A. J. McGeth,
Augusta
1834.

A

PRACTICAL TREATISE

ON THE

LAW OF NATIONS,

RELATIVE TO THE LEGAL EFFECT OF WAR ON THE COMMERCE OF

Belligerents and Neutrals;

AND

ON ORDERS IN COUNCIL AND LICENSES.

BY JOSEPH CHITTY, ESQUIRE.
Of the Middle Temple.

TO WHICH ARE ADDED,

EXTRACTS FROM GROTIUS, BYNKERSHOEK, AND VATTEL: ALSO, THE LETTER OF SIR WILLIAM SCOTT, AND OF THE DUKE OF NEWCASTLE, &c. CONTAINING MATTERS APPLICABLE TO

THE LAW OF PRIZE.

BOSTON:
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.....
1812.

DISTRICT CLERK'S OFFICE.

DISTRICT OF MASSACHUSETTS, TO WIT:

BE it remembered, That on the twenty-eighth day of October, A. D. 1812, and in the thirty-seventh year of the Independence of the United States of America, Bradford and Read of the said district, have deposited in this office the title of a book, the right whereof they claim as proprietors, in the words following, to wit:

"A Practical Treatise on the Law of Nations, relative to the legal effect of War on the Commerce of Belligerents and Neutrals; and on Orders in Council and Licenses. By Joseph Chitty, Esq. Of the Middle Temple. To which are added, Extracts from Grotius, Bynkershoek, and Vattel: also, the letter of Sir William Scott, and of the Duke of Newcastle, &c. containing matters applicable to the Law of Prize.

In conformity to the Act of the Congress of the United States, intitled, "An Act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the Authors and Proprietors of such copies, during the times therein mentioned;" and also, to an act, intitled "An act supplementary to an act, intitled, an act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies during the times therein mentioned; and extending the benefits thereof to the Arts of Designing, Engraving, and Etching Historical, and other Prints."

WILLIAM S. SHAW,
Clerk of the District of Massachusetts.

ADVERTISEMENT TO THE AMERICAN EDITION.

In giving an American edition of the following work, the publishers were persuaded the public would take a deep interest in the decisions reported and doctrines advanced in this volume.

We have indeed, many theoretic works on the law of nations, on neutral and belligerent rights, &c. But this volume is more of a practical nature; and has the peculiar merit of exhibiting a collection of judicial decisions methodically arranged, on the several topics which are therein discussed.

To the Merchant and the Lawyer, the work, we think, cannot fail to be interesting. And it is believed the Politician will be furnished with useful information from ascertaining the legal decisions of a nation, with which we have been long connected, and in a commercial intercourse with which our interests are deeply involved. The volume also affords much incidental matter, which must be valuable to those who are to legislate on either our maritime or national rights.

The character of Chitty, the author of this work, is already well known to gentlemen of the profession. His treatise on Bills of Exchange, and another, on Pleading, furnish ample proofs of his talents, and have established his reputation as an accurate and judicious compiler.

It is not intended to assert, that every position of the writer of this volume is tenable, or that every principle advanced is correct.

Some of the limitations of neutral commerce, expressed in the fourth and fifth chapters, have been considered in this country, and by men of distinguished names in Great Britain, as an undue extension of belligerent rights. Several of the positions, which the author considers as legitimate doctrines of the Law of Nations, have been strenuously disputed, and the controversy has, at length, issued in a contest of melancholy aspect to both nations.

The doctrine of retaliation in reference to neutrals which the author considers as admitted, has been denied by the most eminent jurists,* and it is believed, that the case of the Nayade, quoted from the decisions of Sir William Scott, will be found not to have been grounded on the principle which the author has stated.

Some quotations from other writers, merely referred to by the author, will be found in an appendix; which also furnishes a letter from the DUKE OF NEWCASTLE, and a letter and instructions from SIR WILLIAM SCOTT and SIR JOHN NICHOLL, prepared at the instance of HON. JOHN JAY, ESQ. The decisions of American cases could not be furnished, as promised in the proposals, without delaying the publication for several weeks.

* Vid. Bynkershoek, Quæst: Jus. Pub. ch. 4.

BOSTON, November, 1812.

DEDICATION.

TO THE RIGHT HONOURABLE

THOMAS LORD ERSKINE,

&c. &c. &c.

MY LORD,

PERMIT me to dedicate to you the following pages, as a small testimony of my respect and regard; and at the same time to acknowledge, how much I am indebted to your Lordship for many of the principles to be found in this work, collected from your Lordship's most comprehensive Speech upon the *Law* as well as *Policy* of the recent ORDERS IN COUNCIL, which

form a part of the inquiry in this volume. I have the honour to subscribe myself,

My Dear Lord,

with the greatest respect and gratitude,

Your Lordship's

much obliged and

faithful servant,

JOSEPH CHITTY.

Temple, Jan. 23, 1812.

PREFACE.

THOUGH the great national question between this country and America, as to the legality and policy of our extensive blockades, and of the Orders in Council, occasioned by the Berlin and Milan Decrees, has been the subject of much able discussion, as well in Parliament as in various political publications; yet it appears to me, that many of the principles and rules of the Law of Nations, upon which measures of this nature may be founded, have either not been noticed, or have not been so minutely considered as their importance deserves. I have therefore endeavoured, in the following pages, to collect and arrange all the rules and decisions connected with this subject; and as the whole law relative to the foreign commerce of belligerents and neutrals, in time of war, is peculiarly interesting, as well to the statesman and the lawyer as to the merchant, I have extended my inquiry into the Law of Nations generally, and of Great Britain in particular, as to the effect of war upon the commerce of belligerents and neutrals.

In the *first* chapter, I have considered the principle of the rule which *prohibits commercial intercourse between the subjects of belligerent states*, or their allies, without the permission of the Sovereign, and the consequences of its violation (*a*), together with the futility of the various attempts to evade this law (*b*).

In the *second* chapter, the legal definition of *war*, and of the term *alien enemy*, is considered (*c*), and what constitutes an *hostile character* as to commercial purposes, so as to subject the property of the party to seizure, though he may not in other respects be an alien enemy (*d*); as, by having possessions in the territory of the enemy (*e*), by residence there personally, or by agent (*f*), by particular modes of traffic, by sailing under the enemy's flag (*g*); and the rule which precludes the transfer of property from an enemy to a neutral whilst in transitu (*h*).

The *third* chapter relates to the rights of belligerents to *capture* each other's property, and how far the property of neutrals may, in certain cases, be affected by this right (*i*); and here are particularly considered, the principles and rules

(*a*) 1 to 13.
(*b*) 13 to 27.
(*c*) 28 to 31.
(*d*) 31 to 57.
(*e*) 32 and 33.
(*f*) 34.
(*g*) 58.
(*h*) 60 to 64.
(*i*) 65 to 108.

on which the right of capturing property engaged in commerce is founded (*k*); the legality of *embargoes* on the breaking out of hostilities (*l*); the right of granting *letters of marque and reprisals;* by whom they are to be granted; and how they may be vacated, either by express revocation, cessation of hostilities, or by the misconduct of the grantees, are next examined (*m*). It is then shown, that, according to the modern exercise of the King's prerogative, *choses in action*, or contracts entered into before the breaking out of hostilities, are not forfeited to the King, but that the right of action is only suspended (*n*). Next are considered, the right of capture out of the territory of the belligerent (*o*), and the Law of Nations relative to *capture and re-capture* (*p*), *postliminium* (*q*) and *salvage* (*r*).

The *fourth* and *fifth* chapters relate to the effect of war upon the commerce of NEUTRALS, their right to carry on their *accustomed commerce*, and the principle upon which that right is founded (*s*); the immunity of the property of neutrals in an enemy's ship (*t*); the protection afforded to enemy's property by a neutral territory or port, and the consequent illegality of a capture

(*k*) 65 to 67.
(*l*) 68 to 82.
(*m*) 73 to 80.
(*n*) 82 to 86.
(*o*) 86 to 108.
(*p*) 91 to 93.
(*q*) 93 to 104.
(*r*) 104 to 107.
(*s*) 108.
(*t*) 111.

within cannon shot of her shores (*u*). In the next place is considered the rule, that a neutral ship affords no protection to enemy's goods (*x*), and the consequences of *neutrals being engaged in illegal commerce*, as *contraband* of war (*y*), *violations of blockade* (*z*), assistance to the enemy by conveying despatches or troops (*a*), and of the forfeiture of the immunities of the neutral character, by her unresisting submission to the outrages of one of the belligerents (*b*).

In the *fifth* chapter are considered the consequences of a neutral being engaged *in commerce usually interdicted by* the enemy in time of peace, but permitted by her in time of war, viz. her *coasting* (*c*) and *colonial trade* (*d*); of the *rule of the war* A. D. 1756 (*e*); the prohibitions that prevent the *colonial trade* being carried on by neutrals *circuitously* with the mother country (*f*), and the penalty for the infraction of these rules (*g*); and the rule as to what interest of the enemy in property, renders it liable to confiscation (*h*). The remaining subjects of inquiry in this chapter, relate to the right of a belligerent forcibly to detain and employ neutral ships for her own

(*u*) 113 to 118.
(*x*) 118.
(*y*) 119 to 128.
(*z*) 128 to 147.
(*a*) 147 to 150.
(*b*) 150 to 152.
(*c*) 153 to 159.
(*d*) 159 to 166.
(*e*) 166 to 176.
(*f*) 176 to 182.
(*g*) 182.
(*h*) 183.

emergent occasions (*i*); the right of *visitation and search*, and *consequences of resistance* (*k*); and the papers and documents usually required to entitle a neutral ship to the immunities of that character (*l*).

In the *sixth* chapter are considered the *Navigation Laws of Great Britain*, and the origin, progress, and completion of that justly celebrated code of law which has rendered our country so paramount in her naval power (*m*).

The *seventh* chapter comprises the law relative to the *prerogative of the King in peace and war*, as it affects *foreign commerce;* and here are considered the authority of the King as to *proclamations* and *embargoes*, *blockades* and other acts, and *Licenses* and *Orders in Council*, whether issued in virtue of the general prerogative of the King, or in pursuance of particular Acts of Parliament, extending the power of the King for temporary purposes.

Though the great importance of the existing contest between this country and America, upon the subject of blockades, and our Orders in Council, has more immediately drawn my attention to this branch of the law, yet it is far from my intention to publish an Essay merely with a view to any temporary political question.

(*i*) 188.
(*k*) 190 to 196.
(*l*) 196 to 199.
(*m*) 200 to 256.

I have therefore, in the following pages, endeavoured so to arrange the principles and rules of the Law of Nations generally, as it affects commerce during war, as to render the work of substantial and permanent utility to the statesman, the lawyer, and the merchant.

J. CHITTY.

Temple, 23d Jan. 1812.

LEGAL EFFECT

OF

WAR ON THE COMMERCE

OF

BELLIGERENTS AND NEUTRALS,

&c.

CHAPTER I.

OF THE ILLEGALITY OF COMMERCE BETWEEN BELLIGERENTS AND THEIR ALLIES, AND OF THE FUTILITY OF THE ATTEMPTS TO EVADE THIS LAW.

No principle is more clearly established than that when war takes place between two nations, all commercial intercourse between them must immediately cease. Hostilities once commenced, any attempt at trading on the part of the subjects of either state, unless by the permission of the sovereign, is interdicted and becomes ipso facto a breach of the allegiance due to their respective sovereigns, and as such is interdicted by the general maritime law of Europe (*a*); by that law which does not spring from the

(*a*) The Hoop, 1 Rob. Rep. 198.

institutions of this or that particular state, but which having its source in natural reason and natural justice is alike binding on the whole community of the civilized world. So indisputable is this proposition, so necessarily, as it were, does it grow out of the very nature of war itself, that all the great writers who have treated on the law and practice of nations, assume it as a point which is incontrovertible (*b*). This rule is founded upon the principle that war puts every individual of the respective belligerent governments into a state of mutual hostility, and there is no such thing as a war for arms and a peace for commerce. In that state all treaties, civil contracts, and rights of property, are put an end to, and the law imposes a duty on every subject to attack the enemy and seize his property, though by custom this is restrained to those individuals only, who have commissions from their government for that purpose. Trading, which supposes the existence of civil contracts and relations, and a reference to courts of justice, and the rights of property, is necessarily contradictory to a state of war; besides it is criminal in a subject to aid and assist the enemy, and trading affords that aid in the most effectual manner by enabling the merchants

(*b*) See Grotius, lib. 3. c. 4. s. 8.—Bynkershock, lib. 1. c. 3.—Vattel. lib. 3. c. 4. cited by Dr. Phillimore in his work on Licenses, 5. [See Appendix.]

of the enemy's country to support their government. Export duties are to be paid, when goods are brought from an enemy's country, which is furnishing the very sinews of war to the hostile government; and such trading would facilitate the means of conveying intelligence and carrying on a traitorous correspondence with the enemy, which would more than counterbalance any advantage likely to accrue to individuals from such trading. These considerations apply with peculiar force to maritime states, where the principal object is to destroy the marine and commerce of the enemy, in order to force them to peace (*c*).

It was observed by Sir Wm. Scott, in the cause of the Hoop (*d*), "that by the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse, which is a partial suspension of the war. There may be occasions, where such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely

(*c*) Potts v. Bell, 8 Term Rep. 548.

(*d*) 1 Rob. Rep. 196.

and possibly on grounds of private advantage, not very reconcileable with the general interests of the state. It is for the state alone on more enlarged views of policy, and on consideration of all circumstances that may be connected with such an intercourse, to determine, when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred, than that this intercourse cannot subsist on any other footing, than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in a time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme: and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them, if necessary, under the eye and control of the government charged with the care of the public safety (*c*)?" And after enumerating all the cases which tended to establish this rule, Sir Wm. Scott observed, "The cases which I have produced prove, that the rule has been rigidly enforced, where

(*c*) Per Sir Wm. Scott, in the Hoop, 1 Rob. Rep. 199.

acts of parliament have, on different occasions, been made to relax the navigation law, and other revenue acts; where the government has authorised, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced, where strong claim, not merely of convenience, but almost of necessity, excused it on behalf of the individuals; that it has been enforced, where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; that it has been enforced, not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice, and apply mutually to the subjects of each other."

The principal cases, which establish the illegality of commerce between belligerents, are the Hoop (*f*), and Potts v. Bell and others (*g*). In the first case, Mr. Malcolm, of Glasgow, and other Scotch merchants, had traded to Holland,

(*f*) 1 Rob. Rep. 196. (*g*) 8 Term Rep. 548.

for articles necessary for the agriculture and manufactures of that part of the country, for which they had several times before applied for and obtained the King's license; but after the passing of certain acts of parliament, having, upon application to the commissioners of the customs at Glasgow, been informed (erroneously as it afterwards appeared) that such licenses were no longer necessary, they had omitted to obtain one on that occasion, in consequence of which, the cargo being taken was condemned as prize, on the general ground, that all trading with an enemy, without the King's license, was illegal and a cause of confiscation. And in the case of Potts v. Bell, a British subject shipped from the enemy's country, on board a neutral ship, goods which he had purchased of the enemy during hostilities, and it was decided, that an insurance upon such cargo was illegal and void. These cases shew, that there is no distinction between trading with an enemy and with an enemy's country, and that aid is considered as being equally given to the enemy, whether goods be furnished immediately by the enemy, or through the medium of a neutral merchant, and that the danger of a traitorous correspondence is the same.

This strict exclusion of trade between belligerents has been carried so far as to prohibit a remittance of supplies even to a British colony,

during its temporary subjection to an enemy. This extreme point is established by the case of the Bella Guidita (*h*). In that case, Grenada, a British possession, had been seized by the French, but by the public acts, both of France and of this country, it appeared, that the island was not considered to have entirely changed its national character; the French having made ordinances with respect to it, which they would not have made in the case of an island strictly French, and the British legislature having even enacted, in the 20th year of his present Majesty, that it being just and expedient to give every relief to the proprietors of estates there, no goods of the produce of Grenada, on board neutral vessels going to neutral ports, should be liable to condemnation as prize. Notwithstanding all these evidences, that the character of Grenada was not to be considered strictly hostile, notwithstanding even the express permission to export the produce of that island, a neutral vessel sent from England with goods to be imported into Grenada was seized, as employing itself in an illicit intercourse with the enemy, and condemned in the vice-admiralty court of Barbadoes; upon appeal to the privy council by the proprietors of the cargo, the sentence was

(*h*) 1 Rob. Rep. 207.

affirmed. The hardship of the rule, as applied to this individual case, was strongly represented in the printed papers of appeal, as will be seen by the following extract (*i*) :

" In the late unfortunate war, say the appellants, Great Britain saw many of its valuable West India possessions fall into the hands of the enemy, from the absolute inability to protect them ; the proprietors being still British in principle and affection, and many of them by actual residence, and the hope being constantly entertained, as well by the public as by individuals, that those islands would soon revert to the dominion of their natural sovereign, the parliament, in the several cases of Nevis, Montserrat, St. Christopher's, Grenada, and the Grenadines, expressly permitted the produce of those plantations to be conveyed to Europe free from British capture, under limitations intended merely to prevent the abuse of this permission, by the clandestine extension of it to the produce of foreign colonies. In this provision, the principle appears to be clearly recognised and established, that these islands, though captured, were not to be considered as French, for upon what other principle could British protection have been imparted to them? and if the British legislature did thus solemnly declare its intention to protect and encourage the

(*i*) 1 Rob. Rep. 219, in notes.

produce of those plantations during the remainder of the war, upon what grounds of legal or political analogy, can it be contended, that it was criminal to transmit those supplies, without which those plantations could not possibly be continued in a state of culture? Does not the expressed permission of exportation involve a permission of all that species of necessary importation without which the pretended permission of the other is merely nugatory and insulting? It remains for your Lordships to decide, whether those could possibly be the intentions of the British government, viz. That those islands should be condemned to absolute sterility by a refusal of such necessary supplies, as the French, from a partiality for their own islands, found it convenient to withhold from them, that the only practicable mode for the immediate collection of British debts, secured upon those plantations to an enormous amount, should be prohibited and punished, and that Great Britain, instead of receiving many important articles of consumption and commerce from its ancient markets, which it still continued to consider as its own, should lie at the mercy of the ancient markets of the enemy upon such terms, as a successful monopoly would prescribe."

Cartel ships.

One of the most reasonable instances in which this rule has been enforced, appears to be in the

Cartel ships.

case of *ships of truce*, or *cartel ships*. As observed by Sir William Scott, in the case of the Venus (*k*), "The conduct of ships of this description cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity, that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations." The Venus was a British vessel, which had gone to Marseilles, under cartel, for the exchange of prisoners. She had there taken a cargo on board, and was stranded and captured on a voyage to Port Mahon. Sir William Scott condemned her, on a full view of the circumstances of the case, adding these further remarks, which are applicable to all other cases of cartel ships trading with the enemy: "It is not a question of gain, but one on which depends the recovery of the liberty of individuals, who may happen to have become prisoners of war; it is therefore a species of navigation which, on every consideration of humanity and policy, must be conducted with the most exact attention to the original purpose, and to the rules which have been built upon it; since, if such a mode of intercourse is broken off, it cannot but be followed by consequences extremely

(*k*) 4 Rob. Rep. 357.

calamitous to individuals of both countries. Cartel ships are subject to a double obligation to both countries not to trade. To engage in trade may be disadvantageous to the enemy, or to their own country; both are mutually engaged to permit no trade to be carried on under a fraudulent use of this intercourse; all trade must therefore be held to be prohibited, and it is not without the consent of both governments, that vessels engaged in that service can be permitted to take in any goods whatever."

Cartel ships.

This rule, which renders it illegal for a British subject to carry on commerce with an enemy, also precludes an *ally* from a similar intercourse. In the case of the Nayade (*l*), Sir William Scott said, "that the case of the Enigheid was decided on the ground that, during a conjoint war, no subject of one belligerent can trade with the enemy without being liable to a forfeiture of his property engaged in such trade, in the courts of the ally." The principle of this rule is stated by Sir William Scott, in the case of the Neptunus (*m*), who said, "It is well known that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce. This is the natural result of a state of war, and it is by no means necessary

Illegal for an *ally* to carry on commerce with enemy.

(*l*) 4 Rob. Rep. 251. (*m*) 6 Rob. Rep. 405.

Illegal for an *ally* to carry on commerce with enemy.

that there should be a special interdiction of commerce to produce this effect. At the same time it has happened, since the world has grown more commercial, that a practice has crept in, of admitting particular relaxations, and if one state only is at war, no injury is committed to any other state. It is of no importance to other nations how much a single belligerent chooses to weaken and dilute his own rights; but it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express, contract, that one state shall not do any thing to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be, that it will supply that aid and comfort to the enemy, especially if it is an enemy depending very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause, and the interests of its ally. It should seem, that it is not enough therefore to say, that the one state has allowed this practice to its own subjects, it should appear to be at least desirable that it could be shewn, that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate state."

Attempts to elude the rule unavailable.

The advantages which particular individuals might derive from the violation of this rule, have caused a number of attempts to elude it, but no artifice has yet succeeded in discovering any legal mode of trade between belligerents, without the express permission of their governments. In the case of the Jonge Pieter (*n*), an attempt was made to protect a cargo shipped in England, and ultimately destined for an enemy's market, by dividing the voyage, and directing the cargo to be taken, in the first instance, to a neutral port, from whence it might or might not be afterwards carried forward to the place of its real destination, the enemy's market. But Sir William Scott condemned it to the captors, making use of the following expressions (*o*): "Without the license of government, no communication, direct or indirect, can be carried on with the enemy. On the policy of that law, this is not the place to observe; it is the law of England; and if any consideration of mercantile policy interfere with it, the duty of the subject is to submit his case to that authority of the country which can legalize such a trade looking to all the considerations of political as well as commercial expediency that are connected with it. But an individual cannot do this; he is not to say, such a trade is convenient, and therefore

(*n*) 4 Rob. Rep. 79.

(*o*) 4 Rob. 83, 84.—See to the same effect, 3 Rob. 21.

Attempts to elude the rule unavailable.

legal; neither can the court exercise such a distinction. Where no rule of law exists, a sense or feeling of general expediency, which is, in other words, common sense, may fairly be applied; but where a rule of law interferes, these are considerations to which the court is not at liberty to advert. In all the cases that have occurred on this question, and they are many, it has been held indubitably clear, that a subject cannot trade with the enemy without the special license of government. The interposition of a prior port makes no difference; all trade with the enemy is illegal, and the circumstance, that the goods are to go first to a neutral port, will not make it lawful. The trade is still liable to the same abuse, and to the same political danger, whatever that may be."

Nor have the endeavours which have been made to protect the cargo, by the intervention of *third persons*, been more successful than the interposition of a fictitious destination. Thus, in the case of the Samuel (*p*), it was decided, that if an English subject employs a neutral to purchase for him in the country of the enemy, the neutral is in such case but the mere agent, the goods must then be considered to pass immediately from the enemy to the British subject, and such a transaction would be illegal. But if a

(*p*) 4 Rob. Rep. 284—Vid et Potts v. Bell, 8 Term Rep. 548.

neutral merchant has, bona fide, goods or vessels of his own, lying in an enemy's port, the Court admitted that he might dispose of them, even to a British subject, as freely as if they were on the seas, and the locality of the ship will not affect the legality of the sale. However, we shall hereafter see, that merchants, taking up their residence in an enemy's country, are not to be considered neutrals at all, so that there is little possibility of collusion by this resource.

Attempts to elude the rule unavailable.

A *partnership* has also been tried as a cloak for this illegal intercourse, but with the same unvarying ill success which has attended all other stratagems. For, in the case of the Franklin (*q*), which was a case of trade carried on with the enemy by a firm, consisting partly of neutrals and partly of British subjects, Sir William Scott said, "It has been decided, that even an inactive, or sleeping partner, as it is termed, cannot receive restitution in a transaction in which he could not lawfully be engaged as a sole trader."

There was formerly some doubt, whether the rule, which we have seen to be thus rigidly enforced in the Admiralty Courts, was to prevail to the same extent in the Courts of Common Law. The cases of Gist and Mason (*r*), and Bell and Gilson (*s*), had left the question in

Decisions at Law on this rule.

(*q*) 6 Rob. Rep. 131.
(*r*) 1 Term Rep. 84.
(*s*) 1 Bos. & Pul. 245.

Decisions at Law on this rule.

much perplexity, but the uniformity of decision between both tribunals was definitively established by Lord Kenyon, in the case of Potts against Bell, in error (*t*). His Lordship said, " That the reasons urged, and the authorities cited, were so many, so uniform, and so conclusive, to shew that a British subject trading with an enemy was illegal, that the question might be considered finally at rest, and that it was needless to delay giving judgment for the sake of pronouncing the opinion of the Court in more formal terms; more especially, as they could do but little more than recapitulate the judgment, with the long train of authorities, already to be found in the clearest terms in the printed report of the case of the Hoop, published by Dr. Robinson."

Nor does it make any difference in the illegality of the trade, that it be carried on by land rather than by water. There is an authority in Rolle's Abridgment, 173, shewing, that it was anciently deemed illegal to trade with Scotland, then in a general state of enmity with this kingdom; and in the case of the Hoop, Sir William Scott, referring to this note in Rolle, declares, " That the rule in no degree arises from the transaction being upon the water, but from principles of public policy, and of public law, which are just as weighty on the one element as

(*t*) 8 Term Rep. 548.

on the other, and of which the cases have happened more frequently upon the water, merely in consequence of the insular situation of this country; but when an enemy existed in the other part of the island, the only instance in which it could occur upon the land, it appears to have been deemed equally criminal in the jurisprudence of this country."—In the case of Gist *v.* Mason (*u*), Lord Mansfield, mentioned an instance, where trading with an enemy was deemed unlawful, from a note given him by Lord Hardwicke, on a reference to all the Judges, in the time of King William the Third, whether it were a crime at Common Law to carry corn to an enemy, who were of opinion that it was a misdemeanour."

Decisions at law on this rule.

But though the rule is thus general and impartial, it is not extended beyond its just and strict construction. The case of the packet De Bilboa (*x*), was a claim made by an English house for goods shipped on board a Spanish vessel, by order of Spanish merchants, before hostilities with Spain. Hostilities had been declared subsequently to the shipment, and the vessel, on its voyage from London to Corunna, had been seized by a British captor. Sir William Scott observed, "That the English merchant, who shipped the goods in London, was not called upon to

Exceptions to the rule.

(*u*) 1 Term Rep. 84.; see also Skinner, 638.

(*x*) 2 Rob. Rep. 133.

Exceptions to the rule.

know that the injustice of the other party would produce a war before the delivery of his goods; that the goods were to have been at the risk of the shippers till delivery: and that the contract was perfectly fair. He therefore decreed restitution to the shipper."

The case of the Abby (*y*) also shews, that the Court of Admiralty has not been disposed to force the rule beyond its true spirit. A ship sailed on the 11th September, 1795, for the island of Demarara, then a Dutch colony. War being declared, on the 16th of the same month, against Holland, Demarara became of course a hostile possession. The ship was captured off its coast, in May, 1796, but the island having in the mean time surrendered to the British forces, had become a British colony. Sir William Scott held, that as the port to which the ship was destined did, at the time of her carrying the design into effect, belong, not to an enemy, but to his Britannic Majesty, the ship was not to be deemed in fact an illegal trader. "I conceive," said he, "that there must be an act of trading to the enemy's country, as well as the intention; there must be, if I may so speak, a legal as well as a moral illegality. If a man fires a gun at sea, intending to kill an Englishman, which would be legal murder, and by accident does not kill an Englishman, but an enemy, the moral guilt is the same, but

(*y*) 5 Rob. Rep. 251.

the legal effect is different; the accident has turned up in his favour, the criminal act intended has not been committed, and the man is innocent of the legal offence. So, if the intent was to trade with an enemy, (which I have already observed cannot be ascribed to the party at the commencement of the voyage, when hostilities were not yet declared), but at the time of carrying the design into effect, the person is become not an enemy; the intention here wants the corpus delicti. No case has been produced in which a mere intention to trade with the enemy's country, contradicted by the fact of its not being an enemy's country, has enured to condemnation. Where a country is known to be hostile, the commencement of a voyage towards that country may be a sufficient act of illegality; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect. On principle, I am of opinion, that the party is free from the charge of illegal trading." Exceptions to the rule.

From the same case, and from the case of the Hoop (z), it is further to be collected, that where cargoes have been laden before the war, they will be restored to the claimants, if it be shewn that on the first notice of hostilities all possible diligence was employed to countermand the voyage, or alter its destination, so as to avoid the culpability of an illegal trading with the enemy. But

(z) 1 Rob. Rep. 198.

Exceptions to the rule.

if proper exertions have not been made, and the cargo has been suffered, whether wilfully or negligently, to sail from the enemy's country, no excuse deduced from individual convenience, or from the alleged necessity of withdrawing British property out of a territory which has become hostile can, of strict right, secure the cargo without a protection from government (*a*). It is true that in the case of Bell and Gilson (*b*), it was held, that if an Englishman, at the commencement of hostilities, had goods in an enemy's country, he might bring them away. But it seems, that the case of Potts and Bell (*c*) has reversed that, as well as most of the other doctrines laid down in Bell and Gilson. This doctrine is established by a decision quoted in the case of Potts and Bell by the king's advocate. That authority he cited from a MS. note of Sir Edward Simpson, of the case of St. Philip, at the Cock Pit, wherein it was established, that trading with an enemy is a subject of confiscation, and excludes any exception, even on the ground that the goods had been purchased before the war. This authority, with all the others cited by the king's advocate in the case of Potts and Bell, received the general sanction of Lord Kenyon in delivering the judgment of the court.

(*a*) See cases cited in 8 Term Rep. 548.

(*b*) 1 Bos. and Pul. 345.

(*c*) 8 Term Rep. 548.

Exceptions to the rule.

At the same time, in cases of hardship, the courts have not shewn themselves unwilling to make some relaxations. In the case of Dree Gebroeders (*d*), Sir W. Scott observes, "That pretences of withdrawing funds, are at all times to be watched with considerable jealousy; but, when the transaction appears to have been conducted bona fide with that view, and to be directed only to the removal of property, which the accidents of war may have lodged in the belligerent country, cases of this description are entitled to be treated with some indulgence." But in the case of the Juffrow Catharina (*e*), a case where an indulgence was allowed by the court for the withdrawing of British property, Sir W. Scott intimated, that his decree in that instance, was not to be understood as in any degree relaxing the general necessity of obtaining a license, wherever property is to be withdrawn from the country of the enemy. Dr. Robinson (*f*) has subjoined to the report of the case of the Ocean the following useful note: "The situation of British subjects wishing to remove from the country of the enemy on the event of a war, but prevented by the sudden irruption of hostilities from taking measures for removing sufficiently early to enable them to obtain restitution, forms not unfrequently a case of considerable hardship in the Prize Court.

(*d*) 4 Rob. Rep. 234.
(*e*) 5 Rob. Rep. 141.
(*f*) 5 Rob. Rep. 91.

Exceptions to the rule.

In such cases, it would be adviseable for persons so situated, on their actual removal, to make application to government for a special pass, rather than to hazard valuable property to the effect of a mere previous intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution. In the case of the Juffrow Catharina (*g*), a license had been granted to import certain raw materials from France, and under this license an attempt was made to protect a quantity of lace. According to the general principle laid down in the numerous cases that have been considered, there seemed reason to regard this lace as subject to condemnation. But Sir William Scott, in consideration of particular circumstances, was of opinion that it should be restored to the claimant. This decision forms a remarkable exception to the ordinary rules by which licenses are construed, and constitutes also an exception to the spirit of that leading principle, by which all commerce with the enemy on private account is so rigidly forbidden, without respect to the hardship of particular cases. "This lace," said Sir William Scott, "was shipped under an order given before hostilities, and it is argued on the part of the captors, that lace is an article which cannot be included under the terms,

(*g*) 5 Rob. Rep. 141.

raw materials, that no protection can be derived from the license, and that the original order ought to have been countermanded at the breaking out of the war. Certainly, if a license is to be deemed necessary, it will be difficult to say, that the particular license alluded to in the present case can avail to the protection of this shipment. But there are some considerations, applying to the manner in which this shipment had originated, which may entitle it to more indulgence. It appears, that goods were sent out from this country to Flanders, and that an order was given at the same time for a return of certain other foreign articles, and, among the rest, for this lace. It seems, that when an order is given for lace, it is put into a state of preparation, and that more time is required to countermand an order for this article, than for others on which less labour and preparation is required. It is a work of long and slow process, in which advances must be made to the manufacturers; and although the demand on that account against the merchant would be suspended during hostilities, it might be difficult to relieve the British merchant from the demand, when the foreign correspondent was rehabilitated and restored to his right of action by the return of peace. It is to be remembered also, that during the present hostilities, there has been a more than ordinary difficulty in carrying on any correspondence with the

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enemy's countries : a circumstance for which the court has, in other cases, thought it not unreasonable to make some allowance. It does not appear that the party had an opportunity of countermanding; and although it would have been a more satisfactory and a more guarded proceeding on the part of the British merchant, to have applied for a license for the special importation of this article under the circumstances of his case, there are sufficient considerations to induce the court to think favourably of this claim. There seems to have been no intention to dissemble; it was owing to the erroneous conception of the enemy's shipper that this article was put on board to take the benefit of a license that had been procured for other articles in this vessel. It is, therefore, in this point of view, distinguishable from Mr. Hankey's case, in which the shipment was made here, where the party had still the dominion over the goods, and the power to stop them from proceeding. Here, the dominion was in the enemy's shipper, under a discretion reposed in him by orders before the war, and which the importer is not shewn to have had any opportunity of countermanding. I wish it to be understood, that by this decree, the necessity of obtaining a license is not in any degree relaxed. On the contrary, this court cannot sufficiently inculcate the duty of applying, in all cases, for the

protection of a license, where property is to be withdrawn *from the country of the enemy;* it is, indeed, the only safe way in which parties can proceed. Without meaning in the least to weaken the force of the obligation, I think the claim, under the particular circumstances of this case, is justly entitled to the favourable considerations which I have thrown out, and I shall direct the property to be restored." An attempt was made by the counsel in the case of De Tastet v. Baring (*h*), to establish, that no bill drawn from an hostile country upon this, could legally be passed here; but, upon this point, the court do not appear to have given any opinion. In several recent instances of bills drawn by British prisoners in France upon this country, holders, with full notice of the circumstances, have been permitted at Nisi Prius to recover, on the ground that otherwise prisoners at war might be deprived of the the means of comfortable subsistence.

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In the case of the Madonna Delle Gracie (*i*), some degree of relaxation was undoubtedly admitted, but it was admitted under very peculiar circumstances, which, though certainly infractious of the letter, yet by no means contravened the spirit of the rule. The goods in question, which were wines purchased solely for the supply

(*h*) 11 East. 268.—2 Campb. 86.

(*i*) 4 Rob. 195.

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of the British fleet before hostilities with Spain, were secretly deposited in that country after the breaking out of the war, and then removed to Leghorn, with an addition of some other newly purchased wines mixed in order to colour the previous stock, which had become too pale to be saleable by itself. The mixture of the new wine, which had been purchased subsequently to hostilities, was considered by Sir William Scott so indispensably necessary to the disposal of the old cargo, as not to affect the legality of the transaction. His judgment then proceeds in the following words: "It is said that Mr. Gregory, the claimant in this case, might have obtained a license; I certainly do not mean to weaken the obligation to obtain licenses for every sort of communication with the enemy's country, in all cases where the measure is practicable; but, I think, I see great difficulties that might have occurred in applying for a license, or in using it in the present case. How could Mr. Gregory describe his wines, as to the place from whence they would be exported? They were deposited secretly, and could only be exported by particular opportunities. On the other hand, can I entertain a doubt that government would have been very desirous to protect him in the recovery of this property, purchased under a contract with them? Or, on the ground of public utility, is it too much

to hold out this encouragement to persons engaged in contracts of this sort, that they shall obtain every facility in disposing of such stores? It would be a considerable discouragement to persons in such situations, at a distance from home, and employed in the public service, if they were to know, that in case of hostilities intervening, they would be left to get off their stores as well as they could, with a danger of capture on every side. The circumstances of this case may be taken as virtually amounting to a license, inasmuch as if a license had been applied for, it must have been granted."

Exceptions to the rule.

CHAPTER II.

OF THE RIGHT OF A BELLIGERENT TO INTERFERE WITH THE COMMERCE OF ANOTHER BELLIGERENT AMONG HER OWN PEOPLE OR THE REST OF THE WORLD, AND WHAT CONSTITUTES AN HOSTILE CHARACTER AS TO COMMERCIAL PURPOSES.

In the preceding chapter we considered the law, which prohibits commercial intercourse of belligerent nations with each other; we will now examine the right of either belligerent to interfere in the commercial intercourse which the enemy may carry on, either among her own people or with the rest of the world. It is here then necessary to ascertain what is the strict definition of war, and who are to be deemed the alien enemies of a belligerent nation.

War defined.

War is that conflict between nations, which cannot be undertaken, or carried on, except by the authority of the sovereign. But the universal law of nations does not acknowledge any general obligation of making a declaration of war to the

enemy, previous to the commencement of hostilities. Formerly, such a declaration was considered essential; but since the beginning of the 17th century, it has been the practice for nations to content themselves with publishing a declaration of war, through their own dominions, explaining their motives to other powers in writing. In the case of the Nayade (*a*), Sir Wm. Scott, with reference to the situation in which Portugal stood as to France, during the year 1801, said, "The relation which Portugal has borne towards France at different periods has been extremely ambiguous; at first, there was a wish on the part of Portugal not to consider herself as being at war with France, and, if a submissive conduct, and a disposition not to resent injuries, could have afforded protection against the violence of France, she might have escaped. But it is equally notorious, that all these concessions were made without success, and proved utterly inefficacious to prevent Portugal from being implicated in a war with France. In cases of this kind, it is by no means necessary, that both countries should declare war. Whatever might be the prostration and submissive demeanour on one side, if France were unwilling to accept that submission, and persisted in attacking Portugal, it was sufficient, War defined.

(*a*) Rob. Rep. 252.

War defined.

and it cannot be doubted by any body, who has attended to the common state of public affairs, that Portugal was considered as engaged in war with France."

In order, however, to legalize a war, it must not only be commenced or declared by one of the contesting states, but such commencement or declaration must be made by that particular branch of the state which is invested by the constitution with this important prerogative. "If," says Brooke in his Abridgement (*b*), "all the people of England would make war with the King of Denmark, and the King, (that is, our own King,) will not consent to it, this is not war, but when the peace is broken by ambassadors the league is broken."

Alien enemy defined.

An alien enemy is a person under the allegiance of the state at war with us (*c*). A distinction has been taken between a permanent and a temporary alien enemy. A man is said to be permanently an alien enemy, when he owes a permanent allegiance to the state at war with us, his hostility being as permanent as his allegiance, beginning at the commencement of his country's quarrel, and concluding only with the termination of the dispute; but he, who does not owe a perma-

(*b*) Tit. Denizen, pl. 20. Sparenburgh v. Bannatyne, 1
(*c*) Per Eyre, Ch. J. in Bos. and Pul. 163.

nent allegiance to the state at war with us, though he be himself engaged in actual combat against our forces, is not to be deemed a permanent enemy, for his hostility endures no longer than his own individual interest or convenience may continue it. This distinction between permanent and temporary enemies, as applied to the case of a neutral, was taken by Eyre, Ch. J. in the case of Sparenburgh and Bannatyne (*d*). In that case his Lordship said, "A neutral can be an alien enemy only with respect to what he is doing under a local or temporary allegiance to a power at war with us; when the allegiance determines the character determines. He can have no fixed character of alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us, it being only in respect of his being in a state of actual hostility, that he was even for a time an enemy at all.

Alien enemy defined.

But besides those persons who are alien enemies strictly so called, as actually bearing arms against one of the belligerent nations, or being liable to be called upon to bear arms against her by the obligation of their allegiance, we have to consider a hostile relation of a much more complicated nature, the relation that exists between a belligerent nation, and that class of persons, who, though they be not, during a whole war, nor even

Of an hostile character merely as to commercial purposes.

(*d*) 1 Bos. and Pul. 163.

Of an hostile character merely as to commercial purposes.

at a particular period of it, enemies in the strict sense of the word, absolutely and in all respects, yet must be deemed alien enemies to certain intents and purposes of a commercial nature, so that their property may, for the most part, be taken as prize, according to the laws of war between adverse belligerents. Therefore, when we speak of an *hostile character*, it is to be understood to imply, not hostility to all intents and purposes, but only that degree of hostility which attaches to particular property, and which has been held to authorize the seizure of it.

Hostile character by having possessions or residing in the territory of the enemy.

The hostile character, thus understood, may be acquired in several ways. It cannot be doubted, said Sir Wm. Scott in his judgment on the Vrow Anna Catharina (*e*), that there are transactions so radically and fundamentally national, as to impress the national character independent of peace or war. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil is to be taken as part of that country in that particular transaction, independent of his own personal residence

(*e*) 5 Rob. Rep. 161.

and occupation." So too in the case of the Phœnix (*f*), Sir Wm. Scott delivered the following principle: "Certainly nothing can be more decided and fixed, as the principle of this court, and of the supreme court, upon every solemn argument there, that the possession of the soil, does impress upon the owner the character of the country, as far as the produce of that plantation is concerned in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided both in this, and in the superior court, that it is no longer open to discussion. No question can be made on the point of law at this day. First, then, it appears that the produce of the hostile soil is to be considered as bearing a hostile character, and certainly, if any property ought to be considered as bearing such a character at all, for purposes of seizure, nothing can be more reasonable, than that the tracts of the enemy's land, one of the greatest sources, and as some have supposed, the sole source of national wealth, should be regarded as legitimate prize. That the interests of friends may sometimes be involved in our vengence upon enemies, is a matter which it is natural to regret, but impossible to avoid. The administration of

Hostile character by having possessions or residing in the territory of the enemy.

(*f*) 5 Rob. Rep. 21.

Hostile character by having possessions or residing in the territory of the enemy.

public rules admits of no private exceptions, and he who clings to the profits of a hostile connection must be content to bear its losses also. Secondly, it will be found, that a settlement in a hostile jurisdiction, whether it be by residence, or merely by the maintenance of a commercial establishment, impresses on the person, so settling, the character of the enemies among whom he settles, in regard to such of his commercial transactions as are connected with that settlement." The ship President (*g*) was taken on a voyage from the Cape of Good Hope, then in possession of the Dutch, at war with us, to Europe, and claimed for Mr. J. Elmslie, as a subject of America. It appeared, that he had been a British-born subject, who had gone to the Cape of Good Hope during the last war, and had been employed as American Consul at that place. Sir Wm. Scott said, "The court must, I think, surrender every principle on which it has acted in considering the question of national character, if it were to restore this vessel. The claimant is described to have been for many years settled at the Cape with an established house of trade, and as a merchant of that place, and must be taken as a subject of the enemy's country.

In the case too of the Indian Chief (*h*), Sir

(*g*) 5 Rob. Rep. 277. (*h*) 3 Rob. Rep. 12.

Hostile character by having possessions or residing in the territory of the enemy.

Wm. Scott said, "No position is more established than this, that if a person goes into another country, and engages in trade and resides there, he is by the law of nations to be considered as a merchant of that country." In the case of M'Connel and Hector (*i*), Lord Alvanley said, "That while an Englishman resides in a hostile country, he is a subject of that country." And upon the same principle in the case of De Luneville v. Phillips (*k*), the court, upon discovering that the plaintiff was resident in an enemy's country, refused to afford her relief.

In the earlier part of the last war, a very general misapprehension prevailed among the American merchants, who conceived themselves entitled to retain the entire privilege of the American character, notwithstanding a residence and occupation in any other country. This misapprehension was, however, corrected by a great number of decisions of our courts. In the case of the Anna Catharina (*l*), a gentleman had been at first described as an American merchant; but upon further proof being required by the court, he was described as a person having a house of trade and actually living at Curacoa, then a Dutch possession. Under this description, Sir Wm.

(*i*) 3 Bos. and Pul. 113. (*l*) 4 Rob. Rep. 107.
(*k*) 2 New Rep. 97.

Hostile character by having possessions or residing in the territory of the enemy.

Scott said, "He is undoubtedly to be considered as an enemy at the commencement of this transaction, Holland being at that period of time the enemy of this country."

Upon the same principle, a foreigner lawfully residing within the British dominions has been held to be for various commercial purposes a British subject. In the case of the Indian Chief (*m*), a cargo, which belonged to Mr. Millar, an American Consul, resident at Calcutta, and which had been taken in trade with the enemy, was condemned as the property of a British merchant engaged in illegal commerce. "It is said to be hard," observed Sir Wm. Scott, "that Mr. Millar should incur the disabilities of a British subject, at the same time that he receives no advantage from that character; but I cannot accede to that representation, because he is in the actual receipt of the benefit of protection for his person and commerce from British arms and British laws; under an existing British administration in the country, he may be subject to some limitations of commerce incident to such establishments, which would not occur in Europe, but he must take his situation with all its duties, and amongst those duties, the duty of not trading with the enemies of this country."

(*m*) 3 Rob. Rep. 22.

Hostile character by having possessions or residing in the territory of the enemy.

This general rule, that a person's settlement will impress him with the national character of the place where he is settled, is not confined to the instance of persons settling among enemies; it is admitted with great impartiality in all cases, and therefore, Lord Alvanley, in his judgment in the case of M'Connel and Hector (*n*), gave it as his own determination, and quoted as a further authority, the case of Marryatt v. Wilson (*o*), that an Englishman is entitled to all the privileges of a neutral country, while resident in a neutral country. So also, Sir Wm. Scott, in the case of the Emanuel (*p*), stated it as a general rule, that a person living bona fide in a neutral country, is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides; provided it is not inconsistent with his native allegiance. And the same doctrine seems to have been decided, even beyond the reservation of native allegiance in the case of Danvers (*q*), which was determined before the Lords. In this case a British-born subject, resident at the English factory at Lisbon, was allowed the benefit of a Portuguese character, so far as to render his trade with Holland, then at war with England but not with Portugal, not impeachable as an

(*n*) 3 Bos. and Pul. 114.
(*o*) 1 Bos. and Pul. 43.—8 Term Rep. 31.
(*p*) 1 Rob. Rep. 296.
(*q*) 4 Rob. Rep. 255.

Hostile character by having possessions or residing in the territory of the enemy.

illegal trade. It is true, that in the case of De Metton v. De Mello (*r*), Lord Ellenborough does not notice these decisions; but the observations of his Lordship in that case, particularly when coupled with the concluding part of his judgment, which advised that the plaintiff should go back to the Court of Admiralty, and have the matter set right there, appear to amount to nothing like a denial of the above doctrine.

What constitutes a residence.

We come now to the question what constitutes residence; a question which at first sight almost seems to answer itself, but upon which the subtleties of foreign merchants have given birth to various disputes, and to several direct decisions. And yet there has been no disposition in the Courts of Admiralty to press the rule with any thing like rigour of construction. Sir Wm. Scott declared, in the case of the Bernon (*s*), "that he did not mean to lay down so harsh a rule, as that two voyages from France should make a man a Frenchman; but the claimant appearing to have had a continued residence there, during the interval of his voyages, and to have had that residence also with an intention of remaining, the property was condemned." For, from the whole of that case, it appears that the intention of remaining the animus manendi, is the chief point to be considered by the court, in

(*r*) 2 East. 234.—2 Camp. 420. (*s*) 1 Rob. Rep. 102.

determining what shall be deemed a residence. "Whenever it appears," said Sir William Scott, "that the purchaser was in France, he must explain the circumstances of his residence there: the presumption arising from his residence is, that he is there animo manendi, it lies on him to explain it." The case of the Diana (*t*) affords us a further elucidation. There Sir William Scott decided, that "mere recency of establishment would not avail, if the intention of making a permanent residence there was fully fixed upon the party." He cited the case of Mr. Whitehill, as fully establishing this point: "Mr. Whitehill had arrived at St. Eustatius, then a hostile possession, only a day or two before Admiral Rodney and the British forces made their appearance, but it was proved that he had gone with an intention of establishing himself there, and his property was condemned; mere recency, therefore, would not be sufficient." What constitutes a residence.

But when there is not really an animus manendi, an intention to continue the abode, then the abode is not considered as a residence to any hostile purpose; the case of the Ocean (*u*) was the case of a claim given on behalf of Mr. F——, a British-born subject, who had been settled as a merchant in Flushing, but who, on the appearance of approaching hostilities, had

(*t*) 5 Rob. Rep. 60. (*u*) 5 Rob. Rep. 90.

What constitutes a residence.

taken means to move himself, and return to England. The affidavit of the claimant stated, that, in July 1803, he actually effected his escape, and returned to this country; that he had actually dissolved his partnership; and that he had continued to reside in Holland after the war, only under the detention so unwarrantably applied to all Englishmen resident in the country of the enemy at the breaking out of hostilities. "Under these circumstances," said Sir William Scott, "it would, I think, be going farther than the principle of law requires, to conclude this person, by his former occupation, and by his constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal." The same point is incidentally but decisively laid down by Lord Ellenborough, in the cases of Bromley v. Heseltine (*x*), and O'Mealy v. Wilson (*y*).

On the other hand, it must be observed, as Sir William Scott expressed it in the case of La Virginie (*z*), that the native character easily reverts, and that it requires fewer circumstances to constitute domicile in the case of a native subject, than to impress the national character on one who is originally of another country. The circumstances which drew this remark from the

(*x*) 1 Campb. 76.
(*y*) 1 Campb. 482.
(*z*) 5 Rob. Rep. 98.

court, are simply these, that Mr. Lapiarre, by birth a Frenchman, was present in a French colony, where he shipped goods for France. The goods were captured, and he put in his claim as a merchant of America, where he had resided before his coming to the French colony. The court allowed, that if he had made the shipment for America, his asserted place of abode, it might have been a circumstance to be set in opposition to his actual presence in the French colony, and might afford a presumption that he was in St. Domingo only for temporary purposes; but the shipment being made to France from a French colony, and by a Frenchman, the presumption was, that he had returned to his native character of a French merchant. What constitutes a residence.

The voluntary intention of remaining, therefore, being the material question in determining what is to be deemed a commercial residence, we shall find, that when the intention exists voluntarily and without force or restraint, the commercial residence is usually held to be complete, whether it be a literal and actual, or only an implied residence. In the case of the Indian Chief (*a*), it was objected against the claim of the captors, that the residence of an American in Calcutta was not a residence among British belligerents; that the Mogul having the imperial rights of Bengal,

(*a*) 3 Rob. Rep. 22.

What constitutes a residence.

the King of Great Britain does not hold the British possessions in the East Indies in the right of the sovereignty; and that, therefore, the character of British merchants does not necessarily attach on foreigners locally resident there. This objection was thus overruled by Sir William Scott: "Taking it, that such a paramount sovereignty on the part of the Mogul princes really and solidly exists, and that Great Britain cannot be deemed to possess a sovereign right there, still it is to be remembered, that wherever even a mere factory is founded in the eastern parts of the world, European persons, trading under the shelter and protection of those establishments, are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries. In the western parts of the world, alien merchants mix in the society of the natives, access and intermixture are permitted, and they become incorporated to almost the full extent. But in the east, from the oldest times, an immiscible character has been kept up, foreigners are not admitted into the

general body and mass of the society of the nation. They continue strangers and sojourners, as all their fathers were; not acquiring any national character under the general sovereignty of the country, and not trading under any recognised authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade. With respect to establishments in Turkey, it was declared, in the case of Mr. Freemeaux, in the last war, that a merchant carrying on trade at Smyrna, under the protection of the Dutch consul at Smyrna, was to be considered as a Dutchman, and, in that case, the ship and goods belonging to Mr. Freemeaux being taken after the order of reprisals against Holland, were condemned as Dutch property. So in China, and I may say generally throughout the East, persons admitted into a factory, are not known in their own peculiar national character, and not being admitted to assume the character of the country, they are considered only in the character of that association or factory. I remember perfectly well, in the case of Mr. Constant de Rubecque, it was the opinion of the Lords, that, although he was a Swiss by birth, and no Frenchman, yet if he had continued to trade in the French factory in China, which he had fortunately quitted before

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What constitutes a residence.

the time of capture, he would have been liable to be considered as a Frenchman. I am, however, inclined to think, that these considerations are unnecessary, because, though the sovereignty of the Mogul is occasionally brought forward for purposes of policy, it hardly exists otherwise than as phantom. It is not applied in any way for the actual regulation of our establishments. This country exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty, and if the high, or as I may almost say, this empyrean sovereignty of the Mogul is sometimes brought down from the clouds as it were, for purposes of policy, it by no means interferes with that actual authority which this country and the East India company, a creature of this country, exercises there with full effect. The law of treason, I apprehend, would apply to Europeans, living there, in full force; it is nothing to say, that some particular parts of our civil code are not applicable to the religious or civil habits of the Mahomedan or Hindoo natives, and that they are, on that account, allowed to remain under their own laws. I say this is no exception, for, with respect to internal regulations, there is amongst ourselves, in this country, a particular sect, the Jews, that, in matters of legitimacy, and on other important subjects, are governed by their own particular regulations, and not by

all the municipal laws of this country, some of which are totally inapplicable to them. It is besides observable, that our own acts of parliament, and our public treaties, have been by no means scrupulous, in later times, in describing the country in question, as the territory of Great Britain. In the American treaty, the particular expression occurs, that the citizens of America shall be admitted, and hospitably received in all the sea-ports and harbours of the British territories in India. The late case in the Court of King's Bench, Wilson v. Marayat (*b*), arising upon the interpretation of that treaty, and in which it appears to have been the inclination of that court to hold our possessions in India to come within the operation of the Navigation Acts, gave occasion to an act of parliament, in which the term British territory is borrowed from the treaty. There is likewise a general act, of 37 Geo. 3, ch. 117, for the allowance of neutral traders in India, which expressly uses the same term, reciting that, whereas it is expedient, that the ships and vessels of countries and states, in amity with his Majesty, should be allowed to import goods and commodities into, and export the same from, the British territories in India. It is, besides, an obvious question, To whom are the credentials of this gentleman, as consul, addressed? certainly to the British go-

What constitutes a residence.

(*b*) 8 Term Rep. 31, and 1 Bos. and Pul. 430.

What constitutes a residence.

vernment, to the East India company, and not to the Mogul. What is the condition of a foreign merchant residing there? From attention to the argument of a gentleman, whose researches have been particularly turned to subjects connected with the East, I have made inquiry of a person of the greatest authority on such a subject, who is just returned from the highest judicial situation in that country, and the result is, as on general principles I should certainly have expected, that a foreign merchant, resident there, is just in the same situation with a British merchant, subject to the same obligations, bound by the same duties, and amenable to the same common authority of British tribunals. It being insinuated in the same case, as a further objection, that Mr. Miller was not a general merchant of Calcutta, Sir Wm. Scott shortly observed upon it in these words (*c*): "Whether he was a general merchant or not is totally immaterial, for if this was even his first adventure, still, in this transaction, he must be taken as a merchant, and can be considered in no other character.

The case of the Junge Ruiter (*d*) establishes, that when a person has fixed his residence, with a voluntary intention of remaining, his national character, communicated by that residence, will not be divested by his periodical absence on account of professional avocations.

(*c*) 3 Rob. Rep. 27, 8. (*d*) 1 Acton, 116.

Residence of an agent

Nor does it appear to be invariably necessary, that in order to impress a man with a national character, his residence must be personal. In the case of the Anna Catharina (*e*), a contract had been made with a hostile government; a contract which, from the peculiar privileges annexed to it, not only placed the contractors, being neutrals, upon the footing of Spanish subjects, but perhaps might be considered as going further still and giving them privileges to which a Spanish merchant, merely as a native subject of Spain, would probably not have been admitted. For the purpose of executing this contract, the merchants engaged in it thought fit not indeed to reside themselves in the hostile territory, but to commission an agent, who did reside there. On this residence by agent Sir William Scott thus animadverted in his judgment:—"It is not indeed held in general cases, that a neutral merchant, trading in an ordinary manner (*f*) to the country of a belligerent, does contract the character of a person domiciled there by the mere residence of a stationed agent; because in general cases the effect of such a residence is counteracted by the nature of the trade, and the neutral character of the British merchant himself. But it may be very different where the principal is not trading on the ordinary footing of a foreign merchant, but as a

(*e*) 4 Rob. Rep. 107. (*f*) 4 Rob. Rep. 119.

Residence of an agent

privileged trader of the enemy. There the nature of his trade does not protect him; on the contrary, the trade itself is the privileged trade of the enemy, putting him on the same footing as their own subjects, and even above it." But though this judgment shews that a merchant, trading to a foreign nation, does not in general contract the character of that nation by the residence of a stationed agent, yet when the agent so residing performs duties for his employer, which imply that this employer considers himself as being virtually a resident of the country, where in fact his agent resides, that is, in short, where the agent, instead of being the mere factor becomes the deputy of his employer, it should appear that then the employer will be considered as sufficiently invested with the national character by the residence of his agent. Thus a person holding the office of a consul in a foreign state, though he do not reside there himself, but commit his whole duty to vice-consuls, must be deemed to be virtually a resident of that state where the commission of his office implies him to reside: and the appointment of deputies is a proof that he still considers himself as retaining the office to which this implied residence attaches, though he may have found it convenient to avoid the personal burden of its functions. This distinction between those agents who are mere factors, and those who may be considered

as deputies, may be inferred from the comparison of the decision last cited with a decision of the same judge, in the case of the Dree Gebroeders (*g*): the claimant, who represented himself as an American, stated in his affidavit, that the government of the United States had appointed him consul-general for Scotland, but that he had not yet acted further in that capacity than to appoint deputies. Sir William Scott said, "It will be a strong circumstance to affect him with a British residence as long as there are persons acting in an official situation here, and deriving their authority from him." Residence of an agent

But whether the residence of the party be personal or by agent, the external circumstances need not be notorious nor numerous, in order to establish the fact that the party is so resident; the intention of permanent abode will still be the decisive proof. In the case of the Jonge Klassina (*h*), the claimant, wishing to persuade the Court that he was not to be deemed a resident in the hostile country, pleaded, that he had no fixed compting-house there; upon which plea Sir William Scott gave the following determination:— "That he has no fixed compting-house in the enemy's country will not be decisive. How much of the great mercantile concerns of this kingdom is carried on in coffee-houses? A very considerable portion of the great insurance bu- Mode of residence.

(*g*) 4 Rob. Rep. 232. (*h*) 5 Rob. Rep. 297.

Mode of residence.

siness is so conducted. It is indeed a vain idea, that a compting-house or fixed establishment is necessary to make a man a merchant of any place, if he is there himself, and acts as a merchant of that place, it is sufficient: and the mere want of a fixed compting-house there will make no breach in the mercantile character, which may well exist without it." As by the commencement of a residence in a hostile state, a hostile character is acquired, so it is terminated by the cessation of that residence. This is decided in the case of the Indian Chief (*i*).

Character imposed by traffic.

Having said thus much respecting national character, as impressed by the actual residence of the party himself, or of his agent, we will now examine a doctrine nearly connected with the question of residence, and laid down by Sir William Scott, in the case of the Vigilantia (*k*). "It is," says that learned Judge, "a doctrine supported by strong principles of equity and propriety, that there is a traffic which stamps a national character in the individual, independent of that character which mere personal residence may give. And it was expressly laid down in the case of the Nancy and other ships, which was heard before the Lords on the 9th of April, 1798, that if a person entered into a house of trade in the

(*i*) 3 Rob. Rep. 12.

(*k*) 1 Rob. Rep. 13.; and see also the case of the Portland, 3. Rob. Rep. 41.

enemy's country, in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country."—This position, that he who maintained an establishment, or house of commerce, in a hostile country, is to be considered as impressed with a hostile character, with reference to so much of his commerce, as may be connected with that establishment, is confirmed by a great variety of other cases; which prove too that the rule is the same, whether he maintain that establishment as a partner, or as a sole trader (*l*). Character imposed by traffic.

Upon the whole, it may be received as a general rule, that the maintenance of a commercial house in a hostile country, or such a sojourning as the Courts construe to be a residence, either personally or by agent, will impart a national character; that the subject of a belligerent, residing or maintaining a commercial house amongst the subjects of the adverse belligerent, who are the enemies of his country, must be deemed an enemy, with reference to the seizure of so much of his property concerned in commerce, as is connected with his residence or establishment there; that a neutral, residing or maintaining a commercial establishment among the subjects of one belligerent state, is to be deemed an enemy by the General rules.

(*l*) 3 Rob. Rep. 41.

General rules.

other, with reference to the seizure of so much of his property concerned in commerce as is connected with his residence or establishment; that the subject of a belligerent state, residing or maintaining a commercial establishment among neutrals, is to be deemed a neutral, both by his native government, and by the adverse belligerent, with reference as well to the trade which he may carry on with the adverse belligerent, as to his trade with all the rest of the world.

The residence only affects the particular trade.

But though a belligerent nation has a right to consider as enemies all who reside or maintain commercial establishments in a hostile country, whether they be by birth neutrals, or whether they be by birth her own subjects or allies, yet it is with this qualification, that they are to be deemed enemies only with reference to the seizure of so much of their commerce as is connected with that residence or establishment. Sir Wm. Scott lays it down, in the case of the Jonge Klassina (*m*), "That a man having mercantile concerns in two countries, and acting as a merchant of both, must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries." In the case too of the Herman (*n*), we find the same distinguished authority thus remarking upon the facts before the Court:—"The personal domicile of the claimant

(*m*) 5 Rob. Rep. 297. (*n*) 4 Rob. Rep. 228.

is at Embden, where he resides, and has a house of trade; he is only connected with this country by his partnership in a house here, which is to be taken in a manner as collateral, and secondary to his house at Embden: that he may carry on trade with the enemy at his house in Embden cannot be denied, provided it does not originate from his house at London, nor vest an interest in that house."

The residence only affects the particular trade.

The case of the Portland, and nine other ships (*o*), still more precisely establishes the distinction, in respect of liability to capture, between the trade which a merchant may be carrying on to his hostile, and that which he may be carrying on to his neutral establishment. The claimant resided in a neutral territory, but he had two settlements, or places of resort for his business; one in a neutral territory, and the other in a hostile country, at Ostend. Sir William Scott said, "As to the circumstance of his being engaged in trading with Ostend, I think it will be difficult to extend the consequences of that act, whatever they may be, to the trade which he was carrying on at Hamburgh, and having no connection with Ostend; because, call it what you please, a colourable character, as to the trade carried on at Ostend, I cannot think that it will give such a colour to his other commerce as to make that liable for the frauds

(*o*) 3 Rob. Rep. 41.

The residence only affects the particular trade.

of his Ostend trade; as far as the person is concerned, there is a neutral residence; as far as the commerce is concerned, the nature of the transaction and the destination are perfectly neutral, unless it can be said that trading in an enemy's commeree makes the man, as to all his concerns, an enemy; or that, being engaged in a house of trade in the enemy's country, would give a general character to all his transactions. I do not see how the consequences of Mr. Ostermeyer's trading to Ostend can affect his commeree in other parts of the world. I know of no case, nor of any principle that would support such a position as this,—that a man having a house of trade in the enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in those which belonged to his belligerent domicile (*p*)."

The rights of capture in respect of residence, or commercial establishment, are not inforced with any inequitable severity. In the case of the Vigilantia (*q*), Sir William Scott cites a judgment pronounced by the Lords Commissioners of Appeal, wherein they said, that "a person carrying on trade habitually in the country of the enemy, though not resident there, should have time to withdraw himself from that commeree;

(*p*) See 1 Camp. 76. (*q*) 1 Rob. Rep. 1.

and that it would press too heavily on neutrals, to say, that immediately on the first breaking out of a war, their goods should become subject to confiscation."

The residence only affects the particular trade.

The next mode in which a hostile character may be impressed, is by dealing in those branches of commerce which are usually confined to the subjects of the adverse belligerents themselves. The rule on this point may be collected from the case of the Princessa.(*r*)

Hostile character by particular trading.

"This," said Sir William Scott, "is a Spanish frigate, employed as a packet of the king of Spain, to bring bullion and specie from South America to Old Spain; and I think the presumption is most strong, that none but Spanish subjects are entitled to the privilege of having money brought from that colony to Spain. I have looked carefully through the manifest, and I perceive there is not one shipment but in the name of Spaniards; therefore it appears that this is not an ordinary trade; and I must take this to be property which must have been considered as Spanish, and which could not have been exported in any other character. It has been decided by the Lords, in several cases, that the property of British merchants, even shipped before the war, yet if in a Spanish character, and in a trade so exclusively peculiar to Spanish subjects, as that no foreign name could appear in it, must take the

(*r*) 2 Rob. Rep. 49.

Hostile character by particular trading.

consequences of that character, and be considered as Spanish property."

That he who is permitted by the enemy to deal, and does deal accordingly, in branches of commerce, usually confined to the subjects of the enemy, must be deemed an enemy himself, is further established by the case of the Anna Catharina (*s*), in which there was a contract between the Spanish Government, then at war with this country, and certain persons claiming to be considered as neutrals. But the Court held, that as the contract was of so privileged a nature, that none but Spanish merchants would have been admitted to it; and not even Spanish merchants merely as such, it did in fact carry with it, in the hands of the contractors, a character decidedly Spanish, and that character was held to adhere to the contract, not only in the hands of the party with whom it was originally made, but when in the hands of those whom he had subsequently admitted to share it. "It is by nothing peculiar in his own character," said Sir William Scott, "that the original contractor would be liable to be considered as a Spanish merchant, but merely by the acceptance of this contract, and by acting upon it. If other persons take their share, and accept those benefits, they take their share also in the legal effects. They accepted

(*s*) 4 Rob. Rep. 107.

his privileges; they adopted his resident agent. It would be monstrous to say that the effect of the original contract is to give the Spanish character to the contracting person, but that he may dole it out to an hundred other persons, who in their respective portions are to have the entire benefit, but are not to be liable to the effect of any such imputations. The consequence would be, that such a contract would be protected, in the only mode in which it could be carried into effect; for a contract of such extent must be distributed; and if every subordinate person is protected, then here is a contract which concludes the original undertaker of the whole, but in no degree affects one of those persons who carry that whole into execution. On these grounds, I am of opinion that these goods are liable to be considered as the property of the Spanish Government; and further, that these parties are liable to be considered as persons clothed in this transaction with the character of Spanish merchants."

Hostile character by particular trading.

Within the rule which thus annexes a hostile character to the property of the neutral engaged in a trade peculiar to the enemy, falls of course the instance of a strict exclusive colonial trade, from the colony of the mother country, where the trade is limited to native subjects by the fundamental regulations of the state, and the national character is required to be established by oath,

Carrying on colonial trade.

Carrying on colonial trade.

as in the case of the Spanish register ships. It was in the case of the Vrow Anna Catharina (*t*), that Sir Wm. Scott particularized this instance of the Spanish Register ships: and he added, that whosoever asserts himself to be the proprietor by the solemn averments of an oath, takes the fortunes of the community as to that property.

Sailing under enemy's flag, &c.

There are yet other modes in which a hostile character may be affixed to property, such is the sailing of the vessel under the flag and pass of an enemy: the case which most distinctly decides this point, is that of the Elizabeth (*u*), "By the established rules of law, said the court, it has been decided, that a vessel sailing under the colours and pass of a nation, is to be considered as cloathed with the national character of that country. With goods it may be otherwise; but ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claims of interest, that persons living in neutral countries may actually have in them. In the war before the last, this principle was strongly recognised in the case of a ship taken on a voyage from Surinam to Amsterdam, and documented as a Dutch

(*t*) 5 Rob. Rep. 161. (*u*) 5 Rob. Rep. 2.

ship. Claims were given for specific shares, on behalf of persons residing in Switzerland; and one claim was on behalf of a lady to whom a share had devolved by inheritance, whether during hostilities or no, I do not accurately remember; but if it was so, she had done no act whatever with regard to that property, and it might be said to have dropped by mere accident into her lap. In that case, however, it was held, that the fact of sailing under the Dutch flag and pass, was decisive against the admission of any claim; and it was observed, that as the vessel had been enjoying the privileges of a Dutch character, the parties could not expect to reap the advantages of such an employment without being subject, at the same time, to the inconveniencies attaching on it." To this case of the Elizabeth (*x*), Dr. Robinson has subjoined a note, containing a report of the case of the Vreede Schottys, in which the Court laid down the distinction as to hostility of character between the ships and the cargo, in the following terms: "A great distinction has been always made by the nations of Europe, between ships and goods, some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also, but this country has never carried the principle to that extent. It holds the ship

Sailing under enemy's flag, &c.

(*x*) 5 Rob. Rep. 2.

Sailing under enemy's flag, &c.

bound by the character imposed upon it by the authority of the government, from which all the documents issue. But goods which have no such dependence upon the authority of the state, may be differently considered." The immunity of neutral cargoes on board an enemy's ship is also asserted by Vattel (*y*).

Transfers of property in transitu.

These are the principal circumstances which have been held by the courts of international law, to impress an hostile character upon commerce. When property has borne such character at the commencement of the voyage, the general rule seems to be, that it cannot change that character on its passage, or, as it is generally expressed, in transitu. It was even decided in the case of the Danekebaar Affricaan (*z*), that property sent from a hostile colony and captured in the voyage, did not change its character in transitu, although, before the capture, the owners had became British subjects by the colony's capitulation. The principle had been originally stated in the case of the Neegotie en Zeevart, which is cited by Sir Wm. Scott in his judgment in the Danekebaar Affricaan.

Attempts to evade these rules.

We will now consider the attempts which have been made to protect this hostile commerce by

(*y*) Lib. 3. c. 7. s. 107. [See Appendix.]

(*z*) 1 Rob. Rep. 107.; see also 3 Rob. Rep. 197.

fraudulent contrivances of various descriptions: a belligerent not unfrequently attempts to save the property which he has already shipped, from the capture of his adversaries, by assigning it, while on the voyage, to neutrals. This practice has been held by the courts to be unavailing, for its protection. "During peace," says Sir William Scott, in giving judgment upon the case of the Vrou Margarittha (*a*), "a transfer in transitu may certainly be made; but in a state of war existing or imminent, (that is, whether the war have actually broken out, or whether it be in the expectation of the parties,) it is held, that the property shall be deemed to continue as it was at the time of shipment, till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy; if such a rule did not exist, all goods shipped in an enemy's country, would be protected by transfers, which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted in transitu, and in that sense I recognise it as the rule of this court (*b*).

Attempts to evade these rules.

The illegality of transfer in transitu during, or in contemplation of war, is shewn at great length by Sir Wm. Scott, in the case of the Jan

(*a*) 1 Rob. Rep. 338. (*b*) 1 Burr. 147.

Attempts to evade these rules.

Frederick (*c*), but where the contract was made, in contemplation of peace after the signature of preliminaries, as in the case of the Vrow Catharina (*d*), the court held that the transfer was legal, as not tending to defeat a belligerent's right of capture. All these are cases of bona fide transfers, but in many instances a belligerent finding it impossible to protect his own trade under his own flag, transfers it to a neutral fraudulently; that is, either nominally or without a reservation of its solid advantages to himself, or actually for a time, with a condition that the neutral shall restore it on the conclusion of peace. All these colourable transfers are held to be illegal, and the circumstances of them are as various as may be expected from the ingenuity of men, who have great interests at stake. The cases arising upon these and other frauds are almost all mere questions of evidence, turning solely on the construction which the transaction can be made to bear, by the acuteness of the captors on the one hand in tracking the deceit, and by the dexterity of the claimants on the other, in eluding the investigation (*e*).

Reservations of risk to the neutral consignors, in order to protect belligerent consignees, are uni-

(*c*) 5 Rob. Rep. 128.

(*d*) 5 Rob. Rep. 161.

(*e*) See the several instances and decisions, 1 Rob. Rep. 1. 101. 122.—1 Acton. 43.—2 Rob. 137.—1 Rob. 16. note.—4 Rob. 32.

formly treated by the Admiralty Court as fraudulent and invalid. The principle case on this point, is that of the Sally (*f*). The cargo, which occasioned the question in the case of the Sally, had been shipped during the last war, ostensibly on the account of American merchants: the master deposed as to his belief, that it would have become the property of the French government upon being unladen. The sale, therefore, had obviously been completed, and the pretext of an American risk and account, was merely to evade that capture, to which the cargo would have been subject, if it had sailed avowedly as French property: the Court said, "It had always been the rule of the prize court, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken in transitu is to be considered as enemy's property. When the contract is made in time of peace, or without any contemplation of a war, no such rule exists. But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses account and risk of the American merchants; but papers alone make no

Attempts to evade these rules.

(*f*) 5 Rob. Rep. 300.

Attempts to evade these rules.

proof; unless supported by the depositions of the master: instead of supporting the contents of his papers, the master deposes, that on arrival the goods would become the property of the French government; and all the concealed papers strongly support him in this testimony. The evidentia rei is too strong to admit further proof; supposing it was to become the property of the enemy on delivery, capture is considered as delivery. The captors by the rights of war, stand in the place of the enemy, and are either entitled to a condemnation of goods passing under such a contract, as of enemy's property on every principle on which prize courts can proceed, this cargo must be considered as enemy's property."

The principles on which this judgment was given are stated more at large in the case of the Packet de Bilboa (*g*), and of the Anna Catharina (*h*).

(*g*) 2 Rob. Rep. 133. (*h*) 4 Rob. Rep. 107.

CHAPTER III.

OF THE RIGHT OF THE BELLIGERENTS TO CAPTURE EACH OTHER'S PROPERTY.

HAVING, in the preceding chapters, considered the illegality of commerce between belligerents, and who is to be considered as an alien enemy, or adhering to one of the belligerent powers, as far as respects commercial purposes, we will now consider the right of capture or seizure by the respective belligerents of each other's property. It was justly observed by the King's Advocate, in the case of Potts v. Bell (*a*), that there is no such thing as a war for arms, and a peace for commerce. The commerce of the enemy has in all ages been considered as the legitimate prize of war. We will, in this chapter, consider the nature and effects of what are termed the rights of war, as far as relates to hostile commerce.

The rights of war, as they may be lawfully exercised against hostile commerce, are discussed at large in the 3rd book of Grotius, ch. 6. and in the 3rd book of Vattel, chapters 8 and 9.[*] The

(*a*) 8 Term Rep. 548. [* See Appendix.]

doctrines laid down in these, and in other treatises on international law, are condensed in the following passage, which is an extract from a summary of the laws of nations, compiled by Professor Martens, of Gottingen (*b*): "The conqueror has a right to seize on the property of the enemy, whether moveable or immoveable. These seizures may be made, 1st, in order to obtain what he demands as his due, or an equivalent; 2dly, to defray the expenses of the war; 3dly, to force the enemy to an equitable peace; 4thly, to deter him, or, by reducing his strength, hinder him from repeating in future the injuries which have been the cause of the war. And, with this last object in view, a power at war has a right to destroy the property and possessions of the enemy, for the express purpose of doing him mischief. However, the modern laws of war do not permit the destruction of any thing, except, 1st, such things as the enemy cannot be deprived of by any other means than those of destruction, and which it is at the same time necessary to deprive him of; 2dly, such things as, after being taken, cannot be kept, and which might, if not destroyed, strengthen the enemy; 3dly, such things as cannot be preserved without injury to the military operations. To all these we may add, 4thly, whatever is destroyed by way of retaliation." This is the ge-

(*b*) Lib. 8. c. 3. s. 9.

neral rule as to the right of seizure. But, in strict justice, that right can take effect only on those possessions of a belligerent, which have come to the hands of his adversary after the declaration of hostilities. "The sovereign," says Vattel (*c*), "can neither detain the persons, nor the property of those subjects of the enemy, who are within his dominions at the time of the declaration. They came into his country under the public faith. By permitting them to enter and reside in his territories, he tacitly promised them full liberty and security for their return. He is, therefore, bound to allow them a reasonable time for withdrawing with their effects, and if they stay beyond the term prescribed, he has a right to treat them as enemies, as unarmed enemies however. But if they are detained by an insurmountable impediment, as by sickness, he must necessarily, and, for the same reason, grant them a sufficient extention of the term. At present, so far from being wanting in this duty, sovereigns carry their attention to humanity still farther, so that foreigners, who are subjects of the state against which war is declared, are very frequently allowed full time for the settlement of their affairs. This is observed in a particular manner with regard to merchants; and the case is moreover carefully provided for in commercial treaties.

(*c*) Vatt. b. 3. c. 4. sect. 63.

Of embargoes.

At first sight it would appear, that this rule of faith and justice is totally violated by the practice, so common in modern Europe, of imposing embargoes at the breaking out of hostility. But, upon examining a little more carefully the nature of the transaction, we shall find, that there is not this violent infraction of honesty or honour. Embargoes, the effect of which is to detain vessels in the ports where they may be lying, are imposed on various occasions and for various purposes. They are of two descriptions, warlike, or civil. The only species of embargo, which it is necessary for us to consider in this place, is that which, in its nature, partakes of hostility. It is imposed by a nation upon such foreign vessels within her ports, as belong to states against whom she has declared war, or is about to declare it. Now we may remember the rule, as Vattel lays it down, to be, that a nation is not at liberty to seize that part of her enemy's property which is in her dominions at the time of the declaration, because it came into her power upon the faith of previously existing peace. But declarations of war are not construed to take effect merely from the time when a formal notification of hostility is given; there are certain preceding acts, of a hostile nature, which are deemed to be virtually declarations of war, to certain intents and purposes, though they may be explained away and annulled

by a subsequent accommodation between the governments. (*d*) When, therefore, a nation receives certain injuries, for which she sees no prospect of obtaining redress, she is reduced to consider hostilities as virtually declared, and issues an embargo upon the commerce of the offending state, then lying within her ports, in order to indemnify herself in the only way in which, perhaps, it may be possible for her to obtain indemnification at all. In this case, the hostile property, which comes to her hands after the commission of the injury, may be, and is regarded, as having come to her hands after the declaration of hostilities, though that declaration have not been duly and formally notified; and, therefore, the case of embargo is not within the prohibition of Vattel, which reaches to the exemption only of goods in our hands at the time of the declaration, and does not cover property coming into our territory after that declaration, whether such declaration be only virtual, or whether it be announced with all the fullness of formality. Upon the right of seizing on property under this implied kind of declaration, and upon the effect of the seizure in the event of an accommodation being adjusted before the formal notification of war, Sir William Scott most satisfactorily comments in the case of the Boedes Lust (*e*). In that case, an embargo had been

Of embargoes.

(*d*) Ante, ch. 1. (*e*) 5 Rob. Rep. 246.

Of embargoes.

laid upon Dutch property by Great Britain, previously to an open declaration of war, but under such circumstances of injustice on the part of Holland, as were considered by the British court as amounting to an implied declaration of war; and the formal declaration, which afterwards supervened, was deemed to have a retrospective effect, confirming all that had been done by the embargo under the implied declaration. "The seizure," said Sir William Scott, "was at first equivocal, and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the animus, by which it is done; that it was done hostili animo, and is to be considered as an hostile measure ab initio. The property taken, is liable to be used as the property of persons trespassers ab initio, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken

before a formal declaration of hostilities." So, in the case of the Herstelder (*f*), Sir William Scott observed, "That actual hostilities are not to be reckoned merely from the date of the declaration, but that such declaration has been applied with a retroactive force." Of embargoes.

Embargoes, we have seen (*g*), are of two kinds, warlike, and civil embargoes; the former are enforced against enemies, the others are employed in the case of allies and subjects. The first kind of embargo is usually issued by a state in time of war or threatened hostilities, prohibiting the departure of ships or goods from some, or all of the ports of such state until further order. And Beawes, in his Lex Mercatoria (*h*), speaking of the civil embargo, says, "That it is laid on ships and merchandise in the ports of this kingdom by virtue of the King's proclamation, and is strictly legal, when the proclamation does not contravene the ancient laws, or tend to establish new ones, but only to enforce the execution of such laws as are already in being, in such manner as the King shall judge necessary (*i*)." Thus observes Mr. Justice Blackstone (*k*): "The law is, that the King may prohibit any individual of his subjects

(*f*) 1 Rob. Rep. 114.

(*g*) Ante, 68.—Skinner. 335. as to the King's right to impose embargoes.

(*h*) Beawes. 271.—1 Mod. 177. 179.—Skinner. 93.—1 Salk. 32.—3 Inst. 162.—Skinner. 335.

(*i*) Jenkins, 2 Cent. 745.

(*k*) 1 Bla. Com. ch. 7.

Of embargoes.

from leaving the realm. A proclamation, therefore, forbidding this, in general for three weeks, by laying an embargo upon all shipping in time of war, will be equally binding with an act of parliament, because founded on a prior law."

But this civil embargo cannot be imposed upon British ships in a foreign port, unless by the concurring authority of the state to which that port belongs; for the King has no right to disturb the peace of neighbouring nations by any seizures, however useful to the interests of his own people. This may be collected from the judgment of Sir William Scott, in the case of the Gertruyda (*l*). Even within the jurisdiction of this kingdom the prerogative of the King, with respect to the imposition of embargoes, is of a nature by no means unlimited, or absolute. Among the many reports that are to be found, of the great case of Sands and the East India Company, there is one in Salkeld, p. 32, where it is set down as agreed, that the King may lay embargoes; but then it must be for the public good, and not for the private advantage of a particular trader or company; and the embargo which was issued by his Majesty to prevent the exportation of corn in 1766, is noticed by Beawes in his Lex Mercatoria, p. 276, as having been illegally imposed, such exportation, says he, being allowed by law at the time;

(*l*) 2 Rob. Rep. 211.

and, therefore, the preamble to the Stat. 7 Geo. 3. ch. 7. for indemnifying all persons advising or acting under the order of council, laying an embargo on all ships laden with corn, or flour, during the recess of parliament in 1766, says, "which order could not be justified by law, but was so much for the service of the public, and so necessary for the safety and preservation of his Majesty's subjects, that it ought to be justified by act of parliament." This embargo, as was allowed, saved the people from famine; yet it was declared illegal by the above act of the legislature, including the King himself, who laid it, which was therefore needful to sanction it; and the proprietors of the embargoed ships and cargoes were accordingly indemnified by government.

Of embargoes.

The necessity of vesting the sole right of granting letters of marque (*m*) and reprisal in the sovereign, is obvious; were the law otherwise, each private sufferer would be a judge in his own cause.

Of letters of marque and reprisal.

The statute 4 Hen. 5. c. 7. accordingly declares, "That if any subjects of the realm are oppressed in time of truce by any foreigners, the King will grant marque in due form to all that feel themselves grieved, which form is thus

(*m*) As to letters of marque in general, see 1 Bla. Com. 251.—4 Hen. 5. c. 7.—1 Wooddes. Vin. Lec. 34.—Vin. Abr. Prerogative, n. a. —Com. Dig. Prerogative, B. 4.

Of letters of marque and reprisal.

directed to be observed: the sufferer must first apply to the Lord Privy Seal, and he shall make out letters of request, under the privy seal; and if, after such request of satisfaction made, the party required do not, within convenient time, make due satisfaction or restitution to the party grieved, the Lord Chancellor shall make him out letters of marque under the great seal, and by virtue of these, he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber, or pirate."

The case provided for by this statute, is only the case of injuries done to subjects by foreigners during peace; but the letters of marque which are granted during war, are also, says Molloy (*n*), grantable with the approbation of the King, or council, or both, and I am inclined to think one reason of committing such a prerogative to the crown may be this: that as the property of a ship, taken without a letter of marque, vests in the King (*o*), he ought, in justice, to have a discretion by himself, or his officers, as to the persons who shall thus take out commissions thus tending to abridge his revenue.

Letters which have been so granted, may be vacated in three ways; by express revocation, or by a cessation of hostilities between the na-

(*n*) Molloy. b. 1. ch. 2. s. 10.

(*o*) Vin. Ab, Prerog. n. a. pl. 22.

tions which they affect, or by the misconduct of the grantees. Letters granted during war, having usually been designed only for the general annoyance of the enemy, may be vacated by the mere express revocation of his Majesty. But with regard to letters granted during peace, by way of reparation to subjects for losses actually sustained by them from foreigners, these, says Molloy (*p*), can be revoked by no domestic act of the government, because, after the person injured has petitioned, and made legal proof of his loss, and letters of request have gone, and no reparation been made, then the letters of reprisal being sealed, create and vest a national debt in the grantee. Even this claim, however, is defeated by the cessation of hostilities, as appears from a case decided by the Lord Chancellor Nottingham (*q*). The defendant, as executor, was entitled to letters of reprisal, granted by the king, for a great sum of money, and containing a clause, that no treaty of peace should prejudice them. But his majesty afterwards, by several treaties of peace with the Dutch, expressly articled that they should not be damnified by these letters patent. The question was, whether the King could, by any treaty of peace, annul, or, in the technical phrase, amortise this instrument. That great judge was of opinion

Of letters of marque and reprisal.

(*p*) Lib. 1. ch. 2. s. 8.

(*q*) 2 Wooddes. 440.—1 Vern. 54.

Of letters of marque and reprisal.

that letters of reprisal might be revoked and amortised by a truce, and by letters of safe conduct, and a fortiori by a treaty of peace. It seems just and reasonable, that, after a solemn ratification of amity between nations, no retrospect of private grievances, unprovided for by the convention, should be allowed.

The third method in which letters of marque may become vacated, is by the misconduct of the grantees. In the case of the Mariamne (*r*), Sir William Scott laid it down that cruelty works a forfeiture of the letters of marque; and this he affirmed to be the ancient law of the Admiralty, of which the Prize Act, containing the same provision, was to be taken as a formal declaration. "During the contest," said he, "destruction is necessary and lawful, but it is contrary to every principle of the law of nations, that after the contest has ceased, hostile and destructive force should still be continued."

The last Prize Act (*s*) contains several provisions for the revocation of letters of marque; which being regulations of a nature merely municipal, may be made and varied at the will of the legislature, whose power, of course, is paramount even to the prerogatives of the crown. It has been decided (*t*) that a subject of the King

(*r*) 5 Rob. Rep. 9.

(*s*) 43 Geo. 3. 160.

(*t*) 2 Vern. 592.

cannot take goods belonging to the subjects of a prince in amity with the King, by virtue of letters of marque granted by any other sovereign or state. Of letters of marque and reprisal.

But letters granted by the King of this country are not construed strictly against the subject; for in the case of the Sacra Familia (*u*), it was decided that a vessel cruizing under letters of marque against one state, as for instance, against France, is at liberty, on obtaining notice of hostilities commencing against another, as for instance against Spain, to capture a Spanish vessel, with as full advantage to herself as if the prize had been French.

In cases of recapture, no letter of marque from the King is required, to give to the recaptor the benefit of the same salvage to which he would have been entitled if he had been provided with letters of marque (*x*).

The King, however, has the right of releasing any prize previously to its condemnation. This, said Lord Ellenborough, in the case of Sterling v. Vaughan (*y*), is an implied exception in the grant of prize by the crown.

The doctrine as to embargoes preceding hostilities, is not peculiar to the British coasts. Its principle has been acknowledged amongst all nations, and forms the basis of the right of re- Reprisals.

(*u*) 5 Rob. Rep. 360.
(*x*) The Helen, 2 Rob. Rep. 224.
(*y*) 11 East. 619.

Reprisals. prisals. "Reprisals," says Vattel (z) "are used between nation and nation, in order to do themselves justice, when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if she refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to her own advantage, till she obtains payment of what is due to her, together with interest and damages; or keep it as a pledge till she has received ample satisfaction. In the latter case, it is rather a stoppage, or a seizure, than reprisals; but they are frequently confounded in common language. The effects thus seized on are preserved while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated, and then the reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that war is declared, or hostilities commenced; and then also the effects seized may be confiscated."

"In reprisals," continues the same author (a), "we seize on the property of the subject just as we would on that of the state, or sovereign; every thing that belongs to the nation is sub-

(z) Vatt. b. 2. ch. 18. sect. 342.

(a) Vatt. b. 2. ch. 18. sect. 344.

ject to reprisals, whenever it can be seized, pro- Reprisals.
vided it be not a deposit intrusted to the public faith. As it is only in consequence of that confidence which the proprietor has placed in our good faith, that we happen to have such a deposit in our hands, it ought to be respected, even in case of open war; such is the conduct observed in England, and elsewhere, with respect to the money which foreigners have placed in the public funds."

Reprisals thus understood and authorized, are made in two ways, either by embargo, as we have already seen, in which case the act is that of the state, or by letters of marque and reprisals, in which case the act is that of the subject, authorized by the state's permission. "These words, marque and reprisal," says Mr. Justice Blackstone (*b*), "are synonymous, and signify a taking in return. They are grantable wheresoever the subjects of one state are injured by those of another, if justice be denied by that state to which the offender belongs. And the effect of the grant is to authorize the seizure of the bodies and goods of the subjects of the offending state, which may be detained till satisfaction be made, but no longer (*c*)."

"But by the law of nations," says Molloy (*d*),

(*b*) 1 Bla. Com. ch. 7. 435 to 440. [See Appendix.]
(*c*) Grot. b. 3. c. 2.— (*d*) B. 1. c. 2. s. 18. Vatt. b. 2. c. 13.—2 Wooddes.

Reprisals. "letters of marque or reprisal will not authorize the molestation of ambassadors, nor of those who travel for religion; nor of students, scholars, or their books; nor of women or children, by the civil law; nor those that travel through a country, staying but a little while there, for they are only subject to the law of that place. By the canon law, ecclesiastical persons are expressly exempt from reprisals." A merchant of another place than that against which reprisals are granted, albeit the factor of such goods were of that place, is not subject to "reprisals."

Such appears to be at present the law and practice of civilized nations, with respect to hostile property in general found within their dominions at the breaking out of a war. There seems, however, something of subtlety in the distinction between the virtual and the actual declaration of hostilities, and in the device of giving to the actual declaration a retrospective efficacy, in order to cover the defect of the virtual declaration previously implied. The rule of our ancestors was much clearer and broader. In early times, at the beginning of a war with another country, merchants belonging to that country, and found within the realm of England, were attached indeed; that is to say, they were not permitted to go abroad. But Magna Charta provides, that this

attachment shall be without harm of body or goods, with this limitation, until it be known to the King, or keeper of the realm in the King's absence, how our merchants, in the country at war with us, shall be entreated: and, if our merchants be well entreated, then theirs shall be likewise with us (*e*). Reprisals.

And by the statute 27 Ed. 3. stat. 2. cha. 17. it was enacted, that in case any dispute shall arise between this country and the sovereign of any foreign land, the merchants and others of that land shall not be sent suddenly out of our kingdom and territories, on account of such dispute, until they shall be warned and proclamation published: and that they shall go out of this kingdom and territory with their goods freely, within forty days after such warning or proclamation, and that in the mean time, they shall not be in any thing hindered or disturbed in their passage, or to make profit with their said merchandise, if they wish to sell them, and in default of wind or ship, or in case (from sickness or other evident cause) they cannot go out of this kingdom in so short a time, then they shall have forty other days, or more, if the King think fit, within which time they may

(*e*) Magna Charta, 2 inst. 58.—1 Bla. Com. 260.—Bro. Ab. tit. Property, pl. 11 38.—Skin. 204.—Bac. Abr. Mercht. A.

Reprisals. pass conveniently with their merchandises, or sell as before (*f*).

Choses in action. But though the law of our ancestors thus appears to have surpassed, in liberality, the institutions of their modern descendants, with regard to hostile property found within this realm in the actual possession of the enemy; yet, with respect to property belonging to the enemy, but not actually rendered into his possession, such as debts which may be due to him, our law, at this day, pursues a policy of a more liberal character.

When Alexander, by conquest, became master of Thebes, he found, among the treasures of the conquered, an engagement from the Thessalians to pay a hundred talents. The Thessalians having served with merit in his army, he gave up the engagement to them, and thus remitted the debt. Vattel (*g*), after citing this case, observes, that "the sovereign has naturally the same right over what his own subjects may owe to enemies. He may, therefore, confiscate debts of this nature, if the term of payment happen in time of war; or at least, he may prohibit his subjects from paying while the war continues." The latter course has been adopted by the British law. We suspend the right of the enemy to the debts which our traders may owe to him, but we do not annul it; we preclude him, during war, from suing to re-

(*f*) Beawes. 38.

(*g*) Vatt. b. 3. ch. 5. sec. 77.

cover his due; for we are not to send treasure abroad for the direct supply of our enemies in attempts to destroy us; but, with the return of peace, return the right and the remedy. Choses in action.

This doctrine of the British law respecting suspension and subsequent restoration of hostile rights and remedies is evidenced by a great many decisions. We will first consider the case of the Hoop (*h*), because it comprehends, in one concise view, not only the law of nations respecting the power of withholding payment from an enemy of the debts that may be due to him, but the rule of our own law also, with the exceptions which it admits. "It is a principle of law," says Sir William Scott (*i*), "that during a state of war, there is a total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of an alien enemy carries with it a disability to sue or to sustain, in the language of the Civilians, a persōna standi in judicio. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular cir-

(*h*) 1 Rob. Rep. 196. (*i*) 1 Rob. Rep. 200.

Choses in action.

cumstances, that pro hac vice discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority, that puts him in the King's peace pro hac vice."

This short statement sufficiently testifies what is the law on the subject of withholding the debt during war. The following decision (*k*) will evince, what is the law on the subject of restoring the debt, at the return of peace. A petition came on in the Court of Chancery, in the matter of Boussmaker, a bankrupt, praying, that the petitioner might be admitted to prove, under the commission, a debt which the commissioners had refused to admit, upon the objection that the creditors, applying to prove, were alien enemies. The Lord Chancellor explained the distinctions of the law and its principles, on this important question, whether the right of an alien enemy was destroyed or only suspended by war. "If this," said his Lordship (*l*), "had been a debt, arising from a contract entered into with an alien enemy during war, it could not possibly stand, for the contract would be void; but if the two nations were at peace at the date of the contract, though, from the time of war taking place, the creditor could not sue, yet, the contract being originally

(*k*) Ex parte Boussmaker, 13 Ves. Jun. p. 71.

(*l*) 13 Ves. Jun. 72.

good, upon the return of peace the right would revive: it would be contrary to justice, therefore, to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be divided among the other creditors. The point is of great moment, from the analogy to the case of an action. The policy avoiding contracts with an enemy, is sound and wise; but where the contract was originally good, and the remedy is only suspended, the proposition that therefore the fund should be lost, is very different." According to the strictness of the law of nations, we have already seen, that debts due to alien enemies may be confiscated by the state. But in England, and in some other modern states, a gentler law appears to have been established, a law which, though in no way compulsory with regard to foreign nations, is binding upon the crown in this particular country. An old case, indeed, of the Attorney General against Weedon and another (*m*), seems to countenance the prerogative of the British crown in all the rigour of the old law of nations, but that doctrine is questioned by Rolle, in his Abridgment; and in the case of Furtado v. Rogers (*n*), Lord Alvanley said, "With respect to the argument, that all contracts made with the enemy enure to the benefit of the King during war, and that he

Choses in action.

(*m*) Parker's Rep. 207. (*n*) 3 Bos. and Pul. 191.

Choses in action.

may enforce payment of any debt due to an alien enemy from any of his subjects, we think it is not entitled to much weight. Such a course of proceeding never has been adopted, nor is it very probable that it ever will be adopted, as well from the difficulties attending it, as from the disinclination to put in force such a prerogative."

Right of capture out of the kingdom.

HAVING thus considered the effect of war upon that portion of commerce belonging to one belligerent, which lies within the dominions of the other; we will now proceed to consider the effect of war upon that portion of commerce belonging to one belligerent, which subsists out of the dominions of the other. With respect to the commerce thus subsisting abroad, as there are, for the most part, no general ties of faith that confine the common rights of capture, the broad principle is, that such commerce is liable by the acknowledged laws of nations, to be seized and appropriated by the adverse belligerent wherever it is found. To this rule the exceptions are only those admitted by the law of nations in favour of neutral territory, or which may arise from relaxations expressly permitted by one belligerent state to the merchandise of the other. The only commercial exceptions are

by the protections, which, on peculiar occasions, the government affords to particular adventures, and the nature of which will be considered in a subsequent chapter. In some wars, it has been usual to make an exception in favour of small fishing-vessels, from tenderness to a poor and industrious order of people. This, however, as appears from the case of the Young Jacob and Johanna (*o*), is a matter of forbearance, and not of right.

Right of capture out of the kingdom.

We will now consider the mode in which the rights of seizure are usually exercised, and these are by embargo or capture. We have already considered the subject of embargo. Capture, properly so called, bearing avowedly a warlike complexion, is said to be made (*p*) where a ship is subdued and taken, either by a pirate or by an enemy, whether in open war or by way of reprisals, and whether with intent to appropriate both ship and cargo, or only certain hostile or contraband goods found on board. Of capture by a pirate, nothing can be said, but that it is illegal by all laws, human and divine: and I therefore confine myself to the consideration of capture by an enemy. The case of the Jonge Jacobus Baumann (*q*), is a striking instance of what may, or may not be considered as a capture: the vessel bearing that name was

(*o*) 1 Rob. Rep. 19.

(*p*) 2 Marshall on Insurance, 422.

(*q*) 1 Rob. Rep. 243.

Right of capture out of the kingdom.

boarded one morning by an officer and several men belonging to the Apollo Frigate, then lying stranded and in distress, who told the master, a neutral, that he must go down to the assistance of the frigate. The master accordingly went down, and took the whole of the crew on board, to the number of one hundred and seventy, or one hundred and eighty men. The ship arrived at Yarmouth three days afterwards and was navigated, during the passage, by the master himself and his own crew, except that the pilot belonging to the frigate steered through the banks of Yarmouth; on arriving at Yarmouth, the persons who had been thus preserved had the ingratitude to proceed against the ship as a prize, which they alleged themselves to have taken, on a suspicion of her being engaged in a hostile trade. Sir William Scott said, "the owners of the cargo, indeed, had done no service to the English seamen, and that, therefore, if the cargo appeared to be hostile, there was no reason against its condemnation: but that the master and owner of the ship, had been most materially instrumental in saving one hundred and seventy, or one hundred and eighty British officers and men to their country, and therefore, were entitled to be liberally considered by those who had received this benefit;" and he added these words (*r*): "If the ship had really be-

(*r*) 1 Rob. Rep. 245.

longed to an enemy, in my opinion the character of enemy itself must have been blotted out and obliterated by such a service as this. If I was compelled to condemn this ship, it would be a most reluctant condemnation indeed. I hope and trust that, if the circumstances are true as stated by the master, a condemnation of the vessel would be the very last thing to present itself to the expectation of the asserted captors."

Right of capture out of the kingdom.

In case of a conquest by capitulation, property at sea does not seem to be in precisely the same predicament as property upon land. For, from the case of the ships taken at Genoa (*s*), it appears that a permission to the conquered of withdrawing themselves, their money, merchandises, moveables, or effects, by sea or land, does not necessarily nor usually imply a permission to withdraw property afloat. The permission means, that they may withdraw, either by sea or by land, the property which it is lawful for them to withdraw, but does not defeat the usual custom, that property at sea cannot be withdrawn at all. And from the same case it further appears, that though one of the articles of a capitulation expressly grant the freedom of trade, still the capitulation shall not be understood to protect property afloat; a distinction having been usually taken by the commanders

(*s*) 4 Rob. Rep. 388.

Right of capture out of the kingdom.

of fortunate expeditions between this property and property at land: and Sir Wm. Scott said, in his judgment, "It is in every day's practice to seize all property afloat, and yet to allow a general freedom of trade exclusive of such particular seizure."

When the capture is made previously to the formal declaration of hostilities, and not in open war, it is made under letters of marque and reprisal. The nature of these has been explained in the foregoing part of this chapter, where the right of a state to seize the property of her rival, found within her dominions, was considered, and there is no distinction between the reprisals upon property within her dominions, and reprisals upon property without. When, by any of the lawful means which have been enumerated, a belligerent had possessed himself of property belonging to his enemy, it was formerly the custom, among almost all nations, to redeem it from his hands by ransom. But ransom from the hands of an enemy is now little known to the commercial law of England: for, by the statute 22 Geo. 3. c. 25. the ransom of any ships, or merchandises on board the same, belonging to any subject of this country, and taken by the subjects at war of any state at war with his Majesty, or by any person committing hostilities against his Majesty's subjects, is absolutely prohibited: and by the statutes of

43 Geo. 3. c. 160. and of the 45 Geo. 3. c. 72. (*t*), such ransom is again prohibited, unless in the case of extreme necessity, to be allowed by the Court of Admiralty. And all contracts for ransom contrary to these statutes, are made void, and subjected to a penalty of five hundred pounds (*u*). Right of capture out of the kingdom.

Having examined those cases, in which the right of the captor takes effect, and invests him with the benefit of his capture, we will now consider those cases in which he is deprived of that benefit by rescue or recapture. Rescue and recapture are distinguishable from each other. The term recapture is ordinarily employed when a prize, having been captured by an enemy, is recovered from his possession by the arrival of a friendly force. The term rescue more usually denotes that recovery which is effected by the rising of the captured party himself against his captor. There is, however, another kind of rescue, which partakes of the nature of recapture: it occurs where the weaker party, before he is overpowered, obtains relief from the arrival of fresh succours, and is thus preserved from the force of the enemy. From the case of the Helen (*x*), though that case indeed turns upon the duty of recapture, it may Of rescue and recapture.

(*t*) Marshall, 431. 2.

(*u*) Marshall on Insurance, 431.

(*x*) 3 Rob. Rep. 224.; and also the Two Friends, 1 Rob. Rep. 271.

Of rescue and recapture.

fairly be inferred, that it is also a duty among fellow subjects, and equally incumbent of course upon allies, to attempt the rescue of one another from the enemy, wherever there appears to be any reasonable prospect of success. But as to the other kind of rescue, that which is effected by the rising of the captured to defeat their captor, this is a matter rather of merit than of duty. In the case of the Two Friends (*y*), Sir William Scott said, "Seamen are not bound by their general duty, as mariners, to attempt a rescue; nor would they have been guilty of a desertion of their duty in that capacity if they had declined it. It is a meritorious act to join in such attempts; and if there are persons who entertain any doubt whether it ought to be so regarded, I desire not to be considered as one of that number. As to the situation and character of persons engaged in such attempts, it is certainly to be regarded an act perfectly voluntary, in which each individual is a volunteer, and is not acting as a part of the crew of the ship, or in discharge of any official duty, either ordinary or extraordinary."

The distinction between the obligation to the performance of the two kinds of rescue, appears to be perfectly reasonable. If it were the bounden duty of the conquered to rise against their conquerors, their original surrender would have

(*y*) 1 Rob. Rep. 271.

been a nugatory act, availing them absolutely nothing; the presumption is always, that a surrender does not take place till conquest and even escape are hopeless; and under such circumstances, it is but reasonable, that each man be allowed to judge for himself of the opportunities that may justify a subsequent insurrection. But the case is otherwise with a newly arriving force: they are bound to attempt the rescue of their friends. Their strength is fresh and untried, and unless there be a clear superiority against them, it seems but just that they brave the risk of a contest. Nor is a letter of marque, nor any other commission of the state, required by the law of nations, in order to subject a newly arriving force to the duties of rescue and recapture (*z*). Of rescue and recapture.

Out of the questions of rescue and recapture arises the consideration of postliminium and salvage. "The right of postliminium," says Vattel (*a*), "is that in virtue of which persons and things, taken by the enemy, are restored to their former state, on coming again into the power of the nation to which they belonged. When persons or things captured by the enemy are retaken by our allies or auxiliaries, or in any other manner fall into their hands, this, so far as relates to the effect of the right, is precisely the same thing Postliminium.

(*z*) The Helen, 3 Rob. Rep. 224.

(*a*) Lib. 3. c. 14. s. 204.

Postliminium.

as if they were come again into our power: since, in the cause in which we are jointly embarked, our power and that of the allies is but one and the same." So that when possessions, taken by the enemy, are either recaptured or rescued from him by the fellow-subjects or allies of the original owner, they do not become the property of the recaptor or rescuer, as if they had been a new prize; but are restored to the possession of the original owners, by what is called the right of postliminium, or jus posliminii, upon certain conditions which we shall presently have occasion to consider. But (*b*) the right of postliminium does not take effect in neutral countries: for when a nation chooses to remain neuter in war, she is bound to consider it as equally just on both sides, so far as relates to its effects; and consequently, to look upon every capture made by either party as a lawful acquisition. To allow one of the parties, in prejudice to the other, to enjoy in her dominions the right of claiming things taken by the latter, or the right of postliminium, would be declaring in favour of the former, and departing from the line of neutrality. Moveables, however, are not entitled to the full benefit of postliminium. Lands, houses, and other fixed possessions, are easily identified, and therefore are completely within the right: and the reason for the excep-

(*b*) Vattel. b. 3. c. 14. s. 208.

tion of moveables is, that in general the identification of them is impracticable, and the original owners are therefore presumed to have given them up as lost. However, even moveables are restored to the original owners, if retaken from the enemy immediately after his capture of them: in which case the proprietor neither finds a difficulty in recognizing his effects, nor is presumed to have relinquished them. This is the general law of nations with regard to the effect of the right of postliminium upon moveables; but particular nations, as we shall presently see, have relaxed the rigour of that rule in regard to their own subjects, and (by mutual consent) in regard to the subjects of one another. "Prisoners (*d*) of war who have given their parole, territories and towns which have submitted to the enemy, and have sworn or promised allegiance to him, cannot of themselves return to their former condition by the right of postliminium; for faith is to be kept even with enemies. But if the sovereign retake those towns, countries, or prisoners, who had surrendered to the enemy, he recovers all his former rights over them, and is bound to re-establish them in their pristine condition." Postliminium.

But it is not so with countries or persons taken by a belligerent state, who were not the subjects of that state during any preceding part of the same war. For the law of postliminium implies

(*d*) Vattel. b. 3. c. 14. s. 210, 211.

Postliminium. that the party claiming it returns to his previous character: and he who, during the whole war, has been the subject of the enemy alone, must be considered, when he falls into the hands of the rival state, not as returning to a previous character, but as acquiring a character absolutely new. Upon this principle was decided an important question, in the case of the Boedus Lust (*e*).

We will now inquire what rights of postliminium attach upon property which has been alienated by the enemy. Here we must attend to the distinction before laid down, between immoveable property, which is recoverable by the rights of postliminium, and things moveable, to which that right does not, by the law of nations extend. "Let it be remembered," says Vattel (*f*), "as to immoveables, that the acquisition of a town, taken in war, is not fully consummated till confirmed by a treaty of peace, or by the entire submission or destruction of the state to which it belonged. Till then the sovereign of that town has hopes of retaking it, or of recovering it by a peace. And from the moment it returns into his power, he restores it to all its rights, and consequently it recovers all its possessions, as far as in their nature they are recoverable. It therefore resumes

(*e*) 5 Rob. Rep. 233.

(*f*) Vattel. b. 3. ch. 14. sect. 212.

its immoveable possessions from the hands of those persons who have been so prematurely forward to purchase them. In buying them of one who had not an absolute right to dispose of them, the purchasers made a hazardous bargain; and if they prove losers by the transaction, it is a consequence to which they deliberately exposed themselves. But if that town had been ceded to the enemy by the treaty of peace, or was completely fallen into his power by the submission of the whole state, she has no longer any claim to the right of postliminium; and the alienation of any of her possessions by the conqueror, is valid and irreversible; nor can she lay claim to them, if, in the sequel, some fortunate revolution should liberate her from the yoke of the conqueror." Postliminium.

As to things moveable, we find from the same section that the law is otherwise. And this, indeed, is of course: for, as moveable property, according to the law of nations, is held to be irrecoverable by the original owner, in virtue of any postliminium, when once it has passed into the complete possession of the enemy, much more is such property to be protected from the effect of postliminium, when it has not only passed into the complete possession of the enemy, but been by him transferred bona fide to a neu-

Postliminium.

tral (*g*). To this may be added (*h*), that, "as things not mentioned in the treaty of peace remain in the same condition in which they happen to be at the time when the treaty is concluded, and are on both sides tacitly ceded to the present possessor, it may be said, in general, that the right of postliminium no longer exists "after the conclusion of the peace. That right entirely relates to the state of war."

Though the law of nations in general most clearly establishes that the right of postliminium, with respect to moveables, is extinguished, as soon as those moveables are completely reduced into the possession of the enemy, and that they then may be immediately alienated to neutrals as indefeasible property, yet there has been a considerable difference of opinion and of practice as to the question, what shall be deemed to constitute this complete possession. Some writers on the law of nations have stated it to be merely requisite that the property shall have been twenty-four hours in the enemy's power; others, that the property must have been brought infra præsidia, that is, within the camps, towns, ports, or fleets of the enemy; and others have drawn other lines, of an arbitrary

(*g*) 2 Wooddes. p. 441. sect. 34.
(*h*) Vatt. b. 3. ch. 14. s. 216.

nature. Of late years, however, a more absolute species of possession seems to have been required. Postliminium.

"I apprehend," said Sir Wm. Scott, in the case of the Flad Oyen (*i*), "that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemnation as one of the title deeds of the ship, if he buys a prize-vessel. I believe there is no instance in which a man, having purchased a prize-vessel of a belligerent, has thought himself quite secure in making that purchase, merely because that ship had been in the enemy's possession twenty-four hours, or carried infra præsidia."

At any rate, the rule of condemnation is the general rule applied by England. In our Courts of Admiralty it has always been holden that the property is not changed in favour of a vendee, or recaptor, so as to bar the original owner, till there has been a regular sentence of condemnation (*k*). And in the reign of King Charles the Second, a solemn judgment was given upon this point, and restitution of a ship taken by a privateer was decreed, after she had been fourteen weeks in the enemy's possession, because she had not been condemned.

(*i*) 1 Rob. Rep. 134.

(*k*) Vid. et 3 Rob. Rep. 236, 7, 8.

Postliminium.

This judgment of the Court of Admiralty was cited by Lord Mansfield in the case of Goss and Withers (*l*). And the Courts of Common Law have enforced the same rule, as will be seen from the case of Assievedo against Cambridge (*m*), where it was holden that four years possession, and several voyages performed, will not change the property without a sentence of condemnation; and this condemnation must be pronounced by a Court of competent jurisdiction, in the country either of the enemy himself, or of some of his allies, and not in a neutral country. But if, after the time of the enemy's transferring his prize to a neutral, a peace be concluded between that enemy and the state from whose subject the prize was taken; then the transfer to the neutral becomes valid, even though there was no legal condemnation. For, as we have already seen from Vattel, the right of postliminium no longer exists after the conclusion of peace. And, therefore, in the case of the Schooner Sophie (*n*), the British Court of Admiralty decided, that a ship which had been sold to a neutral, after an illegal condemnation by a Prize Tribunal, and which, therefore, would not have been considered as fairly trans-

(*l*) Goss and Withers, 2 Burr. 683. See also the case of the Constant Mary, reported in a note to the case of the Kierlighett, 3 Rob. Rep. 97.

(*m*) Assievedo against Cambridge, 10 Mod. 79.—See also 3 Rob. Rep. 237, 8.

(*n*) 6 Rob. Rep. 142.

ferred during war, was to be deemed, by the intervention of peace, a legitimate possession in the neutral's hands, and cured of all defects in the title. For as the title of the enemy captor himself, would have been quieted by the intervention of peace, so it was thought to be but reasonable that the general amnesty should have the same effect upon property in the hands of those to whom that enemy might have assigned it. "Otherwise," observed Sir William Scott, "it could not be said that the intervention of peace would have the effect of quieting the possession of the enemy; because, if the neutral possessor was to be dispossessed, he would have a right to resort back to the belligerent seller, and demand compensation from him. And as to a renewal of war, though that may change the relation of those who are parties to it, it can have no effect on neutral purchasers, who stand in the same situation as before." Postliminium.

When the assignment has been made by the hostile captor, regularly and bona fide, and the party to whom the captor has so made that assignment was, at the time of making it, a neutral, the title in the hands of such assignee will not be defeated by his subsequently becoming an enemy, as appears from the case of the Purissima Conception (*o*). But though, in such instances, the rights of rescue and recapture are gone, so that

(*o*) 6 Rob. Rep. 45.

Postliminium.

the original owner has irrecoverably lost his property, yet the party to whom it was transferred during neutrality, having become hostile, his property is of course, in common with all other hostile possessions, liable to be seized as prize of war; the only difference being that, instead of passing as a recapture, and reverting to the original owner, it is considered as a new booty, and belongs either to those who make the seizure or to the state, according to the circumstances of the case.

The rules which have been stated, are those which govern the right of postliminium by the general law of nations, and to which, therefore, England is obliged in common justice to conform, where the interests of neutrals are concerned. But in cases arising among her own subjects, with one another, and in cases arising between her own subjects and those of her allies, peculiar modifications of the principle have been introduced or acknowledged by her.

Thus it has been established by several acts of parliament (*p*), that, among English subjects, the maritime right of postliminium subsists even to the end of the war; and, therefore, the ships or goods of the subjects of this country, taken at sea by an enemy, and afterwards retaken, at

(*p*) 13 Geo. 2. ch. 4.—17 Geo. 2. ch. 34.—19 Geo. 2. ch. 34.—43 Geo. 3. ch. 160.—Vide 2 Burr. 1198. and 1 Bl. Rep. 27. Hamilton v. Mendes.

any indefinite period of time, and whether before or after sentence of condemnation, are to be restored to the original proprietors. The statute of the 43 Geo. 3. c. 160. s. 39. makes an exception as to ships which have been set forth by the enemy as vessels of war, enacting that these shall not be restored to the original owners, but belong wholly to the recaptors. But if the property recaptured were captured at first in an illegal trade, then the original right is divested, and the previous owner will not be admitted to restitution from the recaptors, as was determined in the case of the Walsingham Packet (*q*). Postliminium.

The rule which this country adopts in giving effect to the right of postliminium between her own subjects and those of her allies, may be gathered from the judgment pronounced by Sir W. Scott in the case of the Santa Cruz (*r*). It was the case of a Portuguese vessel taken by the French; and after remaining a month in the enemy's possession, retaken by the cruizers of this country, which was in alliance with Portugal. "The actual rule of the English maritime law," said Sir W. Scott, "I understand to be clearly this, that the maritime law of England, having adopted a most liberal rule of restitution with respect to the recaptured property of its own sub-

(*q*) 2 Rob. Rep. 77. (*r*) 1 Rob. Rep. 49.

Postliminium.

jects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle. In such a case it adopts their rule, and treats them according to their own measure of justice."

It appears from the case of the San Francisco (*s*), that, by a treaty between this country and Spain, the vessels of the respective countries, which have been recaptured, are to be restored on payment of salvage.

Salvage.

But though it has been the rule of this country, as among her own subjects, to restore recaptured property to the original owner, yet it has not been her rule to make the recaptors afford this restitution altogether gratuitously. By the acts of the 43 Geo. 3. c. 160. s. 39. the legislature has secured to the recaptors, according to the circumstances of the recapture, certain rates of salvage: which salvage is, as the term indeed implies, a reward given for saving the property, or (which is nearly the same thing) recovering it. The salvage allotted to British recaptors, is at the rate of one eighth of the beneficial interest in the whole recaptured property, where the recapture is effected by ships belonging to the royal navy; and one sixth, where it is effected by private ships; the judge of the court being at liberty, in cases of recapture by the joint efforts of king's ships and

(*s*) 1 Edwards. 279.

private vessels, to order such salvage as he shall deem reasonable. In our old books, the word salvage is used in another sense, being made to denote the goods saved or recovered. But at present, it almost universally bears this sense, namely, the reward to which the deliverer of such goods becomes entitled for the service he has performed. Salvage.

The reward of salvage is not confined to recapture alone, it is given also in cases of rescue. But here, it is necessary to advert again to that distinction which was before pointed out, between the two kinds of rescue. When the rescue is effected by the arrival of a fresh succour, which relieves the weaker party before he falls into the power of the adversary, no salvage is given to the rescuers. Thus it was said by Sir William Scott, in the case of the Franklin (*t*), "No case has been cited, and I know of none in which military salvage has been given, where the property rescued was not in the possession of the enemy, or so nearly as to be certainly and inevitably under his grasp. There has been no case of salvage where the possession, if not absolute, was not almost indefeasible, as where the ship had struck, and was so near as to be virtually in the hands and gripe of the enemy." When the rescue is of the other description, that is to say, when it is effected by

(*t*) 4 Rob. Rep. 147.—1 Edw. Rep. 68.

Salvage. the rising of the captured crew against the captors, a salvage is given; as is manifest from very many cases in the Admiralty Reports, and most particularly from that of the Two Friends (*u*).

The allotment of salvage, on recapture and rescue, is not a matter of British regulation alone; for salvage, as the court remarked in the case last quoted, is a question of the law of nations. The particular rates, indeed, which our acts of parliament assign, are binding only in cases between British subjects (*x*); but, in cases where restitution has been made to the subjects of other states, it has been usual, with our courts, to assess such a salvage as the nature of the service performed might reasonably appear to deserve (*y*); and that assessment is usually, though not necessarily made according to the British rates. This was stated by Sir Wm. Scott, in the case of the Two Friends. Nor is there any thing unjust in this requisition of salvage from neutrals upon restitution. The restitution of moveables being, as we have seen, a matter of favour and relaxation, not enjoined in any way by the strict law of nations, we, of course, have a right to annex a condition to our liberality. And, after all, as Lord Mansfield observed, in the case of Cornu against Blackburn (*z*),

(*u*) 1 Rob. Rep. 271.
(*x*) Two Friends, 1 Rob. Rep. 271.
(*y*) Marshall, 474.
(*z*) Dougl. 648.

there is no exaction in the case; for no man can be compelled to pay salvage, unless he chooses to have the property back. Salvage.

If the property of a nation, not engaged in hostility with the enemies of this country, happen to be taken as prize by them, and retaken out of their hands by his majesty's subjects, the probability of its condemnation in the courts of the country of the captors is to be considered; and unless there appear to be ground, on which it may be supposed that it would have been condemned in those courts, it is to be restored without the payment of any salvage. In the late war, the conduct of the cruizers and prize courts of France, having given reason to apprehend that neutral property, arrested by the former on the high seas, would, in almost all cases, be condemned by the latter, salvage was usually allowed to the recaptors of neutral property out of the hands of the French by our Court of Admiralty, and such allowance was not thought unreasonable by the neutral merchants. But this was treated as an exception to the general rule, founded on particular circumstances (*a*).

(*a*) Eleonora Catherina, 4 Rob. Rep. 156.—Warousheu, 2 Rob. Rep. 299.—Carlotta, 5 Rob. Rep. 54.—Huntress, 6 Rob. Rep. 104.—Abbot's Law of Shipping, part 3. c. 11. s. 13.

CHAPTER IV.

THE EFFECT OF WAR UPON THE COMMERCE OF NEUTRALS.—THEIR GENERAL RIGHT TO CARRY ON THEIR ACCUSTOMED COMMERCE.—PROTECTION AFFORDED BY NEUTRAL TERRITORY AND PORTS.—ILLEGAL COMMERCE; AS CONTRABAND—VIOLATION OF BLOCKADE—CARRYING DESPATCHES OR TROOPS—AND SUBMISSIONS, BY A NEUTRAL, TO OUTRAGES OF ONE OF THE BELLIGERENTS.

Right of neutrals to carry on their accustomed commerce.

"To mitigate, as much as possible, the calamities and sufferings of warfare, and to confine them to the belligerent powers, nations have found it convenient mutually to adopt certain principles, which, like the common law of our own country, have become fixed and settled by usage, confirmed by precedents and illustrated by the writings of learned men. These principles have also been adverted to, and ratified by treaties between civilized nations in all ages; and this public law establishes, that countries, not engaged in war, nor interposing in it, shall not be affected by the differences of contending nations; but, to use the very words of the eminent judge, who now presides with so much learning in the Court of Ad-

miralty, " upon the breaking out of war, it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded places, or in contraband articles, and of their ships being liable to visitation and search (*a*)."

Right of neutrals to carry on their accustomed commerce.

Every maritime war in Europe, since civilization gradually made the benefits of commerce appreciated, has produced discussions about the rights of those nations that remained at peace. In some instances their commerce certainly suffered; but where their rights were supported, the balance of advantages was greatly in their favour. The belligerents themselves found a mutual benefit in the exchange of their own produce, which could only be effected by neutral carriers. The intercourse with their colonies was enlarged by all, but principally by the weaker party; and though the varying opinions of the belligerents of the comparative advantages they derived from this intercourse, produced occasional interruptions, neutrals still maintained their rights, partly from the power they were able to throw into one scale or the other, but principally by the general advantages which were recognised by all. Though, however, power and advantage were the real founda-

(*a*) Lord Erskine's speech, 8th of March, 1808, upon the Orders in Council, 10 Cobbett's Parl. Deb. 935.

Right of neutrals to carry on their accustomed commerce.

tion of this practice, the variety of interests, and the constant charges in them, produced the necessity of some unvarying tribunal; for this purpose, the opinions of a few wise men, for want of better means, were erected into a code of international law; and though the contradictions and fanciful extravagances of some of their opinions still leave great room for arbitrary interpretations, something was gained towards permanency and juctice, by the admission of these authorities (*b*).

In the case of Barker v. Blakes (*c*), where a neutral ship, trading to a hostile port, had been detained for the purpose of search, and thereby lost her voyage, the underwriters being called upon to indemnify the neutral owner, attempted to set aside his claim, on the ground, that a neutral could not, in a British court, recover an indemnity for losses incurred in a trade which he had carried on with the enemies of Britain, in contravention of her interests and policy. But the right of the neutral to carry on such a trade, was vindicated and clearly established by Lord Ellenborough, who decided, not only that a neutral has a right to pursue his general commerce with the enemy, but that he has a right even to act as the carrier of the enemy's goods from his own to the enemy's country, without being sub-

(*b*) Baring on the Orders in Council, 30, 1.

(*c*) 9 East. 283.

ject to any confiscation of the ship, or of the neutral articles which may be on board, though certainly not without the risk of having his voyage interrupted by the seizure of hostile property.

Right of neutrals to carry on their accustomed commerce.

As, on the one hand, a neutral has a free and just right to carry the property of enemies in his own vessels; so, on the other, his own property is inviolable, though it be found in the vessels of enemies (*d*). "It is to be restored to the owners," says Vattel (*e*), "though without any allowance for detention, decay, &c. The loss sustained by the neutrals, on this occasion, is an accident to which they expose themselves by embarking their property in an enemy's ship; and the captor, in exercising the rights of war, is not responsible for the accidents which may thence result, any more than if his cannon kills a neutral passenger who happens unfortunately to be on board an enemy's vessel (*f*)."

Property of neutrals in an enemy's ship protected.

The law, on this subject, does not appear to have been always so distinctly understood; and it was an old saying, mentioned by Grotius (*g*), "that goods found in our enemies' ships are reputed theirs." But the sense of the maxim amounts only to this, that it is commonly presumed in

(*d*) See Marshal, B. 1. chap. 8. sect. 5., where he cites the Consolato del Mare, and Bynkershook.

(*e*) Vatt. b. 3. c. 7. s. 116.

(*f*) Marshall, b. 1. ch. 8. s. 5.

(*g*) Lib. 3. ch. 6. s. 6.

Property of neutrals in an enemy's ship protected.

such case, that the whole belongs to one and the same master; a presumption, however, which, by evident proofs to the contrary, may be taken off; and so it was formerly adjudged in Holland, in a full assembly of the sovereign court, during the war with the Hanse Towns, in the year 1338, and from thence hath passed into a law. At present, the law is so completely settled, that if a neutral, in partnership with any other trader, engage in a trade which, to that partner, is illegal, yet the share of the neutral is not affected by the illegality of such partner's trade. This may be collected from the case of the Franklin (*h*), which was a case of a partnership between Mr. John Bell, residing in America, a neutral country, and Mr. William Bell, residing in England, a belligerent country. The partnership appeared to have carried on a trade in tobacco with the enemy; a trade which, to Mr. John Bell, as a neutral, residing in a neutral country, was perfectly lawful, but which to Mr. William Bell, residing in a belligerent country, and therefore invested, as we have seen (*i*), with the national character of a belligerent, was of course illegal, as all trade with the enemy has previously been shown to be, according to the laws of all nations. The tobacco was seized; the share of Mr. William Bell was condemned:

(*h*) 6 Rob. Rep. 127.; see also the case of Zulema, 1 Acton. Rep. 14.

(*i*) Ante, 32 to 54.

but that of Mr. John Bell, who retained his neutral character, was saved harmless." But if the neutral voluntarily constitute himself agent of the belligerent, and make use of false papers, his share in the cargo will also become liable to condemnation (*k*).

Property of neutrals in an enemy's ship protected.

Nor does the general inviolability of the neutral character extend solely to the protection of neutral property; in some instances it goes even further, and protects the property of belligerents themselves. Thus "it is unlawful," says Vattel (*l*), "to attack an enemy in a neutral country, or to commit in it any other act of hostility. The Dutch East India fleet having put to Bergen, in Norway, in 1666, to avoid the English, the British admiral had the temerity to attack them there, but the governor of Bergen fired on the assailants; and the court of Denmark complained, though perhaps too faintly, of an attempt so injurious to her rights and dignity. At present the whole space of the sea, within cannon shot of the coast, is considered as making a part of the territory; and, for that reason, a vessel taken under the cannon of a neutral fortress, is not a lawful prize (*m*)."

Protection afforded by a neutral port.

Professor Martens, in his summary of the Law of Nations (*n*), enforces the same doctrine, and

(*k*) The Zulema, 1 Acton, Rep. 14.

(*l*) Vatt. b. 3. ch. 7. sect. 132.

(*m*) Vatt. b. 1. c. 23. s. 289.

(*n*) Mart. b. 8. ch. 6. sect. 6.; vid. et 1 Molloy, b. 1. c. 3. s. 7.; and c. 1. s. 16.

Protection afforded by a neutral port.

adds, in a note, that "when two vessels, the enemies of each other, meet in a neutral port, or when one pursues the other into such port, not only must they refrain from all hostilities while they remain there, but, should one set sail, the other must not set sail in less than twenty-four hours afterwards."

Some important cases have been tried in the British Court of Admiralty, in which the immunity of neutral domain, has been strenuously and most ably enforced by the learned judge who presides there. Such were the cases of the Twee Gebroeders (*o*), and of the Anna (*p*), in the latter of which, Sir William Scott observed, "captors must understand, that they are not to station themselves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river; much less in the very river itself. They are not to be standing on and off, overhawling vessels in their course down the river, and making the river as much subservient to the purposes of war, as if it had been a river of their own country." But the principal decision is the Twee Gebroeders (*q*). In that case, boats had been sent out from L'Espiegle, a British ship, which was itself lying in the Eastern Eems, within the protection of the neutral territory of Prussia, to capture the

(*o*) 3 Rob. Rep. 336.
(*p*) 5 Rob. Rep. 373.
(*q*) 3 Rob. Rep. 162.

vessel called the Twee Gebroeders, with three others, which were all lying a little way out at sea. A claim was given in against the captors by the Prussian consul, in consequence of the violation of his country's neutrality. In that case, Sir William Scott, said, "It is said, that the ship was, in all respects, observant of the peace of the neutral territory; that nothing was done by her, which could affect the right of territory, or from which any inconvenience could arise to the country, within whose limits she was lying: in as much as the hostile force which she employed, was applied to the captured vessel lying out of the territory. But that is a doctrine that goes a great deal too far; I am of opinion, that no use of a neutral territory for the purposes of war, is to be permitted, I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but, that no proximate acts of war are, in any manner, to be allowed to originate on neutral grounds: and I cannot but think, that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted. For supposing, that even a direct hostile use should be required to bring it within the prohibition of the law of na-

Protection afforded by a neutral port.

Protection afforded by a neutral port.

tions, nobody will say, that the very act of sending out boats to effect a capture, is not itself an act directly hostile, not complete, indeed, but inchoate and clothed with all the characters of hostility. If this could be defended, it might as well be said, that a ship, lying in a neutral station, might fire shot on a vessel lying out of the neutral territory; the injury, in that case, would not be consummated, nor received on neutral grounds, but no one would say, that such an act would not be an hostile act immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon shot, which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat, armed and manned, to effect the very same thing at the same distance? It is, in both cases, the direct act of the vessel lying in neutral ground. The act of hostility actually begins, in the latter case, with the launching, and manning, and arming the boat, that is sent out on such an errand of force.

"If it were necessary, therefore, to prove, that a direct and immediate act of hostility had been committed, I should be disposed to hold, that it was sufficiently made out by the facts of this case. But direct hostility appears not to be necessary; for whatever has an immediate

connection with it is forbidden. You cannot, without leave, carry prisoners or booty into a neutral territory, there to be detained: because such an act is an immediate continuation of hostility. In the same manner an act of hostility is not to take its commencement on neutral ground. It is not sufficient to say, it is not completed there; you are not to take any measure there, that shall lead to immediate violence; you are not to avail yourself of a station in neutral territory, making, as it were, a vantage ground of the neutral country, a country which is to carry itself with perfect equality between both belligerents, giving neither the one or the other any advantage. Many instances have occurred, in which such an irregular use of a neutral country has been warmly resented: and some, during the present war. The practice which has been tolerated in the northern states of Europe, of permitting French privateers to make stations of their ports, and to sally out to capture British vessels in that neighbourhood, is of that number: and yet, even that practice, unfriendly and noxious as it is, is less than that complained of in the present instance: for here, the ship, without sallying out at all, is to commit the hostile act. Every government is perfectly justified in interposing to discourage the commencement of such a practice; for the inconvenience,

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to which the neutral territory will be exposed, is obvious. If the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also, till, instead of neutral ground, it will soon become the theatre of war."

Neutral ship no immunity for enemy's goods.

But the immunity which neutral territory imparts, is not imparted by neutral ships; for an enemy's goods may be regularly captured, on board a neutral ship, as in any other situation. Thus Vattel (*r*) lays it shortly down, that "if we find an enemy's effects on board a neutral ship, we seize them by the rights of war: but we are naturally bound to pay the freight to the master of the vessel, who is not to suffer by such seizure." But this freight is not, in all cases, to be measured by the charter party (*s*), but particular states have sometimes relaxed the rigour of the rule, and granted, by treaty, a privilege of immunity to all goods found sailing in each other's ships, to whomsoever such goods may belong: the maxim in such cases, being, "Free ships, free goods." Such a privilege was granted by this country to Portugal, in the treaty of 1654 (*t*).

Illegal commerce of neutrals.

These are the immunities which may be legally afforded by neutrals to the subjects of one belligerent nation, against the hostility of the

(*r*) Vatt. b. 3. ch. 7. sect. 115.

(*s*) 1 Moll. L. 18.—Twil. ling Riget, 5 Rob. Rep. 82.

(*t*) 5 Rob. Rep. 52.—6 Rob. Rep. 24. 41. 358.

other. We will now proceed to those instances where neutrals, so far from affording immunity to the commerce of strangers, forfeit, by misconduct, even that immunity, which would otherwise belong to their own. This misconduct is of various kinds. We will first speak of the cases where neutrals are found engaged in contraband commerce (*u*).

Illegal commerce of neutrals.

What commerce shall be deemed contraband is a question which has given rise to various discussions, between the forces of belligerent states, and the merchants of neutral nations. "The catalogue of contrabands," said Sir William Scott, in the case of the Jonge Margaretha (*x*), "has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations; owing to particular circumstances, the history of which has not accompanied the history of the decisions." The King having, by his prerogative, the power to promulgate who are his enemies, is bound to watch over the safety of the state, he may, therefore, make new declarations of contraband, when articles come into use as implements of war which were before innocent; this is not the exercise of discretion over contraband; the law of nations prohibits contraband, and it is the usus bellici which shifting from time to

Contraband commerce.

(*u*) See Acton's Rep. 25. (*x*) 1 Rob. Rep. 189.

Illegal commerce of neutrals.

time, make the law shift with them (*y*). Thus much, at least, is acknowledged in all hands, as Vattel (*z*) has laid it down, that commodities particularly useful in war are contraband, such as arms, ammunition, horses, timber for ship-building, and every kind of naval stores. But torse and Cordilla hemp, found unfit for naval service, have been held not to be contraband. The greatest difficulty seems to have occurred in the instance of provisions: which have not been held universally contraband, though Vattel (*a*) admits that they become so on certain occasions, when there is an expectation of reducing the enemy by famine. In modern times, one of the principal criteria adopted by the courts for the decision of the question, whether any particular cargo of provisions be confiscable as contraband, is to examine whether those provisions be in a rude or in a manufactured state. For all articles, in such examinations, are treated with greater indulgence in their native condition, than when they are wrought up for the convenience of the enemy's immediate consumption. "Thus," said Sir Wm. Scott, in the case of the Jonge Margaretha (*b*), "Iron unwrought is treated with indulgence, though an-

(*y*) Lord Erskine's Speech 8th March, 1808, on the Orders in Council, 10 Cobbett's Par. Deb. 958-9.

(*z*) Vatt. b. 3. chap. 7. sect. 112.

(*a*) Vatt. b. 3. ch. 7. sect. 112.

(*b*) 1 Rob. Rep. 189.

chors and other instruments, fabricated out of it, are directly contraband. Hemp is more favourably considered than cordage: and wheat is not considered so obnoxious a commodity, as any of the final preparations of it for human use." Illegal commerce of neutrals.

But these differences of opinion, with respect to the nature of provisions, appear to have arisen, rather from individual carelessness or misapprehension, than from any radical confusion in the law of nations on this subject. That they are, in strictness, confiscable as contraband, appears to be undeniable. In the case of the Haabet (*c*), Sir William Scott explained the strict law, and the relaxations of modern practice, in the following words: "The right of taking possession of cargoes of this description, Commeatûs, or provisions, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations. The ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely. A century has not elapsed since this claim has been asserted by some of them; a more mitigated practice has prevailed in later times, of holding such cargoes subject only to a right of pre-emption; that is, to a right of purchase, upon a reasonable compensation to the individual whose property is thus diverted. I have never understood, that, on the

(*c*) 2 Rob. Rep. 182.

Illegal commerce of neutrals.

side of the belligerent, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind: or that, on the side of the neutral, the same exact compensation is to be expected, which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity, if it gets there: it does not follow that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress."

From the foregoing opinions of Sir Wm. Scott, it may be collected that all provisions, going to an enemy's port are, in strictness, confiscable as contraband; but that, in the case of provisions in their rude state, such as wheat, the strict right of confiscation is waived by the belligerent for the more lenient exercise of pre-emption; that, nevertheless, where those provisions are manufactured for use, as, if the wheat be baked into biscuit, the rigour of the original right revives, and the penalty of confiscation for contraband may be, in strictness, enforced.

From a further position, laid down by the same learned judge in the case of the Jonge Mar-

garetha (*e*), it will be found, that of all circumstances in the interpretation of contraband, none will be deemed more materially to affect the cargo than the destination with which it is sailing. "The most important distinction," continued he, "is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate, or other ships of war, may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final application of an article ancipitis usûs, it is not an injurious rule which deduces, both ways, the final use from the immediate destination; and the presumption of a hos-

Illegal commerce of neutrals.

(*e*) 1 Rob. Rep. 189. Vid. Rep. 97.—6 Rob. Rep. 126. et 4 Rob. Rep. 33.—5 Rob. —6 Rob. Rep. 93.

Illegal commerce of neutrals.

tile use, founded on its destination to a military port, is very much inflamed if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful."

There are some articles decidedly contraband in their nature, such as tar and pitch; which, however, when they are the produce of the claimant's own country, have been exempted from the penalty attaching upon contraband in general; as it has been deemed a harsh exercise of a belligerent right, to prohibit a material branch of a neutral's natural trade. "But," said Sir William Scott, in the case of the Sarah Christina (*f*), "this relaxation is understood with a condition that the cargo may be brought in, not indeed for confiscation, but for pre-emption."

Except in cases of relaxation like these, where the practice of pre-emption has interposed, it usually happens that when the goods are once clearly shewn to be contraband, confiscation to the belligerent captor ensues, as a matter of course. "Barely to stop such goods," says Vattel (*g*), "would in general prove an ineffectual mode, especially at sea, where there is no possibility of entirely cutting off all access to the enemy's harbours. Recourse is, therefore, had to the ex-

(*f*) 1 Rob. Rep. 237.—1 Rob. 26.—1 Rob. 89.—1 Rob. 212.

(*g*) Vatt. b. 3. ch. 7. sect. 113.

pedient of confiscating all contraband goods that we can seize on, in order that the fear of loss may operate as a check on the avidity of gain, and deter the merchants of neutral countries from supplying the enemy with such commodities. And, indeed, it is an object of such high importance to a nation at war, to prevent, as far as possible, the enemy's being supplied with such articles as will add to his strength, and render him more dangerous, that necessity, and the care of her own welfare and safety, authorize her to take effectual methods for that purpose, and to declare that all commodities of that nature, destined for the enemy, shall be considered as lawful prize. On this account, she notifies to the neutral states her declaration of war; whereupon the latter usually give orders to their subjects to refrain from all contraband commerce with the nations at war, declaring, that if they are captured in carrying on such trade, the sovereign will not protect them. This rule is the point where the general custom of Europe seems at present fixed, after a number of variations. And, in order to avoid perpetual subjects of complaint and rupture, it has, in perfect conformity to sound principles, been agreed that the belligerent powers may seize and confiscate all contraband goods which neutral persons shall attempt to carry to their enemy, without any complaint from the sovereign of

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those merchants; as, on the other hand, the power at war does not impute to the neutral sovereigns these practices of their subjects."

It is necessary for a neutral, if he would escape the danger of these seizures, to be exceedingly circumspect in his whole voyage. From the case of the Trende Sostre (*h*), it appears that he will not be permitted with impunity to touch at an enemy's port, if he have contraband goods on board, upon any excuse, however genuine, of selling other things less objectionable in their nature. Innocent articles, if they are so unfortunate as to be in company with obnoxious commodities, must take the ill consequences resulting from such an association. They must proceed to some other port, where the enemy is not established, and where the obnoxious commodities consequently lose their contraband character, and become fair articles of general trade. For though sailcloths and hemp are most mischievous materials, if they be sailing to a hostile market, yet a belligerent nation interposes no objection against the transfer of such commodities from a neutral possessor to her own subjects, or to another neutral.

It is a metaphorical maxim very frequently to be met with in the cases upon these captures, that contraband is of an infectious nature, and

(*h*) Reported in a note to the case of the Lisette, 6 Rob. Rep. 390.

contaminates the whole cargo. The innocence, therefore, of any particular article, is not usually admitted to exempt it from the general confiscation. By the ancient law of Europe, the ship also was liable to condemnation: "Nor can it be said," observed Sir Wm. Scott, in the case of the Ringende Jacob (*i*), "that such a penalty was unjust, or not supported by the general analogies of law, for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the Courts of Admiralty of this country, (and I believe of other nations also,) a milder rule has been adopted, and the carrying of contraband articles is attended only with the loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances (*k*)." Among such circumstances, those of false destination and false papers are considered as the most heinous (*l*). "These," as it was said by the Court in the case of the Neutralitet (*m*), "constitute excepted cases out of the modern rule, and continue them under the ancient one." Illegal commerce of neutrals.

(*i*) 1 Rob. Rep. 89.

(*k*) Charlotte, 5 Rob. 275.—Eleonora Wilhelmina, 6 Rob. 331.—Parkin v. Dick, 2 Campb. 221.—Ringende Jacob, 1 Rob. 89.—Jonge Tobias, 1 Rob. 330.

(*l*) Mercurius, 1 Rob. 288.

(*m*) 3 Rob. Rep. 295. See also the Baltic, 1 Acton's Rep. 25. and id. 333.

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And it has been recently decided that contraband, concealed out, affects the ship, however remote her return voyage may be (*n*), and that the misconduct of a supercargo in this respect affects the ship-owner (*o*). The ancient law and the modern relaxations are collected by Dr. Robinson, in a very learned note to the case of the Franklin (*p*).

Violation of blockade.

Having thus fully considered the nature of this contraband commerce, and its consequences to the neutral who engages in it, we will now examine how a neutral may forfeit the immunities of his national character, by violations of blockade. "If," says Vattel (*q*), "I lay siege to a place, or simply blockade it, I have a right to hinder any one from entering, and to treat as an enemy whosoever attempts to enter the place, or carry any thing to the besieged, without my leave; for he opposes my undertaking, and may contribute to the miscarriage of it, and this involves me in all the misfortunes of an unsuccessful war." It has been well observed (*r*), that amongst the rights of belligerents, there is none more clear and incontrovertible, or more just and necessary as to its applica-

(*n*) The Margaret, 1 Acton's Rep. 333.

(*o*) 1 Acton's Rep. 25.

(*p*) Franklin, 3 Rob. Rep. 221. note.

(*q*) Vatt. b. 3. ch. 7. sect. 117. As to distinction between military and commercial blockade, and their effect, see 1 Acton's Rep. 128.

(*r*) Dr. Phillimore on license trade, 49.—1 Acton's Rep. 59.

tion, than that which gives rise to the law of blockade, as it has been ascertained, defined, and administered by the maritime tribunals in this country. The greater the research that shall be made into the principles of natural law, the more the details of the diplomatique and conventional history of Europe shall be studied, the more will it appear that this right has its origin in the purest sources of maritime jurisprudence, that it is sanctioned by the practice of the best times, and above all, that it is so essentially connected with the vital interests of Great Britain, that the renunciation of it, under any circumstances, must be regarded as the renunciation of one of the firmest charters of our naval pre-eminence, and as the surrender of one of the surest bulwarks of our national independence. Clear, however, and indisputable as this right is, just and necessary as is the exercise of it, it cannot be denied but that it is one of the most severe and harsh in its operation of any that is inscribed in the whole code of public law. It is under this impression that tribunals of the law of nations, before they have enforced the provisions of a blockade, have uniformly required it to be established by clear and unequivocal evidence, first, that the party proceeded against has had due notice of the existence of the blockade, and secondly, that the squadron allotted for the purposes of its execution, was fully competent to cut off all

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communications with the interdicted port. These points have been deemed so indispensably requisite to the existence of a legal blockade, that the failure of either of them has been held to amount to an entire defeazance of the measure, and this even in cases where the notification of it has issued immediately from the fountain of supreme authority (*s*).

"On the question of blockade," said Sir William Scott, in the case of the Betsy (*t*), "three things must be proved, 1st, the existence of an actual blockade; 2ndly, the knowledge of the party; and thirdly, some act of violation, either by going in or by coming out with a cargo laden after the commencement of blockade." We will consider each of these three points in its order.

Actual blockade necessary.

First, then, there must be the existence of an actual blockade. It must have been declared by competent authority; and, as a declaration of blockade is a high act of sovereignty, it was held, in the case of the Henrick and Maria (*u*), that a commander of a king's ship is not to extend it. But, from the case of the Rolla (*x*), it should seem that this limitation of a commander's power is held to subsist only "on stations in Europe, where go-

(*s*) This was decided in the Court of Appeal, in Feb. 1792. Dr. Phillimore on License Trade, 52. in notes.

(*t*) 1 Rob. Rep. 92. See also the case of the Nancy, 1 Acton's Rep. 59.

(*u*) 1 Rob. Rep. 146.

(*x*) 6 Rob. Rep. 367.

vernment is almost at hand to superintend the course of operations; and that a commander going out to a distant station, may reasonably be supposed to carry with him such a portion of sovereign authority delegated to him as may be necessary to provide for the exigencies of the service on which he is employed." Actual blockade necessary.

The blockade must not only have been declared by competent authority, but must be also an actually existing blockade. A blockade is then only to be considered as actually existing, when there is a power to enforce it (*y*). "The very notion of a complete blockade," said Sir William Scott, in the case of the Stert (*z*), "includes that the besieging force can apply its power to every point of the blockaded state. If it cannot, there is no blockade of that part where its power cannot be brought to bear." We find, however, from the case of the Frederick Molke (*a*), that "it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind, (if the suspension and the reason of the suspension are known,) that will be sufficient in law to remove a blockade." But if the relaxation happen not by such accidents as these, but by the

(*y*) Mercurius, 1 Rob. Rep. 80.

(*z*) 4 Rob. Rep. 66.—1 Acton. 64, 5. Ld. Erskine's speech, 8th March, 1808, on the Orders in Council, 10 Cobbett's Parl. Deb. 949, 950.

(*a*) 1 Rob. Rep. 86.—1 Rob. 93, 94. 147. 156.—1 Acton's Rep. 59.

Actual blockade necessary.

mere remissness of the cruizers stationed to maintain the blockade, (who are too apt, by permitting the passage of some vessels to give fair ground to others for supposing the blockade concluded,) then it is impossible for a court of justice to say that the blockade is actually existing. "It is in vain," said Sir William Scott, in the case of the Juffrow Maria Schroeder (*b*), "for governments to impose blockades, if those employed on that service will not enforce them. The inconvenience is very great, and spreads far beyond the individual case. Reports are eagerly circulated, that the blockade is raised; foreigners take advantage of the information; the property of innocent persons is ensnared, and the honour of our own country is involved in the mistake."

Mr. Serjeant Marshall (*c*), in his excellent work on insurance, observes, that, "not only a single port, but a number of ports, and even a great extent of coast, may be blockaded. In the month of March, 1799, the British government notified to all neutral powers, that the ports of Holland, were all invested and blockaded by the British forces: and that every vessel, of whatever flag, every cargo, and every bottom, attempting to enter them, would become forfeited by the law of nations, as attempting to carry succour to the be-

(*b*) 3 Rob. Rep. 156.—Ibid. 158, 159. note.—1 Acton's Rep. 59.

(*c*) Marshall, b. 1. c. 3. s. 3.—1 Acton Rep. 63.

sieged. It must be admitted, that in no former war had the blockading system been pushed to this extent; but this has been not for want of right, but for want of power. If a single port may be blockaded by a single squadron, which has never yet been disputed, a number of squadrons may blockade a certain extent of coast; and if a country possesses the power and means, and will incur the expense and hazard, of covering the whole extent of an enemy's coast, it becomes entitled, upon the same principle, to the same exemption from neutral interference, as if, with a single division, it invested a single fortress." Actual blockade necessary.

The second point to be examined is the knowledge which the neutral may have respecting the blockade of any particular port: since, in order to affect him with the penal consequences of a violation, it is absolutely necessary for him to have been sufficiently informed of the blockade itself. This sufficient information may be communicated to him in two ways: by a formal notification from the blockading power, or by the notoriety of the fact. "To make a notification effectual and valid," said Sir William Scott, in the case of the Rolla (*d*), "all that is necessary is that it shall be communicated in a credible manner: because, though one mode may be more formal than another, yet any communication which brings it to the knowledge of the party, in a way which could leave no doubt Knowledge of blockade necessary.

(*d*) 6 Rob. Rep. 367.

Knowledge of blockade necessary.

in his mind as to the authenticity of the information, would be that which ought to govern his conduct, and will be binding upon him. It is at all times most convenient that the blockade should be declared in a public and distinct manner, instead of being left to creep out from the consequences produced by it."

The effect of a notification to a foreign government, is to include all the individuals of that nation. "It would be the most nugatory thing in the world," said Sir William Scott, in the case of the Neptunus (*e*), "if individuals were allowed to plead their ignorance of it. It is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect: I shall hold, therefore, that a neutral master can never be heard to aver, against a notification of blockade, that he is ignorant of it." A subsequent decision in the case of the Adelaide (*f*), goes further yet, and establishes, that a notification given to one state must be presumed, after reasonable time, to have reached the subjects of neighbouring states also, binding them, though not of its own force, yet by way of evidence. But a reasonable time is allowed for the promulgation of the notice, so that neutrals are

(*e*) 2 Rob. Rep. 110.—Welvaart Van Pillaw, 2 Rob. 128. as to the effect of general notoriety of blockade de facto upon neutrals.—1 Acton Rep. 61 and 62.

(*f*) 2 Rob. Rep. 110. in notes.

held to be bound by it, not from the precise moment when it was given to the government, but from the period when it may fairly be supposed to have reached themselves (*g*). Knowledge of blockade necessary.

When once the notice, actually or constructively, has reached the neutral, he is not permitted to go to the station of the blockading force, upon pretence of inquiring whether blockade have terminated. "The merchant," said Sir William Scott, in the case of the Spes and Irene (*h*), "is not to send his vessel to the mouth of the river, and say, 'If you don't meet with the blockading force, enter; if you do, ask a warning, and proceed elsewhere.' Who does not at once perceive the frauds to which such a rule would be introductory? The true rule is, that, after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of inquiry."

In adventures from America, indeed, the Court allowed some relaxation of this rule, on account of the distance of that country. This relaxation, as explained in the last mentioned case, was, "that ships sailing from America, before the knowledge of the blockade had reached America, should be entitled to a notice, even at the blockaded port, and that ships sailing afterwards, might sail on a

(*g*) Jonge Petronella, 2 Rob. 298.
Rob. Rep. 131.—Calypso, 2 (*h*) 5 Rob. Rep. 76.

Knowledge of blockade necessary.

contingent destination even for that port, with the purpose of calling at some British port, or at some neutral port, for information, and that they should be allowed the benefit of such a contingent destination to be ascertained and rendered definite, by the information which they should receive in Europe. But in no case was it held that they might sail to the mouth of a blockaded port to inquire whether a blockade, of which they had received previous formal notice, was still in existence or not. If particular parties are innocent in their intention, it is still a measure of necessary caution, and of preventive legal policy, to hold the rule general, against the liberty of inquiring at the very mouth of the blockaded port: which would amount, in practice, to a universal license to attempt to enter, and, on being prevented, to claim the liberty of going elsewhere."

The indulgence, thus limited, was considered as due in reason to the American merchants. "For," observed Sir William Scott, in the case of the Betsy (*i*), "Lying at such a distance, where they cannot have constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that they should send their ships conjecturally, upon the expec-

(*i*) 1 Rob. Rep. 332.— and see also 1 Acton Rep. Neptunus, 2 Rob. 114.— 141. 161. Vrow Johanna, 2 Rob. 109.;

tation of finding the blockade broken up, after it had existed for a considerable time. A very great disadvantage indeed would be imposed upon them, if they were bound rigidly by the rule, which justly obtains in Europe, that the blockade must be conceived to exist till the revocation of it is actually notified. For, if this rule is rigidly applied, the effect of the blockade would last two months longer upon them than on the trading nations of Europe, by whom intelligence is received almost as soon as it is issued." Knowledge of blockade necessary.

The receipt of the notification will not prevent a neutral, who, at the time of receiving it, is lying in the very port blockaded, from retiring freely: and it has even been laid down in the case of the Betsy (*k*), that he may retire with a cargo which he may already have laden, and which has thereby become actually neutral property: the distinction being, that he is not at liberty to make any fresh purchase after the notification. From the case of the Rolla (*l*) it appears, that the court will hold every cargo to be a fresh purchase which was not delivered, previously to the notification, either on board the neutral ship itself, or in lighters.

The notification of blockade must be legal and regular. During a blockade, which extended

(*k*) 1 Rob. Rep. 92. and 152.

(*l*) 6 Rob. Rep. 364.

Knowledge of blockade necessary.

only to Amsterdam, an English commander gave a notice to a neutral entering Amsterdam, of blockade upon all Dutch ports. The notice was held to be invalid (*m*), 1st, with reference to the other ports, because, as we have seen, a commander of a King's ship has no right to enlarge a blockade; and, 2dly, with reference to Amsterdam itself, "Because," said Sir William Scott, "it took from the neutral all power of election as to what other part of Holland he should enter, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral master to this kind of distress; and I am of opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation."

No formal notification can ever be necessary for vessels lying within the blockaded port. "The continued fact," said Sir William Scott, in the case of the Vrow Judith (*n*), "is itself a sufficient notice; it is impossible for those within to be ignorant of the forcible suspension of their commerce; the notoriety of the thing supersedes the necessity of particular notice to each ship."

This brings us to the consideration of the other mode, in which, as we have already seen, a neutral may receive what shall be deemed sufficient

(*m*) Henrich and Maria, 364. 1 Rob. 146.—Rolla, 6 Rob.

(*n*) 1 Rob. Rep. 152.

information of a blockade, that is, by the notoriety of the fact. "If," says Sir William Scott, in the case of the Columbia (*o*), "you can affect a neutral with the knowledge of the fact, a formal warning becomes an idle ceremony, of no use, and not to be required. But the sight of one vessel, before a harbour, would not be sufficient notice to a neutral, though that vessel might alone be adequate to the operations of the blockade." There must be an apparent, or notorious blockade, in order to affect a neutral with knowledge, unless there be individual proof that he had received specific information of it (*p*). On the other hand, if the fact be of a nature manifestly notorious, a person violating such a blockade will be considered, prima facie, as having knowingly offended; but he may be admitted to give evidence of his ignorance. For there is a distinction between this case, of a knowledge by the notoriety of the fact, and the before-mentioned cases, of knowledge by formal notice. In these cases we have seen, that no plea of ignorance is ever admitted; in this, such a plea will be allowed, if fairly established. This rule is laid down in the cases of the Hurtige Hane (*q*) and of the Neptunus (*r*). In the latter, there is also this further

Knowledge of blockade necessary.

(*o*) 1 Rob. Rep. 156.—1 Rob. Rep. 83.—1 Rob. Rep. 146.

(*p*) Mercurius, 1 Rob. 83. —6 Rob. 65.

(*q*) 3 Rob. Rep. 324.

(*r*) 2 Rob. Rep. 110.

Knowledge of blockade necessary.

distinction taken between the two classes of cases: that, in the cases of a notification formally given, the act of sailing to the blockaded port with a contingent destination to enter if the blockade be raised, and to proceed if it be not, is sufficient to constitute the offence. It is to be presumed, that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up; and, from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing de facto only. There, no presumption arises as to the continuance; and the ignorance of the party may be admitted, as an excuse, for sailing on a doubtful and provisional destination."

What is a violation of blockade.

Thus, we have gone through two of the three points which are chiefly necessary to be considered in the question of blockade, namely, the existence of an actual blockade, and the neutral's knowledge of it. It remains for us to examine the third point, namely, the violation of the blockade, so existing and so known. This violation may be, either, by going into the place blockaded, or by coming out of it with a cargo laden after the commencement of the blockade. But, in order to constitute such a going into the blockaded port as will subject the neutral to the penal-

ties of confiscation, it is not necessary that the entrance be completed into the very heart of the harbour. Vessels are not permitted even to place themselves in the vicinity, if their situation be so near that they may, with impunity, break the blockade whenever they please. "If a vessel could, under pretence of proceeding farther, approach close to the blockaded port, so as to be in a condition to slip in without obstruction, then," said Sir Wm. Scott, in the case of the Neutralitet (*s*), "it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence, to hold, as a presumption de jure, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence, and essential to the effectual exercise of this right of war." Still less is a neutral permitted to place himself in such a situation as to be within the protection of the batteries on the shore (*t*). What is a violation of blockade.

A blockade is broken as completely by coming out as by going in. "There may be instances, indeed, of innocent egress," said Sir Wm. Scott, in the case of the Frederick Molke (*u*), "instances

(*s*) 6 Rob. Rep. 30.

(*t*) Charlotte Christine, 6 Rob. Rep. 101.—Gute Ernwartung, 6 Rob. 182.

(*u*) 1 Rob. Rep. 86. 92. 150. 172.—6 Rob. Rep.

What is a violation of blockade.

where the vessels have gone in before the blockade; and, under such circumstances, it could not be maintained that they might not be at liberty to retire. But the utmost that can be allowed to a neutral vessel, is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this court means to apply, that neutral ships departing, can only take away a cargo, bona fide purchased and delivered before the commencement of the blockade. If she afterwards take on board a cargo, it is a fraudulent act, and a violation of the blockade."

What excuses violations of blockade.

In some cases, the violations of blockade may be excusable. In cases of this nature, the whole burthen of exonerating himself from the penal consequences lies upon the party. He must show that he was led into the blockaded port by some accident which he could not control, or by some want of information which he could not obtain; in doing this, he must prove his whole case; and however innocent his intentions may have been, he must explain his conduct in a way consistent, not only with the innocence of himself and his owner, but he must bring it within those principles which the court has found it necessary to lay

364.—5 Rob. Rep. 27. 256. —2 Rob. Rep. 124.—1 Ed. wards. 33.; and see case of Charlotte, 1 Edwards. 252.

down for the protection of the belligerent right, and without which, no blockade can ever be maintained. An excuse that the ship went in to procure a pilot for another port is insufficient (*y*). What excuses violations of blockade.

The invention of neutrals has been abundantly fertile in providing excuses for their violations of blockade, but these excuses are received by the belligerent Courts of Admiralty with much suspicion. "An excuse," said Sir William Scott, in the case of the Fortuna (*z*), "in order to be admissible, must shew an imperative and overruling compulsion to enter the particular port under blockade. This can scarcely ever be the case with respect to mere want of provisions. That want may drive the master to seek some port, but can hardly force him to resort exclusively to the port blockaded." A continued gale of wind, however, may sometimes furnish an excuse.

If a place be blockaded only by sea, it is no violation of the belligerent rights for a neutral to carry on commerce with it by inland communications. In the case of the Ocean (*a*), which was a case arising out of the blockade of Amsterdam, Sir William Scott said (*b*), "The legal consequences of a blockade must depend on the means of a blockade, and on the actual or possible appli-

(*y*) The Arthur, 1 Edwards. 203.

(*z*) 5 Rob. Rep. 27.—Adonis, 5 Rob. 256.—Exchange, 1 Edwards. 39.—Hurtige Hane, 2 Rob. 124.

(*a*) 3 Rob. Rep. 297.

(*b*) Ocean, 3. Rob. 297.

What excuses violations of blockade.

cation of the blockading force. On the land side, Amsterdam neither was nor could be affected by a blockading naval force. It could be applied only externally; the internal communications of the country were out of its reach, and in no way subject to its operation." And in another case (*c*), arising out of the same blockade, he said, "The blockade of Amsterdam is, from the nature of the thing, a partial blockade, a blockade by sea; and if goods are going to Embden, with an ulterior destination by land to Amsterdam, or by an interior canal navigation, it is not, according to my conception, a breach of the blockade.

Effect of violation of blockade.

We will now consider the effect of those violations of blockade which have been thus defined. "Prima facie," said Sir William Scott, in the case of the Neptunus (*d*), "the cargo is considered as liable to the same judgment with the ship." But evidence will be generally admitted, on the part of the owners of the cargo, to exonerate them from the guilt in which the vessel is implicated; for though the presumption is always against them, yet it is not impossible that the master alone may have been to blame. In cases, however, where any privity appears between the own-

(*c*) Jong Pictor, 4 Rob. 79.—Stert, 4 Rob. 65.—Maria, 6 Rob. 204.

(*d*) 3 Rob. Rep. 173.—Juffrow Maria Schroder. 3 Rob. 147.—Adonis, 5 Rob. 256.—Exchange, 1 Edw. 39. Mercurius, 1 Rob. 80.—Alexander, 4 Rob. 93.

ers of the cargo and the master, the subsequent imputation of the entire blame to the master alone will not avail to protect the owners of the cargo. Effect of violation of blockade.

In the Juffrow Maria Schroeder (*e*), the cargo was even placed in a worse situation than the ship: for the ship was restored on the ground of her having been permitted, by license, to take a cargo in, and being therefore fairly at liberty to bring a cargo out: but an evil intention appearing on the part of the owners of the cargo to slip it out whenever an opportunity should occur, the cargo was condemned. From the same case it farther appears, that where a ship has contracted guilt, by sailing with an intention of entering a blockaded port, or by sailing out, "The offence is not purged away until the end of the voyage; till that period is completed, it is competent to any cruizers to seize and proceed against her for that offence (*f*)." "When a vessel enters an interdicted port," said Sir William Scott, in the case of the Christianberg (*g*), "the offence is consummated, and the intention is for the first time declared. It is not till the vessel comes out again, that any opportunity is afforded of vindicating the law, and of enforcing the restriction of this order. It is objected, that, if the penalty is

(*e*) 3 Rob. Rep. 147.

(*f*) Juffrow Maria Schroeder, 3 Rob. 147.—Acton. 25.

(*g*) 6 Rob. Rep. 376.—Welvaart Van Pillaw, 2 Rob. 128.

Effect of violation of blockade.

applied to the subsequent voyage; it may travel on with the vessel for ever. In principle, perhaps, it might, not unjustly, be pursued farther than to the immediate voyage. But we all know, that, in practice, it has not been carried farther than to the voyage succeeding, which affords the first opportunity of enforcing the law."

But, though the offence is consummated by the act of sailing, yet if, between the times of sailing and of capture, the blockade have been raised, that offence is held to be wiped away. This was decided in the case of the Lisette (*h*), on the ground, that the necessity of applying the penalty to prevent future transgression, continued no longer, after the cessation of the blockade.

Now with respect to the circumstances under which a blockade may be deemed to have ceased, the case of the Hoffnung (*i*), seems to have firmly established, that the raising of a blockade by a superior force is a total defeasance of that blockade, and of its operations. "A new course of events arises," said Sir William Scott, "which may tend to a very different disposition of the blockading force, and which introduces, therefore, a very different train of presumptions in favour of

(*h*) 6 Rob. Rep. 387. see 1 Acton's Rep. 59. 61.

(*i*) 6 Rob. Rep. 112.— 261.

Tuketen, 6 Rob. 65.; and

the ordinary freedom of commercial speculations. In such a case, the neutral merchant is not bound to foresee, or to conjecture, that the blockade will be resumed; and therefore, if it is to be renewed, it must proceed de novo, and without reference to the former state of facts which has been so effectually interrupted." Effect of violation of blockade.

On the same principle on which contrabands of war and infractions of blockade, have been interdicted in the commerce of neutrals, I mean, the principle, that a neutral has no right to relieve a belligerent, against the direct hostility of his enemy, it has been held, that other acts of illegal assistance, afforded to an enemy, expose to confiscation the property of the neutral concerned in them. Among these, none is of a more injurious nature than the conveyance of hostile despatches. A full review of the authorities and a summary of the principles on this subject, will be found in Sir William Scott's judgment in the case of the Atalanta (*k*). The vessel bearing that name, had been captured, carrying despatches from a French colony to Paris. The mischievous consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed; the carrying of two or three cargoes of stores is necessarily an assistance of a limited nature: but, Illegal assistance by conveying despatches.

(*k*) 6 Rob. Rep. 440.—1 Ewd. 41.

Illegal assistance by conveying despatches.

in the transmission of despatches, may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerent in that quarter of the world.

The strict rule of the law of nations originally was, as we have already seen, that, in cases of contraband, the ship should be confiscated as well as the cargo. Modern practice, has, in most cases of contraband, though not in all, very leniently relaxed that rule. But as the conveyance of despatches is a much greater offence, and as that offence, though committed by the master, is to be taken as virtually the offence of the owner of the ship, according to that rule of law which makes the principal responsible for the acts of his agent, the Court, in this case, thought it proper to condemn the ship. In cases of contraband, the forfeiture of the goods themselves, and the loss of the freight by the master, are penalties of considerable force. "But," observed Sir William Scott, "to talk of the confiscation of despatches would be ridiculous. There would be no freight dependant on it, and therefore, the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle."

The owners of the cargo, as appears from the same case (*l*) are responsible only as in other instances, where they are actually culpable, or where a privity subsists between them and the master, which involves them, by implication, in his delinquencies.

Illegal assistance by conveying despatches.

The case of the Caroline (*m*), turns upon the same question; and Dr. Robinson has subjoined a valuable note, containing several interesting authorities. In this case of the Caroline, however, the ship and cargo were restored to the neutral claimants, because it appeared that the despatches on board were not (as in the last case) going to the mother country of the enemy, from the enemy's colony, but only from the enemy's ambassador resident in a neutral country. "The neutral country," said Sir Wm. Scott, "has a right to preserve its relations with the enemy, and you are not at liberty to conclude, that any communications between them, can partake, in any degree, of the nature of hostility against you. The enemy may have his hostile projects to be attempted with the neutral state; but your reliance is on the integrity of that neutral state, that it will not favour, nor participate in such designs, but, as far as its own counsels and actions are concerned, will oppose them. Another distinction," con-

(*l*) Vide et Rapid, 1 Edwards, 228.

(*m*) 6 Rob. Rep. 461.—Madison, 1 Edwards, 224.

Illegal assistance by conveying despatches.

tinued the learned judge, "arises from the character of the person, who is employed in the correspondence. He is not an executive officer of the government, acting simply in the conduct of its own affairs, within its own territories, but an ambassador resident in a neutral state, for the purpose of supporting an amicable relation with it. I have before said, that persons discharging the functions of ambassadors, are, in a peculiar manner, objects of the protection and favour of the law of nations."

Carrying troops, &c.

Equally intolerable is the employment of a neutral ship, as a transport for the private men, or for the officers of the enemy; and such vessels were accordingly condemned, in the cases of the Friendship (*n*), and the Orozembo (*o*).

Trade contrary to treaty.

There is yet another species of commerce, which is illegal to the neutral engaged in it. It is that which he may be carrying on, in contravention of particular treaties, concluded with either belligerent. In this case, the belligerent, whose compact is thus violated, has a right to call the neutral to account for his misconduct (*p*).

Submission of neutral to outrages of one of the belligerents.

It appears also to be admitted, that if a belligerent adopts a mode of conduct towards a neutral, which amounts to an act of hostility, and

(*n*) 6 Rob. Rep. 420.

(*o*) 6 Rob. Rep. 430.

(*p*) See the cases in Marshall, p. 1. ch. 8. sec. 15. p. 319.

in which that neutral acquiesces, the other belligerent has a right to retaliate (*q*); and that if a decree interdicting a neutral from trading with us, or visiting our ports is executed upon him, it is an interdiction he has no right to submit to, because the moment it is executed, we are injured by the interruption of his commerce with us. If he submits, from favour, to the unjust belligerent, he directly interposes in the war, and the neutral character is at an end; retaliation then would not only be strictly applicable, but just and legal; and if he submits from weakness or from any other cause not hostile or fraudulent, we have an unquestionable right, without any invasion of neutrality, to insist, that what he suffers from the enemy he shall consent to suffer from us, otherwise he would keep an open trade with the enemy at our expense, relieving him from the pressure of the war, and becoming an instrument of its illegal pressure upon us. In that case also the term retaliation, though not applicable perhaps in literal strictness, as it applies to the neutral, is substantially and justly applicable to him; because it is, in fact, retaliation upon the enemy through the sides of the neutral, in a case where the injury to us cannot exist without the participation of the

Submission of neutral to outrages of one of the belligerents.

(*q*) Lord Holland's speech 26 Feb. 1808, on Orders in Council, 10 Cobbett's Parl. Deb. 783.—See also Baring on Orders in Council. 110, 1.

Submission of neutral to outrages of one of the belligerents.

neutral, in doing or suffering, by either of which our commerce is alike interrupted (*r*). It was on this principle that Sir William Scott, in the case of the Nayade (*s*), decided, that goods the property of a merchant resident in Portugal, and consigned from thence to Bourdeaux, were liable to capture by a British vessel, the Portuguese having submitted to repeated insults from France, though she had not declared war.

(*r*) Lord Erskine's speech 8 March 1808, on the Orders in Council, 10 Cobbett's Parl. Deb. 938.

(*s*) 4 Rob. Rep. 251.

CHAPTER V.

OF NEUTRALS CARRYING ON COMMERCE USUALLY INTERDICTED IN TIME OF PEACE, VIZ. THE COASTING TRADE AND COLONIAL TRADE—OF THE RULE OF THE WAR, 1756, AND RELAXATIONS—WHAT PROPERTY OF ENEMY LIABLE TO CONFISCATION—FORCIBLE EMPLOYMENT OF NEUTRAL SHIPS—OF VISITATION AND SEARCH AND CONSEQUENCE OF RESISTANCE AND OF THE PAPERS AND DOCUMENTS USUALLY REQUIRED ON BOARD A NEUTRAL SHIP.

In the preceding chapter we considered the illegal acts by the commission of which a neutral trade may forfeit the natural immunities of his own commerce, as by contraband traffic, transgressions of blockade, the conveyance of despatches or of troops, and by the contravention of particular treaties, or submission to the outrages of one of the belligerents. All these illegal acts are of an intelligible and unequivocal character; any one of these acts themselves being brought to light, there can remain no doubt respecting the unfairness of

that specific transaction. But the class of cases which we are, in this chapter, to examine, are of a less decided character, they are cases of commerce so constituted, as not to be necessarily fraudulent, though it is usually so. I speak of that commerce which either belligerent forbids to neutral states in time of peace, but permits them to enjoy in time of war; possibly, indeed, with a fair design, but more probably with the fraudulent and collusive intention of covering and withdrawing his own possessions from the grasp of his enemy's hostility. The possibility of fair dealing makes it impracticable to decide, ipso facto, on any particular adventure, that it is fraudulent and collusive; and therefore, on the other hand, the strong probability of fraud and collusion has made it necessary for the belligerents to declare that such adventures shall not be tolerated at all.

The principal branches of trade which are thus incessantly liable to abuse, and from which it has therefore been deemed necessary that neutrals shall be totally excluded, are the enemy's coasting trade, and the enemy's colonial trade.

Coasting trade.

It has long been the policy of almost all nations, to preserve, exclusively, in the hands of their own subjects, all the traffic carried on between the ports of their own coast; and nothing,

except the accidental and insuperable necessities of war, has been usually thought sufficient to justify the slightest deviation from that policy. When a neutral, therefore, presents himself in the character of a trader engaged in the coasting trade of the enemy, does he not present himself in the character rather of the enemy's ally than of a neutral properly so called? Is he not the willing and active instrument of relieving one belligerent from the extremities to which the other has lawfully reduced him? "Is there nothing," to use the words of Sir William Scott (*a*), "like a departure from the strict duties, imposed by a neutral character and situation, in stepping in to the aid of the depressed party, and taking up a commerce, which so peculiarly belonged to himself, and to extinguish which was one of the principal objects, and proposed fruits of victory? Is not this, by a new act, and by an interposition neither known nor permitted by that enemy in the ordinary state of his affairs, to give a direct opposition to the efforts of the conqueror, and to take off that pressure which is the very purpose of war to inflict, in order to compel the conquered to a due sense and observance of justice?

Coasting trade.

"As to the coasting trade," continues the learned judge, "supposing it to be a trade not

(*a*) The Emanuel, 1 Rob. Rob. Rep. 252. Rep. 296. The Ebenezer, 6

Coasting trade.

usually open to foreign vessels, can there be described a more effective accommodation that can be given to an enemy during a war, than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? It is said, that this is not importing any thing new into the country, and it certainly is not: but has it not all the effects of such an importation? Suppose that the French navy had a decided ascendant, and had cut off all British communication between the northern and southern parts of this island; and that neutrals interposed, to bring the coals of the north for the supply of the manufactures, and for the necessities of domestic life in this metropolis, is it possible to describe a more direct and more effectual opposition to the success of French hostility, short of an actual military assistance in the war? The duties of neutrality are clearly expressed in Lord Howick's letter to Mr. Rist (*b*), in the following words: "Neutrality, properly considered, does not consist in taking advantage of every situation between belligerent states, by which emolument may accrue to the neutral, whatever may be the consequences to either belligerent party; but in observing a strict and honest

(*b*) 10 Cobbett's Parl. Deb. 406.

impartiality, so as not to afford advantage, in the war, to either; and particularly in so far restraining its trade to the accustomed course, which is held in time of peace, as not to render assistance to one belligerent in escaping the effect of the other's hostilities. The duty of a neutral is "non interponere se bello, non hoste imminente hostem eripere;" and yet it is manifest that lending a neutral navigation to carry on the coasting trade of the enemy, is in direct contradiction to this definition of neutral obligations, as it is in effect, to rescue the commerce of the enemy from the distress to which it is reduced, by the superiority of the British navy to assist his resources, and to prevent Great Britain from bringing him to reasonable terms of peace." Coasting trade.

Formerly the Courts of Admiralty in Great Britain, were so strict in the enforcement of the prohibition against the interference of neutrals in the coasting trade of the enemy, that all neutral vessels found engaged in that trade, were subjected to the penalty of confiscation. In later times, and until the late Orders in Counsel, that penalty was alleviated, and the neutral was considered subject only to the forfeiture of the freight: which, as we have before seen (*c*), is in other cases usually paid by the captor to the neutral owner, whenever he takes from that neutral any cargo belonging to

(*c*) Ante. But now see Orders in Council, 7 Jan. 1807.

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the enemy. For though it be perfectly fair that we seize on the property of an enemy, wheresoever we find it, yet it is also necessary, in point of justice, that we indemnify the neutral for the loss which we thus occasion him to undergo. His trade, in carrying innocent merchandize for the enemy, being a trade completely legitimate as to him, and in no way affected in its legitimacy by the hostility of the belligerents. But when he is detected in the act of interfering with a trade which is not legally permitted to him, a trade which the hostility of the belligerents is the sole cause of throwing into his power (*d*), then he is no longer entitled to the same indemnity; and he is treated with very ample indulgence, in being suffered to escape without the confiscation of his ships, in addition to the forfeiture of his freight. The strict ancient law, and the modern relaxations, are collected and digested in the reply of the King's Advocate upon the case of the Johanna Tholen (*e*).

But the relaxation of the ancient penalty was not suffered to take effect, when, in addition to the generally obnoxious nature of the trade itself, there appeared to be circumstances of specific

(*d*) See the French Navigation Act, which prohibits the coasting trade of France being carried on except in French-built ships, 1 Acton, 277.

(*e*) 6 Rob. Rep. 72. See also Dr. Robinson's note to that case; and see also another note, 6 Rob. Rep. 250.

fraud in the individual instance. Therefore, in the case of the Johanna Tholen (*f*), the Court held, that the carrying on of the enemy's trade with false papers subjected the ship to confiscation; and, in the case of the Ebenezer (*g*), the same sentence was pronounced, with respect to the cargo, which happened in that instance to be the property, not of an enemy, but of the neutral himself. For it is impossible not to feel that the fabrication of false papers (*h*), which are intended to deceive the captors respecting the vessel's real destination, is a gross aggravation of the guilt originally incurred, by the simple act of illegal traffic. Coasting trade.

The strict rigour of the prohibition of the interference of neutrals in the coasting trade of a belligerent, was renewed by the Order in Council of the 7th January, A. D. 1807, which directs, that if any vessel shall be found proceeding from one port in possession of France to another such port, she shall be captured and brought in, and, together with her cargo, shall be condemned as lawful prize (*i*).

Precisely analogous in its principle is the rule which prohibits the neutral from engaging in the Colonial trade.

(*f*) 6 Rob. Rep. 72. The Ebenezer, 6 Rob. Rep. 252.

(*g*) 6 Rob. Rep. 250. See also Carolina, 3 Rob. Rep. 75.

(*h*) Phœnix, 3 Rob. Rep. 191.

(*i*) See observations on this Order, in Lord Erskine's speech, 8th March, 1808, on the Orders in Council; 10 Cobbett's Parl. Deb. 945, 6.

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enemy's colonial trade. "Upon the breaking out of a war," said Sir Wm. Scott, in the case of the Immanuel (*k*), "it is the right of neutrals to carry on their accustomed trade, with the exception of the particular cases of a trade to blockaded places, or in contraband articles, (in both which cases their property is liable to be condemned,) and of their ships being liable to visitation and search, in which case, however, they are entitled to freight and expenses. I do not mean to say that, in the accidents of a war, the property of neutrals may not be variously entangled and endangered. In the nature of human connections, it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it. These inconveniences are more than fully balanced by the enlargement of their commerce. The trade of the belligerents is usually interrupted, in a great degree, and falls, in the same degree, into the lap of neutrals. But, without reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade, to the utmost extent of

(*k*) 2 Rob. Rep. 197, 198. the Orders in Council, 10 and see Lord Erskine's Cobbett's Parl. Deb. 936. speech, 8th March, 1808, on

which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title. And such I take to be the colonial trade, generally speaking. What is the colonial trade, generally speaking? It is a trade generally shut up to the exclusive use of the mother country to which the colony belongs; and this to a double use;—that of supplying a market for the consumption of native commodities, and that of furnishing to the mother country the peculiar commodities of the colonial regions (*l*). Upon the interruption of a war, what are the rights of belligerents and neutrals respectively, with regard to colonial territories? It is an indubitable right of the belligerent to possess himself of such places as of any other possession of his enemy. This is his common right; but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea. Such colonies are dependant for their existence, as colonies, on foreign supplies; if they cannot be suppli- Colonial trade.

(*l*) See the French Navigation Act, 1 Acton. 277. which prohibits the importation of the produce from their colonies in any ships but their own.

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ed and defended, they must fall to the belligerent of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it. He can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say, true it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and, by sharing its benefits, prevent its progress. You have, in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening which the prevalence of your arms alone has affected. Supplies shall be sent, and their products shall be exported. You have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories; and your blood and treasure have been expended, not for your own interest, but for the common benefit of others. Upon these grounds, it cannot be contended to be a right of neutrals to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by

the pressure of war; for when the enemy, under an entire inability to supply his colonies, and to export their products, affects to open them to neutrals, it is not his will, but his necessity, that changes his system; that change is the direct and unavoidable consequence of the compulsion of war; it is a measure not of French counsels, but of British force." Colonial trade.

Sir Wm. Scott proceeds, in the same case, to observe upon certain other instances of relaxation, afforded by belligerents to neutrals during war, which do not, like the relaxations of the coasting and colonial trades, subject the neutral to any penalty for availing himself of them. "The admission of foreigners," continues he, "into the merchant service, as well as into the military service of this country, the permission given to vessels to import commodities not the growth, produce, and manufacture of the country to which they belong, and other relaxations of the act of navigation, and other regulations founded thereon; these, it is true, take place in war, and arise out of the state of war: but then they do not arise out of the predominance of the enemy's force, or out of any necessity resulting therefrom; and that I take to be the true foundation of the principle. It is not every convenience, or even every necessity, arising out of the state of the war, but that

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necessity which arises out of the impossibility of otherwise providing against the urgency of distress inflicted by the hand of a superior enemy, that can be admitted to produce such an effect. Thus, in time of war, every country admits foreigners into its general service. Every country obtains, by the means of neutral vessels, those products of the enemy's country which it cannot possibly receive either by means of its navigation, or its own. These are ordinary measures, to which every country has resort in every war, whether prosperous or adverse. They arise, it is true, out of the state of the war, but are totally independent of its events, and have therefore no common origin with these compelled relaxations of the colonial monopoly. These are acts of distress, signals of defeat and depression; they are no better than partial surrenders to the force of the enemy, for the mere purpose of preventing a total dispossession."

These were the chief grounds of general principle, upon which the Court of Admiralty proceeded to condemnation in the case of the Immanuel (*m*); and the doctrines there laid down were most fully confirmed by the judgment of the Court of Appeal, in the case of the Wilhelmina (*n*). The judgment in this case was delivered

(*m*) 2 Rob. Rep. 197.

(*n*) 4 Rob. Rep. Appendix, 4.

by the Lord Chancellor, and it concluded in these decisive terms: "It has already been pronounced to be the opinion of this Court, that, by the general law of nations, it is not competent in neutrals to assume, in time of war, a trade with the colony of the enemy which was not permitted in time of peace; and, under this general position, the Court is of opinion that this ship and cargo are liable to confiscation." Colonial trade.

The prohibition by which neutrals are forbidden to avail themselves of the relaxations extended by belligerents, reaches only to those cases where such relaxations did not exist in time of peace. Where the relaxation did exist in time of peace, its benefit is continued to the neutral during war; in accordance with the leading rule, which enjoins that war shall not place the neutral in a worse situation than that in which he would have found himself if peace had continued. And, therefore, in the case of the Juliana (*o*), which was the case of a neutral vessel sailing between France and Senegal, then a French colony, the Court having ascertained, after much investigation, that France had been accustomed to leave open the trade of Senegal to foreign ships, as well before as since the war, restored the vessel to the neutral claimants.

(*o*) 4 Rob. Rep. 321.

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It was in the year 1756 that the strict rule, which we have been hitherto considering, was, for the first time, practically established, and universally promulgated, the case which demanded its application having then, for the first time, occurred (*p*). It has therefore become generally known by the title of "the rule of the war 1756; by which every one understands the rule that neutrals are not to carry on, in time of war, a trade which was interdicted to them in time of peace (*q*)."

Relaxations of the rule of 1756.

Having seen distinctly what is the strict measure of the belligerent's right, as comprised in the foregoing rule, we will now inquire what relaxations have been introduced by the more lenient policy of later times. These relaxations are comprehensively and clearly stated by Dr. Robinson in the Appendix to the 4th vol. of his Reports. The following are the points of information most important to our present purpose.

"During the war between England and America, and the several powers of Europe that interfered to foment those differences, the principle was altogether intermitted—and on this ground, that France had professed, a short time before the commencement of hostilities, to have altogether

(*p*) 6 Rob. Rep. Appendix, note 1.—4 Rob. Rep. Appen. 13.

(*q*) See observations on this rule, Baring on Orders in Council, 32. &c. 80. &c.

abandoned the principle of monopoly, and meant, as a permanent regulation, to admit neutral merchants to trade with the French colonies in the West Indies. The event proved the falsehood of that representation: but, for a time, the effect was the same. The Court of Admiralty of this country did not, during that war, apply the principle, or interrupt the intercourse of neutral vessels in that branch of commerce more than in any other. Relaxations of the rule of 1756.

"Soon after the commencement of the late war, the first set of instructions that issued, were framed, not on the exception of the American war, but on the antecedent practice: and directed cruizers 'to bring in, for lawful adjudication, all vessels loaden with goods, the produce of any colony of France, or carrying provisions or supplies for the use of any such colony.' The relaxations that have since been adopted, have originated chiefly in the change that has taken place in the trade of that part of the world, since the establishment of an independent government on the Continent of America. In consequence of that event, American vessels had been admitted to trade in some articles, and on certain conditions, with the colonies both of this country and France. Such a permission had become a part of the general commercial arrangement, as the ordinary state of their trade in time of peace. The commerce of

Relaxations of the rule of 1756.

America was therefore abridged by the foregoing instructions, and debarred of the right generally ascribed to neutral trade in time of war, that it may be continued, with particular exceptions, on the basis of its ordinary establishment. In consequence of representations made by the American government to this effect, new instructions to our cruizers were issued on the 8th January, 1794, apparently designed to exempt American ships, trading between their own country and the colonies of France. The directions were, 'to bring in all vessels loaden with goods the produce of the French West India Islands, and coming directly from any port of the said islands to any port in Europe."

"In consequence of this relaxation of the general principle, in favour of American vessels, a similar liberty of resorting to the colonial market for the supply of their own consumption, was conceded to the neutral states of Europe. To this effect, a third set of public instructions issued 25th January, 1798, which recite, as the special cause of further alteration, the present state of the commerce of this country, as well as that of neutral countries, and direct cruizers 'to bring in all vessels coming with cargoes the produce of any island or settlement belonging to France, Spain, or Holland, and coming directly from any port of the said islands, or settle-

ments, to any port of Europe, not being a port of this kingdom, nor a port of the country to which such ships, being neutral ships, belonged.' Relaxations of the rule of 1756.

"Neutral vessels were, by this relaxation, allowed to carry on a direct commerce between the colony of the enemy and their own country: a concession rendered more reasonable by the events of war, which, by annihilating the trade of France, Spain, and Holland, had entirely deprived the states of Europe of the opportunity of supplying themselves with the articles of colonial produce in those markets. This is the sum of the general rule, and of the relaxations in the order in which they have occurred. On the effect and extent of the law to be extracted from the rule and the exceptions taken together, much argument has been displayed, and several important judgments have been delivered."

The illegality of the direct trade between the colony and the parent state of the enemy, was settled in the case of the Immanuel (*r*). A trade between the country of the enemy and the colony of his ally, was held, in the case of the Rose (*s*), to be upon the same footing; and in the case of the New Adventure (*t*), which was the case of a ship going from the French settlement of Goree

(*r*) 2 Rob. Rep. 186.—Reeve's Shipping, 271.

(*s*) 4 Rob. Rep. App.

(*t*) 4 Rob. Rep. App.

Relaxations of the rule of 1756.

to the Spanish colony of the Havannah, it was decided, that even this species of trade, though not at all connected with either parent state, but carried on simply from the settlement of one enemy to the colony of another, fell within the general principle of the rule, and was therefore unlawful to the neutral. These cases refer to principles of the original rule, which have never been relaxed by any instructions (*u*).

We next advance to the consideration of those cases which have arisen out of the instructions or relaxations just mentioned. The Danish ship Wilhelmina was taken on a voyage from a hostile colony to a port of Europe, which was not a port either of this kingdom or of the country to which the ship or cargo belonged. It was therefore considered as a case not falling within the protection of the instructions, and a condemnation ensued. In the case, indeed, of the Hector (*w*), and in the subsequent case of the Sally (*x*), the instructions appear to have been construed a little more favourably than their tenor dictated. Those were cases of American ships, captured on voyages from hostile colonies in the West Indies to another West Indian Island, that of St. Thomas, which was then a neutral possession. The trade thus car-

(*u*) See 4 Rob. Rep. App. Appendix.

(*w*) Hector, 4 Rob. Rep. (*x*) Sally, ibid.

ried on by the American neutrals, was not to any port of this kingdom, nor to a port of their own country; and, upon principle, would therefore have been subject to confiscation; but the instructions had directed the capture only of ships coming from the hostile colonies to Europe; and as this produce had not been carried out of the West Indies, it was restored, although it should seem, that, even without any instructions at all, the trade was inherently illegal. However, it was thought right, at that time, to put a liberal interpretation on the instructions, and to consider as exempted, that which was not specifically included; though, in the Sally, the Court professed merely to act on the authority of the Hector, and intimated that, if the question had been a new one, their decision would have been different. In the case of the Lucy (*y*), an attempt was made by a neutral claimant to extend the indulgence still further. It was the case of a neutral Swedish vessel, taken on a voyage from a hostile colony to a neutral American port. Here too the adventure was certainly not pointed out for confiscation by the letter of the instructions; but the Court thought proper to decide upon the principle, which they did not conceive to have been in this instance relaxed by the instructions:

Relaxations of the rule of 1756.

(*y*) 4 Rob. Rep. App.

Relaxations of the rule of 1756.

and they therefore proceeded to condemnation. The Master of the Rolls pronounced judgment to the following effect: "In the case of the Sally, the Court thought they were going further than they should have been disposed to go, if it had not been for the authority of the Hector: now we are required to go farther. In neither of those cases was the produce of the colonies carried out of the West Indies. If an American vessel would not be permitted to trade from Saint Domingo to Sweden, there can be no reason why the same rule should not be applied to Swedish vessels, trading between the colony of the enemy and America."

On the other hand, in the case of the Margaretha Magdalena (*z*), which was the case of a ship captured on a voyage, bona fide, from a hostile colony to her own port, the protection of the instructions was held to be fairly applicable, and the property was restored. In the case of the Providentia (*a*), a vessel having been captured in a trade with a hostile colony, which trade, even in time of war, was not generally open to all neutrals but permitted only to particular persons, by special passes or licenses, it was contended, on the part of the captors, that the instructions were not meant to protect these adventures, but merely to exempt

(*z*) 2 Rob. Rep. 138. (*a*) 2 Rob. Rep. 142.

that trade which was generally open to all neutrals. But the court thought it proper to put a more liberal interpretation on the instructions: "If," said Sir William Scott, "a distinction was intended between cases of trade generally open, and cases in which a special license or pass is necessary, that distinction ought to have been expressly inserted in the instructions, as an exception. There is nothing in the general terms to direct neutrals to such interpretation. It would be, therefore, to operate with surprise upon them and to mislead them into a trade to their own undoing, to put such an interpretation upon the King's instructions. Unless it can be shewn that it was the particular meaning of the instructions to except vessels under this license, I must hold, that it is not in the terms of them to inquire whether they are going with a pass or not. So I understand them, and till I am instructed to the contrary by the superior court, I shall so interpret them, as importing a general permission, and as not affected by the special license; the law being simple and universal in its language, and there being nothing to lead me to think that there was any such reserve in the mind of the legislature."

Relaxations of the rule of 1756.

But it is not possible, consistently with the justice which a belligerent nation owes herself, to exercise this liberality of interpretation towards neutrals in all cases. In that of the Rends-

Relaxations of the rule of 1756.

borg (*b*), a contract had been made between a neutral merchant and the Dutch East India Company, with the avowed object of securing the Dutch property from English hostility. The adventure, it is true, was to Copenhagen, the port of the neutral merchant himself, and therefore, by the letter of the instructions, appeared to be legal: but the Court were of opinion, that a commerce, formed with such express views, facilitated as it was by the enemy with peculiar privileges, and conducted on so immense a scale, was not to be considered as a neutral traffic, though the property did really belong to the neutral merchants who claimed it. "It is a possible thing," said Sir Wm. Scott, "that the commerce may not be neutral although the property is; and, if that is the case, the mere neutral ownership will not be a sufficient title to restitution: with respect to the avowed object of the enemy in entering into the contract, namely, the view of preserving his property from British capture;" the learned judge proceeded to speak in the following terms: "It has been argued that the motive does not concern the buyers: that the motive of the sellers is nothing to the buyers, is laid down as a position, true in the most unlimited extent. I think that is advanced a little too largely; because if the motive is disclosed,

(*b*) 4 Rob. Rep. 121.

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it is possible that the duties of neutrality may, on the disclosure of such a motive, create some new obligations on the neutral purchaser, arising from his relation to the other belligerent; the grand fundamental duty of neutrality being, that he is not to relieve one belligerent from the infliction of his adversary's force, knowing the situation of affairs upon which the interposition of his act would have such a consequence. Neutrals may not be bound to inquire very accurately; but if it is clearly declared, either by the fact itself or a fortiori, by express acknowledgments, they are bound to take notice of it and regulate their conduct accordingly. If one belligerent is in a state of distress, created by the superiority of his enemy, and on that account gives invitations to neutrals, for other pretended reasons, it is not necessary for me to say how far the neutral is bound to scrutinize the truth of those reasons, and to decline, in all cases, a beneficial invitation upon his own private surmises. But if a belligerent come and say, I am in the utmost distress; my enemy is all powerful; without your assistance, I am a lost man: in such a case, it is an invitation which he is manifestly not at liberty to accept. He cannot afford such assistance, without being guilty of a direct interposition in the war. Nor does it affect the justice of the case at all, that such assistance is not given gratuitously; though done

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lucrandi causâ, it is not less an unlawful interposition; a man does not send contraband out of pure love of the enemy, but with a view of obtaining advantage to himself, from the relief of the enemy's distress. If it is a sound principle of the law of nations, that you are not to relieve the distress of one belligerent to the prejudice of another; any advantage that you may derive from such an act, will not make it lawful. The adversary has a full right to destroy his commerce. By his own confession the adversary is effecting this; he has the power, as well as the right, and you are not, from a prospect of advantage to yourself, or from any other motive to step in, on every outcry, for help to rescue him from the gripe of his adversary."

Colonial trade not to be carried on circuitously by neutrals.

The colonial trade which a neutral may not carry on directly, he may not carry on circuitously; "An American," said Sir William Scott, in the case of the Polly (*c*), "has undoubtedly a right to import the produce of the Spanish colonies for his own use; and, after it is imported bona fide into his own country, he would be at liberty to carry it on to the general commerce of Europe."

Then arises the question, what shall be considered a fair importation for the use of the neutral, and what shall be considered only a colour-

(*c*) 2 Rob. Rep. 361.—1 Acton's Rep. 171.

able importation to protect the enemy's adventures? So many cases had occurred where the importation, from the hostile colony into the neutral country, had been merely fraudulent, the produce being, in truth, hostile property covered by a neutral name, and destined for the mother country of such hostile colony, that it had become very difficult for the court to decide, what species of importation should be deemed a fair and honest importation, sufficient to break the continuity of the voyage, and relieve the neutral from the suspicion of hostile collusion (*d*). The question at length was discussed, upon an appeal before the Lords Commissioners, in the case of the William (*e*), and the Master of the Rolls, in giving judgment, expressed himself to the following effect: "What, with reference to this subject, is to be considered a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest, and a shortest course in which the voyage could be performed, would change its destination and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree, or the direction of the deviation, whether it be of more or fewer leagues: whether towards the coast of Africa, or towards that of America.

Colonial trade not to be carried on circuitously by neutrals.

(*d*) Polly, 2 Rob. Rep. 361.—Maria, 5 Rob. 365.

(*e*) 5 Rob. Rep. 387.

Colonial trade not to be carried on circuitously by neutrals.

Neither will it be contended that the point, from which the commencement of a voyage is to be reckoned, changes as often as the ship stops in the course of it. Nor will it the more change, because a party may choose arbitrarily, by the ship's papers, or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again to the ship, does not necessarily amount to the termination of one voyage, and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo, purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the

appearance of having begun from a different place? The truth may not always be discernible, but when it is discovered, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage, from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. That those acts have been attended with trouble and expense, cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence to shew the purpose for which the acts were done, but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same, but there is this difference between them: the landing of the cargo, the entry at the Custom-house, and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation; the true purpose of the owner cannot be effected without them. But, in a fictitious im-

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Colonial trade not to be carried on circuitously by neutrals.

portation, they are mere voluntary ceremonies which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage, which he has resolved to continue, the appearance of being broken by an importation which he has resolved not really to make."

In consequence of some complaints of the conduct of our Vice Admiralty Court, on the part of America, an official correspondence took place between Lord Hawkesbury and Mr. King, in 1801, in the course of which the Advocate General, on the 16th of March in that year, in his official character, made the following report as to the law concerning the colonial trade: "The general principle respecting the colonial trade has, in the course of the present war, been relaxed to a certain degree in consideration of the present state of commerce. It is now distinctly understood, and has been repeatedly so decided by the High Court of Appeal, that the produce of the colony of an enemy may be imported by a neutral into his own country, and may be re-exported thence even to the mother country of such colony; and, in like manner, the produce and manufacture of the mother country may, in this circuitous mode, legally find their way to the colony. The

direct trade, however, between the mother country and its colonies has not, I apprehend, been recognised as legal either by his Majesty's government or by his tribunals. What is a direct trade, or what amounts to an intermediate importation into the neutral country, may sometimes be a question of some difficulty. A general definition of either, applicable to all cases, cannot well be laid down. The question must depend upon the particular circumstances of each case. Perhaps the mere touching in the neutral country to take fresh clearances, may properly be considered as a fraudulent evasion, and is, in effect, the direct trade (*f*); but the High Court of Admiralty has expressly decided, (and I see no reason to expect that the Court of Appeal will vary the rules) that landing the goods and paying the duties in the neutral country, breaks the continuity of the voyage, and is such an importation as legalizes the trade, although the goods be reshipped in the same vessel, and on account of the same neutral proprietors, and be forwarded for sale to the mother country or the colony." It is said, that in the case of the Essex, contrary to prior determinations, it was decided in the Court of Appeal, that if an American ship, which has exported goods from a French colony to America, and there only given bond for the payment of the duties instead of

Colonial trade not to be carried on circuitously by neutrals.

(*f*) See 1 Acton's Rep. 171.

Colonial trade not to be carried on circuitously by neutrals.

actually paying them, and then conveys the goods to France, this is decisively illegal, and subjects the cargo to capture and condemnation; a doctrine, which it has been insisted, is contrary to legal principles (*g*). Upon the whole it should seem, that the genuineness of these adventures is a matter to be judged of, not by any definite and precise criterion, but by the particular circumstances of each particular case.

The penalty for breach of this rule.

The penalty in these cases of colonial trade, as well as in the other cases of illegal commerce carried on by neutrals, is confiscation. It was for some time the custom that the ship should be restored, and the cargo alone confiscated; but, in later times, the strictness of the original principle has been revived, and ship and cargo are both condemned (*h*).

These are the chief regulations and decisions of a permanent nature, respecting the interference of neutrals with the enemy's colonial trade. I say, of a permanent nature, because I apprehend that their principles, being founded in natural justice and the established jurisprudence of nations, will be recurred to, and universally acknow-

(*g*) Baring on Orders in Council, 81, 2., but quære if the case of the Essex was decided on this ground.

(*h*) Jonge Thomas in a note to the report of the Minerva, 2 Rob. Rep. 229.; and the Volant, note to the report of the Wilhelmina, 4 Rob. Append. 1 Acton's Rep. 171.

ledged by the neutral powers, as soon as the period shall return when neutrals will be permitted to acknowledge any principles at all in questions of international law. The Decrees of France and the Orders in Council of Great Britain, and all those various inventions of aggression and retaliation which have abounded through the present war, do not appear to me to wear the same probability of permanence, adopted as they have been in particular emergencies, and calculated for individual objects.

The penalty for breach of this rule.

Besides the coasting and colonial trades, there are some other commercial transactions, of a nature so liable to abuse, that belligerents have felt themselves justified in setting aside the claims which neutrals have preferred respecting them. In the case of the Marianna (*i*), a hostile ship, which had been bought of a neutral, this neutral put in a claim against the captors, suggesting that the purchase money had not been paid to him, and that he had therefore retained a lien upon the property for the payment of that money. But the court said, "Such an interest cannot be deemed sufficient to support a claim of property in a court of prize. Captors are supposed to lay their hands on the gross tangible property on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it

What interest of the enemy in property renders it liable to confiscation.

(*i*) 6 Rob. Rep. 24.

What interest of the enemy in property renders it liable to confiscation.

would be quite impossible for captors to know, upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens, which could not in any manner come to their knowledge. It would be equally impossible for the Court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims, would require of the Court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all diversities in which that law exists. From necessity, therefore, the Court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions."

Of the same class, is the case of the Josephine (*k*). Silver had been shipped by a hostile merchant to his agent in Hamburgh, for the purpose, as it was asserted, of satisfying a debt to an American neutral. The cargo was captured: and the American, for whose payment it was thus stated to have been destined, put in a claim

(*k*) 4 Rob. Rep. 25.

in the British Court of Admiralty. The claim was disallowed: "For," said the Court, "even if the asserted intention, on the enemy's part, of applying the silver to the payment of the neutral were ever so sincere, it always remained revocable. The hostile merchant retained the power of converting it to any purpose of his own, and the neutral claimant had no document whatever, giving him the control over it. Under these circumstances, the hostile merchant must be taken to be the legal proprietor; and, as his property, this silver must be condemned."

What interest of the enemy in property renders it liable to confiscation.

The belligerent, when he thinks fit, has of course a power to remit the strictness of any of his own rights, and such remissions are not unfrequently made by orders in council, and royal instructions to the commanders of vessels, enjoining them to spare certain branches of trade in particular places, or for a particular time. Whenever these relaxations are afforded by the government, the Court of Admiralty shews itself uniformly liberal in their constructions. It will be unnecessary to multiply instances in order to illustrate this favourable temper in the judicial interpretation of public dispensations; one case will be amply sufficient. In the case of the Nostra Signora de Piedade (*l*), instructions had been issued by the King in council, directing the commanders of ships not to molest neutral vessels laden

Relaxations occasionally allowed.

(*l*) 6 Rob. Rep. 41.

Relaxations occasionally allowed.

solely with corn, and going to Spain, to whomsoever that corn might belong. The ship in question was not laden solely with corn, having on board, besides grain, a few dozen of oars and other insignificant articles; nor was she going to Spain, in the common acceptation of those words, but was captured in a voyage from one Spanish port to another. Sir William Scott gave judgment to the following effect: "The corn constitutes the cargo, and although there were on board some other small articles, they are not material, I think, to affect the privilege of the principal cargo, being corn, going under the humane permission of his Majesty to an enemy afflicted with famine and pestilence. At the same time it is objected, that this cargo does not come under the literal terms of the instructions which are described to be for the importation of corn, &c. But it would, in my opinion, be no more than the fair interpretation of the humane intention of these instructions, to consider them as extending as well to the distribution of corn between the provinces of Spain, as to an importation directly from any other country. Indeed, the indulgence would be in a great measure fruitless without this construction: if cargoes, on board neutral ships, are entitled to protection in coming from the north of Europe to the northern ports of Spain, they are to be protected also by the same spirit of the same instructions, in being

distributed afterwards between the provinces of that kingdom. I am therefore disposed to hold this cargo entitled to protection, unless the privilege shall have been forfeited by any fraudulent or improper conduct; since every grant of this kind must be fairly and honourably acted upon, and if fraud is interposed, and the parties resort to subterfuges of ill faith for their protection, they may justly be considered to have forfeited all benefit from the special indulgence which has been granted to them."

Relaxations occasionally allowed.

We now arrive at the view of those cases where the law of nations, in consideration of the urgent necessities of war, permits the suspension of some of the absolute rights of neutrals. The absolute rights of neutrals may be summed up in the terms of that rule which has been before mentioned, "that a neutral is not to be placed in a worse situation by the war, than that in which he would have remained if peace had continued uninterrupted." To this rule of absolute right the urgent necessities of war form the only exception.

Suspension of the rights of neutrals.

"By virtue of these urgent necessities of war, vessels are frequently detained," says Beawes, in his Lex Mercatoria, "to serve a prince in an expedition; and, for this, have often their lading taken out, if a sufficient number of empty ones are not procurable to supply the state's necessity:

Forcible employment of neutral ships, &c.

Forcible employment of neutral ships, &c.

and this without any regard to the colours they bear, or whose subjects they are; so that it frequently happens, that many of the European nations may be forcibly united in the same service, at a juncture when most of their sovereigns are at peace and in amity with the nation which they are obliged to serve. Some have doubted of the legality of the thing; but it is certainly conformable to the law both of nature and nations, for a prince, in distress, to make use of whatever vessels he finds in his ports, that are fit for his purpose, and may contribute to the successes of his enterprises; but under this condition, that he makes them a reasonable recompense for their trouble, and does not expose either the ships or men to any loss or damage."

"In the law of dominion," says Molloy (*m*), "extreme necessity seems excepted; hence it is, that the vessels and ships, of what nature and nation soever, that should be found riding in the ports or havens of any prince or state, may be seized on and employed upon any service of that sovereign that shall seize the same; being but a harmless utility, not divesting the owners of their interest or property." After putting a case on this point, he proceeds: "Who would not pluck a shipwrecked man from his plank, or a wounded man from his horse, rather than suffer himself to

(*m*) Molloy, b. 1. ch. 6. sec. 1 and 2.

perish? To slight which, is a sin, and to preserve, the highest wisdom. Besides, in the taking of the vessel, the right is not taken from the owner, but only the use, which, when the necessity is over, there is a condition of restoring annexed tacitly to such a seizure. And, doubtless, the same right remains to seize the ships of war of any nations, as well as those of private interest, the which may be employed as occasion shall present. So the Grecians seized on ships of all nations that were in ports, by the advice of Xenophon; but, in the time, provided food and wages to the mariners."

Forcible employment of neutral ships, &c.

But these are nice points of casuistry, which few will submit to have settled for them, by the reasonings of their neighbours. But surely nothing but a necessity, really and absolutely the most perilous and extreme, can authorize such invasions of neutral right. For, if the calls of convenience or passion are to be interpreted into the dictates of necessity, (a species of interpretation too common, both with public and with private men,) the laws of security and property are a dead letter, and the only law is the law of the strongest. The great danger consists in this; that, of the necessity which is set up as the excuse, the interested party must be himself the judge; and having only his own conscience to consult as to its existence he is but too apt to persuade himself, that

Forcible employment of neutral ships, &c.

it is the same thing to possess the power, and to labour under the necessity. The mode in which this suspension of neutral right is most usually and commodiously made, is that of embargo; and this species of civil embargo which is always attended with compensation to those whose ships are attacked by it, is distinguishable from that kind of warlike embargo, which we have before explained to be a mode of seizing the property of enemies.

Of visitation and search and consequences of resistance.

The rights of a belligerent nation against the delinquencies of neutrals would exist in vain, if she were not armed with a practical power, by which those rights may be enforced. Such a power, by the law of nations, regularly exists; and it is called the power of visitation and search. "We cannot prevent the conveyance of contraband goods," says Vattel (*n*), "without searching neutral vessels that we meet at sea. We have, therefore, a right to search them." This is clear and satisfactory, if, upon making this search, the vessel be found employed in contraband trade, or in carrying despatches or troops, or in any other illegal commerce, she is brought in for adjudication in the Court of Admiralty. If, on the other hand, her commerce appear to be legitimate, she is dismissed without further molestation or inconvenience.

Neutrals have made many struggles against

(*n*) Vattel, b. 3. ch. 7. sect. 114.

this right of visitation and search, and particularly by the celebrated league, which was formed during the American war, with the empress of Russia at its head. A declaration, dated the 28th of February, 1781 (*o*), was delivered to the minister of each of the belligerent powers, purporting, "that neutral ships ought to be at liberty to navigate freely from port to port, and upon the coast of the nations at war; that the goods and effects of the subjects of the belligerent powers should be free, with the exception of contraband goods. That no goods should be considered as a contraband, but such as were specified in the 10th and 11th articles of the treaty of commerce between Russia and Great Britain, dated 20th of June, 1766, that to ascertain what should be deemed a blockaded port, it was determined that none should be admitted to come within that description, but such only, where by reason of the near approach of the ships employed in the attack, there was an apparent danger that they would be able to enter it. And finally, that these principles should serve as a basis, for all proceedings and judgments upon the legality of prises."

Of visitation and search and consequences of resistance.

The right of visitation and search was not strictly enforced by Great Britain under these circumstances; but it was not abandoned. Similar attempts, subsequently made, have been defeated

(*o*) Marshall on Insurance, b. 1. ch. 8. sec. 5.

Of visitation and search and consequences of resistance.

and totally overthrown; and the right, at this day, subsists practically as well as theoretically. Such opposition, (illegal according to the soundest principles of international jurisprudence,) is adverted to in terms of strong disapprobation, by three of the judges in the case of Garrels v. Kensington (*p*).

The whole international law upon this subject is admirably summed up by Sir Willam Scott, in his judgment on the case of the Maria (*q*), where he establishes three important points which follow: First, that the right of visiting and searching merchant ships, upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation, "I say, be the ships, the cargoes, and the destinations, what they may; because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are, and it is for the purpose of ascertaining these points, that the necessity of this right of visitation and search exists." The second point is, that the

(*p*) Garrels v. Kensington, 8. T. R. 230.—See also Lord Erskine's speech, 8th March, 1808, upon the Orders in council, 10 Cobbett's Parl. Deb. 955.—Mr. Baring observes, in his Work upon the Orders in Council, page 102, that the pretensions to a right to search a national ship for any thing, appears generally exploded and renounced by all parties.

(*q*) 1 Rob. Rep. 340.—See also 1 Edwards's Rep. 208.

authority of the sovereign of the neutral country being interposed in any manner of mere force, cannot legally vary the rights of a lawfully commissioned belligerent cruiser: "Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply, that nothing is to be found in that convoy of merchants ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it." The third point is, that the penalty for the violent contravention of this right, is the confiscation of the property so withheld from visitation and search. "I stand with confidence upon all fair principles of reason, upon the distinct authority of Vattel, upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, that, by the law of nations, as now

Of visitation and search and consequences of resistance.

Of visitation and search and consequences of resistance.

understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequence of confiscation."

A rescue effected by the crew, after capture, when the captors are in actual possession, is considered a resistance within the application of the penalty: "For a rescue," said Sir William Scott, in the case of the Dispatch (*r*), can be nothing else than, as the very term imports, a delivery from force by force. In the case of the Elsabe (*s*), it is laid down as settled, that the resistance of the convoying ships is the resistance of the whole convoy; whence it follows, that in such cases the whole convoy is subject to confiscation. But from the case of the Pennsylvania (*t*), it appears, that if a neutral vessel has been captured, and the captors, whether from want of hands to navigate her, or for the sake of making other prizes, or from any other motive, allow the neutral commanders to resume the direction of the vessel, without any express agreement binding those commanders to bring her in for adjudication in pursuance of the original capture, then the escape of the neutral will not be regarded as a rescue or a resistance. On the same principle it was said by the Court, in the case of the Saint Juan Bap-

(*r*) 3 Rob. Rep. 278.
(*s*) 4 Rob. Rep. 408.
(*t*) 1 Acton, 33.

tista (*u*), that a mere attempt to escape before any possession assumed by the captor, does not draw with it the consequences of condemnation. And the same case further establishes, that, unless the neutral vessel have reasonable grounds to be satisfied that a war has actually broken out, even a direct resistance will not superinduce the penalty: for, without a war, there is no such thing as a neutral character, nor any foundation for the several duties which the law of nations imposes on that character. Nor has the penalty been deemed to attach in those instances where a disposition to resistance has at first been betrayed, but afterwards abandoned without being actually carried into operation (*x*). In the case of the Mentor (*y*), Sir William Scott said, "As to the instructions that were given to the master of an American ship by his employers, directing him not to speak to any British cruiser, it must be understood, that every commissioned cruiser has an undoubted right of inquiring, and it is not the arbitrary decrees of the other belligerent that can abrogate it. On strict principle, to defeat that right by evasion might be as penal as to resist it by force, though it has not been so held in practice; but certainly it is conduct which is always to be view-

Of visitation and search and consequences of resistance.

(*u*) 5 Rob. Rep. 33.

(*x*) Maria, 1 Rob. Rep. 340.—Elsabe, 4 Rob. Rep. 409.—Catharina Elizabeth, 5 Rob. Rep. 232.

(*y*) 1 Edwards, 208.

Of visitation and search and consequences of resistance.

ed with jealousy, and cannot be set up as an excuse, advantageous to the parties, in any matter requiring explanation of their conduct." Where the penalty attaches at all, it appears to attach to the cargo as completely as to the ship: "If a neutral master," said Sir William Scott, in the case of the Catharina Elizabeth (z), "attempts a rescue, he violates a duty which is imposed upon him by the law of nations, to submit to come in for inquiry, as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the confiscation of the whole cargo intrusted to his care, and thus fraudulently attempted to be withdrawn from the rights of war."

Papers and documents requisite on board a neutral vessel.

When the right of visitation and search is exercised upon a neutral vessel, the first object of inquiry is generally the ship's papers. The following are the papers and documents which are usually required, by way of evidence of a vessel's neutral character, and which are, therefore, expected to be uniformly found on board.

1. The passport. This is a permission from the neutral state to the captain or master of the ship to proceed on the voyage proposed, and usually contains his name and residence, the name, descrip-

(z) 5 Rob. Rep. 232.

tion and destination of the ship, with such other matters as the practice of the place requires. This document is indispensably necessary for the safety of every neutral ship. Hubner says, that this is the only paper that is rigorously insisted upon by the Barbary corsairs, by the production of which alone, their friends are protected from insult.

Papers and documents requisite on board a neutral vessel.

2. The sea letter, or sea brief, which specifies the nature and quantity of the cargo, the place from whence it comes, and its destination. This paper is not so necessary as the passport, because that, in most particulars, supplies its place.

3. The proofs of property, which ought to shew that the ship really belongs to the subjects of a neutral state. If she appear to either belligerent to have been built in the enemy's country, proof is generally required that she was purchased by the neutral before, or captured and legally condemned since, the declaration of war; and in the latter case, the bill of sale, properly authenticated, ought to be produced. Even Hubner admits that these proofs are so essential to every neutral vessel, for the prevention of frauds, that those which sail without them will have no reason to complain if they are interrupted in their voyages, and their neutrality even disputed.

4. The muster roll, which the French call role d'equipage, contains the names, ages, quality,

Papers and documents requisite on board a neutral vessel.

place of residence, and, above all, the place of birth, of every person of the ship's company. This document is of great use in ascertaining the ship's neutrality. It must naturally excite a violent suspicion, if the majority of the crew be found to consist of foreigners; still more, if they be natives of the enemy's country.

5. The charter party. This instrument serves to authenticate many of the facts, on which the proof of the ship's neutrality must rest, and is, therefore, extremely necessary.

6. The bill of lading, by which the captain acknowledges the receipt of the goods specified therein, and promises to deliver them to the consignee, or his order. Of this there are usually several duplicates; of which one is delivered to the captain, one kept by the shipper of the goods, and one transmitted to the consignee. This instrument being only the evidence of a private transaction between the owner of the goods and the captain, does not carry with it the same degree of authenticity as the charter party.

7. The invoices, which contain the particulars and prices of each parcel of goods, with the amount of the freight, duties, and other charges thereon, which are usually transmitted from the shippers to their factors or consignees. These invoices prove by whom the goods were shipped, and to whom consigned. They carry with them, however, but

little authenticity, being easily fabricated, where fraud is intended.

Papers and documents requisite on board a neutral vessel.

8. The log-book, or ship's journal, which contains an accurate account of the ship's course, with a short history of every occurrence during the voyage. If this be faithfully kept, it will throw great light on the question of neutrality. If it be in any respect fabricated, this may, in general, be easily detected.

9. The bill of health, which is a certificate, properly authenticated, that the ship comes from a place where no contagious distemper prevails, and that none of the crew, at the time of her departure, were infected with such distemper. This bill of health is generally found on board of ships coming from the Levant, or from the coast of Barbary, where the plague so frequently prevails.

Upon the subject of the ship's documents, it is to be observed, that, though by the law of nations, the want of some of these papers may be taken as strong presumptive evidence, yet the want of none of them amounts to conclusive evidence against a ship's neutrality (*a*).

(*a*) 8 Term Rep. 434. 437. 562.—Mayne and Webber, Parke, 363.

CHAPTER VI.

OF THE NAVIGATION LAWS OF GREAT BRITAIN.

HAVING, in the preceding chapters, considered the legal effect of war upon the commerce of belligerents and neutrals, I propose, in this chapter, to compress and illustrate the various provisions of the navigation laws, by which the legislature of Great Britain has prohibited, or, in a certain degree, restricted, the intercourse of foreign vessels with her own ports, or those of her dependent possessions. This inquiry will enable us the better to ascertain the object and effect of Licenses, and Orders in Council, which will be the subject of the last chapter of this work.

It appears to have been the favourite and uniform object of British policy, to confine our foreign trade, as far as was consistent with the extent of it, to the shipping and mariners of this country; and, in order to accomplish that object, to hold out peculiar privileges and immunities to the mariners and shipping of Great Britain, and to prohibit, under severe penalties, the communica-

tion of these immunities to the shipping and mariners of foreign states. It will not be an uninteresting task to point out how gradually the principles of these laws developed and unfolded themselves, before they were digested into one permanent and regular code.

Ancient Navigation Acts.

The Act 5 R. 2. stat. 1. ch. 3. is generally considered as the first of the British Navigation Laws (*a*). This act ordained, that none of the King's liege people should export or import merchandize, except in ships of the King's liegance.

But subsequent statutes of the same reign seem to have permitted the employment of foreign vessels when there was not sufficient British shipping, or when the owners of the British shipping demanded unreasonable freight.

The Statute 1 Hen. 7. ch. 8. prohibited the traffic in any wine of Guienne or Gascony, unless brought in English or Irish ships, and by mariners of England, Ireland, Wales, Calais, or the Marches of the same. Having expired, it was revived by 4 Hen. 7. chap. 10. and its provisions were extended to Thoulouse woad, with the requisition that the master, as well as the majority of the mariners, should be of one of the countries before mentioned, or of Berwick. These acts are re-

(*a*) There was a prior act, 42 Edw. 3. c. 8.; but this cannot be properly ranked amongst the acts of navigation. Reeves' Law of Shipping, 11, 12.

Ancient Navigation Acts.

markable for having brought forward, in a specific form, two of the leading provisions of the modern navigation code ; the requisition as to the British property of the vessels, and the requisition as to the British character of the master and mariners. The third great requisition, that the ship should be British built, as well as British owned and British navigated, was reserved for later times. As to other merchandizes than the wines and woad abovementioned, the same Statute of 4 Hen. 7. c. 10. permits such general trade to be carried on by merchants, strangers, in any vessels, but forbids that any other persons, inhabiting here, shall carry it on in ships belonging to foreigners, except where sufficient British shipping cannot be obtained. But merchandize forced in by stress of weather, or enemies, was exempted from the provisions of the act. This law was confirmed by Stat. 32 H. 8. ch. 14.

The policy of these provisions received a check by the 5 and 6 Edw. 6. c. 18. which permitted the importation of the before-mentioned wines and woad in any vessel, and with any master or mariners; and the Acts of 4 Hen. 7. and 5 Rich. 2. were absolutely repealed by the Statute of 1 Eliz. ch. 13. ; but as to vessels, the restriction was reimposed by the 5 Eliz. c. 5. s. 11. Several acts about this time, by the imposition of duties upon foreign navigation, enforced the spirit of the Bri-

tish policy: but the only direct provisions were those of the Stat. 5 Eliz. c. 5. which forbade the purchase of fish from foreign vessels, in pursuance of the tenor of an act passed in the 33 H. 8. ch. 2. the earliest of those legislative provisions by which the fisheries are considered as connected with navigation. It was by this statute of Elizabeth also that those parts of our present policy were introduced which relate to the coasting trade. The act provided, that no person should cause to be loaden or carried, in any bottom whereof a stranger born was owner, ship-master, or part owner, any kind of fish, victual, wares, or things of what kind or nature soever, from one port or creek of this realm to another port or creek of the same, on pain of forfeiting the goods so laden or carried. Ancient Navigation Acts.

A permission was given to all persons being subjects to export wheat, rye, barley, malt, peas, or beans, when they did not exceed certain prices, into any parts beyond sea, in ships, crayers, or other vessels, whereof English subjects should be the only owners.

This statute went further than any of those which had preceded it, by forbidding an alien born to become part owner of the vessels employed in the coasting trade; and it continued in force till the conclusion of the reign of Charles the First.

Ancient Navigation Acts.

In the mean time, James the First, by some charters and proclamations, enforced the exclusive employment of British shipping in the plantation trade.

The republican parliament of England, in A. D. 1646, encouraged British shipping in the plantation trade by fiscal exemptions; and introduced another of the leading principles in our navigation code, that of confining to the mother country the trade of its colonies and plantations. In 1650, another restriction was laid upon the plantations in general, which has continued in some degree to the present time. It was in these words: "The Parliament doth forbid and prohibit all ships of any foreign nation whatsoever to come to, or trade in, or traffic with, any of the English plantations in America, or any islands, ports, or places thereof, which are planted by, and in possession of the people of this commonwealth, without license first had and obtained from the Parliament or Council of State."

But the most important of all the statutes which passed before the Restoration, was the famous Act of Navigation, passed by the Parliament on the 9th of October, 1651. It directs, "That no goods or commodities whatsoever, of the growth, production, or manufacture of Asia, Africa, or America, or of any part thereof, or of any islands be-

longing to them, or any of them, or which are described or laid down in the usual charts or maps of those places, as well of the English plantations as others, shall be imported or brought into this commonwealth of England, or into Ireland, or any other lands, islands, plantations, or territories, to this commonwealth belonging, or in their possession, in any other ship or vessel whatsoever, but only in such as do truly and without fraud belong only to the people of this commonwealth, or the plantations thereof, as the proprietors or right owners thereof, and whereof the master and mariners are also, for the most part of them, of the people of this commonwealth." Ancient Navigation Acts.

Having thus secured the import trade of Asia, Africa, and America, the act proceeds to direct, "That no goods, the growth, production, or manufacture of Europe, or of any part thereof, shall be imported or brought into this commonwealth of England, or into Ireland, or any other lands, islands, plantations, or territories, to this commonwealth belonging, or in their possession, in any ship or vessel whatsoever, but in such as do truly and without fraud belong only to the people of this commonwealth, as the true owners and proprietors thereof, and in no other, except only such foreign ships and vessels as do truly and properly belong to the people of that country or place of which the said goods are the growth, production,

Ancient Navigation Acts.

or manufacture, or to such ports where such goods can only be, or most usually are, first shipped for transportation; and no goods or commodities that are of foreign growth, production, or manufacture, and which are to be brought into this commonwealth in shipping belonging to the people thereof, shall be by them shipped or brought from any other place or country, but only those of their growth, production, or manufacture, or from those ports where the said goods and commodities can only, or are, or usually have been, first shipped for transportation, and from none other place or country."

The fisheries were the next object of this Act, which accordingly provided, that no sort of cod-fish, ling, herring, pilchard, or any other kind of salted fish usually fished for and caught by the people of this nation, nor any oil made of any kind of fish whatsoever, nor any whale-fins, or whale-bones, should be imported into this commonwealth, or into Ireland, or any other lands, islands, plantations, or territories thereto belonging, or in their possession, but only such as should be caught in vessels that truly and properly belonged to the people of this nation, as proprietors and right owners."

Nor did the Act, in its prohibitions upon foreign shipping, confine itself to imports alone; it also ordained, that such fish should not be exported from any place belonging to this commonwealth

in any other ship or vessel than such as truly and properly appertained to the people of this commonwealth, as right owners, and whereof the master and mariners were, for the most part of them, English. Ancient Navigation Acts.

Finally, the Act extended its care to the coasting trade; with regard to which it directed, that no person whatever should load or carry, in any bottom, ship, or vessel, whereof any stranger born (unless such as were denizen, or naturalized) were owner, part owner, or master, any fish, victual, wares, or things of what kind or nature soever, from one port or creek of this commonwealth to another.

The great purpose of this celebrated act was to cripple the trade of the Dutch, who were, in those times, the greatest mercantile people of the world. "And although," says Mr. Reeves, in his excellent History of the Navigation Acts (*b*), "this measure brought upon the country an obstinate and bloody war, and though the authority on which this act was founded was unconstitutional and usurped, yet a plan so wise and solid was strenuously maintained by those who formed it: and it was not suffered to pass away with the transient

(*b*) Page 53. The origin of this statute has been ascribed by some to the pique of an individual, by others to the general jealousy entertained by the nation against the Dutch. Ludlow's Memoirs, vol. 1. p. 345.

Ancient Navigation Acts.

government from which it derived its origin: the great features of it were adopted by the lawful government at the Restoration of Charles II. when a new Act of Navigation rose out of the ashes of this, and became the basis of all those laws that have since been made for the increase of shipping and navigation."

The Navigation Act, 12 Car. 2. c. 18.

We now arrive at that new and still subsisting Act of Navigation to which the author just cited alludes: the Act of 12 Cha. 2. c. 18. Those of its provisions which may properly be considered within our present object are threefold; relating, first, to the coasting trade of this country; secondly, to the trade of this country with other independent states; and, thirdly, to the trade which she carries on herself, or permits other states to carry on, with her plantations and foreign possessions.

Though it has been deemed expedient thus to give a short historical sketch of the most material statutes which preceded the Restoration, in order to afford a general view of the undigested policy of our ancestors, it will not be necessary to specify, in the order of their succession, the whole list of important statutes which have passed since the Act of 12 Car. 2.; because they are already collected so accurately, up to the year 1792, in that excellent work on the Law of Shipping and Navigation by Mr. Reeves; but on each of the three heads proposed to be considered, a single con-

solidated abstract of the Statute Law, with the decisions upon it, will be given. The Navigation Act.

First, then, we will examine the regulations which respect the coasting trade; that is, the trade from one port of this country to another port of the same country. Coasting trade.

The following is the enactment of the Statute 12 Car. 2. c. 18. s. 6. "That it shall not be lawful to any person or persons whatsoever to load, or cause to be loaden and carried, in any bottom or bottoms, ship or ships, vessel or vessels whatsoever, whereof any stranger or strangers born (unless such as shall be denizens, or naturalized) be owners, part-owners, or master, and whereof three-fourths of the mariners, at least, shall not be English, any fish, victual, wares, goods, commodities, or things of what kind or nature soever the same shall be, from one port or creek of England, Ireland, Wales, islands of Guernsey or Jersey, or town of Berwick-upon-Tweed, to another port or creek of the same, or of any of them."

In the second place, we are to consider the foreign trade of this country herself; that is, her trade with other independent states. By this Navigation Act, the 12 Cha. 2. c. 18. s. 8. (*c*), it is Foreign European trade.

(*c*) A license by the King, contrary to this statute, was declared void by proclamation, two years after the passing it. Ander. Hist. Com. 2 vol. p. 473.—Reeves on Shipping, 201.

Foreign European trade.

enacted, " That no goods or commodities of the growth, production, or manufacture of Muscovy, or of any of the countries, dominions, or territories, to the Great Duke or Emperor of Muscovy or Russia belonging; as also that no sort of masts, timber, or boards, no foreign salt, pitch, tar, rosin, hemp, or flax, raisins, figs, prunes, olive oils, no sorts of corn or grain, sugar, potashes, wines, vinegar, or spirits called aqua-vitæ, or brandy wine, shall be imported into England, Ireland, Wales, or town of Berwick-upon-Tweed, in any ship or ships, vessel or vessels whatsoever, but in such as do truly and without fraud belong to the people thereof, or some of them, as the true owners and proprietors thereof, and whereof the master, and three-fourths of the mariners, at least, are English: And that no currants no commodities of the growth, production, or manufacture of any of the countries, islands, dominions, or territories, to the Othoman or Turkish Empire belonging, shall be imported into any of the beforementioned places in any ship or vessel but which is of English built, and navigated as aforesaid, and in no other, except only such foreign ships and vessels as are of the built of that country or place of which the said goods are the growth, production, or manufacture respectively, or of such port where the said goods can only be, or most usually are,

first shipped for transportation, and whereof the master, and three fourths of the mariners, at least, are of the said country or place, under the penalty and forfeiture of ship and goods, as in the last-mentioned clause." Foreign European trade.

This exception as to foreign ships is construed to apply not only to Turkey, but to Russia, and to all the enumerated articles before mentioned in the same section (*d*). But by a subsequent statute (*e*), foreign ships, British-owned, were subjected to the payment of alien's duty.

Such is the ground-work of all the law on the subject of the European trade; but some alterations have been introduced by subsequent statutes. That of the 27th Geo. 3. c. 19. s. 10. after reciting the statutes from which I have repeated the foregoing extracts, proceeds to ordain, "That any of the commodities enumerated in the said act, being the growth, production, or manufacture of Europe, may be imported into Europe under certain conditions, which it is not material to particularize, either in ships which, before the first day of May, 1786, did truly and without fraud wholly belong to his Majesty's dominions, or which are of the built of his Majesty's dominions, and registered respectively according to law, or in

(*d*) Reeves, 198. (*e*) 13 and 14 C. 2. c. 1. s. 6.

Foreign European trade.

ships or vessels the built of any countries or places in Europe belonging to or under the dominion of the sovereign or state in Europe of which the said goods or commodities so enumerated or described as aforesaid, are the growth, production, or manufacture respectively, or of such ports where the said goods or commodities can only be, or are most usually first shipped for transportation, such ships or vessels being navigated with a master and three fourths of the mariners, at the least, belonging to such countries, or places, or ports respectively, and in none other ships or vessels whatever; any law, usage, or custom to the contrary notwithstanding."

The Act of 2 W. & M. sess. 1. c. 9. declares, that throwing of silk is not nor ought to be construed a manufacture within the intention of the said Act for the encouraging and increasing of shipping and navigation; and that no thrown silk of the growth or production of Turkey, Persia, East India, or China, or of any other country or place, (except only such thrown silk as is or shall be of the growth or production of Italy, Sicily, or of the kingdom of Naples, and which shall be imported in such ships or vessels, and navigated in such manner as in the said Act of Navigation is directed or allowed, and brought from some of the ports of those countries or places whereof the same is of the growth or production, and which

shall come directly by sea, and not otherwise), shall be brought or imported into the kingdom of England, dominion of Wales, the islands of Jersey or Guernsey, or the town of Berwick-upon-Tweed." Foreign European trade.

So that only such silk as is really the growth of Italy, Sicily, and Naples, may be imported within the meaning of the Navigation Act. Yet during the war, the prohibition has been frequently relaxed, and the importation of thrown silk from a friendly country permitted in any vessel whatever (*f*).

There is, however, one European production, namely, the timber of Germany, which the Act of Charles II. allowed to be imported in vessels of the country of which it was the growth or production, or in vessels of the most usual port, but which the Stat. 6 Geo. 1. c. 15. confines to English shipping alone. This Statute repeals a previous prohibition, forbidding the importation of timber from Germany in any ships whatsoever, and allows its importation in British vessels: "Enacting," in the second section, "That it shall be lawful for any of his Majesty's subjects to import any quantity or quantities of fir timber, fir planks, masts, and deal-boards, being of the growth of Germany, into this kingdom, from any port or place in Germany, in British built ships only, so as the owner or owners are his Majesty's

(*f*) 43 Geo. 3. c. 153.

Foreign European trade.

British subjects, and whereof the master and three-fourths of the mariners at least are British subjects."

Trade with Asia, Africa, and America.

These are the principal regulations with respect to prohibiting or limiting foreigners in the trade between this country and the rest of Europe. As to the trade of this country with Asia, Africa, and the greatest part of America, our policy is still stricter and more exclusive. The Act of Navigation lays down the following ordinance (*g*): "That no goods or commodities whatsoever, of the growth, production, or manufacture of Africa, Asia, or America, shall be imported into England, Ireland, or Wales, islands of Guernsey and Jersey, or town of Berwick-upon-Tweed, in any other ship or ships, vessel or vessels whatsoever, but in such as do truly and without fraud belong only to the people of England or Ireland, dominion of Wales, or town of Berwick-upon-Tweed, or of the lands islands, plantations, or territories in Asia, Africa, or America, to his Majesty belonging, as the proprietors and right owners thereof, and whereof the master and three-fourths at least of the mariners are English, under the penalty of the forfeiture of all such goods and commodities, and of the ship or vessel in which they were imported, with all her guns, tackle, furniture, ammunition, and apparel: one moiety to his Ma-

(*g*) 12 Car. 2. c. 18. s. 3.

jesty, his heirs and successors, and the other moiety to him or them who shall seize, inform, or sue for the same in any Court of Record by bill, information, plaint, or other action, wherein no essoin, protection or wager of law shall be allowed." Trade with Asia, Africa, and America.

An exception to this rule has been made in favour of the Portuguese dominions in South America by the 48 Geo. 3. c. 11. which "enacts, That it shall be lawful to import into the united kingdom directly from Brazil, or any of the territories and possessions of the crown of Portugal on the continent of South America, in ships or vessels built in the kingdom of Portugal before the first day of January, 1808, or in ships or vessels built in any of the aforesaid territories or possessions on the continent of South America, or in ships or vessels taken by the ships or vessels of war belonging to the Portuguese government, or belonging to any subjects of the said government, having commissions or letters of marque and reprisals from the Portuguese government, and condemned as lawful prize in any Court of Admiralty in the Portuguese government," and "owned by subjects of the Portuguese government, resident in the said territories and possessions on the continent of South America, and whereof the master and three-fourths of the mariners at least are subjects of the Portuguese go-

Trade with Asia, Africa, and America.

vernment, and residents in the said territories and possessions, any goods, wares, or merchandize, the growth, produce, or manufacture of the said territories and possessions, which are not prohibited by law to be imported from foreign countries."

Trade with United States of America.

There is one part of America which does not fall within the force of the Navigation Act of 12 Car. 2.; I mean the territory of the United States. What may be the exact predicament of our commercial relations with those countries at the present moment, it is not indeed very easy to declare: still less, in the present uncertainty of the negotiations, is it possible to point out the law as it is likely to stand hereafter; so that for practical purposes, that part of the Navigation Code which relates to the United States, might almost as well be omitted in a legal work in this peculiar crisis of the political world. We will, however, shortly state the leading regulations of the law which has ordinarily governed our intercourse with the countries in question. Those ordinances originated in the Stat. of the 37 Geo. 3. c. 97. which enacts, "That it shall be lawful to import into this kingdom, directly from any of the territories of the United States of America, in British-built ships or vessels, owned, navigated, and registered according to law, or in ships built in the countries belonging to the United States of America, or any of them, or in ships taken by any of the ships or

vessels of war belonging to the government, or any of the inhabitants of the said United States, having commissions or letters of marque and reprisal from the government of the said United States, and condemned as lawful prize in any Court of the Admiralty of the said United States, and owned by the subjects of the said United States, or any of them, and whereof the master and three-fourths of the mariners at least are subjects of the said United States, any goods, wares, or merchandize, the growth, production, or manufacture of the said United States, which are not prohibited by law to be imported from foreign countries."

Trade with United States of America.

The 27th section declares, that the act shall continue in force so long as the said treaty between his Majesty and the United States shall continue in force. The treaty has ceased to be in force long since, but the statute was continued by several subsequent enactments (*h*), up to the end of the cession of parliament in the year 1808. Before the conclusion of that session, these particular provisions were continued for another year, and the 49 Geo. 3. c. 59. re-enacted them without any limitation as to their continuance. It may therefore be presumed that this last act is still in permanent force, except as it may be from time to time affected by momentary measures of non-

(*h*) 45 Geo. 3. c. 35.— 3. Stat. 2. c. 2.—48 Geo. 3. 46 Geo. 3. c. 16.—47 Geo. c. 6.—48. Geo. c. 85.

Trade with United States of America.

intercourse or embargo, adopted in Congress, or by any temporary retaliations which may be resorted to on this side of the Atlantic.

There are a few commodities, however, which form exceptions to all the provisions of the Navigation Act respecting the trade of England with Europe, Asia, Africa, America in general, or the United States. These commodities, for a certain time, may be imported in any ships whatsoever. One of them is unmanufactured tobacco; and the Stat. 49 Geo. 3. c. 25. enacted, that it might be imported from any place whatever, in any ship belonging to any country in amity with his Majesty, however navigated, until the 25th March, 1811. The others are cochineal and indigo, which, by the Stat. of the 49 Geo. 3. ch. 18. made to continue several previous acts, may be imported, until the 25th of March, 1814, in any ship belonging to any state in amity with his Majesty, from any port or place, provided that no cochineal or indigo, the growth or produce of any of the countries within the limits of the East India Company's charter, shall be imported, except by and on the account, or with the license, of the said company."

With respect to a few kinds of goods, there is a still a greater liberty: a liberty not consisting merely in temporary relaxations, but in the total

and permanent absence of all restriction whatsoever. Such are masts, timber, or boards, pitch, tar, rosin, hemp, or flax, which, by the 47 Geo. 3. sec. 2. ch. 27. may be imported in any vessel belonging to any state in amity with his Majesty, navigated in any manner whatever. Trade with United States of America.

And such, lastly, are bullion and prize goods, which form an exception, not only to these restrictions, but also to the regulations respecting the coasting trade. This general exception is created by the 15th section of the 12 Car. 2. ch. 18, which provides, that nothing in the act shall extend to bullion, nor to goods taken by way of reprisals by any ship or ships belonging to England, Ireland, or Wales, islands of Guernsey or Jersey, or town of Berwick-upon-Tweed, and whereof the master and three-fourths of the mariners at least are English, having commission from his majesty, his heirs or successors.

Besides all these relaxations, it has been usual to make temporary suspensions, during war, of many enactments in the Navigation Law with respect to commodities in general, or to particular articles. Other temporary provisions may deserve a particular notice through the probability of their re-enactment from time to time; but those which are ordained only upon the pressure of war, will terminate of course in the restoration of peace (*i*). Temporary suspensions during war.

(*i*) See Statutes at large, Index, Tit. Importation.

Decisions. We will now briefly inquire into the decisions which the Courts have pronounced upon those parts of the Navigation Law which relate to the trade of this country with other independent states. These decisions turn altogether upon the 8th sec. of the Act of 1 Car. 2. c. 18.; the section respecting the shipping in which foreigners may carry on such branches of trade as are permitted to them.

It was once supposed and decided, that this section enjoined the importation of Russian commodities, and of the other enumerated foreign articles, in Russian ships, English manned. This doctrine was laid down in the case of Scott v. Schwartz (*k*). It was contended by the counsel for the crown, and admitted and reasoned upon at length by the Chief Baron Comyns, "That the words expressing the ships in which Russia goods should be imported, such as belong to the people thereof, &c. must mean the people of Russia, and not the people of England: and that the policy of that provision was, that Russia ships should be the bringers of those articles, but they should be navigated by English masters and mariners; and comparing it with the wording respecting the importation of articles from Turkey, which requires the ship to be English-built, it was said, that the manning of Russia ships with English mari-

(*k*) Comyns' Rep. 677.

ners, was a policy extremely beneficial to English navigation, and such as both countries would find an advantage in; but that it was foreseen, that Turkish ships would hardly be suffered by the Mahometans to be navigated by Italian sailors, nor would it be proper for Christian powers to condescend to suffer it; and therefore the act requires, in that case, that where the mariners were English, the ship also should be such. This seems to have been the decided opinion of the Chief Baron upon that occasion." Decisions.

But Mr. Reeves, in his history of the Navigation Laws (*l*), observes, "That very little verbal criticism would have drawn from these words a very different construction. For, in the first place, it is not only the goods of Russia that are in question, but also various enumerated goods which are not expressed to be the produce of any particular country; and therefore, when we admit that ships belonging to the people thereof may, when referred to Russia, have an antecedent to which they may refer, it may be asked, what people are referred to where no country is mentioned as the place where the enumerated goods are produced? So that in all cases, except that of Russian commodities, this construction upon these words leaves them without effect or meaning.

"In the next place, this construction seems to

(*l*) P. 226.

Decisions. be taken contrary to the obvious method of tracing the antecedent referred to. For the words being, that no goods, &c. of Russia, &c. nor any masts, &c. shall be imported into England, Ireland, Wales, or Berwick, in any ship or vessel whatsoever, but in such as do truly and without fraud belong to the people thereof, or some of them, as the true owners and proprietors thereof, and whereof the master and three-fourths of the mariners at least are English, the natural construction is to refer the people thereof to the last antecedent, viz. England, Ireland, Wales, and Berwick, and not to Russia.

Lastly, upon comparing this description of the ships, and the manning of them, with other descriptions of ships in the same act, it appears to be the same form of words as is used in various places, in former parts of the act, to describe English shipping. It is used in the first section to describe the shipping for the plantation trade; in the third section, to describe those that are to bring the commodities of Asia, Africa, and America; it is nearly repeated in the fourth section; and as much of it as regards ships is used in the fifth section, relating to the fishery; it is likewise used in several parts of the act subsequent to the eighth section. Indeed, this is the sense in which this provision is understood on a subsequent occa-

sion. In the case of Scott v. Ditchez (*m*), Lord Chief Baron Parker lays down the law in that sense, without noticing the determination to the contrary, or that there was any doubt ever entertained upon the subject. Decisions.

The exception at the close of this section has occasioned some discussion (*n*): "Except only such foreign ships as are of the built of the country or place of which the goods are the growth, &c. or of such port where the goods can only be, or most usually are, first shipped for transportation, and whereof the master and three-fourths of the mariners at least are of the said country or place."

The most material doubt upon these words was, whether they applied only to the latter part of the section, relating to currents and the Turkey trade, or extended to the whole of the section. It was maintained by the crown lawyers, in the before mentioned case of Scott v. Schwartz (*o*), that it was confined to the Turkey trade; but this was over-ruled by the Chief Baron Comyns, who clearly thought the exception extended to the whole section, upon the consideration that the goods of Russia, and the enumerated goods, as well as currents and the commodities of Turkey, are all declared in the ninth section to be aliens

(*m*) Parker's Rep. 27. 29.
(*n*) Reeves, 29. 230.
(*o*) Comyn's Rep. 677.

Decisions. goods, if they are imported in other than English shipping."

It was for some time contended by many, that English-built ships, sold to foreigners and navigated by them, were qualified under this section of the Navigation Act. But this opinion was over-ruled by the decision in the case of Scott v. D'Achez (*p*); where an English ship, having become French property, imported French wine and vinegar from France, the master and three-fourths of the mariners being French. In favour of this ship, it was objected, that the main design of the act was, that the English, and not foreign nations, should be carriers; and therefore they may carry as well in foreign built ships, being their property, as in ships of the built of their own country, if they qualify them according to the tenth section, and navigate them with a master and three-fourths of the mariners English; and this is enforced in the eleventh section. Again, if a foreign ship may have the privilege of an English ship, pari ratione, or rather à fortiori, an English ship, being foreign property, should be entitled to the like privilege, taking the encouragement of shipbuilding to be the second consideration of the act. For, in the present case, our own timber and workmen were employed, and we had the benefit of rigging and furniture; whereas, if she

(*p*) Parker's Rep. 30. &c.

had been French-built, she would have been duly qualified to have imported those articles, and we should not have had the advantage of building and equipping. Decisions.

To these objections it was answered and resolved, by the Chief Baron Parker, that they were indeed spacious, but were founded on a supposition, that we could have prohibited the importation of European goods in foreign bottoms; but, as that could not be done with safety to our trade, the force of the objections vanished.

It was seen, said he, that many countries in Europe, as France, Spain, and Italy, could more easily buy ships than build them; that, on the other hand, countries like Russia, and others in the North, had timber and materials enough for building ships, but wanted sailors. It was from a consideration of this inaptness in most countries to accomplish a complete navigation, that the parliament prohibited the importation of most European goods, unless in ships owned and navigated by English, or in ships of the built of, and manned by sailors of that country of which the goods were the growth. The consequence would be, that foreigners could not make use of ships they bought, though English subjects might. This would force them to have recourse to our shipping; and the general intent of the act, to secure the carrying trade to the English, would

Decisions. be answered as far as it possibly could. On the other hand, if foreign property had been sufficient to qualify ships, foreigners might have bought ships where they pleased, and manned them with their own sailors; and then not only the freight, but the employment of our sailors, would have been lost to England; and preventing this must greatly counterbalance any advantage that could accrue to England from the building and equipping ships for foreign use; which too, being a secondary consideration in making the act, was not to defeat the primary one.

The Chief Baron remarked, that, with all the desire the parliament had to encourage English shipping, and notwithstanding they had, with that view, required the productions of our own colonies, and those of Asia, Africa, and America, to be imported only in English shipping, yet they wisely foresaw, that if they restrained the importation or exportation of European goods, unless in our own ships, and manned with our own seamen, other states would do the same; and this, in its consequences, would amount to a prohibition of all such goods, which would be extremely detrimental to trade, and, in the end, defeat the very design of the act. This exposition of the Act of Navigation is certainly the true one.

The requisite, that "the master and three-

fourths of the mariners should be of the same country or place," led also to considerable discussion. This point was decided in the case of Scott and Schwartz (*q*); and in which it was adjudged to be the design of the act, that no foreign ships should import any of the goods enumerated and described in this section, if mariners were brought from any foreign kingdom to navigate them. From the same case we may further collect, that though the act does not precisely fix and determine who shall be the people of a country, yet it gives a larger extent and signification of the phrase than belongs to the term natives; and the precise notation of it is left to the general import and common understanding of the words. Decisions.

In this case of Scott and Schwartz (*r*), there was a ship, Russian built, from Riga, navigated by a master who was born out of the Russian dominions, but who had, nine years before, been admitted a burgher of Riga, and had ever since continued so, residing there when not engaged in voyages. There were eleven mariners, four of whom were born in Russia; the fifth was born in Ireland, there bound apprentice to the master, and as such went with him to Riga; for three or four years before the seizure, he served on board this ship, and sailed in it from Riga on the present voyage. The other six were born out of the do-

(*q*) Comyns' Rep. 677. (*r*) Comyns' Rep. 689.

Decisions. minions of Russia; but one had resided at Riga for eight years next before the seizure; another, five years; another, four years; another, seven years; and the last four had, during the same period, sailed from Riga in that and other vessels. It was understood there was no such thing as naturalization known in Russia.

The Chief Baron Comyns was of opinion, that the master being a burgher, and having taken an oath of allegiance to the Empress, as was proved on the trial, there was hardly any thing more cogent than this to denominate a man of a country; he must be a subject of the Empress. As to the other four mariners, he thought them to be people of the country within the meaning of the act: first, because the act seems to intend nothing more than fixed and settled inhabitants there; and a residence of four or five years might well satisfy that expression: secondly, because it seemed to answer the intent of the act; which was not so much to create difficulties to other countries to find mariners amongst themselves, as to prevent their supplying themselves with them from other countries than England: thirdly, because, by the civil law, such a residence gives a country a right to the resident's service: fourthly, because, in the present case, it was not found by the special verdict, that these persons had ever any habitation

or residence out of the Empress of Russia's dominions; and what does not appear, is not to be intended. It was found that they had made several voyages from Russia, but it did not appear that they had made any voyage from any other country; so that they might properly be said to be mariners of Russia, but not of any other country: and as the act speaks of mariners of the country, and does not say mariners born in the country, and as mariners is a denomination they must acquire, for they cannot be born mariners; if therefore they were of that country while they were mariners, and never were mariners of any other country, they seem to satisfy the words and intent of the act. Decisions.

Upon the whole, it was said, that it would be almost impracticable, and make commerce very hazardous, if a merchant was to search out the nativity of every mariner he employed, and in case of mistake or misinformation, was to forfeit his ship and cargo.

Having thus fully considered the trade of England herself upon her own shores, and with the dominions of all other states, we are next to examine the regulations affecting the trade of the British possessions abroad. The Statute 12 Car. 2. c. 18. contains the following enactment: "For the increase of shipping, and encouragement of the navigation of this nation, wherein, under the good providence and protection of God, the Trade with our colonies.

Trade with our colonies.

wealth, safety, and strength of this kingdom is so much concerned; be it enacted, That no goods or commodities whatsoever shall be imported into or exported out of any lands, islands, plantations, or territories to his Majesty belonging, or in his possession, or which may hereafter belong unto, or be in the possession of his Majesty, his heirs and successors, in Asia, Africa, or America, in any other ship or ships, vessel or vessels whatsoever, but in such ships or vessels as do truly, and without fraud, belong only to the people of England or Ireland, dominion of Wales, or town of Berwick-upon-Tweed, or are of the built of, and belonging to, any the said lands, islands, plantations, or territories, as the proprietors and right owners thereof, and whereof the master and three-fourths of the mariners at least are English."

Some material alterations have been made in this act by the Statute 45 Geo. 3. c. 57. which was passed to consolidate and extend several previous ordinances. It enacts, in the first section, that "wool, cotton-wool, indigo, cochineal, drugs of all sorts, cocoa, logwood, fustic, and all sorts of wood for dyers' use, hides, skins, and tallow, beaver, and all sorts of furs, tortoise-shell, hard wood, or mill-timber, mahogany, and all other woods for cabinet ware, horses, asses, mules, and cattle, being the growth or production of any of the colonies or plantations in America, or of any

country on the continent of America belonging to or under the dominion of any foreign European sovereign or state, and all coin and bullion, diamonds, and precious stones, may be imported from any of the said countries into the several ports of Kingston, Savannah La Mar, Montego Bay, Saint Lucea, Antonio, and Saint Ann, in the island of Jamaica, the port of Saint George in the island of Grenada, the port of Rosseau in the island of Dominica, the port of Saint John's in the island of Antigua, the port of San Josef in the island of Trinidad, the port of Scarborough in the island of Tobago, the port of Road Harbour in the island of Tortola, the port of Nassau in the island of New Providence, one of the Bahama islands, the ports of Pitt's Town and Portland Harbour in Crooked Island, another of the Bahama islands, the port of Kingston in the island of Saint Vincent, and the principal port in the island of Bermuda, in any foreign sloop, schooner, or other vessel whatever, not having more than one deck, and being owned and navigated by persons inhabiting any of the said colonies or plantations in America, or countries on the continent of America, belonging to or under the dominion of any foreign European sovereign or state, any law, custom, or usage to the contrary notwithstanding." To these ports the Statute 46 Geo. 3. chap. 72.

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has added Road Harbour in the island of Tortola.

By the second section it is provided, "That tobacco, the growth or production of any island or continental country of America, under the dominion of any foreign European state, may be also imported into the same ports. The importation of foreign coffee and sugar is permitted by sect. 4. but limited to the ports of Nassau and Pitt's Town, to the principal port in the island of Bermuda, and such other port or ports in the Bahama and Caicocs islands as shall be approved by his Majesty in council; and the 7th section provides, that no foreign ship shall import, from any of the beforementioned places in America, any goods except those before enumerated.

The 8th section permits, "That British rum and Negroes, and all goods legally imported, except masts, yards, bowsprits, pitch, tar, turpentine, and such iron as shall have been brought from the British colonies or plantations in America, may be again exported to any of the colonies or plantations in America, or any countries on the continent of America, belonging to or under the dominion of any foreign European sovereign or state, in any sloop, schooner, or other vessel whatever, not having more than one deck, and being owned

and navigated by persons inhabiting any such colony, plantation, or country." Trade with our colonies.

So much of this enactment as relates to Negroes is annulled by 47 Geo. 3. St. 1. c. 36. which cleared the present age from the crime and shame of preceding generations, by the final and total abolition of the slave trade (*s*).

And the second section, and the Statute 46 Geo. 3. chap. 72. provide, that tobacco, the growth of foreign islands in the West Indies, or of the possessions of foreign European states in America, may be exported from the ports where it had been imported, and brought into this kingdom, in the like foreign vessels as before-mentioned.

But the possessions in America and the West Indies have not been the only objects of legislative attention in modern times. The Statute 37 Geo. 3. chap. 117. makes provision for regulating the trade of foreign ships with the British possessions in India. It enacts, that during the continuance of the exclusive trade of the United Company of Merchants of England trading to the East Indies, and during the term for which the possessions of the British territories in India is secured to the said United Company, it shall and may be lawful India.

(*s*) An American ship engaged in slave trade is now subject to capture. Case of the Amedie. 1 Acton's Rep. 240.

India. for the ships and vessels of countries and states in amity with his Majesty, to import and export from the British possessions in India such goods and commodities as they shall be permitted to import into and export from the said possessions by the directors of the said company, who are hereby directed to frame such regulations for carrying on the trade to and from the said possessions, and the countries and states in amity with his Majesty, as shall seem to them most conducive to the interest and prosperity of the said British possessions in India, and of the British empire."

Malta and Gibraltar. With respect to Malta, it is provided by the 41 Geo. 3. c. 103. "That Malta and its dependencies shall be deemed part of Europe for all purposes." And the 27th Geo. 3. c. 19. enacts, with respect to Gibraltar, "That it shall and may be lawful for any person or persons whatever to import or bring into Great Britain from Gibraltar, in any ship or vessel which, before the 1st day of May, 1786, did truly, without fraud, wholly belong to his Majesty's dominions, navigated and registered according to law, the goods, wares, or merchandizes, being the growth or production of the dominions of the Emperor of Morocco, and which shall have been imported into Gibraltar directly from any part of the said dominions not lying or being to the southward of the port of Mogadore,

in ships or vessels of the built of his Majesty's dominions, as before described, navigated and registered according to law, or in ships or vessels belonging to the subjects of the said Emperor of Morocco. Malta and Gibraltar.

These are the chief enactments respecting the trade of the British possessions abroad; enactments, however, which, during time of war, have been usually suspended by specific Acts of Parliament.

The multiplicity of enactments, however, does not appear to have secured that certainty which is of so much importance in all matters of positive regulation; as may be perceived from the case of the ship Recovery (*t*), which came on before Sir Wm. Scott in the Admiralty Court. The ship in question was an American; in spite of any prohibitions that might exist against the trade of foreigners to the British colonies, she had taken in a cargo at a British settlement in the East Indies, and was proceeding with the goods from Bombay to Rotterdam. On that voyage she was captured, and the owners came into the Admiralty Court to claim her. The claim was resisted by the captors, on the ground of illegality: the voyage having, as they contended, been undertaken in contravention of the Navigation Laws. "It is well known," Decisions.

(*t*) 6 Rob. Rep. 341.

Decisions. said Sir William Scott, in his judgment on this case, "that our establishments in that quarter of the world have stood on a very peculiar footing, which it has been, perhaps, the policy of this country not to define with great exactness. They may have assumed a different character at different times; and it may be very important in effect, and very proper in point of principle, that the general maxims of our navigation system should be applied to them in their present state, although there might have been a great anomaly in practically applying them at a former period. It will not, however, be necessary for me to enter into a discussion of the policy of such a measure.

"With regard to the fact, I had always entertained the notion that they had not hitherto been so applied. But a case occurred not many years since, which brought the consideration of the question in a distinct form before the Courts of common law. After repeated arguments, and much deliberation, the Court of King's Bench expressed an opinion, that the Navigation Laws did extend to those countries; and on a writ of error, the judgment of the King's Bench in that case was affirmed, with a complete adoption of the doctrine laid down. An Act of Parliament was afterwards passed to quiet the alarm which had been occasioned by this exposition of the law, and to recognise, in general terms, the

policy of admitting foreign vessels to a regulated trade, on certain conditions which the East India Company were empowered to impose. But nothing appears to have been ever done under those powers of the Act; and now, for the first time, the question arises, What is the state of the law, as applicable to this peculiar situation of things, the provisional relaxation of the Act of Parliament, and the total inaction on the part of the East Indian Company, who have, for more than eleven years, delayed to apply the regulations under which the Act of Parliament had expressed it to be expedient that foreign ships should be admitted? Decisions.

"This is a question of very considerable magnitude and importance. But there is, I think, a preliminary question, which may supersede the necessity of pronouncing a decision upon it; and that is, Whether the more general question is properly brought before the Court in its present form? If it is not, I shall not be desirous of delivering my sentiments upon it, unless I am called upon in another form of proceeding, which would bring it before me as a case of undisputed jurisdiction."

It is much to be regretted for our present purpose, that this preliminary question arose; for the learned judge concluded by determining that he had not jurisdiction to entertain that question of law, which belonged more properly to the Reve-

Decisions.

nue Court; and we have lost the benefit of a decision which, from the great learning and comprehensive understanding of the judge, we have every reason to suppose would have set this important doubt at rest for ever.

The Court of Common Pleas, in the cases of Mareh v. Abel (*u*), and Chalmers and Bell (*x*), deeided, that the traffic of foreigners with these settlements was illegal by the Navigation Acts. But both these eases arose upon polieies of insuranee, effected upon the passing of that Act of the 37 Geo. 3. eh. 117. to which Sir William Scott alludes in his judgment in the case of the Reeovery (*y*), as recognising and legalizing a regulated and eonditional trade. So that we have no express decision upon the law as it stands at this moment.

Every provision whieh we have hitherto notieed, has for its objeet to enforee some or all of these three requisites; that the ships employed be British owned, British built, and British navigated. Therefore it will be necessary to aseertain what the phrases British owned, British built, and British navigated, are legally understood to signify.

British owned.

A ship is eonsidered as British owned when it belongs to some of his Majesty's subjects in Great Britain, Ireland, Jersey, Guernsey, or the

(*u*) 3 B. and P. 35.
(*x*) 3 Bos. and Pul. 604.
(*y*) 6 Rob. Rep. 341.

Isle of Man, or some of the King's colonies, plantations, islands, or territories in Asia, Africa, or America (z); but no subject whose usual residence is in any country not under the dominion of his Majesty, is to be deemed a British subject, for this purpose, during such residence, unless he be a member of some British factory, or agent for, or copartner in a house or copartnership actually carrying on trade in Great Britain or Ireland. British owned.

There were formerly numerous advantages enjoyed by vessels that were British owned, though they were not built in this country, or, as it is termed, British built; and ship-building was not sufficiently advanced to justify the legislature in confining the privileges of British ships to those vessels built in this country. But in the last century, the great increase of our shipping rendered it expedient to adopt such a measure, and it was accordingly enacted by the 26th Geo. 3. c. 60. sec. 1. "That no ship or vessel foreign built (except such ships or vessels as have been, or shall hereafter be taken by any of his Majesty's ships or vessels of war, or by any private or any other ship or vessel, and condemned as lawful prize in any Court of Admiralty,) nor any ship or vessel built or rebuilt upon any foreign made keel or bot- British built.

(z) 26 Geo. 3. c. 60. s. 8.

British built.

tom, in the manner heretofore practised and allowed, although owned by British subjects and navigated according to law, shall be any longer entitled to any of the privileges or advantages of a British built ship, or of a ship owned by British subjects; and that all the said privileges and advantages shall hereafter be confined to such ships only as are wholly of the built of Great Britain or Ireland, Guernsey, Jersey, and the Isle of Man, or of some of the colonies, plantations, islands, or territories in Asia, Africa, or America, which now belong, or at the time of building of such ships or vessels did belong, or which may hereafter belong to, or be in the possession of, his Majesty, his heirs or successors."

To this act there were some exceptions with respect to certain vessels belonging to British subjects before the 1st May, 1786. But these exceptions could operate no longer than the vessels which were built or building before the 1st May, might continue fit for service.

By a more modern statute, however, the construction of the phrase British shipping has been a little enlarged. This statute is the 37th Geo. 3. c. 63. of which the following is an extract: "Whereas in consequence of articles of capitulation, whereby certain foreign colonies or settlements, or parts thereof, have been, or may hereafter be surrendered to his Majesty during the pre-

sent war, certain foreign ships and vessels may have been put, or may be put, under his Majesty's protection: Be it enacted, That all foreign ships and vessels which in consequence of any such capitulation shall have been, or may be so put under his Majesty's protection, at the time of, or in consequence of the surrender of any foreign colony or settlement, or part of any foreign colony or settlement, to his Majesty, shall and may be registered in like manner as ships taken and condemned as lawful prize, may, by the laws now in force, be registered, and shall, by virtue thereof, become entitled to the privileges and advantages of British ships or vessels under the regulations and restrictions herein after mentioned." British built.

Then follow certain provisions as to the mode of registering; and the 3d section enacts, "That it shall be lawful for any such ship or vessel being registered, and having a certificate of registry, as aforesaid, and being navigated as British ships are now, or may hereafter be required by law to be navigated, to import and export to and from any place or places whatsoever, such goods and merchandizes respectively, and none other, as may be imported and exported by any ship or vessel taken and condemned as lawful prize; such importations and exportations to be made in like manner, and under and subject to the like duties, condi-

British built.

tions, regulations, and restrictions, and subject to the like penalties and forfeitures for the breach thereof, as if the same were made by any ship or vessel taken and condemned as lawful prize: Provided always, that such ships and vessels, so put under his Majesty's protection, shall not be allowed to import or export any goods whatsoever to or from any port in Europe not in the possession of his Majesty."

In all other respects these vessels appear to be in the same condition with prize ships, which by the statute 33 Geo. 3. c. 66. sec. 45. are to be deemed British built.

Various acts have, from time to time, been passed enjoining the registry of vessels, a form without which no vessels above a certain size can obtain the rights of British ships. But as these acts are matter of merely municipal regulation, and do not immediately affect the commerce of foreigners, I shall not particularize them.

The Stat. 27 Geo. 3. c. 19. sec. 19. enacts, that all ships not entitled to the privileges of a British ship, or of a ship owned by British subjects, before the 1st May, 1786, and all ships not duly registered, shall, although such ships and vessels may be owned by his Majesty's subjects, be held and deemed, to all intents and purposes, as alien ships.

But there is one exception which deserves to be noticed; it is that enacted by the 35th Geo. 3. ch. 115.; the words are as follow: "Whereas the Court of Directors of the United Company of Merchants of England trading to the East Indies, with the approbation of the board of commissioners for the affairs of India, have sent instructions to their presidencies in the East Indies to take up such proper ships as they can procure for sending home investments of goods from India and China, and other parts within the limits of the said company's trade, in the place of ships usually sent from this country to India and China for that purpose, which last mentioned ships now are, or may be engaged in the public service: and whereas the ships so to be taken up may not be British built, or have been registered as such, and may not be navigated as required by the laws now in force: British built.

"Be it enacted, That if, during the continuance of the present war, and for 18 months after the conclusion thereof, any such ship shall arrive in the ports of this kingdom, freighted with goods in the manner, and from any of the places within the limits before mentioned, it shall and may be lawful, upon representation made by or on behalf of the said company to his Majesty in council, for his Majesty, by and with the advice of his privy council, to authorize the importation and entry of such goods, subject to the like duties,

British built.

and no other, as if they were imported in British built ships, though such goods shall be brought in ships which may not be British built, nor have been registered as British built ships, nor navigated as required by the laws now in force; provided the said ships shall have been built within the territories belonging to the said United East India Company, or the ports under the immediate protection of the British flag in the East Indies: And also to permit such ships to export from this kingdom to the British settlements in the East Indies, or to any of the places within the limits before mentioned, with the license and consent of the said company, any goods, wares, or merchandizes whatsoever, ordnance and military stores excepted, any law, usage, or custom to the contrary thereof notwithstanding."

This act extended only to the expiration of 18 months after the conclusion of the war; but by the 42d Geo. 3. c. 20. its provisions are continued during the continuance of the exclusive trade to the East Indies granted to the company by 35th Geo. 3d. ch. 52.

Summary.

On the whole, as the exceptions during war, and those which have been before noticed respecting ships built or building before May, 1786, are in their nature but temporary, we may consider the general law as to British ownership and British built to be this: That a vessel, in order to be entitled to any of the advantages of a British

ship, must be the property of the King's subjects in Great Britain or Ireland, Guernsey, Jersey, or the Isle of Man, or in some of the colonies, plantations, islands, or territories in Asia, Africa, or America, belonging to or in the possession of his Majesty: Further, it must have been built in some of the dominions last enumerated, unless it be a prize vessel, legally condemned, or a vessel put under his Majesty's protection by any capitulation at the time, or in consequence of the surrender of any foreign colony or settlement to his Majesty; in which case, however, such vessel cannot import or export any goods to or from any port in Europe not in his Majesty's possession: Finally, the forms required by the register acts must have been duly observed. Summary.

A ship thus far qualified, that is to say, a ship which, according to the statutes, is to be deemed English owned and English built, needs yet another qualification to complete her immunity; she must be not only British owned and British built, but British navigated also. British navigated.

The Statute of the 12th Car. 2. c. 18. wherein it requires a trading ship to be either English owned or English built, requires also that the master and three-fourths of the mariners be subjects of the King, and the Statute of 13th and 14th Car. 2. c. 11. sec 6. explains, that the number of mariners are to be accounted according to

British navigated.

what they shall have been during the whole voyage. By the Stat. 34th Geo. 3. c. 68. s. 3. it is ordained, that whenever that or any other act requires, "that the master and the whole, or any proportion of the mariners shall be British subjects, they must be so during the whole voyage, unless in case of sickness, death, desertion of the whole, or part of the crew being taken prisoners in the voyage." And in order to prevent doubts, the same statute, in the 7th section, enacts, that all foreign mariners who shall have served or who shall serve on board any of his Majesty's ships or vessels of war, in time of war, for three years, and who shall have obtained from the commanding officer certificates testifying that they have so served, and testifying also their fidelity and good behaviour during such service, and who shall have taken the oath of allegiance, and complied with certain forms particularly mentioned by the act, shall be entitled to be employed as masters of British ships or vessels, or as British mariners on board any British ships or vessels within the intent and meaning of any of the laws in force at the time of the passing of that act; but the act, in the 8th section, excludes from the power of obtaining this qualification every person, however otherwise qualified, who, after he has become qualified, has taken or shall take the oath of allegiance

to any foreign sovereign or state, for any purpose, except under the terms of some capitulation upon a conquest by an enemy, and for the purpose of such qualification only. British navigated.

At the same time, the same section permits, that "the navigation on the seas of Ameriea and the West Indies, from any port of America and the West Indies, to any port of Ameriea and the West Indies, any Negroes belonging to any person or persons being or having become his Majesty's subjects in manner aforesaid, and with the qualifications aforesaid, and in the seas to the eastward of the Cape of Good Hope, from any port to the eastward of the Cape of Good Hope to any other port to the eastward of the Cape of Good Hope, Lasears and other natives of any of the countries to the eastward of the Cape of Good Hope, may be employed as British sailors, seamen, or mariners, in manner heretofore practised."

There is, however, a provision, in its nature temporary, against the employment of Negroes from the colonies then lately belonging to the Freneh King, except under certain conditions.

The 12th seetion enacts, that in case any British ship shall be found at sea having on board a greater number of foreign mariners than is allowed by this aet, or any law now in force, or hereafter to be made, and the master of such ship or vessel shall produce a certificate of the actual ne-

British navigated.

cessity of engaging such foreign mariners in some foreign port, by occasion of the sickness, death, or desertion of the like number of British mariners, or of the same having been taken prisoners during his voyage, and that British mariners could not be engaged in such foreign port to supply their room; and that for the safe navigation of such ship or vessel it became necessary to engage and employ such foreign mariners, under the hand of his Majesty's consul at the foreign port where the said foreign mariners were so engaged, or, if there is not any such consul there, under the hands of two known British merchants at such foreign port, it shall not be lawful for any of the persons authorized by this act to make seizures of ships or vessels navigated contrary to the directions of this act, to stop or detain any such ship or vessel so found at sea, or to hinder her from proceeding on her voyage; but such persons shall, and are hereby required to indorse the certificate so produced, testifying the production thereof, and when and where met with at sea, and that the number of foreign mariners correspond with the certificate of such British consul, or such known British merchants, for the consideration and investigation of the commissioners of his Majesty's customs in England and Scotland respectively.

The Statute 13 Geo. 2. c. 3. sec. 1. and 4. con-

tains a proviso enabling the King, at all times when it shall be found necessary to declare war against any foreign power, to publish a proclamation to permit all merchant ships and other trading vessels and privateers to be manned with foreign mariners and seamen during such war, so as the number of such foreign seamen or mariners do not exceed three-fourths of the mariners at any one time employed to navigate such merchant ship, or other trading ship or vessel, or privateer, and that one fourth, at least, of the mariners or seamen so employed, be at all times natives, or his Majesty's naturalized subjects of Great Britain; sudden death, and the hazard and casualties of war and the seas, saved and excepted. British navigated.

And this right is reserved to the King by 33 Geo. 3. c. 68. sec. 9.

Since the union of Great Britain and Ireland, regulations similar to those which we have noticed, have been made by the legislature with respect to the navigation of Irish ships by subjects of the united kingdom.

We have seen that a vessel of which a foreigner is part-owner, is excluded in certain branches of trade from the privileges of a British ship, though it be British built and British navigated. Wherever, therefore, a foreigner purchases a share in a vessel, the shares of the other owners, of course,

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became materially prejudiced. To remedy this evil, it was enacted by the 34 Geo. 3. ch. 68. sec. 20. "That no foreigner, or other person or persons whatsoever, not being a natural-born subject of his Majesty, his heirs or successors, shall be entitled to, or purchase, or contract for, any part or parts, share or shares, of any British ship or vessel whatsoever, belonging only to natural-born subjects of his Majesty, his heirs or successors, without the consent, in writing, of the owner or owners of three-fourth parts in value, at least, of such ship or vessel, for that purpose first had and obtained, and indorsed on the certificate of the register of such ship before two witnesses; and all agreements, contracts, purchases, and sales of any part or share of any British ship or vessel, belonging only to natural-born subjects of his Majesty, his heirs or successors, made, entered into, contracted for, or concluded, by any such foreigner, or other person or persons, not being a natural-born subject or subjects of his Majesty, his heirs or successors, without such consent first had and obtained, and indorsed as aforesaid, shall be, and are hereby declared to be, absolutely null and void, to all intents and purposes whatsoever."

Policy of the navigation acts.

It now remains only to add a few words upon the general policy of the Acts of Navigation; various, indeed, and difficult to be digested, but concurring and combining, throughout all their

numerous and complicated ordinances, to the one great object of enlarging and strengthening the maritime power of Great Britain. Dr. Adam Smith (*a*) observes, that there are two cases in which it will generally be advantageous to lay some burden upon foreign, for the encouragement of domestic industry. The first is when some particular sort of industry is necessary for the defence of the country. The defence of Great Britain, for example, depends very much upon the number of its sailors and shipping. The Act of Navigation, therefore, very properly endeavours to give the sailors and shipping of Great Britain the monopoly of the trade of their own country, in some cases by absolute prohibitions, and in others by heavy burdens upon the shipping of foreign countries.

Policy of the navigation acts.

When the Act of Navigation was made, though England and Holland were not actually at war, the most violent animosity subsisted between the two nations. It had begun during the government of the long Parliament, which first framed this act, and it broke out soon after in the Dutch wars, during that of the Protector and of Charles the Second. It is not impossible, therefore, that some of the regulations of this famous act may have proceeded from national animosity. They are as

(*a*) 2 Smith's W. N. 212. Savary.—See Beawes' Lex Merc. 16. 17.—The good policy of the regulations is also admitted by

Policy of the navigation acts.

wise, however, as if they had been all dictated by the most deliberate wisdom. National animosity, at that particular time, aimed at the very same object which the most deliberate wisdom would have recommended, the diminution of the naval power of Holland, the only naval power which could endanger the security of England.

The Act of Navigation is not favourable to foreign commerce, or to the growth of that opulence which can arise from it. The interest of a nation, in its commercial relations to foreign nations, is like that of a merchant, with regard to the different people with whom he deals, to buy as cheap, and to sell as dear as possible. But it will be most likely to buy cheap, when, by the most perfect freedom of trade, it encourages all nations to bring to it the goods which it has occasion to purchase; and for the same reason, it will be most likely to sell dear, when its markets are thus filled with the greatest number of buyers. The Act of Navigation, it is true, lays no burden upon foreign ships that come to export the produce of British industry. Even the ancient aliens duty, which used to be paid upon all goods exported as well as imported, has, by several subsequent acts, been taken off from the greater part of the articles of exportation. But if foreigners, either by prohibitions or high duties, are hindered from coming to

sell, they cannot always afford to come to buy; because, coming without a cargo, they must loose the freight from their own country to Great Britain. By diminishing the number of sellers, therefore, we necessarily diminish that of buyers, and are thus likely not only to buy foreign goods dearer, but to sell our own cheaper, than if there was a perfect freedom of trade. As defence, however, is of much more importance than opulence, the Act of Navigation is, perhaps, the wisest of all commercial regulations of England (*b*). Policy of the navigation acts.

"Experience," says Mr. Reeves (*c*), "has shewn the advantage of adhering to this maritime policy. The inducement and obligation to employ British ships, had the effect of increasing their number. The increase of their number became a spur to seek out employment for them. Foreign trade and the fisheries were, by various expedients, made subservient to advance the interests of shipping. Trade and shipping thus reciprocally contributed to advance each other; and, thus combined, they constituted very considerable sources of national wealth. Having been at first

(*b*) M. Savary observes upon the sound policy of the English Navigation Act, and urges his own countrymen, the French, to adopt similar regulations.——See Beawes' Lex Mercatoria, 16.

(*c*) Law of Shipping, 548.

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encouraged for the sake of the navy, they were afterwards encouraged for their own. From being subordinate and auxiliary to another object, they are now become principal objects themselves in the national policy; and, in the mean time, the naval power of the country is sure of supply and support, without being directly in contemplation.

"This action and re-action between shipping and trade, has even been promoted by the effects of naval armaments. It has been found, that after the conclusion of a war, there has constantly been a great increase of mercantile shipping. This has been caused, first, by the government having employed, during the war, a number of transports, which has induced the merchants to invest their money in the building of ships for that service. Secondly, the privateers which were fitted out during hostilities have no employment at the peace but the merchants' service. Transports and privateers fall into foreign trade or the fisheries; and in this manner, does the service of the navy pay back to trade and navigation the obligations it had before received.

"If the wisdom of any scheme of policy is to be measured by its effects and consequences, our navigation system is entitled to the praise of having attained the end for which it was designed. Whether we regard the primary or inferior ob-

jects in this system; whether it is the increase of shipping, the extension of our foreign trade, or the strength of our navy, they have all advanced to a degree of consideration unexampled, and they owe that advancement to this system."

Policy of the navigation acts.

CHAPTER VII.

OF THE PREROGATIVE OF THE KING WITH RESPECT TO ORDERS IN COUNCIL AND LICENSES, AND OF THE TEMPORARY STATUTES ENLARGING HIS AUTHORITY.

HAVING, in the preceding chapters, considered the legal effect of war upon the commerce of belligerents, prohibiting all trading between them, and the reciprocal right of capturing each other's property, and how far neutrals are affected by the hostilities that exist between other powers, and the general policy of Great Britain with respect to the Navigation Laws, we will, in this chapter, consider those dispensations, with the exceptions by virtue of Licenses and Orders in Council, founded either in the King's prerogative, or on some Act of Parliament. We have several times had occasion incidentally to observe, that, notwithstanding the general prohibition, it has been the custom to grant dispensations from the general rule in peculiar circumstances of policy or hardship. These dispensations are sometimes general, extending to a whole class of cases; and sometimes particular, affecting only individual adven-

tures. The general dispensations are of two descriptions, by the permission of the King, and by Acts of Parliament. The first are usually issued in council, and vary, of course, from time to time with the exigencies of the state. The Acts of Parliament for temporary purposes of public convenience are passed from time to time, usually to last till the termination of the war, or for some other more definite period, and by which the general strictness of the commercial code, and more particularly of the Navigation Law, is for a while suspended. The dispensations of a particular nature are chiefly of two kinds, passports and licenses. We will first consider those dispensations by license, or otherwise, which the King, by virtue of his prerogative, may grant, and then those founded on particular Acts of Parliament.

1*st. Dispensations by the King's Prerogative.*

The King is usually denominated the arbiter of commerce (*a*). The King, with the advice of his council, has the right of regulating the commerce of this kingdom, except where there have been particular provisions made by Statute, over which he has no authority (*b*).

Proclamations, &c.

It was formerly a doctrine generally prevalent, that the proclamations of the King were of equal

(*a*) 1 Bla. Com. 273.

(*b*) 2 East. 296.—1 Taunt. 227.

Proclamations, &c.

force with the Statute Law, and an enactment declaratory of the principle thus assumed was passed in the year 1539 (*c*). This Statute, which was enforced by 34 and 35 of H. 8. c. 23. declared, that the King, with the advice of his council, might set forth proclamations under such penalties and pains as should seem necessary, which should be observed as if they were made by Act of Parliament; and though there was a proviso, that this should not be prejudicial to any person's inheritance, offices, liberties, chattels, or life, yet that reservation was little better than a nullity, when the Statute immediately proceeded to enact, that whosoever should willingly offend against any article contained in the said proclamations, he should pay such forfeitures, or be so long imprisoned, as should be expressed in the said proclamations; and that if any offender should depart the realm to avoid answering the offence, he should be adjudged a traitor. Happily, however, these provisions no longer exist to disgrace the code of British jurisprudence. If they had continued, the constitution, of which we are now so proud, would be but one degree removed from an absolute despotism; and the parliament, instead of enjoying the exclusive right of legislation, would possess but a legislative power, concurrent with that of the King in his sole capacity (*d*). This

(*c*) 31 H. 8. c. 8.

(*d*) 4 Hume Hist. 196, 7. 6 Hume Hist. 52.

obnoxious act was formally repealed in the commencement of the reign of Edward VI (*e*); and at this day the prerogative of the King, with regard to proclamations and other acts, extends only where it does not interfere with the Statutes, or the common law of the land (*f*); and in Coke's Reports (*g*) it is said, that the King cannot, by his proclamation, make a thing unlawful which was before lawful, and therefore nothing will be punishable after proclamation which was not so before. But, with this limitation, there is still left to the King a very extensive power. He may, by virtue of his prerogative, declare war or make peace; may grant letters of marque and reprisal, and licenses dispensing with the rigour of war, passports and letters of safe conduct (*h*). He may promulgate blockades according to his direction of the national force; he may also make new declarations of contraband, when articles come into use as implements of war, which were before innocent; he may relax from the utmost rights of war, and from its extreme severities (*i*). What is termed the war prerogative of the King, is created by the perils and exigencies of war for

Proclamations, &c.

(*e*) 1 Edw. 6. c. 12.

(*f*) 12 East. 296.—1 Taunt. 227.

(*g*) 12 Co. 75.; but see Hob. 251.—Bac. Ab. Prerogative, p. 549.—4 Mod. 179.—11 East. 138.

(*h*) Com. Dig. Prerogative.

(*i*) Lord Erskine's speech, March 8, 1808, on Orders in Council, 10 Cobbett's Parl. Deb. 958, 9.

Proclamations, &c.

the public safety, and by its perils and exigencies is therefore limited. The King may lay on a general embargo, and may do various other acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion. The King cannot change, by his prerogative of war, either the law of nations or the law of the land, by general and unlimited regulations (*k*).

Licenses.

With respect to licenses, in the case of the Hoffnung (*l*), which was a vessel licensed to import Spanish wool from the hostile territory of Holland, Sir William Scott said, "It is indubitable that the King may, if he pleases, give an enemy liberty to import: he may, by his prerogative of declaring peace and war, place the whole country of Holland in a state of amity; or, a fortiori, he may exempt any individual from the operation of a state of war." But the license to enable an enemy to import goods must be express, for an enemy will not be protected by a general license (*m*); and it has not been usual to grant licenses to an enemy (*n*). The right itself is established by the common law (*o*); and in the case

(*k*) Lord Erskine's speech, March 8, 1808, on the Orders in Council, 10 Cobbett's Parl. Deb. 961.

(*l*) 2 Rob. Rep. 162.; see also 1 Acton's Rep. 313. 322. 328.

(*m*) 1 Acton's Rep. 313. 322. 328.

(*n*) Philimore, 2 Edit. 9. in notes, and Preface, xx. xxi.

(*o*) 2 Roll. Abr. 173. pl. 3.; and 8 Term Rep. 550.

of Vandyck v. Whitmore (*p*), Lord Ellenborough said, though the King may, at common law, license a trading with an enemy's country, yet he may also qualify his license; in which case the parties seeking to protect themselves under it must conform to its regulations. Licenses.

The most usual mode in which a dispensation is granted to individuals from the general prohibition upon all traffic with the enemy, is by the grant of licenses. The nature of these licenses is clearly explained, and certain rules for their construction most ably laid down, by the Court in the case of the Cosmopolite (*q*). In this case Sir William Scott said, "A license is a high act of sovereignty; an act immediately proceeding from the sovereign authority of the state, which is alone competent to decide on all the considerations of commercial and political expediency, by which such an exception from the ordinary consequences of war must be controled. Licenses being then high acts of sovereignty, they are necessarily stricti juris, and must not be carried farther than the intention of the great authority which grants them may be supposed to extend. I do not say that they are to be construed with pedantic accuracy, or that every small deviation should be held to vitiate the fair effect of them. An excess in the quantity of goods permitted might not be consi-

(*p*) 1 East. 475. (*q*) 4 Rob. Rep. 11.

Licenses. dered as noxious to any extent. A variation in the quality or substance of the goods might be more significant, because a liberty assumed of importing one species of goods under a license granted to import another, might lead to very dangerous abuses. In several cases of licenses, this Court has had occasion to observe, that articles have been introduced which might interfere with our own manufactures, not merely raw materials for the necessary employment of the skill and labour of British artizans, but the finished productions of foreign industry and art, which might come in competition with those of our own; and it has been observed, not without surprise, that some licenses themselves have given a countenance to this practice. Where the licenses have expressly permitted the introduction of such goods, this Court cannot take upon itself to withhold from the individual the benefit of such licenses, however obtained; but it will always consider it to be its duty to look to the license for the enumeration of the goods that are to be protected by it. In the present case it appears, that the terms of the license have not been followed in this respect. Here is a license for barilla wool, liquorice, orchilla wood, and dying wood; yet there are other articles, a considerable quantity of wine and some hides, on board. It is said that these, comparatively with the burden of the vessel, form but a very trifling part of the cargo. Be the quantity

what it may it ought to have been provided for in the enumeration which the merchant submitted to the discretion of government when he applied for his license. As it now stands, I must consider this part of the cargo as totally denuded of any authority "under the license, and therefore subject to condemnation." Licenses.

The same point, as to the nature of the articles constituting the cargo, was again decided in the case of the Vriendschap (*r*). The question turned upon a quantity of barilla sent from London to Rouen; the claimants had obtained a license to export certain enumerated articles thither, but the barilla was not included in that license; Sir William Scott condemned it. "The shipper," said he, "obtains a license, which is a thing stricti juris, to be obtained by a fair and candid representation, and to be fairly pursued. Is this a fair execution of the license? I cannot think it is. It is certainly a good logical rule, not to argue ab abusu contra usum; but if it is clear that the abuse would be certain and frequent, and impossible to be prevented in numerous cases which must occur, then the abuse so probable, certain, and frequent, is a fair argument against the allowance of the practice. If the Court is convinced, that, out of a thousand instances, there would be nine hundred and ninety-nine of abuse, in opposition

(*r*) 4 Rob. Rep. 96.

Licenses. to one fair and bona fide execution of such an intention as is here alleged, it is reasonable to conclude, that such a practice would not be permitted. If this could be admitted, what has any British merchant to do, but to put articles of any sort on board under such pretences? and how is it possible to prevent them from going without molestation into the hands of the enemy?"

In the case of the Cosmopolite (*s*), Sir Wm. Scott said, "Another material circumstance in all licenses is the limitation of time in which they are to be carried into effect; for as it is within the view of government, in granting these licenses, to combine all commercial and political considerations, a communication with the enemy might be very proper at one time, and at another very unfit and highly mischievous; it might be highly proper in 1799, and highly inexpedient in 1801. Time therefore appears to be a very important ingredient; if the party takes upon himself to extend the term of the license in this respect, it would be, in my opinion, a license not reasonably assumed." The same point was decided in the case of Vandyck v. Whitmore (*t*).

In this case of the Cosmopolite Sir William Scott goes on to say, "Two circumstances are required to give the due effect to a license: first, that the intention of the granter shall be pursued;

(*s*) 4 Rob. Rep. 12. 13. (*t*) 1 East. 475.—4 Rob. 13.

and, secondly, that there shall be an entire bona fides on the part of the user. It has been contended, that the latter alone should be sufficient, and that a construction of the grant merely erroneous should not prejudice. This is, I think, laid down too loosely. It seems absolutely essential, that that only shall be done which the granter intended to permit; whatever he did not mean to permit is absolutely interdicted; and the party who uses the license engages not only for fair intention, but for an accurate interpretation and execution. When I say an accurate interpretation and execution, I do not mean to exclude such a latitude as may be supposed to conform to the intentions of the granter, liberally understood." Licenses.

But these are not all the particulars in which a license is construed strictly by the Courts: the port of shipment also appears to be of moment. In the case of the Twee Gebroeders (*u*), it appeared that the vessel had obtained a license for the purpose of bringing away a cargo from Bourdeaux to any port of this kingdom. The parties interested, however, thought proper, without any communication with government, to change this license, so as to accommodate it to a voyage from the port of St. Martin's: Sir William Scott condemned the ship and cargo. "It has been said," observed he, in giving judgment, "that specific

(*u*) 1 Edwards, 95.

Licenses. licenses were at the time obtained for the purpose of carrying on this trade from St. Martin's, and that the deviation cannot therefore be considered as contrary to the policy of government; but I cannot consider that as a sufficient excuse: such an alteration can only be made upon a particular representation, leaving government to judge of the terms on which it may be proper to comply with the request. What is the ground of the policy of granting licenses at all, but that government may see what communication is going on with the enemy: and therefore I do not think that a case, in which the real port is not disclosed, does come within that latitude of interpretation which the necessities of commerce might tolerate. Parties cannot be permitted to take licenses for one purpose and apply them to another; in such a case it would be going beyond the powers of this Court to extend its protection."

With respect to the limitation of the use of the license to the precise persons for whose advantage it has been obtained, some difference of opinion appears to have prevailed. In the case of Defflis v. Parry (*x*), the following facts were proved:—A license had been granted to Messrs. Bridge and Smith, enabling themselves, or their agents, or the bearers of their bills of lading on

(*x*) 3 Bos. and Pul. 3.

board six ships, to import certain goods. Other persons, by the permission of Messrs. Bridge and Smith, had imported goods in one of these ships, and bills of lading had been made out, by which the captain undertook to deliver the cargo, not to Messrs. Bridge and Smith, but to the shippers or their order: the shippers accordingly wrote to the merchants in London, by whom they were employed, enclosing one of the bills of lading indorsed in blank. But the same shippers also indorsed one general bill of lading for the whole cargo to Messrs. Bridge and Smith. The question was, whether this bill of lading, indorsed to Messrs. Bridge and Smith, who evidently had not the property of the goods, should be considered as the true bill of lading, or only as a fraudulent paper for the purpose of protecting the property of those who were not within the terms of the license? Lord Alvanley thought the general bill of lading, indorsed to Messrs. Bridge and Smith, sufficient to protect the whole transaction. "I have no difficulty," concluded his Lordship, "in saying, that it was the intention of government, that any goods which should come to this country under their bill of lading, and with their permission, should be protected by the license. I believe it to be within the knowledge of government, that this sort of use is made of the licenses granted to individuals. We are not to construe the acts of Licenses.

Licenses. government strictly against the merchants: if it had been intended that the license should have been more confined, I think it would have been so expressed. It appears to me, that a fair use has, in this instance, been made of the license, the terms of which fully warranted the transaction."

This cause was tried in the Common Pleas on the 27th of January, 1802; but in the month of May following, a case, precisely similar, came on in the Admiralty Court before Sir William Scott, who decided contrary to this judgment of the Common Pleas. This was the case of the Jonge Johannes (z). Messrs. Bridge and Smith were the ostensible owners in this case also. This license, as in the last case, extended not only to themselves, but to their agents and to the bearer of their bills of lading; and, as before, a general bill of lading had been made out to them, while there were other bills of lading, by which the master was bound to deliver the several parcels to the order of the Dutch shippers. Sir William Scott thus expressed himself upon the facts of this case: "Is it possible to say that these parties come under either of the descriptions of persons mentioned in the license? Bridge and Smith are certainly not the importers, because the real and effective bills of lading consign the goods to other persons; they cannot claim any interest before the

(z) 4 Rob. Rep. 263.

Court. Are the claimants the agents of Bridge and Smith? Certainly not: that house appears rather to act as the agents of these persons, and to have no original interest in the shipment. Then the only possible character in which the claimants can stand before the Court, is that of bearers of their bills of lading, as deriving a title from bills of lading transferred from Bridge and Smith. There was a general bill of lading on board, consigning the property to Bridge and Smith; but it appears clearly that this was meant to operate only as a formal paper, by which no right whatever was to be conveyed; there being other bills of lading on board, by which the master was bound to deliver the several parcels to the order of the Dutch shippers. Then how can I restore these goods under either of these titles? The only persons to whom I am authorized to restore, are Bridge and Smith as importers, or their agents, or persons holding their bills of lading, and claiming under bills of lading which Bridge and Smith, after having conducted the importation from the enemy on their own account, had transferred to them. Seeing that there is no apparent violation of good faith towards the public in the parties interested in this claim, I am sorry to be obliged to pronounce that there is no character in which they

Licenses.

Licenses. can receive restitution. The great principle in these cases is, that subjects are not to trade with the enemy, without the special permission of the government; and a material object of the control which government exercises over such a trade is, that it may judge of the particular persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war (*a*). I hardly conceive I am, upon any principle, warranted to declare, that when a license is granted to one person, it may be extended to the protection of all other persons who may be permitted by that person to take advantage of it."

The case of the Aurora (*b*) establishes the same general doctrine as to the employment of the license by the party to whose use it was granted, or by some person legally connected with him, for the purpose of that particular transaction.

The license which came into question in the case of Timson and Merac (*c*), was very liberally construed by the Court of King's Bench. This license was proved to have been obtained for Merac and Co. and other British merchants, to authorize an importation of brandy, being, according to the words of the instrument, the property of the

(*a*) See Argument in the Hendrick.—1 Acton's Rep. 326.

(*b*) 4 Rob. Rep. 218.

(*c*) 9 East. 35.

said persons, or some of them, as might be specified in their bills of lading. Under this license brandy was imported, of which Merac and Co. were the guarantees, but in which they had no absolute property of their own. "If," said Lord Ellenborough, "the license had only extended to cover the property of Merac and Co. and they had no other interest in the goods than appears upon the statement of this case, it might have been contended not to be sufficient to cover this adventure; but it includes other British merchants; and it afterwards says, being the property of the said persons or some of them. It might, indeed, have been a more certain means of avoiding fraud, if the names of the persons really interested were specified in the license; but the act of parliament does not require this, and it appeared at the trial that the license in question was in the common form. The articles, however, licensed to be imported, are specified, together with the ship and the time; and there could be no more than that ship could contain in one cargo; and these checks seem to have been thought sufficient for the purpose in view, without greater particularity." Licenses.

The same liberality of construction appears also in the case of Rawlinson against Janson (*d*). A license had been granted, extending protection to the cargo in question, upon satisfactory proof

(*d*) 12 East. 223.

Licenses.

being made, that such cargo was really shipped by, or under the directions of Henry Noden or his agents, for the purpose of being exported to some port on the river Elbe, Weser, or Jalide. It appeared that Henry Noden, on whose application this license was obtained, after the goods were shipped, was only an agent for the persons really interested in the cargo, who were British merchants at Liverpool. Lord Ellenborough held that this was sufficient to protect the adventure under the license, and the plaintiffs recovered. Upon a motion for a new trial, the Attorney-General took the opinion of Court, whether this were a sufficient compliance with the terms of the license? But all the Court were satisfied that it was sufficient; and Lord Ellenborough said, "that the object of inserting the name of a particular person in these licenses, was to prevent their being obtained and handed about at large, by which means they might have been made an improper use of. But he had no doubt that Henry Noden, the person named, being proved to be the agent of the British merchants really interested in the adventure, sufficiently identified the license with it." However, the case of Barlow and M'Intosh (*e*) throws much light on the two preceding decisions, and shews that they are not to be construed in quite so favourable a manner as the terms of them might induce a

(*e*) 12 East. 311.

hasty observer to conclude. A license had been granted enabling Richard Smith and other merchants to import and export certain articles. The captain of the ship produced at the trial this license, which he had received, previously to the voyage, from Mr. Schmaling, a merchant in London, the shipper of the goods in question, and which license was on board during the whole voyage. The counsel, in support of the license, referred to the before mentioned cases of Defflis and Pavey, and Timson and Merac, as cases turning on the generality of these trading licenses, which had received a liberal construction, in furtherance of the trading interests of the country, meant to be facilitated by them. But the Court observed, that in the latter of these cases, the license was granted in the name of Merac and Co. who were sued upon their guarantee of the contract for the importation of the goods under the license; and in the other case, the importers of the goods under the license were proved to have acted in connection with the persons to whom the license was granted; and therefore those transactions were quite in the regular course. Le Blanc, J. further observed, that the license, in this case, did not appear, by any evidence, to have been in the shipper's hands till above three months after the date of it, when it was given by him to the captain.

Licenses.

Licenses. And Lord Ellenborough, Ch. J. said, "That, previous to the time when the license was proved to have been in the possession of Schmaling, and to have been by him delivered to the captain, it might have served for three voyages to Holland. It might have dropped out of the pocket of the person entitled to it, and been found by the present possessor of it. The possibility of such facts existing, consistently with the evidence given at the trial, called upon the shipper of the goods, who endeavours to avail himself of it, to connect himself by other evidence than the mere possession of the particular license; otherwise, in the absence of all proof of such connection, there was a natural suspicion, a preponderance of probability, that the license had been used before to cover an antecedent voyage, and against the lawful use of it upon the voyage in question. The state of the commercial world may make it expedient to grant licenses in this very general form; but this generality subjects the practice to abuse. If the party who produces and seeks to avail himself of it, be required to shew when and how he obtained the possession of it, that will be a salutary check upon the abuse of it. I did not require the assured, at the trial, to shew that he was the person who obtained the license from the Privy Council Office. I am aware of the difficulties which may exist in disclosing the names of the

real parties to the adventure, and the adventure itself; but he might have shewn that he obtained possession of it lawfully from the person by whom it was taken out. But if it be sufficient for a party, at any time, to stand upon his mere possession of such a general license, there can be no check whatever upon any indefinite abuse of them." Licenses.

There is another case (*f*) respecting the persons by whom the license may be employed, which relates not, like the preceding cases, to the question, whether the party employing the license be in reality the party for whose benefit government intended it should operate, but to the question of national character. The point in dispute was, whether a license granted to Mr. Ravie of Birmingham, for the importation of certain goods from Holland into this country, would operate to protect a shipment made by him in person in Holland, and under papers describing the firm of his house as Ravie and Co. of Amsterdam? Sir William Scott decided that it would not, and condemned the property. It has recently been decided that a general license is to be construed strictly, and not to extend to protection of enemy's property (*g*); but a license particularly specifying any flag, protects even enemy's property (*h*).

(*f*) Jonge Kassina, 5 Rob. Rep. 297.

(*g*) The Josephine, 1 Acton. 322.—2 Rob. 162.

(*h*) The Hendrick, 1 Acton. 313.

Licenses. Sometimes a license is granted upon an express condition; and then it is, of course, required that the condition be truly and fairly performed. This was decided in the case of Vandyck and Whitmore (*i*), where Lord Kenyon said, "Though the King may, at common law, license a trading with the enemy generally, yet he may also qualify his license; in which case the party seeking to protect himself under such license must conform to the requisitions of it." The same point will also be found in a note of the case of Gordon and Vaughan, annexed to the case of Shiffner and Gordon (*k*).

A license, by its very nature, is calculated to subsist only during the continuance of the war in which it was granted. "Peace having been concluded," says Sir William Scott, in the case of the Planters Winsch (*l*), "a license is necessarily done away and destroyed, having no subject matter to act upon."

We will now inquire, how far a license granted by an ally in the war, is legally capable of protecting the property which it is designed to cover? In all innocent articles of commerce, it appears that a state is, of course, at liberty to authorize the dealings of her subjects with the enemy, without any express permission from any of her allies; but

(*i*) 1 East. 486.
(*k*) 12 East. 302.
(*l*) 5 Rob. Rep. 22.

in articles that are contraband of war, the rule is otherwise, because the common cause may be directly and materially injured by such traffic. Sir William Scott, in the case of the Neptunus (*m*), said, " A practice has crept in of admitting particular relaxations; and if one state only is at war, no injury is committed to any other state. It is of no importance to other nations, how much a single belligerent chooses to weaken and dilute his own rights. But it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one state shall not do any thing to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be, that it will supply that aid and comfort to the enemy, especially if it is an enemy depending, like Holland, very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause and the interests of its ally. It should seem that it is not enough, therefore, to say that the one state has allowed this practice to its own subjects; it should appear to be, at least, desirable that it could be shewn, that either the practice is of such a nature as can in no manner interfere with the Licenses.

(*m*) 6 Rob. Rep. 403.

Licenses. common operations, or that it has the allowance of the confederate state."

A license duly granted by the King by virtue of his prerogative, or in pursuance of an Act of Parliament, legalizes a trade with the enemy in every respect. It was therefore held, in the case of Kensington v. Inglis (*m*), that where a certain trading with an alien enemy, for specie and goods to be brought from the enemy's country in his ships into our colonial ports, was licensed by the King's authority, that an insurance on the enemy's ship, as well as on the goods and specie put on board for the benefit of the British subjects, was incidentally legalized; and that it was competent for the British agent of both parties in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue. But it was observed by Lord Ellenborough in that case, that the King's license cannot have the effect of removing the personal disability of an alien enemy, so as to enable him to sue in his own name. If, however, the alien reside in this country with the King's permission, he might, in such case, sue in his own name. It was therefore held, in the case of Usparicha v. Noble (*n*),

(*m*) 8 East. 273. (*n*) 3 East. 332.

that a native Spaniard, domiciled here in time of war between this country and Spain, having been licensed in general terms by the King to ship goods in a neutral vessel from hence to certain ports in Spain, such commerce was legalized for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his correspondents, though residing in the enemy's country; and that such goods may therefore be insured by him, either on his own account or as agent for them, and that he might sue and recover upon the policy in his own name in case of a loss. Licenses.

With respect to the issuing of Orders in Council by virtue of the King's prerogative, and independently of any Act of Parliament, there is little to be said which has not been anticipated in our general remarks on the power of the King as arbiter of commerce. Many of the rights which he possesses in that capacity are exercised through the medium of Orders in Council. It is usual, when a permission is to be given to a particular individual, to grant it by license; but Orders of Council are of a more general nature, and contain dispensations or prohibitions extending to a whole branch of commerce. Orders in Council.

It is scarcely necessary to add, that any thing which the Statute Law or the Common Law has ordained, cannot be contravened by an Order in

Orders in Council.

Council, except in those cases where an Act of Parliament comprehends, amongst its own clauses, a power to the King of dispensing with its enactments (*o*).

2dly. Of Dispensations founded on particular Acts of Parliament by Orders in Council, &c.

Though we have seen that the King has not, by virtue of his prerogative, a power to dispense with the common law or any legislative provision, yet it has been usual, particularly during war, to give to the King in Council a power of modifying or dispensing with such provisions as it may be found expedient, in particular conjunctures, to alter or suspend; for the interests of commerce being of so variable a nature, and depending so much on circumstances suddenly arising, it would be very difficult, not to say impossible, during war, to make them generally subject to any permanent legislative provision. Thus the 43 Geo. 3. c. 153. s. 15. and 16. after reciting that it is expedient that his Majesty, by Order in Council, &c. should be authorized to permit, during the continuance of hostilities, and until six months after the ratification of a definitive treaty of peace, the importation, in any neutral ships whatever, of any goods from any port belonging to a state not in amity with his Majesty, enacts, "That it shall

(*o*) 1 Taunt. 227.—12 East. 296.

and may be lawful for his Majesty by Order in Council, and, in Ireland, for the Lord Lieutenant, or other chief governor or governors, and the Privy Council of Ireland, by Order in Council, from time to time, when and as often as the same shall be judged expedient, to permit, during the continuance of hostilities, and until six months after the ratification of a definitive treaty of peace, any such goods, wares, or merchandize, as shall be specified in any such Order in Council, to be imported from any port or place belonging to any kingdom or state not in amity with his Majesty, in ships belonging to the subjects of any kingdom or state in amity with his Majesty, any law then in force in the United Kingdom, or in Great Britain or Ireland respectively, to the contrary thereof notwithstanding." Orders in Council.

By the 45 Geo. 3. c. 34. after reciting that it was expedient, under the then circumstances, to permit certain goods to be imported, under certain restrictions, in foreign ships belonging to subjects of states in amity with his Majesty, it was enacted, "That it shall be lawful for his Majesty, by and with the advice of his Privy Council, to grant a license to any British subject to import into this kingdom, for his own account or for account of a subject of any state in amity with his Majesty, from any country in America belonging to any foreign European sovereign or

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state, any goods of the growth or produce, whether manufactured or otherwise, of any such country, not prohibited to be used or consumed in this kingdom, in any ship belonging to any state in amity with his Majesty, and under such rules, regulations, restrictions, and securities, as his Majesty, with the advice of his Privy Council, shall approve: subject to the same duties as if imported in a British-built ship, and to the same rules respecting the payment thereof; with a proviso that all sugar and coffee imported in pursuance of the Act shall be warehoused immediately on importation, and shall not be taken out of warehouse to be used or consumed in this kingdom, but only for exportation to foreign ports; provided always, that no such license shall be granted to any person who shall not have exported, or given such security as shall be required for exporting, from this kingdom, according to law, to the possessions in America belonging to the same European sovereign or state, any goods or commodities bearing such proportion in value to the goods so to be imported as his Majesty, by and with the advice aforesaid, shall think reasonable, and direct."

The Statute then provides, that if any question shall arise in any case, whether any thing which shall be done was authorized to be done by virtue of any such license, the proof that such thing

was done under the circumstances, and according to the terms and conditions in such license to be expressed, shall be on the person or persons respectively claiming the benefit of such license. Orders in Council.

By the 46 Geo. 3. c. 111. after reciting that, during the late and the present war, emergencies had arisen, and licences been granted contrary to law, but justifiable by the necessity of the case, with a view to the necessary supply of the British West India islands, and of lands and territories belonging to his Majesty on the continent of South America, and that it is proper that provision should be made for meeting such emergencies in future, without the necessity of frequent violation of the law by his Majesty's officers, it is enacted, "That it shall be lawful for his Majesty, by and with the advice of his Privy Council, to permit or authorize the governors or governor of the said islands and territories, in such manner, and under such restrictions, as to his Majesty, by and with the advice of his Privy Council, shall seem fit to permit, when the necessity of the case shall appear to his Majesty, with the advice of his Privy Council, to require it, during the present war, the importation into, and the exportation from, any island in the West Indies, in which description the Bahama Islands, and the Bermuda

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or Summer Islands, are included, or any lands or territories on the continent of South America belonging to his Majesty, of any such goods as shall be mentioned in such Order of his Majesty in Council, in any ships or vessels belonging to the subjects of any state in amity with his Majesty, in such manner as his Majesty, by and with the advice aforesaid, shall direct, subject to certain modifications mentioned in the Act."

The 47 Geo. 3. sec. 2. c. 27. empowers his Majesty, by Order in Council, to grant licenses for permitting naval stores to be imported from any place in amity with him, in any ship belonging to any state in amity, and navigated in any manner.

The 48 Geo. 3. c. 37. reciting that neutral ships, bound to ports on the continent of Europe from which the British flag had been excluded, had arrived in the ports of the United Kingdom, having been warned or brought into such ports in consequence of his Majesty's Orders in Council for that purpose, and parts of the cargoes of such vessels had been admitted to entry for home consumption, or warehoused for exportation, and other parts of such cargoes, consisting of goods the growth, produce, or manufacture of countries within the limits of the charter granted to the East India Company, and not imported by the

said East India Company, and warehoused for exportation only; and in consequence of the late events in Portugal, wine and other commodities had been brought from the dominions of the crown of Portugal in vessels not owned and navigated according to law, all such importations, &c. are declared lawful, and the persons concerned are indemnified; and his Majesty, &c. is empowered, by Order in Council, during hostilities, to permit goods to be imported in any vessels from any ports from which the British flag is excluded. Orders in Council.

The 48 Geo. 3. c. 126, authorizes goods secured in warehouses in the port of London to be removed under Order in Council, to any other port in Great Britain, for exportation in Europe. The second section enacts, that it shall be lawful for his Majesty, by Order in Council, or by his royal proclamation, to direct that all or any such licenses as, by virtue of any Act of Parliament, his Majesty may lawfully grant under his sign manual, shall and may be granted by one of his Majesty's principal Secretaries of State, in pursuance of an Order of Council specially authorizing the grant of such license; a duplicate of which order shall, in all cases, be annexed to such license (*p*).

(*p*) See the form of such Order in Council and license in Dr. Phillimore on License Trade, Appendix, Nos. I. and II.

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The third section authorizes the exportation of goods, by Order in Council, in smaller ships than were otherwise allowed by law.

The 49 Geo. 3. c. 25. permits unmanufactured East Indian or South American tobacco to be imported by Order in Council.

The 49 Geo. 3. c. 60. enacts that, by Order in Council, during hostilities, goods, the produce of any country, may be imported into the United Kingdom from any port of Europe or Africa, in British or friendly ships, however navigated.

Orders in Council.

When Orders in Council are made in pursuance of these Acts, the derivation of the power from the Acts is frequently acknowledged in the recital at the beginning of the order, as in that of the 21st December, 1808. "At the Court at the Queen's Palace, the 21st December, 1808, present the King's Most Excellent Majesty in Council, his Majesty, by virtue of the powers reserved to him by two certain Acts passed in the 48th year of his reign, intituled, &c. is pleased to order, by and with the advice of his Privy Council, and it is hereby ordered, that until further order be made therein, the operation of the aforesaid Acts be suspended, &c."

The power to make these Orders of Council, and to grant licenses in pursuance of them, being

derived from these Acts of Parliament, is of a limited nature, and cannot be extended further than the Acts themselves permit. The constructions of licenses granted by virtue of the King's prerogative, already considered, will in general be applicable to licenses founded on these Statutes. Orders in Council.

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"There can be no doubt," says Bynkershoek, "but that from the nature of war itself, all commercial intercourse ceases between enemies. For to what purpose will trade be carried on, if, as is clearly the case, the goods of enemies brought into our country are liable to confiscation? And if he who having obtained the right of killing his enemy, should go with merchandize into the hostile country, and the enemy should kill him in the midst of commercial intercourse, would you think it justly done? But every commercial intercourse ceases. Hence in declarations of war, commerce with the enemy is prohibited, and it is often done by subsequent edicts."—"The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the law of war as to commerce. Hence it is alternately permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or less want which it may be in of the merchandizes of others. Thus sometimes a mutual commerce is permitted generally; sometimes as to certain merchandizes only while others are prohibited, and sometimes it is prohibited altogether. But in whatever manner it may be permitted, whether generally, or specially, it is always, in my opinion, so far a suspension of the laws of war. And in this manner, there is partly war and partly peace between the subjects of both princes."

Grotius remarks—"cum alicui bellum indicitur, simul indicitur ejus populi hominibus."

Vattel observes, "the *Latins* had a term to distinguish a *public* enemy from a *private*," or individual "enemy." And adds, "that a public enemy may be free from such odious sentiments as are entertained by a private enemy; for he does not desire our hurt, and is only for maintaining his rights. This is a necessary

remark for regulating our dispositions towards a public enemy." And he agrees with Grotius above quoted, and says, "when the head of a nation declares war, it implies the *whole* nation declares war—and nations are concerned with each other respectively only as bodies, in their quality as nations."

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Vattel. L. 3. c. 7. s. 116 (not 107.) "The effects of neutrals found in an enemy's ship, are to be restored to the owners against whom there is no right of confiscation, but without any allowance for detainder, decay, &c. The loss sustained by the neutrals is an accident, to which they expose themselves by sending them in an enemy's ship; and the captor in making use of the law of war, is not answerable for any accidents resulting from it, no more than if a neutral passenger who happened unfortunately to be in an enemy's ship should be killed in the engagement." Again, L. 3 c. v. sect. 75—"It is not the *place* where a thing is, which determines the *nature* of that thing, but the *quality* of the person to whom it belongs; things belonging to neutral persons, which happen to be in an enemy's country, or the enemy's ships, are to be distinguished from those belonging to the enemy. But the owner must prove clearly that they are his, as in default of such proof, a thing is naturally presumed to belong to the nation with which it is found."

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Vattel, B. 111. c. 8. "The end of a just war is to *revenge* or *prevent* injury; that is, to procure by force the justice which cannot otherwise be obtained. The lawful end gives a right only to those means which are necessary for obtaining such end. Whatever exceeds this is censured by the law of nature, and must be condemned at the tribunal of conscience—The sovereign who would preserve a pure conscience, and punctually discharge the duties of humanity, is never to lose sight of this great principle, that nature gives him the right of making war *only* in cases of *necessity*, when a remedy must be used against obstinate injustice or violence—He will be careful that the remedy do not fall with

greater weight and cause more calamity than is requisite for the defence of his rights and the care of his safety."—"In giving an idea of the moderation with which, in the most just war, we are to use the right of pillaging an enemy's country, the whole centres in this general rule; all damage done to an enemy unnecessarily, every hostility which does not tend to put an end to the war, is *licentiousness* condemned by the law of nature.—As, with regard to hostilities against an enemy's person, the law of nations only prohibits such means as are *odious* and really *unlawful;* so the same law condemns every act of hostility, which contributes nothing to the success of our arms, does not increase our forces, nor weaken those of our enemy.—When rigour is not absolutely necessary, it is beautiful (honestum) to listen to the voice of humanity and clemency."

Grotius c. v. refers to *Cicero* the following maxim: "It is not against the law of nature to plunder him, whom it is lawful to kill;" and to *Polybius* for saying, "that by the right of war it is lawful to take away or destroy the cities, ships, fruits of the earth, and such things of an enemy." Again, c. vi. "Besides the impunity of some acts allowed to be used against our enemies, those things may be acquired by a *just* war, according to the law of nature, which are either equivalent to that which is due to us, but which we cannot otherwise get, or which damnifies the injurer, yet within the bounds of a *just* punishment."

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Grotius B. III. c. 2. "*Theodorick* called it a base license, for one man to be kept as a pledge for another—But though this be true, yet by the law of nations it may be and has been admitted, that whatever debts any state contracts, or is engaged for by *not restoring* to others what is their right, all the goods both corporal and incorporal of their subjects shall be obliged to discharge."—But this principle is qualified and limited; for he says, "this might let in all manner of injuries:" and *Barbeyrac* observes in a note on this chapter of *Grotius*, "that *reprisals*, being in some degree an act of hostility, the end of civil society requires that private persons should not make use of this right but with the permission of the sovereign."

Vattel, B. 111. c. 8. observes, "that by military authority prisoners have sometimes been hanged by way of retaliation for a similar act done by the commander of an enemy's army, with a view to oblige him to observe the laws of war."—He adds, "it is a sad extremity to put a prisoner to death for the fault of his general"—and says, "that *Scipio's* generosity is rather to be imitated, who having reduced some Spanish princes who had revolted against the Romans, declared to them that on a breach of their faith, he would not call the *innocent hostages* to an account, but themselves, and that he would not revenge it on a disarmed enemy, but on those who should be found in arms."

The following Copies of a LETTER *and* INSTRUCTIONS *from the Right Hon. Sir* WILLIAM SCOTT *and Sir* JOHN NICHOLL, *prepared at the instance of His Excellency* JOHN JAY, *Esquire, though not in the London edition of this work, cannot otherwise than prove acceptable to the American reader.*

TO HIS EXCELLENCY JOHN JAY, ESQUIRE, &c.

SIR,

I HAVE the honour of sending the paper drawn up by Dr. Nicholl and myself; it is longer and more particular than perhaps you meant; but it appeared to be an error on the better side, rather to be too minute, than to be too reserved in the information we had to give; and it will be in your Excellency's power either to apply the whole or such parts as may appear more immediately pertinent to the objects of your inquiry.

I take the liberty of adding, that I shall at all times think myself much honoured by any communications from you, either during your stay here, or after your return, on any subject in which you may suppose that my situation can give me the power of being at all useful to the joint interests of both countries;—If they should ever turn upon points in which the duties of my official station appear to me to impose upon me an obligation of reserve, I shall have no hesitation in saying, that I feel them to be such: On any other points, on which you may wish to have an opinion of mine, you may depend on receiving one, that is formed with as much care as I can use, and delivered with all possible frankness and sincerity.

I have the honour to be,
With great respect, &c.

WILLIAM SCOTT.

Commons, Sept. 10th. 1791.

Paper inclosed in the foregoing letter.

SIR,

We have the honour of transmitting, agreeably to your Excellency's request, a statement of the general principles of proceeding in prize causes, in British courts of admiralty, and of the measures proper to be taken when a ship and cargo are brought in as prize within their jurisdictions.

The general principles of proceeding cannot, in our judgment, be stated more correctly or succinctly, than we find them laid down in the following extract from a report made to his late Majesty in the year 1753, by Sir George Lee, then judge of the prerogative court, Dr. Paul, his majesty's advocate-general, Sir Dudley Rider, his majesty's attorney-general, and Mr. Murray (afterwards Lord Mansfield) his majesty's solicitor-general.

"When two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other, upon the high seas: Whatever is the property of the enemy, may be acquired by capture at sea; but the property of a friend cannot be taken provided he observes his neutrality.

"Hence the law of nations has established,

"That the goods of an enemy, on board the ship of a friend, may be taken.

"That the lawful goods of a friend, on board the ship of an enemy, ought to be restored.

"That contraband goods, going to the enemy, though the property of a friend, may be taken as prize; because supplying the enemy with what enables him better to carry on the war, is a departure from neutrality.

"By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be, or be not, lawful prize.

Before the ship, or goods, can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard; and condemnation thereupon as prize, in a court of admiralty, judging by the law of nations and treaties.

"The proper and regular court, for these condemnations, is the court of that state to whom the captor belongs.

"The evidence to acquit or condemn, with or without, costs or damages, must, in the first instance, come merely from the ship taken, viz. the papers on board, and the examination on *oath*, of the master, and other principal officers; for which purpose there are officers of admiralty in all the considerable sea ports of every maritime power at war, to examine the captains, and other principal officers of every ship, brought in as a prize, upon general and impartial interrogatories: If there do not appear from thence ground to condemn, as enemy's property or contraband goods going to the enemy, there must be an acquittal, unless from the aforesaid evidence, the property shall appear so doubtful, that it is reasonable to go into farther proof thereof.

"A claim of ship, or goods, must be supported by the oath of some body, at least as to belief.

"The law of nations requires good faith;—Therefore every ship must be provided with complete and genuine papers; and the master at least should be privy to the truth of the transaction.

"To enforce these rules, if there be false or colourable papers; if any papers be thrown overboard; if the master and officers examined in preparatorio, grossly prevaricate; if proper ship's papers are not on board; or if the master and crew cannot say, whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehaviour, or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant, in case of acquittal and restitution:—On the other hand, if a seizure is made without probable cause, the capture is adjudged to pay costs and damages: For which purpose all privateers are obliged to give security for their good behaviour; and this is referred to, and expressly stipulated, by many treaties.

"Though from the ship's papers, and the preparatory examinations, the property does not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect; If he will not shew the property by sufficient affidavits, to be neutral, it is presumed to belong to the enemy.—Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused

paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

"If the sentence of the court of admiralty is thought to be erroneous, there is in every maritime country, a superior court of review, consisting of the most considerable persons, to which the parties who think themselves aggrieved, may appeal; and this superior court judges by the same rule which governs the court of admiralty, viz. the law of nations, and the treaties subsisting with that neutral power, whose subject is a party before them.

"If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

"This manner of trial and adjudication is supported, alluded to, and enforced, by many treaties.

"In this method, all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers;—In this method, by courts of admiralty acting according to the law of nations, and particular treaties, all captures at sea have immemorially been judged of in every country of Europe. Any other method of trial would be manifestly unjust, absurd and impracticable."

Such are the principles which govern the proceedings of the prize courts.

The following are the measures which ought to be taken by the captor, and by the neutral claimant upon a ship and cargo being brought in as prize.

The captor immediately upon bringing his prize into port, sends up or delivers upon oath to the registry of the court of admiralty all papers found on board the captured ship. In the course of a few days, the examinations in preparatory of the captain and some of the crew, of the captured ship, are taken upon a set of standing interrogatories, before the commissioners of the port to which the prize is brought, and which are also forwarded to the registry of the admiralty as soon as taken. A monition is extracted by the captor from the registry, and served upon the royal exchange, notifying the capture, and calling upon all persons interested to appear and shew cause, why the ship and goods should not be condemned. At the expiration of twenty days, the monition is returned into the registry with a certificate of its service, and if any

claim has been given, the cause is then ready for hearing, upon the evidence arising out of the ship's papers, and preparatory examinations.

The measures taken on the part of the neutral master or proprietor of the cargo, are as follows:

Upon being brought into port, the master usually makes a protest, which he forwards to London, as instructions (or with such further directions as he thinks proper) either to the correspondent of his owners, or to the consul of his nation, in order to claim the ship, and such parts of the cargo as belong to his owners, or with which he was particularly entrusted: Or the master himself, as soon as he has undergone his examination, goes to London to take the necessary steps.

The master, correspondent, or consul applies to a proctor, who prepares a claim supported by an affidavit of the claimant, stating briefly, to whom as he believes, the ship and goods claimed, belong, and that no enemy has any right or interest in them: Security must be given to the amount of sixty pounds to answer costs, if the case should appear so grossly fraudulent on the part of the claimant as to subject him to be condemned therein.

If the captor has neglected in the mean time, to take the usual steps (but which seldom happens, as he is strictly enjoined both by his instructions and by the prize act to proceed immediately to adjudication) a process issues against him on the application of the claimant's proctor, to bring in the ship's papers and preparatory examinations, and to proceed in the usual way.

As soon as the claim is given, copies of the ship's papers and examinations are procured from the registry, and upon the return of the monition the cause may be heard. It however seldom happens (owing to the great pressure of business, especially at the commencement of a war) that causes can possibly be prepared for hearing immediately upon the expiration of the time for the return of the monition; In that case, each cause must necessarily take its regular turn: correspondent measures must be taken by the neutral master if carried within the jurisdiction of a vice admiralty court, by giving a claim supported by his affidavit, and offering security for costs, if the claim should be pronounced grossly fraudulent.

If the claimant be dissatisfied with the sentence, his proctor enters an appeal in the registry of the court where the sentence was given, or before a notary public (which regularly should be entered within fourteen days after the sentence) and he afterwards applies at the registry of the lords of appeal in prize causes (which is held at the same place as the registry of the high court of admiralty) for an instrument called an inhibition, and which should be taken out within three months if the sentence be in the high court of admiralty, and within nine months, if in a vice admiralty court, but may be taken out at later periods, if a reasonable cause can be assigned for the delay that has intervened. This instrument directs the judge, whose sentence is appealed from, to proceed no further in the cause; it directs the registrar to transmit a copy of all the proceedings of the inferior court: and it directs the party who has obtained the sentence to appear before the superior tribunal to answer to the appeal. On applying for this inhibition, security is given on the part of the appellant, to the amount of two hundred pounds to answer costs, in case it should appear to the court of appeals, that the appeal is merely vexatious.—The inhibition is to be served upon the judge, the registrar, and the adverse party and his proctor, by shewing the instrument under seal, and delivering a note or copy of the contents.—If the party cannot be found, and the proctor will not accept the service, the instrument is to be served "*viis et modis*," that is by affixing it to the door of the last place of residence, or by hanging it upon the pillars of the royal exchange.—That part of the process above described, which is to be executed abroad, may be performed by any person to whom it is committed, and the formal part at home is executed by the officer of the court.—A certificate of the service is endorsed upon the back of the instrument, sworn before a surrogate of the superior court, or before a notary public, if the service is abroad.

If the cause be adjudged in a vice-admiralty court, it is usual upon entering an appeal there, to procure a copy of the proceedings which the appellant sends over to his correspondent in England, who carries it to a proctor, and the same steps are taken to procure and serve the inhibition, as where the cause has been adjudged in the high court of admiralty. But if a copy of the pro-

ceedings cannot be procured in due time, an inhibition may be obtained, by sending over a copy of the instrument of appeal, or by writing to the correspondent an account only of the time and substance of the sentence.

Upon an appeal, fresh evidence may be introduced if upon hearing the cause the lords of appeal shall be of opinion, that the case is of such doubt, as that farther proof ought to have been ordered by the court below.

Further proof usually consists of affidavits made by the asserted proprietors of the goods, in which they are sometimes joined by their clerks and others acquainted with the transaction, and with the real property of the goods claimed. In corroboration of these, affidavits may be annexed, original correspondence, duplicates of bills of lading, invoices, extracts from books, &c. These papers must be proved by the affidavits of persons who can speak to their authenticity. And if copies or extracts, they should be collated and certified by public notaries. The affidavits are sworn before the magistrates or others competent to administer oaths in the country where they are made, and authenticated by a certificate from the British consul.

The degree of proof to be required depends upon the degree of suspicion and doubt, that belongs to the case.—In cases of heavy suspicion and great importance, the court may order what is called "plea and proof," that is, instead of admitting affidavits and documents introduced by the claimants only, each party is at liberty to allege in regular pleadings such circumstances as may tend to acquit or to condemn the capture, and to examine witnesses in support of the allegations, to whom the adverse party may administer interrogatories.—The depositions of the witnesses are taken in writing; if the witnesses are to be examined abroad, a commission issues for that purpose,—But in no case is it necessary for them to come to England. These solemn proceedings are not often resorted to.

Standing commissions may be sent to America for the *general* purpose of receiving examinations of witnesses in all cases where the court may find it necessary for the purposes of justice, to decree an inquiry to be conducted in that manner.

With respect to captures and condemnations at Martinico, which are the subjects of another inquiry contained in your note, we can only answer in general, that we are not informed of the particulars of such captures and condemnations, but as we know of no legal court of admiralty established at Martinico, we are clearly of opinion that the legality of any prizes taken there, must be tried in the high court of admiralty of England, upon claims given, in the manner above described, by such persons as may think themselves aggrieved by the said captures.

We have the honour to be, &c.

(Signed) WILLIAM SCOTT,
JOHN NICHOLL.

Commons, September 10th, 1794.

.....

Department of State,
Philadelphia, 22d. *Nov.* 1794.

I hereby certify, That the foregoing are true copies of an original communication from Mr. Jay to the Secretary of State.

GEORGE TAYLOR, Jr. Chief Clerk.

The ensuing Paper contains a thorough investigation and justification of the principles adhered to by the Court of Admiralty in England, in cases of capture of the ships and property of neutral powers in time of war. It was composed on a memorable occasion by the united abilities of the great law officers at that time in the service of the crown, and has ever since been received as the standard of authority in cases of that nature.

THE DUKE OF NEWCASTLE'S LETTER,

By his Majesty's order, to Monsieur MICHELL, *the King of Prussia's Secretary of the Embassy, in answer to the Memorial, and other papers, delivered by Monsieur* MICHELL *to the Duke of Newcastle on the* 23*d of November and* 13*th of December*, 1752.

WHITEHALL, Feb. 8, 1753.

SIR,

I LOST no time in laying before the king the memorial which you delivered to me on the 23d of November last, with the papers that accompanied it.

His majesty found the contents of it so extraordinary, that he would not return an answer to it, or take any resolution upon it, till he had caused both the memorial and the *Exposition des Motifs*, &c. which you put into my hands soon after by way of justification of what had passed at Berlin, to be maturely considered; and till his majesty should thereby be enabled to set the proceedings of the courts of admiralty here in their true light; to the end that his Prussian majesty, and the whole world, might be rightly informed of the regularity of their conduct; in which they appear to have followed the only method which has ever been practised by nations where disputes of this nature could happen; and strictly to have conformed themselves to the law of nations, universally allowed to be the only rule, in such cases, when there is nothing stipulated to the contrary by particular treaties between the parties concerned. This examination, and the full knowledge of the facts resulting from it, will shew so clearly the irregularity

of the proceedings of those persons to whom this affair was referred at Berlin, that it is not doubted, from his Prussian majesty's justice and discernment, but that he will be convinced thereof, and will revoke the detention of the sums assigned upon Silesia; the payment of which his Prussian majesty engaged to the empress queen to take upon himself, and of which the reimbursement was an express article in the treaties, by which the cession of that dutchy was made.

I therefore have the king's orders to send you the report made to his majesty upon the papers above mentioned by sir George Lee, judge of the prerogative court; doctor Paul, his majesty's advocate general in the courts of civil law; sir Dudley Ryder, and Mr. Murray, his majesty's attorney and solicitor general. This report is founded on the principles of the law of nations, received and acknowledged by authorities of the greatest weight in all countries; so that his majesty does not doubt but that it will have the effect desired.

The points upon which this whole affair turns, and which are decisive, are,

First, That affairs of this kind are, and can be, cognizable only in the courts belonging to that power where the seizure is made; and consequently that the erecting foreign courts or jurisdictions elsewhere, to take cognizance thereof, is contrary to the known practice of all nations in the like cases: and therefore a proceeding which none can admit.

Secondly, That those courts which are generally styled courts of admiralty, and which include both the inferior courts and the courts of appeal, always decide according to the universal law of nations only; except in those cases where there are particular treaties between the powers concerned, which have altered the dispositions of the law of nations, or deviate from them.

Thirdly, That the decisions in the cases complained of appear, by the enclosed report, to have been made singly upon the rule prescribed by the law of nations; which rule is clearly established by the constant practice of other nations, and by the authority of the greatest men.

Fourthly, That in the case in question, there cannot even be pretended to be any treaty that has altered this rule, or by vir-

tue of which the parties could claim any privileges which the law of nations does not allow them.

Fifthly, That as, in the present case, no just grievance can be alleged, nor the least reason given for saying that justice has been denied when regularly demanded; and as, in most of the cases complained of, it was the complainants themselves who neglected the only proper means of procuring it; there cannot, consequently, be any just cause or foundation for reprisals.

Sixthly, That even though reprisals might be justified by the known and general rules of the law of nations, it appears by the report, and indeed from considerations which must occur to every body, that sums due to the king's subjects by the empress queen, and assigned by her upon Silesia, of which sums his Prussian majesty took upon himself the payment, both by the treaty of Breslau and by that of Dresden, in consideration of the cession of that country, and which, by virtue of that very cession, ought to have been fully and absolutely discharged in the year 1745, that is to say one year before any of the facts complained of did happen, could not, either in justice or reason, or according to what is the constant practice between all the most respectable powers, be seized or stopt by way of reprisals.

The several facts which are particularly mentioned above are so clearly stated and proved in the enclosed report, that I shall not repeat the particular reasons and authorities alleged in support of them, and in justification of the conduct and proceedings in question. The king is persuaded that these reasons will be sufficient also to determine the judgment of all impartial people in the present case.

It is material to observe upon this subject, that this debt on Silesia was contracted by the late emperor Charles the Sixth, who engaged not only to fulfil the conditions expressed in the contract, but even to give the creditors such further security as they might afterwards reasonably ask. This condition had been very ill performed by a transfer of the debt, which had put it in the power of a third person to seize and confiscate it.

You will not be surprised, sir, that in an affair which has so greatly alarmed the whole nation, who are entitled to that protection hich his majesty cannot dispense with himself from

granting, the king has taken time to have things examined to the bottom, and that his majesty finds himself obliged, by the facts, to adhere to the justice and legality of what has been done in his courts, and not to admit the irregular proceedings which have been carred on elsewhere.

The late war furnished many instances which ought to have convinced all Europe how scrupulously the courts here do justice upon such occasions. They did not even avail themselves of an open war to seize or detain the effects of the enemy, when it appeared that those effects were taken wrongfully before the war. This circumstance must do honour to their proceedings; and will, at the same time, shew, that it was as little necessary as proper to have recourse elsewhere to proceedings entirely new and unusual.

The king is fully persuaded that what has passed at Berlin has been occasioned, singly, by the ill-grounded informations which his Prussian majesty has received of these affairs; and does not at all doubt but that, when his Prussian majesty shall see them in their true light, his natural disposition to justice and equity will induce him immediately to rectify the steps which have been occasioned by those informations, and to complete the payment of the debt charged on the Dutchy of Silesia, according to his engagements for that purpose.

I am, with much consideration,
Sir,
Your most obedient humble servant,
HOLLES NEWCASTLE.

TO THE KING'S MOST EXCELLENT MAJESTY.

May it please your Majesty,

In obedience to your majesty's commands, signified to us by his grace the duke of Newcastle, we have taken the memorial, sentence of the Prussian commissioners, and lists marked A. and B. which were delivered to his grace by Monsieur Michell, the Prussian secretary here, on the 23d of November last; and also the printed *Exposition des Motifs*, &c. which was delivered to his

grace the 13th of December last, into our serious consideration; and we have directed the proper officer to search the registers of the court of admiralty, and inform us how the matter appeared from the proceedings there, in relation to the cases mentioned in the said lists A. and B. which he has accordingly done.

And your majesty having commanded us to report our opinion concerning the nature and regularity of the proceedings under the Prussian commission mentioned in the said memorial, and of the claim or demand pretended to be founded thereupon, and how far the same are consistent with, or contrary to, the law of nations, and any treaties subsisting between your majesty and the king of Prussia, the established rules of admiralty jurisdiction, and the laws of this kingdom;

For the greater perspicuity, we beg leave to submit our thoughts upon the whole matter in the following method:

1st, To state the clear established principles of law.

2dly, To state the fact.

3dly, To apply the law to the fact.

4thly, To observe upon the questions, rules and reasoning alleged in the said memorial, sentence of the Prussian commissioners, and *Exposition des Motifs*, &c. which carry appearances of objections to what we shall advance upon the former heads.

First, as to the LAW.

When two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other upon the high seas: whatever is the property of the enemy may be acquired by capture at sea; but the property of a friend cannot be taken, provided he observed his neutrality.

Hence the law of nations has established,

That the goods of an enemy on board the ship of a friend may be taken.

That the lawful goods of a friend on board the ship of an enemy ought to be restored.

That contraband goods going to the enemy, though the property of a friend, may be taken as prize, because supplying the enemy with what enables him better to carry on the war is a departure from neutrality.

By the maritime law of nations universally and immemorially received, there is an established method of determination, whether the capture be, or be not, lawful prize.

Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding wherein both parties may be heard, and condemnation thereupon as prize in a court of admiralty, judging by the law of nations and treaties.

The proper and regular court for these condemnations, is the court of that state to whom the captor belongs.

The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, *viz.* the papers on board, and the examination on oath of the master and other principal officers; for which purpose there are officers of admiralty in all the considerable seaports of every maritime power at war, to examine the captains and other principal officers of every ship brought in as prize, upon general and impartial interrogatories. If there do not appear from thence ground to condemn as enemy's property, or contraband goods going to the enemy, there must be an acquittal; unless from the aforesaid evidence the property shall appear so doubtful, that it is reasonable to go into the further proof thereof.

A claim of ships or goods must be supported by the oath of somebody, at least as to belief.

The law of nations requires good faith; therefore every ship must be provided with complete and genuine papers, and the master at least should be privy to the truth of the transaction.

To enforce these rules, if there be false or colourable papers, if any papers be thrown overboard, if the master and officers examined *in præparatorio* grossly prevaricate, if proper ship's papers are not on board, or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehaviour or suspicion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages; for which purpose

all privateers are obliged to give security for their good behaviour; and this is referred to, and expressly stipulated by, many treaties.*

Though, from the ship's papers, and the preparatory examinations, the property do not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect: if he will not shew the property by sufficient affidavits to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

If the sentence of the court of admiralty is thought to be erroneous, there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties, who think themselves aggrieved, may appeal; and this superior court judges by the same rule which governs the court of admiralty, *viz.* the law of nations, and the treaties subsisting with that neutral power whose subject is a party before them.

If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

This manner of trial and adjudication is supported, alluded to, and enforced by many treaties.†

* Treaty between England and Holland, 17 Feb. 1668. Art. 13.—Treaty 1 Dec. 1674. Art. 10.—Treaty between England and France at St. Germains, 24th of Feb. 1677. Art. 10.—Treaty of Commerce at Ryswick, Sept. 20, 1697, between France and Holland, Art. 30.—Treaty of Commerce at Utrecht, 31 March, 1713, between Great Britain and France, Art. 29.

† As appears with respect to courts of admiralty adjudging the prizes taken by those of their own nation, and with respect to the witnesses to be examined in those cases, from the following treaties:—Treaty between England and Holland, 17 Feb. 1668. Art. 9 and 14.—Treaty 1 Dec. 1674. Art. 11.—Treaty 29th of April, 1689. Art. 12, 13.—Treaty between England and Spain, 23 May, 1667. Art. 23.—Treaty of Commerce at Ryswick, 20 Sept. 1697, between France and Holland. Art. 26 and 31.—Treaty between England and France, 3 Nov. 1655. Art. 17 and 18.—Treaty of Commerce between England and France at St. Germain's, 29 March, 1632. Art. 5 and 6.—Treaty at St. Germain's, 24 Feb. 1677. Art. 7.—Treaty of

In this method all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by courts of admiralty acting according to the law of nations and particular treaties, all captures at sea have immemorially been judged of in every country of Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable.

Though the law of nations be the general rule, yet it may, by mutual agreement between two powers, be varied or departed from; and where there is an alteration or exception introduced by particular treaties, that is the law between the parties to the treaty; and the law of nations only governs so far as is not derogated from by the treaty.

Thus by the law of nations, where two powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband goods to the enemy; but particular treaties have enjoined a less degree of search, on the faith of producing solemn passports and formal evidences of property duly attested.

Particular treaties too have inverted the rule of the law of nations, and by agreement declared the goods of a friend on board the ship of an enemy to be prize, and the goods of an enemy on board the ship of a friend to be free, as appears from the treaties already mentioned, and many others.*

Commerce between Great Britain and France, at Utrecht, 31 March, 1713. Art. 26 and 30.—Treaty between England and Denmark, 29 Nov. 1669. Art. 23 and 34.—*Heineccius*, who was privy counsellor to the king of Prussia, and held in the greatest esteem, in his Treatise *de Navibus ob vecturam vetitarum mercium commissis*, cap. 2. sect. 17 and 18, speaks of this method of trial.

With respect to appeals or reviews,—from Treaty between England and Holland, 1 Dec. 1674. Art. 12, as it is explained by Article 2. of the Treaty at Westminster, 6 Feb. 1715-16.—Treaty between England and France, at St. Germain's, 24 Feb. 1677. Art. 12.—Treaty of Commerce at Ryswick, 20 Sept. 1697, between France and Holland, Art. 33.—Treaty of Commerce at Utrecht, 31 March, 1713, between Great Britain and France, Art. 31 and 32, and other Treaties.

* Particularly by the aforesaid Treaty between England and Holland, 1 Dec. 1674, and the Treaty of Utrecht between Great Britain and France.

So likewise, by particular treaties, some goods reputed contraband by the law of nations are declared to be free.

If a subject of the king of Prussia is injured by, or has a demand upon any person here, he ought to apply to your majesty's courts of justice, which are equally open and indifferent to foreigner or native; so, *vice versâ*, if a subject here is wronged by a person living in the dominions of his Prussian majesty, he ought to apply for redress in the king of Prussia's courts of justice.

If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions.

The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the state, and justice absolutely denied *in re minimè dubiâ* by all the tribunals, and afterwards by the prince.*

Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried.

Secondly, as to the FACT.

We have subjoined hereto two lists tallying with those marked A. and B. which were delivered to his grace the duke of Newcastle by Mons. Michell, with the said memorial, the 23d of November last; and also printed at the end of the said *Exposition des Motifs*, &c. from whence it will appear, that as to the list A. which contains 18 ships and their cargoes,

Four, if ever taken, were restored by the captors themselves, to the satisfaction of the Prussians, who never have complained in any court of justice here.

* *Grotius de Jure Belli ac Pacis*, lib. 3. cap. 2. sect. 4, 5.

Treaty between England and Holland, 31 July, 1667 Art. 31. Reprisals shall not be granted till justice has been demanded according to the ordinary course of law.

Treaty of Commerce at Ryswick, 20 Sept. 1697, between France and Holland, Art. 4. Reprisals shall not be granted but on manifest denial of justice.

One was restored by sentence, with full costs and damages, which were liquidated at 2801*l.* 12*s.* 1*d.* sterling.

Three ships were restored by sentence, with freight, for such of the goods as manifestly belonged to the enemy, and were condemned.

Four ships were restored by sentence, but the cargoes, or part of them, condemned as prize or contraband, and are not now alleged in the lists A. or B. to have been Prussian property.

Five ships and cargoes were restored by sentence, but the claimant subjected to pay costs, because, from the ship-papers and preparatory examinations, there was ground to have condemned, and the restitution was decreed merely on the faith of affidavits afterwards allowed.

One ship and cargo was restored by sentence upon an appeal, but, from the circumstances of the capture, without costs on either side.

There need no observations upon this list. As to the eight cases first above mentioned, there cannot be the colour of complaint.

As to the four next, the goods must be admitted to have been rightly condemned, either as enemy's property or contraband, for they are not now mentioned in the lists A. or B.

If contraband, the ship could have neither freight nor costs, and the sentences were favourable in restoring the ships, upon presumption that the owners of the ships were not acquainted with the nature of the cargo or the owners thereof. If enemy's property, the ships could not be entitled to freight, because the bills of lading were false, and purported the property to belong to Prussians.

The ships could not be entitled to costs, because the cargoes, or part of them, being lawful prize, the ships were rightly brought in.

As the six remaining ships and cargoes were restored, the only question must be upon paying or not receiving costs, which depends upon the circumstances of the capture, the fairness of the ship's documents, and conduct of her crew; and neither the Prussian commissioners, the said memorial, or said *Exposition des*

Motifs, &c. allege a single reason why, upon the particular circumstances of these cases, the sentences were wrong.

As to the list B.

Every ship, on board which the subjects of Prussia claim to have had property, was bound to or from a port of the enemy; and many of them appeared to be, in part, laden with the goods of the enemy, either under their own or fictitious names.

In every instance where it is suggested that any part of the cargo belonged to a Prussian subject, though his property did not appear from the ship's papers, or preparatory examinations, which it ought to have done, sufficient time was indulged to that Prussian subject to make an affidavit that the property was *bonâ fide* in him; and the affidavit of the party himself has been received as proof of the property of the Prussian, so as to entitle him to restitution.

Where the party will not swear at all, or swears evasively, it is plain he only lends his name to cover the enemy's property, as often came out to be the case beyond the possibility of doubt.

It appears by a letter 29th of May and 9th of June, 1747, from Mons. Andriè to his Prussian majesty, exhibited in a cause, and certified to be a true extract by Mons. Michell, under his hand, that this colourable manner of screening the goods of the enemy was stated in the following words:

"Your majesty's subjects ought not to load on board neutral ships any goods really belonging to the enemies of England, but to load them for their own account, whereby they may safely send them to any country they shall think proper, without any risk. Then, if privateers commit any damage to the ships belonging to your majesty's subjects, you may depend on full justice being done here, as in all the like cases hath been done."

List B. contains thirty-three cases.

Two of them never came before a court of justice in England, but (if taken) were restored by the captors themselves, to the entire satisfaction of the owners.

In sixteen of them the goods claimed by the Prussian subjects appear to have been actually restored, by sentence, to the masters of ships in which they were laden; and by the customs of the sea the master is in the place of the lader, and answerable to him.

In fourteen of the cases the Prussian property was not verified by the ship's papers, or preparatory examinations, or claimant's own affidavit, which he was allowed time to make.

And the other cause, with respect to part of the goods, is still depending, neither party having moved for judgment.* And so conscious were the claimants that the court of admiralty did right, there is not an appeal, in a single instance, in list B.; and but one in list A.

Thirdly, to apply the law to the FACT.

The sixth question in the said *Exposition des Motifs*, &c. states the right of reprisals to be, "*puisqu'on leur a si long tems denié toute la justice, qu'ils étoient fondés de demander.*"

The said memorial founds the justice and propriety of his Prussian majesty's having recourse to reprisals, because his subjects, "*n'ont pu obtenir jusqu'à present aucune justice des tribunaux Anglois qu'ils ont reclamés ou du gouvernement auquel ils ont porté les plalntes.*" And in another part of the memorial it is put, "*apres avoir en vain demandé des reparations de ceux qui seuls pouvoient les faire.*

The contrary of all which is manifest from the above state and lists hereto annexed.

In six of the cases specified, if such captures ever were made, the Prussian subjects were so well satisfied with the restitution made by the captors, that they never complained in any court whatsoever of this kingdom.

The rest were judged of by a court of admiralty, the only proper court to decide of captures at sea, both with respect to the restitution and the damages and costs; acting according to the law of nations, the only proper rule to decide by; and justice has been done by the court of admiralty so impartially, that all the ships alleged in list A. to have been Prussian were restored, and all the cargoes mentioned in either list A. or B. were restored, excepting fifteen, one of which is still undetermined.

And, in all the cases in both lists, justice was done so entirely to the conviction of the private conscience of the Prussian claim-

* The Prussian has since applied for judgment on the 29th of January, and obtained restitution.

ants, that they have acquiesced under the sentences without appealing, except in one single instance, where the part of the sentence complained of was reversed;

Though the Prussian claimants must know that, by the law of nations, they ought not to complain to their own sovereign till injustice *in re minimè dubiâ* was finally done them, past redress; and though they must know that rule of the law of nations held more strongly upon this occasion, because the property of prize was given to the captors, and ought therefore to be litigated with them. The Prussian who, by his own acquiescence, submits to the captors having the prize, cannot afterwards with justice make a demand upon the state. If the sentence was wrong, it is owing to the fault of the Prussian that it was not redressed. But it is not attempted to be shewn, even now, that these sentences were unjust in any part of them, according to the evidence and circumstances appearing before the court of admiralty; and that is the criterion.

For as to the Prussian commission to examine these cases, *ex parte*, upon new suggestions, it never was attempted in any country of the world before: prize or not prize, must be determined by courts of admiralty belonging to the power whose subjects make the capture. Every foreign prince in amity has a right to demand that justice shall be done his subjects in these courts, according to the law of nations, or particular treaties, where any are subsisting. If *in re minimè dubiâ* these courts proceed upon foundations directly opposite to the law of nations, or subsisting treaties, the neutral state has a right to complain of such determination.

But there never was, nor never can be, any other equitable method of trial. All the maritime nations of Europe have, when at war, from the earliest times, uniformly proceeded in this way, with the approbation of all the powers at peace. Nay, the persons acting under this extraordinary and unheard-of commission from his Prussian majesty, do not pretend to say, that in the four cases of goods condemned here, for which satisfaction is demanded in list A. the property really belonged to Prussian subjects; but they profess to proceed upon this principle, evidently false, that though these cargoes belonged to the enemy, yet, being on board

any neutral ships, they were not liable to inquiry, seizure, or condemnation.

Fourthly, from the questions, rules, reasonings, and matters alleged in the said memorial, sentences of the Prussian commissioners, and *Exposition des Motifs*, &c. the following propositions may be drawn as carrying the appearance of objections to what has been above laid down:

FIRST PROPOSITION.

"That by the law of nations the goods of an enemy cannot be taken on board the ship of a friend; and this the Prussian commissioners lay down as the basis of all they have pretended to do."

ANSWER. The contrary is too clear to admit of being disputed. It may be proved by the authorities of every writer of the law of nations; some of different countries are referred to.* It may be proved by the constant practice, ancient and modern; but the general rule cannot be more strongly proved than by the exception which particular treaties have made to it.†

* *Il Consolato del Mare*, cap. 273, expressly says, "The enemy's goods, found on board a friend's ship, shall be confiscated." And this is a book of great authority.

Grotius de Jure Belli ac Pacis, lib. iii. cap. 1, section 5, numero 4, in the notes, cites this passage, in the *Il Consolato*, and in his notes, lib. iii. cap. 6. sect. 6.

Loccenius de Jure Maritimo, lib. ii. cap. 4, sect. 12.

Voet de Jure Militari, cap. 5, nu. 21.

Heineccius, the learned Prussian before quoted, *de Navibus ob Vecturam vetitarum Mercium commissis*, cap. 2, sect. 9. is clear and explicit upon this point.

Bynkershoeck Quæstiones Juris Publici, lib. i. cap. 14, per totum.

Zouch (an Englishman) in his book *de Judicio inter Gentes*, pars 2, sect. 8, numero 6

Treaty between Great Britain and Sweden, 23 Oct. 1661. Art. 12 and 13; Treaty between Great Britain and Denmark, 19 Nov. 1669. Art. 2; and the passport or certificate, settled by that treaty, are material as to this point.

† Treaty between France and England, 24 Feb. 1677. Art. 8.

Treaty of Utrecht between France and England, 1713. Art. 17.

SECOND PROPOSITION.

"It is alleged that lord Carteret, in 1744, by two verbal declarations, gave assurances in your majesty's name that nothing on board a Prussian ship should be seized, except contraband; consequently, that all effects not contraband, belonging to the enemy, should be free; and that these assurances were afterwards confirmed in writing by lord Chesterfield, the 5th of January, 1747."

ANSWER. The fact makes this question not very material, because there are but four instances in lists A. or B. where any goods on board a Prussian ship have been condemned; and no satisfaction is pretended to be demanded for any of those four cargoes in lists A. and B. However, it may be proper to shew how groundless this pretence is.

Taking the words alleged to have been said by lord Carteret as they are stated, they do not warrant the inferences endeavoured to be drawn from them. They import no new stipulation different from the law of nations, but expressly profess to treat the Prussians upon the same foot with the subjects of other neutral powers under the like circumstances; *i. e.* with whom there was no particular treaty. For the reference to neutral powers cannot be understood to communicate the terms of any particular treaty. It is not so said. The treaties with Holland, Sweden, Russia, Portugal, Denmark, &c. all differ. Who can say which was communicated? There would be no reciprocity: the king of Prussia does not agree to be bound by the clauses to which other powers have, by their respective treaties, agreed. No Prussian goods on board an enemy's ship have ever been condemned here, and yet they ought, if the treaties with Holland were to be the rule between Great Britain and Prussia; nay, if these treaties were to be the rule, all now contended for, on the part of Prussia, is clearly wrong; because, by treaty, the Dutch, in the last resort, are to apply to the court of appeal here.

Treaty between England and Holland, 17 Feb. 1668. Art. 10.
Treaty between England and Holland, 1 Dec. 1674. Art. 8.
Treaty between England and Portugal, 10 July, 1654. Art. 23.
Treaty between France and the States General at Utrecht, 11 April, 1713. Art. 26.

Treaty of Alliance between Great Britain and Holland, at Westminster, the 6th of Feb. 1715-16, *Article II.*

"Whereas some disputes have happened touching the explanation of the 12th article of the treaty marine in 1674, it is agreed and concluded for deciding any difficulty upon that matter, to declare by these presents, that by the provisions mentioned in the said article, are meant those which are received by custom in Great Britain and the United Provinces, and always have been received, which have been granted, and always are granted, in the like case, to the inhabitants of the said countries, and to every foreign nation."

Lord Carteret is said twice to have refused, in which monsieur Andrié acquiesces, to give any thing in writing, as not usual in England.

Supposing the conversations to mean no more than a declaration of course that justice should be done to the Prussians in like manner as to any other neutral power with whom there was no treaty, there was no occasion for instruments in writing; because in England the crown never interferes with the course of justice. No order or intimation is ever given to any judge. Lord Carteret therefore knew that it was the duty of the court of admiralty to do equal justice, and that they would, of themselves, do what he said to monsieur Andrié.

Had it been intended, by agreement, to introduce between Prussia and England a variation in any particular from the law of nations, and consequently a new rule for the court of admiralty to decide by, it could only be done by a solemn treaty, in writing, properly authorized and authenticated. The memory of it could not otherwise be preserved; the parties interested and the courts of admiralty could not otherwise take notice of it.

But lord Chesterfield's confirmation, in a letter of the 5th of January, 1747, being relied upon, the books of the secretary's office have been searched, and the letter to monsieur Michell is found, which is *verbatim* as follows:

A Whitehall, le 5 Janv. 1747-8.

"*Monsieur,*

"*Ayant eu l'honneur de recevoir les ordres du roy sur ce qui a formé le sujet du memoire que vous m'avez remis du 8 de ce mois, N. S. Je n'ai pas voulu tarder à vous informer, que sa majesté, pour ne rien omettre par où elle peut temoigner ses attentions envers le roy votre maitre, ne fait nulle difficulté de declarer, qu'elle n'a jamais eu l'intention, ni ne l'aura jamais, de donner le moindre empechement à la navigation des sujets Prussiens, tant qu'ils auront soin d'exercer leur commerce d'une maniere licite, et conformément à l'ancien usage établi et reconnu parmi les puissances neutres.*

"*Que sa majesté Prussienne ne peut pas ignorer, qu'il y a des traités de commerce qui subsistent actuellement entre la Grande Bretagne et certaines etats neutres, et qu'au moyen des engagemens formellement contractés de part et d'autre par ces mêmes traités, tout ce qui regarde la maniere d'exercer leur commerce reciproquement, a été finalement constaté et reglé.*

"*Qu'en méme tems il ne paroit point qu'aucun traité de la nature susdite existe à present, ou a jamais existé, entre sa majesté et le roy de Prusse; mais que pourtant cela n'a jamais empeché que les sujets Prussiens n'ayent été favorisés par l'Angleterre, par raport à leur navigation, autant que les autres nations neutres: et cela étant, sa majesté ne presuppose pas, que l'idée du roy votre maitre seroit d'exiger d'elle des distinctions, encore moins des preferences, en faveur de ses sujets à cet égard.*

"*Que de plus sa majesté Prussienne est trop eclairée pour ne pas connoitre, qu'il y a des loix fixes et etablies dans ce gouvernement, dont on ne peut nullement s'écarter; et que s'il arrivoit que la marine Angloise s'avisât de faire la moindre injustice aux sujets commerçans du roy votre maitre, il y a un tribunal ici, savoir, la haute cour de l'amirauté, à laquelle ils se trouvent en droit de s'adresser et de porter leurs plaintes; assurés d'avance, en pareil cas, qu'on leur y rendra bonne justice; les procedés juridiques de ladite cour étant et ayant été de tout tems hors d'atteinte et irreprochables; temoin, nombre, d'exemples, où des*

vaisseaux neutres, pris illicitement, ont été restitués avec fraix et dommages aux proprietaires.

"*Voici ce que le roy m'a ordonne de vous repondre sur le contenu de votre dit memoire; et sa majesté ne sauroit que se flatter, qu'en consequence de ce que je viens d'avancer; il ne restera plus rien à desirer au roy votre maitre relativement à l'objet dont il est question; et le roy s'en croit d'autant plus assuré, qu'il est persuadé que sa majesté Prussienne ne voudroit rien demander que ne fut équitable.*

"*Je suis, avec bien de la consideration,*

"*Monsieur,*

"*Votre très humble et très*

"*Obeissant serviteur,*

"*Chesterfield.*"

There need no observations; it is explicit, and in express terms puts Prussia upon the foot of other neutral powers with whom there was no treaty, and points out the proper way of applying for redress.

The verbal declarations made by lord Carteret in 1744, which are said to have been confirmed by this letter from lord Chesterfield, cannot have meant more than the letter expresses.

And it is manifest by the above extract from mousieur Andrié's letter to his Prussian majesty, that in May 1747 mousieur Andrié himself understood that goods of the enemy taken on board neutral ships ought to be condemned as prize.

It is evident, from authentic acts, that the subjects of Prussia never understood that any new right was communicated to them.

Before the year 1746 the Prussians do not appear to have openly engaged in covering the enemy's property.

The men of war and privateers could not abstain from captures in consequence of lord Carteret's verbal assurances in 1744, because they never were nor could be known; and there was no occasion to notify them, supposing them only to promise impartial justice. For all ships of war were bound to act, and courts of admiralty to judge, according to the law of nations and treaties.

Till 1746 the Prussian documents were, a certificate of the admiralty, upon the oath of the builder, that the ship was Prussian

built; and a certificate of the admiralty, upon the oath of the owner, that the ship was Prussian property.

From 1746 the Prussians engaged in the gainful practice of covering the enemy's goods, but were at a loss in what shape and upon what pretences it might best be done.

On board the ship the Trois Soeurs was found a pass bearing date at Stettin the 6th of October 1746, under the royal seal of the Prussian regency of Pomerania, &c. alleging the cargo, which was ship timber, bound for Port L'Orient, to be Prussian property, and, in consequence thereof, claiming freedom of the ship.

Claiming freedom to the ship from the property of the cargo being quite new, the proposition was afterwards reversed. And on board a ship called the Jumeaux, was found a pass bearing date at Stettin the 27th of June, 1747, under the royal seal, &c. alleging the ship to be Prussian property, and, in consequence thereof, claiming freedom to the goods.

But this pass was not solely relied on, for there was also found on board the same ship another pass, bearing date at Stettin the 14th of June 1747, under the royal seal, &c. alleging the cargo to be Prussian property.

And it is remarkable that the oaths upon which these passes were granted, appeared manifestly to be false; and neither of the cargoes to which they relate are now so much as alleged to have been Prussian property in said list A or B.

It being mentioned in the said *Exposition des Motifs*, &c. that Mons. Michell, in September, 1747, made verbal representations to lord Chesterfield in respect to the cargo taken on board the said ship called the Trois Soeurs, which was claimed as Prussian property, and no mention being made in the lists A. and B. of the said cargo, we directed the proceedings in that cause to be laid before us; where it appears in the fullest and clearest manner, from the ship-papers and depositions, that the cargo was timber, laden on the account and at the risque of Frenchmen, to whom it was to be delivered at Port L'Orient, they paying freight according to charter party; that the Prussian claimant was neither freighter, lader, or consignee; and had no other interest or concern in the matter than to lend his name and conscience; for he swore that the cargo was his property, and laden on or be-

fore the 6th of October, 1746, and yet the ship was then in ballast, and the whole of the cargo in question was not laden before May 1747.

Several other Prussian claims had, in like manner, come out so clearly to be merely colourable, that Mons. Andrié, from his said letter the 29th of May and 9th of June, 1747, appears to have been ashamed of them.

THIRD PROPOSITION.

"That Lord Carteret, in his said two conversations, specified, in your Majesty's name, what goods should be deemed contraband."

ANSWER. The fact makes this question totally immaterial, because no goods condemned as contraband, or which were alleged to be so, are so much as now suggested to have been Prussian property in the said lists A. and B.; and therefore, whether as enemy's property or contraband, they were either way rightly condemned; and, the bills of lading being false, the ships could not be entitled to freight.

But if the question was material, the verbal declarations of a minister in conversation might shew what he thought contraband by the law of nations, but never could be understood to be equivalent to a treaty derogating from that law.

All the observations upon the other parts of these verbal declaration hold equally as to this.

FOURTH PROPOSITION.

"That the British ministers have said that these questions were decided according to the laws of England."

ANSWER. They must have been misunderstood; for the law of England says, that all captures at sea, as prize, in time of war, must be judged of in a court of admiralty, according to the law of nations and particular treaties, where there are any.

There never existed a case where a court, judging according to the laws of England only, ever took cognizance of prize.

The property of prizes being given during the last war to the captors, your majesty could not arbitrarily release the capture,

but left all cases to the decision of the proper courts, judging by law of nations and treaties where there were any; and it never was imagined that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England.

FIFTH PROPOSITION.

"That your majesty could no more erect tribunals for trying these matters than the king of Prussia."

ANSWER. Each crown has, no doubt, an equal right to erect admiralty courts for the trial of prizes taken by virtue of their respective commissions; but neither has a right to try the prizes taken by the other, or to reverse the sentences given by the other's tribunal. The only regular method of rectifying their errors is, by appeal to the superior court.

This is the clear law of nations; and by this method prizes have always been determined in every other maritime country of Europe as well as England.

SIXTH PROPOSITION.

"That the sea is free."

ANSWER. They who maintain that proposition in its utmost extent, do not dispute but that when two powers are at war they may seize the effects of each other upon the high seas, and on board the ships of friends; therefore that controversy is not in the least applicable upon the present occasion.*

SEVENTH PROPOSITION.

"Great Britain issued reprisals against Spain, on account of captures at sea."

ANSWER. These captures were not made in time of war with any power.

* This appears from Grotius in the passages above cited, lib. 3. cap. 1 sect. 5. nu. 4. in his notes; and lib. 3. cap. 6. sect. 6. in his notes.

They were not judged of by courts of admiralty, according to the law of nations and treaties, but by rules, which were themselves complained of in revenue courts; the damages were afterwards admitted, liquidated at a certain sum, and agreed to be paid by a convention, which was not performed; therefore reprisals issued, but they were general. No debts due here to Spaniards were stopped; no Spanish effects here were seized; which leads to one observation more.

The king of Prussia has engaged his royal word to pay the Silesia debt to private men.

It is negotiable, and many parts may have been assigned to the subjects of other powers. It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honour, because a prince cannot be compelled, like other men, in an adverse way, by a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that even during the war they suffered no inquiry to be made whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.

This loan to the late emperor of Germany, Charles the VIth, in January 1734-5, was not a state transaction, but a mere private contract with the lenders, who advanced their money upon the emperor's obliging himself, his heirs and posterity, to repay the principal, with interest, at the rate, in the manner, and at the times in the contract mentioned, without any delay, demur, deduction or abatement whatsoever; and, lest the words and instruments made use of should not be strong enough, he promises to secure the performance of his contract in and by such other instruments, method, manner, form, and words, as should be most effectual and valid to bind the said emperor, his heirs, successors and posterity, or as the lenders should reasonably desire.

As a specific real security, he mortgaged his revenues arising from the Duchies of Upper and Lower Silesia for payment of principal and interest; and the whole debt, principal and interest, was to be discharged in the year 1745. If the money could

not be paid out of the revenues of Silesia, the emperor, his heirs and posterity, still remained debtors, and were bound to pay. The eviction or destruction of a thing mortgaged, does not extinguish the debt or discharge the debtor.

Therefore the empress queen, without the consent of the lenders, made it a condition of her yielding the Duchies of Silesia to his Prussian majesty, that he should stand in the place of the late emperor in respect of this debt.

The seventh of the preliminary articles between the queen of Hungary and the king of Prussia, signed at Breslau the 11th of June 1742, is in these words: "*Sa majesté le roi de Prusse se charge du seul payment de la somme hypothéquée sur la Silesie, aux marchands Anglois, selon le contract signé à Londres le 7me de Janvier* 1734-5."

This stipulation is confirmed by the ninth article of the treaty between their said majesties, signed at Berlin the 28th of July 1742.

Also renewed and confirmed by the second article of the treaty between their said majesties, signed at Dresden at 25th of December 1745.

In consideration of the empress queen's cession, his Prussian majesty has engaged to her that he will pay this money *selon le contract*, and consequently has bound himself to stand in the place of the late emperor in respect of this money, to all intents and purposes.

The late emperor could not have seized this money as reprisals, or even in case of open war between the two nations, because his faith was engaged to pay it without any delay, demur, deduction, or abatement whatsoever. If these words should not extend to all possible cases, he hath plighted his honour to bind himself by any other form of words more effectually to pay the money; and therefore was liable at any time to be called upon to declare expressly that it should not be seized as reprisals, or in case of war; which is very commonly expressed when sovereign princes or states borrow money from foreigners. Therefore, supposing for a moment that his Prussian Majesty's complaint was founded in justice and the law of nations, and that he had a right to make reprisals in general, he could not, consistent with his en-

gagements to the empress queen, seize this money as reprisals. Beside, this whole debt, according to the contract, ought to have been discharged in 1745. It should, in respect of the private creditors, in justice and equity, be considered as if the contract had been performed; and the Prussian complaints do not begin till 1746, after the whole debt ought to have been paid.

Upon this principle of natural justice, French ships and effects wrongfully taken after the Spanish war, and before the French war, have, during the heat of the war with France, and since, been restored by sentence of your majesty's courts to the French owners. No such ships or effects ever were attempted to be confiscated as enemy's property here during the war; because, had it not been for the wrong first done, these effects would not have been in your majesty's dominions. So, had not the contract been first broke by non-payment of the whole loan in 1745, this money would not have been in his Prussian majesty's hands.

Your majesty's guaranty of these treaties is entire, and must therefore depend upon the same conditions upon which the cession was made by the empress queen.

But this reasoning is, in some measure, superfluous; because, if the making any reprisals upon this occasion be unjustifiable, which we apprehend we have shewn, then it is not disputed but that the non-payment of this money would be a breach of his Prussian majesty's engagements, and a renunciation, on his part, of those treaties.

All which is most humbly submitted to your majesty's royal wisdom.

GEO. LEE.
G. PAUL.
D. RYDER.
W. MURRAY.

January 18, 1753.

Translation of the Earl of Chesterfield's Letter to Mons. Michell.

Whitehall, January 5, 1747-8.

SIR,

Having had the honour to receive the king's orders upon the subject of the memorial which you delivered to me on the 8th instant, N.S. I would not delay informing you that his majesty, in order to omit nothing whereby he may shew his attention to the king your master, makes no difficulty in declaring, that his majesty has never had, or will have, any intention to give any interruption to the navigation of the Prussian subjects, as long as they shall take care to carry on their commerce in a lawful manner, and conformably to the ancient usage as established and acknowledged amongst neutral powers.

His Prussian majesty cannot be ignorant that there are treaties of commerce actually subsisting between Great Britain and certain neutral states, and that by means of the engagements formerly contracted on each side by those treaties, every thing relating to the manner of reciprocally carrying on their commerce has been finally settled and regulated.

At the same time it does not appear that any such treaty exists at present, or ever did exist, between his majesty and the king of Prussia; nevertheless that has never hindered the Prussian subjects being favoured by England, with respect to their navigation, as much as other neutral nations: and his majesty does not suppose that the king your master means to require distinctions from his majesty, much less any preferences, in favour of his subjects in this point.

His Prussian majesty is too well informed not to know that there are in this government fixed and established laws which cannot be departed from; and that in case any English ships of war should commit the least injustice to the trading subjects of the king your master, here is a tribunal, *viz.* the high court of admiralty, where they have a right to apply and make their complaints: and they may be previously assured, that in such case impartial

justice will be administered to them; the juridical proceedings of the said court being, and having ever been unimpeached and irreproachable, as appears by numerous examples of neutral vessels illegally taken having been restored with costs and damages to the proprietors.

This is the answer the king has ordered me to give upon the contents of your said memorial; and his majesty cannot but flatter himself that, in consequence hereof, the king your master's desire will be fully answered, with relation to the point in question; and of which his majesty is the more assured, as he is persuaded that the king of Prussia would not require any thing but what is equitable.

I am,
With much consideration,
Sir,
Your most obedient,
And most humble servant,
CHESTERFIELD.

Translation of Mr. Peter Trapaud's Declaration of his having made satisfaction to the Prussians for the damage received by the ship St. John, No. 16, in list A.

In the exposition which his Prussian majesty has published of such ships of his subjects as were taken by the English in the last war, I have observed in the list A. No. 16, that the ship St. John, John Grosse captain, is therein mentioned as having received some damages to the prejudice of the Prussian owners. As the fact is known to me, as I was the sole owner of her cargo, I do hereby, as such, testify the truth, for the satisfaction of all whom it may concern; and I cannot conceive how the Prussian subjects dare demand an indemnification, which they have already more than received, as I am going to convince them.

In the month of November 1747, I ordered the said ship to be freighted at Bourdeaux, and loaded at Lisbon with 158¼ tons of white wine. On the 1st of December following that ship put out to sea. On the 11th of the said month she got as far as the Downs, where she was met by an English privateer, called the Prince of Orange, who sent six of his men on board the Prussian

ship, and had the Prussian pilot brought on board him, with the ship-papers and documents, in order to their being examined. On the 12th of the said month, as she lay at an anchor, a great storm arose from the W. S.W. which obliged the Prussian captain, with the consent of his crew and of the six Englishmen who were then on board his ships, to cut his cable in order to drive off to sea. The ship got afterwards into Browershaven inlet in Holland, on the 15 of the said month of December, without any other damage than the loss of part of her cable and of an anchor, and arrived at Rotterdam the 21st of the said month. All this is proved by the declaration of both the captain and his crew, made on the 4th of January 1748, before Jacob Bremer, notary public in Rotterdam, and afterwards sworn to on the 6th of the said month before the commissioners of the chamber of maritime affairs.

After the ship was unloaded, the captain gave in to me his account for gross average, consisting of the following articles:

1. For the loss of his cable and anchor.

2. For the maintaining, during eight days, the six men who had been put on board his ship by the English privateer.

3. For a passport I procured for him from the Prussian envoy at the Hague, which cost 3 or 4 florins.

I paid him for my share in that gross average 704 florins, Holland currency, over and above 105 florins which I gave captain Grosse as a present, and 10 florins 10 stivers I gave as a present to the crew of his ship: beside all this, it cost me 20 florins, or thereabouts, in England, which Messrs. Simond (brothers) had disbursed by my order for the Prussian pilot who remained on board the privateer after the storm had parted them.

Those who understand the navigation and fitting out of ships must allow, that the Prussian owners will find themselves more than reimbursed for all their pretensions by means of the 839 florins 10 stivers, Holland currency, which I have paid them; and that they cannot, with any foundation, make any other demands.

All that I have alleged above, can be verified by authentic vouchers (except the presents or gratuities to the captain and his crew, amounting to 115 florins 10 stivers, for which I took no receipt.) In witness whereof I have signed this present declaration. Rotterdam, January 30, 1753.

PETER TRAPAUD, JUN.

LIST OF ALL THE PRUSSIAN SHIPS TAKEN BY BRITISH ARMAMENTS AT SEA, DURING THE LAST WAR, AS WELL THOSE DETAINED FOR EXAMINATION ONLY, AS THOSE JUDICIALLY PROCEEDED UPON, TOGETHER WITH THE JUDGMENTS GIVEN IN THE ADMIRALTY COURTS OF GREAT BRITAIN THEREUPON, TALLYING WITH HIS PRUSSIAN MAJESTY'S LIST MARKED A.

Ships, which (if taken) were restored by the captors, upon examination, without either party applying to a court of justice.

La Frederique Amitie, Capitaine Sprenger ——La Catharine Christine, Capit. Frederick Berend.——Le St. Jean,* Capit. Jean Grosse.——Le Jeune Tobie, Capit. Paul Otto.

* On the 3d of February, the duke of Newcastle received a letter from Mr. Wolters, his majesty's agent at Rotterdam, enclosing the following declaration:

"Dans l'Exposition que sa majesté Prussienne a donnée au public des vaisseaux de ses sujets pris par les Anglois dans la derniere Guerre, j'ai remarqué dans la liste A. No. 16 que le navire le St Jean, capitaine Jean Grosse, y est notté comme ayant reçû quelques dommages, au prejudice des proprietaires Prussiens. Comme le fait m'est connu, ayant été seul propriétaire de sa cargaison, je veux en cette qualité rendre temoignage à la verité, pour servir où il appartiendra. D'ailleurs, je ne puis comprendre comment les sujets Prussiens osent demander un dedommagement qu'ils ont deja plus que reçû, comme je vais les en convaincre.

"Dans le mois de Novembre 1747, je fis fretter à Bordeaux, et charger à Libourne, le dit navire avec 158 3-4 tonneaux de vin blanc. Le rer. de Dec. suivant ce navire mit en mer. Le 11 du dit mois, il se trouva à la hauteur des Dunes; là il fut rencontré par le corsaire Anglois, nommé Le Prince d'Orange, qui envoya à bord du navire Prussienne, six hommes de son equipage, et fit venir à son bord le pilote Prussien avec les papiers de mer, pour en faire l'examen Le 12. du dit mois, étant à l'ancre sous les Cingles, il s'eleva une furieuse tempête de la part du W. S. W. qui obligea le capitaine Prussien, du consentement de son equipage, et des six Anglois pour lors dans son bord, de couper le cable pour gagner la mer. Ce navire entra ensuite dans le passage de Browershave en Hollande, le 15e. du dit mois de Decembre, sans avoir eu d'autre dommage que la perte d'une partie de son cable, et d'une ancre, et arriva ensuite à Rotterdam

Ships and goods restored, with all costs and damages attending the capture.

L'Anne Elizabeth, Capit. Daniel Schultz, costs and damages, 2801*l.* 12*s.* 1*d.*

le 21e. du susdit mois. Tout ceci est constaté par la declaration du capitaine et de son équipage, passée, le 4 Janvier 1748, pardevant Jacob Bremer, notaire public dans Rotterdam; ensuite sermentée, le 6e. du dit mois, pardevant les commissaires de la chambre de la marine.

" Après que le navire fut dechargé, le capitaine me fit fournir son compte d'Avarie grosse, dans lequel il portoit les articles suivans :

" 1. Pour la perte de son cable et de son ancre.

" 2. Pour la nourriture de 8 jours à 6 hommes qui avoient été mis par le corsaire Anglois sur son bord.

" 3. Pour un passeport que je lui fis donner à la Haye par l'envoyé de Prusse, qui couta 3 à 4 florins.

" Je lui payai, pour ma portion, dans cette Avarie grosse, 704 florins, argent courant d'Hollande, en outre 105 florins dont je fis present au capitaine Grosse, et 10fl. 10st. aussi de present aux matelots qui composoient son equipage. Outre tout ceci, il m'en a couté 20 florins ou environ, en Angleterre, pour autant que Messrs. Simond, freres, avoient deboursé par mon ordre pour le pilote Prussien qui etoit resté à bord du corsaire, lorsque la tempête les separa.

" Ceux qui se connoissent en navigation et en armament de navire, ne pourront disconvenir, que les proprietares Prussiens se trouvent, au moyen de 839fl. 10st. courans d'Hollande, que je leur ai payés, plus que remboursés de toutes leurs pretensions; et s'ils peuvent, avec quelque fondement, en demander d'autres.

" Tout ce que j'avance ci-dessus peut se verifier par des pieces authentiques (à la reserve des presents, ou gratifications, au capitaine ou à son equipage, montant à 115fl. 10st. dont je n'ai pas retiré de quittance;) en vertu dequoi j'ai signé la presente declaration. Rotterdam, ce 30 Janvier 1753. PIERRE TRAPAUD, LE JEUNE.

The above declaration was signed in my presence, and the original vouchers quoted in the same have been produced to me. Witness my hand and seal.——Rotterdam, January the 30th, 1753.

R. WOLTERS, (L. S.)

Ships restored with freight, according to the bills of lading, for such goods which were found to be the property of the enemy, and condemned as prize.

L'Aigle d'Or, Capit. Onne Arends.—La Dorothee Sophie, Capit. Piere, Kettelhuth.—Les Deux Freres, Capit. Aug. Augustinus.

Ships and goods restored, but without costs, from circumstances arising from the case.

Le Petit David, Cap. Michael Bugdahl.

Ships and cargoes restored, paying costs.—In these cases, it either appeared, that the ship had not the usual evidence of property, according to the custom of the sea; or from the ship-papers, or examination of the crew, there appeared just reason to presume the cargo to belong to the enemy, and the neuter claimant declined proving his property by strict legal evidence, and obtained restitution on the faith of his own affidavit; and, in these cases, courts of admiralty have always made the like decrees.

La Dame Juliene, Capit Martin Prest.—Le Frederick II. Roy de Prusse, Capit. Chretien Schultz.—Le Vaisseau au bon Vent. Capit. Michel Juriansen.—La Daageroud, Capit. Martin Sperwien.—Les Deux Freres, Capit. Jon Hallen.

Cargoes, or part of them, condemned as contraband, and not now alleged, in list A. or B. to have been Prussian property, and therefore were certainly prize of war.

Les Jumeaux, Capit. Kruth.—Le Soleil D'Or, Capit. Jacob Ridder.—Le Frederick II. Roy de Prusse, Capit. Chretien Schultz.—Le Jeune André, Capit Henri Barckhorn.

Appeal from the Admiralty Decrees.

Le Petit David, Cap. Micheal Bugdahl.

LIST OF ALL THE NEUTRAL SHIPS TAKEN BY BRITISH SHIPS DURING THE LAST WAR, IN WHOSE CARGOES THE SUBJECTS OF PRUSSIA CLAIM TO HAVE BEEN INTERESTED; TOGETHER WITH THE JUDGMENTS GIVEN BY HIS BRITANNIC MAJESTY'S COURTS OF ADMIRALTY THEREUPON, TALLYING WITH HIS PRUSSIAN MAJESTY'S LIST MARKED B.

La Cecile, from Cette to Altena, ship and cargo restored.

Le Nahring, from Rochelle to Bourdeaux, ditto.

Le Demoiselle Jeane, from Hambourg to Cadiz, ditto.

Le Carlshavener Weifft, from Hambourg to Cadiz, ditto.

L'Anne Elizabeth, from Hambourg to Cadiz, ship restored, and cargo part restored.

Le Gustave Prince Royal, from Hambourg to Cadiz, ditto.

Le Jeune Benjamin, from Hambourg to Cadiz, ditto.

Le Prince Frederick, from Hambourg to Bilboa and Bayonne, ship and cargo restored.

Le Marie Joseph, from Hambourg to Cadiz, ditto.

L' Union, from Bourdeaux to Hambourg, ship restored, and cargo part restored.

Le Neptune, from Nants to Hambourg, ship and cargo restored.

Le St Paul,* from Nants to Hambourg, ditto.

La Couronne, from Nants to Hambourg, ditto.

La Demoiselle Catherine, from Rochelle to Altena, ship restored, and cargo part restored.

La Concorde, from Rochelle to Hambourg, ditto.

La Feaune, from Charante to Hambourg, ditto.

L'Amitie, from Rochelle to Hambourg, ditto.

Le Jeune Prince Chretien, from Marseilles to Hambourg. ditto.

La Dem. Marguerite, from Bourdeaux to Hambourg, ditto.

Le Roxier, from Bourdeaux to Hambourg, ditto.

La Marie Sophie, from Rochelle to Hambourg, ditto.

* On the 29th of January, affidavits were exhibited in the court of admiralty, and sentence prayed on the part of the Prussian claimant, and the goods were decreed to be restored.

L'Anne Sophie, from Bourdeaux to Koningsberg.

Le Hop de Danzig, from Bourdeaux to Dantzick, ship restored, and cargo part restored.

Le Jeune Jeane, de Petersbourg, from Bourdeaux to Hambourg, ditto.

Le Gregor et de Breme, from Bourdeaux to Hambourg, ditto.

La Jeune Catherine, from Bourdeaux to Hambourg, ditto.

Les Six Soeurs, de Lubeck, from Bourdeaux to Lubeck, ditto.

La Ste. Anne, de Hambourg, from Bourdeaux to Hambourg, ditto.

Le Jeune Eldert, de Hambourg, from Roan to Hambourg, ditto.

Le Juste Henri, de Hambourg, from Bourdeaux to Hambourg, ditto.

L'Elizabeth, from Hambourg to Bourdeaux, ditto.

La Demoiselle Claire, from Hambourg to Roan, ditto.

L'Adolph Frederic, from Marseilles to Hambourg, ditto.

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