correspondence, &c., with Great Britain since the treaty of Ghent. See in the additional documents on colonial intercourse laid before Congress on 28th April last, No. 259, Lord Dudley's declaration, at bottom of page 42. . . . And I *do know* that the British government was equally pleased with the tone and manner of Mr. Rush during the whole of his mission and negotiations. But we publish everything, and the instructions of a Secretary of State to an American minister abroad must be explicit, and may not always be clothed in the same polite language towards a foreign nation which is used in a diplomatic note."

Mr. Gallatin to Mr. Everett, Aug. 6, 1828, 2 Gallatin's Writings, 400.

In Lord Dudley's note to Mr. Gallatin, the passage referred to is as follows: "The undersigned takes pleasure in recognizing in both these letters of Mr. Gallatin, and especially in the inquiry which closes the second of them, the same spirit of good will and conciliation which, in the midst of discussions involving no small difference of opinion, has characterized Mr. Gallatin's correspondence with the British government." (Am. State Papers, For. Rel. VI. 979.)

In connection with Mr. Gallatin's reference to "Pickering *v.* Adet," see a letter of Hamilton to Washington of Jan. 22, 1797, where Hamilton, referring to one of Pickering's diplomatic papers, says that it wants in various parts "that management of expression and *suaviter in modo* which a man more used to diplomatic communications could have given it, and which would have been happy if united with its other merits." (Hamilton's Works, Lodge's Federal edition, X. 233.)

The President "would have been better satisfied if you had never allowed yourself to employ, in your intercourse and correspondence with the Brazilian government, provoking or irritating expressions. These, he thinks, ought always to be avoided."

Mr. Clay, Sec. of State, to Mr. Raguet, min. to Brazil, Jan. 20, 1827, 15 Br. & For. State Papers, 1126, 1128.

"In all discussions between government and government, whatever may be the differences of opinion on the facts or principles brought into view, the invariable rule of courtesy and justice demands that the sincerity of the opposing party in the views which it entertains should never be called in question. Facts may be denied, deductions examined, disproved, and condemned, without just cause of offense; but no impeachment of the integrity of the government in its reliance on the correctness of its own views, can be permitted, without a total forgetfulness of self-respect."

Mr. Forsyth, Sec. of State, to Mr. Livingston, min. to France, Mar. 5, 1835, 23 Br. & For. State Papers, 1319.

This passage related to a note of M. Serurier, French minister at Washington, of Feb. 23, 1835, in which he declared that certain complaints of President Jackson were "strange," not only because of the "total inaccuracy of the allegations on which they are based," but also

because the explanations given to the government of the United States "seemed not to leave the slightest possibility of misunderstanding on points so delicate." (23 Br. & For. State Papers, 1316.)

The United States government will frankly and promptly disavow indecorous language used at variance with their instructions by its diplomatic agents to the governments to which they are accredited. (Mr. Forsyth, Sec. of State, to Mr. Ellis, min. to Mexico, Nov. 16, 1836, MS. Inst. Mex. XV. 87.)

As to the return of one of Mr. Forsyth's notes, when he was minister to Spain, because of the harshness of its language, see Moore, Int. Arbitrations, V. 4497.

The Mexican minister of foreign affairs having addressed directly to the Secretary of State [Mr. Webster] a letter which the President considered "derogatory to the character of the United States and highly offensive," the President directed "that no other answer be given to it, than the declaration, that the conduct of the government of the United States, in regard to the war between Mexico and Texas, having been always hitherto governed by a strict and impartial regard to its neutral obligations, will not be changed or altered in any respect or in any degree. If for this the government of Mexico shall see fit to change the relations at present existing between the two countries the responsibility remains with herself."

Mr. Webster, Sec. of State, to Mr. Thompson, min. to Mexico, July 13, 1842, 6 Webster's Works, 459.

The government of the United States will be more tolerant of expressions of petulance and acts of annoyance on the part of governments of South American states threatened with revolution than it would be of similar acts or expressions by stable European governments. (Mr. Cass, Sec. of State, to Mr. Lamar, min. to Cent. Am., July 25, 1858, MS. Inst. Cent. Am. XV. 321.)

"It is the prerogative and aim of diplomacy to avert disputes, not to foment them."

Mr. Bayard, Sec. of State, to Mr. Jackson, min. to Mexico, July 31, 1885, MS. Inst. Mexico, XXI. 347, suggesting an informal and friendly conversation with the Mexican minister of foreign affairs with regard to the complaint of an American Protestant missionary who had encountered opposition from the authorities of a Mexican community in which he sought to carry on his work. See, also, Mr. Bayard, Sec. of State, to Mr. Jackson, min. to Mexico, July 9, 1885, MS. Inst. Mexico, XXI. 324.

"That diplomacy has been deeply tainted with the vices of dissimulation and falsehood is certain. Secret treaties, and still more secret articles annexed to published treaties, are in the nature of lies; for a treaty is essentially a public engagement, and to publish a part as the whole, keeping the remainder undisclosed, is to palm off an imposition upon Europe. And yet the arguments for truth and openness

in international affairs are plain and irresistible. Without them there can be no confidence, and on the confidence which a diplomatist inspires his whole success depends. . . . 'In politics,' said Ségur, 'and in stormy times, the true dexterity is a courageous good faith. Character saves men from the dangers on which subtlety makes shipwreck, and firm sincerity alone can give solidity to success or dignify misfortune.' 'It is scarcely necessary to say,' wrote Lord Malmesbury, among the suggestions which, late in life, he sent to a young man just entering the profession, 'that no occasion, no provocation, no anxiety to rebut an unjust accusation, no idea, however tempting, of promoting the object you have in view, can need, much less justify, a falsehood. Success obtained by one is a precarious and baseless success. Detection would not only ruin your own reputation forever, but deeply wound the honour of your court. If, as frequently happens, an indiscreet question which seems to require a distinct answer is put to you by an artful minister, parry it either by treating it as an indiscreet question or get rid of it by a grave and serious look, but on no account contradict the assertion flatly if it be true, or admit it as true if false and of a dangerous tendency.'"

Bernard, Lectures on Diplomacy, 126.

As to importance of American diplomacy, see 22 Atlantic Monthly (1868), 348. Address by Mr. R. H. Dana, 20 Scribner's Magazine, 616 (1880). See, also, Moore's American Diplomacy, 254–255.

"The Danish convention was the pioneer treaty for indemnities resulting from maritime spoliations growing out of the 'continental system.' That the success of the negotiation was, in a great degree, to be attributed to the personal character and special qualities of Mr. Wheaton can not be doubted by any one who reads the passages which we have cited from eminent publicists. An American senator ascribes the result to the fact that President Jackson, disregarding, in his case, the mischievous system which treats all public offices, at home and abroad, as mere rewards for partisan services, and distributes them without inquiry as to the peculiar qualifications of the candidates, 'did not change the negotiator—did not substitute a raw for an experienced minister.' (Benton's Thirty Years in the Senate, vol. i. p. 603.)"

Lawrence's Wheaton (ed. 1863), 871.

See, as to Mr. Wheaton, Kellen's Henry Wheaton, An Appreciation, being an address delivered before the alumni of Brown University, June 17, 1902, on the hundredth anniversary of Wheaton's graduation. Boston, 1902.

"To you, sir, it will be unnecessary to undertake a general delineation of the duties of the office to which you are appointed. I shall therefore only express a desire that they be constantly exercised

in that spirit of sincere friendship which we bear to the English nation, and that in all transactions with the minister, his good dispositions be conciliated by whatever in language or attentions may tend to that effect. With respect to their government or policy, as concerning themselves or other nations, we wish not to intermeddle in word or deed, and that it be not understood that our government permits itself to entertain either a will or opinion on the subject."

Mr. Jefferson, Sec. of State, to Mr. Pinckney, July 11, 1792, 2 Randall's Life of Jefferson, 59.

9. Inviolability.

§ 678.

In May, 1795, complaint was made to the British minister that three letters addressed to the Secretary of State of the United States by Mr. Monroe, American minister at Paris, which were on board a vessel that had been carried as a prize into Halifax, were opened in the admiralty court there by the attorney-general, although they bore the American minister's official seal. Confidence was expressed that such an "outrage" would be discountenanced and that the letters would be restored to the Department of State with information whether copies had been taken of them.

Mr. Randolph, Sec. of State, to Mr. Hammond, British min., May 21, 1795, 8 MS. Dom. Let. 200.

A review, published in the *Evening Post* of May 4, 1901, of Mme. Reinhard's Memoirs, states that Reinhard was recalled from the post of ambassador to Switzerland in Oct., 1801, and was soon afterwards sent as French minister to Lower Saxony and Hamburg. The review states that his "instructions ordered him to hinder England from obtaining recruits in Hamburg and in Denmark, and to favor in every possible way the march of the French troops in Germany and in Hanover. He found himself thus in constant relations with the French commandants of army corps, especially with Bernadotte, who occupied Hanover. Bernadotte communicated to Reinhard the order given him by the Emperor to arrest Rumbold, the English minister, near Altona, and to seize all his papers. Reinhard had to execute the order, though he protested in a letter to Talleyrand against what he justly considered a violation of the law of nations. This protest was probably the cause of the recall of Reinhard, who was replaced in Hamburg by Bourrienne."

In 1806 he was sent as consul-general to Moldavia and resident in the Turkish provinces. The review says:

"A Russian army entered Moldavia at the end of November; Jassy was occupied by regiments of Cossacks. Reinhard decided to leave Jassy, and asked for passports. He was made prisoner on the way, and taken to a small town in Ukraine on the confines of Russian Poland. Reinhard was, in his turn, the victim of a violation of the law of nations. . . Reinhard sent a letter to Prince Kurakin protesting against the measure of which he was a victim. Kurakin sent him

word that his letter had been given to the Tsar, and on the 12th of January, 1807, he was released from prison. The Emperor informed him that his arrest was due solely to the precipitancy of certain officials, and expressed his regrets."

"I heartily reprobate the outrage on the British government, in violating [by a privateer] the seals of its accredited minister to the United States, and am desirous of taking such notice of it, as the respect we owe, not only to the government of Great Britain but to ourselves, demand. I pray you, therefore, to refer this business to the attorney of the district, in the absence of the Attorney-General, with instructions to make a diligent inquiry, and strictly to prosecute the persons he may find guilty of any breach of the law of nations or the land."

Mr. J. Adams, President, to Mr. Pickering, Sec. of State, July 20, 1799, 8 John Adams' Works, 668. See id. 658.

In November, 1861, General McClellan was directed to instruct General Wool and other commanding officers, where packages or parcels which were addressed to a foreign minister or a foreign government fell into their hands, by flags of truce or otherwise, to transmit them unopened to the Department of State.

Mr. Seward, Sec. of State, to General McClellan, Nov. 25, 1861, 55 MS. Dom. Let. 495.

"On general principles, however, a government may be said to have a clear right to send its communications to its diplomatic agents in foreign countries, and its legation in one country to those in another by means of couriers, which communications should be inviolable by the authorities of the country through which they may pass. If the courier should be, as he ought to be, provided with a passport attesting his official character, and the dispatches of which he is the bearer are in his luggage, his affirmation to that effect ought, it seems to me, to exempt the latter from search, unless its bulk or other circumstances afford reasonable ground for suspicion that the courier has abused his official position for the purpose of smuggling.

"Formerly it was the practice of this Department, and of the legations of the United States abroad, to issue courier passports for the mere convenience of individuals, when either there were really no dispatches to send, or, if there were, they might as well have gone by post. The abuse to which this practice led, and the consequent disrepute into which it brought the government in Europe, compelled its discontinuance many years since. The authorities of that quarter may probably be induced to withhold perhaps the customary courtesies from couriers of the United States from a recollection of their former excessive numbers. If, however, it should be understood that

persons are not now employed in that capacity except upon occasions similar to those when they are employed by other governments, we would have a right to expect for our couriers the same immunities which are accorded to those of any other government.

Mr. Seward, Sec. of State, to Mr. Dayton, June 21, 1862, MS. Inst. France, XVI. 184. See supra, § 675.

In instructions issued in 1862, with regard to papers found on board of captured vessels, the naval officers of the United States were directed that "official seals, or locks, or fastenings of foreign authorities, are in no case, nor on any pretext, to be broken, or parcels covered by them read by any naval authorities, but all bags or other things covering such parcels, and duly seized and fastened by foreign authorities, will be, in the discretion of the United States officer to whom they may come, delivered to the consul, commanding naval officer, or legation of the foreign government, to be opened, upon the understanding that whatever is contraband or important as evidence concerning the character of a captured vessel will be remitted to the prize court, or to the Secretary of State at Washington, or such sealed bag or parcels may be at once forwarded to this Department, to the end that the proper authorities of the foreign government may receive the same without delay."

Instructions issued by the Sec. of the Navy, Aug. 18, 1862, to naval officers of the United States. (Official Records of the Union and Confederate Navies, ser. 1, vol. 1, pp. 417, 418.)

"I entirely agree with Her Majesty's government in the principle that when a bag purporting to convey despatches on Her Majesty's service is found sealed and duly authenticated by a consul, that seal and authentication ought to be respected by the United States authorities." (Mr. Seward, Sec. of State, to Lord Lyons, British min., April 5, 1862, Dip. Cor. 1862, 258, 259.)

The American minister at Constantinople having expressed his apprehension that letters sent by him to the United States consul at Sivas, touching matters at Marsovan, had been violated, he was advised that the inviolability of the privileged correspondence between recognized agents of the United States was one of the most obvious and indispensable prerogatives of foreign diplomatic representatives, and that any infringement of his rights in that regard would furnish occasion for earnest protest, especially if official correspondence, under his legation's seal, addressed to a subordinate officer of the United States, were opened by the Turkish agents.

Mr. Gresham, Sec. of State, to Mr. Thompson, min. to Turkey, No. 54, March 17, 1893, For. Rel. 1893, 620.

See, also, Mr. Quincy, Act. Sec. of State, to Mr. Thompson, No. 56, March 25, 1893, id. 623.

Mr. Thompson was subsequently instructed, if necessary, to keep communication open with the consul at Sivas by special messenger, and to enter a protest and make an urgent demand that his official rights be respected, "should his correspondence, which is inviolable, be suppressed or opened." (Mr. Gresham, Sec. of State, to Mr. Thompson, tel., April 1, 1893, For. Rel. 1893, 624.)

10. Couriers and Bearers of Despatches.

§ 679.

A diplomatic representative, when the mails are obstructed or deemed unsafe, or when there may be urgent need for so doing, may employ a courier or bearer of despatches; but the Secretary of State reserves to himself the right in all cases to judge of the necessity for the employment of such a messenger and of the propriety of paying the whole or any part of the compensation which may have been recommended.

Instructions to Diplomatic Officers (1897), sec. 132, p. 49. See supra, §§ 675, 678.

Offers of responsible private individuals to bear despatches without compensation may be accepted if deemed advisable. (Sec. 131.)

"Couriers and bearers of despatches employed by a diplomatic representative in the service of his government are privileged persons, as far as is necessary for their particular service, whether in the state to which the representative is accredited or in the territories of a third state with which the government they serve is at peace."

Instructions to Diplomatic Officers (1897), sec. 57, p. 22.

"The practice of nations has also extended the inviolability of public ministers to the messengers and couriers, sent with despatches to or from the legations established in different countries. They are exempt from every species of visitation and search, in passing through the territories of those powers with whom their own government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own government, attesting their official character; and, in the case of despatches sent by sea, the vessel or *aviso* must also be provided with a commission or pass. In time of war, a special arrangement, by means of a cartel or flag of truce, furnished with passports, not only from their own government, but from its enemy, is necessary, for the purpose of securing these despatch vessels from interruption, as, between the belligerent powers. But an ambassador, or other public minister, resident in a neutral country for the purpose of preserving the relations of peace and amity between the neutral state and his own government, has a right freely to send his despatches in a neu-

tral vessel, which can not lawfully be interrupted by the cruisers of a power at war with his own country."

Wheaton's Int. Law, Dana's ed., § 243, p. 320.

"Some looseness of practice has crept in, with reference to passports of this kind [to bearers of dispatches], of an injurious tendency. Originally given to those actually charged with despatches, they have been retained for ordinary use after the despatches have been delivered at their destination. This circumstance has sometimes given an unreal character to these passports, which tends to impair their value in the hands of those entitled to them, besides being objectionable in other respects."

Mr. Everett, Sec. of State, to Mr. Mann, Dec. 13, 1852, 41 MS. Dom. Let. 138.

See, in this relation, circular of Mr. Marcy, Sec. of State, to diplomatic officers, July 10, 1854, MS. Circulars, I. 131.

"The practice of sending persons as bearers of despatches as a personal favor was long ago abused so much that it was entirely stopped at the beginning of this administration. Not a single case has occurred in this Department, and so far as I know, in any other in which any person has been sent in that way. I communicate with the authorities at New Orleans and Key West by post regularly and only in that way. The War Department and Navy Department do the same thing. They invariably decline to give free passages on transports." (Mr. Seward, Sec. of State, to Mr. Thompson, Nov. 25, 1863, 62 MS. Dom. Let. 333.)

Case of Colonel Farrand.

"The question which arose between General Hovey and the minister for foreign affairs of Peru, relative to the right of that government to obstruct the departure of Colonel Farrand, who had been appointed a bearer of dispatches by the general, seems to be of too much general importance to be left unnoticed by this Department. It is of no moment in the particular case, as the Peruvian government ultimately connived at Colonel Farrand's departure.

"The occasion for the colonel's employment in the character adverted to was the conclusion of two treaties between the United States and Peru, which were signed on the 6th and 12th of last month. General Hovey's instructions recognized his right to make such an appointment in such a contingency. The appointment was made accordingly on the 12th of September, and Colonel Farrand's passport in his official character issued to him on that day without any information to General Hovey that any branch of the Peruvian government or any person objected to the colonel's discharging the duties of his trust. It seems, however, that subsequently, but before the colonel could start on his errand, a person claiming to be a creditor of his sued out judicial process forbidding him to leave Peru. Gen-

eral Hovey promptly complained of this proceeding as contrary to international law relative to the immunities of couriers, as set forth in Wheaton's treatise on that subject. The minister, in his reply, while acknowledging the authority of Wheaton, endeavors to restrict the privilege of couriers as there declared to those appointed by a government to its legations abroad, and enlarges upon the inconveniences which the more extensive enjoyment of such immunities would lead to. It is true that no abuse of the privilege in this case is alleged, but its existence is impliedly, at least, denied. This denial, however, has no support from Wheaton, or from any other writer on that branch of public law. If the Peruvian minister supposed that he had any reason to hesitate in acknowledging the unqualified character of the rule laid down by Wheaton, the plain and unequivocal terms in which Calvo speaks upon this point may be enough to remove any such hesitation. The work of this author on international law was published in Spanish at Paris, in 1868. It is remarkable as embracing everything illustrative of the subject up to the time of its publication, and its clearness and precision are at least equal to its fullness. At paragraph 240, on page 350 of the first volume, may be found the words of which the following is a translation:

"'The inviolability which public ministers enjoy has also been extended to the messengers and couriers of the embassies and to those who proceed to them with official dispatches, and as a general rule to all who discharge, as cases may arise, any commission for those embassies.'

"This, it seems, should be conclusive of the question. If General Hovey had been aware that Colonel Farrand was justly liable to arrest, and had willfully appointed him a bearer of dispatches to screen him therefrom, this would have been sufficient cause of complaint on the part of the Peruvian government, and perhaps of censure of its minister by this government. Even this knowledge on the part of the general, however, would not, it is conceived, have impaired the immunity of his courier under the public law. If alleged delinquencies or pretended claims are trumped up against persons appointed or about to be appointed couriers in foreign countries to prevent them from starting, the immunity guaranteed to them by public law may at any time be annihilated by an envious or malicious person. This is a result to be deplored and guarded against by all governments, by the government of Peru as well as by the government of the United States."

Mr. Fish, Sec. of State, to Mr. Brent, Oct. 19, 1870, For. Rel. 1870, 519.

"The publicists, whose writings are within reach of this Department, mention no such qualification of the right of employing a courier [viz., that the immunities of a courier from a legation do not

attach to a person appointed in the country where the legation is situated]. That right is regarded by them as unlimited, or as only subject to the discretion of the legation in the choice of a person for the discharge of the trust. It is a general principle conferred by public law, which, in the interest of all nations, ought not to be restricted by municipal law, but, if necessary or advisable, should be confirmed and facilitated by the latter. It is true that in some countries municipal enactments are necessary to secure to the members of foreign legations those immunities under the law of nations to which they are entitled. This government became sensible of this early in its career, for so long ago as the 30th of April, 1790, Congress declared void any process sued out of any court in the United States against any foreign minister or any domestic of his, and made this and the serving of such process a penal offense. Although bearers of dispatches are not expressly mentioned in the statute adverted to, as its object was to impart to every member of a foreign legation that immunity to which he may be entitled under the law of nations, no doubt is entertained that, if the statute were violated in respect to any bearer of dispatches duly appointed by the head of a foreign legation in this country, the violators would be punishable under that statute. . . . No appointment in a foreign country of a person as courier under arrest, or liable to arrest, would be approved by this Department, especially if such appointment was in any way intended to screen the appointee from his liabilities under the municipal law."

Mr. Fish, Sec. of State, to Mr. Freyre, Dec. 17, 1870, MS. Notes to Peru, I. 411.

It is stated by Mr. Fish in this note that the Peruvian Government alleged that both Colonel Farrand, the courier in question, and General Hovey, the American minister, were aware that a warrant had been issued for the former's arrest before his appointment as bearer of despatches. They both denied, however, that they were aware of any such warrant, although General Hovey, in announcing Colonel Farrand's appointment to the Peruvian government, on the 13th of September, acknowledged that he had been informed by Farrand that legal measures were in progress to prevent his departure. It did not appear that General Hovey was aware of what those measures were. In conclusion, Mr. Fish said: "You are right in saying that it is the duty of foreigners residing in another country with which their own is at peace implicitly to obey the laws, and if Colonel Farrand, when he accepted employment as bearer of despatches, or General Hovey when he appointed him, were either of them aware that the colonel was under arrest, this Department acknowledges that whichever of them may have had such knowledge was guilty of a discourtesy to the government of Peru which would not be justified by this Department." (Ibid.)

See, also, Mr. Fish, Sec. of State, to Colonel Freyre, Dec. 27, 1870, MS. Notes to Peruvian Leg., I. 418.

11. Publication of Correspondence.

§ 680.

"No ground of support of the executive will ever be so sure as a complete knowledge of their proceedings by the people; and it is only in cases where the public good would be injured, and *because* it would be injured, that proceedings should be secret. In such cases it is the duty of the executive to sacrifice their personal interests (which would be promoted by publicity) to the public interest."

Mr. Jefferson, Sec. of State, to the President, Dec. 2, 1793, 4 Jeff. Works, 89.

The question of policy here referred to is quite distinct from that of the preservation by a government of secrecy in its correspondence with its own representatives. In order that such secrecy may be assured the United States, like other governments, uses a cipher.

"The cipher now used by this Department has been used for the last forty years at least, and is framed upon a system which is considered to render it entirely inscrutable to any one not having the key. No doubt offers of other systems have often been made to the Department since the one now in use was adopted. Indeed, the chief clerk, who has been an officer of the Department for about twenty-five years, informs me that such offers have averaged at least four a year within that time." (Mr. Marcy, Sec. of State, to Mr. Breckenridge, Dec. 22, 1853, 42 MS. Dom. Let. 116.)

Various new ciphers have been devised since the one referred to by Mr. Marcy.

"In connection with your dispatch permit me to offer you a word of caution with regard to cipher telegrams. You should never give both the cipher and the text, as in the present instance. The latter is all that is requisite. . . . Such telegrams should either be paraphrased or their import conveyed in a written note, in order that no clue whatever to the Department's cipher may be obtained." (Mr. Bayard, Sec. of State, to Mr. Morgan, May 26, 1886, MS. Inst. Mex. XXI. 499.)

"To the office of the *National Intelligencer*. I saw Mr. Gales there, somewhat perplexed by the publication of Mr. Webster's letter to Edward Everett, recently dispatched, and which he is instructed to read to Lord Aberdeen and give him a copy of it if desired. Gales asked me if it was usual in negotiations to publish in the newspapers controversial notes before they have been received by the parties to whom they are addressed. I told him it was not usual heretofore, but that of late years all negotiation is little more than a perpetual appeal to public opinion, and the negotiators little more than advocates before the tribunal of the civilized world. I referred him to the case of the Spanish minister Pizarro, who in 1818 addressed to George W. Erving, minister of the United States in Spain, a manifesto against General Jackson's invasion of Florida, equivalent to a declaration of war, and, before waiting for our reception of it, pub-

lished it in a Hamburg gazette, whence it was circulated all over Europe; in return for which, my answer of instructions to Erving was communicated to Congress and published all over the Union before it could reach the Spanish minister of foreign affairs, as the counterpart to his manifesto. Other instructions of more recent occurrence were referred to, in the case of Gorostiza's pamphlet, published here in 1836, of General Cass's publication of his preposterous protest against the ratification by France of the quintuple treaty, and the triangular debates between the British Parliament, the French Legislative Chambers, and the North American Congress—like a game of chess played by correspondence between the Cape of Good Hope and Cape Horn, or between Nova Zembla and New Zealand."

11 J. Q. Adam's Memoirs, 360, April 13, 1843.

The publication, by a foreign minister to the United States, "of his correspondence with the Department without the authority of his government, is believed to be unexampled in the history of diplomacy and not decorous to the government of the United States."

Mr. Forsyth, Sec. of State, to Mr. Ellis, min. to Mexico, Dec. 9, 1836, MS. Inst. Mex. XV. 88

For Mr. Webster's criticism of the action of General Cass in publishing in France his protest against the Quintuple Treaty, see 6 Webster's Works, 383.

By the rules of the Department papers connected with pending diplomatic negotiations can not be made public unless the documents are called for by Congress with the usual limitations.

Mr. Marcy, Sec. of State, to Mr. McKeon, Feb. 8, 1854, 42 MS. Dom. Let. 210.

"Both Houses of Congress have passed resolutions calling upon the President for information in reference to the proposition mentioned by Lord Clarendon in the House of Lords on the 31st ult., relative to the reference of the Central American questions to arbitration. These calls will reach the despatch you sent to me last evening. In sending it in, it will be proper to do this by including a copy of your note to me which accompanied that despatch, unless I should hear from you by eleven o'clock to-morrow morning that such a course would not be agreeable." (Mr. Marcy, Sec. of State, to Mr. Crampton, Brit. min., "private," Feb. 28, 1856, MS. Notes to Gr. Br. VII. 517.)

"Your despatch of Feb. 11th, No. 595, has been received, together with reports of the debates which have been held in Parliament upon the condition of our relations toward Great Britain.

"On the 11th of July last the information which was before this Department seemed to oblige the government of the Uinted States

to take into immediate consideration a probable failure of all its friendly appeals to Her Majesty's government against suffering a deeply concerted and rapidly preparing naval war to be waged against the United States from British ports in Europe and America, by British subjects in British built and armed vessels. Events which have transpired since that time, such as the intended invasion of Johnson's Island from Canada, the case of the Chesapeake, the escape of the Rappannock, the enlistment of seamen and sailors, the persistent proceedings in construction of Laird's rams under false pretences of foreign ownership, and especially the report of Mallery, the pretended Secretary of the Navy of the insurgents, have proved that the crisis apprehended in July was not overestimated nor too soon anticipated by this Department. The government of the United States took the subject into consideration with all the seriousness and anxiety that could not fail to be awakened by the seeming approach of a naval conflict with Great Britain in aggravation of our exciting civil war.

"The result of this deliberation was set down in the dispatch which I had the honor to address to you on the day before mentioned. That dispatch was addressed to you because the interests of the government and people of the United States seemed to require that, as the representative of the United States charged with conduct of their correspondence with the government of Great Britain, you should be fully informed of the views which had been adopted by your own government. At the same time, in this case as in all others in which you are not specially directed to submit our instructions to Her Majesty's government, it was left to your own discretion to make so much or so little use of the knowledge thus imparted to you of the views of this government as you should deem expedient, and to use it in such manner and at such time as should seem to you best calculated to avert the evils apprehended.

"Nevertheless, in communicating those views to you, I scrupulously took pains equally to leave no ground for misapprehension of their directness and to avoid expressing myself in any way that could offend the dignity or wound the sensibility of the British government or the British people.

"The Constitution of the United States requires the President from time to time to give to Congress information concerning the state of the Union. In the beginning of our government a practice obtained according to which the President communicated this information on the assembling of Congress in a full and comprehensive annual speech or message, to which are appended all the important reports and documents which have been placed by the heads of Departments before the President as the sources and evidences of the

information, to be by him submitted to Congress. It is hardly necessary to say that the interest of Congress and of the people of the United States in the transactions of the Executive Department, always earnest, became intensified with the breaking out of the civil war. Our foreign affairs have, ever since the war began, been a subject of anxiety as deep as that which is felt in regard to military and naval events. The government continually depends upon the support of Congress and the people, and that support can be expected only on the condition of keeping them thoroughly and truthfully informed of the manner in which the powers derived from them are executed. Mutual confidence in the people and the government is a condition of our national life.

"It has seemed to the President more satisfactory and more in harmony with our vigilance to give to Congress the information prescribed by the Constitution, with all possible fullness at the beginning of each meeting of Congress, rather than to await their special calls for it in particular cases, as is generally done in constitutional governments when the Executive or its ministers hold seats in the legislature.

"Congress and the country at the beginning of the present session had a right to be put fully in possession of a complete history of conflicting claims which had arisen between the United States and Great Britain subsequently to the last preceding annual exposition which had been submitted by the President. They had the same right to see my despatch to you of the 11th of July, 1863, that they had to see any other portion of the executive correspondence concerning foreign affairs. This history would be incomplete without that account. It was the President's duty to communicate it, unless special reasons of a public nature existed for withholding it. Only two such special reasons could be allowed, namely, one that the publication would be incompatible with the public interests by affecting a friendly negotiation on an exciting question. But the question which had called out this despatch had been for a time put at rest, and mutually satisfactory explanations between the two governments had been rendered. The other reason was that the publication might give offence to Great Britain. But the document was a communication from this government, not to Her Majesty's government, but to its agent. The paper was believed to be as respectful to the British government as it manifestly was earnest and sincere. On the other hand, to withhold so important a portion of the executive correspondence would have seemed to imply a confession that it was improper in itself, while to practice reserve on so great a question would be liable to be deemed an abuse of the confidence which Congress and the people had so freely reposed in the government.

"The President now learns with regret that British statesmen, whose opinions he would be the last to undervalue, have declared that in their judgment portions of that communication are disrespectful and menacing towards Her Majesty's government.

"Comity is not only a proper but even an indispensable element in diplomatic intercourse. A just and enlightened government may readily admit, without any sacrifice of its own self-respect, that every other government is entitled to judge for itself what expressions occurring in its needful intercourse with foreign states are exceptionable.

"You are, therefore, authorized to say to Earl Russell that nothing menacing or disrespectful was intended by any expression in the dispatch before referred to, and that the paper is now freely referred by the President to Earl Russell's own criticism with the request that whatever expressions contained in it he shall consider exceptionable be deemed to be hereby withdrawn, with regret on the part of this government that those expressions, although inadvertently, had been incorporated in a paper the object of which was not to offend, but to remove out of the way a stumbling block of national offence; not to provoke war, but to secure peace and restore harmony between Great Britain and the United States."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 859, March 23, 1864, MS. Inst. Gr. Br. XIX. 214.

The dispatch above referred to, viz, Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 651, July 11, 1863, is printed in Dip. Cor. 1863, I. 308.

"At the same time I think it proper to suggest to you that all correspondence between diplomatic and consular agents of the United States residing in foreign countries is conducted, under the law of nations, confidentially, with amenability only to the government of the United States."

Mr. Seward, Sec. of State, to Mr. Sullivan, min. to Colombia, Oct. 25, 1867, MS. Inst. Colombia, XVI. 248.

"The Department gives to the consideration and preparation for publication of the dispatches of its agents abroad every attention, with the object of guarding against the publication of their personal views, which might, if known, expose them to criticism or censure in the land of their official residence. In an examination of the blue books of other governments it is believed that far more care is here exercised in this respect than in other countries. It is, of course, impossible to prevent malicious or honestly mistaken perversion of such publication by outside parties. . . .

"If the propriety of making such matters public in due time be left to the discretion of the Secretary of State, it is, indeed, possible that his views as to what parts of such communications may or may not be unobnoxious to adverse criticism may differ from those of the writer. The latter being brought into direct contact with the foreign adverse elements surrounding him, is naturally often better qualified to judge of what may be liable to be used by unfair partisanship to his discredit. Fully aware of this, the Department always gives the most considerate attention to any intimation its agents may convey that their dispatches are to be deemed confidential, and it rarely happens that public interests are so grave as to override such intimations."

Mr. Davis, Acting Sec. of State, to Mr. Sargent, May 23, 1883, MS. Inst. Germany, XVII. 269.

"Even with all the care that can be exercised, despatches are not infrequently published which get their writers into trouble. It may be remembered, for instance, that the late Mr. Marsh became involved in an annoying difficulty in Italy on account of the publication of a sentence (which he had even written in cipher) in one of his confidential despatches, questioning the sanity of the King. Of still more recent date is the difficulty with Germany, arising from the publication of a despatch of our minister on the pork question, which resulted ultimately in his recall, disguised under the name of transfer." (Schuyler's Am. Dip. 34.)

See the case of Mr. Russell, in Venezuela, supra, § 640.

In 1883 a question was raised in the diplomatic corps at Mexico, on the representation of the Spanish minister, whether the publication by the Mexican Government of correspondence initiated by a foreign minister, without previously consulting such minister, was a breach of etiquette against which the diplomatic corps should remonstrate. The minister of the United States declined to attend a meeting of the diplomatic corps for the purpose of discussing the question, and it does not appear that any meeting was held. The Department of State, in approving his action, said that, in the absence of any express reserve or pledge of confidence, correspondence between governments was the property of either, to be published if the interest of either required, and that it was thought to be immaterial on which side the correspondence may have been initiated.

Mr. Frelinghuysen, Sec. of State, to Mr. Morgan, min. to Mexico, No. 446, Aug. 28, 1883, MS. Inst. Mexico, XX. 656.

"In the published reports of the consuls of the United States, No. 96, of August, 1888, there was printed, on page 205, without date, a report entitled 'Tobacco imports into Egypt,' signed by Mr. John Cardwell, then the consul-general of the United States at Cairo. That report contained reflections upon the methods in which commercial operations were understood by the writer to be conducted by

Greek merchants in the Levant, and incidentally embraced a general reference to the Greek people, which is open to animadversion as altogether unnecessary and unjust.

"The minister of Greece in England, who is also duly accredited to the government of the United States as the representative of the Hellenic government, brought this publication to the personal attention of Mr. Phelps, the late minister of the United States in London, and was assured by Mr. Phelps of the regret with which the publication of the remarks was regarded by the government of the United States. At no time has the minister of Greece availed himself of his diplomatic character to address the government of the United States formally on the subject, nor has any representation in the premises been made directly to the minister of the United States at the Hellenic court.

"This government appreciates the delicate courtesy and good will of the government of Greece in refraining from official remonstrance in respect to utterances which, from their nature, could not have failed to wound the just susceptibilities of the people of Greece; and in turn takes pleasure in offering to that government a sincere expression of its regret that, through an oversight as much to be condemned as it is deplored, the remarks of Mr. Cardwell should have been thus published through the agency of a subordinate bureau of this Department.

"As his Hellenic Majesty's government is aware, the reports of the officers of the United States in foreign countries are prepared for the use and behoof of their own government. Their utility can not be circumscribed by prohibition or censure looking to the exclusion of subjects of report save such as may be agreeable to other governments or peoples. Hence, were Mr. Cardwell still in office, this government could not assent to a proposition that he should be publicly censured or punished for a statement which, however erroneous in judgment, was yet clearly privileged as between the agent and his principal.

"It is, accordingly, for the publication of Mr. Cardwell's utterances that this government spontaneously tenders to the government of Greece its sincere regrets, with the earnest assurance that the act was by no means intentional, and that the government and people of the United States are actuated only by the most cordial respect and friendship for a country and people to whom they are linked by indissoluble ties.

"You are at liberty to read this instruction to his Hellenic Majesty's minister for foreign affairs, leaving with him a copy, should he so desire. At the same time you may say to him that copies hereof will be sent to the legation of the United States in London and to our agency and consulate-general at Cairo for preservation on their files;

and that the present communication will in due course appear in the published diplomatic correspondence of this Department."

Mr. Blaine, Sec. of State, to Mr. Snowden, min. to Greece, No. 26, March 8, 1890, For. Rel. 1889, 483.

"I have the honor to acknowledge the receipt of your note of the 30th ultimo, in which, in the name of the Imperial Government, you call attention to the fact that certain official reports of the American representatives at Apia, found among the printed papers relating to Samoa which were published in obedience to a resolution of the United States Senate of January 29, 1895, have occasioned a feeling of dissatisfaction on the part of your government, by reason of criticism[s] therein made which are deemed to reflect upon the Imperial Government and upon German subjects who had gone to the Samoan Islands in pursuance of the general act of Samoa for the performance of official duties. To instance this, you refer specifically to certain remarks of Vice-Consul Blacklock and Consul-General Mulligan. You add that, in the interest of the maintenance of the amicable relations which happily exist between the two governments, and in order to avoid any difficulty that might impair these amicable relations, the Imperial Government has hitherto always adhered to the system of previously notifying the United States Government of the publication of such matters, with the view of enabling the presentation of any objections to the manner and scope of the contemplated examination that might be thought proper, and you express the regret of the Imperial Government that the United States Government had not the same consideration for it in the present case, and has not observed reciprocity.

"In reply, I have the honor to say that while this government was fully aware of the practice to submit to foreign governments official international correspondence, exchanged with it upon matters requiring confidence and reserve, and did in fact defer to the judgment of your esteemed predecessor, before publishing in the executive document in question, information derived from the notes and confidential memoranda furnished to it by the Imperial Government, it has not generally regarded this courteous practice as inviting the submission to a foreign government of the despatches and instructions exchanged between this Department and its agents in the foreign country before publishing the same; nor do I recall instances where such correspondence affecting matters in the United States has been submitted to this government before publication in the Blue Books or other official documents of other governments. Without implying that any instance is at present recalled to mind of the publication of German diplomatic or consular reports and correspondence reflecting in any way upon the people of this country or the policy of their govern-

ment, I may remark that pointed statements and unqualified comments upon such matters and policy are at times found in the official publications of other governments.

"However this may be, I am indisposed to question the propriety of excluding, as your note seems to contemplate, from official publications of this character statements or criticisms which, however legitimate, or made necessary in the performance of the writer's duty, might appear offensive to a foreign government or be calculated to wound the sensibilities of a friendly people. This course is, in fact, pursued by this Department in the publication of its consular reports and annual diplomatic correspondence, as well as in the compilation of the various collections of diplomatic and consular documents called for by resolution of the legislative branch, and such papers are usually edited with scrupulous care and with a disposition to err on the side of abundant consideration.

"In the present case, however, it is proper to state that the correspondence in question was called for by the Senate of the United States under circumstances which practically excluded such a course. The Senate resolution called unqualifiedly for all the communications touching Samoa received since the ratification of the Berlin Treaty from Judge Ide and Mr. Blacklock, and, although apparently limited to the consular correspondence of Mr. Blacklock, it was ascertained to be intended to also cover the correspondence of Mr. Mulligan, Mr. Blacklock's principal. The voluminousness of the documents and the nearness of the end of the session constrained the instant preparation of the correspondence, many of the originals on the Department's files being sent to the printer for that purpose. The only permissible delay arose through the submission to the British and German governments of the diplomatic correspondence to which I above alluded, which, being of record in the respective foreign offices, permitted of a telegraphic reply being received in season. It would have been obviously impossible to have submitted proofs of our consular reports by mail and awaited their examination and return from Berlin within the four weeks intervening between the reception of the Senate resolution and the close of the session, even had it been supposed that the submission of such correspondence was expected or regarded as usual.

"I trust that these statements will suffice to place the matter in its just light before your government, and I cheerfully express regret that anything found in the papers made public under the circumstances stated should have been deemed incompatible with that friendly regard which this government has ever striven to maintain with other peoples and governments."

Mr. Adee, Act. Sec. of State, to Baron von Thielmann, German ambassador, No. 27, Aug. 14, 1895, MS. Notes to Germany, XI. 483.

*

"Under no circumstances should any public or official paper be published without the express consent of the Department of State."

Inst. to Dip. Off. of the United States (1897), sec. 107, p. 40.

See Mr. Fish, Sec. of State, to Mr. Schuyler, Jan. 26, 1877, MS. Inst. Turkey, III. 213; Mr. Blaine, Sec. of State, to Mr. Egan, tels., Dec. 22, 1891, and April 2, 1892, MS. Inst. Chile, XVII. 389, 407.

"One of the essential qualifications of a diplomatic representative is to observe at all times a proper reserve in regard to the affairs of his government, and the knowledge of these affairs possessed by persons belonging to the mission must be regarded as confidential." (Inst. to Dip. Off. (1897), sec. 65, p. 25.)

By sec. 1751, Revised Statutes, diplomatic officers are forbidden to correspond with any newspaper or other periodical, or with any person other than proper officers of the United States, in regard to the public affairs of any foreign government. (Inst. to Dip. Off. (1897), sec. 68, p. 26.)

Public addresses are likewise prohibited unless upon exceptional festal occasions in the country of official residence, and on such occasions any reference to political issues pending in the United States or elsewhere should be carefully avoided. (Inst. to Dip. Off. (1897), sec. 69, p. 26.)

"It is the particular desire of the Department of State that no diplomatic officer should retain or carry away with him drafts or copies of his official correspondence. Obedience to this request is enjoined, inasmuch as it has sometimes happened—and may at any time happen—that on the death of the possessor of such copies they pass into the hands of others not so scrupulously observant of their confidential character."

Inst. to Dip. Off. (1897), sec. 106, p. 39.

See, to the same effect, Mr. Evarts, Sec. of State, to Mr. Tuttle, May 19, 1879, 128 MS. Dom. Let. 184.

As to record books that are kept at all missions of the United States, see Inst. to Dip. Off. (1897), sec. 110, p. 41.

VIII. *CEREMONIAL.*

1. Observance of Formalities.

§ 681.

"The Comte Sarsfield began, as usual, when we were alone, to give me a lesson of etiquette: this is a trait in his character; no man more attentive to the rules of ceremony and formality; no man more precise. He says that when I made an entertainment I should have placed the ambassador of France at my right hand and the minister of Spain at my left, and have arranged the other principal personages; and when I arose from the table, I should have said, 'Messieurs, voudriez vous,' &c., or 'Monsieur le Duc, voudriez vous,' &c. All

this, every one sees, is à la Françoise; but it is very little regarded here; and it was because it is generally neglected here, that I neglected it. But the Comte, in every affair of dress, billets, rank, &c., has, from my first acquaintance with him, ever discovered such a minute attention to little circumstances. How is it possible to reconcile these trifling contemplations of a master of ceremonies with the vast knowledge of arts, sciences, history, government, &c., possessed by this nobleman? A habit of living in the world, however, is necessary, a facility of living with men—l'habitude de vivre avec les hommes.

"It is the fashion among the Dutch, to arrange all the company by putting a card with the name of each gentleman and lady upon the napkins in the plate. This I never saw practiced in France; indeed, they attend but to one person in France; the feast is made in honor of one person; that is the ton. Mr. Visscher, being told by the count that he and I were to dine to-morrow with General Van der Dussen, appeared surprised, and said that the general, although he had dined with me and rode with me on horseback, would not have dared to have invited me, if he had not met me at M. Boreel's."

John Adams's Diary, Oct. 2., 1782, 3 John Adams's Works, 276.
See, also, Mr. Adams to Mr. Livingston, April 23, 1782, 7 John Adams's Works, 574.

"Ranks, titles, and etiquettes, and every species of punctilios, even down to the visits of cards, are of infinitely more importance in Europe than in America, and therefore Congress can not be too tender of disgracing their ministers abroad in any of these things, nor too determined not to disgrace themselves. Congress will, sooner or later, find it necessary to adjust the rank of all their servants with relation to one another, as well as to the magistrates and officers of the separate governments.

"For example, if, when Congress abolished my commission to the King of Great Britain, and my commission for peace, and issued a new commission for peace, in which they associated four other gentlemen with me, they had placed any other at the head of the commission, they would have thrown a disgrace and ridicule upon me in Europe, that I could not have withstood. It would have injured me in the minds of friends and enemies, the French and Dutch, as well as the English.

"It is the same thing with states. If Mr. Jay and I had yielded the punctilio of rank, and taken the advice of the Count de Vergennes and Dr. Franklin, by treating with the English or Spaniards, before we were put upon the equal footing that our rank demanded, we should have sunk in the minds of the English, French, Spaniards, Dutch, and all the neutral powers. The Count de Vergennes certainly knows this; if he does not, he is not even a European statesman; if he does

know it, what inference can we draw but that he means to keep us down if he can; to keep his hand under our chin to prevent us from drowning, but did not lift our heads out of water."

Mr. J. Adams to Mr. Livingston, Nov. 8, 1782, 8 John Adams's Works, 3.

"Every one, who has any knowledge of my manner of acting in public life, will be persuaded that I am not accustomed to impede the despatch or frustrate the success of business by a ceremonious attention to idle forms. Any person of that description will also be satisfied, that I should not readily consent to lose one of the most important functions of my office, for the sake of preserving an imaginary dignity. But perhaps, if there are rules of proceeding, which have originated from the wisdom of statesmen, and are sanctioned by the common consent of nations, it would not be prudent for a young state to dispense with them altogether, at least, without some substantial cause for so doing. I have myself been induced to think, possibly from the habits of experience, that in general the best mode of conducting negotiations, the detail and progress of which might be liable to accidental mistakes, or unintentional misrepresentations, is by writing. This mode, if I was obliged myself to negotiate with any one, I should still pursue. I have, however, been taught to believe, that there is in most polished nations a system established, with regard to the foreign as well as the other great departments, which, from the utility, the necessity, and the reason of the thing, provides, that business should be digested and prepared by the heads of those departments."

President Washington to Count de Moustier, French min., May 25, 1789, 10 Washington's Writings, 8, 9.

"No government can disregard formalities more than ours. But when formalities are attacked, with a view to change principles, and to introduce an entire independence of foreign agents on the nation with whom they reside, it becomes material to defend formalities."

Mr. Jefferson, Sec. of State, to M. Genet, French min., December 9, 1793, when refusing to accept foreign commissions unless addressed to the United States, or to the President of the United States, 4 Jeff. Works, 90, 92.

"With regard to Mr. Anderson's objections to kissing the Bey's hand, the general principle, which should govern all the agents of this country abroad in their personal intercourse with the sovereigns to whom they are accredited, should be, in matters of form, rather that of accommodation to the established usages of the place, than that of adherence to those of our own country. We expect this deference to our customs and manners from foreign agents residing here, and it is but just that we should yield it elsewhere. As Mr. Anderson

complied with the practice on his first arrival at Tunis, the Bey might with some appearance of reason consider it a more pointed mark of disrespect in him to refuse the same compliance afterwards. It is not conceived that either national or personal dignity requires an inflexible resistance to the formalities of personal respect which, however uncongenial to our own institutions, are understood to import no degredation in the countries where they are observed."

Mr. Adams, Sec. of State, to Mr. Shaler, consul-general at Algiers, No. 1, Jan. 13, 1818, 2 MS. Desp. to Consuls, 85.

"Your despatch No. 24 has been duly received and submitted to the President. In respect to your attendance upon the expected coronation of the King, I am instructed to say that, if the foreign ministers shall be generally invited to be present, and if you think that your absence might be misinterpreted and have a bad effect, you will attend the ceremony. Whilst, on the one hand, the President does not wish the foreign representatives of the United States unnecessarily to assist in a mere pageant, he would not on the other have them omit showing the usual respectful attentions to the governments near which they happen to reside. In the exercise of the discretion which is thus confided to you, if you should determine to witness the coronation, your reasonable expenses will be allowed you. In regulating them, you will bear in mind the simplicity of our institutions, and the economy which the President is desirous rigidly to observe in every branch of the public expenditure."

Mr. Clay, Sec. of State, to Mr. Brown, min. to France, No. 6, March 29, 1825, MS. Inst. U. States Ministers, X. 252.

The United States sent a special ambassador to the coronation of King Edward VII. of Great Britain in 1902, and to the celebration of the coming of age of King Alfonso XIII. of Spain in the same year. (For. Rel. 1902, 498, 954.)

"You will perceive that my absence from the Te Deum in celebration of the taking of Algiers, was made the subject of a newspaper paragraph here. Having reason to believe that this was the result of a diplomatic manœuvre, intended to excite an unfriendly feeling *at court* towards the government of the United States to lead to a rejection of our claims, and thereby produce a breach between France and the United States, which, in the present crisis, might be turned to the account of other parties, I had an unceremonious interview on the following morning with the Prince de Polignac, in which I called his attention to this article; told him it was equally unjust to my government and to myself; that no person had more sincerely rejoiced in the glorious success of the French arms than I had done; that the efforts so constantly employed by my government to repress and chastise piracy everywhere, as well as the friendly sentiments it had

always entertained towards his Majesty's government, assured me that, both for the sake of humanity, and as a glorious illustration of his Majesty's reign, no government would more sincerely sympathise with his Majesty in the brilliant success of his noble enterprise than the government of the United States, and begged him to take occasion to intercept or remove from his Majesty's mind the injurious impressions which the statement in question was calculated to make. He received this explanation in the most cordial manner, and assured me that he would take great pleasure in counteracting a statement, which it needed no assurances to convince him was altogether unjust. In making this explanation, which, under existing circumstances, seemed to be a matter of prudence at least, I took especial care not to go beyond the exigencies of the occasion, and observed to the prince that, in expressing these sentiments as to the happy and glorious termination of the expedition, I did not wish to be understood as saying anything in regard to ulterior questions upon which I had yet received no instructions from my government. The real cause of my absence from the Te Deum was an indisposition which confined me to my bed for the greater part of the day, connected with a belief that it was a matter of entire indifference whether I was there or not—an opinion confirmed by learning since that several other members of the diplomatic corps were also absent."

Mr. Rives, min. to France, to Mr. Van Buren, Sec. of State, July 17, 1830, H. Ex. Doc. 147, 22 Cong. 2 sess. 138.

"We receive from all monarchical states letters announcing the births and deaths of persons connected nearly with the throne, and we respond to them in the spirit of friendship and in terms of courtesy. On the contrary, on our part, no signal incidents or melancholy casualties affecting the Chief Magistrate or other functionaries of the Republic are ever officially announced by us to foreign states. While we allow to foreign states the unrestrained indulgence of these peculiar tastes, we carefully practice our own. This is nothing more than the courtesy of private life extended into the intercourse between nations."

Mr. Seward, Sec. of State, to Mr. Webb, min. to Brazil, July 24, 1865, MS. Inst. Brazil, XVI. 120.

See circular letter of Mr. Jay, Sec. for For. Aff., to the governors of the States, June 14, 1785, stating that Congress had received a letter of the 27th of March from the King of France, announcing the birth on that day of a prince who had been named Duke of Normandy. (1 MS. Am. Let. 303.)

"The President . . . has never addressed letters of congratulation to rulers upon their accession to the throne, except in reply to communications received from them on that subject." (Mr. Hale, Act. Sec. of State, to Mr. Boker, No. 44, Sept. 20, 1872, MS. Inst. Turkey, II. 424.)

As to the death of the ex-Regent of Siam, in January, 1882, and the refusal of the American minister, which was not approved by the Department of State, to place the flag of the legation at half-mast, see Mr. Frelinghuysen, Sec. of State, to Mr. Halderman, No. 29, Oct. 9, 1883, MS. Inst. Siam, I. 25.

Mr. Willis, the American minister at Honolulu, having been invited "to participate in the observance" of the 17th of January, which the Hawaiian legislature had made a national holiday in celebration of the revolution and the overthrow of the monarchy, he was instructed that, on the assumption that he would not be requested or expected "to take such share in the celebration as would seem properly to pertain to Hawaiian officers or citizens," he should "accept any invitation to attend the celebration of the national holiday or do whatever else might be required by international usage and comity under the circumstances, if the celebration of a national holiday in any other country were concerned. The Hawaiian government being established de facto, our rule with regard to the acts and administration of actual governments appears to warrant no distinction between it and any other in the present case."

Mr. Olney, Sec. of State, to Mr. Willis, No. 148, Dec. 11, 1896, MS. Inst. Hawaii, III. 300.

As to the flying of the national flag on the anniversaries of other nations, and the half-masting of the flag as a sign of condolence on the death of the heads of other states, see Mr. Adee, Acting Sec. of State, to Mr. Dudley, min. to Peru, No. 337, Aug. 3, 1904, For. Rel. 1904, 698.

On May 17, 1898, the birthday of the King of Spain, Mr. Bridgman, American minister at La Paz, Bolivia, received by special note the usual announcement that the flag of Spain would be displayed in honor of the occasion, such announcement being equivalent to a demand for the display of the United States flag and to an invitation to the reception held on the same day at the Spanish consulate. Mr. Bridgman instructed his secretary to call at the foreign office and orally explain that as war existed between the United States and Spain, he could not display the flag nor attend the reception. His action was approved as having been discreet, "it being an unwritten precept of diplomatic etiquette, that, in time of war between two nations, their representatives at neutral capitals maintain a guarded attitude of courteous nonintercourse."

Mr. Day, Sec. of State, to Mr. Bridgman, min. to Bolivia, No. 28, June 23, 1898, MS. Inst. Bolivia, II. 89.

In case of the marriage of a member of a royal family (e. g., the Princess of the Asturias), if the diplomatic body as such attends, the minister of the United States may take part and convey the President's felicitations. Special representation of the United States on such an occasion is not customary, and indeed "no invitation to that end is

*

remembered," the President's relation "being official toward the executive power with which this government maintains relations, rather than personal towards the dynasty."

Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, tel., Jan 26, 1901, MS. Inst. Spain, XXIII 102; Mr. Hill, Act. Sec. of State, to Mr. Storer, No. 294, Feb. 12, 1901, id. 106

Replying to an inquiry as to the proper manner of addressing to foreign governments invitations to appoint delegates to the International Commercial Congress to be held in Philadelphia in October, 1899, the Department of State said:

"In the case of governments near which the United States have diplomatic representatives accredited, and of Bulgaria, Montenegro, the Orange Free State, and the South African Republic, the invitations should be addressed to the ministers for foreign affairs.

"In the case of colonies, either self-governing or dependent, the invitations should be addressed to the head of the colony by title, as, for instance, the Viceroy of India, the Governor-General of Canada, etc.

"All the invitations should be sent to this Department, which will properly transmit them."

Mr. Hill, Assist. Sec. of State, to Mr. Wilson, March 10, 1899, 235 MS. Dom. Let. 384.

See, in this relation, Mr. Seward, Sec. of State, to Mr. Hovey, min. to Peru, No. 59, Aug. 14, 1867, Dip. Cor. 1867, II. 774.

"An invitation extended to the President of Mexico to visit Chicago in October, on the occasion of laying the corner stone of the United States government building in that city, was cordially accepted by him, with the necessary consent of the Mexican Congress, but the illness of a member of his family prevented his attendance. The minister of foreign relations, however, came as the personal representative of President Diaz and in that high character was duly honored."

President McKinley, annual message, Dec. 5, 1899, For. Rel. 1899, xxvi.

2. Rules of Precedence.

(1) diplomatic grades.

§ 682.

The general rules of the Department of State in treating questions of precedence among the envoys accredited to the Government of the United States, are as follows:

"1. The rules of Vienna [as modified by the Congress of Aix-la-Chapelle] are followed, whereby four grades of diplomatic representation are recognized, to wit: Ambassador, Minister Plenipotentiary, Minister Resident, and Chargé d'Affaires.

"2. In each of these grades individual precedence is determined by the date of the envoy's presentation of his credentials.

"3. The holding by the envoy of an additional consular office is entirely disregarded; only the diplomatic rank he holds as chief of the mission, permanently or for the time being, is taken into account.

"4. A chargé d'affaires *missi*, that is, a person bearing a letter addressed to the Secretary of State accrediting him as chargé is looked upon as a permanent envoy of the 4th class, and as such takes precedence over a chargé d'affaires ad interim.

"5. Any member of the regular diplomatic personnel of a mission may become chargé d'affaires ad interim upon presentation as such to the Secretary of State by the retiring envoy, or ex officio upon the death or disability of the regular head of the mission. A consular officer, not holding a diplomatic appointment also, may not become a chargé d'affaires ad interim; he can only be made a chargé d'affaires missi by special credentials in that capacity. In neither case would the fact of the chargé's holding a coincident consular appointment affect his precedence as chargé.

"6. The same rule holds as to the higher grades of diplomatic representation. Thus, the title and combined office of minister president and consul general is not uncommon, but the supernumerary consular office neither adds to nor detracts from the diplomatic rank. The officer is simply a minister resident for all purposes of diplomatic precedence. Only as to consular functions would his consular rank be considered in fixing his precedence among *consular* officers.

"7. The fact that a chief of a foreign mission in one country may at the same time be accredited in the same or another diplomatic capacity to the government of another country does not affect his precedence in either. For instance, the United States envoy extraordinary and minister plenipotentiary to Hayti is also accredited to the Dominican Republic as chargé d'affaires (*missi*). His absolute rank in the diplomatic body at Santo Domingo city is merely that of chargé d'affaires, while his relative precedence among the chargés is understood to be fixed by the date of his reception by the Dominican minister of foreign affairs."

Mr. Hay, Sec. of State, to Mr. Sampson, min. to Ecuador, No. 131, Feb. 17, 1900, MS. Inst. Ecuador, II. 22.

See Mr. Foster, Sec. of State, to Mr. Heard, No. 151, Dip. Series, Oct. 31, 1892, MS. Inst. Corea, I. 414.

By the rules of the congresses of Vienna and Aix-la-Chapelle, the eldest (by date of commission) of the chief grade of diplomatic officers takes precedence of the others, and the eldest also when they are all of the same grade; and, while the United States was not a party to those rules, they may be said to have constituted merely a

formal recognition by the chief powers of Europe of a custom which had been the law of nations on the subject ever since diplomacy began in modern times, and as such they have been practically accepted by this government.

Mr. Seward, Sec. of State, to Mr. McMath, consul at Tangier, No. 40, Dec. 30, 1868, For. Rel. 1868, II. 172.

"The rule of this Department arranges diplomatic agents in the order of seniority according to the date of their formal reception."

Mr. Bayard, Sec. of State, to Mr. Dinsmore, min. to Corea, Jan. 26, 1888, For. Rel. 1888, I. 443.

"As a general thing, new credentials (maintaining the same rank) do not alter the precedence gained by priority of original reception. This is the rule the United States follows."

Mr. Bayard, Sec. of State, to Mr. Buck, May 27, 1886, MS. Inst. Peru, XVII. 217.

"While the rule of this Department is to assign precedence to foreign representatives of equal grade in the order of their official audiences of reception, it is equally the practice to fix the time for such audience according to priority of notification of arrival. Although not an adhering signatory of the protocols of the Congress of Vienna, this government has found it convenient to follow in practice the scheme of precedence adopted in the session of March 9, 1815, under the 4th rule of which 'Diplomatic agents shall take precedence in their respective classes according to the date of the official notification of their arrival.' Questions affecting the precedence of new-coming representatives are thus readily met; but the rules of Vienna do not provide for the case of a change in the rank of a representative while already in the country to which he is accredited; and as to these cases, the official notification by the resident representative of the new dignity conferred upon him obviously takes the place of the notification of a new agent's arrival, and is duly respected within reasonable limits of delay in fixing the date of his reception by the President."

Mr. Gresham, Sec. of State, to Mr. Patenôtre, French min., April 11, 1893, MS. Notes to France, X. 278.

Papal representatives.

In a debate in the Senate, March 21, 1848, on the appropriation for a mission to the Papal States, Mr. Calhoun, referring to the possibility of a Papal legate being sent to Washington in return and the question of precedence being raised, said:

"Our established rule is, that the minister bearing the oldest commission in each grade, takes precedence. I feel assured, that to give

precedence here to the Pope's legate, upon spiritual grounds, which is the case in Europe, would produce a very undesirable and dangerous excitement. If the Pope should entertain any design of sending a legate to this Government, I trust that the precaution of informing him with regard to the difficulty on this point will be observed. . . .

"Mr. Cass. . . . In Europe, by universal consent, the Pope's legate takes precedence of any member of the same grade in the diplomatic corps. . . . In this country, of course, the principle is unknown, and I really do not see how the government can be called on to settle such a question.

"Mr. Calhoun. It has settled it.

"Mr. Cass. Well, I cannot imagine how such a question could arise, except as a matter of etiquette in going to the dinner table.

"Mr. Calhoun. The Senator certainly must know that as between the diplomatic corps this is a point insisted upon, and that it has been passed upon here. Within my recollection a case has occurred in which swords were drawn between the French and English ministers in the antechamber of the Presidential mansion; and during the short period in which I was in the Department of State, the point was presented, requiring grave deliberation, so much so, that in that case I thought proper to consult Mr. Adams, who had had more experience in such matters.

"Mr. Cass. That case does not apply to the point of my remarks.

"Mr. Calhoun. It was then established that any minister should take rank according to the date of his commission. Though as between ourselves there may be no question of this kind, yet there can be no doubt that if the Pope's legate, if sent here, should take precedence of all the other members of the diplomatic corps in the face of this established principle, I take it for granted that his claim would not be respected; and the Pope should be apprized of it.

"Mr. Cass. I assure the honorable Senator from South Carolina that were the Pope's minister here, every member of the diplomatic corps would make his bow to him, and allow him to pass first to the dinner table."

Appendix to the Cong. Globe, 30 Cong. 1 sess. (1847–8), 410.

Mr. Cass and Mr. Calhoun both voted for the appropriation. See supra, § 18.

"I have to acknowledge receipt of your letter of the 5th instant, in which you ask the meaning of the clause in the document entitled 'Diplomatic and Consular Service of the United States,' which reads as follows: 'The present regulations shall not cause any innovations with regard to the representative of the Pope.'

"The paragraphs of which the above is one have been printed in the Department registers since 1874. You are informed that the rules

of the Congresses of Vienna and Aix-la-Chapelle were framed in 1815 and 1818, when the States of the Church existed as a temporal power. Since the unification of Italy, the Vatican sends nuncios or legates only to governments with which it has concordats. The rules of the Congress of Vienna subsist as to these papal representatives, to the extent of continuing the honorary precedence of the nuncio at courts where the Vatican maintains representation. At Madrid, for example, the traditional rule gave precedence to the papal nuncio as dean of the diplomatic body, and the accession of Spain to the rules of Vienna caused no 'innovation' in the practice of that court.

"The government of the United States has sent no envoy to the Vatican since the government of the States of the Church ceased to exist, nor has it received an envoy of the Pope."

Mr. Uhl, Act. Sec. of State, to Mr. Dunbar, Sept. 10, 1894, 198 MS. Dom. Let. 525.

See, also, Mr. Adee, Act. Sec. of State, to Mr. Hicks, min. to Peru, No. 118, Feb. 19, 1891, MS. Inst. Peru, XVII. 453.

"With the States of the Church the United States maintained diplomatic relations for many years; but, in 1868, Congress neglected to make appropriations for the support of a mission, and the minister was withdrawn. In his annual message to Congress in 1871, President Grant said: 'I have been officially informed of the annexation of the States of the Church to the Kingdom of Italy, and the removal of the capital of that Kingdom to Rome. In conformity with the established policy of the United States, I have recognized this change.'" (Mr. J. C. B. Davis, Treaty Notes, 1346.)

The precedence of the papal representative as dean of the diplomatic corps is a personal courtesy paid to his sacred calling, and is incapable of delegation or assignment.

Mr. Olney, Sec. of State, to Mr. Smythe, No. 184, Feb. 20, 1897, MS. Inst. Hayti, III. 521.

Dean of diplomatic corps.

"If the foreign representative be dissatisfied with the place assigned to him, his appeal to the master of ceremonies (if there be one), or to the minister of foreign affairs, is in order. Such a question could not, it is thought, be decided by the dean of the diplomatic body. But in all matters affecting the personal relations of the members of the diplomatic body among themselves, or their social relations to the unofficial community in which they reside, the dean of the body may very properly be asked to advise, or even decide, if so requested. These matters would not appear to be referable to the government of the country represented by the dean, for the deanship is not a function representing the officer's government, but is personal and limited in its effects to the local diplomatic circle."

Mr. Hay, Sec. of State, to Mr. Sampson, min. to Ecuador, No. 131, Feb. 17, 1900, MS. Inst. Ecuador, II. 22.

"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."

Mr. Hay, Sec. of State, to Sec. of Navy, May 12, 1900, 245 MS. Dom. Let. 87.

"I should say, therefore, that it is not at all necessary for the governor [of Porto Rico] 'to call in person upon all consular officers.' Consuls-general rank with commanders in the Navy or brigadier-generals in the Army. Consuls rank with captains in the Navy, . . . colonels in the Army. Subordinate consular officers rank with lieutenants in the Navy or captains in the Army." (Ibid.)

(2) AMBASSADORIAL PRIVILEGES.

§ 683.

"The Emperor has intimated that he expects an ambassador from us. Let him understand that this may be a custom of the Old World, but it is not ours; that we never sent an ambassador to any nation."

Mr. Jefferson, Sec. of State, to Mr. Barclay, consul in Morocco, May 13, 1791, MS. Inst. U. States Ministers, I. 45.

Should the Bey of Tunis send an ambassador to the United States, "it must be in a vessel of his own, and at his own expense."

Mr. Adams, Sec. of State, to Mr. Shaler, consul-general at Algiers, No. 1, Jan. 13, 1818, 2 MS. Desp. to Consuls, 85.

"It being supposed to be desirable for the mutual convenience of the Secretary of State and of the diplomatic agents of foreign powers accredited to this government, that the practice which is understood to prevail in the capitals of other countries, of granting those representatives interviews on business at a stated time, should be introduced here, I have the honor to inform you, sir, that on Saturday next, at twelve o'clock, and at the same hour on every succeeding Saturday, I will be happy to receive you for the purpose indicated. Diplomatic agents will be received in the order in which they may reach the Department.

"This arrangement, however, is not intended to prevent the reception of those agents on other occasions which in their judgment may not admit of delay."

Mr. Seward, Sec. of State, to Mr. Mercier, French min., circular, Oct. 7, 1861, MS. Notes to French Leg. VII. 67.

"The question [of appointing ambassadors] is one which, on previous occasions, has been considered by this government, with unfavorable conclusions. Certain foreign powers—Austria and Spain, for instance—have proposed to send ambassadors here if the United

States would raise in like manner the grade of our representatives at their courts. The answer has been that the proposed change would be a possible source of embarrassment here, but without setting forth the grounds for so replying. It is a historical fact that the so-called personally representative character adhering to an ambassador is compatible with the repersentation of a republic. As abstract theory, it is perhaps more suitable that the collective dignity of a self-governed state should be concentrated in and represented by one of its citizens abroad, than that the real personality of the sovereign should be imagined as present at each foreign court in the person of a delegate; and it may be that this course of reasoning led the framers of our government to use the phrase 'ambassadors, and other public ministers.' Still, in practice, objections are seen, and while on the one hand there might be social embarrassments occasioned here in public intercourse with one supposed to embody the personal rank and dignity of a monarch, on the other would be the perhaps painful incongruity of forcing our representative abroad to face the alternative of meeting from private resources the expenses of a mode of life beyond any salary which our Congress would be likely to attach to the ambassadorial rank, or falling below the social plane of those whose equals they became in name.

"Under all these circumstances, this Department could not in justice to its ministers abroad ask Congress to give them higher rank with their present salaries; neither could it with propriety appeal to Congress for an allowance commensurate with the necessary mode of life of an ambassador."

Mr. Frelinghuysen, Sec. of State, to Mr. Hunt, min. to Russia, No. 87, Jan. 31, 1884, MS. Inst. Russia, XVI. 388.

In Constantinople it was long the practice for the senior ambassador, as *doyen* of the diplomatic corps, to call the ambassadors and ministers together, in consultation, on matters of common interest, particularly those affecting the capitulations. At length, the seniority happening to belong to the Persian ambassador, objection was made to recognizing him in such maters, on the ground that his government had no interest in the capitulations, nor community of interest with the Western powers. In consequence, the meetings of the corps for some time fell into abeyance. It was finally arranged that, when the senior ambassador present happened to be that of Persia, the diplomatic corps should be convoked, upon matters affecting the capitulations, by the senior Christian ambassador. (Mr. Wallace, min. to Turkey, to Mr. Frelinghuysen, Sec. of State, No. 87, April 17, 1882, MS. Desp. from Turkey; Mr. Frelinghuysen, Sec. of State, circular, April 17, 1882, 3 MS. Circulars; circular, Jan. 30, 1883, 3 MS. Circulars, 65; Mr. Frelinghuysen to Mr. Hunt, No. 13, Sept. 21, 1882, MS. Inst. Russia, XVI. 309.)

See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Wallace, min. to Turkey, tel., March 1, 1884, and desp. No. 167, March 26, 1884, MS. Inst. Turkey, IV. 91, 101.

"The question of sending and receiving ambassadors, under the existing authorization of the Constitution and the statutes, has on several occasions had more or less formal consideration, but I can not find that at any time the benefits attending a higher grade of ceremonial treatment have been deemed to outweigh the inconveniences which, in our simple social democracy, might attend the reception in this country of an extraordinarily privileged foreign class.

"It seems hardly necessary to point out in detail considerations which will doubtless readily suggest themselves to your discernment.

"I infer from your statement that the position of the United States minister in the order of precedence, especially after a change in the mission, when the newcomer necessarily falls to the foot of the list, may entail delay in obtaining access to the secretary of foreign affairs in the ordinary transaction of business. This is regulated in Washington and in several other capitals by the adoption of the rule *detur priori*, with entire acceptability.

"In 1871, when Mr. George Bancroft was minister of the United States at Berlin, the question of his yielding the *pas* at the foreign office in everyday intercourse to representatives of higher grade or longer residence came up for consideration. I inclose transcript of a dispatch from Mr. Bancroft, reporting the rule then adopted by Prince von Bismarck."

Mr. Bayard, Sec. of State, to Mr. Phelps, July 2, 1885, MS. Inst. Gr. Brit. XXVII. 499.

MK. Le Mamea, the Samoan, who signed on the part of his Government the treaty with the United States concluded at Washington Jan. 17, 1878, though described in the treaty as an envoy extraordinary, is twice designated in the records of the Department of State as an "ambassador." (Mr. Brown, chief clerk, to Mr. Baldwin, April 17, 1878, 122 MS. Dom. Let. 478; Mr. F. W. Seward, Act. Sec. of State, to Admiral Howell, April 29, 1878, id. 575.)

"Since the passage of the act of March 3, 1893, authorizing the President to raise the grade of our envoys to correspond with the rank in which foreign countries accredit their agents here, Great Britain, France, Italy, and Germany have conferred upon their representatives at this capital the title of ambassador, and I have responded by accrediting the agents of the United States in those countries with the same title. A like elevation of mission is announced by Russia, and when made will be similarly met. This step fittingly comports with the position the United States hold in the family of nations."

President Cleveland, annual message, Dec. 1, 1893, For. Rel. 1893, xii.

As to the appointment of Sir Julian Pauncefote as British ambassador — the first in the series of promotions above mentioned — see For. Rel. 1893, 333.

The Hon. John W. Foster, in a lecture before the school of diplomacy, Columbian University, in 1899, criticised the act of 1893 as an unadvised piece of legislation, bad in principle and inconvenient and injurious in operation, especially as tending to introduce undesirable ceremonial pretensions and practices and to restrict the diplomatic representation of the United States to men of fortune. (*Washington Post*, Dec. 18, 1899; reprinted in pamphlet form.)

1. The foreign ambassadors at Washington claim, as the personal representatives of their sovereigns, the right, when present at official ceremonies conducted by the government of the United States, to come next to the President, thus outranking the Secretary of State and other members of the cabinet and all other officials of government—executive, legislative, and judicial.

2. This claim the Department of State in principle concedes, except as to the Vice-President.

3. The ambassadors have, as a courtesy, yielded precedence to the Vice-President.

4. At the first inauguration of President McKinley, in 1897, the ambassadors were outranked not only by the Vice-President, but also by the Speaker of the House and also by the Chief Justice and associate justices of the Supreme Court.

5. This was done on the ground (1) that the American officials in question were entitled, as the highest representatives of coordinate branches of the government, to come next to the President, and (2) that this was especially so since the inauguration of the President was a domestic function, at which the ambassadors were present only as spectators.

6. At the second inauguration of President McKinley, in 1901, the ambassadors and associate justices of the Supreme Court were so seated in the Senate Chamber that neither could be said to have precedence of the other, but in the procession from the Senate Chamber to the platform from which the President delivered his inaugural address the justices preceded the ambassadors. The ambassadors accepted this order only as a matter of courtesy, without yielding their claim of precedence, which they still assert.

7. In a note to Lord Pauncefote, British ambassador, March 19, 1902, Mr. Hay, as Secretary of State, said that "the Executive Department, while desirous of showing all due respect to the diplomatic body in all ceremonies under the control of the President or the Secretary of State, is unable to do more than use its good offices with the committees in Congress who have such ceremonies in charge," i. e., official ceremonies in the two Chambers of Congress.

8. It is understood that the ambassadors do not deny that it is proper for the Chief Justice to precede them at the inauguration, since he administers the oath to the President.

9. The ceremonial precedence which the ambassadors claim extends to all official intercourse, including that of first visits.

This statement was approved, with certain amendments, by the Hon. A. A. Adee, Second Assistant Secretary of State.

"There will be no satisfactory settlement of diplomatic rank until all distinctions and special privileges are abolished and a single grade is established in all the capitals of the world."

The Hon. John W. Foster, on the proper grade of diplomatic representatives, a paper read before the International Congress of Arts and Sciences at St. Louis, Sept. 23, 1904: The George Washington University Bulletin, vol. iii, No. 2, pp. 14, 31.

"In a diplomatic house every functionary of the country, having any rank whatever, takes precedence of the members of the diplomatic corps, ambassadors excepted. The latter yield precedence only to the minister of foreign affairs."

Martens, Le Guide Diplomatique (1866), § 42, I. 133.

"With reference to diplomatic rank, I only heard last night, for the first time, that the Duke of Sutherland had, some time ago, addressed a formal remonstrance to Palmerston, against Foreign Ministers (not Ambassadors) having place given them at the Palace (which means going first out to dinner over himself *et suos pares*), a most extraordinary thing for a sensible man to have done, especially in such high favor as his wife and her whole family are. He got for answer, that Her Majesty exercised her own pleasure in this respect in her own palace. The rule always has been that Ambassadors (who represent the persons of their Sovereigns) have precedence of everybody; Ministers (who are only agents) have not: but the Queen, it appears, has given the *pas* to Ministers Plenipotentiaries, as well as to Ambassadors, and ordered them to go out at her dinners before her own subjects of the highest rank."

In a note it is said to have been "afterwards settled by Her Majesty that Foreign Ministers should take precedence *after* Dukes and before Marquesses."

Greville's Mem., Mar. 29, 1840, 2d part, vol. 1, pp. 281–282.

"At very many foreign offices the rule 'first come first served' is not observed; but an envoy or a minister, though he may have been waiting hours in the antechamber for an important affair, must give place to an ambassador who has come in at the moment; and at Constantinople it is even expected that, should a minister be in conversation with the minister of foreign affairs or the grand vizier, he should withdraw and wait whenever an ambassador may be announced. In some countries a different rule is observed. In Russia

it has been for many years the custom for the minister to receive the foreign representatives in the order in which they arrive at his office, without regard to their rank. This rule was brought into force at Berlin, owing to a personal dispute between Mr. Bancroft, our minister, and the British ambassador. Mr. Bancroft, after having waited a long time for an audience, was on one occasion obliged to yield to the British ambassador, who had that moment arrived. As the ambassador was personally disagreeable to the chancellor, and Mr. Bancroft was a friend of his, a representation of the injustice done to the United States and its representatives brought about a change of rule."

Schuyler's Am. Diplomacy, 113.

Mr. Bancroft, in a dispatch to Mr. Fish, No. 325, Jan. 20, 1872, reporting the change of rule at Berlin, said: "Since Germany became an empire the number of ambassadors in Berlin has increased from two to four. The rule of precedence on all social occasions of a public nature remains as of old; in the foreign office the rule which the Department follows at Washington has been introduced. In the right to transact business with the foreign office equality is established, and the chief of a mission who arrives first is first admitted, be his rank that of ambassador, minister, or chargé."

On this dispatch there is a reference to an instruction to the American minister at London, of July 2, 1885, together with this note, in Mr. Bayard's handwriting: "This rule referred to by Mr. Bancroft I believe has been lately abrogated at Berlin, but it could be restored, and doubtless would be on occasions."

"They [ambassadors] possess the privilege of conferring with the sovereign directly; a privilege which, in our day, is not of great scope, at least in constitutional states, and the exercise of which might offer in one way or another inconveniences and even dangers. It is also said that ambassadors are authorized to demand interviews with the head of the state; but this is an obvious exaggeration, since the head of the state can not be put in this way at the disposition of a foreign envoy, even of the highest rank."

Rivier, Principes du Droit des Gens, I. 449.

"'An ambassador may go directly, and without giving notice to anyone, to the palace and request an interview with the sovereign.' Thus speaks Ch. de Martens. But the sovereign is no doubt at liberty not to be at home at the moment. Martens indeed himself remarks that 'generally ministers of the first class, just as their colleagues of the second order, treat only with the minister of foreign affairs, who assists at the interviews of ambassadors with the sovereign, at least in constitutional countries.' M. Pradier-Fodéré says that, save in what related to external honors, 'the observance of which declines more and more, and certain other distinctions purely titular, am-

bassadors no longer possess to-day the exceptional prerogatives which they formerly enjoyed: such, for example, as that of treating immediately with the sovereign near whom they are accredited.' Pinheiro-Ferreira maintains that even formerly the conversations of ambassadors with sovereigns, concerning the interests of their mission, were not regarded as binding acts in their negotiations, 'since it is with the ministers of the monarch that they must confer and conclude.'"

Rivier, Principes du Droit des Gens, I. 449, citing Ch. de Martens, Guide Diplomatique (Geffcken, 1868), I. § 13; Pradier-Fodéré, Cours de Droit Diplomatique (1881), II. 236.

The opinion of Pinheiro Ferreira, as quoted by Rivier, is shared by T. J. Lawrence, who says: "Ambassadors, as representing the person and dignity of their sovereign, are held to possess a right of having personal interviews, whenever they choose to demand them, with the sovereign of the state to which they are accredited. But modern practice grants such interviews on suitable occasions to all representatives of foreign powers, whatever may be their rank in the diplomatic hierarchy. Moreover the privilege can have no particular value, because the verbal statements of a monarch are not state acts. Formal and binding international negotiations can be conducted only through the minister of foreign affairs." (The Principles of Int. Law (ed. 1895), p. 263.)

3. Official Calls.

§ 684.

"13. In the ceremonies on all formal occasions the diplomatic representative will be governed by the established usage of the country of his official residence. There is usually at foreign courts an officer having charge of such ceremonial matters, and it is advisable to confer with him informally in order to insure appropriate conformity to established rules. In the absence of such an official, he should confer with the dean of the diplomatic corps.

"14. There is also in each country an established rule as to official calls. The diplomatic representative should, immediately upon his arrival, inform himself upon this subject and conform strictly to the rule.

"15. If the mission be provided with one or more secretaries, the newly arrived diplomatic representative should be accompanied by them in the official ceremony of presenting his letter of credence and in his subsequent official visits to his colleagues."

Instructions to Diplomatic Officers of the United States (1897), pp. 6–7.

"In the intercourse between the Secretaries and Attorney-General of this Government and the ministers of foreign powers the period of the arrival of either at the seat of government is not considered. The first visit is expected from the foreign ministers. This

rule, it is believed, is invariably observed by the governments of Europe, and seems to grow out of the mission itself. It is proper that the minister sent on a foreign mission should make himself known to the government to which he is addressed, and that he should extend his visit to all the chief officers of that government. It is equally correct, on any change in the members of the administration, that the first visit should be paid to those who may be brought into power. The intercourse must be opened, and that ought to be commenced by the foreign ministers, the principle being the same between these parties as between the government and the foreign ministers on their first arrival in the country. The rule which prevails between persons in private life is not applicable to this case. This latter rule varies in different places, and is founded on no fixed principle."

Mr. Monroe, Sec. of State, to Mr. de Daschkoff, Mar. 9, 1813, MS. Notes to For. Legs. II. 3.

"In England the secretaries of the government take rank of foreign ministers, as do all those distinguished persons, who take rank of the secretaries, such as the sons of the King and collateral branches of his family, the lord-chancellor, the chief-justice, and as is believed the speaker of the House of Commons, and others. In France the secretaries of the government likewise take rank of foreign ministers, as do the family of the sovereign, the arch-chancellor, the arch-treasurer, and others. It is believed that the marshals of France would all take rank of the foreign ministers if they were brought into the same circle. This, however, is not asserted with confidence; a knowledge in detail is not possessed.

"The same rules are supposed to exist at St. Petersburg and at other European courts—the same precedence to be given to the secretaries of the government over foreign ministers of every grade, and to all those distinguished persons who take rank of the secretaries of the government. Precise information of the rules adopted at St. Petersburg, and the other courts, is also wanting. It will be readily received.

"The secretaries of the governments above mentioned return the visits of ambassadors only. Their wives follow their example.

"The visits of the American ministers in England and France to the secretaries of state were in many instances not returned, nor were those of their wives to the families of the secretaries of state. The omission was imputed to the circumstance that our representatives were ministers plenipotentiary and not ambassadors.

"The government of the United States adopts the rule of the European governments, with this exception, that the heads of the

Government return the first visit of foreign ministers, without regard to grade, and that their wives return every visit."

Informal paper transmitted by Mr. Monroe, Sec. of State, to Mr. Serurier, French min., May 5, 1814, MS. Notes to For. Legs. II. 129.

It having been suggested, on the occasion of the departure of His Majesty the Shah of Persia from Teheran, that the ministers of the United States at the European capitals which he intended to visit should be instructed to call upon him, the Department of State replied: "It is understood to be the custom for a sovereign visiting a foreign capital, and not being under the reserve of 'incognito,' to fix a day for the ceremonial reception of the diplomatic body at such capital. Should this be the case, when His Majesty visits St. Petersburg, Berlin, London, Paris, Vienna, and Constantinople, the representatives of the United States in those cities will probably avail themselves of the occasion to pay their respects to the Shah."

Mr. Blaine, Sec. of State, to Mr. Pratt, min. to Persia, No. 177, dip. ser., May 23, 1889, MS. Inst. Persia, I. 256.

With reference to the then recent visit of Prince Oukhtomsky to Peking, as bearer of presents from the Czar to the Emperor of China, the Department of State, in an instruction to the American minister at Peking, said: "A special ambassador or envoy for a ceremonial function is not a member of the resident diplomatic corps, and you, as minister of the United States, could have no official knowledge of Prince Oukhtomsky's mission except by notification of the Russian legation, or by the prince's own announcement of his arrival, and appointment of a day and hour to receive official visits, which is a common but not obligatory course when the special envoy is of the ambassadorial rank. Individually, therefore, and inasmuch as neither of these notifications was made to you, your course in not calling on the prince is not open to animadversion."

Mr. Adee, Act. Sec. of State, to Mr. Denby, min. to China, No. 1472, July 23, 1897, MS. Inst. China, V. 462.

"While the people of the United States are not very tenacious on questions of etiquette, they can not consent that, when such questions are raised by other powers, the head of their government shall not be regarded as the full equal of the head of any other government."

Mr. Fish, Sec. of State, to Mr. Boker, min. to Russia, No. 74, March 7, 1877, MS. Inst. Russia, XV. 586.

When King Kalakaua, of Hawaii, a reigning sovereign, visited Washington, he did not demand a visit from the President, but

"voluntarily made a visit to the President, which was of course returned by the President."

Mr. Fish, Sec. of State, to Mr. Boker, min. to Russia, No. 74, March 7, 1877, MS. Inst. Russia, XV. 586.

When President Yglesias, of Costa Rica, visited the United States, in 1898, the government, although he was traveling in a strictly private character, took notice of his visit. Orders were given to the revenue officers at New York to extend to him all fitting courtesies, and the major-general commanding the Department of the East was instructed to meet him and welcome him to the United States, while a colonel of the United States Army was detailed to meet him on his arrival and, as the personal representative of the President, escort him to Washington, where quarters were assigned him at the Arlington Hotel; and upon his arrival the President at once called to pay his respects.

Mr. Hay, Sec. of State, to Sec. of War, Nov. 17, 1898, 232 MS. Dom. Let. 596; Mr. Hay, Sec. of State, to Mr. Merry, No. 163, Dec. 10, 1898, MS. Inst. Central Am. XXI. 395.

The minister of Costa Rica at Washington, by a note of November 16, 1898, advised the Department of State of the expected arrival of President Yglesias, adding that his visit was for pleasure and the recuperation of his health, and that he traveled in a strictly private character.

When ex-President Guzman Blanco, of Venezuela, visited the United States, in 1884, he received the courtesy of free entry, and a revenue cutter or a naval tug, with the Venezuelan minister on board, was detailed to meet his steamer in lower New York Bay and convey him to that city. A salute of 21 guns was also ordered to be fired in his honor from the fort in the harbor, as well as from the United States men-of-war there; and the commandant of the New York Navy-Yard was instructed to detail an officer to proceed on the cutter or tug to the steamer and escort the ex-President to New York. (Mr. Frelinghuysen, Sec. of State, to Mr. Baker, min. to Venezuela, No. 309, June 5, 1884, MS. Inst. Venezuela, III. 376.)

When the Prince of Wales visited Washington, during President Buchanan's term, the prince was met at the railway station by the representatives of the President and conducted to the White House, where he remained during his stay. No question of the return of calls could arise in this case, since the prince during his stay in Washington was the personal guest of the President at the White House.

See Mr. Adee, Second Assist. Sec. of State, to Count Lichtervelde, Jan. 28, 1898, MS. Notes to Belgian Leg. VIII. 193.

When the Grand Duke Alexis, in his journey to the United States in 1870, visited Washington, he stayed at the Russian legation. On the day following his arrival, and in pursuance of arrangements made with the minister, Mr. Catacazy, he came to the Department of

State, where the Secretary of State received him. The Secretary of State afterwards conducted him to the White House, where he had a personal audience of the President. He left Washington the next morning. That his visit was thus brief and his call on the President not returned, was due to the course of the Russian Government in retaining at Washington, during the Grand Duke's visit and as his official attendant in his visit to the President, a minister for whose recall, because he was deemed peculiarly unacceptable, the President had asked, and whose continued presence "prevented the exhibition of those courtesies which the President had so greatly desired to extend to a member of the family of his Imperial Majesty of Russia." The President regretted that he was "thus deprived of the opportunity of entertaining the grand duke, or of returning his visit, inasmuch as he was stopping at the house of the minister with whom the President could hold no private or social relations, and to enter whose door would have been to submit to a personal humiliation."

Mr. Fish, Sec. of State, to Mr. Boker, min. to Russia, No. 74, March 7, 1877, MS. Inst. Russia, XV. 586; same to same, No. 76, March 9, 1877, id. 597.

As to the visit of H. R. H. Prince Albert of Belgium, in 1898, see Mr. Adee, Second Assist. Sec. of State, to Count Lichtervelde, Jan. 28, 1898, MS. Notes to Belg. Leg. VIII. 193; same to same, Jan. 31, 1898, id. 195; Mr. Adee, Second Assist. Sec. of State to Sec. of War, March 1, 1898, 226 MS. Dom. Let. 114; Mr. Sherman, Sec. of State, to Count Lichtervelde, No. 92, March 2, 1898, MS. Notes to Belg. Leg. VIII. 203; Mr. Day, Sec. of State, to Count Lichtervelde, June 16, 1898, id. 222.

Prince Albert traveled incognito as Count de Rethy, and it was specially requested that no salutes should be fired on his arrival at New York.

Where a foreign prince of the blood is presented to the President, it is proper for the diplomatic representative and suite who accompany him to the White House to wear uniforms in deference to his exalted rank; but if he should prefer to preserve the *incognito* under which he may be travelling, his wishes in that regard should prevail. The etiquette of the White House does not prescribe uniform except on high state occasions. At other times it is entirely optional with the distinguished visitors to be in uniform or simple morning costume.

Mr. Adee, Second Assist. Sec. of State, to Mr. Tateno, personal, Sept. 8, 1893, MS. Notes to Japan, I. 429.

4. Social Intercourse.

§ 685.

"We went up to dinner. I went up with the comte alone. He showed me into the room where were the ladies and the company. I

singled out the countess, and went up to her to make her my compliments. The countess and all the ladies rose up; I made my respects to them all, and turned round and bowed to the rest of the company. The count, who came in after me, made his bows to the ladies, and to the countess last. When he came to her he turned round and called out, 'Monsieur Adams, venez ici, voilà la Comtesse de Vergennes.' A nobleman in the company said, 'Mr. Adams has already made his court to Madame la Comtesse.' I went up again, however, and spoke again to the countess, and she to me. When dinner was served the comte led Madame de Montmorin, and left me to conduct the countess, who gave me her hand with extraordinary condescension, and I conducted her to table. She made me sit next to her on her right hand, and was remarkably attentive to me the whole time. The comte, who sat opposite, was constantly calling out to me to know what I would eat, and to offer me *petits gateaux*, claret, and Madeira, &c., &c. In short, I was never treated with half the respect at Versailles in my life.

"In the antechamber, before dinner, some French gentlemen came to me and said they had seen me two years ago; said that I had shown in Holland that the Americans understand negotiation as well as war. The compliments that have been made me since my arrival in France, upon my success in Holland, would be considered as a curiosity if committed to writing. 'Je vous félicite sur votre succès,' is common to all. One adds: 'Monsieur, ma foi, vous avez réussi bien merveilleusement. Vous avez fait reconnoître votre indépendance; vous avez fait un traité, et vous avez procuré de l'argent. Voilà un succès parfait.' Another says: 'Vous avez fait des merveilles en Hollande: vous avez culbuté le Stathouder et le parti Anglois; vous avez donné bien du mouvement, vous avez remué tout le monde.' Another said: 'Monsieur, vous êtes le Washington de la négociation.' This is the finishing stroke. It is impossible to exceed this. Compliments are the study of this people, and there is no other so ingenious at them."

Adams's Diary, Nov. 10, 1782, 3 John Adams's Works, 305–306.

"The Vice-President has the honor to present his humble opinion on the points proposed for his consideration.

"1. That an association with all kinds of company, and a total seclusion from society, are extremes, which in the actual circumstances of this country, and under our form of government, may be properly avoided.

"2. The system of the President will gradually develop itself in practice, without any formal communication to the legislature, or publication from the press. Paragraphs in the public prints may,

however, appear, for time to time, without any formal authority, that may lead and reconcile the public mind.

"3. Considering the number of strangers from many countries, and of citizens from various States, who will resort to the seat of government, it is doubted whether two days in a week will not be indispensable for visits of compliment. A little experience, however, will elucidate this point.

"4. Under the fourth head, it is submitted to consideration, whether all personal applications ought not to be made, in the first instance, to a minister of state. Yet an appeal should be open, by petition, to the President, who, if he judges the subject worthy of it, may admit the party to a personal interview. Access to the supreme magistrate ought not to be rigorously denied in any case that is worthy of his consideration. Nevertheless, in every case, the name, quality, and when these are not sufficient to raise a presumption in their favor, their business, ought to be communicated to a chamberlain, or gentleman in waiting, who should judge whom to admit and whom to exclude. Some limitation of time may be necessary, too, as, for example, from eight to nine or ten; for, without it, the whole forenoon, or the whole day, may be taken up.

"5. There is no doubt that the President may invite what official characters, members of Congress, strangers, or citizens of distinction he places, in small parties, without exciting clamors, but this should always be done without formality.

"6. The entertainments mentioned in this article would much more properly be made by a minister of state for foreign or domestic affairs, or some other minister of state, or the Vice-President, whom, upon such occasions, the President, in his private character, might honor with his presence. But in no case whatever can I conceive it proper for the President to make any formal public entertainment.

"7. There can be no impropriety in the President's making or receiving informal visits among his friends or acquaintances, at his pleasure. Undress, and few attendants, will sufficiently show that such visits are made as a man, a citizen, a friend, or acquaintance. But in no case whatever should a visit be made or returned in form by the President; at least, unless an Emperor of Germany, or some other sovereign, should travel to this country. The President's pleasure should absolutely decide concerning his attendance at tea parties in a private character; and no gentleman or lady ought ever to complain, if he never, or rarely attends. The President's private life should be at his own discretion, and the world should respectfully acquiesce. As President, he should have no intercourse with society, but upon public business, or at his levees. This distinction, it is, with submission, apprehended, ought to govern the whole conduct.

"8. A tour might, no doubt, be made, with great advantage to the public, if the time could be spared; but it will naturally be considered, as foreign affairs arrive every day, and the business of the executive and judicial departments will require constant attention, whether the President's residence will not necessarily be confined to one place."

Vice-President Adams to President Washington, May 17, 1789, 8 John Adams's Works, 491.

As to precedence at dinners, see 3 John Adams's Works, 122, 127, 276, 305.

"At a distance from the theatre of action, truth is not always related without embellishment, and sometimes is entirely perverted, from a misconception of the causes which produce the effects that are the subjects of censure. This leads me to think, that the system, which I found it indispensably necessary to adopt on my first coming to this city, might have undergone severe strictures, and have had motives, very foreign from those that govern me, assigned as causes thereof. I mean, first, returning no visits; secondly, appointing certain days to receive them generally, not to the exclusion however of visits on any other days under particular circumstances; and, thirdly, at first entertaining no company, and afterwards (until I was unable to entertain any at all) confining it to official characters. A few days evinced the necessity of the two first in so clear a point of view, that, had I not adopted it, I should have been unable to attend to any sort of business, unless I had applied the hours allotted to rest and refreshment to this purpose; for by the time I had done breakfast, and thence till dinner, and afterwards till bed time, I could not get relieved from the ceremony of one visit, before I had to attend to another; in a word, I had no leisure to read or to answer the despatches, that were pouring in upon me from all quarters."

President Washington to Mr. Stuart, July 26, 1789, 10 Washington's Writings, 17, 18.

"Upon the whole, it was thought best to confine my invitations to official characters and strangers of distinction. This line I have hitherto pursued. Whteher it may be found best to adhere to it, or depart from it, must in some measure be the result of experience and information."

President Washington to Mr. Stuart, July 26, 1789, 10 Washington's Writings, 19.

"I can truly say, I had rather be at Mount Vernon with a friend or two about me, than to be attended at the seat of government by the officers of state and the representatives of every power in Europe.

"These visits are optional. They are made without invitation. Between the hours of three and four every Tuesday I am prepared to

receive them. Gentlemen, often in great numbers, come and go, chat with each other, and act as they please. A porter shows them into the room, and they retire from it when they please, and without ceremony. At their first entrance, they salute me, and I them, and as many as I can talk to, I do. What pomp there is in all this, I am unable to discover. Perhaps it consists in not sitting. To this, two reasons are opposed; First, it is unusual; secondly, which is a more substantial one, because I have no room large enough to contain a third of the chairs, which would be sufficient to admit it. If it is supposed, that ostentation, or the fashions of courts (which, by the by, I believe originate oftener in convenience, not to say necessity, than is generally imagined) gave rise to this custom, I will boldly affirm, that no supposition was ever more erroneous; for, if I were to give indulgence to my inclinations, every moment that I could withdraw from the fatigue of my station should be spent in retirement. That it is not, proceeds from the sense I entertain of the propriety of giving to every one as free access, as consists with that respect, which is due to the chair of government. And that respect, I conceive, is neither to be acquired nor preserved but by observing a just medium between much state and too great familiarity."

President Washington to Mr. Stuart, June 15, 1790. 10 Washington's Writings, 94, 100.

"Among Mr. Jefferson's papers was found one indorsed in his handwriting: 'This rough paper contains what was agreed upon,' meaning, undoubtedly, what was agreed upon by the President and his Cabinet:

"'I. In order to bring the members of society together in the first instance, the custom of the country has established that residents shall pay the first visit to strangers, and, among strangers, first comers to later comers, foreign and domestic; the character of stranger ceasing after the first visits. To this rule there is a single exception. Foreign ministers, from the necessity of making themselves known, pay the first visit to the ministers of the nation, which is returned.

"'II. When brought together in society, all are perfectly equal, whether foreign or domestic, titled or untitled, in or out of office.

"'All other observances are but exemplifications of these two principles.

"'I.—1st. The families of foreign ministers, arriving at the seat of government, receive the first visit from those of the national ministers, as from all other residents.

"'2d. Members of the legislature and of the judiciary, independent of their offices, have a right as strangers to receive the first visit.

"'II.—1st. No title being admitted here, those of foreigners give no precedence.

"'2d. Difference of grade among the diplomatic members, gives no precedence.

"'3d. At public ceremonies, to which the Government invites the presence of foreign ministers and their families, a convenient seat or station will be provided for them, with any other strangers invited, and the families of the national ministers, each taking place as they arrive, and without any precedence.

"'4th. To maintain the principle of equality, or of *pêle mêle*, and prevent the growth of precedence out of courtesy, the members of the Executive will practice at their own houses, and recommend an adherence to the ancient usage of the country, of gentlemen in mass giving precedence to the ladies in mass, in passing from one apartment where they are assembled into another.'

"The President had two public days for the reception of company, the first of January and fourth of July, when his doors were thrown open to all who chose to enter them. At other times, all who chose were permitted to call upon him on business or as a matter of courtesy."

2 Randall's Life of Jefferson, 667.

Case of Mr. Merry.

"Mr. Merry has been with us some time. He appears to be an amiable man in private society, and a candid and agreeable one in public business. A foolish circumstance of etiquette has caused some irritability in Mrs. Merry, and perhaps himself, but they will find so uniform and sincere a disposition in all connected with the government to cultivate a cordial society with them, and to manifest every proper respect for their character and station, that if any unfavorable impression has happened it must be very transient. It would be unfortunate if it were otherwise, because a dissatisfaction of whatever sort, or however produced, might mingle itself with his general feelings, and through them with the agency committed to him."

"Mr. Merry is with us, and we believe him to be personally as desirable a character as could have been sent us. But he is unluckily associated with one of an opposite character in every point. She has already disturbed our harmony extremely. He began by claiming the first visit from the national ministers. He corrected himself in this. But a pretension to take precedence at dinners, &c., over all others is persevered in. We have told him that the principle of society, as well as of government, with us, is the equality of the individuals composing it, that no man here would come to a dinner where he was to be marked with inferiority to any other, that we might as well attempt to force our principle of equality at St. James's as he his principles of precedence here. I had been in the habit, when I

invited female company (having no lady in my family), to ask one of the ladies of the four Secretaries to come and take care of my company; and as she was to do the honors of the table I handed her to dinner myself. That Mr. Merry might not construe this as giving them precedence over Mrs. Merry, I have discontinued it, and here as well as in private houses the *pêle-mêle* practice is adhered to. They have got Yrujo to take a zealous part in the claim of precedence; it has excited generally emotions of great contempt and indignation (in which the members of the legislature participate visibly) that the agents of foreign nations should assume to dictate to us what shall be the laws of our society. The consequence will be that Mr. and Mrs. Merry will put themselves into Coventry, and that he will lose the best half of his usefulness to his nation, that derived from a perfectly familiar and private intercourse with the Secretaries and myself. The latter, be assured, is a virago, and in the short course of a few weeks has established a degree of dislike among all classes which one would have thought impossible in so short a time. Thornton has entered into their ideas. At this we wonder, because he is a plain man, a sensible one, and too candid to be suspected of wishing to bring on their recall and his own substitution. To counterwork their misrepresentations it would be well their Government should understand as much of these things as can be communicated with decency, that they may know the spirit in which their letters are written. We learn that Thornton thinks we are not as friendly now to Great Britain as before our acquisition of Louisiana. This is totally without foundation. Our friendship to that nation is cordial and sincere, so is that with France. We are anxious to see England maintain her standing, only wishing she would use her power on the ocean with justice. If she had done this heretofore other nations would not have stood by and looked with unconcern on a conflict which endangers her existence. We are not indifferent to its issue, nor should we be so on a conflict on which the existence of France should be in danger. We consider each as a necessary instrument to hold in check the disposition of the other to tyrannize over other nations. With respect to Merry, he appears so reasonable and good a man that I should be sorry to lose him as long as there remains a possibility of reclaiming him to the exercise of his own dispositions. If his wife perseveres she must eat her soup at home, and we shall endeavor to draw him into society as if she did not exist. It is unfortunate that the good understanding of nations should hang on the caprice of an individual who ostensibly has nothing to do with them."

President Jefferson to Mr. Monroe, Jan. 8, 1804 (unofficial). MS. Monroe Papers, Lib. of Congress.

"The next step was as follows:

"'Thomas Jefferson asks the favor of Mr. Merry to dine with a small party of friends on Monday, the 13th, at half past three.

"'February 9, 1804.'

"Mr. Merry replied at once, saying that he had 'engaged some company to dine with him on that day. Under the circumstances, however, he would have informed himself whether it is the usage, as is the case in most countries, for private engagements of every kind to give way to invitations from the Chief Magistrate of the United States; and if such were the usage, he would not have failed to have alleged it as a just apology for not receiving the company he has invited. But after the communication which Mr. Merry had the honor to receive from Mr. Madison on the 12th of last month, respecting the alteration which the President of the United States had thought proper should take place in regard to the treatment to be observed by the Executive Government towards foreign ministers from those usages which had been established by his predecessors, and after the reply which Mr. Merry had the honor to make to that notice, stating that, notwithstanding all his anxiety to cultivate the most intimate and cordial intercourse with every (member) of the Government, he could not take upon himself to acquiesce in that alteration, on account of its serious nature, which he would, therefore, report to his own Government, and wait for their instructions upon it; it is necessary that he should have the honor of observing to Mr. Madison that, combining the terms of the invitation above mentioned with the circumstances which had preceded it, Mr. Merry can only understand it to be addressed to him in his private capacity, and not as His Britannic Majesty's minister to the United States. Now, however anxious he may be, as he certainly is, to give effect to the claims above expressed, of conciliating, personally and privately, the good opinion and esteem of Mr. Jefferson, he hopes that the latter will feel how improper it would be on his part to sacrifice to that desire the duty which he owes to his sovereign, and, consequently, how impossible it is for him to lay aside the consideration of his public character. If Mr. Merry should be mistaken as to the meaning of Mr. Jefferson's note, and it should prove that the invitation is designed for him in his public capacity, he trusts that Mr. Jefferson will feel equally that it must be out of his power to accept it without receiving previously, through the channel of the Secretary of State, the necessary formal assurances of the President's determination to observe towards him those usages of distinction which have heretofore been shown by the Executive Government of the United States to the persons who have been accredited to them as His Majesty's ministers.

"'Mr. Merry has the honor to request of Mr. Madison to lay this

explanation before the President, and to accompany it with the strongest assurances of his highest respect and consideration.

"'Washington, February 9, 1804.'

"To this Mr. Madison replied as follows:

"'Mr. Madison presents his compliments to Mr. Merry. He has communicated to the President Mr. Merry's note of this morning, and has the honor to remark to him that the President's invitation, being in the style used by him in like cases, had no reference to the points of form which will deprive him of the pleasure of Mr. Merry's company at dinner on Monday next.

"'Mr. Madison tenders to Mr. Merry his distinguished consideration.

"'Washington, February 9, 1804.'"

Wharton, Int. Law Digest, § 107*a*, vol. 1, p. 733.

Mr. Madison thus comments on the above incidents in a letter to Mr. Monroe, then on a special mission to England:

"Washington, *February 16, 1804.*

"Dear Sir: In a private letter by Mr. Baring I gave you a detail of what had passed here on the subject of etiquette. I had hoped that no further jars would have ensued, as I still hope that the good sense of the British Government respecting the right of the Government here to fix its routes of intercourse, and the sentiments and manners of the country to which they ought to be adapted, will give the proper instructions for preventing like incidents in future. In the meantime, a fresh circumstance has taken place which calls for explanation.

"The President, desirous of keeping open for cordial civilities whatever channels the scruples of Mr. Merry might not have closed, asked me what these were understood to be, and particularly whether he would come and take friendly and familiar dinners with him. I undertook to feel his pulse thro' some hand that would do it with the least impropriety. From the information obtained, I inferred that an invitation would be readily accepted, and with the less doubt, as he had dined with me, (his lady declining,) after the offense originally taken. The invitation was accordingly sent, and terminated in the note from him to me and my answer herewith inclosed. I need not comment on this display of diplomatic superstition, truly extraordinary in this age and in this country. We are willing to refer it to the personal character of a man accustomed to see importance in such trifles, and over cautious against displeasing his Government by surrendering the minutest of his or its pretensions. What we apprehend is, that with these causes may be mingled a jealousy of our disposition towards England, and that the mortifications which he has inflicted on himself are to be set down to that account. In fact, it is

known that this jealousy, particularly since the final adjustment with France, exists, or is affected in a high degree, and will doubtless give its colour to the correspondence of the legation with its Government. To apply an antidote to this poison will require your vigilant and prudent attention. It can scarcely be believed that the British Government will not at once see the folly committed by its representative, especially in the last scene of the farce, and that it will set him right in that respect. But it may listen with a different ear to the suggestions that the United States, having now less need of the friendship of Britain, may be yielding to a latent enmity towards her. The best of all proofs to the contrary would be the confidential communications you possess, if it were not an improper condescension to disclose them for such a purpose. Next to that is the tenor of our measures and the dictates of our obvious policy; on an appeal to both of which you may found the strongest assurances that the Government of the United States is sincerely and anxiously disposed to cultivate harmony between the two nations. The President wishes to lose no opportunity and spare no pains that may be necessary to satisfy the British administration on this head and to prevent or efface any different impressions which may be transmitted from hence.

"I collect that the cavil at the *pêle mêle* here established turns much on the alleged degradation of ministers and envoys to a level with chargés d'affaires. The truth is, and I have so told Mr. Merry, that this is not the idea; that the President did not mean to decide anything as to their comparative grades or importance; that these would be estimated as heretofore; that among themselves they might fix their own ceremonies, and that even at the President's table they might seat themselves in any subordination they pleased. All he meant was that no seats were to be designated for them, nor the order in which they might happen to set to be any criterion of the respect paid to their respective commissions or countries. On public occasions, such as an inaugural speech, &c., the heads of Department, with foreign ministers, and others, invited on the part of the Government, would be in the same *pêle mêle* within the space assigned them. It may not be amiss to recollect that under the old Congress, as I understand, and even in the ceremonies attending the introduction of the new Government, the foreign ministers were placed according to the order in which their governments acknowledged by treaties the independence of the United States. In this point of view the *pêle mêle* is favorable both to Great Britain and to Spain.

"I have, I believe, already told you that the President has discountenanced the handing first to the table the wife of a head of Department, applying the general rule of *pêle mêle* to that, as to other cases.

"The Marquis d'Yrujo joined with Merry in refusing an invitation from the President, and has, throughout, made a common cause with him, not, however, approving all the grounds taken by the latter. His case is, indeed, different, and not a little awkward, having acquiesced for nearly three years in the practice against which he now revolts. Pichon, being a chargé only, was not invited into the pretensions of the two plenipotentiaries. He blames their contumacy; but I find he has reported the affair to his Government, which is not likely to patronize the cause of Merry and Yrujo.

"Thornton has also declined an invitation from the President. This shews that he unites, without necessity, with Merry. He has latterly expressed much jealousy of our views, founded on little and unmeaning circumstances."

See 2 Madison's Writings, 195.

A letter similar in substance, but of greater length, was sent to Monroe on this subject January 19, 1804.

"Mr. Merry is perhaps kept as yet a little distant by the scruples of etiquette. I invited him and his lady to make us a visit, and notwithstanding the public ceremony interposed by him to official civilities, I should gladly have drawn him into the circle of private hospitality. He has never dropped a word on the subject of etiquette lately. I suspect that his Government has been silent and left him to all the embarrassment resulting from that cause. He is at bottom a very worthy man and easy to do business with." (Mr. Madison, Sec. of State (unofficial), to Mr. Monroe, July 21, 1804, MS. Monroe Papers.)

"It here occurs to us that we have omitted to mention a circumstance which afforded the subject of much new Federal indignation. We will let Mr. Thomas Moore, the Irish poet, preface it in a passage taken from a letter he wrote to his mother from Baltimore, June 13th, 1804, which is published in Lord John Russell's Memoirs, Journal and Correspondence of Moore [1. 161, 162].

"'I [writes Moore] stopped at Washington with Mr. and Mrs. Merry for near a week: They have been treated with the most pointed incivility by the present democratic President, Mr. Jefferson; and it is only the precarious situation of Great Britain which could possibly induce it to overlook such indecent, though, at the same time, petty hostility. I was presented by Mr. Merry to both the Secretary of State and the President.'

"The 'indecent and petty hostility' to Mr. and Mrs. Merry was manifested in this wise: They were invited to dine at the President's. When dinner was announced Mr. Jefferson chanced to be standing by and talking with Mrs. Madison at some distance from Mrs. Merry, and he accompanied the former to the table. Mr. Merry regarded this as almost an insult.

"Such a stir was made by the angry ambassador that Madison wrote Monroe (who had succeeded Mr. King as our minister to England), apprising him of the facts to enable him to answer an expected call of the British Government for official explanations. Monroe, however, got his first information from a friendly British under secretary, who intimated that he would soon probably hear of the matter through a different channel. The minister was delighted. Within a

very short period the wife of an English under secretary had been accorded precedence over his own, under analogous circumstances. He had no great fund of humor, but the absurdity of the whole affair, and the excellent materials in his possession for a reply to a call for explanations, struck him in a most amusing light. Shaking with merriment, he hinted to his informant the satisfaction the call would give him. He never afterwards heard a lisp on the subject.

"Mrs. Merry tossed her head without shaking the peace of two nations, and poor Mrs. Madison was saved from involuntarily 'firing another Troy.' But Merry never forgot this 'pointed incivility,' though he and his friends knew that, by an express regulation at the White House, all etiquette in respect to official precedence was formally abolished; and though with the most stringent etiquette of the Celestial Empire in force, it would seem an amusing specimen of impertinence in him to claim priority over the Secretary of State of the United States.

"But the farce was not ended. Mrs. Merry thenceforth eschewed the Presidential mansion; and if her husband went there, it was only officially. After the clamor subsided the President felt a good-natured desire to put an end to this frivolous matter, and to relieve the offended dignitaries from the awkwardness of their position. Accordingly he made inquiry through a common friend (the representative, we think, of the Swedish Government) whether Mr. and Mrs. Merry would accept an invitation to a family dinner. The former was understood to give an affirmative answer, and the invitation was sent, written in the President's own hand. The minister replied by addressing the Secretary of State to know whether he was invited in his private or his official capacity: if in the one, he must obtain the permission of his sovereign; if in the other, he must receive an assurance in advance that he would be treated as became his position. The 'Secretary of State' put an end to the correspondence in a very dry note; and here the affair ended." (3 Randall's Life of Jefferson, 115 et seq.)

According to Mr. Jackson, in a letter written by him when British minister at Washington, on October 20, 1809 (Bath Archives, Jackson Correspondence, 2d series, I. 22, 26), "a foolish question of precedence, which ever since Merry's time has been unsettled and has occasioned some heartburnings amongst the ladies, was also decided . . . by the President [Madison], departing from his customary indifference to ceremony and etiquette, and taking Elizabeth [Mrs. Jackson] in to dinner, while I conducted Mrs. Madison."

This subject is presented at length in Foster's Century of Am. Dip. 209–220.

"Where you are, although it is not pleasant to fall short in returning civilities, yet necessity has rendered this so familiar in Europe as not to lessen respect for the person where circumstances do not permit a return of hospitalities."

Mr. Jefferson, President, to Mr. Monroe, min. at Paris, Jan. 8, 1804, MS. Monroe Papers.

"The gentlemen who composed General Washington's first administration took up, too, universally a practice of general entertain-

ment, which was unnecessary, obstructive of business, and so oppressive to themselves, that it was among the motives for their retirement. Their successors profited by the experiment, and lived altogether as private individuals, and so have ever continued to do. Here [at Washington], indeed, it can not be otherwise, our situation being so rural, that during the vacations of the legislature we shall have no society but of the officers of the Government, and in time of sessions the legislature is become and becoming so numerous, that for the last half dozen years nobody but the President has pretended to entertain them."

Mr. Jefferson, President, to Mr. R. R. Livingston, Dec. 4, 1806, 4 Jeff. Works, 337, 339.

"To have come, at any time, to the seat of your public residence with the ulterior view of a personal visit, without a previous sanction, derived through the usual channel, might have been thought not entirely respectful, if prudent. But so to invade the sanctity of your domestic retreat, really, sir, looks to me, independent of all other considerations, as scarcely less than an outrage. . . . I remember that when Talleyrand was in Philadelphia, as ex-bishop of Autun, General Washington declined being visited by him, although he made known a wish to wait on him."

Mr. Rush, At. Gen., to Mr. Madison, President, unofficial, Sept. 17, 1815. MS. Monroe Papers.

"I have just returned from Carlton House, it being the seventh day in succession that I have rode into town on purpose to make my inquiries there, in the usual manner, respecting the present King's health. The answer to-day is that he is out of all danger. These are attentions which it is believed he will be extremely scrupulous in expecting of foreign ministers. Indeed the ceremonious inquiries which we are obliged to make, under present circumstances, throughout all the circles of the royal family, keep our carriages in motion the livelong day over the rattling stones. In mine, I have just had a breakdown. You know how dispersed they live, from stable yard to Kensington Palace, and how many of them there are. I have often thought since I came here that we maintain our diplomatic intercourse, at least with this Government, upon terms of great inequality. I have yet to learn in what point our Republic is behind this monarchy in dignity, *and yet what are not the acts of ceremonious homage, to give them no other appellation, which the minister of the former is compelled to go through here, from which the British minister with us is exempt?*"

Mr. Rush, min. at London, to Mr. Monroe, President, Feb. 6, 1820, confidential, MS. Monroe Papers.

In January, 1851, the Brazilian minister, at a nonofficial dinner party at Mr. Webster's house, was placed at table after Sir H. Bulwer, who, however, had been of later arrival at Washington. The Brazilian minister then addressed a letter to Mr. Webster, which contained the following passage:

"It is a principle established by the congress of Vienna, and adopted by all the civilized nations, even those who were not represented there (as the United States and Brazil), that the precedence between the diplomatic agents of the same capacity must be established only by the priority of the presentation of their credentials. Being yesterday present at your table, the minister of Mexico, I, and the minister of Great Britain, your excellency gave the first places to the minister of Great Britain and his lady, contrary to the rule above mentioned."

This was followed by an argument to sustain the position taken.

Mr. Webster replied:

"It happens to be my fortune not to be entirely unacquainted with the rules adopted by the treaty of Vienna, respecting the rank of diplomatic agents; and, although the government of the United States was no party to that treaty, it has usually conformed to what was then established, as being the regulation prevailing with other states. But the treaty of Vienna, like other treaties, affects only official acts, and does not assume to give the law to private intercourse; and, although I exceedingly regret that anything should have occurred to cause you concern, yet I am sure you will see, upon consideration, that the private hospitality of my own house may well be regulated by my own discretion, without being made the subject of diplomatic representations."

The Brazilian minister in reply accepted this explanation, saying:

"I shall not discuss the distinction established by your excellency between official acts and the private hospitality of the Secretary of State to the diplomatic agents. I rather accept it as saving the principles, which seemed to me could be put in doubt on account of the incident then mentioned."

Sir H. Bulwer, being appealed to, sustained the position that "a private party" was to be distinguished from an official ceremony, to which alone treaties could apply.

2 Curtis's Life of Webster, 563–565.

A minister of the United States is required, as far as possible, to cultivate kindly relations with other foreign ministers in the place, and to enter into no controversy with them which could be avoided without loss of personal self-respect and propriety.

Mr. Seward, Sec. of State, to Mr. Webb, Feb. 6, 1863, MS. Inst. Brazil, XVI. 6.

"A diplomatic representative should omit no occasion to maintain the most friendly personal and social relations with the members of the government and of the diplomatic corps at the place of his residence."

Instructions to Diplomatic Officers of the United States (1897), § 16, p. 7.

"Ceremonial and social duties take up a large part of a minister's time; but those who have been noted as our best and ablest representatives have always been most punctilious in their performance. No one has ever served us better than Mr. John Quincy Adams; and yet we may see from his 'Diary' that night after night he went into society, danced, played cards, talked, and ingratiated himself with the people about him. In spite of certain peculiarities derived from his Puritan ancestry, peculiarities which were sometimes disagreeable when they showed themselves, Mr. Adams was a man not only fond of society, but very popular in society, and, in a word, combined the most useful external diplomatic qualities with those of intellect, study, and experience."

Schuyler, Am. Diplomacy, 151.

5. Court Dress.

§ 686.

"MEMORANDUM OF THE DRESS OF AN AMERICAN MINISTER, AS FIXED BY THE MISSION TO GHENT.

"A blue coat, lined with white silk; straight standing cape, embroidered with gold, single-breasted, straight or round buttonholes slightly embroidered; buttons plain or, if they can be had, with the artillerists' eagle stamped upon them, i. e., an eagle flying with a wreath in its mouth, grasping lightning in one of its talons; cuffs embroidered in the manner of the cape; white cassimere breeches; gold knee buckles; white silk stockings, and gold or gilt shoe buckles; a three-cornered chapeau-bras, not so large as those used by the French nor so small as those of the English; a black cockade, to which lately an eagle has been attached; sword, etc., corresponding.

"The secretaries have the same costume, with the exception that their coats have less embroidery than that of the minister.

"It is usual at all European courts, on what are called *gala days*, such as birthdays of the sovereign, marriages of princes of his family, and other extraordinary occasions, for the foreign ministers, as well as other persons of distinction connected with the court, to appear in uniforms more splendid with embroidery than upon occasions of ordinary levees, drawing rooms, and diplomatic circles. A decent respect for the usages of the courts, and a suitable compliance with forms

there established, make it proper that the minister of the United States should adopt this custom and wear on those occasions a coat similar to that above described, but embroidered round the skirts and down the breasts, as well as at the cuffs and cape, all the other parts of the dress remaining the same. The coats to be distinguished as the *great* and the small uniform. There should be a white ostrich feather or *plumet* in the minister's hat, not standing erect, but sewed round the brim.

"All the persons attached to the legation wear the same uniform as the secretary, and need to have only one.

" Department of State, November 6, 1817."

MS. Circulars, I. 8; S. Ex. Doc. 31, 36 Cong. 1 sess. 3. A plate accompanied this description in the original circular.

John Quincy Adams, in 1823, referring to the engraved design then used of the uniform worn by ministers of the United States at foreign courts on occasions when full dress was required, said: " In the monarchical governments of Europe a minister of the United States is compelled to conform to the established usages of appearing in the presence of the sovereign in a court dress. He can not, indeed, deliver his credential letter without it, and this uniform was adopted for the convenience of using the same dress upon all necessary occasions and at every court. In the republican government of Colombia it may be presumed that no such dress will be required or expected, and, if not, you will have no occasion for using it. The use of it is in no case prescribed by this Government, and every minister of the United States abroad may wear at his discretion any dress conformable to the customs of the place where he may reside."

Mr. Adams, Sec. of State, to Mr. Anderson, May 28, 1823, MS. Inst. U. States Ministers, IX. 312.

See, also, Mr. Clay, Sec. of State, to Mr. Poinsett, min. to Mexico, March 27, 1825, MS. U. States Ministers, X. 238.

" From a suitable respect to what is understood to be the usage at the several courts of Europe, requiring the members of the diplomatic body accredited to them, to wear a court dress upon established occasions, such as their presentation to the sovereigns, or chief executive officers of these governments, respectively, &c., &c., the President has thought proper to adopt the following as the dress to be used by our ministers and other diplomatic agents upon all such occasions, which is recommended as well by its comparative cheapness as its adaptation to the simplicity of our institutions, viz: A black coat with a gold star on each side of the collar, near its termination; the under clothes to be black, blue, or white, at the

option of the wearer; a three-cornered chapeau de bras; a black cockade and eagle, and a steel-mounted sword with a white scabbard. It is to be understood, however, that the use of this particular dress is not prescribed by the President. It is barely suggested, by his direction, as an appropriate and a convenient uniform dress for the use of our ministers and other diplomatic agents of the United States."

Extract from the personal instructions to the diplomatic agents of the United States, adopted at the commencement of the administration of President Jackson, Mr. Van Buren, Sec. of State, to Mr. Van Ness, Oct. 2, 1829, MS. Inst. U. States Ministers, XIII. 124.

See S. Ex. Doc. 31, 36 Cong. 1 sess. 4; Mr. Brent, Act. Sec. of State, to Mr. McLane, No. 1, July 20, 1829, MS. Inst. Gr. Br. XIV. 1.

"The fashion of the coat recommended for the use of our ministers, &c., upon occasions when full dresses are required by the usages of the courts to which they are accredited, is a single-breasted one, with a standing collar, though they are left at perfect liberty, by the personal and circular instructions which are addressed to all of them by this Department, to consult and be governed by their own taste in the adoption of any other that may be more agreeable to them. The fashion recommended was supposed to be correspondent with the simplicity of our institutions, and was believed to be sufficiently distinguished for all the purposes intended, and it is for these reasons, and for the sake of uniformity, recommended, but *not prescribed*, for their adoption. We were unapprised till the receipt of your letter that our ministers at London and Paris had adopted a different fashion." (Mr. Van Buren, Sec. of State, to Mr. Van Ness, Mar. 3, 1831, MS. Inst. U. States Ministers, XIII. 208.)

The Marcy circular, June 1, 1853.

"In addition to the 'personal instructions to the diplomatic agents of the United States in foreign countries,' the following are hereafter to be observed:

"In performing the ceremonies observed upon the occasion of his reception, the representative of the United States will conform, as far as is consistent with a just sense of his devotion to republican institutions, to the customs of the country wherein he is to reside and with the rules prescribed for representatives of his rank; but the Department would encourage as far as practicable, without impairing his usefulness to his country, his appearance at court in the simple dress of an American citizen. Should there be cases where this cannot be done, owing to the character of the foreign government, without detriment to the public interest, the nearest approach to it compatible with the due performance of his duties is earnestly recommended. The simplicity of our usages and the tone of feeling among our people is much more in accordance with the example of our first and most distinguished representative at a royal court than the practice which has since prevailed. It is to be regretted that there was ever any departure in this respect from the example of Dr. Franklin.

History has recorded and commended this example, so congenial to the spirit of our political institutions. The Department is desirous of removing all obstacles to a return to the simple and unostentatious course which was deemed so proper and was so much approved in the earliest days of the Republic. It is our purpose to cultivate the most amicable relations with all countries, and this we believe can be effectually done without requiring our diplomatic agents abroad to depart in this respect from what is suited to the general sentiments of our fellow citizens at home. All instructions in regard to what is called diplomatic uniform, or court-dress, being withdrawn, each of our representatives in other countries will be left to regulate this matter according to his own sense of propriety, and with a due respect to the views of his Government as herein expressed."

Mr. Marcy, Sec. of State, to the diplomatic agents of the United States, June 1, 1853, MS. Circulars, I. 117. See Moore's American Diplomacy, 257–261.

"It is now well known that this [Dr. Franklin's appearance at the French court in simple dress] was not owing to any love of simplicity on the part of Franklin, but merely that on a certain occasion his presence was so much desired at court, when he had no clothes in which he considered it fit to appear, that he was requested to come in whatever he happened to be wearing at the moment." (Schuyler, Am. Dip. 141.)

Wharton, in a note to this passage from Schuyler, says that the dress Franklin wore "was Quaker full dress, being court dress in the times of Charles II." (Wharton, Int. Law Digest, § 107*b*, I. 745.)

Late in October, 1853, Mr. Buchanan, who was then minister to England, chancing to meet Maj. Gen. Sir Edward Cust, master of ceremonies, intimated to the latter his intention to appear at the court "in the simple dress of an American citizen," unless the Queen herself should intimate her desire that he should appear in costume. Sir Edward replied that Her Majesty would receive Mr. Buchanan at court in any dress he chose to put on, but that he did not doubt that it would be disagreeable to her if he did not conform to the established usage, and that he of course could not expect to be invited to court balls or to court dinners where all appeared in costume. In the course of the conversation, which became somewhat warm, Mr. Buchanan mentioned the circumstance that Senator Stephen A. Douglas, who had lately visited St. Petersburg, had been permitted to visit the Czar, both at the palace and on parade, in plain dress. In reporting the conversation to Mr. Marcy, Mr. Buchanan suggested that he should probably "be placed socially in Coventry on this question of dress," since, if he should not be invited by Her Majesty to her balls and dinners, he would not be invited to the balls and dinners of her courtiers, and would thus lose the opportunity of cultivating relations

which might be available for purposes of information and diplomatic business. And, in conclusion, Mr. Buchanan stated that, if it should prove to be impossible for him to conform to the suggestions of the circular without detriment to the public interest and without impairing his usefulness, he should be guided by its recommendation to adopt the nearest approach to a simple costume compatible with the due performance of his public duties—a course which he had pursued from choice while minister in Russia and which he should have pursued in London without instructions.

Some time after his interview with Sir Edward Cust, Mr. Buchanan let it be known that he had decided to wear neither gold lace nor embroidery at court, but that he desired to appear, out of respect for the Queen, in such dress as he might suppose would be most agreeable to her without departing from the spirit of the circular. It was then suggested to him, from a quarter which he did not feel at liberty to mention, that he might assume the civil dress worn by General Washington; but, after examining Stuart's portrait, Mr. Buchanan came to the conclusion that by adopting a costume so much out of date he might expose himself to "ridicule for life," to say nothing of the fact that it might be considered presumptuous "to affect the style of dress of the Father of his Country."

The question was soon brought to an issue. Early in February, 1854, Parliament was to be opened by the Queen in person; and Mr. Buchanan, as a member of the diplomatic corps, received a copy of the printed circular on the subject, which contained the sentence: "No one can be admitted into the Diplomatic Tribune, or in the body of the House but in full court dress." In consequence, Mr. Buchanan did not attend the ceremony, and his absence became the subject of an outcry in the London press. In fact, he found it difficult to prevent the incident from becoming the subject of inquiry and remark in the House of Commons.

The question of court costume was finally settled to Mr. Buchanan's entire satisfaction. In a despatch to Mr. Marcy, of February 24, 1854, he said: "I appeared at the Queen's levee, on Wednesday, last in the very dress which you have often seen me wear at the President's levees, with the exception of a very plain black-handled and black-hilted dress sword, and my reception was all that I could have desired. I am confident they are as well pleased as myself that this small affair has ended. I have never felt prouder, as a citizen of my country, than when I stood amidst the brilliant circle of foreign ministers and other court dignitaries, in the simple dress of an American citizen. I think I can not be mistaken in saying that the preponderance of public opinion in England is decidedly in favor of the circular. Many of the most distinguished Liberal members of Parliament have never appeared at court, simply because they would not

consent to wear the prescribed costume. . . . In the matter of the sword, I yielded without reluctance to the earnest suggestion of a high official character, who said that a sword, at all the courts of the world, was considered merely as the mark of a gentleman; and although he did not mention the Queen's name, yet it was evident from the whole conversation, that this was desired as a token of respect to Her Majesty. He had, on a former occasion, expressed the hope that I would wear something indicating my official position, and not appear at court, to employ his own language, in the dress I wore upon the street. I told him promptly I should comply with his suggestion, and that in wearing a sword at court, as an evidence of the very high regard which I felt for Her Majesty, I should do nothing inconsistent with my own character as an American citizen, or that of my country. I might have added, that as the 'simple dress of an American citizen' is exactly that of the upper court servants, it was my purpose from the beginning to wear something which would distinguish me from them. At the first I had thought of United States buttons; but a plain dress sword has a more manly and less gaudy appearance. I hope I am now done with this subject forever."

Mr. Buchanan, min. to England, to Mr. Marcy, Sec. of State, Oct. 28, 1853, 2 Curtis's Buchanan, 107; same to same, No. 23, Feb. 7, 1854, id. 110, S. Ex. Doc. 31, 36 Cong. 1 sess. 16; Mr. Buchanan to Miss Lane, Dec. 9, 1853, and Feb. 18, 1854, 2 Curtis's Buchanan, 109, 112; Mr. Buchanan to Mr. Marcy, No. 25, Feb. 24, 1854, S. Ex. Doc. 31, 36 Cong. 1 sess. 19; 2 Curtis's Buchanan, 114–115.

In a despatch, No. 76, to Mr. Marcy, June 15, 1855, Mr. Buchanan stated that the dress worn by himself and the members of his legation had recently been recognized as an appropriate court dress for other American citizens, and also for British subjects. (S. Ex. Doc. 31, 36 Cong. 1 sess. 23.)

In 1858 the following dress was agreed to with Mr. Dallas, Mr. Buchanan's successor: "At levees in a suit of black evening clothes, with white neckcloth, sword, and cocked hat, and at drawing rooms or other full-dress occasions with breeches and buckles." (Dip. Cor. 1868, I. 411.)

In June, 1856, Mr. Dallas took to the palace three American gentlemen, one of whom, who was a professor at West Point, wore his official costume, a blue dress coat, with buttons of the Engineer Corps, blue pantaloons, white vest, black stock, and the common hat. "It was objected, in a manner exceedingly kind and courteous, that he wore a black cravat, had no chapeau, and no sword, and could not thus pass the Queen. . . . We retired. It was impossible to do less, and we did no more." (1 Dallas's Letters, 53).

For characteristic comments on this incident by Lord Malmesbury, see 2 Memoirs of an Ex-Minister, 48.

Mr. Henry S. Sanford, on receiving, as chargé d'affaires ad interim at Paris, the circular of the 1st of June, made known to the French foreign office his desire to appear at the Tuileries in citizen's dress,

and received permission to do so. The new minister, Mr. John Y. Mason, however, after his arrival at Paris, was informed by the foreign office, which he had consulted on the subject, that it would be agreeable to the Emperor if he would, on the occasion of his presentation at court, conform in some degree to the usage of ministers of his rank. Mr. Mason delivered his credentials to the Emperor "in the simple dress of an American citizen," but on subsequently going to the Tuileries he wore what he called a "simple uniform dress." Mr. Sanford considered this action of Mr. Mason's as rendering further official intercourse on his part with the court "impracticable," unless he should return to the use of costume; and, as this would seem to create an implication that his action in discarding costume had been disapproved by his government, he resigned. His resignation was accepted, although his previous course was approved.

Mr. Sanford, chargé, to Mr. Marcy, Sec. of State, Jan. 22, 1854, S. Ex. Doc. 31, 36 Cong. 1 sess. 11; Mr. Mason, min. to France, to Mr. Marcy, No. 1, Jan. 28, 1854, id. 13; Mr. Marcy to Mr. Sanford, Feb. 18, 1854, id. 18; Mr. Sanford to Mr. Marcy, March 12, 1854, id. 21.

In January, 1860, Mr. Sanford wrote an account of the matter to Mr. Cass, then Secretary of State, and said that the costume adopted by Mr. Mason was "a coat embroidered with gilt tinsel, a sword and cocked hat, the invention of a Dutch tailor in Paris, borrowed chiefly from the livery of a subordinate attaché of legation of one of the petty powers of the Continent." In the course of his letter, Mr. Sanford declared that the United States ought not to have "any national livery for its diplomatic agents;" that the proper diplomatic uniform was the costume of the ambassador's own country; that the dress prescribed by his sovereign or government indicated the independence of that state, but that the representative of a vassal state would be bound to conform with the usage of the court which he attended, where he owed allegiance. In illustration of his contention, Mr. Sanford stated that when he was in Paris, Prince Callimaki, the Turkish ambassador, invariably appeared at court "in the Turkish costume, a distinctive feature of which was the fez or red cap, which he wore before the Sultan," although on ordinary occasions he appeared in the costume of a European gentleman and removed his hat according to the rules of etiquette in private life. (Mr. Sanford to Mr. Cass, Jan. 19, 1860, S. Ex. Doc. 31, 36 Cong. 1 sess. 24.)

"Mr. Sanford in this letter confounded two things, court dress and diplomatic uniform; for even in countries where court dress is required, there is a diplomatic uniform different from that worn by other officials; and the example of the Turkish ambassador . . . was by no means to the point. Turkish diplomats always wear a diplomatic uniform, and by no means the ordinary Turkish dress, which can be worn in the presence of the Sultan." (Schuyler's Am. Dip. 143.)

In a confidential letter to Mr. Marcy, of January 19, 1854, Mr. Mason fully explains his decision to wear court dress at Paris. At his first interview with M. Drouyn de l'Huys, he stated that he would

present himself to the Emperor in plain black and desired to know whether such a course would be regarded as wanting in respect to the French government. M. Drouyn de l'Huys subsequently informed him that the Emperor would receive him in the costume which he had indicated, but added that it would have been very agreeable to the Emperor if he had felt at liberty in some degree to conform to the usage of the ministers who had preceded him, except Mr. Sanford. Mr. Mason said that he had conferred with Mr. Robert McLane and Gereral J. A. Thomas, and they sustained him in the opinion that great advantage would result to his country if he were at once to determine on all social occasions to modify his dress and conform in the simplest manner to the prevalent usage. He did this and was presented accordingly. He had learned that the American minister to Prussia had conformed to usage there, and that the same course had been taken by Mr. Soulé at Madrid. Mr. Mason said he believed that, although Mr. Sanford stood well in society generally, his visits and intercourse were not as agreeable as they would have been if he had conformed to usage. Mr. Mason said that he had, as he was authorized by the President to do, informed Mr. Sanford that a change would be made in the office which he held, but suggested that he tender his resignation to take effect at some future day. Subsequently, however, after he had decided to conform to usage, he found that Mr. Sanford declared that he could not, as secretary of legation, wear a dress different from what he wore as chargé d'affaires, and that he would probably resign immediately.

Mr. H. R. Jackson, at Vienna, found that his intimation to Count Buol that he would appear in simple citizen's dress was not well received. Subsequently, Count Buol expressed to Mr. Jackson the hope that he might see him at a certain court ball and that he might adopt some dress as suitable for the occasion. Mr. Jackson asked him whether an army uniform, which he had used when serving in the army, was acceptable. Count Buol said, perfectly so. It seems that Mr. Jackson consulted Mr. Buchanan, who, under date of January 9, 1854, advised him to wear the uniform of a colonel in the army, which he had worn in Mexico, and stated that he himself, although he had distinctly announced his purpose neither to put on gold lace nor embroidery, should still assume a costume other than "the dress of an American gentleman," which was precisely that worn by the upper servants of the Queen" and "which he could not wear without exposing himself to ridicule."

Mr. J. M. Daniel, writing from Turin, December 25, 1854, referred to "the endless tail of the diplomatic coat." Mr. Daniel said that the other day he was formally requested to come to the foreign office, where he found that they had interrogated their ministers at all the

courts as to the dress worn by American diplomats. They found that Mr. Buchanan wore his tights and swords, that Mr. Jackson dressed like a militia colonel, and that Mr. Vroom wore an elegant costume. The end of it was that a large number of American diplomats had adopted court dress, and they hoped he would do the same. It had not been required during the previous year, he admitted, but as so many others had yielded they expected that he would adopt the same costume for the festivities which would begin anew on the 1st of January. Mr. Daniel replied that he regarded the matter as finally settled, and that a change would subject him to misrepresentation and ridicule; but he added that, in order to avoid unpleasantness on either side, he would stay away from the assemblages in question altogether.

At The Hague Mr. Belmont was informed by the minister of foreign affairs that the King would receive him in citizen's dress if he insisted upon it, but that his appearing in uniform "would have been better liked." Mr. Belmont appeared in plain citizen's dress, which he afterwards continued to use.

At Lisbon Mr. O'Sullivan appeared at court in "an ordinary evening suit (blue coat and black trousers)," with "a simple American button indicating my representative capacity."

At Berlin Mr. Vroom was informed that the King of Prussia "would not consider an appearance before him without costume respectful." Mr. Vroom thereupon provided himself with a court dress, which he described as "very plain and simple."

At Stockholm the King expressed his willingness to receive Mr. Schroeder "in an audience for business . . . in any dress his Government may prescribe," but added: "In the society of my family, and on occasions of court, no one can be received but in court dress, in conformity with established custom." Mr. Schroeder therefore appeared at court in the costume which he had previously worn there.

Mr. Belmont, min. to the Netherlands, to Mr. Marcy, Sec. of State, No. 6, Nov. 8, 1853; No. 8, Nov. 25, 1853, and No. 15, Feb. 28, 1854, S. Ex. Doc. 31, 36 Cong. 1 sess. 8, 11, 20; Mr. O'Sullivan, min. to Portugal, to Mr. Marcy, No. 2, June 28, 1854, id. 22; Mr. Vroom, min. to Prussia, to Mr. Marcy, No. 2, Oct. 31, 1853, id. 8; Mr. Schroeder, min. to Sweden, to Mr. Marcy, No. 105, Nov. 24, 1853, id. 9.

Joint resolution of 1867.

By a joint resolution, approved March 27, 1867, Congress prohibited persons in the diplomatic service of the United States "from wearing any uniform or official costume not previously authorized by Congress."

Section 31 of the act of July 28, 1866, however, authorizes officers who have served during the rebellion as volunteers in the armies of the United States to bear the official title, and, upon occasions of

ceremony, to wear the uniform of the highest grade they have held, by brevet or other commissions, in the volunteer service.

Mr. Seward, Sec. of State, to the diplomatic agents of the United States, circular, March 27, 1867, Dip. Cor. 1867, I. 77.

See, also, Rev. Stat. of the U. S., secs. 1226, 1688; Inst. to Dip. Off. (1897), secs. 66, 67, p. 25.

For comments on this circular, see Mr. Adams, min. to England, to Mr. Seward, Sec. of State, No. 1409, July 22, 1867, and Mr. Seward to Mr. Adams, No. 2039, Aug. 13, 1867, Dip. Cor. 1867, I. 117, 124. See, also, Dip. Cor. 1867, I. 639, 657, 660, 681; Dip. Cor. 1868, I. 409, 410, II. 73.

"Though your office may not in all respects be regarded as of a diplomatic character, it is considered to be sufficiently so to require you to abstain from wearing any uniform which may not be authorized by Congress." (Mr. Hunter, Second Assist. Sec. of State, to Mr. Hale, consul at Alexandria, No. 60, Oct. 26, 1868, MS.)

"Congress having by resolution taken from the Secretary of State the discretion reposed in the heads of other Departments to prescribe the costumes of those employed in the public service under the directions of this Department, I propose to leave to each gentleman, except so far as limited by law and by the general printed instructions of the Department, the discretion to select his own costume, in the belief that each one's good judgment will bring him to a conclusion in which I can acquiesce."

Mr. Fish, Sec. of State, to Mr. Jay, min. to Austria-Hungary, No. 8, July 13, 1869, MS. Inst. Austria, I. 376, acknowledging the receipt of Mr. Jay's dispatch No. 13.

"I have received your No. 3, of the 18th ultimo, wherein you describe your conveyance to the Queen Regent of the expression of sympathy and condolence on the part of the President and people of the United States by reason of the death of His Majesty Don Alfonso XII; and your attendance at the funeral services as the special envoy of the United States. It is gratifying to know that the feeling and impressive manner in which you have performed this duty has been so highly appreciated.

"I observe that, in your despatch, you refer to the exceptional position of the minister and secretary of legation of the United States, whose plain evening costume, amidst the brilliant display of uniforms of every class, 'succeeded,' as you say, 'in securing the embarrassment of "*digito monstrari*" conspicuousness.'

"The suggestion of uniform for the diplomatic representatives of the United States abroad has been often mooted, but has found no acceptation here, where civil officers bear no such distinguishing mark of service or rank. The absence of civil distinctions at home forbids their adoption abroad, and even were the diplomatic organization a distinct branch of service, with appointment for life or good

behaviour and promotion by seniority, the fitness of adopting for its members a distinctive uniform is questionable. The analogy of the military and naval services is not wholly in point, for with them uniform is necessary to a proper disciplinary organization, and visible distinctions of official rank are essential.

"Uniforms are of two classes—those denoting relative rank and authority in an organized disciplined service, and those which, like the robes of knightly orders and the like, mark class or titular privilege. Neither of these is applicable, in theory, to those citizens who may be chosen to represent abroad the sovereignty of the Republic. In some respects their position resembles that of legislative representatives, who could not wear the livery of the municipality or state which sends them to the general assembly. The dignity of the representative office should be deemed *per se* above all distinctions in the way of personal apparel.

"I have been told of a pertinent illustration of this in Spain, some years ago, on the occasion of the first official reception of the late king. All the dignitaries and officers of the realm, to the number of some three thousand, were in attendance, and foreign representatives likewise assisted. Uniform being *de rigueur*, every one wore that of the highest official or titular rank to which he was entitled. In the whole assemblage four men appeared in evening dress—the president of the Senate, the president of the Chamber of Deputies, and the minister and secretary of legation of the United States. They were indeed conspicuous, but necessarily so. The Spanish legislative body wears as such no uniform. Either of the presiding officers might have worn, as a private individual, any one of the uniforms belonging to the rank held in other official stations, as ambassador, privy councillor or grand cross; but such uniform would have been beneath the dignity of the representative function with which they stood invested.

"Upon reflection, and in the light of this example, it may be questioned whether the representative quality of an envoy, the highest known in the coequal intercourse of nations, is not rather diminished than enhanced by wearing, as is done in some cases under statutory authority, the uniform of past or present military rank."

Mr. Bayard, Sec. of State, to Mr. Curry, min. to Spain, No. 24, Jan. 15, 1886, MS. Inst. Spain, XX. 142.

Mr. Breckinridge was instructed that, in the absence of a national uniform denoting his office and rank, he might conform to local requirements and wear the prescribed costume appropriate to ununiformed guests, as at London court functions.

Mr. Olney, Sec. of State, to Mr. Breckinridge, min. to Russia, tel., May 7, 1896, MS. Inst. Russia, XVII. 452.

"I have received your despatch No. 83 of the 28th ultimo, in further relation to the subject of your No. 29 of the 22nd of April last, wherein you reported upon an arrangement proposed to be established in connection with official ceremonies at the imperial court, whereby a special court costume is to be prescribed to be worn by distinguished foreigners and by diplomatic representatives who have no uniform.

"The Department has always distinguished between a 'uniform' and a court dress conforming to local custom. A uniform serves to show the branch of public service to which the wearer belongs and also the rank or grade held by him therein. A court dress, denoting no public office or function, when worn by ununiformed functionaries and private citizens alike, without any indication of individual rank or precedence, is in no sense a 'uniform,' and is not obnoxious to the statutory prohibition. Having in view the usage of several European courts where, in the absence of a characteristic uniform, an appropriate general court costume may be prescribed to be worn at official functions, the Department, by paragraph 67 of the Personal Instructions which you quote, has authorized the wearing of the locally appropriate court costume upon suitable occasion.

"The suggestion reported in your No. 29, as having been put forth by the Russian minister of foreign affairs, appears to be designed to supply the omission hitherto of a prescribed court dress for the imperial court. In principle it is entirely unobjectionable. In practice, the nature of the costume appears, to judge from your statements, to call for special consideration, having in view the exceptional character of the Russian climate. Your suggestions in this regard appear to have been practical and to have commended themselves to the good judgment of Count Mouravieff. If I were to be invited to make any comment, it would be that a distinction might be made between daylight and evening functions, assigning to each a costume fitted to the occasion. In ordinary social use, the frock coat is worn by day, the dress coat by night. In the public usage of this capital, as, for instance, at the audience of an ununiformed minister, which takes place in the daytime, a frock coat is admitted as appropriate to the hour and place. The usage of this capital runs against wearing evening dress by daylight, but it is understood that in other countries, as in France, evening dress is worn on ceremonial occasions in the daytime by high officers whose rank and station have no distinguishing uniform.

"With these remarks, the matter is left to your own good judgment, in the belief that it may not be difficult for you and the minister for foreign affairs, aided by the advice of the grand master of ceremonies, to agree upon an evening 'court dress' to be worn on occasion of court ceremonial by all foreign participants not using a uniform denoting an organized public service and their rank in such

service; and to prescribe in addition some modification thereof suitable for daylight or open-air functions."

Mr. Adee, Acting Sec. of State, to Mr. Tower, amb. to Russia, No. 87, September 15, 1899, MS. Inst. Russia, XVIII. 224.

6. Audiences at Peking.

§ 687.

"On the arrival of Mr. Ward at Peking, he requested an audience of the Emperor to present his letter of credence. This he did not obtain, in consequence of his very proper refusal to submit to the humiliating ceremonies required by the etiquette of this strange people in approaching their sovereign. Nevertheless, the interviews on this question were conducted in the most friendly spirit and with all due regard to his personal feelings and the honor of his country. When a presentation to His Majesty was found to be impossible, the letter of credence from the President was received with peculiar honors by Kweiliang, 'the Emperor's prime minister and the second man in the Empire to the Emperor himself.' The ratifications of the treaty were afterwards, on the 16th of August, exchanged in proper form at Pei-tsang. As the exchange did not take place until after the day prescribed by the treaty, it was deemed proper before its publication again to submit it to the Senate. It is but simple justice to the Chinese authorities to observe that throughout the whole transaction they appear to have acted in good faith and in a friendly spirit toward the United States. It is true this has been done after their own peculiar fashion; but we ought to regard with a lenient eye the ancient customs of an Empire dating back for thousands of years, so far as this may be consistent with our own national honor. The conduct of our minister on the occasion has received my entire approbation."

President Buchanan, annual message, Dec. 19, 1859, Richardson's Messages, V. 559.

In regard to the ceremony of presentation to the Emperor of China, see Mr. Webster, Sec. of State, to Mr. Cushing, May 8, 1843, 6 Webster's Works, 470, 471.

In 1868, when Mr. Burlingame and the two Chinese plenipotentiaries who were associated with him, came to Washington, they were duly received by the President, in order that they might deliver their credentials. In a note of June 3, 1868, informing them that they would be so received, Mr. Seward observed that, owing to the minority of the Emperor of China, the sovereign authority of the Empire was then exercised by a regency, and that the President therefore waived, "though only during the Emperor's minority, the

question concerning the privileges of personal audience by the head of the Chinese government."

In October, 1872, it was announced by a public decree that the regency would be set aside in the following October. On receiving a copy of this edict, Mr. Fish, December 21, 1872, instructed the American minister at Peking that when the question of audience was previously agitated the Chinese government would yield to the foreign representatives nothing beyond the privilege of residing at Peking, and that it was the opinion of the President that an audience of the Emperor "should now be demanded," perhaps not in the first instance imperatively, by the representative of the United States, in concert with the representatives of the other powers.

On June 29, 1873, the ambassador of Japan and the ministers of the United States, England, France, Holland, and Russia were personally presented to the Emperor. The Chinese foreign office, however, in the course of the negotiations intimated an intention that the reception of the "five ministers" was to be treated as a precedent only under similar conditions, and was not to be considered as justifying the expectation that individual ministers coming in future to Peking would be allowed as of course to bring their credentials to the Emperor.

In 1874 Mr. Avery, the new American minister, was received in audience by the Emperor, as also at other times were other foreign ministers. In January, 1875, however, the Emperor, by whom these audiences were granted, died, and Mr. Avery reported that the advisers of the young Emperor might decline to grant any audiences to the representatives of Western powers for the time being, and were disposed to keep strictly within the precedent of granting such audiences only when the Emperor should attain his majority. The question being thus raised as to whether the United States would send new credentials to its representatives and take steps towards securing an audience at which they might be presented, Mr. Fish, on April 27, 1875, sent identic instructions to the ministers of the United States near the European governments which were represented at Peking, with a view to bring about a concert of action on the subject. A difference of opinion was, however, soon disclosed as to whether the question of audience should be delayed till the new Emperor should arrive at such age as to consider and direct a change in the forms, or until the increasing intercourse with China should prove the wisdom of such change. Mr. Avery was instructed, July 21, 1875, that he might use his "best judgment;" and the question thus remained for the time being in abeyance.

February 7, 1887, the regency ended, and the Emperor, Kuang Hsu, nominally assumed the imperial power, subject to the advice and direction of the Empress Dowager. No notice of the event was sent to

the legations. The question of audience with the foreign ministers was thereby postponed. During the long regency of the Empress Dowager no effort to secure an audience had been made. On December 11, 1886, Mr. Bayard had instructed Mr. Denby, then American minister at Peking, that the question of audience, while apparently one of form, was in reality one of substantial and high importance, since it involved the consideration of the equality of sovereign states in their intercourse one with another; that the only respect in which the existing situation differed from that in 1873 was the decree of the Empress Dowager of July 19, 1886, which announced her determination to continue to advise and direct the Emperor for a few years on account of his extreme youth; that this circumstance, however, was held to be immaterial, as the Department understood that the Emperor would, after the 7th of the coming February, be the supreme ruler of the Chinese Empire; and that the question had become more important than it was in 1873, since China had in the interval accredited to the United States ministers who had been cordially received and treated on an equal footing of honor and respect with the representatives of other powers and had been accorded personal audiences with the President, besides enjoying all other ceremonial honors. On June 6, 1888, however, with reference to the Emperor's sole assumption in that year of the imperial rule, Mr. Bayard declined to instruct Mr. Denby to make, in common with other diplomatic representatives in Peking, a declaration that if the Emperor should refuse to receive them in audience, the ministers of China would in like manner be refused audiences by the heads of the governments to whom they were accredited.

The members of the diplomatic corps at Peking decided that it was best to wait and let China take the initiative. On December 12, 1890, a decree was issued by the Emperor, stating that it was about two years since he had assumed the reins of government, and that it was proper that the diplomatic representatives at Peking should have an audience of him, and that provision was to be made for the holding of annual audiences. The ceremonial of 1873 was referred to as a precedent. Again, as in 1873, the announcement that an audience would be granted gave rise to a long negotiation concerning the etiquette to be observed. The foreign representatives were received by the Emperor on March 5, 1891.

Mr. Seward, Sec. of State, to the Chinese Embassy, June 3, 1868, Dip. Cor. 1868, I. 603; Mr. Fish, Sec. of State, to Mr. Low, min. to China No. 115, Dec. 21, 1872, and No. 116, Dec. 30, 1872, For. Rel. 1873, I. 135, 136; Mr. Low, min. to China, to Mr. Fish, Sec. of State, No. 268, June 27, 1873, and No. 271, July 10, 1873, For. Rel. 1873, I. 190, 195; Mr. Avery, min. to China, to Mr. Fish, Sec. of State, No. 11, Dec. 4, 1874, For. Rel. 1875, I. 228; Mr. Fish, Sec. of State, to Gen. Schenck, min. to England, circular, No. 719, April 27, 1875, MS. Inst. Gr. Br.

XXIV. 59; Mr. Fish, Sec. of State, to Mr. Avery, min. to China, No. 37, June 5, 1875, MS. Inst. Ch'na, II. 308; Mr. Cadwalader, Act. Sec. of State, to Sir E. Thornton, Brit. min., Aug. 20, 1875, MS. Notes to Gr. Br. XVII. 14; Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, No. 135, Dec. 11, 1886, MS. Inst. China, IV. 222; Mr. Denby to Mr. Bayard, No. 339, March 19, 1887, For. Rel. 1887, 202; Mr. Bayard, Sec. of State, to Mr. Denby, No. 324, June 6, 1888, For. Rel. 1888, I. 307–309; Mr. Denby, min. to China, to Mr. Blaine, Sec. of State, No. 1256, Feb. 28, 1891, and No. 1263, March 10, 1891, For. Rel. 1891, 374–391.

As to the insistence by the diplomatic corps, in conformity with the etiquette observed by the Western powers, that the Tsung-li yamên should, on exchanging cards on the Chinese New Year, send their cards to the secretaries and other members of the legations, see Mr. Denby, min. to China, to Mr. Bayard, Sec. of State, No. 574, Feb. 20, 1888, For. Rel. 1888, I. 260–262; same to same, No. 639, May 5, 1881, id. 300–301; Mr. Bayard to Mr. Denby, No. 329, June 15, 1888, id. 313.

"In reply to the last paragraph of your dispatch, touching the President's reception and the interchange of official calls between the Secretary of State and the members of the various legations here, I inclose three copies of the current diplomatic list. The precedence of the Chinese secretaries over 'translators and attachés' therein indicated follows the official list communicated to this Department by the Chinese minister. In practice no distinction is here made, the translators being accorded equal treatment with the secretaries. At the President's reception on New Year's Day the Chinese minister attends, with such suite as he deems proper, and all are presented by him to the President. In the social intercourse of the Chinese minister with the Cabinet officers, as for example at their receptions at their dwellings, the minister is generally accompanied by one or sometimes both of the translators, and their cards, when left on the Secretary of State, are returned the same as the secretaries' cards." (Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, No. 307, April 23, 1888, For. Rel. 1888, I. 296.)

As to the felicitations of the President to the Emperor of China on the occasion of the latter's marriage, see For. Rel. 1889, 98 et seq.

December 13, 1898, the wives of all the foreign ministers at Peking were received by the Empress Dowager in the "I Luan Hall," in the presence of the Emperor. An address was read by the wife of the British minister, as doyenne, and a reply was made by the Empress Dowager. The ladies were then entertained at breakfast, with Prince and Princess Ching and several other princesses, after which the Empress Dowager reappeared and presented the Empress. It was the first time that an Empress or an Empress Dowager had met foreign ladies.

Mr. Conger, min. to China, to Mr. Hay, Sec. of State, Dec. 14, 1898, For. Rel. 1898, 223–225.

The addresses are printed at pp. 224–225, and the ceremonial at p. 225.

Protocol of September 7, 1901.

"*MEMORANDUM on the ceremonial to be followed in solemn audiences.*

"1°. Solemn audiences to be given by His Majesty the Emperor of China to the Diplomatic Body or to Representatives of the Powers separately shall take place in the palace hall called 'Ch'ien-ch'ing Kung.'

"2°. In going to or coming back from these solemn audiences the Representatives of the Powers shall be carried in their sedan chairs as far as outside of the Ching-yun gate. At the Ching-yun gate they will get out of the sedan chair in which they have come and will be carried in a little chair (i chiao) as far as the foot of the steps of the Ch'ien-ch'ing gate.

"On arriving at the Ch'ien-ch'ing gate the Representatives of the Powers shall get out of their chairs, and shall proceed on foot into the presence of His Majesty in the Ch'ien-ch'ing Kung hall.

"When departing the Representatives of the Powers shall return to their residences in the same manner as that in which they arrived.

"3°. When a Representative of a Power shall have occasion to present to His Majesty the Emperor his letters of credence or a communication from the Head of the State by whom he is accredited, the Emperor shall cause to be sent to the residence of said Representative, to bear him to the Palace, a sedan chair with yellow trimmings and tassels, such as are used by the Princes of the Imperial family. The said Representative shall be taken back to his residence in the same manner. An escort of troops shall likewise be sent to the residence of said Representative to accompany him going and returning.

"4°. When presenting his letters of credence or communication from the Head of the State by whom he is accredited, the Diplomatic Agent, while bearing said letters or communications, shall pass by the central openings of the Palace doors until he has arrived in the presence of His Majesty. On returning from these audiences he will comply, as regards the doors by which he may have to pass, with the usages already established at the Court of Peking for audiences given to Foreign Representatives.

"5°. The Emperor shall receive directly into his hands the letters and communications above mentioned which the Foreign Representatives may have to hand to him.

"6°. If His Majesty should decide upon inviting to a banquet the Representatives of the Powers it is well understood that this banquet shall be given in one of the halls of the Imperial Palace and that His Majesty shall be present in person.

"7°. In brief, the ceremonial adopted by China as regards Foreign Representatives shall, in no case, be different from that which results

from perfect equality between the Countries concerned and China, and without any loss of prestige on one side or the other."

Annex No. 19, to Final Protocol of Sept. 7, 1901, Report of Mr. Rockhill, special commissioner to China, For. Rel. 1901, App. 338.

See, also, the same volume, pp. 120, 121, 132, 133, 160, 188, 279, 291.

"The foreign ministers, on the 22nd, were received as representatives of sovereigns of equal rank with the Emperor. The audiences were held in the innermost of the large halls of the Forbidden City. The Emperor sat on a dais behind a table, with four princes at the back of his chair and a dozen officials on each side. The Dowager Empress was concealed behind a screen, according to the accounts of the attendants, but there was no visible indication of her presence . . . Sir Ernest Satow, on being presented with his staff, bowed thrice, and then the secretary, Mr. Campbell, translated his address, a copy of which the British minister handed to the Emperor. Prince Ching delivered a reply. The audiences of the other ministers were of a different character. The Emperor throughout did not speak a word, but sat stolid and impassive. . . .

"The Emperor made a better impression at the diplomatic reception given by the Dowager Empress on Tuesday, although he was still evidently of less importance than the Empress. This was the second reception given by the Empress, the first having been in the honor of Prince Henry of Prussia, while this was in full recognition of all the powers. The Empress appeared ill at ease, and her reply to the address of the *doyen* of the diplomatists was quite unintelligible as interpreted, but it was believed to have been an expression of sorrow for the troubles that had occurred and an assurance that they should not occur again.

"The Dowager Empress occupied the throne in the main audience chamber, while the Emperor sat behind a table on a low dais before the throne. The fiction of recognizing the Emperor as the sovereign was maintained, but the Dowager Empress was the personage of chief interest and importance. . . .

"The Chinese declare that the Empress Dowager experienced immense relief by her triumph on Tuesday, when the entire diplomatic body officially recognized her as undisputed ruler of China. Yung-lu will now call officially on the foreign ministers, who have resolved to treat the government as having expiated its crimes and will accord him the honor due to his rank and position." (The London Times, weekly ed., Jan. 31, 1902, p. 69, column 1.)

"Peking, Feb. 1.—The audience granted to the ladies of the legations at the palace to-day was the most revolutionary event which has occurred since the court's return, the exclusiveness of the Chinese Imperial Court and its prejudices against the meeting of the sexes being waived. The Dowager Empress occupied the throne, with a brilliant assemblage of princesses and ladies of the court about her. The Emperor was seated on a small platform in the center of the room. The ladies on entering bowed thrice to the Emperor, and Mrs. Conger read a speech, which was interpreted by Mr. Williams, Chinese secretary to the United States legation. It ran as follows:

"'We heartily congratulate you and the Imperial Court that the unfortunate situation which led you to abandon your beautiful capital has been so happily resolved, and that you are now permitted to return

in freedom and peace. The events of the last two years must have been as painful to you as to the rest of the world, but the sting of the sad experience may be eliminated by the establishment of franker, more trustful, and friendlier relations between the Chinese and the other peoples of the earth. The world is moving forward, the tide of progress can not be stayed, and it is to be hoped that China will join the great sisterhood of nations in their grand march. The imperial edicts give promise of great good to your people and your vast Empire.'

"The reply of the Empress was exceedingly friendly in tone. 'Last year,' said her Majesty, 'dissensions in the Palace caused a revolution, which compelled our hasty departure, but it is a source of great gratification to us that our return to the capital has caused such rejoicing in China and abroad.'

"Baron Czikann von Wahlborn, the Austrian minister, presented all the ladies, the Dowager-Empress taking the hand of each. They were next presented to the Emperor, who also shook hands with his guests. The ladies then retired to the ante-room, and the Dowager-Empress entering grasped Mrs. Conger's hand for some minutes. Trembling, weeping, and sobbing loudly she exclaimed in broken sentences that the attack on the legations was a terrible mistake, of which she repented bitterly. Mrs. Conger replied that the past would be forgotten. Her Majesty then removed some bracelets and rings of great value and placed them on Mrs. Conger's wrists and fingers. She next inquired for the other ladies who had been through the siege, and Mrs. Bainbridge and Mme. Morisse, the wives of the American and French secretaries, were presented and greeted warmly.

"A banquet was spread on three tables, and the Dowager-Empress took the seat at the head of the principal table. The Emperor was the only man present. He sat at the head of the second table. Their Majesties touched glasses with their guests, and the Dowager-Empress talked with animation. She said that China would abandon her isolation, adopt the best features of Western life, and send many students abroad. Chang Te-yi, the prospective minister to Great Britain, kneeling beside Her Majesty, interpreted her statements. Afterwards the Dowager-Empress and the Emperor mingled with their guests. The Empress conversed with every one, and particularly noticed the children. An interpreter delivered an address on behalf of the Emperor, who smiled and bowed, but did not speak. The interpreters composed the replies. Every lady was given a pair of jeweled bracelets, a solitaire pearl, rings, and other souvenirs." (London Times (weekly), Feb. 7, 1902, p. 81, column 3.)

"Peking, Feb. 20.—The New Years' reception of the Diplomatic Corps took place to-day. The Dowager-Empress was seated on the throne, while the Emperor occupied a chair on Her Majesty's left hand, one step lower.

"Baron Czikann, the Austrian minister and *doyen* of the diplomatic corps, presented a congratulatory address to the Emperor, and Prince Ching read his Majesty's reply. The Dowager-Empress and Baron Czikann afterwards exchanged a few informal remarks.

"This second reception, like the first, was marked by some undignified proceedings, owing to the lack of order. The diplomatists on enter-

ing the hall rushed towards the throne, scrambling for the most favorable points of view. The Emperor, it is stated by an official who was present, sneered noticeably because several members of the diplomatic corps, as at the first reception, took 'snapshots' with hand cameras, a proceeding which the Chinese consider undignified." London Times (weekly), Feb. 28, 1902, p. 133.)

In another dispatch from Peking, Feb. 24, on the same page, it is stated that Sir Robert Hart, who had been in the Chinese service forty years, was on that day granted his first audience by the Emperor and the Dowager-Empress—his first reception by the Imperial Court.

"Peking, Feb. 27.—The foreign ladies in Peking were given a second reception to-day by the Dowager-Empress and the Emperor, who conducted them through the private apartments of the Palace. The reception was of an even more informal character than the first audience." (The London Times (weekly), March 7, 1902, p. 148.)

"Peking, March 3.—While some disapproval is expressed regarding the procedure at the recent imperial audiences, there can be no possible doubt that the result of the attention shown by the Emperor and Empress, especially to the foreign ladies and children, has materially increased the respect and regard shown to foreigners by Chinese, and has removed some social barriers. Whether the effect will be permanent can not be said, but certainly never before has there been seen such a disposition on the part of the Chinese to meet foreigners, never before been such friendly intercourse between foreigners and Chinese officials in Peking and elsewhere in Chi-li province." (The London Times (Weekly), March 7, 1902, p. 148.)

"An agreeable occasion to testify alike the sincere regard of the American people for China, and the high appreciation here felt for one of the most eminent of oriental statesmen, was afforded by the recent visit of Li Hung Chang. No proper opportunity to manifest these sentiments officially or in private was omitted by the United States Government or by the communities through which Earl Li passed, and in his capacity as premier of the Chinese Empire bearing an introductory letter from his sovereign, he was received in personal audience by the President."

Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxvi.

As to audiences at the palace at Seoul, Corea, see For. Rel. 1894, App. I. 56.

IX. *DEPARTMENT OF STATE.*

1. Organ of Official Communication.

§ 688.

"There shall be at the seat of Government an Executive Department to be known as the Department of State, and a Secretary of State, who shall be the head thereof."

Revised Statutes, § 199, acts of July 27, 1789, and Sept. 15, 1789, 1 Stat. 28, 68.

"The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department, and he shall conduct the business of the Department in such manner as the President shall direct."

R. S. § 202.

See, further, as to the Department of State, R. S. § § 200, 201, 203–213, 3660–3665, 3669, 1794.

A foreign minister has no right to take official notice of informal remarks made by the President at one of his "drawing-rooms."

"What right had Mr. Onis to speak upon this matter to the President at the drawing-room at all? He was treating with me. I had sent him a copy of my full powers and received the copy of his. The Secretary of State was the officer with whom the negotiation was to be conducted, and all immediate applications to the President by Mr. Onis concerning it were improper."

Memoirs of John Quincy Adams, IV. 269.

"This Department is the legal organ of communication between the President of the United States and foreign countries. All foreign powers recognize it and transmit their communications to it, through the dispatches of our ministers abroad, or their own diplomatic representatives residing near this Government. These communications are submitted to the President, and, when proper, are replied to under his direction by the Secretary of State. This mutual correspondence is recorded and preserved in the archives of this Department. This is, I believe, the same system which prevails in the governments of civilized states everywhere."

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, June 27, 1862, MS. Inst. France, XVI. 189.

Official communications with the President can be only through the Secretary of State.

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 19, 1873, MS. Inst. France, XIX. 88.

"It is not regular for any other authority than that of the department of foreign affairs in the country where diplomatists are accredited to address letters upon public business directly to them,

When such other authority has occasion to communicate with them, this is invariably done through the department intrusted with the foreign relations of the country."

Mr. Fish, Sec. of State, to Mr. Cox, Jan. 22, 1874, 101 MS. Dom. Let. 169.

The opinion of the Attorney-General of the United States can not be taken officially by a diplomatic representative of the United States except through the medium of the Secretary of State.

Mr. Fish, Sec. of State, to Mr. Delaplaine, Aug. 2, 1874, MS. Inst. Austria, II. 258.

"Your idea of improving our foreign diplomacy by having each minister apprised of the principal objects pursuing at every court is excellent. I urged something analogous to it upon Mr. Forsyth, while I was at St. Petersburg, and I pressed it upon Mr. Webster when Secretary of State. It is the great practical advantage enjoyed by the diplomats of Russia. It produces a harmony of action and *inculcation* that, in a long run, tells conclusively. Mr. Webster's difficulty was in the great labor which it must throw upon somebody in the Department, already overtaxed. How that may be, I can't pretend to say, but if there be any use at all in having missions dotted over Europe, they might as well be made to co-operate in the general policy of the government as run the risk of impeding it by a want of information from the fountain head."

Mr. Dallas to Mr. Cass, Sec. of State, Oct. 13, 1857, 1 Dallas's Letters from London, 213.

2. Powers and Duties.

§ 689.

The Secretary of State has no power to appoint a commission or board to determine how much money a foreign prince shall pay to counsel in the United States for professional services.

Cushing, At. Gen., 1854, 6 Op. 386.

Where, by a convention, it was agreed that all moneys awarded by the commissioners under that convention on account of any claim should be paid by one government to the other, the moneys found due from the foreign government to claimants who were citizens of the United States were properly paid to the Secretary of State, whose duty it was to have the same paid to those entitled to receive them.

Bates, At. Gen., 1861, 10 Op. 31.

The Austrian legation having communicated to the Department of State the request of a Hungarian court, before which an action was

pending, to the Hungarian minister of justice, to intercede with the United States court at Cleveland, Ohio, to obtain the affidavit of a resident of that city in the pending cause, Mr. Fish, observing that it did not appear that any letters rogatory or commission had been issued from the Hungarian court for the examination of the person in question as a witness, said: "I am not aware of any provision of law, or of any practice, by which this Department can compel a person under such circumstances to appear and make an affidavit, or could properly address the United States district court, in reference to the matter. Should the witness be willing to make the affidavit, it might readily be sworn to before such officer as may be required by the Hungarian law, without the intervention of this Department."

Mr. Fish, Sec. of State, to Baron von Schwarz-Senborn, Feb. 19, 1875, MS. Notes to Austria, VIII. 50.

A request having been made for the opinion of the Secretary of State as to the right of the government of a foreign country, within whose jurisdiction a child may have been born to a citizen of the United States, to impress such child into the military service of the country, Mr. Cass replied: "It is not the province or the practice of this Department to express opinions in advance of cases which may require its interposition. If any citizen is interested in ascertaining what the law may be upon any subject, the proper course is for him to apply to his legal advisers."

Mr. Cass, Sec. of State, to Mr. Moore, Dec. 22, 1857, 48 MS. Dom. Let. 59.

"It is the long established practice of this Department to decline giving advice upon a hypothetical case arising out of our foreign relations."

Mr. Fish, Sec. of State, to Mr. Harriman, April 27, 1870, 84 MS. Dom. Let. 344.

The Department of State is authorized to authenticate "only the seals of United States courts and State seals." Hence the seal of the circuit court of De Kalb County, Indiana, must be certified under the seal of the United States district court for Indiana, or under the seal of the State, before the Department can affix its seal.

Mr. Fish, Sec. of State, to Mr. Williams, Feb. 4, 1870, 83 MS. Dom. Let. 228.

Mr. Cass, replying to a request for the authentication of a certificate of a justice of the peace for the District of Columbia, said that the practice for the first twenty years after the District became the seat of government was for the Department of State to authenticate such certificates, in common with the clerk of the circuit court for the District; but that for the last eight years the original rule had, by order of the President, been recurred to and rigidly observed. The

commissions of justices of the peace for the District of Columbia were, said Mr. Cass, recorded in the Department of State, but they were also recorded pursuant to law in the office of the clerk of the circuit court, for the very purpose, it was presumed, of enabling that officer to attest the official character of such justices. (Mr. Cass, Sec. of State, to Mr. Hollingshead, Aug. 17, 1859, 51 MS. Dom. Let. 25.)

In authenticating a power of attorney for use abroad, the usual course is to have it authenticated, first, under the great seal of the State in which it is executed; the certificate of the Department of State is then affixed, and the certificate of the Department is then authenticated either by the diplomatic representative in the United States of the country in which the power is to be used, or by the American diplomatic representative in that country.

Mr. Moore, Act. Sec. of State, to Mr. Pashayan, Sept. 9, 1898, 231 MS. Dom. Let. 292.

It is within the power of the head of an executive department to allow a claim which has been rejected by one of his predecessors, without new evidence. But the decision of the head of a department ought only to be reversed on clear evidence of mistake or wrong.

Bates, At. Gen., 1861, 10 Op. 56.

A decision made by a former head of department, after having heard the parties in interest, and after careful and thorough consideration of the case, there being no allegation that any material fact can be shown which was not before him, or of fraud, should be regarded by his successor as final, and be left undisturbed.

Akerman, At. Gen., 1871, 13 Op. 387.
See, also, Bristow, Act. At. Gen., 1871, 13 Op. 456.

"It is a settled practice of this Department that a decision of the Secretary, given deliberately on an issue specifically presented to him, will be considered as final, unless it is shown to have been produced by fradulent misrepresentations, or made under a palpable mistake of fact or of law."

Mr. Bayard, Sec. of State, to Messrs. Coudert Bros., Oct. 7, 1885, 157 MS. Dom. Let. 306.

See, to the same effect, Mr. Bayard, Sec. of State, to Mr. Bispham, 156 MS. Dom. Let. 88.

The Department of State does not review its decisions "except upon the production of further evidence or upon proof that its former action was based upon a misapprehension as to the material facts in the case." (Mr. Rives, Assist. Sec. of State, to Mr. Pierce, May 4, 1888, 168 MS. Dom. Let. 293, affirming the refusal by Mr. Fish, February 16, 1870, further to press the claim of Mr. Pierce against Russia for the seizure of his property in Circassia in 1861, the Russian government having taken the ground that the claimant had an appropriate remedy in the judicial tribunals of the country.)

In the matter of giving to citizens of the United States general letters of introduction to American diplomatic and consular officers, the practice of the Department of State has varied. January 12, 1855, Mr. Marcy said that the practice of giving letters of recommendation had "long been discontinued," in consequence of the frequent complaints by such officers of "the inconvenience and trouble to which they have been subjected by repeated demands upon their time for the furtherance of private interests." June 20, 1863, Mr. Seward stated that there had "for many years been established in this Department a rule which inhibits the Secretary of State from giving letters of introduction, circular or otherwise, for persons going abroad, to the ministers or consuls of the United States." This rule did not apply to officers of the government going abroad on public business. The practice of granting letters of introduction was, however, afterwards resumed. It was again suspended in 1881, but was subsequently renewed. The present rule is to grant general letters of introduction to diplomatic and consular officers on the recommendation of public officers; but the requests of other persons are sometimes accepted. Each person receiving a letter of introduction receives with it a warning that it is not to be used as a passport.

Mr. Marcy, Sec. of State, to Mr. Solmson, Jan. 12, 1855, 43 MS. Dom. Let. 307; Mr. F. W. Seward, Assist. Sec. of State, to Mr. Baker, April 8, 1861, 53 MS. Dom. Let. 547; Mr. Seward, Sec. of State, to Mr. Spencer, June 20, 1863, 61 MS. Dom. Let. 82; Mr. Seward, Sec. of State, to Mr. Bidwell, June 21, 1864, 65 MS. Dom. Let. 14; Mr. Blaine, Sec. of State, to Mr. Morse, March 24, 1881, 136 MS. Dom. Let. 632; Mr. Blaine, Sec. of State, circular, April 25, 1881, MS. Inst. Argentine Repub. XVI. 205.

Mr. Hunt, chief, passport bureau, to Mr. Moore, Sept. 26, 1903, MS.

3. Continuity of Policy.

§ 690.

Wharton, in his International Law Digest (§ 80), observes: "Whatever may be the changes in the persons directing at home and abroad our foreign relations, the Department [of State] maintains a continuity in the traditions and management of the office; nor will it permit an appeal, based on party changes, to be made either to or from foreign representatives. This course was taken by Mr. Webster and Mr. Marcy in connection with the action of Mr. Clayton in sending Mr. Mann to Hungary."

It may also be said that the principle of continuous policy was maintained by Mr. Clayton, with regard to the action of President Polk and his Secretary of State, Mr. Buchanan, in authorizing

Messrs. Clifford and Sevier, as special commissioners, who were not nominated to the Senate, to make explanations as to the Senate's amendments of the treaty of Guadalupe Hidalgo.

On the other hand, political changes in the administration of the government necessarily affect to some extent its policy. Especially is this the case with regard to commercial and fiscal matters. The change of policy on such questions, unless such change should be announced to foreign governments in derogatory terms, could not be considered as implying any censure by one administration upon the conduct of another.

By an act of Parliament of July, 1825, trade to the British West Indies was opened to foreign vessels on certain conditions. Compliance with these conditions was required within a year, and as they were not accepted by the United States within that time the trade was forbidden to American vessels. Mr. Gallatin had been sent as minister to England in order to effect an arrangement, but he did not succeed in doing so, and in March, 1827, the United States adopted measures of retaliation. In 1829 the administration of John Quincy Adams was succeeded by that of Andrew Jackson, who chose Martin Van Buren as his Secretary of State. In instructions to Mr. McLane, who succeeded Mr. Gallatin at London, Mr. Van Buren, abandoning the policy of retaliation, endeavored to lay the basis of a mutually beneficial compromise; and, after expressing disapproval of certain claims of privilege which had previously been advanced, he instructed Mr. McLane to say to the British Government that it would be unjust to decline to enter into a suitable arrangement by reason of an "act of the late administration;" and added: "Their [the late administration's] views upon that point have been submitted to the people of the United States; and the counsels by which your conduct is now directed are the result of the judgment expressed by the only earthly tribunal to which the late administration was amenable for its acts."

Mr. McLane, under these instructions, admitted that the United States had committed "mistakes" in the past, and assured Lord Aberdeen that the "American pretensions" which had prevented a formal arrangement would not be revived. The negotiations were successful, and in 1830 a reciprocal arrangement was concluded under which British vessels and their cargoes, coming from the colonies, were admitted to American ports on payment of the same charges as American vessels coming from the same colonies, and American vessels and cargoes were admitted to reciprocal privileges in the colonial ports. January 3, 1831, the papers, including Mr. Van Buren's instructions to Mr. McLane, were sent by President Jackson to the Senate.

August 1, 1831, Mr. Van Buren was appointed minister to England, and in September arrived in London. In February, 1832, he learned that his nomination had been rejected by the Senate; and on March 22, 1832, he had his audience of leave. His nomination was rejected on January 25, 1832. By the debates in secret session, which were soon made public, it appeared that the principal ground of the opposition to his confirmation was the language above quoted from his instructions to Mr. McLane in which he had referred to a change in policy as the result of a change in the political complexion of the government, and had criticised and extenuated the acts of a previous administration.

See Shepard, Martin Van Buren (Am. Statesmen Series), 185–198; 1 Benton's Thirty Years' View, 216. See, also, Moore's American Diplomacy, 115–117.

For animadversions on the correspondence of Mr. Van Buren and Mr. McLane, see 8 J. Q. Adams's Memoirs, 264, Jan. 6, 1831.

Mr. Calhoun, Vice-President, gave the casting vote against Mr. Van Buren's nomination.

"Gallatin, it was afterwards shown from his original despatch to Clay, had expressly said the same thing," i. e., that some of the American claims were untenable. (Shepard, Martin Van Buren, 197.)

"I am directed to bring to your particular notice some views taken by the late administration of this government of the conduct and character of the President Bolivar, in their instructions to Messrs. Sargeant and Poinsett, Envoys Extraordinary and Ministers Plenipotentiary to Tacubaya, of the 16th of March, 1826, and which were communicated to Congress by the late President at the close of his administration, and have been since published. In these will be found the following sentence: 'The intelligence which has reached us as to the ambitious projects and views of Bolivar has abated very much the strong hopes which we once entertained of the favorable results of the Congress of American Nations. If that intelligence is well founded (as there is much reason to apprehend), it is probable that he does not look upon the Congress in the same interesting light that he formally did.' It is feared that the avowal of the sentiments contained in the above extract may, if not explained to the Colombian government (of which the individual referred to forms so prominent and influential a member), have a tendency to impair the friendly relations which have hitherto existed between the two countries, and which the President greatly desires to cherish and sustain. He therefore directs you, if those apprehensions are confirmed by your own observations (but not otherwise), to place that matter before the Colombian government upon its true grounds, in informal but frank and friendly conversations with the Colombian Secretary of State. It was the undoubted right of the late

President, whilst administering the government of this country, to form such opinions as to the conduct and views of the public functionaries of other countries, as he might deem just, and to give them as much publicity as might comport with his views of propriety. The President is not required to express his opinion upon the justice of those now referred to, and he will not allow himself to judge of the nature or adequacy of the motives that existed for their publication at the time, and under the circumstances that they were promulgated. Should any occasion hereafter occur, that may demand an official expression of the opinion of the President as to the form of government at any time existing in Colombia or elsewhere, or the views of those who administer such government, that opinion would naturally be in conformity with the sentiments of the great mass of our countrymen, who having, first in modern times, established a government founded on the will of the people, can not but desire to see other nations adopt the same principle. But, upon this subject, the President only claims from the justice and liberality of the government of Colombia that the present administration of the government of the United States shall not be held responsible for the individual opinion of his predecessor. He asks that the disposition of the Colombian government towards this country, so far as it is influenced by the personal views and opinions of those who administer its affairs, should not take its character from sentiments which have been expressed by those whom the people of these States, in the exercise of their sovereign power, have divested of executive authority. The President will not disguise the fact that recent events in Colombia, viewed at this distance and with an imperfect knowledge of attending circumstances, have produced in the minds of the friends of liberty in this region occasional and painful apprehensions as to the ultimate views of President Bolivar. The President, notwithstanding, is free to say that he has at all times been himself sustained by an abiding hope that they would, in the sequel, be found such as the friends of freedom throughout the world could approve. He is sensible of the difficulties arising from the political condition of the people, and other causes with which President Bolivar has had to contend in the discharge of the high trusts that have from time to time devolved upon him. In our opinion he ought to be considered responsible to the cause of free and liberal principles only for the honest and faithful application of the means placed under his control, and a liberal allowance should be made for the difficulties incident to all attempts to convert long oppressed subjects into discreet depositories of sovereign power. The application of a different rule would be to make President Bolivar answerable for the oppressions which have been for a succession of years heaped upon his countrymen, and to the removal of which the best portion of his life has been

devoted. These favorable impressions, upon which it gives the President pleasure to dwell, have been greatly strengthened by the moderation evinced by President Bolivar on a recent occasion, when, in the seductive hour of victory, he terminated the war with the Republic of Peru, and by the principles which have been established under his auspices for the election and organization of the convention to which is to be delegated the delicate and important trust of laying anew the foundations (as I hope) of a free government in Colombia.

"The President is unwilling to believe that he who has made such liberal sacrifices and exerted such great powers, physical and moral, to redress the wrongs and secure the liberties of his country, can ever consent to exchange the imperishable renown which posterity will doubtless award to the constant and untiring patron of public liberty for the fleeting and sordid gratification of personal aggrandizement."

Mr. Van Buren, Sec. of State, to Mr. Moore, min. to Colombia, No. 3, June 9, 1829, MS. Inst. U. States Ministers, XIV. 12.

Mr. Motley, when he was sent as minister to England, was instructed, among other things, to explain to the British government the causes of the rejection by the Senate of the convention which had been concluded by Mr. Johnson and Lord Clarendon for the settlement of the Alabama claims. In his instructions there is the following passage:

"The time and the circumstances under which the convention was negotiated were very unfavorable to its acceptance either by the people or the Senate.

"The nation had just emerged from its periodical choice of a chief magistrate, and having changed the depositary of its confidence and its power, looked with no favor on an attempt at the settlement of the great and grave questions depending, by those on the eve of retiring from power, without consulting or considering the views of the ruler recently intrusted with their confidence, and without communication with the Senate, to whose approval the treaty would be constitutionally submitted, or with any of its members."

Mr. Fish, Sec. of State, to Mr. Motley, min. to England, May 15, 1869, S. Ex. Doc. 11, 41 Cong. 3 sess. 2, 3.

See Mr. Bayard, Sec. of State, to Mr. Jarvis, min. to Brazil, No. 10, Sept. 6, 1886, For. Rel. 1886, 12, announcing the repudiation by the former of the Jewett claim against Brazil, which had been presented by direction of Mr. Blaine, when Secretary of State, in 1881; and Mr. Bayard, Sec. of State, to Mr. Jewett, June 24, 1886, id. 14.

4. Relations to the Judicial Department.

§ 691.

The executive will not give, upon the solicitation of a foreign sovereign or his minister, opinions on questions of law, where the determination of such questions belongs to the judiciary.

Mr. Jefferson, Sec. of State, to the French min., March 20, 1793, 5 MS. Dom. Let. 73; Mr. Jefferson, Sec. of State, to Mr. Hammond, Brit. min., April 18, 1793, id. 88.

In the case of Marbury *v.* Madison the Senate refused to permit its secretary to give extracts from the executive journal touching the appointment. Summonses were then issued for Jacob Wagner and Daniel Brent, clerks in the Department of State, with a view to learn from them the facts in regard to the commission. They objected to being sworn. The court ordered them to be sworn and their answers taken in writing, but informed them that they might state their objections to any particular question. Mr. Wagner answered various questions. He objected to answering a certain question, and the court sustained him on the ground that it was not pertinent. His personal knowledge of the subject was indefinite. Mr. Brent testified, to the best of his recollection, as to the preparation, signature, and sealing of the commission. He did not know what became of it.

Mr. Lincoln, Attorney-General, who was acting as Secretary of State when the commission was made out, having been summoned, objected to answering as to any fact that came officially to his knowledge while he was acting as Secretary of State. Certain questions were read to him and the court expressed the opinion that he ought to answer, since there was nothing "confidential" required to be disclosed; the fact as to whether the commissions were in his office was one "the whole world have a right to know." After consideration he answered most of the questions.

Marbury *v.* Madison (1803), 1 Cranch, 137.

In May, 1821, Mr. John Quincy Adams, then Secretary of State, received from Mr. Henry Wheaton, acting as judge-advocate, a summons to attend as a witness on the part of Captain James Barron before a naval court of inquiry which was to be held on the 10th of that month at Brooklyn. Mr. Adams answered as follows:

"I pray you, sir, to express to the court my regret that my attendance upon the indispensable official duties at this place precludes the compliance which, but for them, I should cheerfully have given to this summons, and further to state that I am ready to give in writing,

and under oath, any testimony which I am competent to give and which may subserve the purposes of justice, in the case of Captain Barron. I am authorized also by the Secretary of the Navy to say that no objection on the part of the government will be made to the production of any testimony which I may be competent to give in this case, taken in the form of a deposition, or answers to interrogatories in writing."

Mr. Adams, Sec. of State, to Mr. Wheaton, May 9, 1821, 19 MS. Dom. Let. 11.

A commission having been issued to take the testimony of the Secretary of State concerning certain supposed records of his Department, the Department replied: "The regular way to obtain evidence as to records of this Department is by procuring duly authenticated copies. By section 882, Revised Statutes of the United States, it is provided that 'copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof.' Such copies being expressly made of equal validity as evidence with the originals, it should seem that parol evidence as to the contents of the originals, being only secondary, would be improper and inadmissible. This Department furnishes copies of its records, etc., whenever it can do so consistently with the public interest, upon the payment by the person asking for them of the cost of their production."

Mr. Bayard, Sec. of State, to Mr. Monroe, Nov. 10, 1885, 157 MS. Dom. Let. 607.

See Mr. Adams, Sec. of State, to Mr. Harris, Feb. 26, 1821, 18 MS. Dom. Let. 260.

An application was made to the Supreme Court of the United States for a writ of mandamus to compel James Madison, as Secretary of State, to deliver a commission as justice of the peace in the District of Columbia to William Marbury, who had been appointed to that office by the late President, John Adams, by and with the advice and consent of the Senate, and for whom a commission had been duly signed and sealed.

Marshall, C. J., although he expressed the opinion that a mandamus would lie in such a case, held that the Supreme Court had no original jurisdiction to issue it, and the writ was accordingly refused.

Marbury *v.* Madison (1803), 1 Cranch, 137. In the course of his opinion, Marshall said:

"Where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitu-

tional or legal discretion, nothing can be more perfectly clear than that their acts are only political examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." (Id. 166.)

To an application for a writ of mandamus to compel the distribution of money received from the Mexican government on an award made by the mixed commission under the treaty of July 4, 1868, the Secretary of State answered that he could not recognize the claims of the petitioner without ignoring the conflicting claims of another person, between whom and the petitioner litigation in respect of the award had long been pending. Held, That this was a sufficient answer, and that the petition should be dismissed. The court expressly declared that it expressed no opinion as to the validity of another ground of defence set up in the answer, to the effect that the Secretary of State was not invested with authority over the money independently of the President, and that the latter was of opinion that the public interests forbade the payment of the money to the petitioner under the existing circumstances.

Bayard *v.* White (1888), 127 U. S. 246.

A writ of mandamus will not lie to compel the Secretary of State to pay over to claimants the interest which has accrued on moneys received from a foreign government under the award of a mixed commission, and withheld by the United States for a time from the claimants, the moneys while so withheld being invested in interest-bearing securities of the United States. The writ was denied on the ground that, as the moneys were withheld by the United States, the case fell within the principle that the United States does not, except by express stipulation or statutory provision, pay interest on claims.

Angarica *v.* Bayard (1888), 127 U. S. 251.

On an application for a writ of mandamus to compel the Secretary of State to pay to the applicant certain moneys paid by the Mexican government under the treaty of July 4, 1868, on the award of the mixed commission thereunder in favor of Benjamin Weil, it was held that the political department of the government still had control of the matter, and that the writ should not issue, since the effect of its issuance would be to direct or control the head of an executive department in the discharge of a duty involving the exercise of judgment or discretion.

United States, ex rel Boynton, *v.* Blaine (1891), 139 U. S. 306, 11 S. Ct. 607.

See, also, Frelinghuysen *v.* Key, 110 U. S. 63.

5. Care of Archives.

§ 692.

Mr. Aceval, the Paraguayan minister, having by a note of Nov. 18, 1878, asked for the return of certain documents and books which accompanied and were referred to in the Paraguayan argument in the Argentine-Paraguayan boundary arbitration, before the President of the United States, Mr. Evarts replied: "I have the honor to express my regret that, in my judgment, the request can not be conveniently complied with, inasmuch as the documents and books adverted to form a part of the record of the case, and without them the important business to which they relate could not be properly understood. They must consequently be regarded as pertaining to the archives of this department, and as such will be carefully preserved. They will, however, at all times be accessible to any member of your legation or other authorized person who may desire to examine them."

Mr. Evarts, Sec. of State, to Mr. Aceval, Paraguayan min., Nov. 20, 1878, MS. Notes to Paraguay, I. 6; Moore, Int. Arbitrations, II. 1944.

An answer in similar terms was given by Mr. Evarts, Nov. 18, 1878, to a like request of the Argentine minister. (MS. Notes to Arg. Leg. VI. 164.)

By article 11 of the treaty of 1819 between the United States and Spain, the Department of State was made the depository of the records and papers referred to in the article. They should not be delivered to the claimants, and any law of Congress which should authorize or direct them to be delivered up would be a violation of the treaty.

Taney, At. Gen. 1832, 2 Op. 515.

A claimant before the mixed commission under the treaty between the United States and Mexico of July 4, 1868, having requested the return by the Department of State of a deed filed in his claim against Mexico, the Department replied that, in order to withdraw the document, the authority of an act of Congress would be required, and enclosed for its correspondent's information a copy of a joint resolution which had been adopted in a similar case. The Department added that if a certified copy of the deed would suffice, such a copy would be prepared.

Mr. Frelinghuysen, Sec. of State, to Mr. Henley, Dec. 15, 1884, 153 MS. Dom. Let. 438.

Under section 8 of the act of March 2, 1901 (31 Stat. 879), which provides that all reports, records, or other documents now on file or

of record in the Department of State, or in any other department, or certified copies thereof, relating to any claims prosecuted before the Spanish Treaty Claims Commission, shall be furnished to the commission upon its order, it is discretionary with the head of the department to send either the original papers or certified copies thereof upon a request of the commission for certified copies.

Knox, At. Gen. July 30, 1901, 23 Op. 470.

X. *SALARIES AND EXPENSES.*

1. Salaries.

§ 693.

By the Revised Statutes of the United States (1878), provision was made for envoys extraordinary and ministers plenipotentiary to France, Germany, Great Britain, and Russia, at a salary, each, of $17,500; and to Austria, Brazil, China, Italy, Japan, Mexico, and Spain, at a salary, each, of $12,000; while those to all other countries, unless a different compensation was fixed by law, were each to receive $10,000. The salaries of ministers resident and commissioners were to be seventy-five, and of chargés d'affaires, fifty, per centum of the salaries paid to envoys to the respective countries.

By the act of March 3, 1905, the following provision was made: Ambassadors extraordinary and plenipotentiary to France, Germany, Great Britain, Mexico, and Russia, each, $17,500; to Austria-Hungary, Brazil, and Italy, each, $12,000. Envoys extraordinary and ministers plenipotentiary to the Argentine Republic, China, Cuba, Japan, and Spain, each, $12,000; to Belgium, Chile, Colombia, the Netherlands and Luxemburg, Panama, Peru, Turkey, and Venezuela, each, $10,000; to Nicaragua, Costa Rica and Salvador, $10,000; to Guatemala and Honduras, $10,000; to Denmark, Morroco, Paraguay and Uruguay, Portugal, Roumania and Servia, Sweden and Norway, and Switzerland, each, $7,500; to Greece and Montenegro (including the post of diplomatic agent to Bulgaria), $7,500; to Bolivia, Ecuador, Haiti, Korea, Persia, and Siam, each, $7,500. Minister resident and consul-general to Liberia, $5,000; to Santo Domingo, $5,000. Agent and consul-general to Cairo, $5,000.

Revised Statutes, § 1675; act of March 3, 1905, 33 Stat. I. 915.

As to the compensation of ambassadors and consuls, see United States *v.* Bee, 4 C. C. A. 219.

As to the liability of bondsmen, see ibid.

Mr. Webster's report of June 26, 1852, in favor of adopting a graduated scale of diplomatic salaries, is given in S. Ex. Doc. 93, 32 Cong. 1 sess.

"No advance of salary or allowance in the nature of an outfit is made either for a diplomatic officer or for his family, nor is transportation furnished by the government."

Instructions to diplomatic officers of the United States (1897), § 295.

As to allowances made to a minister while receiving instructions, during transit to his post, etc., see id. §§ 292, 301, 302, etc.

Formerly, when an annual fund was placed at the disposal of the President to defray the expenses of foreign intercourse, advances and allowances in the nature of an outfit, which are now superseded by the specific allowances above mentioned, were made. See, as to the earlier practice and its change, the following:

The fund for foreign intercourse is an annual fund placed at the disposal of the President to defray its expenses; and he is limited in respect to an outfit only by the provision that it shall not exceed a year's salary. When the outfit has been paid, it is beyond the recall of the President or Congress. (Wirt, At. Gen., 1822, 1 Op. 545.)

The opinion of Mr. Wirt, Oct. 1, 1821, as to allowance of salaries and outfits to ministers, is given in Senate Doc. 411, special sess., 1821, 5 Am. State Papers, For. Rel. 755. (This opinion is not given in the series of opinions of Attorneys-General.)

The President may advance money to a minister going abroad. (Wirt, At. Gen., 1823, 1 Op. 620; Berrien, At. Gen., 1829, 2 Op. 204.)

By sec. 1743, Revised Statutes, embodying sec. 20, act of Aug. 18, 1856, 11 Stat. 59, it is provided that the compensation allowed by law shall be in full for all services and expenses, and that "no allowance, other than such as is so provided, shall be made in any case for the outfit or return home of any such officer or person" in the diplomatic or consular service; and by sec. 3648, any advance of public money is prohibited.

As to the term during which salary is payable, see R. S., sec. 1740.

The statute fixing the annual salary of a public officer at a certain sum, without limitation as to time, is not repealed or suspended by a subsequent statute which merely appropriates a smaller amount for the services of such officer for particular fiscal years, and which contains no words that expressly or by clear implication modify or repeal the previous law; and the officer may recover the amount fixed by law.

United States *v.* Langston (1886), 118 U. S. 389; Foote *v.* United States, 23 Ct. Cl. 443.

By section 1675 of the Revised Statutes of the United States, as amended by the act of March 3, 1875, 18 Stats. at L. 483, the salary of certain ministers plenipotentiary was fixed at $17,500 and of certain others at $12,000, and it was provided that the pay of ministers plenipotentiary to all other countries should be $10,000, unless a different compensation was prescribed by law. At that time the diplomatic representative of the United States to Turkey held the office of minister resident and consul-general, with a salary of $7,500. This situation continued till 1882. By the act of July 1, 1882, 22 Stats.

128, an appropriation was made for the salary of a minister plenipotentiary to Turkey at the rate of $7,500, and on July 13, 1882, a minister plenipotentiary was appointed and for three years received as salary the amount appropriated therefor. Subsequently he claimed the difference between that amount and the annual sum of $10,000 prescribed by the prior legislation for ministers plenipotentiary, relying on the case of United States *v.* Langston, 118 U. S. 389. The claim was not sustained; the court said that in Langston's case a prior statute had fixed the annual salary of a diplomatic officer at a designated sum without limitation as to time, and a subsequent statute appropriated a less amount for a particular fiscal year without containing any words of express or implied repeal of the prior statute. In the present case the prior legislation had no application, because a different compensation for the office was prescribed by law before the President made any appointment.

Wallace *v.* United States (1890), 133 U. S. 180, 10 S. Ct. 251.

A retired army officer is not entitled to salary as an officer in the army while holding abroad a diplomatic or a consular office.

Badeau *v.* United States (1889), 130 U. S. 439, 9 S. Ct. 579.

The acts of June 6, 1900, 31 Stat. 637, and March 3, 1901, 31 Stat. 1179, making appropriation for the "expenses of delegates to the proposed International Conference of American States [in Mexico], and for necessary clerical assistance," do not authorize the payment of expenses, or compensation, of counsel to the delegates.

Knox, At. Gen., Oct. 1, 1901, 23 Op. 533.

A public minister who was at home at the time of his recall and who was paid his salary down to the date of his recall, is not entitled, in addition, to compensation for such further time as would be necessarily spent in coming home from the seat of his mission.

Black, At. Gen., 1858, 9 Op. 261.

Where a minister is, with the permission of the Department of State, away from the capital of the country to which he is sent, but is within his jurisdiction and in communication with the government to which he is accredited, he is technically at his post, and is not absent within the contemplation of the law or the regulations. In such a situation he could not lawfully designate another person to act as chargé d'affaires ad interim. Were the case otherwise, his salary would cease after the expiration of sixty days' physical absence from the capital, under the provisions of sec. 1742, Revised Statutes.

Mr. Hay, Sec. of State, to Mr. King, min. to Siam, No. 64, Oct. 2, 1900, MS. Inst. Siam, I. 319.

2. EXPENSES.

§ 694.

"Congress have mortified me a little by cutting off one-fifth of my salary, at a time when the increase of my family rather required an increase of it. The consequence of it must be that I must entertain less company, whereas the interest of the United States requires that I should entertain more. There is not a man in the world less inclined to pomp or to entertainments than myself, and to me personally it is a relief to be excused from both. But if I know anything in the world, I know that this measure is not for the public good, nor a measure of economy. If there is anybody in America who understands economy better than the Dutch nation, I know nothing of either, and their policy is always, upon occasions of consequence, to appoint ambassadors, and even ambassadors extraordinary, as they did at the late peace, my friend Brantzen, with seventy-five thousand guilders to furnish his house and his table, and seventy-five thousand guilders a year to spend in it. In short, that nation which places its own ambassadors at the tail of the whole creation, can not itself expect to be soon at the head. If this policy do not expose our country to a million insults, and at last compel her by war and bloodshed to consult better her own honor, I am much mistaken. How are we to do? We are to negotiate with all the ambassadors here, that is, we are to be invited to dine to-morrow at a table with three thousand pounds sterling in plate upon it, and next day we are to return this civility, by inviting the same company to dine with us upon earthenware! I am well aware of the motives to this conduct, which are virtuous and laudable, but we shall find that we can not keep up our reputation in Europe by such means, where there is no idea of the motives and principles of it, and where extreme parsimony is not economy. We have never been allowed anything to furnish our houses or tables, and my double capacities have obliged me to furnish myself, both in Holland and France, which, besides exposing me to be unmercifully robbed and plundered in my absence, has pinched and straitened me confoundedly. However, I am the best man in the world to bear it, and so be it."

Mr. J. Adams to Mr. Warren, Aug. 27, 1781, 9 John Adams's Works, 524, 525. See, also, 3 id. 139, 161.

The report of Mr. Jefferson, as Sec. of State, on Nov. 3, 1792, in respect to expenses of foreign intercourse, is given in 1 Am. State Papers, For. Rel. 137.

As to the inadequacy of the salary allowed ministers in Paris for their support, see Mr. Gallatin to Mr. Madison, Nov. 23, 1815, 1 Gallatin's Writings, 659.

"He [the Duke of Dorset] then told me I must be in London time enough to pay my respects to the King on the 4th of June, his birthday; that to that end I must carry over from hence a fine new coat, ready-made, for that it was a rule of etiquette there for everybody who went to court to have new clothes upon that day, and very rich ones, and that my family must be introduced to the Queen. I told him I was sorry to hear that, but that I hoped it was not indispensable, for that as at the court of Versailles the families of ambassadors only were required to be presented, and ministers plenipotentiary and envoys had their option, my family had chosen to avoid it here for many reasons. He said it was true, that here the etiquette required only the presentation of ambassadresses; but in England it was otherwise, and the ladies and daughters of all ministers must be presented to the Queen.

"I hope, sir, you will not think this an immaterial or a trifling conversation, when you consider that the single circumstance of presenting a family to court will make a difference of several hundred pounds sterling in my inevitable annual expenses. This is not the first serious lecture that I have had upon the subjects of etiquette, and even dress. I have formerly related to you in conversation another much more grave, which I had five years ago from the Count de Vergennes. I believe I have also repeated to you similar exhortations made to me, even by the best patriots in Holland. There is a certain appearance in proportion to rank, which all the courts of Europe make a point of exacting from everybody who is presented to them."

Mr. J. Adams to Mr. Jay, May 13, 1785, 8 John Adams's Works, 250.

"Is it necessary that the United States should be represented with foreign powers? That has long ceased to be a question. Shall they maintain a proper station there, not assuming, but dignified, such as the general expectation and common opinion of mankind have given them? That has never been a question. The character of the country, if not its rank, is in some degree affected by that which is maintained by its ministers abroad. Their utility in all the great objects of their mission is essentially dependent on it. A minister can be useful only by filling his place with credit in the diplomatic corps, and in the corresponding circle of society in the country in which he resides, which is the best in every country. By taking the proper ground, if he possesses the necessary qualifications and is furnished with adequate means, he will become acquainted with all that passes, and from the highest and most authentic sources. Inspiring confidence by reposing it in those who deserve it, and by an honorable deportment in other respects, he will have much influence, especially in what relates to his own country. Deprive him of the necessary means to sustain this ground, separate him from the circle to which he belongs, and he is

reduced to a cipher. He may collect intelligence from adventurers and spies, but it will be of comparatively little value; and in other respects he had as well not be there."

> Mr. Monroe, Sec. of State, to Mr. Lowndes, chairman of Committee on Ways and Means, Apr. 5, 1816, quoted in Schuyler's American Diplomacy, 150.
>
> Mr. Monroe, when succeeding Mr. Morris as minister at Paris, was, in consequence of the hospitality required of him, "encouraged not only to spend all his salary in his office, but much more, and had he been in a condition to enlarge his expenditures still beyond, his country would have profited by the sacrifice." "As a preliminary principle, it seems clear that the representatives of a great nation like the American ought to appear in some measure as the representatives of other great nations appear; otherwise the loss of influence produced by refusing to submit to small expenses may have to be made good by other expenses. . . . Whoever is fit to represent a nation at a great court must be trusted to act on these occasions at his own discretion, subject to the approbation of his superiors at home." (Mr. Vaughan, Memorandum of 1826 in Monroe MSS.)

"The late royal marriage, and the other that is in prospect, make distressing drafts upon the pockets of all who are obliged to go through the ceremonies to which they give rise. To-morrow the Queen holds a drawing room, and we have a summons from the Lord Chamberlain to attend a party at Carlton House on Monday. I would as soon have been served with a summons, in debt, for fifty pounds sterling. Ladies who have been at court and know what must be the expense of a wardrobe will be the persons to understand this remark."

> Mr. Rush, minister at London, to Mr. Monroe, President (unofficial), Apr. 22, 1818, Monroe MSS.

"The general superintendence of our foreign relations, which, under your direction, is vested in the head of the State Department, would seem to require that he should, at proper periods, bring to your view the state of our diplomatic intercourse with other nations, and suggest the measures which occur to him for making its agency more effectual.

"That agency employed (necessarily perhaps) by European powers, in forming or defeating political combinations, and in a vigilant observation of each other's plans and operations, with us has different objects. Remote from these scenes of political jealousy and strife, strong in our own resources, and giving no umbrage by intermeddling in the affairs of other nations: we want no alliances for our defence, nor do we fear that any will be formed which it will be our interest to defeat; and thus have no motive for entering into the vortex of European diplomacy. Ours has a distinct character. Its only objects are, the preservation of peace; the extension, to other

powers, of a mutually beneficial commerce; the promotion of a friendly interchange of good offices; and the establishment, by treaty, of principles which may render wars less frequent, and disarm them, when they must occur, of many unnecessary horrors, inconsistent with the manners and feelings of the age in which we live.

"Confined, however, to these objects, this branch of the Executive functions of our Government would seem to be sufficiently important; but all who have observed its operations must be convinced, that its utility is not sufficiently appreciated, and that it is even regarded with an unreasonable jealousy. Ministers are considered as favorites, selected to enjoy the pleasures of foreign travel at the expense of the people; their places as sinecures; and their residence abroad as a continued scene of luxurious enjoyment.

"Their exertions, their embarrassments, their laborious intercourse with the governments to which they are sent, their anxious care to avoid anything that might, on the one hand, give just cause of offence, or to neglect or abandon the rights of their country or its citizens, on the other, are all unknown at home. Even the merit of their correspondence, from which, at least, the reward of honor might be derived, is hid in the archives of the Department, and rarely sees the light; and, except in the instances of a successful negotiation for claims, a minister returns to his country, after years of the most laborious exertion of the highest talent, with an injured, if not a broken fortune, his countrymen ignorant of his exertions, and undervaluing them, perhaps, if known. On the whole, there is scarcely an office, of which the duties, properly performed, are more arduous, more responsible, and less fairly appreciated, than that of minister to a country with which we have important commercial relations. Yet there is some reason to believe that appointments to them are sometimes eagerly sought from the same false ideas of the nature of the employment. To these mistaken ideas, more or less prevalent, may be traced many of the evils which have operated, and still operate, injuriously upon the interests and reputation of the country. . . .

"A minister to a foreign power, whatever may be his grade, is the accredited agent of his country. If he is forced, from the inadequate compensation that is allowed him, to live in a manner that will not allow him to associate, on an equal footing, with others of the same grade, he is deprived of many of the advantages which social intercourse affords, to perform essential duties, and to gain important information which can only be obtained by mixing in the first circles. It is not expected, nor should I recommend, that his allowance should be such as to enable him to vie, in expense of living, with the ministers of monarchs, who allow extravagant salaries, and who, themselves, have large fortunes, which they expend in addition to their official allow-

ance; but he ought to have the means of returning civilities which he receives—of giving to his countrymen a plain hospitable reception when they visit the place of his residence; and, above all, he ought to have an allowance that will enable him to meet the expenses absolutely necessary for the due performance of his official duties, without trenching on his salary so much as to render it entirely incompetent to his necessary and decent support. . . .

"The usual answer to these representations is that, notwithstanding all these inconveniences, candidates are always found eagerly seeking these appointments. But it must be remarked that these candidates are of two kinds: First, men of wealth, who are willing to purchase the honor of the station at the expense of their private fortunes. But, although these are not always the fittest, in other respects, for the place, they are sometimes selected, and their appointment is popular, because there seems to be no objection to a minister's keeping up a decent appearance, provided he does it at his own expense. Secondly, there are others who seek these appointments, because they make false calculations on the consequences. They resolve to be very economical, to live within their income, and to be drawn into no extravagance. But, on arriving at their place of destination, they find that expenses which might, with prudence, have been avoided here, are inevitable abroad. Civilities are received which must be returned; strangers are introduced who must be entertained; their countryment call on them, and must be treated hospitably; in short, they find themselves obliged to live as others do; or, to forego all the advantages which social intercourse would give them in the business of their mission. The consequence is, that all our ministers return with impaired fortunes, however firm their resolutions have been to avoid unnecessary expense. It is possible there may be exceptions; but they are certainly very rare. If, then, none of the ministers we have sent abroad, however prudent, have been able to live for the salaries that are allowed them, the conclusion is inevitable, that the salaries ought to be increased, or the ministers should be recalled. If the mission is useful it ought to be supported at the public, not at private expense; and the representatives of a great nation ought not to be obliged to employ, in devising parsimonious expedients for their support, that time and those talents which ought to be occupied in the service of their country."

Report of Mr. Livingston, Sec. of State, to President Jackson, Jan. 31, 1833, H. Ex. Doc. 94, 22 Cong. 2 sess.

"I have, since my arrival, been living inconveniently in an hotel, taking time to get my establishment on a footing of economy united with the necessary respectability of my station; and I find that the four articles of house rent, coach hire, servants, and fuel will take about seven thousand dollars, leaving for all my other expenses, in this

expensive capital, two thousand dollars. I make this statement, not because I can have any interest in it, for I am not rich enough to remain here until some remedy could be applied to the evil, but for the honor of the country, and to enable it to avail itself of the services of other than men of large fortunes." (Mr. Livingston, min. at Paris, to the Sec. of State, ——, 1834, Hunt's Life of Livingston, 414. This does not appear in the Department records.)

"Now, in order to preserve good relations with a country, it is not sufficient simply to have a person living in a town as cheaply as he can afford to exist, because the social position of your representative is a very important element in his power to be useful. In regard to his intercourse with the ministers of the country, great facilities and great means of good understanding are afforded by easy social intercourse, which can only possibly be obtained by his being able to receive them, as well also as being received by them. Again, it is of great importance that your embassador at Paris should be in habits of social intercourse with the public men not in office, that he should have the means of receiving them, and becoming acquainted with their views, and explaining to them the views and policy of his own country. Therefore, I think that it is of great importance to this country that your representative at Paris should be in such an easy position with regard to money affairs as may enable him to receive hospitably persons of all kinds, and I may also say, of different nations in Paris."

Lord Palmerston, testimony before committee of House of Commons, quoted in S. Ex. Doc. No. 93, 32 Cong. 1 sess. 8. (Schuyler's Am. Diplomacy, 150.)

"In several oriental countries generous offers have been made of premises for housing the legations of the United States. A grant of land for that purpose was made some years since by Japan, and has been referred to in the annual messages of my predecessor. The Siamese government has made a gift to the United States of commodious quarters in Bangkok. In Corea the late minister was permitted to purchase a building from the government for legation use. In China, the premises rented for the legation are favored as to local charges. At Tangier, the house occupied by our representative has been for many years the property of this government, having been given for that purpose in 1822 by the Sultan of Morocco. I approve the suggestion heretofore made, that, in view of the conditions of life and administration in the Eastern countries, the legation buildings in China, Japan, Corea, Siam, and perhaps Persia, should be owned and furnished by the government, with a view to permanency and security. To this end I recommend that authority be given to accept the gifts adverted to in Japan and Siam, and to purchase in the other

countries named, with provision for furniture and repairs. A considerable saving in rentals would result."

President Cleveland, annual message, Dec. 8, 1885, For. Rel. 1885, xvii.

As to the grant of land made by Japan, above mentioned, see For. Rel. 1885, 554–556, 560–562, 566–567. See, also, infra, § 851.

Expenses of insurance on legation property can not be allowed except by express authority of law. (Mr. Foster, Sec. of State, to Mr. Denby, No. 735, July 1, 1892, MS. Inst. China, IV. 660.)

"I am thoroughly convinced that in addition to their salaries our ambassadors and ministers at foreign courts should be provided by the government with official residences. The salaries of these officers are comparatively small and in most cases insufficient to pay, with other necessary expenses, the cost of maintaining household establishments in keeping with their important and delicate functions. The usefulness of a nation's diplomatic representative undeniably depends much upon the appropriateness of his surroundings, and a country like ours, while avoiding unnecessary glitter and show, should be certain that it does not suffer in its relations with foreign nations through parsimony and shabbiness in its diplomatic outfit. These considerations and the other advantages of having fixed and somewhat permanent locations for our embassies, would abundantly justify the moderate expenditure necessary to carry out this suggestion."

President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, xxxvii.

This recommendation was repeated in President Cleveland's annual message of Dec. 7, 1896.

"I earnestly urge that Congress recast the appropriations for the maintenance of the diplomatic and consular service on a footing commensurate with the importance of our national interests. At every post where a representative is necessary, the salary should be so graded as to permit him to live with comfort." (President Cleveland, annual message, Dec. 8, 1885, For. Rel. 1885, xvii.)

"Recommendation was made in the last annual message, of December 2, 1895, in favor of providing official residences for the ambassadors and ministers of the United States at foreign capitals. Such provision is common in the diplomatic administration of other nations, and several important embassies and legations in this city are established in premises owned by their respective governments. The present custom of throwing upon an envoy, often appointed for a brief, uncertain term, the onerous charge of leasing and equipping a proper official residence develops in practice many objections, personal in part, but also partly official, owing to the frequent changes of quarters it entails.

"The experience of many years shows the advisability, if not the imperative need, of governmental ownership of our permanent representative establishments abroad. There is no question that it will largely conduce to the more orderly and effective fulfillment of the purpose of those missions, by affording a degree of permanence, security, and representative dignity which is obviously lacking when the haphazard scheme of annual leases by the envoy, and at his personal cost, is followed.

"To the end of testing the views and conclusions of the Department of State by obtaining data in this regard covering the whole field of our diplomatic representation, each ambassador and minister has been asked to report upon the cost of a suitable residence in the capital of the country to which he is accredited, having especial regard to the proper accommodation of the public offices of the mission and the security of its archives. Estimates of the necessary expenditure, based upon such reports, will in due time be submitted to Congress."

Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, xc.

The appropriation for bringing home the remains of deceased diplomatic and consular officers can not be applied for the purpose of transferring from the port of arrival, in the United States, to the place of interment therein, the remains of a naval officer who has been acting as naval attaché of an American legation, and for the removal of whose remains to the United States on board a man-of-war the Navy Department had arranged.

Mr. Bayard, Sec. of State, to Mr. Warner, Aug. 5, 1886, 161 MS. Dom. Let. 172.

3. Contingent Fund and Secret Service.

§ 695.

"The allowance to a minister resident of the United States is 4,500 dollars a year *for all his personal services and other expenses*, a year's salary for his outfit, and a quarter's salary for his return. It is understood that *the personal services and other expenses* here meant do not extend to the cost of gazettes and pamphlets transmitted to the Secretary of State's office, to translating or printing necessary papers, postage, couriers, and necessary aids to poor American sailors. These additional charges, therefore, may be inserted in your accounts; but no other of any description, unless where they are expressly directed to be incurred. The salary of your new grade being the same as of your former one, and your services continued, though the scene of them is changed, there will be no intermission of salary, the new one beginning where the former ends, and ending when you shall receive

notice of your permission to return. For the same reason there can be but one allowance of outfit and return, the former to take place now, the latter only on your final return."

Mr. Jefferson, Sec. of State, to Mr. Short, Jan. 23, 1792, MS. Inst. U. States Ministers, I. 115.

See Mr. Jefferson, Sec. for For. Aff., to Sec. of Treas., March 12, 1791, 4 MS. Am. Let. 211.

As to the expenses of the legation at Constantinople, see Mr. Bayard, Sec. of State, to Mr. Cox, No. 67, Jan. 8, 1886; affirmed, as to horse hire, by Mr. Blaine, Sec. of State, to Mr. Hirsch, No. 102, July 1, 1890, MS. Inst. Turkey, IV. 353; V. 139.

"As to the expense incurred for court mourning, a review of the course pursued by the Department of State in regard to contingent allowances shows that none was ever made by it, under that head, with the single exception of the case of Mr. McLane, to which you refer, and which you are already informed is regarded by the President as having been made without sufficient consideration. The President, before whom your dispatch has been laid, desires me to state to you that he sees no cause for changing the decision which he had, with deliberation, adopted on the subject."

Mr. Forsyth, Sec. of State, to Mr. Stevenson, Apr. 1, 1840, MS. Inst. Gr. Brit. XIV. 302.

The appropriation for the contingent expenses of foreign intercourse is placed at the disposal of the executive, who is charged with the care and management of all our foreign relations. And, as it has been the practice of our government, from its earliest history, to interchange presents with the semibarbarous nations of Asia and Africa, and as the executive is vested with a discretion respecting the manner in which friendly relations with them can be best maintained, it follows that, if he shall be of opinion that the public interests will be promoted by tendering a present in return for one received, he may legally do so, and cause the expense thereof to be defrayed from the funds thus placed at his disposal.

Mason, At. Gen., 1845, 4 Op. 358.

The Attorney-General therefore advised that the President might defray from the appropriation in question the cost of recasting cannon to be presented to the Imaum of Muscat, in return for presents received.

"The usual annual appropriation 'for the contingent expenses of intercourse between the United States and foreign nations' has been disbursed since the date of the act of May 1, 1810, in pursuance of its provisions. By the third section of that act it is provided: 'That when any sum or sums of money shall be drawn from the Treasury, under any law making appropriation for the contingent expenses of intercourse between the United States and foreign nations, the Presi-

dent shall be, and he is hereby, authorized to cause the same to be duly settled, annually, with the accounting officers of the Treasury, in the manner following, that is to say: By causing the same to be accounted for, specially, in all instances wherein the expenditure thereof may, in his judgment, be made public, and by making a certificate of the amount of such expenditures as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum or sums therein expressed to have been expended.'

"Two distinct classes of expenditure are authorized by this law; the one of a public, and the other of a private and confidential character. The President in office at the time of the expenditure is made by the law the sole judge whether it shall be public or private. Such sums are to be 'accounted for specially in all instances wherein the expenditure thereof may, in his judgment, be made public.' All expenditures 'accounted for specially' are settled at the Treasury, upon vouchers, and not on 'President's certificates,' and, like all other public accounts, are subject to be called for by Congress, and are open to public examination. Had information as respects this class of expenditures been called for by the resolution of the House, it would have been promptly communicated.

"Congress, foreseeing that it might become necessary and proper to apply portions of this fund for objects, the original accounts and vouchers for which could not be 'made public' without injury to the public interests, authorized the President, instead of such accounts and vouchers, to make a certificate of the amount 'of such expenditures as he may think it advisable not to specify,' and have provided that 'every such certificate shall be deemed a sufficient voucher for the sum or sums therein expressed to have been expended.'

"The law making these provisions is in full force. It is binding upon all the departments of the government, and especially upon the executive, whose duty it is 'to take care that the laws be faithfully executed.' In the exercise of the discretion lodged by it in the executive several of my predecessors have made 'certificates' of the amount 'of such expenditures as they have thought it advisable not to specify,' and upon these certificates, as the only vouchers, settlements have been made at the Treasury."

President Polk, special message, April 20, 1846, Richardson's Messages, IV. 432.

"Actuated undoubtedly by considerations of this kind, Congress provided such a fund, coeval with the organization of the Government; and subsequently enacted the law of 1810 as the permanent law of the land. While this law exists in full force, I feel bound by a high sense of public policy and duty to observe its provisions, and the uniform practice of my predecessors under it." (Id. 435.)

O