A DIGEST

OF

INTERNATIONAL LAW

AS EMBODIED IN

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

AND ESPECIALLY IN

DOCUMENTS, PUBLISHED AND UNPUBLISHED, ISSUED BY PRESIDENTS AND SECRETARIES OF STATE OF THE UNITED STATES, THE OPINIONS OF THE ATTORNEYS-GENERAL, AND THE DECISIONS OF COURTS, FEDERAL AND STATE.

BY

JOHN BASSETT MOORE, LL. D.,

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

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

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CHAPTER XXII.

MODES OF REDRESS.

I. *AMICABLE.*

1. Negotiation.

§ 1064.

The ordinary mode of obtaining international redress is by diplomatic negotiation. There is nothing that so much conduces to the adjustment of differences as a full and frank discussion of them. Usually, negotiations are conducted by the regular official representatives of the governments concerned. Where, however, the exigencies or magnitude of the controversy appear to render it expedient, special or additional representatives, official or unofficial, are employed; and, where the occasion requires it, formal international conferences are held. Of such conferences the history of diplomacy affords many examples.

Where negotiation fails, the parties may try the good offices or mediation of a friendly power, or may resort to arbitration.

"When a dispute as to territorial limits arises between two nations, the ordinary course is to leave the territory claimed by them respectively in the same condition (or as nearly so as possible) in which it was when the difficulty first occurred, until an amicable arrangement can be made in regard to conflicting pretensions to it. It has not been the intention of the United States to deviate from this course, nor has any notice been given by Mexico that she proposed to assume jurisdiction over it, or change the possession as it was held at the conclusion of the treaty of peace and limits between the two Republics."

Mr. Marcy, Sec. of State, to Mr. Conkling, min. to Mexico, May 18, 1853, MS. Inst. Mex. XVI. 376.

2. Good Offices and Mediation.

(1) to adjust differences.

§ 1065.

"There is a distinction between the case of *good offices* and of *mediator*. The demand of good offices or their acceptance does not confer the right of mediator. (Klüber, Droit des Gens Moderne de l'Europe, Part II. tit. 2, § 1, ch. 2, § 160.) The offer of Russia to mediate between the United States and Great Britain, in the war of 1812, was at once accepted by the former; and in order to avoid delays incident to the distance of the parties, plenipotentiaries were commissioned to conclude a treaty of peace with persons clothed with like power on the part of Great Britain. (Wait's State Papers, Vol. IX. p. 223; President Madison's message, May 25, 1813.) The re-

fusal of Great Britain, at that time in the closest alliance with Russia, can only be accounted for by the supposed accordance between the United States and Russia in questions of maritime law. Sir James Mackintosh considered the rejection of the proffered mediation, whereby hostilities were unnecessarily prolonged, the less justifiable, as 'a mediator is a common friend, who counsels both parties with a weight proportioned to their belief in his integrity and their respect for his power. But he is not an arbitrator, to whose decisions they submit their differences, and whose award is binding on them.' (Hansard's Parliamentary Debates, Vol. XXX. 526, April 11, 1815.)"

Lawrence's Wheaton (1863), 495.

As to Russia's offer of mediation in the war of 1812, see Am. State Papers, For. Rel. III. 623.

"The phrase 'good offices' being somewhat elastic, it may be well to confine its use to the two contingencies in respect to which this Department is careful to limit its employment. In its first sense, it corresponds to the French term *officieux*, or the Spanish *oficioso*, and means the unofficial advocacy of interests which the agent may properly represent, but which it may not be convenient to present and discuss on a full diplomatic footing. In its second sense, it is allied to arbitral intermediation as an impartial adviser of both parties, and not only implies but requires the assent of both parties and oftener, a spontaneous invitation from each. Neither of these meanings may be attached to the service which the Colombian minister desires you to render."

Mr. Hay, Sec. of State, to Mr. McNally, No. 235, March 16, 1900, MS. Inst. Cent. Am. XXI. 645.

"On the part of France the mediation [that of Great Britain in 1835, as to the non-performance of the French spoliation treaty] had been publicly accepted before the offer of it could be received here. Whilst each of the two Governments has thus discovered a just solicitude to resort to all honorable means of adjusting amicably the controversy between them, it is a matter of congratulation that the mediation has been rendered unnecessary. Under such circumstances the anticipation may be confidently indulged that the disagreement between the United States and France will not have produced more than a temporary estrangement. . . . Of the elevated and disinterested part the Government of Great Britain has acted, and was prepared to act, I have already had occasion to express my high sense."

President Jackson, message of February 22, 1836, Richardson's Messages, III. 216.

As to the dispute between the United States and France, to which President Jackson referred, see infra, § 1095.

"It has never been the purpose of the Government of the United States to interpose, directly or indirectly, in the affairs of the states of Central America, with a view to settle the controversies between them by any influence whatsoever exercised by this Government, without their request or free consent. The mediation and friendly offices of this Government have been solicited, and this request has been complied with and nothing more. Not a step has been taken to coerce either of those Governments into any measure not satisfactory to itself. These Republics are small, and in a great degree powerless, but we respect the national character and independence of each. And although it is to be deeply regretted that, for national purposes, they are not united in some form of confederacy, yet, whilst things remain as they now are, we are to treat with each of them as a separate and independent state."

Mr. Webster, Sec. of State, to the President, Aug. 12, 1852, MS. Report Book VI. 447.

With reference to the action of the American minister in Bolivia in tendering to the Bolivian Government the good offices of the United States for the renewal of friendly relations between Bolivia and Great Britain, Mr. Seward expressed the opinion that the American minister was "rather premature" in making the offer. If the Bolivian Government, said Mr. Seward, desired the mediation of the United States, its wish should have been referred to Washington and not accepted at once without instructions. "The office of a mediator is an important one. Its duties can not be discharged satisfactorily to the mediator himself or to the parties to the controversy, without a full knowledge on his part of the origin, history, and nature of the dispute. . . . It would consequently be necessary to furnish that information before even the expediency of our acting as a mediator could properly be determined."

Mr. Seward, Sec. of State, to Mr. Caldwell, min. to Bolivia, No. 18, Feb. 18, 1869, MS. Inst. Bolivia, I. 105.

"The Government of the United States feels a deep interest in the permanent peace and prosperity of the South American states and will not refuse to exercise such influence as may be proper to secure an amicable settlement of the difficulty which has unfortunately arisen among some of those countries."

Mr. Fish, Sec. of State, to Mr. Clapp, No. 19, Oct. 23, 1872, MS. Inst. Argentine Republic, XVI. 22.

This statement referred to an intimation made by a special envoy of Bolivia at Buenos Ayres, that, in case he should fail to obtain satisfactory terms for his country in the difficulty between Brazil and the Argentine Republic, which also involved Bolivia and Paraguay, an application would be made for the friendly offices of the United States.

In 1887, the Government of Salvador expressed to Mr. Hall, the minister of the United States in Central America, a wish that the mediation of the United States should be offered to Italy for the settlement of a claim against Salvador arising from the sale of the Government printing establishment in that country to an Italian subject. The amount of the claim was about 2,000,000 francs. The United States replied that, without more precise knowledge of the grounds of the claim, it hesitated to tender mediation, but subsequently suggested that the Salvadorian Government should sustain its minister in naming a sum to settle the claim, and that, if a reasonable proposal should be rejected by the Italian Government, the good offices of the United States might then be offered. Subsequently, Mr. Hall's good offices were solicited by the diplomatic representative of Italy, and, under these circumstances, he was instructed that, if both parties joined in requesting his impartial good offices, he might visit Salvador for that purpose. Mr. Hall accordingly tendered his good offices, and, as the result of their exercise, it was agreed to settle the claim for $270,000 payable in instalments.

For. Rel. 1888, I. 77, 78, 107, 120.

With reference to an inquiry as to what action the President would take in case he should be requested to act as mediator between Great Britain and the Congo State in a controversy as to certain territorial rights in Africa, the Department of State said:

"The readiness with which the Executive of this government has responded in the past to invitations to exert friendly offices toward the composition of questions at issue between foreign countries with which the United States maintain relations of amity is in itself an earnest of the cordial spirit in which such overtures are likely to be welcomed, when addressed to the President by the parties to the disagreement. I may, however, assume that the President would feel a natural delicacy in making any statement of readiness to so act, in advance of his offices being solicited by the concurrent action of the two governments concerned. . . . On several important occasions, some of them quite recent, the President has abstained from any indication in advance, to either party, of what reception he might ultimately give to a joint request for his friendly concourse as a mediator or arbitrator. Regarding, for my own part, such an attitude of reserve as comporting with the principle of resort to amicable and impartial mediation, and having in mind, moreover, the circumstance that the President's electoral term will expire on the 4th of March next, thus rendering it improbable that the suggested trust could be personally accepted and discharged by the present incumbent of that high office, I have thought it proper to refrain from taking Mr. Harrison's direction in the premises."

Mr. Foster, Sec. of State, to Mr. Terrell, min. to Belgium, No. 260, Nov. 23, 1892, MS. Inst. Belgium, III. 117.

(2) TO AVERT HOSTILITIES.

§ 1066.

"The United States stand as the great American power, to which, as their natural ally and friend, they [the South America nations] will always be disposed first to look for mediation and assistance in the event of any collision between them and any European nation. As such we may often kindly mediate in their behalf without entangling ourselves in foreign wars or unnecessary controversies. Whenever the faith of our treaties with any of them shall require our interference, we must necessarily interpose."

President Taylor, annual message, Dec. 4, 1849. Richardson's Messages, V. 14.

"England again offered mediation between the United States and Mexico in 1847, but the offer was not accepted by either party." (Dana's Wheaton, § 73, note 40.)

President J. Q. Adams, message of May 21, 1828, giving correspondence in relation to efforts to mediate between Spain and the Spanish American states, is given in Am. State Papers, For. Rel. VI. 1006.

"The President has observed with deep solicitude the existence of feelings of alienation between the republics of Ecuador and Peru. The United States have neither a right nor a disposition to question the merits of any controversies which have arisen between those states, with both of which we desire to cultivate the most amicable relations, while we would, if possible, contribute to the prosperity and advancement of both. The United States feel very sensibly that internal differences, like those which are now affecting themselves, as well as differences between independent republics on this continent, have a manifest tendency to injure the common interest of all the American republics. Animated by these views, the President desires that you will seek an early opportunity to express them to the Government of Ecuador. While fully admitting the right of the Government to pursue its own counsels, you will express a hope on the part of this Government that its difficulties with Peru may admit of peaceful solution by arbitration or otherwise. You will not tender mediation on the part of the President.

"It is not consistent with his views of propriety and policy to assume such an office. But if his good offices should be desired by both parties, he would use his best efforts in the recommendation of a mediator who would do justice to the two republics."

Mr. Seward, Sec. of State, to Mr. Hassaurek, min. to Ecuador, No. 6, Nov. 20, 1861, MS. Inst. Ecuador, I. 100.

The action of the German admiral in 1884 in raising the imperial flag at Yap, in the Caroline Islands as a sign of occupation, caused

in Spain an outbreak of popular violence, which was marked by attacks on the German embassy and the German consulate at Madrid. In order to avert hostilities between the two countries Prince Bismarck proposed the submission of the matter to the mediation of the Pope. This proposal the Spanish Government accepted, and on October 22, 1885, the Pope, as mediator, presented to the two governments certain propositions by which the sovereignty of Spain over the Caroline and Pelew islands was confirmed, but by which Germany acquired exceptional commercial rights, together with the right to establish a naval station and a coal depot in the islands. His Holiness advised that his propositions should be embodied by Germany and Spain in a protocol, which should follow the form of that concluded at Madrid on March 7, 1885, between Germany, Great Britain, and Spain in relation to the Sulu archipelago. Such a protocol was signed at Rome December 17, 1885, by the German and Spanish ambassadors.

For. Rel. 1886, 776.
Moore, Int. Arbitrations, V. 5043–5046.
See, also, supra, § 89.

The Guatemalan minister at Washington having expressed a desire for the friendly offices and moral influence of the United States to prevent a "war for conquest" by Mexico, the American minister at Mexico was instructed to "tender good offices in favor of peace with honor between American republics, and deprecate unnecessary war."

Mr. Bayard, Sec. of State, to Mr. Morgan, tel., April 11, 1885, MS. Inst. Mexico, XXI. 269.

"For some years past a growing disposition has been manifested by certain states of Central and South America to refer disputes affecting grave questions of international relationship and boundaries to arbitration rather than to the sword. It has been, on several such occasions, a source of profound satisfaction to the Government of the United States to see that this country is, in a large measure, looked to by all the American powers as their friend and mediator. The just and impartial counsel of the President in such cases has never been withheld, and his efforts have been rewarded by the prevention of sanguinary strife or angry contentions between peoples whom we regard as brethren."

Mr. Blaine, Sec. of State, to Mr. Morgan, Nov. 29, 1881, MS. Inst. Mexico, XX. 373.

Art. I. of the treaty between the United States and Corea, of May 22, 1882, provides that "if other powers deal unjustly or oppressively with either Government, the other will exert their good offices, on

being informed of the case, to bring about an amicable arrangement, thus showing their friendly feelings." In June, 1894, the Corean minister at Washington, under instructions of his government, represented that its independence was seriously menaced by the action of China and Japan, and invoked the interposition of the United States. The United States tendered its good offices, but the precipitation of hostilities between China and Japan defeated this purpose.

Mr. Gresham, Sec. of State, to Mr. Bayard, ambass. to England, No. 28, July 20, 1894, For. Rel. 1894, App. I. 36; President Cleveland, annual message, Dec. 3, 1894.

July 9, 1894, Mr. Gresham telegraphed to Mr. Sill, American min. at Seoul, that the United States could not intervene forcibly. (For. Rel. 1894, App. 1. 31.)

Oct. 12, 1894, Mr. Gresham wrote to a Mr. Goschen, British chargé, that while the President earnestly desired "that China and Japan shall speedily agree upon terms of peace alike honorable to both, and not humiliating to Korea, he can not join England, Germany, Russia, and France in an intervention, as requested." (For. Rel. 1894, App. I. 70.)

(3) TO END WAR.

§ 1067.

In 1838, the Government of the United States instructed its minister at Paris to acquaint the French Government with the readiness of the President to afford his assistance in any form in which it might appear likely to prove beneficial for the purpose of bringing an end to the controversy then existing between France and Mexico. The President, it was stated, would feel no delicacy in tendering his good offices for that purpose, if he were not precluded from the adoption of any specific steps by a report that the British Government had offered its mediation.

Mr. Vail, Act. Sec. of State, to Mr. Cass, min. to France, No. 30, Oct. 29, 1838, MS. Inst. France, XIV. 249.

A similar communication was addressed to the American minister in London. (Ibid.)

"Our minister to China, in obedience to his instructions, has remained perfectly neutral in the war between Great Britain and France and the Chinese Empire, although, in conjunction with the Russian minister, he was ever ready and willing, had the opportunity offered, to employ his good offices in restoring peace between the parties. It is but an act of simple justice, both to our present minister and his predecessor, to state that they have proved fully equal to the delicate, trying, and responsible positions in which they have on different occasions been placed."

President Buchanan, annual message, Dec. 3, 1860, Richardson's Messages, V. 643.

June 15, 1861, Lord Lyons, British minister, and M. Mercier, French minister at Washington, called on Mr. Seward, and proposed each to read an instruction which he had received from his Government and to leave a copy of it, if desired. Mr. Seward, before consenting that the papers should be officially communicated to him, inquired as to their contents, and, after inspecting them, he "declined to hear them read, or to receive official notice of them." "The British Government while declining, out of regard to our natural sensibility, to propose mediation for the settlement of the differences which now unhappily divide the American people, have nevertheless expressed, in a very proper manner, their willingness to undertake the kindly duty of mediation, if we should desire it. The President expects you to say on this point to the British Government, that we appreciate this generous and friendly demonstration; but that we can not solicit or accept mediation from any, even the most friendly quarter."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 21, June 19, 1861, Dip. Cor. 1861, 90, 92.

See supra, § 911; S. Ex. Doc. 38, 37 Cong. 3 sess.; 55 Br. & For. State Papers (1864–1865); 3 Phillimore Int. Law (3d ed.), 11.

In the war between Spain and the republics on the west coast of South America in 1865–66, the United States "seeks the friendship of neither at the cost of unfairness or concealment in its communications to the other. We have tendered our own good offices to each. They have not been accepted. We have concurred in a suggestion that the merits if these unhappy controversies should be referred to the Emperor of Russia. We are quite willing to see Great Britain and France undertake the task of mediation. We will favor that or any other mediation the parties may be inclined to adopt. We seek no acknowledgments or concessions from either party as an equivalent for impartiality and friendship."

Mr. Seward, Sec. of State, to Mr. Hale, Oct. 27, 1866, MS. Inst. Spain XV. 582. See same to same, Dec. 20, 1866, inclosing mediating action of House of Representatives, and making specific proposals of mediation; and see, also, same to same, Feb. 25, 1867, Aug. 27, 1868.

One of the most remarkable mediations of the United States is that which was begun in 1866 and concluded in 1872 for the purpose of bringing to a close the war between Spain, on the one hand, and the allied republics of Peru, Chile, Bolivia, and Ecuador on the other. As early as December 20, 1866, Mr. Seward instructed the diplomatic representatives of the United States near the belligerent governments to propose that a conference should be held at Washington. Spain was willing to accept the proposal on certain conditions. Bolivia and Ecuador were disposed to do whatever Chile and Peru might agree upon. Chile and Peru were willing

to accept only on certain conditions, one of which was that Spain should acknowledge that the bombardment of Valparaiso was a violation of international law. This Spain refused to do, and Mr. Seward's first effort was thus unsuccessful; but, as the war itself eventually fell into a state of "technical continuance," he renewed his proposals on March 27, 1868. Spain substantially accepted. Chile thought that the conclusion of a definitive peace would be impossible, but intimated a readiness to enter into a truce, which would offer to neutrals all the guarantees and securities which they could properly claim. Bolivia concurred in Chile's views; Peru and Ecuador were disposed to accept unreservedly. On October 22, 1869, Mr. Fish, as Secretary of State, renewed the invitation for a conference. Such a conference was opened at the Department of State October 29, 1870, under the presidency of Mr. Fish. Owing to the question as to the bombardment of Valparaiso, it was found to be impossible to conclude a formal peace; but on April 11, 1871, the delegates in the conference agreed upon and signed an armistice by which the de facto suspension of hostilities between the belligerents was "converted into a general armistice or truce," which was to "continue indefinitely," and could not be broken by any of the belligerents "save in three years after having expressly and explicitly notified the other," through the Government of the United States, "of its intention to renew hostilities;" and it was provided that, during the continuance of the armistice, all restrictions on neutral commerce which were incident to a state of war should cease.

See, more fully, Moore, Int. Arbitrations V. 5048–5056.

The conference reassembled January 24, 1872, but adjourned on the same day, having again failed to conclude a formal peace, owing to the question as to the bombardment of Valparaiso.

See, also, Mr. Seward, Sec. of State, to Mr. Robinson, min. to Peru, No. 110, May 19, 1864, MS. Inst. Peru, XVI. 33; same to same, No. 114 (confid.), June 18, 1864, id. 36; Mr. Seward, Sec. of State, to Mr. Asta Buruaga, Chilean min., April 19, 1866, MS. Notes to Chilean Leg. VI. 139; Mr. Seward, Sec. of State, to Mr. Washburn, min. to Paraguay, May 27, 1867, MS. Inst. Paraguay, I. 106; Mr. Fish, Sec. of State, to Mr. Markbreit, min. to Bolivia, No. 8, Oct. 22, 1869, MS. Inst. Bolivia, I. 116; same to same, No. 29, Oct. 31, 1870, id. 129; Mr. Fish, Sec. of State, to Mr. Brent, min. to Peru, No. 13, Feb. 16, 1871, MS. Inst. Peru, XVI. 191; Mr. Fish, Sec. of State, to Mr. Godoy, Chilean min., March 19, 1872, MS. Notes to Chilean Leg. VI. 196.

July 5, 1884, the Chilean minister at Washington communicated to the Department of State an autograph letter from the President of Chile, informing the President of the United States "of the resumption of friendly relations with Spain, and of the abrogation of the armistice of 1871." (Mr. Davis, Act. Sec. of State, to Mr. Godoy, Chilean min., Aug. 7, 1884, MS. Notes to Chilean Leg. VI. 332.)

July 16, 1886, the Ecuadorian minister at Washington reported that the ratifications of a treaty to put an end to the technical state of war

between that country and Spain had been exchanged. This intelligence was "received with much gratification." (Mr. Bayard, Sec. of State, to Mr. Flores, July 31, 1886, MS. Notes to Ecuador, I. 99.)

Separate treaties of peace were previously concluded by Spain with Peru and Bolivia. (Moore, Int. Arbitrations, V. 5056.)

"A pressure upon the belligerents to secure their acceptance of the good offices of the United States for the attainment of peace would prove impracticable; and even if it were practicable, I can not think it would be expedient. If our proposition is a beneficent one, as we suppose, it may be expected to commend itself to favor. If not beneficent, it ought to be rejected. In either case our high responsibility is discharged."

Mr. Seward, Sec. of State, to Mr. Asboth, No. 28, April 1, 1867, MS. Inst. Argentine Republic, XV. 277.

"Washburne telegraphs that France requests United States to join other powers in effort for peace. Uniform policy and true interest of United States not to join European powers in interference in European questions. President strongly desires to see war arrested and blessings of peace restored. If Germany also desires to have good offices of United States interposed, President will be glad to contribute all aid in his power to secure restoration of peace between the two great powers now at war, and with whom United States has so many traditions of friendship. Ascertain if North Germany desires such offices, but without making the tender thereof unless assured they will be accepted."

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Prussia, tel., Sept. 9, 1870, For Rel. 1870, 193.

See, also, Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, tel., Sept. 9, 1870, id. 68.

Sir Edward Thornton, writing to Earl Granville, September 12, 1870, reported that on the preceding day Mr. Fish, in a conversation at his own house, stated that Mr. Washburne had been requested by the French minister of foreign affairs to ask whether the United States would be disposed to mediate conjointly with the European powers for the restoration of peace between North Germany and France. Mr. Fish, by direction of the President, had instructed Mr. Washburne that it was contrary to the traditional policy of the United States to intervene in the affairs of Europe, and that the Government was therefore precluded from offering mediation conjointly with the European powers. In this particular case, said Mr. Fish, it was the more impossible for the United States to interfere, because it was a question of dynasty which had been the origin of the war and in which the United States could take no part. But Mr. Washburne

had been further instructed that if France and North Germany should both ask the good offices and sole mediation of the United States for the restoration of peace, the Government would feel it its duty, for humanity's sake, to accept the task. Sir Edward Thornton observed that any durable arrangement would hardly be feasible without consulting the interests of other European powers. Mr. Fish replied that the United States would not have the slightest objection to confer with other European governments upon the subject; that it would indeed be absurd to attempt the establishment of a durable peace without listening to the expression of their views, but that the United States would be obliged to decline a joint official mediation with European powers.

61 Brit. & For. State Papers, 784.

"The reasons which you present against an American intervention between France and Germany are substantially among the considerations which determined the President in the course and policy indicated to you in the cable dispatches from this office on the 9th instant, and in rejecting all idea of mediation unless upon the joint request of both of the warring powers.

"It continues to be the hope of the President, as it is the interest of the people of this country, that the unhappy war in which France and North Germany are engaged should find an early end.

"This Government will not express any opinion as to the terms or conditions upon which a peace may or should be established between two Governments equally sharing its friendship, but it is hoped that the prolongation of the war may not find its cause either in extreme demands on the one side, or extreme sensitiveness on the other side.

"So far as you can consistently and without my official interposition of advice or of counsel, it is hoped that you will lose no proper opportunity to indicate the wishes and hopes of the President and of the American people as above represented, and to contribute what you may to the presentation of such terms of peace as befit the greatness and the power which North Germany has manifested, and as shall not be humiliating or derogatory to the pride of the great people who were our earliest and fast ally."

Mr. Fish, Sec. of State, to Mr. Bancroft, Sept. 30, 1870, For. Rel. 1870, 194.

"We were asked by the new Government [of France] to use our good offices, jointly with those of European powers, in the interests of peace. Answer was made that the established policy and the true interests of the United States forbade them to interfere in European questions jointly with European powers. I ascertained, informally and unofficially, that the Government of North Germany

was not then disposed to listen to such representations from any power, and though earnestly wishing to see the blessings of peace restored to the belligerents, with all of whom the United States are on terms of friendship, I declined, on the part if this Government, to take a step which could only result in injury to our true interests, without advancing the object for which our intervention was invoked. Should the time come when the action of the United States can hasten the return of peace, by a single hour, that action will be heartily taken."

President Grant, annual message, Dec. 5, 1870, For. Rel. 1870, 4.

In June, 1879, simultaneous but independent overtures were made to the United States by the cabinets of London and Berlin looking to a future formal proposal from Germany and Great Britain to act with them in a mediation between the belligerents in South America in the interest of the protection of commerce. The United States, while indicating its readiness to assist in the restoration of peace whenever its good offices might be usefully proffered, stated that it did not look with favor upon any premature effort, or any effort in combination with other neutral powers, which would carry an impression of dictation or coercion in disparagement of belligerent rights. The United States subsequently intimated to its minister in Bolivia, with reference to a conversation which he had had with the minister of foreign affairs and acting President of that country, that it would be willing to use its mediation with a view to arbitrating or otherwise composing the differences between Chile and Peru and bringing about an honorable ending of the war.

Mr. F. W. Seward, Act. Sec. of State, to Mr. Pettis, min. to Bolivia, No. 21, Aug. 18, 1879, MS. Inst. Bolivia, I. 257.

See Sir E. Thornton, Brit. min., to Mr. Evarts, Sec. of State, Sept. 8, 1879, For. Rel. 1880, 487; Mr. Evarts to Sir E. Thornton, Sept. 24, 1879, Id. 490.

The United States minister at Lima having, early in 1883, united with the representatives of France, Great Britain, and Italy, to bring about a joint intervention in South American affairs, his action was disapproved. (Mr. Frelinghuysen, Sec. of State, to Mr. Logan, March 7, 1883, and tel. of April 2, 1883, MS. Inst. Chile, XVII. 60, 77.)

"The war between the Republic of Chili, on the one hand, and the allied Republics of Peru and Bolivia on the other, still continues This Government has not felt called upon to interfere in a contest that is within the belligerent rights of the parties as independent states. We have, however, always held ourselves in readiness to aid in accommodating their difference, and have at different times reminded both belligerents of our willingness to render such service.

"Our good offices, in this direction, were recently accepted by all

the belligerents, and it was hoped they would prove efficacious; but I regret to announce that the measures which the ministers of the United States at Santiago and Lima were authorized to take, with the view to bring about a peace, were not successful. In the course of the war some questions have arisen affecting neutral rights; in all of these the ministers of the United States have, under their instructions, acted with promptness and energy in protection of American interests."

President Hayes, annual message, Dec. 6, 1880, For. Rel. 1880, xiii.
See, also, President Hayes, annual message, Dec. 1, 1879; President Arthur, annual message, Dec. 4, 1882.

Where the American minister at Port au Prince, in conjunction with the other foreign representatives there, offered, in the name of the Haytian Government, certain propositions to insurgents, pledging that Government to a certain course of action, he was instructed that the paper delivered to the insurgents could be regarded, so far as the United States was concerned, only as the personal and unauthorized expression of his individual opinion, although, even in this light, the failure of his good intentions was regretted.

Mr. J. Davis, Act. Sec. of State, to Mr. Langston, min. to Hayti, No. 210, June 4, 1883, For. Rel. 1883, 586.

It was stated that, after the killing of President Barrios in battle on April 2, 1885, Mr. Hall, the American minister in Central America, by the exercise of his good offices prevented the assumption of a military dictatorship in Guatemala by General Barrundia, and that he had been instrumental in prevailing upon the Guatemalan Government to adhere to legal measures, and had advised, as a step towards peace with Salvador, the appointment of a new ministry. It was further stated that the efforts of the legation had been directed towards preventing a renewal of hostilities with Salvador and threatened anarchy in Guatemala, and that strict neutrality had been maintained throughout. It appears that on the night of April 3, 1885, the members of the diplomatic corps at Guatemala city met, at the solicitation of the Guatemalan minister of foreign affairs, at the legation of the United States, the minister of foreign affairs and the minister of war being present. After discussion, the foreign ministers united in a telegram to the presidents of the five republics of Central America, recommending an armistice for one month. The President of Salvador declined this proposal, but expressed a wish for a definitive peace. The members of the diplomatic corps then came together again at the legation of the United States and formulated a proposal that the five governments should join in a declaration of peace and friendship without conditions or reclamations of any kind, and that an absolute amnesty should be conceded

to all who were in any way implicated in political matters relating to the war. This proposal was at once accepted by the President of Salvador as well as by the President of Guatemala. Peace was also proclaimed between Salvador and Honduras. On April 18, 1885, the legislative assembly of Guatemala adopted a resolution of thanks to the diplomatic corps for its friendly mediation.

For. Rel. 1885, 99, 100, 103, 112, 114, 117, 118, 123.

In his No. 377, June 26, 1885, Mr. Hall reported, with reference to the revolution in Salvador, that he had been enabled to exert his influence to bring about a peaceful understanding between the hostile parties and avert further bloodshed; and that, although he was invited to be present at the meeting of the representatives of the hostile parties, he deemed it prudent to limit his mediation to recommending to them a prompt and peaceful settlement, leaving it to the representatives themselves to discuss the merits of their respective claims. His conduct was approved. (Mr. Bayard, Sec. of State, to Mr. Hall, No. 278, July 20, 1885, MS. Inst. Central America, XVIII. 537.)

Mr. Hall's No. 377, of June 26, 1885, is printed in For. Rel. 1885, 130.

As to the conclusion of a protocol between Guatemala and Nicaragua through Mr. Hall's good offices, see For. Rel. 1885, 136.

See, also, Mr. Bayard, Sec. of State, to Mr. Pringle, No. 305, Nov. 18, 1885, expressing the willingness of the President of the United States to permit the latter's representatives in Central America to use their influence towards the establishment of peace between the Central American States when it could be done with full recognition of their sovereign rights. (For. Rel. 1885, 143.)

"The traditional attitude of the United States towards the sister Republics of this continent is one of peace and friendly counsel.

"When as colonies they threw off their political connection with Europe, we encouraged them by our sympathies. By the moral weight of our official declarations we prevented intervention, either to restore old political connections with Europe, or to create new ones. The policy we then adopted has been since maintained. While we would draw them nearer to us by bonds of mutual interest and friendly feeling, our sole political connection springs from the desire that they should be prosperous and happy under the republican form of government which they and we have chosen. We aim to be regarded as a disinterested friend and counselor, but we do not assume to impose our wishes upon them, or to act as arbitrator or umpire in their disputes unless moved to it by the wish of both parties, or by controlling interests of our own."

Mr. Frelinghuysen, Sec. of State, to Mr. Trescot, special envoy, No. 7, Feb. 24, 1882, For. Rel. 1882, 73, 76.

See Mr. Evarts, Sec. of State, to Sir E. Thornton, Brit. min., Sept. 24, 1879, MS. Notes to Gr. Br. XVIII. 135; Mr. Frelinghuysen, Sec. of State, to Mr. Partridge, June 26, 1882, MS. Inst. Peru, XVI. 544.

See, as to peace negotiations in South America, For. Rel. 1882, 54–115.

On July 26, 1890, Mr. Blaine, with reference to the war that had been declared by Guatemala as existing with Salvador by reason of the invasion of Guatemalan territory by Salvadorean troops, instructed Mr. Mizner, the American minister in Central America, to tender the good offices of the United States for the friendly adjustment of all the differences between the states of Central America, and added that, while the United States was prompted by impartial and earnest friendship and desired not to exercise any constraint, it was its wish to make an end of a situation not only destructive of the peace of its neighbors, but injurious to the common interests of all. On August 17, 1890, the members of the diplomatic corps in Central America presented bases of peace between Guatemala and Salvador. Certain provisions of the document were objected to by Salvador, but, on the strength of an explanation made by the members of the diplomatic corps, the terms were accepted and peace was subsequently declared.

For. Rel. 1890, 39, 90–96, 100–104, 106, 113, 121.
See, also, For. Rel. 1891, 56, 62, 82, 86–87.

"I have to thank you for the full and interesting statement, presented in your dispatches Nos. 8 and 10, of the respective dates of May 23 and 31, showing the course of the revolution in Nicaragua and the adjustment of the controversy by means of the peace commission which you were happily instrumental in bringing about.

"Your course in this relation merits my cordial approval. You appear to have rightly understood the policy of this Government, which is at all times disposed to lend its impartial good offices, or those of its diplomatic agents, to the honorable adjustment of issues of peace or war in neighboring communities, whenever acceptable to both parties; and it would seem that the tender of your mediation was not made without previous knowledge that it would be equally welcomed by the titular Government and the revolutionists. In the commission itself you appear to have acted merely in the neutral capacity of a presiding officer, concerned only in reaching a harmonious result, and regarding the facts of the situation without advocating the claims of either side. It is pleasant to know that your friendly course has deserved the commendations alike of the retiring Executive and of the party which has succeeded to power."

Mr. Gresham, Sec. of State, to Mr. Baker, min. to Nicaragua, No. 27, July 14, 1893, For. Rel. 1893, 201.

Mr. Baker acted as president of the peace commission, the other members being three representatives of the Government and three representatives of the revolutionists. (For. Rel. 1893, 189–193, 194–196, 200.)

"The correspondence growing out of the effort of this Government to make known to China and Japan its willingness to contribute

its kindly offices toward the restoration of peace between them has reached a stage where a review of the facts and circumstances becomes proper.

"The disposition of certain powers more immediately affected by the war to bring about its termination found expression in a proposal conveyed to this Government by the British chargé d'affaires of the 6th ultimo, inquiring whether the United States would be willing to join England, Germany, France, and Russia in an intervention between China and Japan on the basis of Korea's independence being guaranteed by the powers and the payment to Japan of an indemnity for the expenses of the war.

"This important inquiry was considered by the President, who directed reply to be made on the 12th ultimo that, while he earnestly desired China and Japan should speedily agree on terms of peace alike honorable to both and not humiliating to Korea, he could not join the powers mentioned in such an intervention

"The subsequent qualifying statement by Mr. Goschen, on behalf of his Government, that the intervention contemplated would be limited to diplomatic action, and would only take place in the event of a suitable opportunity presenting itself for the adoption of such a course, did not alter the President's judgment.

"With a few exceptions the record of our diplomatic history shows no departure from the wise policy of avoiding foreign alliances and embarrassing participation in guaranteeing the independence of distant states. The United States may, however, consistently with that policy, lend their aid to further the efforts of friendly powers unhappily at war to compose their differences whenever they concur in expressing a desire for our impartial mediation.

"In several interviews had at the State Department with the Chinese minister prior to the 6th instant, Mr. Yang Yü made known the earnest desire of his Government that the President, in accordance with the general policy of the United States and following notable precedents for such action, should use his good offices toward bringing the war to a close. The offer of the President, as telegraphed to you on the 6th instant, was accordingly made, but not until I had satisfied myself, in the course of frequent friendly conferences with the Japanese envoy, that the benevolent and impartial motives of the President were fully comprehended and appreciated by Japan.

"My statements to both the Chinese and Japanese ministers in the course of these interviews made it clear to them that the United States have no policy in Asia to be endangered by the war, and that thus occupying a position of absolute and impartial neutrality toward the belligerents, the President, however solicitous to see the restoration of peace, would in no event go beyond acting as a mere peacemaker upon the request of both parties.

"Before sending my telegram of the 6th instant to Mr. Dun, I submitted it to Mr. Kurino, who expressed approval and manifested appreciation of the frank and considerate course I had pursued and of the friendship which the President's action displayed toward Japan.

"As you have already been informed, the instruction to you was forwarded on the 6th instant, and was on its way to Peking several hours before your telegram, received on the night of the 5th, communicating the Yamên's note to you of the 3d instant, was placed in my hands.

"The latest information from Tokyo leaves no doubt that the Japanese Government understands the way in which the President's coincident offers came about, and is aware that the purpose was simply to have the two Governments know that the President would be disposed to mediate should such mediation be acceptable to Japan as well as China.

"With the response of the Japanese Government expressing appreciation of the President's amicable desire and indicating readiness to consider any direct proposal for peace made by China through the United States legation at Peking, the matter now stands."

Mr. Gresham, Sec. of State, to Mr. Denby, min. to China, Nov. 24, 1894, For. Rel. 1894, App. I. 81.

A copy of this instruction was sent to Mr. Dun, min. to Japan, for his information, Nov. 26, 1894. (For. Rel. 1894, App. I. 82.)

Mr. Gresham's telegram to Mr. Dun of Nov. 6, referred to in the instruction, was as follows:

"The deplorable war between Japan and China endangers no policy of the United States in Asia. Our attitude toward the belligerents is that of an impartial and friendly neutral, desiring the welfare of both. If the struggle continues without check to Japan's military operations on land and sea, it is not improbable that other powers having interests in that quarter may demand a settlement not favorable to Japan's future security and well-being. Cherishing the most friendly sentiments of regard for Japan, the President directs that you ascertain whether a tender of his good offices in the interests of a peace alike honorable to both nations would be acceptable to the Government at Tokyo." (For. Rel. 1894, App. I. 76.)

The telegram to Mr. Denby, of Nov. 6, was as follows:

"Prompted by that sincere friendship which the United States constantly desire to show toward China, the President directs that you intimate his readiness to tender his good offices toward bringing the present war with Japan to a close on terms alike honorable to both nations should he be assured that such a tender would be acceptable to both." (For. Rel. 1894, App. I. 76.)

The telegram from Mr. Denby, of Nov. 3, received after the foregoing telegram was sent, was as follows:

"I send by telegraph at the expense of China the following:

"'*The Princes and Ministers of the Tsung-li-Yamên to His Excellency Charles Denby.*

"'Yesterday we handed your excellency a dispatch concerning the Chinese-Japanese question, but as your excellency has but recently returned, the special points of the affair may have escaped your attention, and we therefore write this supplementary note. The Emperor desires to maintain and cement the most friendly relations with the President of the United States, and is equally unwilling to wage a great war against Japan. Besides, the United States treaty of 1858 with China, says: "If any other nation should act unjustly or oppressively, the United States will exert their good offices, on being informed of the case, to bring about an amicable arrangement of the question," thus showing their friendly feeling, and accordingly in the present case the difficult circumstance in which China is placed should be laid before you. Will your Government do us the great favor to intervene to stop war and reestablish peace? Such an act would be happy for China, happy for every country.'

"The above is a special appeal to you. To-day Yamên convoked the ministers of England, France, Germany, Russia, and myself to ask us to telegraph our Governments to intervene to secure peace. She gives as a basis of negotiation independence of Korea, payment of war indemnity (amount to be decided conjointly by foreign powers friendly to China) payable by installments." (For. Rel. 1894, App. I. 73.)

Mr. Dun, United States minister at Tokyo, telegraphed to Mr. Gresham, Nov. 17, as follows: "Japanese minister for foreign affairs requests in the event of China desiring to approach Japan upon the subject of peace it shall be done through the legation of the United States at Peking." (For. Rel. 1894, App. I. 80.)

Nov. 19, Mr. Gresham sent to Mr. Denby the following telegram: "Our minister Tokyo is advised that any direct overtures for peace made by China to Japan through the American minister at Peking will be considered." (For. Rel. 1894, App. I. 80.)

Nov. 23, Mr. Denby cabled: "Yesterday China made through me direct overtures to Japan for peace; basis, independence Korea; war indemnity." (For. Rel. 1894, App. I. 81.)

May 21, 1900, the Boer delegates were received by the Secretary of State, Mr. Hay, at the Department of State. Mr. Hay subsequently gave out, through his secretary, the following statement:

"Messrs. A. Fischer, C. H. Wessels, and A. D. W. Wolmarans, the delegates in this country of the South African Republics, called to-day, by appointment, at the State Department. They were cordially received, and remained with the Secretary of State for more than an hour. They laid before the Secretary at much length and with great energy and eloquence the merits of the controversy in South Africa, and the desire of the Boer Republics that the United States should intervene in the interest of peace, and use its influence to that end with the British Government.

"The Secretary of State made the following reply:

"'The President, in his message to the Congress, last December, said:

"'"This Government has maintained an attitude of neutrality in

the unfortunate contest between Great Britain and the Boer States of Africa. We have remained faithful to the precept of avoiding entangling alliances as to affairs not of our direct concern. Had circumstances suggested that the parties to the quarrel would have welcomed any kindly expression of the hope of the American people that war might be averted, good offices would have been gladly tendered."

"'As the war went on, the President, while regretting the suffering and the sacrifices endured by both of the combatants, could do nothing but preserve a strict neutrality between them. This he has steadily and consistently done, but there never has been a moment when he would have neglected any favorable occasion to use his good offices in the interests of peace.

"'On the 10th of last March we received from Mr. Hay, the United States consul at Pretoria, this telegram:

"'"I am officially requested by the Government of the Republics to urge your intervention with a view to cessation of hostilities. Same request made to representatives of European powers."

"'The President at once directed me to convey the substance of this telegram to the British Government, and, in communicating this request I was directed by him to express his earnest hope that a way to bring about peace might be found, and to say that he would be glad to aid in any friendly manner to promote so happy a result. The Transvaal Government was at the same time informed of the President's action in the matter. Our representative in London promptly communicated the President's instruction to Lord Salisbury. In answer he was requested to thank the President for the friendly interest shown by him, and Lord Salisbury added that Her Majesty's Government could not accept the intervention of any power. This communication also was immediately transmitted to our consul at Pretoria, to be communicated to the President of the South African Republic.

"'So far as we are informed, the United States was the only Government in the world of all those approached by the South African Republics which tendered its good offices to either of the combatants in the interest of cessation of hostilities.

"'As allusion has been made to The Hague convention, and as action has been suggested based upon that instrument, it may be as well to quote a phrase from Article III., which states: "Powers stranger to the dispute may have the right to offer good offices or mediation even during the course of hostilities," and Article V., which says: "The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not

accepted." This would seem to render any further action of the United States unadvisable under existing circumstances.

"'The steps taken by the President in his earnest desire to see an end to the strife which caused so much suffering may already be said to have gone to the extreme limit permitted to him. Indeed, if in his discretion he had chosen not to present to England the South African request for good offices, he might have justified his action by referring to the following declaration, which was made in the very act of signing The Hague convention by the plenipotentiaries of the United States:

"'" Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself with questions of policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions."

"'The President sympathizes heartily in the desire of all the people of the United States that the war which is now afflicting South Africa may, for the sake of both parties engaged, come to a speedy close; but, having done his full duty in preserving a strictly neutral position between them and in seizing the first opportunity that presented itself for tendering his good offices in the interests of peace, he feels that in the present circumstances no course is open to him except to persist in the policy of impartial neutrality. To deviate from this would be contrary to all our traditions and all our national interests, and would lead to consequences which neither the President nor the people of the United States could regard with favor.'"

The *New York Times*, May 22, 1900, special dispatch from Washington, May 21.

The delegates were received by the President at the Executive Mansion on the morning of May 22, the President's secretary being the only other person present at the interview.

Their reception both by the Secretary of State and by the President was unofficial. They presented no credentials, the only evidence of their possessing diplomatic powers being an inscription on the card of each of them indicating that he had been sent out as a minister plenipotentiary of the Boer Republics.

On June 8, 1905, the following message was sent, mutatis mutandis, to the ministers of the United States at St. Petersburg and Tokyo:

"The President feels that the time has come when in the interest of all mankind he must endeavor to see if it is not possible to bring to an end the terrible and lamentable conflict now being waged. With both Russia and Japan the United States has inherited ties of friendship and good will. It hopes for the prosperity and welfare of

each, and it feels that the progress of the world is set back by the war between these two great nations.

"The President accordingly urges the Russian and Japanese Governments, not only for their own sakes, but in the interest of the whole civilized world, to open direct negotiations for peace with one another. The President suggests that these peace negotiations be conducted directly and exclusively between the belligerents; in other words, that there may be a meeting of Russian and Japanese plenipotentiaries or delegates without any intermediary, in order to see if it is not possible for these representatives of the two powers to agree to terms of peace. The President earnestly asks that the Russian [Japanese] Government do now agree to such meeting, and in asking the Japenese [Russian] Government likewise to agree.

"While the President does not feel that any intermediary should be called in in respect to the peace negotiations themselves, he is entirely willing to do what he properly can, if the two powers concerned feel that his services will be of aid in arranging the preliminaries as to the time and place of meeting. But if even these preliminaries can be arranged directly between the two powers, or in any other way, the President will be glad, as his sole purpose is to bring about a meeting which the whole civilized world will pray may result in peace."

Mr. Loomis, Assist. Sec. of State, to Mr. Meyer, amb. at St. Petersburg, tel., June 8, 1905, MS. Inst. Russia, XIX. 27; Mr. Loomis, Assist. Sec. of State, to Mr. Griscom, min. at Tokyo, tel., June 8, 1905, MS. Inst. Japan, V. 232.

The negotiations following this invitation led to the sending of plenipotentiaries by Russia and Japan to Portsmouth, N. H., where on Aug. 23–Sept. 5, 1905, a treaty of peace was signed. See Hishida, The International Position of Japan as a Great Power, 239–244, 274.

(4) THE HAGUE CONVENTION.

§ 1068.

"TITLE I.—ON THE MAINTENANCE OF THE GENERAL PEACE.

"ARTICLE I. With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.

"TITLE II.—ON GOOD OFFICES AND MEDIATION.

"ARTICLE II. In case of serious disagreement or conflict, before an appeal to arms, the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

"ARTICLE III. Independently of this recourse, the Signatory Powers recommend that one or more Powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

"Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities.

"The exercise of this right can never be regarded by one or the other of the parties in conflict as an unfriendly act.

"ARTICLE IV. The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

"ARTICLE V. The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

"ARTICLE VI. Good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never having binding force.

"ARTICLE VII. The acceptance of mediation can not, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

"If mediation occurs after the commencement of hostilities it causes no interruption to the military operations in progress, unless there be an agreement to the contrary.

"ARTICLE VIII. The Signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:—

"In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to whom they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

"For the period of this mandate, the term of which, unless otherwise stipulated, can not exceed thirty days, the States in conflict cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the meditating Powers, who must use their best efforts to settle it.

"In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

"TITLE III.—ON INTERNATIONAL COMMISSIONS OF INQUIRY.

"ARTICLE IX. In differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the Signatory Powers recommend that the parties, who have not been able to come to an agreement by means of diplomacy, should as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

"ARTICLE X. The International Commissions of Inquiry are constituted by special agreement between the parties in conflict.

"The Convention for an inquiry defines the facts to be examined and the full extent of the Commissioners' powers.

"It settles the procedure.

"On the inquiry both sides must be heard.

"The form and the periods to be observed, if not stated in the inquiry Convention, are decided by the Commission itself.

"ARTICLE XI. The International Commissions of Inquiry are formed, unless otherwise stipulated, in the manner fixed by Article XXXII of the present convention.

"ARTICLE XII. The powers in dispute engage to supply the International Commission of Inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to be completely acquainted with and to accurately understand the facts in question.

"ARTICLE XIII. The International Commission of Inquiry communicates its Report to the conflicting Powers, signed by all the members of the Commission.

"ARTICLE XIV. The report of the International Commission of Inquiry is limited to a statement of facts, and has in no way the character of an arbital award. It leaves the conflicting Powers entire freedom as to the effect to be given to this statement."

Convention for the Pacific Settlement of International Disputes, The Hague, July 29, 1899, 32 Stat. II. 1785.

3. ARBITRATION.

(1) A JUDICIAL METHOD.

§ 1069.

According to present practice, the redress of national grievances may be pursued, first, by amicable methods; and, secondly, by force. Of amicable methods the most common is negotiation. There is nothing more conducive to the settlement of differences than a fair

and candid discussion of them. Where this fails, we may yet try arbitration or mediation.

These methods are often discussed as if they were practically the same, but in reality they are fundamentally different. Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides. While nations might for this reason accept mediation in various cases in which they might be unwilling or reluctant to arbitrate, it is also true that they have often settled by arbitration questions which mediation could not have adjusted.

It is, for example, hardly conceivable that the question of the Alabama claims could have been settled by mediation. The same thing may be said of many and indeed of most of the great number of boundary disputes that have been settled by arbitration. The importance of mediation as a form of amicable negotiation should not be minimized. The Congress of Paris of 1856, as well as the Congo Conference of 1884, made a declaration in favor of the practice of mediation; and a formal plan of mediation forms part of the convention lately adopted at The Hague for the settlement of international disputes. Nevertheless, mediation is merely a diplomatic function and offers nothing new.

Arbitration, on the contrary, represents a principle as yet only occasionally acted upon, namely, the application of law and of judicial methods to the determination of disputes between nations. Its object is to displace war between nations as a means of obtaining national redress, by the judgments of international judicial tribunals; just as private war between individuals, as a means of obtaining personal redress, has, in consequence of the development of law and order in civilized states, been supplanted by the processes of municipal courts. In discussing the subject of arbitration we are therefore to exclude from consideration, except as a means to that end, mediation, good offices, or other forms of negotiation.

"It seems . . . that the commissioners [under the claims convention between the three states formerly composing the original Republic of Colombia] consider their functions as partially if not exclusively diplomatic and not judicial. This we were not prepared to expect either by the convention under which they are acting or by the despatches of Mr. McAfee in relation to it. It was known that the main objects of that convention were to fix the proportion due from each of the states on account of the debts of Colombia, to constitute a board for hearing and deciding upon them and to prescribe the forms in which the proceedings of the board were to be conducted. According to all our previous experience in relation to such bodies, their functions were considered to be purely judicial in their nature. Not only all diplomatic action between those states themselves in rela-

tion to the subjects of the convention was supposed to be finally concluded by it, but also to be suspended between them and such foreign nations as might be disposed to respect it, at least until those subjects had been judicially investigated and disposed of by the board. 'La comision de ministros' is the phrase used in the convention when the board is mentioned. This, though literally '*commission* of ministers,' was, when the duties assigned were considered, interpreted as conveying in English the meaning of 'board of commissioners.' In their communications to you the commissioners assume the titles of 'ministers plenipotentiary and Colombian assembly.' As these titles are not authorized by the convention, it is reasonable to presume that they were used to inculcate the idea that the functions of the commissioners were designed to be exclusively diplomatic. It is true that the convention also stipulates that the commissioners shall be duly accredited and instructed. This, however, was construed to mean that they were severally to be furnished by the governments appointing them with evidence of their appointment and that the instructions which they were to receive were not designed to extend or alter the nature of their proceedings as prescribed by the convention itself. There is no article of the convention which requires the board to demand evidence of the agents of foreign creditors of their authority to represent their constituents.

"Though in forming their governments the Spanish-American Republics have copied with considerable accuracy the Constitution of the United States, some of their constitutions are deficient in the precision with which that model defines the functions of the executive and judicial authority, and in none of them are the duties and powers of those departments as distinct and independent as they were intended to be made by our Constitution. There is also frequent occasion to remark that the public men of those countries do not appear to be aware how essential it is for all good government and especially for all claiming to be republican in theory and aiming to be so in practice, that neither the executive nor the judiciary should encroach upon the peculiar provinces the one of the other. In the course of the negotiation of a late convention with Mexico, Mr. Martinez, the Plenipotentiary of that Government, submitted a draft of articles one of which contained a stipulation that the commissioners of the two Governments to be appointed to hear and decide on the claims were to be duly instructed, etc. This was objected to by me as being incompatible with the peculiarly *judicial* functions of the commissioners, and the force of the objection was acknowledged, for the convention, as concluded, contains no stipulation of the character referred to."

Mr. Forsyth, Sec. of State, to Mr. Semple, chargé d'affaires to New Granada, No. 7, Feb. 12, 1839, MS. Inst. Colombia, XV. 58.

See Moore, Int. Arbitrations, II. 1226.

Upon the refusal of the Government of Buenos Ayres to pay a debt to a citizen of the United States, which the Government of the United States claimed to be justly due, the minister of the United States at Buenos Ayres was instructed "to insist upon an arbitration to take place at this city" [Washington], and that the award of the arbitrators should be final. He was further instructed to say to the Government of Buenos Ayres "that any further delay on its part in facilitating and effecting its final settlement, will be regarded by the President as indicating but a slight disposition to do justice to a citizen of the United States, and to cultivate and promote the friendly relations which so happily subsist between the two Governments."

Mr. Calhoun, Sec. of State, to Mr. Brent, Mar. 3, 1845, MS. Inst. Arg. Rep. XV. 14.

"This Department has for many years past adopted the policy of submitting to a disinterested arbitration claims of its citizens against other governments, when otherwise unable to agree upon an adjustment, and when no political reasons have interfered to prevent such submission, and when there has been no great principle of public law at issue."

Mr. J. C. B. Davis, Act. Sec. of State, to Messrs. Allen & Son, Aug. 13, 1869, 81 MS. Dom. Let. 543.

April 7, 1888, an agreement was entered into between Mr. Lewis, United States consul at Tangier, and the Moorish authorities, for the arbitration of the claims against the Government of Morocco growing out of the neglect or refusal of that Government to observe and enforce treaty rights of American citizens and protegés. The Sultan having refused to approve the agreement, Mr. Strobel, secretary of the United States legation at Madrid, was directed, April 28, 1888, to proceed to Tangier to assist in the negotiations. He arrived at Tangier on the 2d of May, and on the 8th of the same month, with the assistance of Mr. Strobel and of Commander Folger, of the U. S. S. *Quinnebaug*, a new arrangement was completed, satisfactory to all parties. By this agreement a tribunal was to be constituted, to be composed of Mr. Lewis and of two persons designated by the Sultan, who were, however, to have but one vote. The agreement contained an enumeration of four matters which were to be disposed of, but stipulated that other claims of American citizens in regard to debts, commercial intercourse, and robberies might be presented. The tribunal was to endeavor to make its report by June 1, 1888, and its decisions were to be binding. In the event of a disagreement one of the foreign representatives at Tangier was to be named as umpire. The tribunal met and agreed upon an award, which was signed by Mr. Lewis and the two representatives of the Sultan. This award

embraced the matters specifically enumerated in the agreement, and stipulated that the other claims should be left to the examination and decision of certain other persons. Complaint was afterwards made of the nonobservance by the Moorish Government of the provisions of the award in respect of two of the four enumerated matters.

Mr. Bayard, Sec. of State, to Mr. Lewis, consul at Tangier, March 1, 1889, 129 MS. Inst. Consuls, 112.

"The condition of international law fails to furnish any imperative reasons for excluding boundary controversies from the scope of general treaties of arbitration. If that be true of civilized states generally, *a fortiori* must it be true of the two great English-speaking nations."

Mr. Olney, Sec. of State, to Sir J. Pauncefote, Brit. ambass., June 22, 1896, For. Rel. 1896, 232, 236.

(2) AGREEMENT TO ARBITRATE.

§ 1070.

Where the parties to a controversy agree to submit it to arbitration, it is the usual practice to draw up and sign a treaty, convention, or protocol defining the question at issue and the arbitrator's powers, besides providing for the appointment of arbitrators and regulating to some extent their procedure.

The agreement of two nations to arbitrate a question "constitutes an obligation between them which neither is morally free to disregard on grounds of technical formality."

Mr. Gresham, Sec. of State, to Mr. Baker, min. to Costa Rica, July 14, 1893, For. Rel. 1893, 202, 203.

(3) APPOINTMENT OF ARBITRATORS.

§ 1071.

"Under no circumstances . . . could the Government of the United States carry its mediatory good offices to the extent of proposing itself as arbitrator, even if excluding the imputation of being itself an interested party to the arbitration;" and the fact that it had been constrained to occupy a position of reserve with regard to a question between two other nations "for its own protection and to safeguard American interests, would effectually preclude any suggestion that the Executive of this Government be invited to decide it as a judge."

Mr. Gresham, Sec. of State, to Mr. Peralta, Costa Rican min., May 18, 1893, For. Rel. 1893, 287, 288, 289.

On June 12, 1848, Lord Palmerston earnestly opposed a proposition in Parliament that Great Britain should pledge herself to abide the result of arbitration, on the ground that "there is no country which, from its political and commercial circumstances, from its maritime interests, and from its colonial possessions, excites more anxious and jealous feelings in different quarters than England does, and there is no country that would find it more difficult to obtain really disinterested and impartial arbitrators."

Creasy's First Platform of Int. Law, 698.

For notice of the arbitration of the German Emperor in the case of the San Juan water boundary, see Phillimore, Int. Law (3d ed.), 5–10.

In July, 1892, the British schooner *Lottie May* put into the port of Ruatan, island of Ruatan, Honduras, unloaded a cargo of provisions and asked for a clearance for Great Caiman, whence she had come. Clearance was refused because of revolutionary troubles on the Honduran coast, and afterwards the captain of the schooner was arrested for alleged insulting language to the authorities. He was imprisoned for six days, the vessel meanwhile being detained. The British Government claimed damages to the amount of £300 for the captain and £200 for the vessel. The Honduran Government admitted liability, but contested the amount of damages, claiming that it was not liable for damages on account of imprisonment of the master, but only for the detention of the vessel.

It was agreed to arbitrate the question, and an invitation to act as arbitrator was extended to Mr. Arthur M. Beaupre, chargé d'affaires ad interim of the United States to Guatemala and Honduras. Mr. Beaupre was authorized by the United States to act on the understanding that he was to do so personally and not as the representative of his Government. This condition was accepted by the parties to the dispute, who desired, however, that the case should be submitted to "Arthur M. Beaupre, who is now chargé d'affaires ad interim of the United States," with the understanding that he was to sign his individual name and render his decision over his personal signature. This arrangement was approved.

For. Rel. 1899, 371–372.

The members of the general board provided by The Hague treaty are not officers of the United States whose appointments require confirmation by the Senate, nor are they in the ordinary acceptation of the terms persons holding office. Their work is not only occasional, but is contingent upon their appointment by foreign powers to act as arbitrators in the settlement of disputes between them.

Griggs, At. Gen., Nov. 7, 1900, 23 Op. 313.

(4) LIMITATION OF ARBITRATORS' POWERS.

§ 1072.

An award was made under the 7th article of the treaty of 1794 with Great Britain to several persons collectively, who afterwards disagreed as to their respective shares. It was advised that the Government had only to see that the money was paid to those in whose favor it was awarded, and that they must resort to the courts to settle their differences.

Breckenridge, At. Gen., 1805, 1 Op. 153.

Under the treaty with Spain of February 22, 1819, provision was made for the appointment of commissioners to "receive, examine, and decide upon the amount and validity of all the claims" of a certain description against that Government. It was held that this gave the commissioners power to decide conclusively upon the amount and validity of claims, but not upon the conflicting rights of parties to the sums awarded by them.

Comegys *v.* Vasse, 1 Pet. 193.

Under the act of Congress constituting a board of commissioners to pass on claims, provided for by the treaty with France of 1831, the decision of the board between conflicting claimants is not conclusive, and the question of their respective titles is fully open to be adjudicated by the courts.

Frevall *v.* Bache, 14 Pet. 95.

The award of commissioners under the act of 1849 (9 Stat., 393), passed to carry into effect the convention with Mexico of 1848, does not finally settle the equitable rights of third persons to the money awarded. It makes, however, a legal title to the person recognized by the award as the owner of the claim, and if he also have equal equity, his legal title can not be disturbed.

Judson *v.* Corcoran, 17 How. 612.

When it was announced, in 1887, that Costa Rica and Nicaragua would refer their boundary dispute to the President of the United States, the Colombian minister at Washington suggested that it would be advisable to postpone the proceedings till the Spanish Government should render its decision in the pending arbitration of the boundary between Colombia and Costa Rica, and in case this could not be done he reserved the rights of his Government, so far as they might be affected by any decision on the dispute between Costa Rica and Nicaragua. Replying to these representations, the Department

of State said: "I do not conceive it possible for an arbitrator to assume to decide any question other than that submitted to him by the two states which may seek his judgment, or to take cognizance of any collateral issue between either of them and a third state, which is not expressly submitted to him by the parties directly interested. I am not aware that Nicaragua is a party to the submission now before the Queen Regent of Spain, any more than Colombia is a party to the question which Costa Rica and Nicaragua may submit to the arbitrament of the President of the United States; and I find nothing in the submission to Spanish arbitration (as heretofore made known to this Department by the official communications of the representatives of Colombia and Costa Rica at this capital) which would induce me to advise the President that, in the event of his accepting the personal trust of arbitrating the boundary question between Costa Rica and Nicaragua, his decision should await or be in any way contingent upon the decision of the Spanish arbitrator in the wholly independent question between Costa Rica and Colombia, or be otherwise rendered than upon the precise facts submitted to him."

Mr. Bayard, Sec. of State, to Mr. Becerra, Colombian min., July 23, 1887, MS. Notes to Colombia, VII. 125.

An award was rendered on the question between Costa Rica and Nicaragua by President Cleveland on March 22, 1888. (Moore, Int. Arbitrations, II. 1964.)

The arbitration between Colombia and Costa Rica lapsed, owing to a dispute between the contracting parties as to the time within which their cases were to be presented. Negotiations were, however, afterwards undertaken for a new treaty of arbitration. (Moore, Int. Arbitrations, V. 4857.)

"Regarding this state of facts as established by the diplomatic understanding of the two governments, we have a case in which, notwithstanding the provisions of the treaty placing American citizens upon the same plane in this regard as natives, a tax is levied upon them of double the amount of that imposed upon natives, and when not paid the employers of such workmen are subject to a summary seizure and sale of their goods. It is strongly urged in the able argument submitted by the minister of Hayti that the remedy of the claimants should be sought in the local courts of Hayti, and that such remedy is exclusive. Numerous precedents are cited to the proposition that governments will not intervene diplomatically when such remedy is given. As a general proposition, it is settled international law that a government will not intervene in claims against foreign governments when redress may be had in the courts of that country. If there has been a substantial denial of justice, or a gross miscarriage thereof, sanctioned and approved by the opposing government, a

nation will then intervene. The arbitrator in this case, however, is given jurisdiction of the differences between the two governments by the terms of the arbitral agreement, giving him jurisdiction and authority to determine certain differences. It is expressly provided in the protocol:

"'That the question of the liability of the Republic of Hayti to pay an indemnity in each of said cases, and if so found by the arbitrator, the further question of the amount of the said indemnity to be awarded shall be referred to the Hon. William R. Day, sometime Secretary of State of the United States, and now judge of the circuit court thereof, who is hereby appointed to hear said causes and to determine the questions of said liability and the amount of said indemnity, if any is found by said arbitrator to be justly due.'

"From this agreement the authority of the arbitrator is derived. I can not perceive that the competency of the arbitrator can be limited, because of the fact that Metzger & Co. might have sought judicial remedies in the courts of Hayti. This fact may have weight in the determination of the government when its attention is called to claims against other governments, and may be sufficient reason for declining diplomatic intervention until an attempt has been made to obtain judicial redress in the courts of the country where the claimant is domiciled. The fact that such remedy is afforded may be good ground for withholding consent from an offer to arbitrate differences. I am at a loss to perceive how it can afford a valid objection to the arbitrator exercising powers conferred in the protocol of arbitration."

Award of the Hon. William R. Day, arbitrator, in the matter of the claims of John D. Metzger & Co. *v.* The Republic of Hayti, protocol of Oct. 18, 1899, For. Rel. 1901, 262, 264, 275.

For the brief of the Hon. W. L. Penfield, Solicitor of the Department of State, for the United States, in this case, see Mr. Hay, Sec. of State, to Mr. Day, March 29, 1900, 244 MS. Dom. Let. 65.

The judicial and executive departments being under the Constitution distinct, the functions of the former, so far as concerns the determination of litigated issues of fact, can not be vested in the latter, unless by a treaty or an act of Congress. The Department of State, therefore, can not, either through its own officers or through an arbitrator appointed by it, take and mould sworn testimony in order to determine such issues. Hence, where an arbitrator appointed under a protocol which was signed by the Secretary of State of the United States and the diplomatic representative of a foreign government, administered oaths to witnesses, determined what questions were to be put to them, and issued commissions for the taking of testimony on oath, it was held that his proceedings, so far as they involved the exercise of distinctively judicial prerogatives, as in the matters specified, were ultra vires.

Report of Mr. Bayard, Sec. of State, to the President, in the cases of Pelletier and Lazare, Jan. 20, 1887, For. Rel. 1887, 593, 608.

The protocol required the arbitrator to "receive and examine all papers and evidence" which might be "presented to him on behalf of either Government," and provided that if he should then "request further evidence, whether documentary or by testimony, given under oath before him or before any person duly commissioned to that end," the two Governments should use all means in their power to furnish it. It was assumed from the beginning of the proceedings before the arbitrator that the protocol was intended to empower him to administer oaths; but it appeared that he entertained doubts whether he was authorized to send out a commission to take testimony abroad. Subsequently, however, he stated that he would "sign what purports to be a commission," though he had "very serious doubts" as to his powers in the matter. (Moore, Int. Arbitrations, II. 1752–1756.)

(5) POWER TO DETERMINE JURISDICTION.

§ 1073.

A controversy arose in the proceedings of the London commission under Article VII. of the Jay treaty as to the power of the commission to decide whether it possessed jurisdiction of claims on which a final decision had been rendered by the lords commissioners of appeal—the highest court of appeals in prize cases. In order to prevent the commission from acting on this question, the British commissioners asserted a right to withdraw from the board, the treaty requiring at least one of the commissioners on each side and the fifth commissioner to be present at the performance of any act appertaining to the commission. In this way the progress of the board was brought to a halt. In this dilemma the matter was brought by Rufus King, American minister in London, to the attention of Lord Grenville, who submitted the question to Lord Chancellor Loughborough. The lord chancellor resolved the difficulty by declaring "that the doubt respecting the authority of the commissioners to settle their own jurisdiction, was absurd; and that they must necessarily decide upon cases being within, or without, their competency."

Moore, Int. Arbitrations, I. 324–327.

A similar question was raised by the British Government with regard to the power of the Geneva tribunal to deal with what were known as the "indirect claims." This question was disposed of by the declaration of the arbitrators on June 19, 1872, that, without regard to the question of the interpretation or effect of the treaty, the claims in question did not in their opinion constitute, upon principles of international law, a good foundation for an award of compensation or computation of damages between nations, and should therefore be

excluded from the consideration of the tribunal in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide upon them. This declaration was accepted by both Governments.

Moore, Int. Arbitrations, I. 646.

For other precedents as to the power of international commissions to determine their own jurisdiction, see Moore, Int. Arbitrations, II. 1141, 1143, 1241, 1628; III. 2277.

The convention of 1864 with the United States of Colombia confers on the commission thereby created authority to decide the cases which had been presented within the time specified, and which had not been decided by the commission appointed under the convention of 1857, and therefore conferred jurisdiction to determine what cases had been presented to, but not decided by, the old commission.

Speed, At. Gen., 1865, 11 Op. 402.

A proposal having been made by the United States to create a new mixed commission to consider and dispose of the cases which were presented to a previous commission, but were not, for want of time, disposed of finally, the Chilean Government assented, but suggested that a certain claim which was presented to the previous commission should be excluded from the consideration of the new. The United States replied:

"I note the arguments advanced by you in behalf of your suggestion that the North and South American Construction Company's claim should be excluded. These objections were in substance made before the late commission, and were not considered by it sufficient to exclude the case from its jurisdiction. One of the principal reasons advanced by you for excluding that case from the new commission is that the claim is in its nature contractual. If this were true your objection might be sufficiently answered by calling attention to the fact that a purely contractual claim asserted by a citizen of Chile against the United States was entertained by the commission, a demurrer which the agent of this Government made to the same having been overruled.

"I refer to the case of Mr. Trumbull, who filed a claim for $6,000 for service rendered by him as attorney in securing the extradition from Chile of a fugitive from the justice of this country. In point of fact, however, the construction company's claim is not, properly speaking, based upon the contract, but upon conduct of the Chilean Government, amounting to a practical confiscation of its property.

"But the question whether any particular claim is a proper one for the consideration and decision of an international commission is necessarily one which the commission itself must determine. The

conventions under which such commissions are organized usually describe in general terms the class of cases of which the commission is to take jurisdiction, and whether any particular case presented to it comes within this class the commission must, of course, determine. The decisions of the late commission, both interlocutory and final, are binding upon both Governments, the latter absolutely so, the former unless reversed, after proper proceedings for a rehearing. That commission having overruled a demurrer interposed by your Government to the construction company's claim, any new commission must take up the question just where the former commission left it, subject to the right of your Government to move for a rehearing. It certainly would not be proper to exclude the claims entirely from the considerations of a new commission."

Mr. Olney, Sec. of State, to Mr. Gana, Chilean min., June 28, 1895, For. Rel. 1895, I. 83.

(G) MAJORITY DECISION.

§ 1074.

By Art. V. of the Jay treaty, the determination of what was the true river St. Croix under the treaty of peace of 1783 was committed to a board of three commissioners, one to be appointed by each government, and the third to be chosen by the two so appointed. When the American and British commissioners met, they found that there was a variance in the phraseology of their commissions, the former being authorized to render a decision " with the other commissioners," while the British commissioner's commission expressly declared that full effect would be given to any decision made by him "with the other two commissioners" or by "*the major part* of the said three." Attorney-General Lee, July 26, 1796, 1 Op. 66, had advised the Secretary of State that the concurrence of all three commissioners was necessary to a decision. Neither government, however, accepted this view; and the Attorney-General's opinion was expressly rejected by the United States in instructions to the American commissioner, dated August 22, 1796, with which a copy of the opinion was enclosed. In these instructions Mr. Pickering, who was then Secretary of State, after stating that he had consulted the Secretary of the Treasury and the Secretary of War, said:

" With respect to the operation of the decision of the commissioners, if you proceed to examine and decide the question we are unanimously of the opinion, contrary to that of the Attorney-General, that the determination of any two of the three commissioners (all being met on the business) will be binding on both parties, and for the following reasons:

"1. That the great object of the treaty was to *terminate* the *differences* between the two nations; among which was the dispute about the river St. Croix as their boundary.

"2. That the 5th article declares 'that question shall be referred to the *final* decision of commissioners to be appointed in the manner therein prescribed:' yet on both sides, the very possible, and even probable dissent of one of the commissioners must have been contemplated when the article was framed.

"3. The parties, therefore, could never have intended to leave it positively in the power of either, against whom the decision should be made, to defeat its operation, by instructing its commissioner to withhold his signature from the declaration signed by the other two.

"4. The nature of such transactions between parties at variance confirms the justness of the opinion, that two out of three agreeing, their decision will be binding; for when each has chosen one, or an equal number, another is appointed to insure a majority on one side or the other; one very important object of such an examination of any disputed point being, to bring the controversy about it to an end. This is exemplified in the 6th and 7th articles of the treaty, in which provision is made that three out of the five commissioners shall constitute a quorum for business; and any two of those three agreeing, their decision will be binding. Thus the differences mentioned in these two articles, which must embrace several millions of property, are to be terminated; and it is impossible to believe that two parties would purposely leave the termination of a third subject of difference to depend on the mere chance of unanimity among the arbitrators; especially when the only obvious and conceivable design of the appointment of the third commissioner must have been to insure a decision by the agreement of two out of the three; and when to have rested the final decision on the precarious and even improbable ground of *unanimity*, would have been evidently to risque the grand effect of the whole negotiation, the *continuance of peace*, by removing every cause of war."

Moore, Int. Arbitrations, I. 10–12, 751–753.

In instructions to Mr. Welsh, minister to England, of Sept. 27, 1878, concerning the Halifax award, Mr. Evarts raised the question whether the award was vitiated by the fact that it was made by only a majority of the three commissioners. The question presented on the face of the award, viz, whether the concurrence of the three commissioners was required by the treaty, was, said Mr. Evarts, a matter of public discussion in Great Britain and in the provinces, both before and during the sitting of the commission. In this discussion the legal, political, and popular organs of opinion seemed quite positive that unanimity was required by the treaty. In the United States the

matter was little considered, either because the British view of the subject was accepted, or because complete confidence in the merits of the American case superseded any interest in the question. The question involved, first, the text of the treaty, and second, the surrounding circumstances. By the treaty of Washington four boards of arbitration were constituted for the determination of different matters. In respect of three of them, it was expressly provided that a majority should be sufficient for an award. In the case of the Halifax commision, there was no such provision, and the inference from this fact was that it was not intended to invest a majority of that commission with power to make an award. The suggestion that the omission of such a provision was due to inadvertence was not to be lightly entertained, since there was special reason, in the case of the Halifax commission, for adopting every possible guaranty against unreasonable or illusory estimates. Mr. Evarts, however, in submitting this argument, declared that the Government of the United States would regard the maintenance of entire good faith and mutual respect in all dealings, under the beneficent treaty of Washington, as of paramount concern, and would not assume to press its own interpretation of the treaty on the point in question against the deliberate interpretation of Her Majesty's Government to the contrary.[a]

Lord Salisbury, in reply, cited Halleck, Bluntschli, and Calvo, to the effect that the decision of a majority of arbitrators binds the minority, unless the contrary is expressed, and declared that he was not aware of any authorities on international arbitration who could be quoted in the contrary sense. Lord Salisbury also argued that the form of the tribunal, and the manner in which it was constituted, indicated the intention of the contracting parties that a majority of its members should be competent to render an award.

The award was duly paid.

Mr. Evarts, Sec. of State, to Mr. Welsh, min. to England, Sept. 27, 1878, For. Rel. 1878, 290; Lord Salisbury, for. sec. to Mr. Welsh, min. to England, Nov. 7, 1878, For. Rel. 1878, 316.

Senator George F. Edmunds, in the North American Review, 1879, vol. 128, p. 1, in an article on "The Fishery Award," maintained that unanimity was essential to the validity of the award of the Halifax commission. He argued that, in countries whose jurisprudence is founded on the Roman law, a majority is in the ordinary course of procedure sufficient for a decision, but that in Great Britain and the United States, where the common law prevails, the opposite rule obtains. On this ground he impeached the authority of Bluntschli, Heffter, and Calvo, in whose countries the Roman law is the basis of jurisprudence, and maintained that as between Great Britain and the United States unanimity was, in the absence of a contrary stipulation, essential to an award. It should not be forgotten, however,

[a] Mr. Evarts, Sec. of State, to Mr. Welsh, min. to England, Sept. 27, 1878, For. Rel. 1878, 290.

that the rules of international law are based upon the principles of the Roman civil law. This is due to the fact that international law was first developed by the nations of continental Europe, of whose jurisprudence the Roman civil law is the foundation. If, by general international practice, based on the authority of international law, the concurrence of a majority of a board of arbitrators is sufficient for a decision, the natural inference would be that the United States and Great Britain, in their dealings with each other or with other powers, as independent nations, intended to observe that practice, unless they expressly agreed to disregard it.

By the fifth article of the convention of 1822, "in the event of the two commissioners (on the part of the United States and Great Britain respectively) not agreeing in any particular case under examination, or of their disagreement upon any question which may result from the stipulations of this convention, then and in that case they shall draw by lot the name of one of the two arbitrators, who, after having given due consideration," etc. The commissioners disagreed as to the allowance of interest, but the British commissioner refused to call an arbitrator. It was held that his action was unwarranted.

Wirt, At. Gen., 1826, 2 Op. 28.

The Colombian Government and the Cauca Company, an American corporation, agreed to submit certain differences to a special commission composed of three members, one appointed by Colombia, one by the company, and the third by agreement between the Secretary of State of the United States and the Colombian minister at Washington. The commission, under the power vested in it to "determine" its "procedure," resolved that all decisions should be by majority vote. At the end of the hearing, when little remained to be done but the signing of the award, the Colombian commissioner resigned. The potential existence of the commission was limited to 210 days, and 203 days had already elapsed. The two remaining members then rendered an award. Held, that the award was sufficient and effective.

Colombia *v.* Cauca Co. (1902), 190 U. S. 524.

(7) RULES OF DECISION.

§ 1075.

"Decisions of international commissions are not to be regarded as establishing principles of international law. Such decisions are molded by the nature and terms of the treaty of arbitration, which often assumes certain rules, in themselves deviations from international law, for the government of the commission. Even when there are no such limitations, decisions of commissions have not heretofore been regarded as authoritative, except in the particular case decided.

I am compelled, therefore, to exclude from consideration the rulings to which you refer, not merely because they do not sustain the position for which they are cited, but because, even if they could be construed as having that effect, they do not in any way bind the Government of the United States, except in those cases in which they were rendered."

Mr. Bayard, Sec. of State, to Mr. Muruaga, Spanish min., Dec. 3, 1886, For. Rel. 1887, 1015, 1021.

The statement that the decisions of international commissions "are not to be regarded as establishing principles of international law" is to be understood only in a very restricted sense. It is no doubt true that where such decisions rest upon special stipulations of treaty inconsistent with international law, and not upon the general principles of law, they are not to be received as expositions of the latter; but where they purport to expound the general principles of law they possess, as do the decisions of other judicial tribunals, an authority commensurate with the dignity of the commission and the reputation and learning of the persons who compose it. Phillimore specifies, as one of the sources of international law, "the decisions of international tribunals." (Int. Law, 3rd ed., I. 68.) Likewise Wheaton, who, in discussing the sources of international law, enumerates: "4. The adjudications of international tribunals, such as boards of arbitration and courts of prize." And he pertinently declares that, "as between these two sources of international law greater weight is justly attributable to the judgments of mixed tribunals, appointed by the joint consent of the two nations between whom they are to decide." (Lawrence's Wheaton, 1863, 30.) Oppenheim, one of the most recent of publicists, mentions, among the "causes" of international law, i. e., the factors that "influence the gradual growth of new rules," (as distinguished from "sources" or "springs," i. e., "treaties and custom") the decisions of courts and "arbitral awards." (Int. Law, 24.) Citations to the same effect might be greatly multiplied. It would indeed be strange if the judgments of tribunals erected by nations to decide between them upon principles of international law should be destitute of authority as to what those principles are.

By a protocol signed at St. Petersburg August 26 (Sept. 8), 1900, it was agreed to submit to arbitration the claims of the American sealing schooners *James Hamilton Lewis*, *C. H. White*, and *Kate and Anna* and of the American whaling bark *Cape Horn Pigeon*, growing out of their seizure and detention by Russian cruisers.

The Russian Government desired to include in the protocol a provision that the arbitrator should, in determining each claim, follow "the general principles of international law and the spirit of inter-

national agreements bearing upon the subject." The United States objected to the phrase "spirit of international agreements bearing upon the subject" as vague and possibly retroactive, and after some discussion proposed to omit the whole passage, thus leaving the entire case to the unreserved judgment of the arbitrator. The Russian Government, however, adhering to the phrase on the ground of a desire to recognize treaties as a source of international law, the whole passage was retained, with the addition of the proviso that it should have "no retroactive force," and that the arbitrator should apply to the cases "the principles of international law and of international agreements which were in force and binding upon the parties to this litigation at the moment when the seizures aforementioned took place."

For. Rel. 1900, 851, 853, 854, 857, 858, 861, 863, 865, 870, 871, 872, 874, 885.

(8) AGENTS AND ATTORNEYS.

§ 1076.

Mr. Semple, the chargé d'affaires of the United States to New Granada, was authorized by his Government to appear in its behalf before the commissioners appointed under the treaty between the three states formerly composing the original Republic of Colombia for the purpose of deciding upon the debts due by that Republic. The commissioners intimated a doubt as to his authority to act. With reference to this question the Department of State said: "It is true that you are accredited in a diplomatic capacity to the Government of New Granada only, but as the functions of the board of commissioners were believed to be merely judicial, it was not deemed expedient that the United States should incur the expense or necessary that they should go through the form of sending a special diplomatic agent to Bogotá to advocate the few and inconsiderable demands which were supposed to be within the powers of the board to adjust. It was thought sufficient for you to inform it that you had been directed by your Government to act for that purpose, and it was presumed that if any scruples should be raised as to your powers, an authenticated extract from your instructions would and should be judged adequate to obviate all doubt on that head. When the claims should have been adjusted and the time for payment should have approached, it was considered that it might be necessary for you to be specially empowered by the President to receive and give acquittances for whatever sums of money might have been payable at Bogotá."

Mr. Forsyth, Sec. of State, to Mr. Semple, chargé d'affaires to New Granada, No. 7, Feb. 12, 1839, MS. Inst. Colombia, XV. 58.

The act establishing the Department of Justice does not prohibit the designation by the President of an advocate on the part of the United States under the agreement with Spain of 1871 organizing the American and Spanish Claims Commission.

Akerman, At. Gen., 1871, 13 Op. 416.

A commission constituted in pursuance of treaty provisions to settle and adjust disputed claims is for that purpose a quasi court, and an agreement to present and prosecute before it a claim at a fixed compensation, or for a reasonable percentage of the amount recovered, is not illegal, immoral, or against public policy.

Wright *v.* Tebbitts, 91 U. S. 252.

(9) CESSATION OF ARBITRATORS' FUNCTIONS.

§ 1077.

According to the public law of the monarchies of Europe, the authority of ministers, and perhaps of international commissioners, expires on the death, deposition, or abdication of the prince; but not so as between the American Republics, in which the executive power is permanent and continuous, without regard to the governing person, and there is no interruption of the authority or renewal of the credentials of their public ministers on a change of President for whatever cause, provided such President continues to represent and exercise the appointing power of the Government.

Cushing, At. Gen., 1855, 7 Op. 582.

The officers of international commissions may be removed by agreement of the contracting powers creating the commission.

Mr. Trescot, Acting Sec. of State, to Lord Lyons, July 31, 1866, MS. Notes to Gr. Brit. VIII. 336.

June 13, 1885, the Honorable William Strong rendered as arbitrator an award against the Government of Hayti in the cases of Pelletier and Lazare, under the protocol between the United States and Hayti of May 24, 1884. Soon after the award was rendered, counsel for Hayti endeavored to obtain from the arbitrator a rehearing of the Lazare case, on the ground of alleged newly discovered evidence, but he declined to grant their application on the ground that, in his judgment, his "power over the award was at an end" when it "had passed from his hands and had been filed in the State Department."

Mr. Strong to Mr. Preston, Haytian min., Feb. 18, 1886, S. Ex. Doc. 61, 49 Cong. 2 sess. 43. It appears that Judge Strong, June 23, 1886, made at the Department of State an "oral statement" to the effect that if the documents had been presented to him they would have made a "vast difference" in his award. The United States on

various grounds subsequently refused to ask for the payment of the award. (Moore, Int. Arbitrations, II. 1800–1804.)

By a protocol between the Governments of Italy and Colombia it was agreed to submit to the President of the United States, as arbitrator, all claims of Ernesto Cerruti, an Italian subject, against the Government of Colombia for the loss and damage of his property in the State of Cauca during the political troubles of 1885. The protocol provided that the arbitrator, when he should have qualified himself to enter upon his duties, should "become vested with full power, authority, and jurisdiction to do and perform, and to cause to be done and performed all things without any limitation whatsoever, which in his judgment may be necessary or conducive to the attainment, in a fair and equitable manner, of the end and purposes which this agreement is intended to secure." The arbitrator was then required to proceed to examine and decide (1) which, if any, of the claimant's demands were "proper . . . for international adjudication," and (2) which, if any, were "proper . . . for adjudication by the territorial courts of Colombia." As to claims of the first class, he was required to determine "the amount of indemnity, if any, which the claimant . . . be entitled to receive from the Government of Colombia through diplomatic action;" while, as to claims of the second class, he was directed, after ascertaining that they belonged in that category, to "take no further action" upon them.

In his award, which bears date March 2, 1897, President Cleveland allowed to the claimant for loss and damage of his individual property and of his interest in the copartnership of E. Cerruti and Company, including interest, the sum of £60,000. The arbitrator, however, then went further, and in the exercise of his "full power, authority, and jurisdiction to do and perform, and to cause to be done and performed, all things, without any limitation whatsoever," which in his judgment might "be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes" which the protocol was intended to secure, declared that, as the Colombian Government had destroyed Cerruti's means of liquidating the debts of the copartnership of E. Cerruti and Company, for which he might be held personally liable, that Government, in order that he might enjoy and be protected in the sum awarded to him, should "guarantee and protect" him "against any and all liability on account of the debts of the said copartnership," and should reimburse him to the extent to which he might be obliged to pay such debts, the Colombian Government, on the other hand, being adjudged to be entitled to all rights, legal and equitable, to Cerruti's property in the State of Cauca.

Moore, Int. Arbitrations, II. 2117 et seq.; IV. 4699.

The Colombian legation protested against the award as being invalid and beyond the defined powers of the arbitrator, on the ground (1) that it did not determine and declare any amount of indemnity which the claimant was entitled to receive from Colombia through diplomatic action, (2) that it did not put an end to any subject of disagreement between the two Governments, (3) that it did not constitute a final disposition of any claim submitted, (4) that it imposed on the Government of Colombia an uncertain and undetermined liability, (5) that it provided for the continuance of disagreements which the protocol was designed to end, and (6) that it involved a delegation of the authority of the arbitrator to some persons and tribunals not named in the protocol nor designated in the award, at times and in modes undefined and unauthorized, to ascertain the amounts and conditions of further liability of Colombia to the claimant by reason of the claims submitted to arbitration.

Mr. Rengifo, Colombian chargé, to Mr. Olney, Sec. of State, March 3, 1897, For. Rel. 1898, 246.

This protest was adopted by the Colombian Government with the statement that the Colombian minister at Rome has been instructed to invite the Government of Italy to join in asking the rectification or reconsideration of the award. (Mr. Rengifo, Colombian chargé d'affaires, to Mr. Sherman, Sec. of State, May 1, 1897, For. Rel. 1898, 247.)

"The President of the United States, whether he be the individual who acted as arbitrator or his successor in office, became, under any circumstances, functus officio, so far as the arbitration was concerned, upon the rendition of his award, and could not undertake to reopen the arbitration and reconsider the award under any just view of the powers conferred upon him as arbitrator by the protocol under which he acted. Should the parties to the arbitration invite the reconsideration of the award in question, in whole or in part, or request its interpretation in any respect, that could only be accomplished by a new submission and arbitration.

"This circumstance precludes me from considering in any way the statements made by you in support of the protest of your Government against the said fifth article of President Cleveland's award. Your note of the 1st instant, as well as the preceding note of March 3, addressed to my predecessor, will be placed on record for convenient reference and the proper effects should a joint request for a new arbitral proceeding be made by the parties to the original arbitration in the manner you foreshadow."

Mr. Sherman, Sec. of State, to Mr. Rengifo, Colombian chargé, May 5, 1897, For. Rel. 1898, 250.

"It is at least possible that the representations of Colombia alone or in conjunction with a joint request from the Governments of Italy

and Colombia might convince the President of the United States that he is not functus officio as to the matter in hand.

"It is also possible that the President might on full consideration hesitate to apply the technical principles recited by the Secretary of State if he should become convinced that the matter is one in which the two Governments might find many insuperable objections to a new submission and arbitration, but could well agree in asking the discharge under the original submission and arbitration of an admitted duty pertaining to the office of arbitrator, accepted by the President of the United States as a friendly act to both Governments.

"If in either of these modes it shall be made to appear that by the fifth article of the award the President of the United States has, through error or misapprehension, clearly exceeded the power and jurisdiction conferred on him by the two parties to the protocol, it is conceived that the chosen arbitrator, who is the President of the United States, and not the individual who made the award, or his successor in office as an individual, can not hesitate as to the question of power or duty in the premises."

Mr. Rengifo, Colombian chargé, to Mr. Sherman, Sec. of State, May 15, 1897, For. Rel. 1898, 251, 253.

"In view of the fact that the arbitration was undertaken by President Cleveland and closed by an award under his Administration and by his direction, it is only proper to state now the views of the present incumbent of the Presidency of the United States; nor is it necessary to discuss whether the submission to arbitration having been accepted by Mr. Cleveland could be taken up by his successor in office. It was intended to state in the note of May 5 the views entertained by President McKinley as to the application to take action in this award, which was supposed to have been completed under Mr. Cleveland. These views are: The President would not undertake to reinvest himself with the function of arbitrator after an award, particularly after a change in the Presidential office, but could only be invited to assume arbitral powers by the joint action of the two parties to the arbitration. Whether this would technically amount to a new submission or not is of little consequence.

"The subject of new action, if any, would have to be defined by the joint request of the parties to the arbitration. It is not here intended to suggest that it would not be competent for them to agree in asking new consideration, and with their joint consent it might properly be asked of the late arbitrator, Mr. Cleveland. Should they see fit, however, to make a joint request of the present incumbent of the Presidential office, the agreement of the parties should define how, and to what extent, the powers conferred are to be exercised, and how far the arbitration is to cover new ground, if at all.

As the international function of arbitrator is not one springing from any duty of the Presidential office under the laws of the United States, so the President does not wish to constrain in any way the course of friendly States in jointly resorting to these good offices for the disposition of their disputes among themselves. The point to be emphasized is that President Cleveland having undertaken to dispose of the matter, nothing short of the joint request of the contracting parties could invoke the action of the present Executive.

"Trusting that these statements may serve to dispel the misapprehension to which your note of the 1st instant and my reply of the 5th appear to have unintentionally given rise, I take pleasure in informing you, by the President's direction, that he will be happy to consider any request which the Governments of Colombia and Italy may jointly agree to submit to him relative to the fifth article of President Cleveland's award, and to further state that it is impossible now for him to subject himself to acquiescence in such request, or to say that he would undertake any further duty in the matter. It will be impossible for him to consider any representations by either party alone in that regard, or in any wise prejudice full liberty of action should a joint request be made to him by the former contracting parties."

Mr. Sherman, Sec. of State, to Mr. Rengifo, Colombian chargé d'affaires, May 19, 1897, For. Rel. 1898, 254–255.

"Under date of the 22d of June last, His Excellency Baron de Fava addressed me in the matter of President Cleveland's award in the claim of the Italian subject, Ernesto Cerruti, against the Government of Colombia, informing me that, as appeared by correspondence had at Rome with the Colombian minister, controversy had arisen as to the manner of making the payments provided in the fourth article of said award, and that, the two parties being unable to agree upon the interpretation thereof, his Government had accepted Mr. Hurtado's proposal 'to refer it indefinitely to the arbitrator for decision.' Baron de Fava accordingly, under his instructions, requested the President, through the Secretary of State, to be pleased to determine himself, in his capacity as arbitrator, and inform the embassy 'the true meaning of his decision as regards the manner of payment and the computation of the amount due.'

"The request so conveyed was not without embarrassment from the merely formal point of view, in that the request was not jointly preferred on behalf of the two Governments concerned, and I awaited the corresponding identical request from your Government before giving the subject its regular course of submission to the President with a view to ascertaining his disposition in the matter.

"A week later you, as Colombian chargé d'affaires at this capital, addressed me a note, under date of June 29, stating that as the Italian

Government, in lieu of a concerted application, had presented its request independently you would follow the same course on behalf of your Government, but that you would need time in order to accompany your presentation of such request by a statement of the ground on which the Colombian Government based its interpretation of the concluding portion of article 4 of the decision of March 2, 1897. A further delay in the matter thus became necessary.

"On the 13th of July last you addressed to me an elaborate argument setting forth the interpretation which, according to the view of your Government, should prevail in deciding the intendment of article 4 of President Cleveland's award.

"This diverse manner of presentation of the matter by the two representatives of the Governments at issue did not remove the embarrassment under which I had labored from the outset: but rather than provoke discussion of a formal point of procedure I endeavored, through unofficial suggestion to the respective counsel of the Colombian Government and of the claimant, Cerruti, to pave the way for a joint submission by the two Governments of a simple question of interpretation of the language of article 4 of President Cleveland's award, which the actual President might take up and render an opinion upon as an independent act of friendliness to both the parties, without regarding himself as the official arbitrator, in continuing function, by whom the original award had been made. These suggestions bore no fruit, and the matter has stood in this unsatisfactory posture until now, the notes of yourself and Baron de Fava remaining unanswered, in the hope that time might bring a satisfactory solution of the problem presented. Longer silence appears, however, not now to be possible in the light of the pressure of the Italian Government for an answer, as stated in Count Vinci's note of December 5 and since by him in oral interviews.

"The merely formal irregularity in the presentation of the several requests for an expression of the President's opinion as to the true intendment of President Cleveland's language in the fourth article of his award is, however, not the only embarrassment that meets me in dealing with the case. Your several notes have advised me that the Colombian Government absolutely denies the validity of the fifth article of that award, claiming that, in deciding as he did, the arbitrator went outside of the submission made to him by the two Governments under the treaty they had concluded for the arbitration of the Cerruti dispute; and, besides, the notification so made to this Government on the 3d of March and the 1st of May last, setting forth such denial and asking the ratification in toto of said fifth article, I was advised by Baron de Fava's oral inquiry of May 6, and by his note of the 30th of May last, that a similar notification had been made to the Italian Government, and had been rejected by it.

"To your notification and request answer was made on the 5th of May last to the effect that the President of the United States, whether he were the individual who acted as arbitrator or his successor in office, became, under any circumstances, functus officio, so far as the arbitration was concerned, upon the rendition of his award, and could not undertake to reopen the arbitration and reconsider the award under any just view of the powers conferred upon him as arbitrator by the protocol under which he acted; but that, should the parties to the arbitration invite the reconsideration of the award in question, in whole or in part, or request its interpretation in any respect, that could only be accomplished by a new submission presenting the point or points in dispute. A note of similar tenor was addressed to Baron de Fava on the 7th of May last.

"You, having subsequently raised the question as to what constituted 'a new submission,' were informed on May 19, 1897, that President McKinley would not undertake to reinvest himself with the function of arbitrator after an award, particularly after a change in the Presidential office, but could only be invited to assume arbitral powers by the joint action of the two parties to the arbitration, and that whether this would technically amount to a new submission or not was of little consequence, inasmuch as the subject of new action, if any, would have to be defined by the joint request of the parties to the arbitration.

"The President was not moved to reach this conclusion save by weighty considerations. Apart from the sound doctrine of finality which is expressed as a binding rule in the agreement to arbitrate, and which constrains the arbitrator to regard his function and office as alike terminated on the rendition of his award, there is good precedent for such a view of his capacity and duty. It recently happened that, in the case of an arbitration by the President of a boundary dispute between Costa Rica and Nicaragua, the parties found themselves unable to give effect to a certain detail of the award, but not until a conventional agreement between them and the express submission by them jointly of a request to that end did the President find himself in a position to aid in the determination of the controversy by appointing an expert engineer as umpire to fix the point at issue.

"Had the Governments of Colombia and Italy jointly requested the President to lend his offices toward an interpretation of the stated terms of the fourth article of the award of March 2, 1897, and thereby presented that point as an independent proposition, not involving any supposed capacity or duty on his part to revise the arbitration itself in the continuing character of the original arbitrator, but by way of a particular submission, the case would have offered little difficulty as an isolated proposition. It has not, how-

ever, been so presented to him. Although the Italian request independently presented, as has been seen, is silent as to the dispute touching the fifth article of the award, except so far as to indicate that the Colombian Government adhered to the exception it had taken to said fifth article, the Colombian request of July 13 explicitly declared that the payments made by the Government of Colombia to the Royal Government of Italy, under the fourth article of if any, would have to be defined by the joint request of the parties the award, were 'under the most positive reservations as regards the validity of article 5 of the decision, and without changing, abandoning, or in any way modifying the position which it has assumed towards the President of the United States of America by means of my [your] communications of March 3 and May 1 last, and towards the Government of the Kingdom of Italy in the notes addressed by its representative at Rome to his excellency the minister of foreign affairs, bearing date of May 1, 12, and 29, and of June 5 and 12 of the present year, of which I [you] have the honor herewith to inclose copies, since they are directly connected with the present request for an explanation of article 4 of the decision.'

"It is impossible for the President to accede to the separate and importantly variant requests of the Governments of Colombia and Italy that he interpret the controverted provisions of article 4 of the award, without encountering at the outset the existent fact of a graver dispute as to the fifth article, and without facing the inconsistency of seeming to recognize in himself a continuing, unexhausted and valid function as arbitrator for the purpose of reviewing article 4, while holding that he, as President, is *functus officio* as to article 5 thereof. He can not thus contradictorily divide his function in relation to the subject-matters. He is constrained to hold, on every sound rule applicable to the case, that he can not revive the personal character of arbitrator which his predecessor discharged by the rendition of his award.

"At the same time, as the impartial friend of both the disputants, he deems it not out of place for him to point out alike to the Colombian Government and to that of Italy the superior importance of the controversy as to article 5 over that raised in regard to article 4, and to suggest to them that, even did he deem himself free to intervene in order to give the desired interpretation to the latter, his doing so would not terminate the difference between the two Governments growing out of the award made by the President of the United States. He can not lose sight of the fact that the Government of Italy, in the correspondence succeeding the award, has not in any wise admitted the invalidity of any part of the award or the right of the Republic of Colombia to seek a reconsideration of the fifth article, whatever may be its view as to an interpretation

of a part of the fourth article; neither can he overlook the circumstance that more than once in that correspondence the Government of Italy insists upon the execution of the award 'pure and simple in all its parts,' a proposition which the Government of Colombia in turn denies as to the fifth article.

"In this view of an apparently irreconcilable situation, which he can not regard without solicitude, especially as it grows out of a service done by the President of the United States 'as a friendly act to both Governments,' and even setting aside further insistence upon his conviction that he possesses no continuing arbitral function in the matter, motives of delicacy and high regard would still counsel him to take no imperfect step toward a settlement of the controversies between the Governments of Colombia and Italy, which would not even palliate their essential cause of difference. Like motives of delicacy would necessarily lead him to refrain from putting forth any suggestion that the parties enlarge the request already made, and he feels that he should confine himself to expressing, for the purposes of this present communication, the gratification it would afford him were the two Governments to see their way to composing all the unfortunate issues that have sprung from the award of March 2, 1897.

"It is proper for me to add that I have, under this date, addressed a substantially identical note, mutatis mutandis, to the chargé d'affaires of the Royal Government of Italy in this capital."

Mr. Sherman, Sec. of State, to Mr. Rengifo, Colombian chargé d'affaires, Jan. 12, 1898, For. Rel. 1898, 270.

"Following close upon the rendition of the award of my predecessor as arbitrator of the claim of the Italian subject, Cerruti, against the Republic of Colombia, differences arose between the parties to the arbitration in regard to the scope and extension of the award, of which certain articles were contested by Colombia, while Italy claimed their literal fulfillment. The award having been made by the President of the United States, as an act of friendly consideration, and with the sole view to an impartial composition of the matter in dispute, I could not but feel deep concern at such a miscarriage, and, while unable to accept the Colombian theory that I, in my official capacity, possessed continuing functions as arbitrator, with power to interpret or revise the terms of the award, my best efforts were lent to bring the parties to a harmonious agreement as to the execution of its provisions.

"A naval demonstration by Italy resulted in an engagement to pay the liabilities claimed upon their ascertainment; but this apparent disposition of the controversy was followed by a rupture of diplomatic intercourse between Colombia and Italy which still continues, although fortunately without acute symptoms having supervened. Notwithstanding this, efforts are reported to be continuing for the ascertainment of Colombia's contingent liability on account of Cerruti's debts, under the fifth article of the award." (President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, LXXIII.)

(10) TESTIMONIAL AND EXPENSES.

§ 1078.

It is customary to present to arbitrators some testimonial, either in the form of plate or other token, or in money. Where the arbitrator is the head of a state, the only acknowledgment given of his services is an expression of thanks, and the more substantial testimonial, whatever it may be, is bestowed upon the persons to whom he may have delegated the discharge of certain functions, such as the examination of documents and perhaps the making of a report.

The expenses of the arbitration are usually borne by the parties in equal proportion, but each side pays its own agent and counsel, as well as its own individual expenses, such as the printing of its case, documents, and proofs.

Dr. Vincente G. Quesada, Argentine minister at Madrid, who acted as arbitrator between the United States and Mexico in the Oberlander-Messenger case, declined "any pecuniary testimonial, on the ground that his sense of the confidence with which he was honored by the two governments in their selection of him as arbitrator could not be measured in money." He further declared that it was sufficient for him to have justified the confidence placed in him by the two Governments and to have decided the case according to his conscience and the best of his knowledge and understanding. The delicacy of sentiment shown by Dr. Quesada was thought to render it impracticable to press upon him the acceptance of any testimonial in a pecuniary form.

Mr. Moore, Act. Sec. of State, to Mr. Godoy, Mexican chargé, Sept. 8, 1898, MS. Notes to Mexican Leg. X. 437.

(11) PAYMENT AND DISTRIBUTION OF AWARD.

§ 1079.

Where, by the convention of 1853 with Great Britain, it was agreed that all moneys awarded by the commissioners on account of any claim should be paid by one Government to the other, it was held that the moneys found due from the foreign Government to claimants, who were citizens of the United States, were to be paid to the Secretary of State, whose duty it was to have the same paid to those entitled to receive them. It was also held to be the appropriate duty of the disbursing clerk of the State Department to take charge of and disburse such moneys. He was not entitled, therefore, to commissions on the fund for any services rendered in keeping and disbursing the same.

Bates, At. Gen., 1861, 10 Op. 31.

The umpire of the mixed commission under the convention between the United States and Peru of January 12, 1863, awarded on the claim of Stephen G. Montano, a citizen of Peru, against the United States the sum of $24,151.29, with interest at the rate of six per cent per annum from September 2, 1851; all payable in the current money (*moneda corriente*) of the United States. When Montano, in July, 1864, applied to the United States for payment, it was offered in paper currency, which was then greatly depreciated. He demanded payment in gold, but Mr. Bates, the Attorney-General, on July 12, 1864, advised Mr. Seward that under the award the debtor had "the option to pay in Treasury notes or in specie." Montano protested against this view, and the question was referred to the mixed commission under the convention between the United States and Peru of December 4, 1868, the umpire of which decided that payment should be made in American gold.

Moore, Int. Arbitrations, II. 1638, 1645, 1649.
For the opinion of the Attorney-General, see 11 Op. 52.
For the views of Mr. Seward, see Mr. Seward, Sec. of State, to Mr. Montano, Feb. 5, 1866, 72 MS. Dom. Let. 18; Mr. Seward to Messrs. Embry et al., May 20, 1867, id. 184.

By the commission under Article XII. of the treaty of Washington of May 8, 1871, an award of $197,190 was made in favor of Augustine R. McDonald, a British subject, on a cotton claim. Subsequently a bill in equity was filed against him in the supreme court of the District of Columbia by two persons, one of whom was McDonald's assignee in a voluntary bankruptcy, in order that the award might be devoted to the benefit of creditors. A decree was afterwards entered by consent of parties by which one half of the award was to go to the payment of the expenses of prosecuting the claim, while the other half was to be placed in the hands of a receiver, who was not a party to the litigation, and to whom the money was paid by the British agent. The case finally went on appeal to the Supreme Court of the United States, where it was contended on behalf of the appellant (1) that the claim against the United States passed by the assignment in bankruptcy, and (2) that, even if the fund had been in England and in the hands of the British Government, the parties were subject to the jurisdiction of the court and could be compelled by process *in personam* to obey its decree. The court sustained these contentions, but at the same time observed that the money had been delivered to the receiver by consent of parties and that no objection had been heard in behalf of the British Government, without the voluntary concurrence of whose agent the receiver could do nothing.

Phelps *v.* McDonald, 99 U. S. 298.
Mr. Justice Miller, with whom Mr. Justice Field concurred, dissented on the ground that the courts of the United States had no control over

the British Government or its agents in the distribution of the fund awarded under the treaty, and that the record did not show that the fund in controversy had ever been "voluntarily paid into court by the agent of that Government."

As to the adjudication of conflicting claims to an award, see Comegys *v.* Vasse, 1 Peters, 123; Clark *v.* Clark, 17 Howard, 315; Judson *v.* Corcoran, 17 Howard, 612.

The act of June 23, 1874, by which a court was erected for the distribution of the Geneva award, proceeded upon the theory of distributing the money, so far as practicable, among the classes of persons on whose claims the award appeared to be based, and the jurisdiction of the court was restricted to claims directly resulting from damage caused by the inculpated cruisers. The judgments of the court amounted to $9,315,735. Claims were subsequently presented to Congress for the distribution of the remainder of the award fund, together with increments arising from interest on the securities in which the fund had been invested as well as from other sources. These claims proceeded chiefly from insurers, who claimed a right of subrogation, from persons who had paid war premiums, and from persons who had suffered damage by the acts of the exculpated cruisers. In support of these claims (except those of the insurers) it was argued that the claims at Geneva and the wrongs on which they were based were national; that all who had suffered loss by reason of the presence of the Confederate cruisers on the sea were entitled to compensation; and that in any event the fund belonged to the United States and might be distributed among such beneficiaries as that Government should designate. By an act of June 5, 1882, a new court was erected for the distribution of the unappropriated moneys. It designated as the beneficiaries of the existing fund (1) claimants on account of damage done by the exculpated cruisers, and (2) claimants who sought reimbursement for the payment of premiums for war risks. The act thus proceeded on the theory of the national ownership of the fund.

Moore, Int. Arbitrations, V. 4657–4661.

In support of the view embodied in the act of 1882, see report of Mr. Reid from the Committee on the Judiciary, Feb. 8, 1882, H. Rept. 207, 47 Cong. 1 sess.; United States *v.* Weld, 127 U. S. 51; Williams *v.* Heard, 140 U. S. 529; Rustomjee *v.* Queen, L. R. 1 Q. B. D. (1876). 487; L. R. 2 Q. B. D. (1876–77), 69.

(12) BARRING OF UNPRESENTED CLAIMS.

§ 1080.

It is usual in general claims conventions to insert a stipulation expressly barring all claims, falling within the jurisdiction of the tribunal, which were not presented to it.

"While the claim of Mrs. Stevens presents analogies of treatment with the other cases to which you refer, it stands on a distinct footing of its own, being one of a class heretofore declared to be proper for adjudication on the merits by a specially provided tribunal of arbitration. If the Mexican Government should set up the late claims convention, and the failure to submit the claim to the commission organized thereunder, as a bar, it has the right to do so. We, however, have no right to debar the claimant from the possible benefits of an appeal for a hearing on the merits, for the Mexican Government has full liberty of waiver in respect of such bar, and may, at its own pleasure, consent and agree to permit the claimant's case to be stated and heard. All that we ask is that the Mexican Government avail itself of the opportunity to manifest its sense of magnanimity and justice in this regard, if its dispassionate examination of the appeal shall warrant it in doing so. If the result be to set up the treaty as a bar, we would not hesitate to concede its effectiveness, as we should expect Mexico to concede our position were the case reversed and our answer made in those terms. But Señor Mariscal can not be unmindful of the fact that this very treaty bar has only recently been the subject of consideration between the two Governments, by reason of the Mexican appeal in the Weil and La Abra cases, and that the United States have met Mexico halfway in an earnest effort to secure the ends of equity and justice, by providing a resort not contemplated when the treaty was framed, and, indeed, barred by its express terms."

Mr. Bayard, Sec. of State, to Mr. Jackson, min. to Mexico, Jan. 26, 1886, MS. Inst. Mex. XXI. 427.

The view expressed in this paper is not that on which the Government of the United States has generally acted. On the contrary, it has been held, with practical uniformity, that where a treaty provides a tribunal for the settlement of claims, and stipulates that all claims not presented to it shall be finally barred, this part of the treaty is no less obligatory than the rest, and that it precludes the two Governments from renewing the claims thus barred, instead of merely giving them an option to decline to pay them.

"It might, indeed, be argued that the adoption and execution of the agreement of 1871, and the final disposition and satisfaction of all claims allowed under it, preclude the presentation by this Department of a claim against Spain for losses suffered by Mr. Morrell between 1870 and 1875. But the agreement contains no provision barring as against Spain all existing claims not presented to the arbitrators, and the present claim does not appear to be so far barred by the agreement or by the proceedings under it as to preclude its presentation to the Spanish Government. Should the minister of state be indisposed to make a present adjustment of this claim, you will endeavor to have

it embraced in any general settlement of pending claims which it may be found convenient in the future to bring about by a convention between the two Governments or otherwise."

Mr. Porter, Act. Sec. of State, to Mr. Curry, Jan. 2, 1886, MS. Inst. Spain, XX. 136.

"This decision of the commission [under the agreement between the United States and Spain of February 11–12, 1871, dismissing a claim for want of jurisdiction], does not prevent this claim from being a proper subject for diplomatic treatment."

Mr. Bayard, Sec. of State, to Mr. Curry, min. to Spain, April 9, 1886, MS. Inst. Spain, XX. 183.

"The second article of the claims convention of January 15, 1880, with France provides as follows:

"'The said commission thus constituted, shall be competent and obliged to examine and decide upon all claims of the aforesaid character, presented to them by the citizens of either country, except such as have been already diplomatically, judicially or otherwise by competent authorities heretofore disposed of by either Government.'

"Under the interpretation put upon the treaty by both Governments, all cases that had been passed upon by prize tribunals were excepted from the jurisdiction of the commission. (Ex. Doc. 235, 48th Cong., 2d sess., p. 235.)

"It is held by this Government that the action of the commission in declaring that it had no jurisdiction of the claim in question in no way bars its presentation to the French Government for payment. I have therefore to request you to recall this claim, including indemnity for the detention of the schooner and the breaking up of the voyage, to the attention of the French foreign office, as one which is believed by this Government to be just and fair, and to urge its early settlement."

Mr. Bayard, Sec. of State, to Mr. McLane, July 29, 1885, MS. Inst. France, XXI. 231.

The claims convention between the United States and Great Britain of 1853 settled (Art. V.) "every claim arising out of any transaction of a date prior to the exchange of ratifications, whether or not the same may have been presented to the commission." Hence a claim not presented for property confiscated during the war of 1812 was barred.

Mr. Rives, Assist. Sec. of State, to Mr. Gregg, May 12, 1888, 168 MS. Dom. Let. 359.

4. FINALITY OF AWARDS.

(1) RULE OF RES JUDICATA.

§ 1081.

The decision of an international tribunal over matters as to which it is made the supreme arbiter is final, and is not the subject of revision, except by the consent of the contesting sovereigns.

Comegys *v.* Vasse, 1 Pet. 193, 212.

An award of arbitrators, under a treaty between the United States and another nation, by which the contracting parties agree that the decision of the arbitrators shall constitute a final settlement of all questions submitted, becomes the supreme law of the land and is as binding on the courts as an act of Congress.

La Ninfa (1896), 75 Fed. Rep. 513, 21 C. C. A. 434, reversing 49 Fed. Rep. 575.

An award was made in favor of R. W. Gibbes, a citizen of the United States, by Mr. Upham, the umpire of the mixed commission under the convention between the United States and New Granada of September 10, 1857, for the sum of $2,500, with interest from July 26, 1826, at the rate of five per cent per annum. The Colombian commissioner declined to sign the award, on the ground that the case was submitted to the umpire only on the question as to whether a valid claim existed, and that the question of the amount to be paid was not submitted. On February 10, 1864, a convention was concluded between the United States and Colombia for the adjudication of claims which were left undecided by the previous commission. Counsel for Gibbes declined to prosecute the case before the new commission, and it was submitted to the board by counsel for Colombia. The commissioners, on May 18, 1866, made the following order: "Stricken from the calendar and docket, protest being made against the action of the board, and case not prosecuted." After the adjournment of the commission, Gibbes demanded payment from the Treasury. His demand was referred to Attorney-General Hoar, who held that the case was decided by the umpire of the first commission, and that neither the United States nor the second board was able to divest his rights under that decision against his will and without his consent. The Attorney-General, however, expressed a doubt as to whether Gibbes was entitled to payment from the Treasury, since he did not possess a certificate from the commissioners; but Gibbes obtained payment in full, and the amount so paid him was included in the account of the United States against Colombia, and

the entire amount was afterwards repaid to the United States by the Colombian Government.

Moore, Int. Arbitrations, II. 1398, 1400, 1401, 1410–1411; Hoar, At. Gen., (1869), 13 Op. 19.

"The principle [of arbitration] is one that has been followed on many occasions by this Government in settling disputed claims between its citizens and foreign powers. It has been the custom in these cases to conclude a formal convention with the interested power by which a claims commission is to be formed, to be composed in general of two arbitrators, one to be chosen by the Secretary of State, and one by the minister of the other power, and an umpire, to be likewise agreed upon by the Secretary of State and the minister, whose decisions shall be regarded as final. . . .

"I may add that an agreement so entered into has all the solemnity and finality of a treaty between the powers who are parties to it, and is in no sense an informal reference of a matter of contention between two powers to the decision of the minister of a third party."

Mr. Frelinghuysen, Sec. of State, to Mr. Rosecrans, Oct. 17, 1883, 148 MS. Dom. Let. 405.

"The general rule is that when an arbitrator or a referee makes a decision and adjourns without expressly deciding a motion for a rehearing, the decision is left in full force. The motion does not *ipso facto* reopen the case; and the adjournment without specific action on the motion by implication denies it.

"With respect to the objection to the decision of the arbitrators, that it is not altogether sound in law, it is to be noticed that by the convention under which the United States and Spanish Claims Commission was organized, the two Governments expressly agreed that they would accept the awards made in the several cases submitted to the proposed arbitration as final and conclusive. This provision was adopted by the contracting parties as an essential part of the arrangement for the settlement and disposition of claims, and with the understanding that it was to be kept as faithfully as any other provision of the treaty."

Mr. Bayard, Sec. of State, to Mr. Rodriguez, Mar. 22, 1886, 159 MS. Dom. Let. 388.

"I have received your letter of the 27th instant, in relation to the claims of M. C. Rodriguez & Co. against Spain, which were rejected by the United States and Spanish Claims Commission.

"I have failed to discover in your letter any reason for changing the opinion expressed in my letter of the 22d instant, that it would be improper, upon the grounds which you allege, for this Government to

seek to reopen the claims in question after their dismissal on the merits by the Commission. It is conceived that the distinction which you draw between a claims commission under a treaty, duly ratified by the Senate, and such a commission under a diplomatic agreement, while material in some relations, does not affect the binding force of the decisions in either case, as between the contracting governments, upon all claims which properly fall within the scope of the commission. The case of the brig *General Armstrong*, which you cite, does not appear to lend any strength to your argument. For, notwithstanding the denunciations of the award of the arbitrator, no effort was made to reopen the question with Portugal; and in the opinion of Chief Justice Gilchrist, to which you refer, there was an express disclaimer of any denial of the power of the United States 'to submit to arbitration the claim of one of its own citizens upon a foreign government which it has been prosecuting in such a way as to preclude itself from again pressing that claim upon such foreign governments.'

"It is also to be observed that in the cases which you are now seeking to have reopened, the claimants submitted themselves to the commission without protest, and had their cause ably and fully presented. In this regard their present position is the reverse of that of the claimants in the case of the *General Armstrong*, when they presented their petition to Congress for relief. The only act by which it was attempted to show that they had consented to the submission of their claim to arbitration was the request of their agent to be permitted to present an argument in support of their claim to the arbitrator, and the request the Secretary of State denied.

"Under all the circumstances, I must decline to reopen the awards of the United States and Spanish Claims Commission in the cases now under consideration."

Mr. Bayard, Sec. of State, to Mr. Rodriguez, March 31, 1886, 159 MS. Dom. Let. 477.

For the decision of the Claims Commission in this case, see Moore, Int. Arbitrations, III. 2336.

As to the case of the *General Armstrong*, see Moore, Int. Arbitrations, II. 1097–1115.

"Motions to open or set aside international awards are not entertained unless made promptly, and upon proof of fraudulent concoction or of strong after-discovered evidence."

Mr. Bayard, Sec. of State, to Mr. Morris, May 12, 1886, 160 MS. Dom. Let. 194.

The rule that the Department of State will not hear, after any considerable delay, applications to reopen cases adjudicated by it, applies even more strongly to final judgments rendered by international commissions on international claims, even apart from the special

stipulations of treaties by which claims not submitted for the adjudication of such commissions may be barred.

Mr. Rives, Assist. Sec. of State, to Mr. Shipman, Feb. 2, 1888, 167 MS. Dom. Let. 70.

This letter related to the case of Danford Knowlton & Co. *v.* Spain, which was dismissed by the mixed commission under the agreement between the United States and Spain of 1871. For the proceedings of the commission in this case, see Moore, Int. Arbitrations, III. 3148.

"While the decision of the arbitrator has been noted with much regret, as a different decision was hoped for, yet this Government is bound by the usage in such cases to abide by the decision as made, inasmuch as it stipulated in the agreement for arbitration that any award made by the arbitrator should be final and conclusive. The award, therefore, must be deemed as a final disposition of the case."

Mr. Day, Assist. Sec. of State, to Mr. Oberlander, January 7, 1898, 224 MS. Dom. Let. 249.

For the award in the Oberlander-Messenger case, above referred to, see For. Rel. 1897, 382.

The claim of Pedro D. Buzzi against Spain, which was dismissed by the commission under the agreement of 1871, was, after the conclusion of the labors of the commission, presented to the Spanish Government, which declined to entertain it, on the ground that it had been definitely disposed of under Article VI. of the agreement, which provided: "The two Governments will accept the awards made in the several cases submitted to the said arbitration as final and conclusive and will give full effect to the same and as soon as possible." On May 15, 1896, Mr. Buzzi again brought his claim to the attention of the Department of State. Mr. Olney, on the 15th of the following month, held that it must, in conformity with Article VI., be regarded as "finally adjudicated and disposed of." This conclusion was subsequently reaffirmed by Mr. Hay.

Mr. Hay, Sec. of State, to Mr. Sparkman, June 6, 1899, 237 MS. Dom. Let. 396.

For the action of the commission in Buzzi's case, see Moore, Int. Arbitrations, III. 2613.

A claim was made, before the mixed commission under the convention between the United States and Mexico, of July 4, 1868, by the Bishop of Monterey and the Archbishop of San Francisco against the Mexican Government for arrears of unpaid interest on what was known as the "Pious Fund," which represented the proceeds of donations made to Jesuit fathers in the Californias for the conversion of the heathen in those provinces. On the expulsion of the Jesuits from Mexico in 1768, the administration of the fund was undertaken by

the Spanish Government. The Mexican Government, on establishing its independence, succeeded to the trust, and by a law of September 19, 1836, its management was confided to the Catholic bishop of the two Californias. This law was abrogated by a decree of President Santa Anna, of February 8, 1842, and the administration of the fund again devolved on the state. By a further decree of October 24, in the same year, Santa Anna directed the property belonging to the fund to be sold, but recognized an obligation on the part of the Government to pay interest on the capital thereafter. In 1845 the Mexican Congress restored to the bishop of the Californias the administration of the properties yet remaining unsold, but the interest on that part of the fund derived from property which had already been disposed of was not paid by the Mexican Government. It was for the amount of this interest that the claim was made before the commission. On November 11, 1875, the umpire, Sir Edward Thornton, awarded the claimants the sum of $904,070.91, which represented an aggregate of $43,080.99 for the term of twenty-one years. The Mexican agent before the commission presented a statement to be entered in the records to the effect that, although the award referred only to the accrued interest, the claim should be considered as "finally settled *in toto*," and that any claim in regard to either principal or interest should thereafter be forever inadmissible. This statement was communicated to Mr. Fish, as Secretary of State, who declined to acquiesce in it or to enter into any discussion of the subject. A claim was afterwards made for the payment to the Archbishop of San Francisco and the Bishop of Monterey of interest accruing after the award of Sir Edward Thornton. It was contended on the part of the Mexican Government that the proceedings under the commission barred the presentation of such a claim. The United States, on the other hand, took the ground that the award of Sir Edward Thornton, instead of barring the further claim, constituted in effect a res judicata, in the sense that it fixed Mexico's liability for the future payment of interest on the fund. This difference was referred, under a protocol concluded May 22, 1902, to a tribunal of arbitration selected from the permanent court at The Hague. This tribunal held that Mexico should pay the overdue installments, and should in future in perpetuity pay the interest due in each year, all in money having legal currency in Mexico.

Moore, Int. Arbitrations, II. 1348–1352; For. Rel. 1902, Appendix II. 17–18.

(2) AWARD OUTSIDE LIMITS OF SUBMISSION NOT BINDING.

§ 1082.

Under the convention between the United States and Great Britain of September 29, 1827, the King of the Netherlands was chosen as

arbitrator to determine the true divisional line between the northeastern part of the United States and the adjacent British possessions under the treaty of peace of 1782–83. The King of the Netherlands, in his award given at The Hague January 10, 1831, held that neither the line claimed by the United States nor that claimed by Great Britain so nearly answered the requirements of the treaty that a preference could be given to the one over the other; and abandoning, therefore, as impracticable, the attempt to draw the line described in the treaty, he recommended a line of convenience. When the award was delivered the agent of the United States entered a respectful protest against it as constituting a departure from the powers delegated to the arbitrator by the high contracting parties. The British Government also recognized the fact that the award was recommendatory rather than decisive, and, while signifying its readiness to acquiesce in the recommendation, authorized its minister at Washington privately to intimate that it would not consider the formal acceptance of the award by the two Governments as precluding modifications of the line by mutual exchange and concession. President Jackson was inclined to accept the award, and, it seems, afterwards regretted that he had not done so. But, as it was unsatisfactory both to Maine and to Massachusetts, he submitted the question of acceptance or rejection to the Senate, which, by a vote of 35 to 8, resolved that the award was not obligatory, and advised the President to open a new negotiation with Great Britain for the ascertainment of the line. The British Government promised to enter upon negotiations in a friendly spirit, and it was agreed that both sides should meanwhile refrain from exercising jurisdiction beyond the territories which they actually occupied.

Moore, Int. Arbitrations, I. 137–138, citing S. Ex. Doc. 3, 22 Cong. 1 sess.; 22 Br. & For. State Papers, 772, 776, 783, 788, 795, 850, 871; Curtis, Life of Webster, II. 139.

The boundary was settled by the Webster-Ashburton treaty of Aug. 9, 1842. (Webster's Works, V. 84; Benton's Thirty Years' View, II. 438.)

By a protocol concluded May 24, 1884, the United States and Hayti agreed to submit to arbitration the claim of Antonio Pelletier, as a citizen of the United States and master of the bark *William*, growing out of the seizure of the vessel and the imprisonment of her master and crew at Fort Liberté, in Hayti, in 1861, on a charge of piracy and attempt at slave trading. The protocol required that the case should be decided "according to the rules of international law existing at the time of the transactions complained of." An award was rendered in favor of the claimant, but it appeared, by the proceedings in the arbitration, that the arbitrator, while declaring it to be "beyond doubt" that "had the bark been captured and

brought into an American port, when she was seized at Fort Liberté, she would have been condemned by the United States courts as an intended slaver," took the ground (1) that, as a claim had been made, he was restricted to the decision of a pure question of law, and (2) that under the stipulation above quoted the sole question to be decided was whether the claimant had been guilty of piracy by law of nations, as distinguished from piracy by municipal statute, so that an award of damages must be made in case it should be found that piracy by law of nations was not committed.

The Department of State, reporting against the enforcement of the award, held that the arbitrator had misconstrued his powers; that the submission of the case to arbitration implied, in the absence of anything to the contrary in the protocol, that the United States did not desire that its previous action on ex parte information should be regarded as a prejudgment of the merits of the claim, and that the arbitrator was not precluded, by the rules of international law as they existed in 1861, from inquiring whether the claimant was guilty of piracy by Haytian law, since it was then, as it had continued to be, a rule of international law that offences committed within the territorial jurisdiction of a nation may be tried and punished there, according to the definitions and penalties of its municipal law.

Report of Mr. Bayard, Sec. of State, to the President, Jan. 20, 1887, For. Rel. 1887, 605–606; Moore, Int. Arbitrations, II. 1794–1800.

By Article V. of the modus vivendi between the United States and Great Britain of April 18, 1892, which was entered into for the purpose of suspending the taking of fur seals in certain waters of Bering Sea and limiting the killing on the Pribiloff Islands, during the arbitration under the treaty of February 29, 1892, it was provided, among other things, that "if the result of the arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens and lessees) for this agreemnt to limit the island catch to 7,500 a season, upon the basis of the difference between this number and such larger catch as in the opinion of the arbitrators might have been taken without an undue diminution of the seal herds." The United States, in its case before the tribunal of arbitration, presented a claim for the damages which the Government and its lessee had sustained by reason of the limitation; but this claim was not presented as a claim which the lessee could maintain against the United States under the lease; and, in the argument for the United States, counsel declared, upon the strength of the proofs in the counter case of the United States, that that Government "could not have allowed its lessees to have much, if any, exceeded the

number of skins allowed by the modus vivendi of 1892 without an undue diminution of the seal herd." Later, counsel announced that the United States would not ask the tribunal for any finding of damages under Article V. Held, in an action against the United States by its lessees, in which the latter claimed damages for the limitation of the island catch to 7,500, that the provisions of Article V. and the action taken thereunder before the tribunal of arbitration, could not be considered as an estoppel, or an admission against interest, on the part of the United States, so as to preclude its denial of the validity of the claim of the lessees for damages. "There was," said the court, "no element of estoppel about the transaction, and counsel had no authority to bind the Government for any other purpose than the pending cause."

North American Commercial Company *v.* United States (1898), 171 U. S. 110, 131.

An act of Congress referring a claim against the Government to an officer of one of the Executive Departments to examine and adjust, does not, even though the claimant and Government act under the statute and the account is examined and adjusted, make the case one of arbitrament and award, in the technical sense of these words, so as to bind either party as by submission to award. Hence a subsequent act repealing the one making the reference (the claim not having been yet paid) impairs no right, and is valid.

Gordon *v.* United States, 7 Wall. 188.

(3) DECISIONS IMPEACHABLE FOR FRAUD.

§ 1083.

In only one case have arbitral proceedings to which the United States was a party been impeached for fraud on the part of the tribunal. This case was that of the mixed commission under the convention between the United States and Venezuela of April 25, 1866, for the settlement of claims against the latter Government. It was alleged that before the commission met a conspiracy was entered into by the United States commissioner, the United States minister at Caracas, and the latter's brother-in-law, who was the moving spirit in the matter, to defraud claimants by exacting of them a large proportion of their awards in the form of attorney's fees; that, in pursuance of this conspiracy, assignments were obtained by claimants of large interests in their claims; that the installation of the umpire of the commission was brought about in an irregular manner, and that certificates of award were made in small amounts and payable to bearer, so as to pass without indorsement, in order that the proceeds might be readily divided. By an act of Congress of February

25, 1873, afterwards known as the "finality act," it was declared that the proceedings of the commission were to be recognized as final and conclusive, but eventually, after a long discussion and much investigation, a joint resolution was adopted by Congress and was approved by the President March 3, 1883, by which the President was requested, in view of the charges which had been made against the commission, to open diplomatic correspondence with the Government of Venezuela, with a view to a rehearing of the claims passed upon under the convention of 1866. A convention was concluded December 5, 1885, for this purpose, and was duly carried into effect. It was held by the new commission that the claims stood before it with respect to hearing and determination substantially as they stood before the previous commission, with the difference that under the convention of 1885 additional evidence was admissible; that the proceedings under that convention constituted a rehearing of the claims and not a mere review of the adjudications of the previous commission; and that the awards of the old commission were not to be considered as continuing to have "force and legal effect."

Moore, Int. Arbitrations, II. 1659–1692, citing S. Ex. Doc. 14, 40 Cong. 3 sess.; S. Ex. Doc. 5, 41 Cong. 1 sess.; H. Ex. Doc. 176, 41 Cong. 2 sess.; S. Misc. Doc. 102, 41 Cong. 2 sess.; H. Rept. 29, 42 Cong. 2 sess.; H. Misc. Doc. 221, 42 Cong. 2 sess.; H. Rept. 4, 42 Cong. 3 sess.; H. Rept. 609, 43 Cong. 1 sess.; H. Rept. 787, 41 Cong. 1 sess.; S. Ex. Doc. 66, 44 Cong. 1 sess.; H. Ex. Doc. 30, 45 Cong. 2 sess.; H. Rept. 702, 45 Cong. 2 sess.; H. Misc. Docs. 11 and 30, 45 Cong. 2 sess.; S. Ex. Doc. 121, 46 Cong. 2 sess.; H. Rept. 2610, 48 Cong. 2 sess.; S. Ex. Doc. 52, 48 Cong. 2 sess.

For the act of February 25, 1873, see 17 Stat. 477; for the joint resolution of March 3, 1883, see 22 Stat. 643.

By the umpire of the mixed commission under the convention between the United States and Mexico of July 4, 1868, an award was made in favor of Benjamin Weil, a naturalized citizen of the United States of French nativity, for the sum of $479,975.95, American gold, as damages for the seizure of cotton by Mexican forces. An award was also made by the umpire in favor of La Abra Silver Mining Company, an American concern, for $672,070.99, American gold, as damages for being dispossessed of a mine in Mexico and for the seizure of ores by the Mexican authorities. The good faith of these claims was impeached before the commission by the agent of Mexico, who, after the awards were rendered, presented to the umpire a motion for a rehearing, accompanied with some new evidence and a reexamination of the old. The convention contained the usual clause to the effect that the contracting parties would consider the result of the proceedings of the commission as "a full, perfect and final" settlement. The umpire refused the motion for a rehearing, on the ground (1) that he had no right to consider any evidence which had

not been presented to the commissioners; (2) that a reexamination of that evidence would not be likely to alter his opinion; (3) that, as his decisions were known to be final and without appeal, they had probably already been made the basis of transactions which a reopening of the case by him might seriously prejudice; and (4) that, in his opinion, the provisions of the convention did not permit him to grant a rehearing. With respect, however, to the charges of fraud and perjury that were made by the Mexican agent, he expressed a doubt whether either Government would insist on the payment of claims shown to be founded on such evidence, and declared that if perjury should be proved no one would rejoice more than himself that his decision should be reversed and that justice should be done. By an act of June 18, 1878, 20 Stat. 144, 145, sec. 5, Congress, in providing for the distribution of the moneys paid by Mexico on the awards of the commission, requested the President to investigate the charges of fraud that had been made in the two cases above mentioned, and, if he should be of opinion that either case should be reopened and retried, to withhold payments till a retrial should be had in such manner as the two Governments should decide or until Congress should otherwise direct. On August 13, 1879, Mr. Evarts, as Secretary of State, reported that in his opinion a further investigation of both cases should be made. On June 9, 1880, a bill to refer them to the Court of Claims was reported favorably by the House Committee on Foreign Affairs; but it was reported unfavorably by the Senate Committee on the Judiciary on the next day, on the ground that, if the awards were to be reopened, it should be done "by a new convention." On the adjournment of Congress, the Mexican Government attempted to take the matter into the courts, but, on objection by the United States, this proceeding was abandoned. Up to this time three instalments had been distributed on La Abra award, but none on the Weil. On September 3, 1879, Mr. Evarts, acting upon the assumption that the Mexican Government impeached only the amount of the award in La Abra case, advised the President that the three instalments then received on that claim might properly be distributed, reserving the question as to later instalments. This course was taken, but the money received in the Weil case was withheld. On January 31, 1880, another instalment was paid by Mexico. This instalment and the four instalments received in the Weil case were withheld till August 14, 1880, when the President, in the absence of the Secretary of State, directed the Acting Secretary of State to distribute them. The fifth instalment on La Abra claim was distributed by Mr. Evarts on March 5, 1881, and the fifth on the Weil claim by Mr. Blaine, then Secretary of State, on the 8th of the same month. The total amount of the distributions on La Abra claim was then $240,683.06; on the Weil claim, $171,889.64. No further distribu-

tions were made; but the Mexican Government, in fulfilment of its obligations under the treaty, continued to pay the instalments to the United States as they fell due.

Moore, Int. Arbitrations, II. 1324–1337, citing H. Ex. Doc. 103, 48 Cong. 1 sess.; H. Rept. 27, 45 Cong. 2 sess., pts. 1 and 2; Congressional Record, 44 Cong. 2 sess. 1548, 2216; S. Ex. Doc. 150, 46 Cong. 2 sess.; H. Rept. 1702, 46 Cong. 2 sess.; S. Rept. 712, 46 Cong. 2 sess.; S. Ex. Doc. 109, 50 Cong. 1 sess.

July 13, 1882, a convention was concluded for a rehearing of both of La Abra and the Weil case. While this convention was pending in the Senate, John J. Key, one of Weil's original attorneys, applied, as assignee of a part of the award, to the supreme court of the District of Columbia for a writ of mandamus to compel Mr. Frelinghuysen, as Secretary of State, to distribute the installments then in his hands. In due course the case came before the Supreme Court of the United States, by which it was, on January 7, 1884, dismissed. Chief Justice Waite, in delivering the opinion of the court, said: "There is no doubt that the provisions of the convention [of 1868] as to the conclusiveness of the awards are as strong as language can make them . . . But this is to be construed as language used in a compact of two nations . . . The citizens of the United States having claims against Mexico were not parties to this convention . . . As to the right of the United States to treat with Mexico for a retrial, we entertain no doubt. Each Government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection as far as possible against frauds and impositions by the individual claimants. It was for this reason that all claims were excluded from the consideration of the commission except such as should be referred by the several Governments, and no evidence in support of or against a claim was to be submitted except through or by the Governments. The presentation by a citizen of a fraudulent claim or false testimony for reference to the commission was an imposition on his own Government, and if that Government afterwards discovered that it had in this way been made an instrument of wrong towards a friendly power, it would be not only its right, but its duty to repudiate the act and make reparation as far as possible for the consequences of its neglect, if any there had been. International arbitration must always proceed on the highest principles of national honor and integrity. Claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good faith of the government from which they come, and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding. No technical rules of

pleading as applied in municipal courts ought ever be allowed to stand in the way of the national power to do what is right under all the circumstances . . . The United States, when they assumed the responsibility of presenting the claims of their citizens to Mexico for payment, entered into no contract obligations with the claimants to assume their frauds . . . As between the United States and the claimants, the honesty of the claims is always open to inquiry for the purposes of fair dealing with the government against which, through the United States, a claim has been made."

Frelinghuysen *v.* Key, 110 U. S. 63.

The case of La Abra Silver Mining Co. *v.* Frelinghuysen, 110 U. S. 63, was disposed of in connection with Frelinghuysen *v.* Key.

See Rustomjee *v.* The Queen, L. R. 1 Q. B. D. (1876), 487; L. R. 2 Q. B. D. (1876–77), 69.

See, in relation to the Weil and La Abra cases, a pamphlet by Mr. Geo. Ticknor Curtis, "International Arbitrations and Awards," and a pamphlet by Mr. John W. Foster, in reply, on "International Awards and National Honor."

See Moore, Int. Arbitrations, II. 1329–1339.

April 20, 1886, the convention negotiated by Mr. Frelinghuysen, after pending in the Senate nearly four years, was rejected. On May 11, 1886, the President again brought the claims to the attention of Congress, and on the 15th of June communicated to the House of Representatives, in response to a resolution of that body, correspondence with the Mexican Government since February, 1884. On the 11th of June Mr. Morgan, from the Committee on Foreign Relations, submitted to the Senate a report, accompanied with a bill to provide for a judicial investigation of the charges of fraud. This proposal was discussed in Congress, and further committee reports were made on the one side and the other; and the matter thus stood, when on December 21, 1887, the Senate adopted a resolution calling for correspondence with the Mexican Government since January, 1886. This request was answered by the President in a message to the Senate of March 5, 1888, which was accompanied with a report by Mr. Bayard, as Secretary of State. In this report Mr. Bayard, besides maintaining that it was the duty of the Government to refuse to enforce an inequitable and unconscionable award, also disclosed the fact that he had sought to obtain a judicial investigation of the two awards, without awaiting further Congressional action, under section 12 of the act of March 3, 1887, but that he had been unable to obtain the concurrence of the claimants in that course. In conclusion, he suggested that provision should be made for the reference of the claims to the Court of Claims or to such other court as might be deemed proper, in order that a competent investigation of the charges of fraud might be made.

Moore, Int. Arbitrations, II. 1339–1345, citing S. Ex. Doc. 140, 49 Cong. 1 sess.; H. Ex. Doc. 274, 49 Cong. 1 sess.; S. Rept. 1316, 49 Cong. 1 sess.; S. Rept. 1454, 49 Cong. 1 sess.; H. Rept. 3474, 49 Cong. 1 sess.; S. Ex. Doc. 109, 50 Cong. 1 sess.

When Mr. Blaine again became Secretary of State, in March, 1889, he adhered to the course of his two immediate predecessors in refusing to distribute the moneys on hand applicable to the two awards in question. In consequence, Sylvanus C. Boynton, as assignee of a part of the Weil claim, on October 23, 1889, filed a petition in the supreme court of the District of Columbia to compel Mr. Blaine, as Secretary of State, to make a distribution. The case eventually came before the Supreme Court of the United States, which, on March 23, 1891, affirmed the decree of the court below dismissing the petition. The court held that the inaction of Congress was not equivalent to a direction by Congress that the money should be paid out, that the political department had not parted with its power over the matter, and that the intervention of the judicial department could not be invoked.

Boynton *v.* Blaine, 139 U. S. 306.

August 30, 1888, the Senate adopted a resolution authorizing the Committee on Foreign Relations, or a subcommittee thereof, to conduct a special investigation of La Abra claim. The result of this investigation was embodied in a report by Mr. Dolph on March 1, 1889, which declared that the whole claim was fraudulent, that the power of Congress to reopen the award was unquestionable, and that the Attorney-General should be authorized to proceed against the company in the Court of Claims in order to determine whether the award was obtained in whole or in part by fraud. By an act of Congress of December 28, 1892, 27 Stat., 409, 410, both cases were at length referred to the Court of Claims to determine whether the charges of fraud were well founded. The Court of Claims found that the award in La Abra case was obtained "by fraud effectuated by means of false swearing, and other false and fraudulent practices," and adjudged that the company and its agents be forever debarred from receiving the money. The case was carried on appeal to the Supreme Court, which, in affirming the decision of the Court of Claims, held that the person who invoked the intervention of his Government in order to collect a claim against another Government impliedly engaged to act in good faith; that, as between him and his Government, the honesty of the claim was always open to inquiry by judicial or other means; that, if his claim proved to be fraudulent or fictitious, it was the duty of his Government to withhold from him any money paid on account of it; that the genuineness of the newly discovered evi-

dence, which Mexico was not fairly chargeable with negligence in not having discovered sooner, was fully established; and that, as the whole story of losses inflicted by the Mexican Government was upon the evidence "improbable and unfounded," the decree of the Court of Claims must be affirmed.

La Abra Silver Mining Co. *v.* United States (1899), 175 U. S., 423, citing Frelinghuysen *v.* Key, 110 U. S., 63, 74, 76; Boynton *v.* Blaine, 139 U. S., 306, 323–326.

For the judgment of the Court of Claims, see United States *v.* La Abra Silver Mining Co. (1897), 32 Ct. Cl. 462. For a prior decision in the same case, on jurisdictional questions, see 29 Ct. Cl. 432.

The investigation of the Court of Claims in the case of Weil resulted in a judgment similar to that in the case of La Abra Company.

United States *v.* Alice Weil et al. (1900), 35 Ct. Cl. 42. This judgment became final by the failure of the defendant to perfect an appeal. (S. Rept. 28, 57 Cong. 1 sess.)

In 1900 the United States returned to Mexico the undistributed balance of the moneys paid by the latter on the two awards in question.

Mr. Hay, Sec. of State, to Mr. Azpiroz, Mexican min., No. 78, March 28, 1900, For. Rel. 1900, 781; same to same, No. 130, Nov. 10, 1900, id. 783.

See S. Docs. 249 and 271, 56 Cong. 1 sess.; H. Doc. 596, 56 Cong. 1 sess.

Not only was the undistributed balance of the moneys paid by Mexico refunded, but Congress appropriated the sum of $412,572.70 for the repayment to that country even of the instalments which were distributed in both cases by the United States.

Act of February 14, 1902, 32 Stat. I. 5. See, as recommending the refunding to Mexico of the distributed installments, report of Mr. Cullom, Committee on Foreign Relations, Jan. 7, 1902, S. Rept. 28, 57 Cong. 1 sess.; Mr. Cousins, Committee on Foreign Affairs, Feb. 5, 1902, H. Rept. 420, 57 Cong. 1 sess.

June 13, 1885, an award was made under the protocol of May 24, 1884, in favor of Antonio Pelletier, a citizen of the United States, in respect of a claim against the Republic of Hayti, growing out of the seizure of the barque *William* in 1861 and the imprisonment of her master and crew on a charge of piracy and attempt at slave trading. The Haytian minister at Washington afterwards filed in the Department of State a formal protest, in which he maintained that the award was induced by a clear mistake by the arbitrator as to his jurisdiction under the protocol. The Department decided that the award should not be enforced, on the ground (1) that the arbitrator, as

appeared by the text of his decision, was induced by an erroneous construction of his powers under the protocol to make an award in favor of the claimant, although he considered the claim to have been originally bad; (2) that it was the duty of the Executive to refuse to enforce an unconscionable award; (3) that, assuming the claimant's naturalization to be proved, his right, being a tort feasor, to claim compensation for the consequences of his tort must be denied; (4) that, upon the general question of turpitude, the claim was one that could not be pressed by the United States, "either as a matter of honor or as a matter of law;" (5) that the principle that a sovereign could not honorably press an unjust award, even although it was made by a tribunal invested by law or treaty with ample judicial powers, applied with still greater force to the award of an arbitrator whose acts in administering oaths to witnesses, determining what questions were to be put, and issuing commissions to take testimony must, if sanctioned only by the Executive, be regarded as ultra vires.

Report of Mr. Bayard, Sec. of State, to the President, Jan. 20, 1897. Moore, Int. Arbitrations, II. 1793–1800.

June 13, 1885, an award was rendered under the protocol of May 24, 1884, in favor of A. H. Lazare, a citizen of the United States, in respect of a claim against the Government of Hayti, growing out of a contract for the establishment of a national bank at Port au Prince. Counsel for Hayti endeavored to obtain a rehearing on the ground of alleged newly discovered evidence, but the arbitrator declined to grant their application for the reason that, in his judgment, he was functus officio. Counsel then appealed to the Department of State and asked to have the award set aside. The Department held that the award should not be enforced, basing its decision (1) on certain papers in the Department of State which were not shown to have been laid before the arbitrator, (2) on irregularities in the arbitrator's proceedings, (3) on errors in the award, (4) on alleged newly discovered evidence, (5) on an oral statement of the person who had acted as arbitrator that this evidence would have affected his judgment, and (6) on the conclusion that the claim as it stood could not be honorably pressed.

Report of Mr. Bayard, Sec. of State, to the President, Jan. 20, 1887. Moore, Int. Arbitrations, II. 1800–1805.

"The duty of the executive to refuse to enforce an award which . . . turns out to have been inequitable or unconscionable, has been maintained in repeated rulings of this Department, and is sanctioned by the Supreme Court of the United States. . . .

"The awards under the treaty with Mexico of 1848 were set aside by act of Congress in the Atocha case, and by the courts in the

Gardiner case (13 Stat. 595; 16 Stat. 633). Two of the awards under the Chinese claims treaty of 1858 were reopened in behalf of rejected claimants (15 Stat. 440; 20 Stat. 171). The Secretary of State, in the case of the *Caroline*, returned to Brazil, against the claimant's protest, money to be paid him under a diplomatic settlement. (See Senate Rep. No. 1376, Fortieth Congress, first session.)

"The precedents in this Department therefore fully sustain the principle stated by Chief Justice Waite, that—

"'As between the United States and the claimants, the honesty of the claim is always open to inquiry for the purpose of fair dealing with the government against which, through the United States, a claim has been made.' (Frelinghuysen *v.* Key, 110 U. S. 63.)"

Report of Mr. Bayard, Sec. of State, to the President, in the case of Antonio Pelletier, Jan. 20, 1887, For. Rel. 1887, 606, 607.

See, also, Moore, Int. Arbitrations, II. 1794–1800.

As to the case of the *Caroline* against Brazil, see Moore, Int. Arbitrations, II. 1342.

5. General Arbitration.

(1) Project of International American Conference, 1890.

§ 1084.

November 29, 1881, Mr. Blaine, as Secretary of State of the United States, extended, in the name of the President, an invitation to all the independent countries of North and South America to participate in a general congress to be held in Washington on the twenty-fourth of November, 1882, "for the purpose of considering and discussing methods of preventing war between the nations of America." Mr. Blaine added that the President desired that the attention of the congress should be "strictly confined to this one great object." On the ninth of August, 1882, Mr. Frelinghuysen, Mr. Blaine's successor, gave notice that the President was constrained to postpone the projected meeting till some future day. As one of the grounds for this action he stated that the peaceful condition of the South American republics, which was contemplated as essential to a profitable and harmonious assembling of the congress, did not exist. The original proposal, however, was never entirely relinquished; and on May 28, 1888, the President gave his approval to the act under which was convoked the International American Conference of 1889–1890. Of this conference one of the results was the celebrated plan of arbitration adopted April 18, 1890. By this plan it was declared that arbitration, as a means of settling disputes between American republics, was adopted "as a principle of American international law;" that arbitration should be obligatory in all controversies concerning dip-

lomatic and consular privileges, boundaries, territories, indemnities, the right of navigation and the validity, construction, and enforcement of treaties; and that it should be equally obligatory in all other cases, whatever might be their origin, nature, or object, with the sole exception of those which, in the judgment of one of the nations involved in the controversy, might imperil its independence; but that, even in this case, while arbitration for that nation should be optional, it should be "obligatory upon the adversary power."

The conference also adopted a resolution recommending arbitration to the nations of Europe.

Moore, Int. Arbitrations, II. 2113–2117.

During the nineteenth century there were eighty-four international arbitrations to which an American nation was a party. In forty, or nearly one-half, of these the other party was a European power, the arbitrations between American nations being forty-four. To about two-thirds of these the United States was a party, the number of arbitrations between other American powers being fourteen. Of this number there were ten that related to questions of boundary.

After the adjournment of the International American Conference the plan of a treaty of arbitration was signed by the following nations: Brazil, Bolivia, Ecuador, Guatemala, Hayti, Honduras, Nicaragua, Salvador, the United States, Uruguay, and Venezuela.

It was provided by Art. XIX. that the treaty should be ratified by the nations approving it, according to their respective constitutional methods, and that the ratifications should be exchanged at Washington on or before May 1, 1891. No ratifications were filed on or before that day, and on October 22, 1891, the United States sent out to the eleven original signatories a proposal to extend the time. Favorable responses were received from Bolivia, Ecuador, Guatemala, Honduras, Nicaragua, Salvador, and Venezuela; but it was stated in December, 1895, that "as the original treaty was rejected by some important governments of South America," and its revival had "only been advocated by a few," the negotiations had "not advanced."

Mr. Adee, Act. Sec. of State, to Mr. Abbott, min. to Columbia, Oct. 24, 1890, For. Rel. 1890, 269; Mr. Wharton, Act. Sec. of State, to Mr. Conger, No. 89, Oct. 22, 1891, MS. Inst. Brazil, XVII. 544; Mr. Wharton, Act. Sec. of State, to Mr. Trueblood, Feb. 27, 1893, 190 MS. Dom. Let. 456; Mr. Olney, Sec. of State, to Mr. Paine, Dec. 9, 1895, 206 MS. Dom. Let. 371.

"It is, in my judgment, incumbent upon the United States to conserve the influential initiative it has taken in this measure by ratifying the instrument and by advocating the proposed extension of the time for exchange." (President Harrison, annual message, Dec. 9, 1891, For. Rel. 1891, XII.)

"A strange indifference has been manifested toward arbitration with our sister republics. In the convocation of the first Pan-American Conference, based upon a resolution of Congress, the invitation issued by our Government mentioned arbitration as one of its chief objects. When the conference assembled, it was found difficult to bring two or three of the nations to an agreement on the subject. Our Government regarded it as of such importance that Mr. Blaine, then Secretary of State, went into the conference and by his matchless personality and great eloquence brought about an arbitration treaty whereby all questions not involving independence were to be submitted to arbitration. In transmitting this treaty to the Senate in 1890 President Harrison stated that its ratification would 'constitute one of the happiest and most hopeful incidents in the history of the Western Hemisphere.' Notwithstandnig the strong committals of Congress and the President, the treaty was never called up for consideration, so far as known to the public, and was allowed to die by limitation." (The Hon. John W. Foster, in The Independent, May 26, 1904, p. 1187.)

See Plan of International Peace League, by Francisco de P. Suarez, Bulletin du Congrés de la Paix, Anvers, 1894, Annexe VI.

In connection with the Pan-American project of 1890, reference may be made to previous efforts to promote international arbitration on the American continents.

One of the declared objects of the Panama congress of 1826 was to promote the peace and union of American nations, and to establish amicable methods for the settlement of disputes between them; but, as is well known, the congress failed to accomplish this design. The project, however, was not wholly abandoned. It appealed too strongly to the imagination to be readily forgotten, and in 1831 Mexico revived it, by proposing a conference of American republics for the purpose of bringing about not only a union and close alliance for defense, but also the acceptance of "friendly mediation" for the settlement of disputes between them, and the framing and promulgation of a code of public law to regulate their mutual relations. This was not a proposal of a scheme of arbitration; but it may be observed that the adoption of a code of public law to govern the relations of nations would remove one of the greatest obstacles to the successful operation of a permanent tribunal for the decision of international differences.

In 1847 there assembled at Lima a congress composed of representatives of Bolivia, Chile, Ecuador, New Granada, and Peru. The avowed object of this meeting was the formation of an alliance of American republics for the purpose of "maintaining their independence, sovereignty, dignity and territorial integrity, and of entering into such other compacts as might be conducive to their common welfare." At the first session of the congress it was decided to extend an invitation to the United States; but it is altogether probable that

this resolution was taken with a view to bring to the attention of the United States the object of the conference, rather than with any hope that the invitation would be accepted. In reality the United States was then at war with Mexico, and was not in a position to lend the weight of its influence to the preservation of the principle of territorial integrity. For a number of years after the congress of 1847 efforts for union among American nations seem to have been confined to the Spanish-American republics, and in no small measure to have been inspired by a feeling of apprehension towards the United States, excited not only by the Mexican war, but also by filibustering expeditions, such as those of William Walker, against Mexico and the states of Central America. This feeling led to the making of the "continental treaty" of 1856 between Chile, Ecuador, and Peru.

January 11, 1864, the Peruvian Government invited the Spanish nations of America to take part in another congress at Lima, with a view to "organize into one family" the several republics of Spanish origin. Among the particular subjects specified for the consideration of the proposed congress was the adoption of measures which should lead to the amicable settlement of boundary disputes, which were declared to be in nearly all the American states the cause of international quarrels, of animosities, and even of wars as disastrous to the honor as to the prosperity of the nations concerned; and to this was added the explicit proposal "irrevocably to abolish war, superseding it by arbitration, as the only means of compromising all misunderstandings and causes for disagreement between any of the South American republics." The congress met at Lima November 14, 1864, the anniversary of the birth of Bolivar. Representatives were present from the Argentine Republic, Bolivia, Chile, Colombia, Ecuador, Guatemala, Peru, and Venezuela.

September 3, 1880, a convention was signed at Bogota between the Governments of Chile and Colombia, by which the two Republics bound themselves "in perpetuity to submit to arbitration, whenever they can not be settled through diplomatic channels, all controversies and difficulties, of whatever nature, that may arise between the two nations." It was also stipulated that the contracting parties should endeavor, at the earliest opportunity, to conclude similar conventions with other American nations," to the end that the settlement by arbitration of each and every international controversy should become a principle of American public law." On the strength of the signature of this convention the Colombian minister of foreign relations, October 11, 1880, extended to the governments of America an invitation to appoint representatives to meet at Panama with full powers to give to the convention full international effect. This invitation was necessarily rendered nugatory by the continuance of the Chile-Peruvian war.

The Application of the Principle of International Arbitration on the American Continents, by J. B. Moore, Annals of the American Academy of Political and Social Science, July, 1903, XXII. 35, 36.

(2) OLNEY-PAUNCEFOTE TREATY, 1897.

§ 1085.

"By a concurrent resolution, passed by the Senate February 14, 1890, and by the House of Representatives on the 3d of April following, the President was requested 'to invite, from time to time, as fit occasions may arise, negotiations with any government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising between the two governments which can not be adjusted by diplomatic agency may be referred to arbitration and be peaceably adjusted by such means.' April 18, 1890, the International American Conference of Washington by resolution expressed the wish that all controversies between the republics of America and the nations of Europe might be settled by arbitration, and recommended that the Government of each nation represented in that conference should communicate this wish to all friendly powers. A favorable response has been received from Great Britain in the shape of a resolution adopted by Parliament July 16 last, cordially sympathizing with the purpose in view, and expressing the hope that Her Majesty's Government will lend ready coöperation to the Government of the United States upon the basis of the concurrent resolution above quoted."

President Cleveland, annual message, Dec. 4, 1893, For. Rel. 1893, XII.

"*Resolved*, That this House has learnt with satisfaction that both Houses of the United States Congress have, by resolution, requested the President to invite from time to time, as fit occasions may arise, negotiations with any government with which the United States have or may have diplomatic relations, to the end that any differences or disputes arising between the two governments which can not be adjusted by diplomatic agency may be referred to arbitration and peaceably adjusted by such means, and that this House, cordially sympathizing with the purpose in view, expresses the hope that Her Majesty's Government will lend their ready cooperation to the Government of the United States upon the basis of the foregoing resolution." (Resolution of the House of Commons, July 16, 1893, For. Rel. 1893, 346, 352.)

The French Chamber of Deputies, July 8, 1895, adopted unanimously the following resolution: "The Chamber invites the Government to negotiate, as soon as possible, a permanent treaty of arbitration between the French Republic and the Republic of the United States of America." (For. Rel. 1895, I. 427.)

For a plan of a general treaty of arbitration with the United States adopted by the Swiss Federal Council, July 24, 1883, see Annuaire de l'Institut de Droit Int., session d' Edimbourg (1904), XX, 36. This

print also contains an unratified treaty between Italy and Argentina, July 25, 1898, and several ratified general treaties of arbitration. (Id. 42.)

September 6, 1878, the Italian legation at Washington brought to the attention of the Department of State a resolution adopted in the Italian Chamber of Deputies on the 3rd of the preceding April, requesting that Government to secure the addition to existing treaties and the insertion in future treaties of a clause providing for the submission to arbitration of questions arising thereunder. The legation enclosed a proposal to add such a clause to the consular convention between the United States and Italy of May 8, 1878. Mr. Evarts, replying, said: "The Government of the United States is not prepared at present to adopt a general measure of the character stated, but will give the question an early consideration." (Mr. Evarts, Sec. of State, to Count Litta, Sept. 16, 1878, MS. Notes to Italy, VII, 401.)

"I transmit herewith a treaty for the arbitration of all matters in difference between the United States and Great Britain.

"The provisions of the treaty are the result of long and patient deliberation and represent concessions made by each party for the sake of agreement upon the general scheme.

"Though the result reached may not meet the views of the advocates of immediate, unlimited, and irrevocable arbitration of all international controversies, it is, nevertheless, confidently believed that the treaty can not fail to be everywhere recognized as making a long step in the right direction, and as embodying a practical working plan by which disputes between the two countries will reach a peaceful adjustment as matter of course and in ordinary routine.

"In the initiation of such an important movement it must be expected that some of its features will assume a tentative character looking to a further advance; and yet it is apparent that the treaty which has been formulated not only makes war between the parties to it a remote possibility, but precludes those fears and rumors of war which of themselves too often assume the proportions of national disaster.

"It is eminently fitting as well as fortunate that the attempt to accomplish results so beneficent should be initiated by kindred peoples, speaking the same tongue and joined together by all the ties of common traditions, common institutions, and common aspirations. The experiment of substituting civilized methods for brute force as the means of settling international questions of right will thus be tried under the happiest auspices. Its success ought not to be doubtful, and the fact that its ultimate ensuing benefits are not likely to be limited to the two countries immediately concerned should cause it to be promoted all the more eagerly. The examples set and the lesson furnished by the successful operation of this treaty are sure to be felt and taken to heart sooner or later by other nations, and will thus mark the beginning of a new epoch in civilization.

"Profoundly impressed as I am, therefore, by the promise of transcendent good which this treaty affords, I do not hesitate to accompany its transmission with an expression of my earnest hope that it may commend itself to the favorable consideration of the Senate."

Special message of President Cleveland to the Senate, Jan. 11, 1897, For. Rel. 1896, 237.

A dispatch of Lord Salisbury to Sir Julian Pauncefote, March 5, 1896, printed in For. Rel. 1896, 222, in relation to the arbitration of disputes between the United States and Great Britain, states that during the spring of 1895 communications were exchanged between Sir Julian and Mr. Gresham upon the establishment of a system of international arbitration for the adjustment of disputes between the two Governments, and that circumstances to which it is unnecessary to refer had prevented further consideration of the question at that time. He considered the occasion favorable for renewing a general discussion.

A discussion followed, leading up to the conclusion of the general treaty of arbitration.

By the treaty referred to in the foregoing message, which was signed at Washington, January 11, 1897, by Mr. Olney, Secretary of State, and Sir Julian Pauncefote, British ambassador, it was agreed to refer "all pecuniary claims or groups of pecuniary claims," not exceeding in the aggregate £100,000, and not involving "the determination of territorial claims," to three arbitrators, of whom each Government was to nominate one, who was to be "a jurist of repute," and the two thus selected were to nominate the third. In case the third arbitrator should not be so chosen within two months, he was to be appointed by agreement between the members of the Supreme Court of the United States and of the Judicial Committee of the Privy Council; and, in case these should fail to agree within three months, then by the King of Sweden and Norway, or by some substitute chosen by the high contracting parties. It was further provided that "all pecuniary claims or groups of pecuniary claims," exceeding £10,000 in amount, and "all other matters in difference, in respect of which either of the high contracting parties shall have rights against the other under treaty or otherwise, provided that such matters in difference do not involve the determination of territorial claims," should be submitted to a similar tribunal, whose award, if unanimous, was to be final; but that, if the award should not be unanimous, either party might within six months demand a review of it, in which case the controversy should be submitted to a tribunal "consisting of five jurists of repute," of whom two should be nominated by each of the contracting parties, and the fifth by the four thus chosen, or, in case they should fail to agree, then in the manner above described. Controversies involving the determination of "territorial claims" were to be submitted to a tribunal composed of six members, three of whom

were to be judges of the Supreme Court of the United States or of the circuit courts, and the other three, judges of the British Supreme Court of Judicature or members of the Judicial Committee of the Privy Council, whose award, if by a majority of not less than five to one, was to be final. The award by a smaller majority was also to be final unless either party should within three months protest against it, in which case it was to be of no validity; but it was stipulated that in such an event no recourse to hostile measures should be taken till the mediation of one or more friendly powers had been invited by one or both of the contracting parties. In case the question concerned a particular State or Territory of the United States, it was to be open to the President to appoint a judicial officer of such State or Territory as one of the arbitrators; and the British Government was to have a similar discretion where the question concerned a British colony or possession. It was further provided that, in case one of the tribunals, constituted for the decision of matters not involving the determination of territorial claims, should, before the close of the hearing, decide, upon motion of either contracting party, that the determination of the case before it necessarily involved "the decision of a disputed question of principle of grave general importance affecting the national rights of such party as distinguished from the private rights whereof it is merely the international representative," the jurisdiction of the tribunal should cease and the case should be dealt with in the same manner as if it involved the determination of a territorial claim. It was explained in the treaty that the phrase "groups of pecuniary claims" meant "claims by one or more persons arising out of the same transactions or involving the same issues of law and of fact;" and that the phrase "territorial claims" included "all claims to territory and all claims involving questions of servitudes, rights of navigation and of access, fisheries and all rights and interests necessary to the control and enjoyment of the territory claimed by either of the high contracting parties." Each Government was to pay its own expenses, while those properly devolving upon the two Governments were to be defrayed in equal moieties; but, where "the essential matter of difference submitted to arbitration" was the right of one of the parties "to receive disavowals of or apologies for acts or defaults of the other not resulting in substantial pecuniary injury," the tribunal was to direct whether any of the expenses of the successful party should be borne by the unsuccessful party, and if so, to what extent. The treaty was to remain in force for five years from the date on which it should go into operation, and further till the expiration of twelve months after notice by either party of a wish to terminate it.

For. Rel. 1896, 238.

May 12, 1897, Mr. Sherman, Secretary of State, notified Sir Julian

Pauncefote "that the Senate of the United States, under date of May 5, 1897, failed to give its advice and consent to the ratification of the arbitration treaty concluded January 11, 1897, between the United States of America and Great Britain."

"International arbitration can not be omitted from the list of subjects claiming our consideration. Events have only served to strengthen the general views on this question expressed in my inaugural address. The best sentiment of the civilized world is moving toward the settlement of differences between nations without resorting to the horrors of war. Treaties embodying these humane principles on broad lines without in any way imperiling our interests or our honor shall have my constant encouragement."

President McKinley, annual message, Dec. 6, 1897, For. Rel. 1897, xxv.

In his inaugural address President McKinley said: "We want no wars of conquest; we must avoid the temptation of territorial aggression. War should never be entered upon until every agency of peace has failed; peace is preferable to war in almost every contingency. Arbitration is the true method of settlement of international as well as local or individual differences . . . Since this treaty [the Olney-Pauncefote treaty of Jan. 11, 1897] is clearly the result of our own initiative, since it has been recognized as the leading feature of our foreign policy throughout our entire national history—the adjustment of difficulties by judicial methods rather than by force of arms—and since it presents to the world the glorious example of reason and peace, not passion and war, controlling the relations between two of the greatest nations of the world, an example certain to be followed by others, I respectfully urge the early action of the Senate thereon, not merely as a matter of policy, but as a duty to mankind. The importance and moral influence of the ratification of such a treaty can hardly be overestimated in the cause of advancing civilization."

(3) THE HAGUE CONVENTION, 1899.

§ 1086.

"The maintenance of general peace and a possible reaction of the excessive armaments which weigh down upon all nations present themselves, in the actual present situation of the world, as the ideal toward which should tend the efforts of all governments.

"The magnanimous and humanitarian views of His Majesty the Emperor, my august master, are entirely in accord with this sentiment.

"In the conviction that this lofty object agrees entirely with the most essential interests and the most rightful desires of all the powers, the Imperial Government believes that the present time is very favorable for seeking, through the method of an international conference, the most effective means of assuring to all nations the benefits of a real and lasting peace, and of placing before all the question of ending the progressive development of existing armaments.

"In the course of the last twenty years the aspirations for a general pacification have become strongly impressed upon the minds of civilized nations. The preservation of peace has been set up as the end of international politics; it is in its name that the great powers have formed powerful alliances with one another; it is for the better guarantee of peace that they have developed, to proportions hitherto unknown, their military forces, and that they shall continue to augment them without hesitating on account of any sacrifice whatever.

"All these efforts have not, however, yet accomplished the beneficent results of the much-wished-for pacification.

"The ever-increasing financial expense touches public prosperity at its very source; the intellectual and physical powers of the people, labor and capital, are, in a great measure, turned aside from their natural functions and consumed unproductively. Hundreds of millions are used in acquiring fearful engines of destruction, which, to-day considered as the highest triumph of science, are destined to-morrow to lose all their value because of some new discovery in this sphere.

"It is true also that as the armaments of each power increase in size they succeed less and less in accomplishing the result which is aimed at by the governments. Economic crises, due in great part to the existence of excessive armaments, and the constant dangers which result from this accumulation of war material, makes of the armed peace of our day an overwhelming burden which it is more and more difficult for the people to bear. It therefore seems evident that, if this state of affairs continues it will inevitably lead to that very cataclysm which we are trying to avoid, and the horrors of which are fearful to human thought.

"To put an end to these increasing armaments, and to find means for avoiding the calamities which menace the entire world, that is the supreme duty which to-day lies upon all nations.

"Impressed with this sentiment, His Majesty the Emperor has deigned to command me to propose to all the governments who have duly accredited representatives at the imperial court the holding of a conference to consider this grave problem.

"This conference will be, with the help of God, a happy augury for the century which is about to open. It will gather together into a powerful unit the efforts of all the powers which are sincerely desirous of making triumphant the conception of a universal peace. It will at the same time strengthen their mutual harmony by a common consideration of the principles of equity and right, upon which rest the security of states and the well-being of nations.

"CTE. MOURAVIEFF.

"ST. PETERSBURG, *August 12, 1898.*

"(New style August 24.)"

Translation of a circular note, a copy of which was handed by Count Mouravieff to Mr. Hitchcock, United States ambassador, Aug. 12/24, 1898, For Rel. 1898, 540, 541.

The contents of the note were summarized by Mr. Hitchcock in a telegram of Sept. 3, 1898. (For. Rel. 1898, 542.)

"Telegram as to disarmament received. Though war with Spain renders it impracticable for us to consider the present reduction of our armaments, which even now are doubtless far below the measure which principal European powers would be willing to adopt, the President cordially concurs in the spirit of the proposal of His Imperial Majesty, and will send a representative to the international conference." (Mr. Moore, Act. Sec. of State, to Mr. Hitchcock, amb. to Russia, tel., Sept. 6, 1898, For. Rel. 1898, 543.)

"St. Petersburg, *December 30, 1898.*

"Mr. Ambassador: When, during the month of August last, my August Master ordered me to propose to the governments who had accredited representatives in St. Petersburg the meeting of a conference for the purpose of seeking the most efficient means of assuring to all peoples the benefits of a real and lasting peace, and above all to place a limit upon the progressive development of existing armaments, nothing seemed opposed to the realization in the comparatively near future of this humanitarian project.

"The welcome reception accorded to the measure of the Imperial Government by almost all the powers can but justify this hope. Appreciating fully the sympathetic manner in which the adhesion of almost all the governments has been expressed, the imperial cabinet has at the same time received with the liveliest satisfaction the evidences of hearty assent which have been addressed to it, and which do not cease to arrive from all classes of society of the different parts of the world.

"Notwithstanding the great current of opinion which has been produced in favor of a general pacification, the political horizon has sensibly changed in its aspect recently. Several powers have proceeded with new armaments, enforcing additional increase of their military forces, and in the presence of this uncertain situation one might be led to ask whether the present moment is opportune for an international discussion of the ideas set forth in the circular of August 12–24.

"Hoping, however, that the elements of trouble which agitate the political world will soon give place to a calmer order of things and one of a nature to encourage the success of the proposed conference, the Imperial Government for its part is of the opinion that it will be possible to proceed at once with a preliminary exchange of ideas among the powers with a view—

"(*a*) Of seeking without delay for means of placing a limit upon the progressive increase of land and naval armaments, a question

which plainly is becoming more and more urgent in view of the new increase of these armaments; and

"(*b*) To prepare the way for a discussion of the questions relating to the possibility of preventing armed conflicts by the pacific means at the disposition of international diplomacy.

"In case the powers consider the present moment favorable for the meeting of a conference on these bases, it certainly will be useful for the cabinets to agree among themselves upon the subject of a programme of its work.

"The themes to submit to an international discussion at the actual conference might generally be summed up in the following manner:

"1. An understanding stipulating the nonincrease for a fixed term of the present effectives of land and naval forces, as well as of the war budgets relating thereto; a preliminary study of the manner in which there might be even realized in the future a reduction of the effectives and the budgets above mentioned.

"2. Interdiction of the putting into use in armies and navies of any new firearms whatever, and of new explosives, as well as more powerful powders than those now adopted, as well for guns as for cannon.

"3. Limitation of the use in land campaigns of explosives of great power already in existence, and the prohibition against the throwing of all projectiles and explosives from balloons, or by similar means.

"4. The interdiction of the use in naval warfare of submarine torpedo boats or plungers, or other engines of destruction of the same nature; engagement not to build in the future war vessels with rams.

"5. The adaptation to naval warfare of the stipulations of the Geneva convention of 1864, upon the basis of the additional articles of 1868.

"6. Revision of the declaration in regard to the laws and customs of war, elaborated in 1874 by the Brussels conference and still remaining unratified.

"7. The acceptance in principle of the usage of good offices, of mediation, and of optional arbitration for such cases as lend themselves to it, with a view of preventing armed conflicts between nations; an understanding upon the subject of their mode of application, and the establishment of a uniform code of practice in their use.

"It is clearly understood that all questions concerning the political relations of states, and of the established order of things by treaty, as, in general, all questions which do not enter directly into the programme adopted by the cabinets, ought to be absolutely excluded from the deliberations of the conference.

"In addressing to you, Mr. Ambassador, the request to have the goodness to obtain the instructions of your Government upon the subject of my present communication, I would ask you at the same time to bring to its notice that in the interest of the great cause

which lies so near the heart of my August Master, His Imperial Majesty considers that it would be well for the conference not to meet in the capital of one of the great powers, where there are concentrated so many political interests, which might perhaps react against the progress of a work in which are interested in a like degree all the countries of the world.

"Accept, etc., "COUNT MOURAVIEFF."

Circular note, handed by Count Muravieff to Mr. Hitchcock, amb. to Russia, and to other members of the diplomatic corps, Dec. 30, 1898, Jan. 11, 1899. For. Rel. 1898, 551.

The programme of The Hague conference, embodied in the Russian circular of Dec. 30, 1898, contained the following article:

"8. Acceptance, in principle, of the use of good offices, mediation, and voluntary arbitration, in cases where they are available, with the purpose of preventing armed conflicts between nations; understanding in relation to their mode of application and establishment of a uniform practice in employing them."

"The eighth article, which proposes the wider extension of good offices, mediation and arbitration, seems likely to open the most fruitful field for discussion and future action. 'The prevention of armed conflicts by pacific means,' to use the words of Count Mouravieff's circular of December 30, is a purpose well worthy of a great international convention, and its realization in an age of general enlightenment should not be impossible. The duty of sovereign states to promote international justice by all wise and effective means is only secondary to the fundamental necessity of preserving their own existence. Next in importance to their independence is the great fact of their interdependence. Nothing can secure for human government and for the authority of law which it represents so deep a respect and so firm a loyalty as the spectacle of sovereign and independent states, whose duty it is to prescribe the rules of justice and impose penalties upon the lawless, bowing with reverence before the august supremacy of those principles of right which give to law its eternal foundation.

"The proposed conference promises to offer an opportunity thus far unequaled in the history of the world for initiating a series of negotiations that may lead to important practical results. The long-continued and widespread interest among the people of the United States in the establishment of an international court, as evidenced in the historical résumé attached to these instructions as Annex A, gives assurance that the proposal of a definite plan of procedure by this Government for the accomplishment of this end would express the desires and aspirations of this nation. The delegates are, therefore, enjoined to propose, at an opportune moment, the plan for an inter-

national tribunal, hereunto attached as Annex B, and to use their influence in the conference in the most effective manner possible to procure the adoption of its substance or of resolutions directed to the same purpose. It is believed that the disposition and aims of the United States in relation to the other sovereign powers could not be expressed more truly or opportunely than by an effort of the delegates of this Government to concentrate the attention of the world upon a definite plan for the promotion of international justice."

Instructions to the American delegates to The Hague Conference, April 18, 1899, For. Rel. 1899, 511, 512–513.

"While much interest was shown in the discussions of the first great committee of the conference, and still more in those of the second, the main interest of the whole body centered more and more in the third. It was felt that a thorough provision for arbitration and its cognate subjects is the logical precursor of the limitation of standing armies and budgets, and that the true logical order is first arbitration and then disarmament.

"As to subsidiary agencies to arbitration, while our commission contributed much to the general work regarding good offices and mediation it contributed entirely, through Mr. Holls, the 'Plan for special mediation' which was adopted unanimously, first by the committee and finally by the conference.

"As to the 'Plan for international commissions of inquiry,' which emanated from the Russian delegation, our commission acknowledged its probable value and aided in elaborating it, but added to the safeguards against any possible abuse of it, as concerns the United States, by our declaration of July 25, to be mentioned hereafter.

"The functions of such commission are strictly limited to the ascertainment of facts, and it is hoped that both by giving time for passions to subside and by substituting truth for rumor they may prove useful at times in settling international disputes. The commission of inquiry may also form a useful auxiliary both in the exercise of good offices and arbitration.

"As to the next main subject, the most important of all under consideration by the third committee—the plan of a permanent court or tribunal—we were also able, in accordance with our instructions, to make contributions which we believe will aid in giving such a court dignity and efficiency.

"On the assembling of the conference the feeling regarding the establishment of an actual permanent tribunal was evidently chaotic, with little or no apparent tendency to crystallize into any satisfactory institution. The very elaborate and in the main excellent proposals relating to procedure before special and temporary tribunals, which were presented by the Russian delegation, did not at first con-

template the establishment of any such permanent institution. The American plan contained a carefully devised project for such a tribunal, which differed from that adopted mainly in contemplating a tribunal capable of meeting in full bench and permanent in the exercise of its functions, like the Supreme Court of the United States, instead of a court like the supreme court of the State of New York, which never sits as a whole, but whose members sit from time to time singly or in groups, as the occasion may demand. The court of arbitration provided for resembles in many features the supreme court of the State of New York and courts of unlimited original jurisdiction in various other States.

"In order to make this system effective a council was established, composed of the diplomatic representatives of the various powers at The Hague, and presided over by the Netherlands minister of foreign affairs, which should have charge of the central office of the proposed court, of all administrative details, and of the means and machinery for speedily calling a proper bench of judges together and for setting the court in action. The reasons for our cooperation in making this plan will be found in the accompanying report. This compromise, involving the creation of a council and the selection of judges not to be in session save when actually required for international litigation, was proposed by Great Britain, and the feature of it which provided for the admission of the Netherlands, with its minister of foreign affairs as president of the council, was proposed by the American commission. The nations generally joined in perfecting other details. It may truthfully be called, therefore, the plan of the conference.

"As to the revision of the decisions by the tribunal in case of the discovery of new facts, a subject on which our instructions were explicit, we were able, in the face of determined and prolonged opposition, to secure recognition in the code of procedure for the American view.

"As regards the procedure to be adopted in the international court thus provided, the main features having been proposed by the Russian delegation, various modifications were made by other delegations, including our own. Our commission was careful to see that in this code there should be nothing which could put those conversant more especially with British and American common law and equity at a disadvantage. To sundry important features proposed by other powers our own commission gave hearty support. This was the case especially with article 27 proposed by France. It provides a means, through the agency of the powers generally, for calling the attention of any nations apparently drifting into war to the fact that the tribunal is ready to hear their contention. In this provision, broadly interpreted, we acquiesced, but endeavored to secure a clause limiting

to suitable circumstances the 'duty' imposed by the article. Great opposition being shown to such an amendment as unduly weakening the article, we decided to present a declaration that nothing contained in the convention should make it the duty of the United States to intrude in or become entangled with European political questions or matters of internal administration or to relinquish the traditional attitude of our nation toward purely American questions. This declaration was received without objection by the conference in full and open session.

"As to the results thus obtained, as a whole, regarding arbitration, in view of all the circumstances and considerations revealed during the session of the conference, it is our opinion that the 'Plan for the pacific settlement of international disputes,' which was adopted by the conference, is better that that presented by any one nation. We believe that, though it will doubtless be found imperfect and will require modification as time goes on, it will form a thoroughly practical beginning, it will produce valuable results from the outset, and it will be the germ out of which a better and better system will be gradually evolved.

"As to the question between compulsory and voluntary arbitration it was clearly seen before we had been long in session that general compulsory arbitration of questions really likely to produce war could not be obtained; in fact that not one of the nations represented at the conference was willing to embark in it, so far as the more serious questions were concerned. Even as to the questions of less moment, it was found to be impossible to secure agreement, except upon a voluntary basis. We ourselves felt obliged to insist upon the omission from the Russian list of proposed subjects for compulsory arbitration international conventions relating to rivers, to interoceanic canals, and to monetary matters. Even as so amended, the plan was not acceptable to all. As a consequence the convention prepared by the conference provides for voluntary arbitration only. It remains for public opinion to make this system effective. As questions arise threatening resort to arms it may well be hoped that public opinion in the nations concerned, seeing in this great international court a means of escape from the increasing horrors of war, will insist more and more that the questions at issue be referred to it. As time goes on such reference will probably more and more seem to the world at large natural and normal, and we may hope that recourse to the tribunal will finally, in the great majority of serious differences between nations, become a regular means of avoiding the resort to arms. There will also be another effect worthy of consideration. This is the building up of a body of international law growing out of the decisions handed down by the judges. The procedure of the tribunal requires that reasons for such decisions shall be given, and these

decisions and reasons can hardly fail to form additions of especial value to international jurisprudence."

Report of the American delegates to The Hague Conference to the Secretary of State, July 31, 1899, For. Rel. 1899, 513, 516–518.

"TITLE IV.—ON INTERNATIONAL ARBITRATION.

"CHAPTER I.—*On the System of Arbitration.*

"ARTICLE XV. International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.

"ARTICLE XVI. In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

"ARTICLE XVII. The Arbitration Convention is concluded for questions already existing or for questions which may arise eventually.

"It may embrace any dispute or only disputes of a certain category.

"ARTICLE XVIII. The Arbitration Convention implies the engagement to submit loyally to the Award.

"ARTICLE XIX. Independently of general or private Treaties expessly stipulating recourse to arbitration as obligatory on the Signatory Powers, these Powers reserve to themselves the right of concluding, either before the ratification of the present Act or later, new Agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.

"CHAPTER II.—*On the Permanent Court of Arbitration.*

"ARTICLE XX. With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.

"ARTICLE XXI. The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special Tribunal.

"ARTICLE XXII. An International Bureau, established at The Hague, serves as record office for the Court.

"This Bureau is the channel for communications relative to the meetings of the Court.

"It has the custody of the archives and conducts all the administrative business.

"The Signatory Powers undertake to communicate to the International Bureau at The Hague a duly certified copy of any conditions of arbitration arrived at between them, and of any award concerning them delivered by special Tribunals.

"They undertake also to communicate to the Bureau the Laws, Regulations, and documents eventually showing the execution of the awards given by the Court.

"ARTICLE XXIII. Within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators.

"The persons thus selected shall be inscribed, as members of the Court, in a list which shall be notified by the Bureau to all the Signatory Powers.

"Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Signatory Powers.

"Two or more Powers may agree on the selection in common of one or more Members.

"The same person can be selected by different Powers.

"The Members of the Court are appointed for a term of six years. Their appointments can be renewed.

"In case of the death or retirement of a member of the Court, his place shall be filled in accordance with the method of his appointment.

"ARTICLE XXIV. When the Signatory Powers desire to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the Arbitrators called upon to form the competent Tribunal to decide this difference, must be chosen from the general list of members of the Court.

"Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:—

"Each party appoints two Arbitrators, and these together choose an Umpire.

"If the votes are equal, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

"If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

"The Tribunal being thus composed the parties notify to the Bureau their determination to have recourse to the Court and the names of the Arbitrators.

"The Tribunal of Arbitration assembles on the date fixed by the parties.

"The Members of the Court, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities.

"ARTICLE. XXV. The Tribunal of Arbitration has its ordinary seat at The Hague.

"Except in cases of necessity, the place of session can only be altered by the Tribunal with the assent of the parties.

"ARTICLE XXVI. The International Bureau at the Hague is authorized to place its premises and its staff at the disposal of the Signatory Powers for the operations of any special Board of Arbitration.

"The jurisdiction of the Permanent Court, may, within the conditions laid down in the Regulations, be extended to disputes between non-Signatory Powers, or between Signatory Powers and non-Signatory Powers, if the parties are agreed on recourse to this Tribunal.

"ARTICLE XXVII. The Signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

"Consequently, they declare that the fact of reminding the conflicting parties of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

"ARTICLE XXVIII. A Permanent Administrative Council, composed of the Diplomatic Representatives of the Signatory Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as President, shall be instituted in this town as soon as possible after the ratification of the present Act by at least nine Powers.

"This Council will be charged with the establishment and organization of the International Bureau; which will be under its direction and control.

"It will notify to the Powers the Constitution of the Court and will provide for its installation.

"It will settle its Rules of Procedure and all other necessary Regulations.

"It will decide all questions of administration which may arise with regard to the operations of the Court.

"It will have entire control over the appointment, suspension or dismissal of the officials and employés of the bureau.

"It will fix the payments and salaries, and control the general expenditure.

"At meetings duly summoned the presence of five members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

"The Council communicates to the Signatory Powers without delay the Regulations adopted by it. It furnishes them with an annual Report on the Labours of the Court, the working of the administration, and the expenses.

"ARTICLE XXIX. The expenses of the Bureau shall be borne by the Signatory Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

"CHAPTER III.—*On Arbitral Procedure.*

"ARTICLE XXX. With a view to encourage the development of arbitration, the Signatory Powers have agreed on the following Rules which shall be applicable to arbitral procedure, unless other rules have been agreed on by the parties.

"ARTICLE XXXI. The Powers who have recourse to arbitration sign a special Act ('Compromis'), in which the subject of the difference is clearly defined, as well as the extent of the Arbitrators' powers. This Act implies the undertaking of the parties to submit loyally to the award.

"ARTICLE XXXII. The duties of Arbitrator may be conferred on one Arbitrator alone or on several Arbitrators selected by the parties as they please, or chosen by them from the members of the permanent Court of Arbitration established by the present Act.

"Failing the constitution of the Tribunal by direct agreement between the parties, the following course shall be pursued:

"Each party appoints two arbitrators, and these latter together choose an Umpire.

"In case of equal voting, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

"If no agreement is arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

"ARTICLE XXXIII. When a Sovereign or the Chief of a State is chosen as Arbitrator, the arbitral procedure is settled by him.

"ARTICLE XXXIV. The Umpire is by right President of the Tribunal.

"When the Tribunal does not include an Umpire it appoints its own President.

"ARTICLE XXXV. In case of the death, retirement, or disability from any cause of one of the Arbitrators, his place shall be filled in accordance with the method of his appointment.

"ARTICLE XXXVI. The Tribunal's place of session is selected by the parties. Failing this selection the Tribunal sits at The Hague.

"The place thus fixed can not, except in case of necessity, be changed by the Tribunal without the assent of the parties.

"ARTICLE XXXVII. The parties have the right to appoint delegates or special agents to attend the Tribunal, for the purpose of serving as intermediaries between them and the Tribunal.

" They are further authorized to retain, for the defense of their rights and interests before the Tribunal, counsel or advocates appointed by them for this purpose.

"ARTICLE XXXVIII. The Tribunal decides on the choice of languages to be used by itself, and to be authorized for use before it.

"ARTICLE XXXIX. As a general rule the arbitral procedure comprises two distinct phases; preliminary examination and discussion.

" Preliminary examination consists in the communication by the respective agents to the members of the Tribunal and to the opposite party of all printed or written Acts and of all documents containing the arguments invoked in the case. This communication shall be made in the form and within the periods fixed by the Tribunal in accordance with Article XLIX.

" Discussion consists in the oral development before the Tribunal of the arguments of the parties.

"ARTICLE XL. Every document produced by one party must be communicated to the other party.

"ARTICLE XLI. The discussions are under the direction of the President.

" They are only public if it be so decided by the Tribunal, with the assent of the parties.

" They are recorded in the *procès-verbaux* drawn up by the Secretaries appointed by the President. These *procès-verbaux* alone have an authentic character.

"ARTICLE XLII. When the preliminary examination is concluded, the Tribunal has the right to refuse discussion of all fresh Acts or documents which one party may desire to submit to it without the consent of the other party.

"ARTICLE XLIII. The Tribunal is free to take into consideration fresh Acts or documents to which its attention may be drawn by the agents or counsel of the parties.

" In this case the Tribunal has the right to require the production of these Acts or documents, but is obliged to make them known to the opposite party.

"ARTICLE XLIV. The Tribunal can, besides, require from the agents of the parties the production of all Acts, and can demand all necessary explanations. In case of refusal, the Tribunal takes note of it.

"ARTICLE XLV. The agents and counsel of the parties are authorized to present orally to the Tribunal all the arguments they may think expedient in defence of their case.

"ARTICLE XLVI. They have the right to raise objections and points. The decisions of the Tribunal on those points are final, and can not form the subject of any subsequent discussion.

"ARTICLE XLVII. The members of the Tribunal have the right to put questions to the agents and counsel of the parties, and to demand explanations from them on doubtful points.

"Neither the questions put nor the remarks made by members of the Tribunal during the discussions can be regarded as an expression of opinion by the Tribunal in general, or by its members in particular.

"ARTICLE XLVIII. The Tribunal is authorized to declare its competence in interpreting the 'Compromis' as well as the other Treaties which may be invoked in the case, and in applying the principles of international law.

"ARTICLE XLIX. The Tribunal has the right to issue Rules of Procedure for the conduct of the case, to decide the forms and periods within which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

"ARTICLE L. When the agents and counsel of the parties have submitted all explanations and evidence in support of their case, the President pronounces the discussion closed.

"ARTICLE LI. The deliberations of the Tribunal take place in private. Every decision is taken by a majority of members of the Tribunal.

"The refusal of a member to vote must be recorded in the *procès-verbal*.

"ARTICLE LII. The award, given by a majority of votes, is accompanied by a statement of reasons. It is drawn up in writing and signed by each member of the Tribunal.

"Those members who are in the minority may record their dissent when signing.

"ARTICLE LIII. The award is read out at a public meeting of the Tribunal, the agents and counsel of the parties being present, or duly summoned to attend.

"ARTICLE LIV. The award, duly pronounced and notified to the agents of the parties at variance, puts an end to the dispute definitely and without appeal.

"ARTICLE LV. The parties can reserve in the 'Compromis' the right to demand the revision of the award.

"In this case, and unless there be an agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence on the award, and which, at the time the discussion was closed, was unknown to the Tribunal and to the party demanding the revision.

" Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character described in the foregoing paragraph, and declaring the demand admissible on this ground.

" The ' Compromis ' fixes the period within which the demand for revision must be made.

"ARTICLE LVI. The award is only binding on the parties who conclude the ' Compromis.'

" When there is a question of interpreting a Convention to which Powers other than those concerned in the dispute are parties, the latter notify to the former the ' Compromis ' they have concluded. Each of these Powers has the right to intervene in the case. If one or more of them avail themselves of this right, the interpretation contained in the award is equally binding on them.

"ARTICLE LVII. Each party pays its own expenses and an equal share of those of the Tribunal."

Convention for the Peaceful Settlement of International Differences, The Hague, July 29, 1899, 32 Stat. II. 1788.

" It is with satisfaction that I am able to announce the formal notification at The Hague, on September 4, of the deposit of ratifications of the convention for the pacific settlement of international disputes by sixteen powers, namely, the United States, Austria, Belgium, Denmark, England, France, Germany, Italy, Persia, Portugal, Roumania, Russia, Siam, Spain, Sweden and Norway, and the Netherlands. Japan also has since ratified the convention.

" The administrative council of the permanent court of arbitration has been organized and has adopted rules of order and a constitution for the International Arbitration Bureau."

President McKinley, annual message, Dec. 3, 1900, For. Rel. 1900, XXIV.
For the organization of the permanent court, see For. Rel. 1900, 790.
For rules adopted by the administrative council, Sept. 21, 1900, see id. 791–792.
For the list of members of the permanent court, see id. 795–797.
For rules adopted by the administrative council, see id. 797.

" It will be observed that the conditions upon which powers not represented at the conference can adhere to the convention for the peaceful regulation of international conflicts is to ' form the subject of a later agreement between the contracting powers.' This provision reflects the outcome of a three days' debate in the drafting committee as to whether this convention should be absolutely open or open only with the consent of the contracting powers. England and Italy strenuously supported the latter view. It soon became apparent that under the guise of general propositions the committee

was discussing political questions of great importance at least to certain powers. Under these circumstances the representatives of the United States took no part in the discussion, but supported by their vote the view that the convention, in its nature, involved reciprocal obligations; and also the conclusion that political questions had no place in the conference, and must be left to be decided by the competent authorities of the powers represented there.

"It is to be regretted that this action excludes from immediate adherence to this convention our sister republics of Central and South America, with whom the United States is already in similar relations by the Pan-American treaty. It is hoped that an arrangement will soon be made which will enable these states, if they so desire, to enter into the same relations as ourselves with the powers represented at the conference."

Report of the American delegates to The Hague Conference, July 31, 1899, For. Rel. 1899, 513, 520.

The convention for the pacific settlement of international disputes was signed by sixteen delegations, as follows: Belgium, Bulgaria, Denmark, France, Greece, Mexico, Montenegro, the Netherlands, Persia, Portugal, Roumania, Russia, Siam, Spain, Sweden and Norway, and the United States. Adjoined to the signatures of the United States delegation there was a reference to their declaration made in open conference on July 25th and recorded in the proceedings of that day. (For. Rel 1899, 513, 519.)

With reference to article 1 of the programme of The Hague Conference, proposing the limitation of land and sea forces as well as of war budgets, the American delegates were instructed that, in comparison with the effective forces of other nations, those of the United States were so far below the normal that the question of their limitation could not be profitably discussed, and that the initiative on the subject should be left to the powers to which it might properly belong.

The committee of the conference to which article 1 was referred, reported that the proposals on the subject presented by the Russian representatives for fixing the amounts of forces and of budgets, military and naval, for periods of five and three years, could not be accepted, and that a more profound study upon the part of each state concerned was to be desired. The American delegates, while concurring in this conclusion, declared that in so doing they did not express any opinion as to the course to be taken by the States of Europe in relation to a matter which practically concerned them alone.

For. Rel. 1899, 511, 512, 513–514.

The Hague Conference adopted a resolution expressing the wish that the Governments therein represented, taking into account all the

propositions that had been made, should study the possibility of an agreement concerning the limitation of armed forces on land and sea and of war budgets. The American delegates voted for this resolution, but a few powers abstained from voting.

For. Rel. 1899, 513, 520.

(4) SECOND INTERNATIONAL AMERICAN CONFERENCE, 1902.

§ 1087.

In the Second International Conference of American States, which was held at the City of Mexico from October 22, 1901, to January 31, 1902, the subject of arbitration was much discussed. There appeared to be a unanimous sentiment in favor of "arbitrations as a principle," but a great contrariety of opinion as to the extent to which the principle should be carried. On this question three views were supported in the conference:

"1. Obligatory arbitration, covering all questions pending or future when they did not affect either the independence or the national honor of a country;

"2. Obligatory arbitration, covering future questions only and defining what questions shall constitute those to be excepted from arbitration; and

"3. Facultative or voluntary arbitration, as best expressed by The Hague convention."

The delegation of the United States advocated the signing of a protocol affirming the convention for the pacific settlement of international disputes, signed at The Hague, July 29, 1899, as the best practicable plan for securing unanimity of action and beneficial results.

A plan was finally adopted in the nature of a compromise. A protocol looking to adhesion to The Hague convention was signed by all the delegations except those of Chile and Ecuador, who are said, however, afterwards to have accepted it in open conference. By this protocol authority was conferred on the Governments of the United States and Mexico, the only American signatories of The Hague convention, to negotiate with the other signatory powers for the adherence thereto of other American nations so requesting. Besides, the President of Mexico was requested to ascertain the views of the different governments represented in the conference regarding the most advanced form in which a general arbitration convention could be drawn up that would meet the approval and secure the ratification of all the countries in the conference, and afterwards to prepare a plan for such a general treaty and if possible to arrange for a series of protocols to carry it into effect; or, if this should be found to be

impracticable, then to present the correspondence with a report to the next conference.

A project of a treaty of compulsory arbitration was signed by the delegations of the Argentine Republic, Bolivia, Santo Domingo, Salvador, Guatemala, Mexico, Paraguay, Peru, Uruguay, and Venezuela.

Besides the protocol and the project of treaty above mentioned, a project of treaty was adopted covering the arbitration of pecuniary claims. This project was signed by the delegations of all the countries then represented in the conference, viz: Argentine Republic, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Guatemala, Hayti, Honduras, Mexico, Nicaragua, Paraguay, Peru, Salvador, the United States, and Uruguay. By this project the signatories obligated themselves for a term of five years to submit to arbitration, preferably to the permanent court at The Hague, all claims for pecuniary loss or damage which might be presented by their respective citizens, and which could not be amicably adjusted through diplomatic channels, when such claims were of sufficient importance to warrant the expense of arbitration. It is provided that the treaty shall be binding on the states ratifying it, from the date on which five of the signatory governments shall have ratified it.

It was ratified by Guatemala April 25, 1902; by Salvador May 19, 1902; by Peru October 29, 1903; by Honduras July 6, 1904; and by the United States January 28, 1905. It was therefore proclaimed by the President of the United States March 24, 1905, as binding on the five ratifying states above specified.

(5) SUBSEQUENT MEASURES.

§ 1088.

"There seems good ground for the belief that there has been a real growth among the civilized nations of a sentiment which will permit a gradual substitution of other methods than the method of war in the settlement of disputes. It is not pretended that as yet we are near a position in which it will be possible wholly to prevent war, or that a just regard for national interest and honor will in all cases permit of the settlement of international disputes by arbitration; but by a mixture of prudence and firmness with wisdom we think it is possible to do away with much of the provocation and excuse for war, and at least in many cases to substitute some other and more rational method for the settlement of disputes. The Hague court offers so good an example of what can be done in the direction of such settlement that it should be encouraged in every way. . . .

"Last year the Interparliamentary Union for International Arbitration met at Vienna, six hundred members of the different legislatures of civilized countries attending. It was provided that the

next meeting should be in 1904 at St. Louis, subject to our Congress extending an invitation. Like The Hague Tribunal, this Interparliamentary Union is one of the forces tending towards peace among the nations of the earth, and it is entitled to our support. I trust the invitation can be extended."

President Roosevelt, annual message, Dec. 7, 1903, For. Rel. 1903, xix.

"The Peace Conference which assembled at The Hague on May 18, 1899, marked an epoch in the history of nations. Called by His Majesty the Emperor of Russia to discuss the problems of the maintenance of general peace, the regulation of the operations of war, and the lessening of the burdens which preparedness for eventual war entails upon modern peoples, its labors resulted in the acceptance by the signatory powers of conventions for the peaceful adjustment of international difficulties by arbitration, and for certain humane amendments to the laws and customs of war by land and sea. A great work was thus accomplished by the conference, while other phases of the general subject were left to discussion by another conference in the near future, such as questions affecting the rights and duties of neutrals, the inviolability of private property in naval warfare, and the bombardment of ports, towns, and villages by a naval force.

"Among the movements which prepared the minds of governments for an accord in the direction of assured peace among men, a high place may fittingly be given to that set on foot by the Interparliamentary Union. From its origin in the suggestions of a member of the British House of Commons, in 1888, it developed until its membership included large numbers of delegates from the parliaments of the principal nations, pledged to exert their influence toward the conclusion of treaties of arbitration between nations and toward the accomplishment of peace. Its annual conferences have notably advanced the high purposes it sought to realize. Not only have many international treaties of arbitration been concluded, but, in the conference held in Holland in 1894, the memorable declaration in favor of a permanent court of arbitration was a forerunner of the most important achievement of the Peace Conference of The Hague in 1899.

"The annual conference of the Interparliamentary Union was held this year at St. Louis, in appropriate connection with the World's Fair. Its deliberations were marked by the same noble devotion to the cause of peace and to the welfare of humanity which had inspired its former meetings. By unanimous vote of delegates, active or retired members of the American Congress, and of every parliament in Europe with two exceptions, the following resolution was adopted:

"'Whereas, enlightened public opinion and modern civilization alike demand that differences between nations should be adjudicated and settled in the same manner as disputes between individuals are adjudicated, namely, by the arbitrament of courts in accordance with recognized principles of law, this conference requests the several governments of the world to send delegates to an international conference to be held at a time and place to be agreed upon by them for the purpose of considering:

"'1. The questions for the consideration of which the conference at the Hague expressed a wish that a future conference be called.

"'2. The negotiation of arbitration treaties between the nations represented at the conference to be convened.

"'3. The advisability of establishing an international congress to convene periodically for the discussion of international questions.

"'And this conference respectfully and cordially requests the President of the United States to invite all the nations to send representatives to such a conference.'

"On the 24th of September, ultimo, these resolutions were presented to the President by a numerous deputation of the Interparliamentary Union. The President accepted the charge offered to him, feeling it to be most appropriate that the Executive of the nation which had welcomed the conference to its hospitality should give voice to its impressive utterances in a cause which the American Government and people hold dear. He announced that he would at an early day invite the other nations, parties to The Hague conventions, to reassemble with a view to pushing forward toward completion the work already begun at The Hague by considering the questions which the first conference had left unsettled with the express provision that there should be a second conference.

"In accepting this trust the President was not unmindful of the fact, so vividly brought home to all the world, that a great war is now in progress. He recalled the circumstance that at the time when, on August 24, 1898, His Majesty the Emperor of Russia sent forth his invitation to the nations to meet in the interests of peace the United States and Spain had merely halted in their struggle to devise terms of peace. While at the present moment no armistice between the parties now contending is in sight, the fact of an existing war is no reason why the nations should relax the efforts they have so successfully made hitherto toward the adoption of rules of conduct which may make more remote the chances of future wars between them. In 1899 the conference of The Hague dealt solely with the larger general problems which confront all nations, and assumed no function of intervention or suggestion in the settlement of the terms of peace between the United States and Spain. It might be the same with a

reassembled conference at the present time. Its efforts would naturally lie in the direction of further codification of the universal ideas of right and justice which we call international law; its mission would be to give them future effect.

"The President directs that you will bring the foregoing considerations to the attention of the minister for foreign affairs of the Government to which you are accredited and, in discreet conference with him, ascertain to what extent that Government is disposed to act in the matter.

"Should his excellency invite suggestions as to the character of the questions to be brought before the proposed second peace conference, you may say to him that, at this time, it would seem premature to couple the tentative invitation thus extended with a categorical programme of subjects of discussion. It is only by comparison of views that a general accord can be reached as to the matters to be considered by the new conference. It is desirable that in the formulation of a programme the distinction should be kept clear between the matters which belong to the province of international law and those which are conventional as between individual governments. The final act of the Hague Conference, dated July 29, 1899, kept this distinction clearly in sight. Among the broader general questions affecting the right and justice of the relation of sovereign states which were then relegated to a future conference were, the rights and duties of neutrals, the inviolability of private property in naval warfare, and the bombardment of ports, towns, and villages by a naval force. The other matters mentioned in the final act take the form of suggestions for consideration by interested governments.

"The three points mentioned cover a large field. The first, especially, touching the rights and duties of neutrals, is of universal importance. Its rightful disposition affects the interests and well-being of all the world. The neutral is something more than an on-looker. His acts of omission or commission may have an influence—indirect, but tangible—on a war actually in progress; whilst on the other hand he may suffer from the exigencies of the belligerents. It is this phase of warfare which deeply concerns the world at large. Efforts have been made, time and again, to formulate rules of action applicable to its more material aspects, as in the declarations of Paris. As recently as the 28th of April of this year the Congress of the United States adopted a resolution reading thus:

"'*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That it is the sense of the Congress of the United States that it is desirable, in the interest of uniformity of action by the maritime states of the world in time of war, that the President endeavor to bring about an under-

standing among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents.

" 'Approved, April 28, 1904.'

" Other matters closely affecting the rights of neutrals are the distinction to be made between absolute and conditional contraband of war, and the inviolability of the official and private correspondence of neutrals.

"As for the duties of neutrals toward the belligerent, the field is scarcely less broad. One aspect deserves mention, from the prominence it has acquired during recent times, namely, the treatment due to refugee belligerent ships in neutral ports.

" It may also be desirable to consider and adopt a procedure by which states nonsignatory to the original acts of the Hague Conference may become adhering parties.

" You will explain to his excellency the minister of foreign affairs that the present overture for a second conference to complete the postponed work of the first conference is not designed to supersede other calls for the consideration of special topics, such as the proposition of the Government of the Netherlands, recently issued, to assemble for the purpose of amending the provisions of the existing Hague convention with respect to hospital ships. Like all tentative conventions, that one is open to change in the light of practical experience, and the fullest deliberation is desirable to that end.

" Finally, you will state the President's desire and hope that the undying memories which cling around The Hague as the cradle of the beneficent work which had its beginning in 1899 may be strengthened by holding the second peace conference in that historic city."

Mr. Hay, Sec. of State, to American diplomatic officers accredited to the signatories of the acts of The Hague conference of 1899, Oct. 21, 1904, For. Rel. 1904, 10.

" The goal to set before us as a nation, the goal which should be set before all mankind, is the attainment of the peace of justice, of the peace which comes when each nation is not merely safeguarded in its own rights, but scrupulously recognizes and performs its duty toward others." (President Roosevelt, annual message, Dec. 6, 1904, For. Rel. 1904, xxxix.)

" By the circular instruction dated October 21, 1904, the representatives of the United States accredited to the several governments which took part in the peace conference held at The Hague in 1899, and which joined in signing the acts thereof, were instructed to bring to the notice of those governments certain resolutions adopted by the Interparliamentary Union at its annual conference held at St. Louis in September last, advocating the assembling of a second peace con-

ference to continue the work of the first, and were directed to ascertain to what extent those governments were disposed to act in the matter.

"The replies so far received indicate that the proposition has been received with general favor. No dissent has found expression. The Governments of Austria-Hungary, Denmark, France, Germany, Great Britain, Italy, Luxemburg, Mexico, the Netherlands, Portugal, Roumania, Spain, Sweden and Norway, and Switzerland exhibit sympathy with the purposes of the proposal, and generally accept it in principle, with a reservation in most cases of future consideration of the date of the conference and the programme of subjects for discussion. The replies of Japan and Russia conveyed in like terms a friendly recognition of the spirit and purposes of the invitation, but on the part of Russia the reply was accompanied by the statement that in the existing condition of things in the Far East it would not be practicable for the Imperial Government, at this moment, to take part in such a conference. While this reply, tending as it does to cause some postponement of the proposed second conference, is deeply regretted, the weight of the motive which induces it is recognized by this Government and, probably, by others. Japan made the reservation only that no action should be taken by the conference relative to the present war.

"Although the prospect of an early convocation of an august assembly of representatives of the nations in the interest of peace and harmony among them is deferred for the time being, it may be regarded as assured so soon as the interested powers are in a position to agree upon a date and place of meeting and to join in the formulation of a general plan for discussion. The President is much gratified at the cordial reception of his overtures. He feels that in eliciting the common sentiment of the various governments in favor of the principle involved and of the objects sought to be attained a notable step has been taken toward eventual success.

"Pending a definite agreement for meeting when circumstances shall permit, it seems desirable that a comparison of views should be had among the participants as to the scope and matter of the subjects to be brought before the second conference. The invitation put forth by the Government of the United States did not attempt to do more than indicate the general topics which the final act of the first conference of The Hague relegated, as unfinished matters, to consideration by a future conference—adverting, in connection with the important subject of the inviolability of private property in naval warfare, to the like views expressed by the Congress of the United States in its resolution adopted April 28, 1904, with the added suggestion that it may be desirable to consider and adopt a procedure by which states nonsignatory to the original acts of The Hague

conference may become adhering parties. In the present state of the project, this Government is still indisposed to formulate a programme. In view of the virtual certainty that the President's suggestion of The Hague as the place of meeting of a second peace conference will be accepted by all the interested powers, and in view also of the fact that an organized representation of the signatories of the acts of 1899 now exists at that capital, this Government feels that it should not assume the initiative in drawing up a programme, nor preside over the deliberations of the signatories in that regard. It seems to the President that the high task he undertook in seeking to bring about an agreement of the powers to meet in a second peace conference is virtually accomplished so far as it is appropriate for him to act, and that, with the general acceptance of his invitation in principle, the future conduct of the affair may fitly follow its normal channels. To this end it is suggested that the further and necessary interchange of views between the signatories of the acts of 1899 be effected through the international bureau under the control of the permanent administrative council of The Hague. It is believed that in this way, by utilizing the central representative agency established and maintained by the powers themselves, an orderly treatment of the preliminary consultations may be insured and the way left clear for the eventual action of the Government of the Netherlands in calling a renewed conference to assemble at The Hague, should that course be adopted.

"You will bring this communication to the knowledge of the minister for foreign affairs and invite consideration of the suggestions herein made."

Mr. Hay, Sec. of State, to American diplomatic officers accredited to the signatories of the acts of The Hague Conference of 1899, Dec. 16, 1904, For. Rel. 1904, 13.

"By Article XIX. of the convention for the pacific settlement of international disputes, concluded at The Hague on July 29, 1899, the signatory governments reserved to themselves the right of concluding agreements, with a view to referring to arbitration all questions which they shall consider possible to submit to such treatment.

"Under this provision certain agreements have already been concluded, notably that between France and Great Britain.

"The long-standing views of the United States concerning the settlement of international disputes by arbitration, to which it has given practical effect in numerous instances, are too well known to need restatement. Repeated expressions to them have been given both by the executive and the legislative branches of the Government.

"As long ago as June 17, 1874, the House of Representatives by a unanimous vote gave expression to its opinion that 'differences

between nations should, in the interest of humanity and fraternity, be adjusted, if possible, by international arbitration.' It was therefore '*Resolved*, That the people of the United States, being devoted to the policy of peace with all mankind, enjoying its blessings and hoping for its permanence and its universal adoption, hereby through their Representatives in Congress recommend such arbitration as a rational substitute for war.'

"The President, in his last message to the Congress of the United States, on December 7, 1903, stated:

"'There seems ground for the belief that there has been a real growth among the civilized nations of a sentiment which will permit a gradual substitution of other methods than the method of war in the settlement of disputes. It is not pretended that as yet we are near a position in which it will be possible wholly to prevent war, or that a just regard for national interest and honor will in all cases permit of the settlement of international disputes by arbitration; but by a mixture of prudence and firmness with wisdom we think it is possible to do away with much of the provocation and excuse for war, and at least in many cases to substitute some other and more rational method for the settlement of disputes. The Hague court offers so good an example of what can be done in the direction of such settlement that it should be encouraged in every way.'

"Moved by these views, the President has charged me to instruct you to ascertain whether the Government to which you are accredited, which he has reason to believe is equally desirous of advancing the principle of international arbitration, is willing to conclude with the Government of the United States an arbitration treaty of like tenor to the arrangement concluded between France and Great Britain, on October 14, 1903.

"I inclose herewith a copy of both the English and French texts of that arrangement. Should the response to your inquiry be favorable, you will request the government to authorize its minister at Washington to sign the treaty with such plenipotentiary on the part of the United States as the President may be pleased to empower for the purpose."

Mr. Hay, Sec. of State, to American diplomatic officers accredited to the signatories of The Hague convention, Oct. 20, 1904, For. Rel. 1904, 8.

The substance of the inclosed convention between Great Britain and France was embraced in the first and second articles, which read:

"Article I. Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the permanent court of arbitration established at The Hague by the convention of the 29th July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two contracting states, and do not concern the interests of third parties.

"ARTICLE II. In each individual case the high contracting parties, before appealing to the permanent court of arbitration, shall conclude a special agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure." (For. Rel. 1904, 9.)

Treaties in precisely similar terms were concluded by the United States with the following countries: France, Switzerland, Germany, Portugal, Great Britain, Italy, Spain, Austria-Hungary, Mexico, Sweden and Norway, and Japan.

The Senate of the United States, Feb. 11, 1904, amended these treaties by substituting for the word "agreement," in Article II., the word "treaty," so as to require, in every case of arbitration under the general treaty, the making of a new special treaty, by and with the advice and consent of the Senate. Mr. Hay subsequently announced that the President would not submit this amendment to the other governments.

"Spain has concluded arbitration treaties with Argentina, Bolivia, Colombia, Guatemala, Mexico, Paraguay, Salvador, San Domingo, and Uruguay." (London *Times*, weekly, Mar. 21, 1902, p. 181, col. 4, "Spain.")

For a general arbitration treaty between the Argentine Republic and Uruguay, June 8, 1899, see For. Rel. 1899, 8–10.

II. *NONAMICABLE, SHORT OF WAR.*

1. WITHDRAWAL OF DIPLOMATIC RELATIONS.

§ 1089.

"At their last session Congress were informed that some of the naval officers of that Empire [Brazil] had advanced and practiced upon principles in relation to blockade and to neutral navigation which we could not sanction, and which our commanders found it necessary to resist. It appears that they have not been sustained by the Government of Brazil itself. Some of the vessels captured under the assumed authority of these erroneous principles have been restored, and we trust that our just expectations will be realized that adequate indemnity will be made to all the citizens of the United States who have suffered by the unwarranted captures which the Brazilian tribunals themselves have pronounced unlawful.

"In the diplomatic discussions at Rio de Janeiro of these wrongs sustained by citizens of the United States and of others which seemed as if emanating immediately from that Government itself the charge d'affaires of the United States, under an impression that his representations in behalf of the rights and interests of his countrymen were totally disregarded and useless, deemed it his duty, without waiting for instructions, to terminate his official functions, to demand his passports, and return to the United States. This movement, dictated by an honest zeal for the honor and interest of his country—motives which

operated exclusively on the mind of the officer who resorted to it—has not been disapproved by me. The Brazilian Government, however, complained of it as a measure for which no adequate intentional cause had been given by them, and upon an explicit assurance through their chargé d'affaires residing here that a successor to the late representative of the United States near that Government, the appointment of whom they desired, should be received and treated with the respect due to his character, and that indemnity should be promptly made for all injuries inflicted on citizens of the United States or their property contrary to the laws of nations, a temporary commission as chargé d'affaires to that country has been issued, which it is hoped will entirely restore the ordinary diplomatic intercourse between the two Governments and the friendly relations between their respective nations."

President J. Q. Adams, annual message, Dec. 4, 1827, Richardson's Messages, II. 385.

"This state of affairs was brought to a crisis in May last by the promulgation of a decree levying a contribution *pro rata* upon all the capital in the Republic between certain specified amounts, whether held by Mexicans or foreigners. Mr. Forsyth, regarding this decree in the light of a 'forced loan,' formally protested against its application to his countrymen and advised them not to pay the contribution, but to suffer it to be forcibly exacted. Acting upon this advice, an American citizen refused to pay the contribution, and his property was seized by armed men to satisfy the amount. Not content with this, the Government proceeded still further and issued a decree banishing him from the country. Our minister immediately notified them that if this decree should be carried into execution he would feel it to be his duty to adopt 'the most decided measures that belong to the powers and obligations of the representative office.' Notwithstanding this warning, the banishment was enforced, and Mr. Forsyth promptly announced to the Government the suspension of the political relations of his legation with them until the pleasure of his own Government should be ascertained.

"This Government did not regard the contribution imposed by the decree of the 15th May last to be in strictness a 'forced loan,' and as such prohibited by the 10th article of the treaty of 1826 between Great Britain and Mexico, to the benefits of which American citizens are entitled by treaty; yet the imposition of the contribution upon foreigners was considered an unjust and oppressive measure. Besides, internal factions in other parts of the Republic were at the same time levying similar exactions upon the property of our citizens and interrupting their commerce. There had been an entire failure on the part of our minister to secure redress for the wrongs which

our citizens had endured, notwithstanding his persevering efforts. And from the temper manifested by the Mexican Government he had repeatedly assured us that no favorable change could be expected until the United States should 'give striking evidence of their will and power to protect their citizens,' and that 'severe chastening is the only earthly remedy for our grievances.' From this statement of facts it would have been worse than idle to direct Mr. Forsyth to retrace his steps and resume diplomatic relations with that Government, and it was therefore deemed proper to sanction his withdrawal of the legation from the City of Mexico."

President Buchanan, annual message, Dec. 6, 1858, Richardson's Messages, V. 513.

A refusal to accept an ultimatum as to a claim for damages due a citizen of the United States may be followed by a withdrawal of our diplomatic representative at the country by which the demand is refused.

Mr. Cass, Sec. of State, to Mr. Dana, Oct. 31, 1860, 53 MS. Dom. Let. 224.

2. Retorsion or Retaliation.

§ 1090.

"Retorsion is the appropriate answer to acts which it is within the strict right of a state to do, as being general acts of state organisation, but which are evidence of unfriendliness, or which place the subjects of a foreign state under special disabilities as compared with other strangers, and result in injury to them. It consists in treating the subjects of the state giving provocation in an identical or closely analogous manner with that in which the subjects of the state using retorsion are treated. Thus if the productions of a particular state are discouraged or kept out of a country by differential import duties, or if its subjects are put at a disadvantage as compared with other foreigners, the state affected may retaliate upon its neighbors by like laws and tariffs."

Hall, Int. Law (5th ed.), 367, citing De Martens, Précis, § 254; Phillimore, III. § vii.; Bluntschli, § 505.

See, further, as to retorsion, Rivier, Principes du Droit des Gens, II. 189.

"Retorsion and reprisal bear about the same relation to arbitration and war, as the personally abating a nuisance does to a suit for its removal. States as well as individuals have a right to protect themselves when injustice is done them by removing the cause of offence; and that in disputes between nations this right is more largely extended than in disputes between individuals, is to be explained by the fact that in disputes between nations there are not the modes of

redress by litigation which exist in suits between individuals. 'Retorsion' and 'reprisal' are often used convertibly; though the difference is that 'retorsion' is retaliation in kind, while 'reprisal' is seizing or arresting the goods or trade of subjects of such state as set-off for the injuries received. Under this head fall embargoes, and what are called pacific blockades (*blocus pacifique*), by the former of which trade is forbidden with the offending state; by the latter of which a port belonging to the offending state is closed to foreign trade. These acts approach in character to war, to which they generally lead; yet technically they are not war, and there are cases where the remedy has been applied without war resulting."

Wharton, Com. Am. Law, § 206.

"Reciprocating to the subjects of a nation, or retaliating on them its unjust proceedings towards our citizens, is a political and not a legal measure. It is for the consideration of the Government not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights, and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation and to thwart its views. . . . If it be the will of the Government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the Government will manifest that will by passing an act for the purpose. Till such an act be passed, the court is bound by the law of nations which is a part of the law of the land."

Marshall, C. J., The Nereide, 9 Cranch, 388, 422.

By the act of April 18, 1818, the ports of the United States were closed, after September 30, 1818, against British vessels arriving from a British colony which, by the ordinary laws, was closed against American vessels.

3 Stat. 432.

A British ship, coming from a foreign port, not British, to a port of the United States, did not become liable to forfeiture under this act by touching at an intermediate British closed port from necessity, in order to procure provisions, and without trading there. (The Frances and Eliza, 8 Wheat. 398.) Nor did the act prohibit the coming of British vessels from a British closed port, through a foreign port, not British, where the continuity of the voyage was actually and fairly broken. (The Pitt, 8 Wheat. 371.)

The Chinese Government having persistently refused to pay a claim for personal injuries to a citizen of the United States which it admitted to be due, the United States minister at China was, in 1855, instructed, at his discretion, "to resort to the measure of withholding duties to the amount thereof."

Mr. Marcy, Sec. of State, to Mr. Parker, Oct. 5, 1855, MS. Inst. China, I. 127.

"Anticipating that an attempt may possibly be made by the Canadian authorities in the coming season to repeat their unneighborly acts toward our fishermen, I recommend you to confer upon the Executive the power to suspend, by proclamation, the operation of the laws authorizing the transit of goods, wares, and merchandise in bond across the territory of the United States to Canada; and further, should such an extreme measure become necessary, to suspend the operation of any laws whereby the vessels of the Dominion of Canada are permitted to enter the waters of the United States."

President Grant, annual message, Dec. 5, 1870, For. Rel. 1870, 11.

3. Display of Force.

§ 1091.

"The constant maintenance of a small squadron in the Mediterranean is a necessary substitute for the humiliating alternative of paying tribute for the security of our commerce in that sea, and for a precarious peace, at the mercy of every caprice of four Barbary States, by whom it was liable to be violated. An additional motive for keeping a respectable force stationed there at this time is found in the maritime war raging between the Greeks and the Turks, and in which the neutral navigation of this Union is always in danger of outrage and depredation. A few instances have occurred of such depredations upon our merchant vessels by privateers or pirates wearing the Grecian flag, but without real authority from the Greek or any other Government. The heroic struggles of the Greeks themselves, in which our warmest sympathies as freemen and Christians have been engaged, have continued to be maintained with vicissitudes of success adverse and favorable.

"Similar motives have rendered expedient the keeping of a like force on the coasts of Peru and Chile, on the Pacific. The irregular and convulsive character of the war upon the shores has been extended to the conflicts upon the ocean. An active warfare has been kept up for years with alternate success, though generally to the advantage of the American patriots. But their naval forces have not always been under the control of their own Governments. Blockades, unjustifiable upon any acknowledged principles of international law, have been proclaimed by officers in command, and though disavowed by the supreme authorities, the protection of our own commerce against them has been made cause of complaint and erroneous imputations against some of the most gallant officers of our Navy. Complaints equally groundless have been made by the commanders of

the Spanish royal forces in those seas; but the most effective protection to our commerce has been the flag and the firmness of our own commanding officers. The cessation of the war by the complete triumph of the patriot cause has removed, it is hoped, all cause of dissension with one party and all vestige of force of the other. But an unsettled coast of many degrees of latitude forming a part of our own territory and a flourishing commerce and fishery extending to the islands of the Pacific and to China still require that the protecting power of the Union should be displayed under its flag as well upon the ocean as upon the land."

President J. Q. Adams, annual message, Dec. 6, 1825, Richardson's Messages, II. 308.

When, in 1852, the Japanese authorities refused to protect citizens of the United States visiting or cast ashore in Japan, it was held proper (there being then no treaty protection) to display at Japan an imposing naval force, and to inform the Japanese Government that the Government of the United States will insist upon the protection and hospitality asked for being given.

Mr. Conrad, Act. Sec. of State, to Mr. Kennedy, Nov. 5, 1852, MS. Notes, Special Missions.

Several citizens of the United States, having been massacred at Jaffa, in January, 1858, and the Turkish Government having taken no efficient measures to bring the assassins to justice, the Secretary of State requested the Secretary of the Navy "that orders may be given to the commanding officer of our squadron in the Mediterranean to put himself in communication with the minister of the United States at Constantinople, and after receiving from him such information as he may require, to repair to Jaffa and to take such measures as may be in his power to induce the Turkish authorities to inflict upon the criminals referred to the punishment which they so richly deserve."

Mr. Cass, Sec. of State, to Mr. Toucey, Sec. of Navy, Aug. 10, 1858, 49 MS. Dom. Let. 111.

Writing to Mr. Beach, American consul-general at Guayaquil, May 1, 1885, with reference to the case of Julio R. Santos, a naturalized citizen of the United States of Ecuadorean origin, who was imprisoned in Ecuador on account of alleged participation in a political uprising, Mr. Bayard said: "This instruction will be handed to you by Commander Mahan, of the U. S. S. *Wachusett*, who revisits the waters of Ecuador by direction of the Secretary of the Navy for that purpose. Commander Mahan will be instructed to remain within reach pending the prompt disposal of Mr. Santos's case, and,

in the probable event of his release, he will be afforded an opportunity to return to the United States on the *Wachusett*, by way of Panama, should he so desire." Writing on June 17, 1885, on the same subject, Mr. Bayard said: "You will understand that the mission of the *Wachusett* is one of peace and good will, to the end of exerting the moral influence of our flag toward a discreet and mutually honorable solution, and in the event of Mr. Santos being released, to afford him the means of returning to the country of his allegiance and domicil. The purpose of her presence is not to be deemed minatory; and resort to force is not competently within the scope of her commander's agency. If all form of redress, thus temperately but earnestly solicited, be unhappily denied, it is the constitutional prerogative of Congress to decide and declare what further action shall be taken."

Mr. Bayard, Sec. of State, to Mr. Beach, No. 30, May 1, 1885, For. Rel. 1886, 251, 253; same to same, No. 42, June 17, 1885, id. 262, 266.

"It is always expected that the agents of this Department abroad will exercise extreme caution in summoning national war vessels to their aid at critical junctures, especially if there be no practical purpose to be subserved by their presence."

Mr. Bayard, Sec. of State, to Mr. Neill, chargé, No. 168, Nov. 16, 1887, MS. Inst. Peru, XVII. 303.

This instruction related to a correspondence between the legation and an American naval officer, which resulted in two U. S. men-of-war coming to Lima, pending the consideration by the Peruvian Congress of legislation which was supposed to tend to the confiscation of the property of citizens of the United States.

See, also, Mr. Bayard, Sec. of State, to Sec. of Navy, July 2, 1888, 169 MS. Dom. Let. 48.

4. Use of Force.

(1) with special authority.

§ 1092.

In 1853 the Government of the United States sent out a naval vessel called the *Water Witch* to survey the tributaries of the Rio de la Plata and report on the commercial condition of the countries bordering on its waters. Permission was obtained from the Argentine and Brazilian Governments to explore such of the waters as were within their jurisdiction, and the surveys of the Plate, the Paraguay, and the Parana had been in progress about a year and a half when, on January 31, 1855, Lieut. T. J. Page, who was in command of the expedition and who was about to ascend the river Salado, sent Lieut. William N. Jeffers with the *Water Witch* to ascend the Parana as

far as her draft would allow. Lieutenant Jeffers left Corrientes on the 1st of February, and had proceeded only a few miles above the point where the Parana forms the common boundary between Paraguay and the Argentine province of Corrientes when he was hailed and afterwards fired into by the Paraguayan fort of Itapiru. The firing of two blank cartridges by the fort was followed by a shot which carried away the wheel of the *Water Witch*, cut the ropes, and mortally wounded the helmsman. The *Water Witch* returned the fire, and the action continued for some minutes. It was admitted that the Paraguayan Government had forbidden foreign men-of-war to enter the waters within its jurisdiction, but it was claimed on the part of the *Water Witch* that, at the point in the Parana where she was fired on, the channel on the Paraguayan side of the river was the main and only navigable channel; that, as the river at that point formed a common boundary between the Argentine Confederation and Paraguay, the navigation of the channel belonged equally to both countries; and that the *Water Witch* therefore had a right to navigate it under the license from the Argentine Government, without regard to the Paraguayan prohibition. The other matter was that of the claim of the United States and Paraguay Navigation Company, which, although it had not been presented by the Government of the United States to that of Paraguay, had, it seems, been pressed upon the latter Government by Edward A. Hopkins, a citizen of the United States, with whom the claim originated, and had been adduced by the Paraguayan Government as an obstacle to the exchange of the ratifications of a treaty of amity and commerce which was concluded on March 4, 1853, with a representative of the United States. In his annual message to Congress of December 8, 1857, President Buchanan referred to the case of the *Water Witch*, and also to the injuries which citizens of the United States were alleged to have suffered by the seizure of their property and otherwise in Paraguay, and stated that a demand for redress would be made in a firm but conciliatory spirit. He also recommended that the Executive be authorized to use "other means in the event of a refusal." By the joint resolution of June 2, 1858, he was authorized to use such measures and such force as might be necessary and advisable in the event of a refusal of the Paraguayan Government to grant redress "in connection with the attack on the U. S. S. *Water Witch*, and with other matters referred to in the annual message." By the act of June 12, 1858, the sum of $10,000 was appropriated for the expenses of a commissioner to Paraguay in execution of the joint resolution. On September 9, 1858, Mr. James B. Bowlin, of Missouri, was appointed special commissioner to Paraguay. In his annual message of December 6, 1858, President Buchanan announced to Congress that Mr. Bowlin had proceeded to Paraguay, and that, in view of the contingency that his efforts to

obtain just satisfaction might be unsuccessful, the Secretary of the Navy had fitted out and dispatched a naval force to rendezvous near Buenos Ayres.

The frigate *Sabine*, under Commodore Shubrick, to whom the command of the expedition was entrusted, left New York with Mr. Bowlin on October 17, 1858, and arrived in the river Plate on the 18th of December, finding most of the vessels comprising the expedition already there. On the 30th of the same month Mr. Bowlin and Commodore Shubrick left Montevideo with the steamers *Fulton* and *Water Witch*, and on January 25, 1859, arrived at Ascuncion. On February 10 Mr. Bowlin took leave of the President of Paraguay, and a week later set out for the United States. In his annual message to Congress of December 19, 1859, President Buchanan announced that "all our difficulties" with Paraguay had been "satisfactorily adjusted." At the same time he stated that the entire cost of the expedition had been defrayed out of the ordinary appropriations for the naval service, except the sum of $289,000 applied to the purchase of seven steamers, which were believed to be worth more than their cost, and which were then actively employed in the naval service, and that the appearance of so large a force in the distant waters of the Plate and the admirable conduct of the officers and men employed in it had had "a happy effect in favor of our country throughout all that remote portion of the world." In the case of the *Water Witch* Mr. Bowlin obtained "ample apologies" and the payment of $10,000 for the family of the seaman who was killed at the wheel. He also concluded, on February 4, 1859, a treaty of amity and commerce, which included a stipulation for the free navigation of the river Paraguay. For the settlement of the claims of the United States and Paraguay Navigation Company he signed a treaty of arbitration. The commission organized under this treaty decided that the claims of the company were unfounded.

Moore, Int. Arbitrations, II. 1485, chap 32; annual messages of President Buchanan, Dec. 8, 1857, and Dec. 19, 1859; Curtis, Life of Buchanan, II. 225; Buchanan's Defence, 256, 265.

Calvo severely criticizes the course of the Government of the United States in these matters. His account is not entirely accurate. He says that the United States spent in the preparation of the expedition "a sum of about 36,000,000 francs," and this for the purpose "of supporting the unjust claims made by Mr. Hopkins to the amount of $1,000,000." He overlooks in this particular assertion the case of the *Water Witch*, which he had just narrated. It is a fact, however, that the claim which originated with Hopkins was held to be unfounded, and it is a singular circumstance that, although the claim had been pressed by Hopkins himself, it had not actually been presented by the United States to the Paraguayan Government prior to the sending out of the expedition. Mr. Richard Fitzpatrick, who was sent as a special commissioner to Paraguay in 1856, was directed "at

a proper time and in a proper manner" to make known to the Paraguayan Government that its proceedings with regard to the United States and Paraguay Navigation Company appeared to be unjust and oppressive and to have been productive of loss to the company; but, before adverting to the subject, he was to endeavor to secure the exchange of the ratifications of the treaty of amity and commerce, concluded on March 4, 1853. He did not succeed in attaining this object, and withdrew mentioning the subject of the claim. (Calvo, Droit International, 5th ed., III. 124–127; Moore, Int. Arbitrations, II. 1489–1492.)

In 1871 three American steamships, the *Hero*, *Nutrias*, and *San Fernando*, the property of the Venezuela Steam Transportation Company, a New York corporation, were taken possession of in the waters of Venezuela and employed in war and otherwise by parties which were contending for the control of the Government. One of the ships was afterwards voluntarily released, while the remaining two were delivered over to the commander of the U. S. S. *Shawmut*, who had been sent out to obtain their restoration. The United States subsequently presented a claim for damages, the adjustment of which was for various causes long delayed. In June, 1890, Congress adopted a joint resolution authorizing the President to take such measures as in his judgment might be necessary promptly to obtain from the Venezuelan Government an indemnity. After the passage of this resolution the claim was brought to an arbitration, which resulted in an award in favor of the United States for $150,000.

Moore, Int. Arbitrations, II. 1693.

(2) WITHOUT SPECIAL AUTHORITY.

§ 1093.

The U. S. sloop of war *Dale*, Captain Pearson, visited the island of Johanna in August, 1851, and under threat of bombarding the town obtained $1,000 as a measure of redress for the unlawful imprisonment and detention of Captain Movers, of the American whaling brig *Maria*, of Nantucket.

Mr. Everett, Sec. of State, to Captain Movers, Dec. 17, 1852, 41 MS. Dom. Let. 150.

As enclosing a despatch of the United States consul at Tahiti, of March 13, 1858, which suggested that a small vessel of war be sent to the Society Islands once a year for the protection of the American whaling fleet, see Mr. Cass, Sec. of State, to Mr. Toucey, Sec. of Navy, July 28, 1858, 49 MS. Dom. Let. 68.

In 1852 a controversy broke out between the authorities of Greytown, or San Juan del Norte, and the Accessory Transit Company, an organization composed of citizens of the United States, who held a charter from Nicaragua, as to the occupation by the company of a

piece of land on the north side of the harbor, known as Punta Arenas, over which jurisdiction was claimed by the municipality. Greytown was regarded by the United States as being within the limits of Nicaragua. It was understood to claim independence under a charter from the Mosquito king; but the United States never recognized the Mosquito king nor the independence of the town, though American naval officers were instructed to respect the police regulations of any de facto authorities there, and not to molest such authorities unless they should attempt to disturb the rights of American citizens. On February 8, 1853, the city council passed a resolution notifying the company to remove its entire establishment within a certain number of days, as the land was said to be needed for public uses. The buildings were not removed, and they were subsequently demolished by the Greytown authorities. In consequence of the dispute as to jurisdiction over Punta Arenas the difficulties between the municipality and the Accessory Transit Company continued. Early in May, 1853, some men, who were then or had previously been employed by the company, ran off with some of its property in a boat to Greytown. They were pursued by employees of the company, who, while attempting to arrest the fugitives, were compelled by the municipal police to desist, and one of them was afterwards arrested at Punta Arenas on the charge of assault and battery, but he was subsequently discharged on bond. Disputes also existed as to the payment of dues and port charges by the company's steamers. In May, 1854, an attempt was made by the Greytown authorities to arrest at Punta Arenas a captain of one of the company's steamers, who was charged with having murdered a native boatman. Mr. Borland, American minister to Central America, who happened to be on board the steamer, assisted the captain in resisting arrest. Mr. Borland's action produced great excitement, and later in the day, while he was on a visit to the American consul at Greytown, an attempt was made to arrest him. A crowd of persons went to the consul's house for that purpose. The mayor, however, hastened to assure Mr. Borland that the proceedings had been taken without his order or authority; but while the conversation was going on some one from the crowd threw a broken bottle at Mr. Borland, slightly wounding him in the face. The person who threw the missile was not recognized. Soon afterwards the crowd dispersed. In June, 1853, Captain Hollins, of the U. S. S. *Cyane*, was sent to Greytown to obtain redress for the damages suffered by the Accessory Transit Company and an apology for the indignities to Mr. Borland. The instructions of Mr. Dobbin, Secretary of the Navy, to Captain Hollins bore date June 10, 1854. They refer to the two incidents of the stealing of the company's property and the indignity to Mr. Borland, and declared it to be desirable that the people of Greytown "should be taught that the United States will not tolerate these out-

rages, and that they have the power and the determination to check them. It is, however, very much to be hoped that you can effect the purposes of your visit without a resort to violence and destruction of property and loss of life. The presence of your vessel will, no doubt, work much good. The Department reposes much in your prudence and good sense." When Captain Hollins arrived at Greytown he found that the American consul had already demanded, on behalf of the United States, an indemnity for the Accessory Transit Company. On July 12, 1854, Captain Hollins, at nine o'clock in the morning, issued a proclamation announcing that, if the demands for satisfaction presented by the consul were not forthwith complied with, he would, at nine o'clock on the following morning, bombard the town. The demands embraced the immediate payment of $24,000 as an indemnity for injuries to the Accessory Transit Company and for outrages perpetrated on the persons of American citizens, and an apology for the indignity to Mr. Borland, together with satisfactory assurances of future good behavior. These demands were not complied with, and at daylight on the morning of the 13th of July Captain Hollins sent a steamer to the town to take away such persons as desired to go. At nine o'clock the batteries of the *Cyane* were opened on the town with shot and shell for three-quarters of an hour. After an intermission of the same length they were opened again for half an hour, and this was followed by an intermission of three hours, after which the firing was renewed for twenty minutes, and then the bombardment ceased. The object of the several intervals in the bombardment was to afford an opportunity to the people of the town to treat and arrange matters. No advantage was taken of it, and at four o'clock in the afternoon a force was sent ashore to complete the destruction of the town by fire. No lives were lost. "The execution," said Captain Hollins, in his report of the incident, "done by our shot and shell amounted to the almost total destruction of the buildings; but it was thought best to make the punishment of such a character as to inculcate a lesson never to be forgotten by those who have for so long a time set at defiance all warnings, and satisfy the whole world that the United States have the power and determination to enforce that reparation and respect due to them as a Government in whatever quarter the outrages may be committed."

46 Br. & For. State Papers, 859, 866–872, 875, 877, 878 et seq; 47 id. 1019–1038; S. Ex. Doc. 9, 35 Cong. 1 sess.

"I could not doubt that the case demanded the interposition of this Government. Justice required that reparation should be made for so many and such gross wrongs, and that a course of insolence and plunder, tending directly to the insecurity of the lives of numerous travelers and of the rich treasure belonging to our citizens passing

over this transit way, should be peremptorily arrested. Whatever it might be in other respects, the community in question, in power to do mischief, was not despicable. It was well provided with ordnance, small arms, and ammunition, and might easily seize on the unarmed boats, freighted with millions of property, which passed almost daily within its reach. It did not profess to belong to any regular government, and had, in fact, no recognized dependence on or connection with anyone to which the United States or their injured citizens might apply for redress or which could be held responsible in any way for the outrages committed. Not standing before the world in the attitude of an organized political society, being neither competent to exercise the rights nor to discharge the obligations of a government, it was, in fact, a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages depredating on emigrant trains or caravans and the frontier settlements of civilized states. . . .

"When the *Cyane* was ordered to Central America, it was confidently hoped and expected that no occasion would arise for 'a resort to violence and destruction of property and loss of life.' Instructions to that effect were given to her commander; and no extreme act would have been requisite had not the people themselves, by their extraordinary conduct in the affair, frustrated all the possible mild measures for obtaining satisfaction. A withdrawal from the place, the object of his visit entirely defeated, would under the circumstances in which the commander of the *Cyane* found himself have been absolute abandonment of all claim of our citizens for indemnification and submissive acquiescence in national indignity. It would have encouraged in these lawless men a spirit of insolence and rapine most dangerous to the lives and property of our citizens at Punta Arenas, and probably emboldened them to grasp at the treasures and valuable merchandise continually passing over the Nicaragua route. It certainly would have been most satisfactory to me if the objects of the *Cyane's* mission could have been consummated without any act of public force, but the arrogant contumacy of the offenders rendered it impossible to avoid the alternative either to break up their establishment or to leave them impressed with the idea that they might persevere with impunity in a career of insolence and plunder.

"This transaction has been the subject of complaint on the part of some foreign powers, and has been characterized with more of harshness than of justice. If comparisons were to be instituted, it would not be difficult to present repeated instances in the history of states standing in the very front of modern civilization where communities far less offending and more defenseless than Greytown have been chastised with much greater severity, and where not cities only have

been laid in ruins, but human life has been recklessly sacrificed and the blood of the innocent made profusely to mingle with that of the guilty."

President Pierce, annual message, Dec. 4, 1854, Richardson's Messages, V. 282.

In June, 1863, the *Pembroke*, a small American steamer, laden with merchandise from Yokohama to Nagasaki, in attempting to pass through the Straits of Shimonoseki was fired upon by the shore batteries and by an armed brig belonging to the Prince of Nagato. She was not struck, but she abandoned her voyage and retraced her way to Nagasaki. The American minister demanded redress for the insult to the American flag, and by his direction Commander McDougall, of the U. S. S. *Wyoming*, proceeded in July to retaliate upon the hostile daimio. He found at Shimonoseki three vessels belonging to the Prince, lying at anchor near the shore. He attacked them, and, after a sharp conflict with them and the shore batteries, sank a brig and blew up a steamer, by which action some forty persons were said to have been killed. The loss of the *Wyoming* was five killed and six wounded. A French steamer and a Dutch corvette had also been fired upon at the straits by the hostile daimio. The American minister presented to the Japanese Government a claim on account of the *Pembroke* for $10,000 for loss of time and freight and the abandonment of her voyage. The claim was promptly paid.

Mr. Seward, Sec. of State, to Mr. Pruyn, min. to Japan, No. 50, Oct. 3, 1863, Dip. Cor. 1863, II. 1060, acknowledging the receipt of Mr. Pruyn's despatches Nos. 48 and 49, July 24, and No. 50, July 25, 1863, printed in the same volume. By the act of February 22, 1883, the Secretary of the Treasury was directed to distribute a certain sum among the officers and crew of the *Wyoming*, "for extraordinary, valuable, and specially meritorious and perilous services in the destruction of hostile vessels in the Straits of Shimonoseki," July 16, 1863. (22 Stat. 421.)

As to the *Monitor* claim, and the refusal of the United States further to press it, see For. Rel. 1888, II. 1068, 1069.

As to the opening of the Straits of Shimonoseki, Japan, by the allied fleets, in 1864, see supra, § 849.

In September, 1864, the treaty powers made a hostile demonstration against the Prince of Nagato, destroyed the batteries of Chosu, commanding the Straits of Shimonoseki, and compelled an unconditional surrender. The Tycoon was then required to express his disapproval of the course of his adversary, the rebellious Prince of Nagato, and to provide for the payment of the expenses of the expedition, or else to open more of his ports to commerce. Accordingly a treaty was concluded October 22, 1864, by representatives of the United States, Great Britain, France, and the Netherlands on the

one part, and a representative of the Tycoon on the other, under which the Japanese Government promised to pay the four powers $3,000,000, "to include all claims of whatever nature for past aggressions on the part of Nagato, whether indemnities, ransom for Shimonoseki, or expenses entailed by the operations of the allied squadrons," or else to open Shimonoseki or some other eligible port in the Island Sea. The indemnity was paid and duly divided among the four powers. By an act of Congress approved February 22, 1883, the President was directed to return the United States' share to the Government of Japan, after deducting a certain amount for the officers and crew of the U. S. S. *Wyoming* and of the steamer *Takiang* for services in destroying hostile vessels in the Straits of Shimonoseki, the former on the 18th of July, 1863, and the latter in September, 1864. The money was duly returned with the specified deduction.

Mr. Bayard, Sec. of State, to Mr. Cowie, April 13, 1888, For. Rel. 1888, II. 1069, 1070–1071.

When the injury involves also an insult to the flag of the United States, the demand for satisfaction must be imperative, and the United States naval force at Japan may not only be used to protect the legation and any of the citizens of the United States there resident, but the Tycoon is to be informed that "the United States will, as they shall find occasion, send additional forces to maintain the foregoing demands."

Mr. Seward, Sec. of State, to Mr. Pruyn, Sept. 1, 1863, MS. Inst. Japan, I. 105.

See, also, same to same, No. 45, July 10, 1863, Dip. Cor. 1863, II. 1039.

The *Haytian Republic*, an American steamer, sailed from New York, October 4, 1888, with cargo and mails for various ports, including certain ports in Hayti. On the 21st of October, while going out of the Bay of St. Marc, she was taken possession of by the Haytian man-of-war *Dessalines* on a charge of breach of blockade. She was taken to Port au Prince, where she was condemned by a special prize tribunal. The United States objected to the seizure of the vessel, as well as to the proceedings by which she was condemned, and on the ground that her condemnation was improper asked for her release and for damages for the injuries suffered by her owners, as well as by the captain, officers, and crew. Admiral Luce was sent with the *Galena* and *Yantic* to Port au Prince to take the vessel in case the Haytian Government should refuse to give her up. He arrived at that port on the 20th of December, 1888, and at once addressed a communication to the American minister, requesting him to represent to the Haytian authorities the necessity of the immediate withdrawal of the guard from the *Haytian Republic*, in order

to avoid the possibility of a collision between the guard and the officer whom he should shortly send to her. The admiral stated that he should take the steamer to the anchorage in the outer harbor before sunset. The Haytian Government, on being advised of the situation of things, surrendered the steamer, and an indemnity was subsequently paid for her arrest and detention.

See S. Ex. Doc. 69, 50 Cong. 2 sess. and particularly pp. 171, 198, 241, et seq.; For. Rel. 1889, 491–494, 497, 503–511.

Perhaps the most remarkable case in which force was used without Congressional authority was that of the march to Peking, in 1900, for the purpose of aiding in the deliverance of the beleaguered legations.

See supra, China, §§ 808–810.

(3) GAIN OF PREFERENCE IN PAYMENT.

§ 1094.

It having been agreed in the protocols signed at Washington on May 7, 1903, between Germany, Great Britain, and Italy, on the one hand, and Venezuela, on the other, that the question whether the three first-named powers, which had united in a hostile blockade of Venezuelan ports, were entitled to the preferential payment of their claims against Venezuela over nonblockading powers having similar claims, should be referred to The Hague Tribunal, and the nonblockading powers having assented to the reference, a tribunal was specially constituted from the members of the Permanent Court of Arbitration, consisting of Mr. N. V. Mouravieff, Russian minister of justice; Mr. L. Lammasch, member of the Austrian House of Peers, and Mr. F. de Martens, permanent member of the council of the Russian ministry of foreign affairs. The arbitrators found that the Government of Venezuela had, in the protocols of February 13, 1903, recognized "in principle the justice of the claims" presented by the Governments of Germany, Great Britain, and Italy, while in the protocols between Venezuela and the nonblockading powers the justice of the claims of the latter was not so recognized; that, until the end of January, 1903, the Venezuelan Government did not protest against the pretension of the blockading powers to obtain special guarantees for the settlement of their claims, and through all the diplomatic negotiations made a formal distinction between "the allied powers" and "the neutral or pacific powers;" that the neutral powers who claimed before the tribunal equality in the distribution of the customs receipts pledged for the payment of foreign claims did not protest against the pretension of the blockading powers to a preferential

treatment, either at the moment when the war against Venezuela ceased or immediately after the signature of the protocols of February 13, 1903; that, all through the negotiations which resulted in the signature of the protocols of February 13, 1903, the British and German Governments constantly insisted on obtaining guarantees for "a sufficient and punctual discharge" of Venezuela's obligations to them; that Venezuela accepted this reservation without protest, and engaged with respect to the allied powers alone to offer special guarantees for the accomplishment of her engagements, and that the blockading powers were consequently entitled to preferential treatment for the payment of their claims out of the customs revenues in question.

For. Rel. 1904, 506.

The arbitrators, in the course of their decision, declared that they were "not called upon to decide whether the three blockading powers had exhausted all pacific methods in their dispute with Venezuela in order to prevent the employment of force;" but adverted to the fact "that since 1901 the Government of Venezuela categorically refused to submit its dispute with Germany and Great Britain to arbitration, which was proposed several times, and especially by the note of the German Government of July 16, 1901." (For. Rel. 1904, 507.)

For the final report of the Hon. W. L. Penfield, agent and of counsel for Venezuela and the United States before the tribunal, see For. Rel. 1904, 509.

As to the claim of France to equal treatment in the settlement of the claims against Venezuela, as opposed to the preferential claim of the blockading powers, see For. Rel. 1903, 410.

5. Reprisals.

(1) Nature of the remedy.

§ 1095.

"According to Molloy (*De Jure Maritimo*, b. i, ch. ii, s. 15), 'persons murdered, spoiled, or otherwise damnified in hostile manner in the territories or places belonging to that king to whom letters of request are issued forth; if no satisfaction be returned, letters of reprisal may issue forth; and the parties petitioners are not in such cases compelled to resort to the ordinary prosecutions, but the prince of that country against whom the same are awarded, must repair the damage out of his or that estate who committed the injuries; and if that proves deficient, it must then fall as a common debt on his country;' and of such reprisals Molloy then proceeds to give many instances out of the maritime annals of this country."

Mr. C. Anstey, House of Commons, June 25, 1850, Hansard, Parl. Debates, CXII, 355, 371.

The law of nations does not allow reprisals, except in cases of violent injuries directed and supported by the state, and the denial of justice by all the tribunals and the prince.

Randolph, At. Gen., 1793, 1 Op. 30.

"'Reprisals,' says Vattel, 'are used between nation and nation in order to do themselves justice when they can not otherwise obtain it. If a nation has taken possession of what belongs to another; if it refuses to pay a debt or repair an injury, or to make a just satisfaction, the latter may seize what belongs to the former, and apply it to its own advantage, till it obtains full payment for what is due, together with interest and damages; or keep it as a pledge till the offending nation has made ample satisfaction. The effects thus seized 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 the war is declared, or hostilities commenced; and then, also, the effects seized may be confiscated.' These remarks are more particularly applicable to *general* reprisals, although, even then, sequestration sometimes immediately follows the seizure. Where such extreme measures are resorted to it is not easy to distinguish between them and actual hostilities. But in *special* reprisals, made for the indemnification of injuries upon individuals, and limited to particular places and things, immediate confiscation is more frequently resorted to. Thus, Cromwell having made a demand on Cardinal Mazarin, during the minority of Louis XIV. for indemnity to a Quaker, whose vessel had been illegally seized and confiscated on the coast of France, and receiving no reply within the three days specified in the demand, dispatched two ships-of-war to make prize of French vessels in the channel. The vessels were seized and sold, the Quaker paid out of the proceeds the value of his loss, and the French ambassador apprised that the residue was at his service. This substantial act of justice caused neither reclamation nor war."

Halleck, Int. Law (Baker's ed.), I. 434, citing, Vattel, Droit des Gens, liv. ii. chap. xviii. § 342.

"Neutral nations in time of war have now no right, when they are injured, to exact compensation from the countrymen of the aggressors, though the Barbary States were said by Lord Stowell to do so 'under a law of nations now peculiar to themselves.' Neither in time of peace are nations entitled to have recourse to reprisals, until reparation for the injury sustained has been formally asked and

denied, both of the proper tribunal, and of the government, *in re minime dubia*."

1 Phillimore, Int. Law (3d ed.), 43–44, citing Rynkershoek, Observationes Juris Romani, c. ii., vol. ii.; The Maria, 1 C. Rob. 373; The Walsingham Packet, id. 83; The Snipe, Edwards' Adm. 412; The Kinder Kinder, 2 C. Rob. 88.

"The British, in case of war, seize every vessel in their ports belonging to the enemy. With this single exception, the relic of an age of barbarism and piracy, and which makes part of the King's droits of admiralty, I am not aware that any civilized nation does at this time, even in case of war, seize the property of private individuals which in time of peace had been trusted to the hospitality and good faith of the country. I am certain that the United States never were guilty of such an act as a nation, neither in 1793, when the British were plundering without notice our West India trade, and when an unsuccessful motion to that effect was made, never to be again repeated, nor in 1798; at the time of the greatest excitement and quasi-war against France, nor when war was declared against England, in 1812. Since the motion of 1793, which, if brought to the test, would have been indignantly rejected, during the various periods when our trade was exposed to the depredations of one or both the belligerents, amongst all the devices and expedients proposed in order to avoid war, never was the iniquitous proposal of seizing property confided to the protection of our laws again suggested. And I trust that, whilst so much is said of what is due to the honor of the nation (how applicable to the present state of things is another question), such truly dishonorable act is not in contemplation.

"The preceding observation is strictly correct with respect to seizures in time of peace, and is intended to show the gross impropriety of supposing that such seizures are a peace measure. I admit that they have sometimes taken place in time of war. Such was the sequestration by several of the States of the British debts during the war of independence. Russia also suspended the payment of the interest on a loan formerly contracted in Holland whilst she was at war with France, of which Holland had become a province. Yet these are not examples for imitation. The seizure without violence of property belonging to the offending Government and not to individuals would, I think, be legitimate in some cases.

"With respect to letters of marque and reprisal, if we were to judge of the act on the immutable principles of justice and in conformity with those which regulate the conduct of nations by land, private war of every description must be disallowed altogether. But we are compelled, in this as in many other instances, to recur to the practice of nations, to their actual practice at this time, and not to

what it was in Grotius's time, or even in that of Vattel, who has, by the by, often copied the first writer without attending to changes which had since taken place, and asserted doctrines which in practice were already obsolete. The change in this case has been produced by the progress of civilization, and may in fact be considered as an amelioration.

"It is undeniable that at present general letters of marque and reprisal are war to all intents and purposes; that they are never granted but in consequence of an existing war, or as a way of making war without a formal declaration. Both the Seven Years' War and that of 1778 between France and England commenced in that way, and were long so continued before war was actually declared.

"It is equally true that special letters of reprisal granted to injured individuals and authorizing them to capture at sea an equivalent for their losses from subjects of the offending country, have fallen into entire disuse. Some cases may have escaped my notice. I recollect no one instance (in time of peace) since Cromwell. In short, the present practice or law of nations admits private war by sea (privateering) in time of war, never in time of peace, any more by sea than by land."

Mr. Gallatin to Mr. Everett, Jan. 5, 1835, 2 Gallatin's Writings, 476, referring to President Jackson's proposal of reprisals against France. It is to be observed, with regard to the opening sentence of the foregoing extract, that Great Britain on the outbreak of the Crimean war abandoned the practice of embargoing ships of the enemy and allowed Russian ships to depart from British ports within a certain term after the outbreak of war.

"The general position assumed by the President, and apparently sustained by Judge Wayne and others, is, that whenever a nation has a claim clearly founded in justice, as that in question undoubtedly is, and justice is denied, resort must ultimately be had to war for redress of the injury sustained. This, as an abstract proposition, is wholly untenable, supported neither by the practice of nations nor by common sense. The denial of justice gives to the offending nation the right of resorting to arms, and such a war is just so far as relates to the offending party. But to assert that a nation *must* in such a case, without attending either to the magnitude or nature of the injury, and without regard either to its own immediate interest or to political considerations of a higher order affecting perhaps its foreign and domestic concerns, inflict upon itself the calamities of war, under the penalty of incurring disgrace, is a doctrine which, if generally adopted, would keep the world in perpetual warfare, and sink the civilized nations of Christendom to a level with the savage tribes of our forests." (Mr. Gallatin to Mr. Everett, Jan. 1835, 2 Gallatin's Writings, 494.)

There is no example in the history of the United States of the granting of authority for special reprisals, for the purpose of enabling an individual to redress his own grievance. In the Aves Islands case

an application was made in 1857 by Henry S. Sanford, in behalf of Philo S. Shelton and Sampson & Tappan, for a *lettre de requête*, authorizing them to take forcible measures to indemnify themselves, but no action on the application appears to have been taken.

Mr. Sanford to Mr. Cass, Aug. 16, 1857, S. Ex. Doc. 10, 36 Cong. 2 sess. 242.

The application was accompanied with an interesting brief. See, also, S. Ex. Doc. 10, 36 Cong. 2 sess. 466.

"The making a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought to precede; and when reprisal follows, it is considered an act of war, and never failed to produce it in the case of a nation able to make war: besides, if the case were important and ripe for that step, Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not with the Executive."

Opinion of Mr. Jefferson, Sec. of State, May 16, 1793, 7 Jefferson's Works, 628.

As to proposed reprisals on the then Spanish possessions of the Floridas, see Mr. Jefferson, President, to the Secretary of State, Aug. 16, 1807, 5 Jefferson's Works, 164.

To a formal declaration of war may be preferred "*general* letters of mark and reprisal, because, on a repeal of their edicts by the belligerent, a revocation of the letters of mark restores peace without the delay, difficulties, and ceremonies of a treaty."

President Jefferson to Mr. Lincoln, Nov. 13, 1808, 5 Jefferson's Works, 387.

By the treaty of July 4, 1831, negotiated by Mr. Rives at Paris, France agreed to pay the United States 25,000,000 francs in six annual installments, with interest, in settlement of spoliation claims. The ratifications were exchanged at Washington February 2, 1832; and under an act of Congress of July 13, 1832, a commission was appointed to adjudicate claims upon the fund. This commission entered upon its labors in August, 1832. The treaty, however, encountered opposition in France, and the Government hesitated to submit it to the Parliament in order that the necessary appropriation might be made. When, therefore, the first installment fell due it was not paid. The Secretary of the Treasury negotiated through the Bank of the United States a draft on the French minister of finance, but, as there was no appropriation to meet it, it was allowed to go to protest. The Duc de Broglie, then minister of foreign affairs, complained of this action on the part of the United States, and urged that under the French constitutional system the financial clauses of the convention could not be carried into effect without the cooperation of the legislative branch of the Government. The United States

took the ground that the convention, having been constitutionally concluded and ratified, was obligatory on every department of the two Governments. In April, 1833, the French Government presented to the Chamber of Deputies a bill to carry the convention into effect. In April, 1834, this bill, when pressed to a vote, failed of passage by eight votes. The Government promised to resubmit the bill to the chambers at the session beginning in the following December; and Edward Livingston, who was then minister of the United States in Paris, in reporting the French Government's determination, said that it had been intimated to him that favorable action by the chambers would be promoted by a display of "energy" in the President's message to Congress. This hint was not lost upon President Jackson, who, in his annual message of December, 1834, after expressing the opinion that commercial retaliation would be ineffective, declared it to be his conviction that the United States ought to insist upon the prompt execution of the treaty, and, in case it should be refused or longer delayed, to take redress into its own hands and proceed to make reprisals. "The laws of nations," said President Jackson, "provide a remedy for such occasions. It is a well-settled principle of the international code that where one nation owes another a liquidated debt, which it refuses or neglects to pay, the aggrieved party may seize on the property belonging to the other, its citizens or subjects, sufficient to pay the debt, without giving just cause of war. This remedy has been repeatedly resorted to, and recently by France herself towards Portugal, under circumstances less unquestionable."

The Senate, acting upon the view set forth by Mr. Clay in a report from the Committee on Foreign Relations of January 6, 1835, unanimously adopted, on the 14th of the same month, a resolution to the effect that it was inexpedient at that time to adopt any legislative measures in regard to the state of affairs between the United States and France. In a message of February 25, 1835, however, the President stated that he had instructed Livingston to quit France with his legation and return to the United States, if an appropriation for the fulfillment of the convention should be refused by the Chambers. On the following day a report on relations with France was made by Mr. Cambreleng, from the Committee of Foreign Affairs, while a minority report, signed by Edward Everett and two other members of the committee, was also presented. On February 28, after a debate that extended far into the night, the House resolved that the execution of the convention should be insisted on, and that preparations ought to be made for any emergency growing out of the differences between the two countries.

In France, the President's recommendation of reprisals, which evidently exceeded in "energy" what had been desired, was received

as a measure of hostility. Livingston expressed regret that it should be so interpreted, but the French minister at Washington was recalled, Livingston was offered his passports, and the Chamber of Deputies was informed that diplomatic intercourse with the United States had been suspended. On March 28, 1835, an appropriation was made by the Chamber of Deputies, but it was coupled with the condition that the money should not be paid to the United States till satisfactory explanations should be made of the President's message. Livingston asked for his passports and withdrew from Paris, leaving the legation in charge of Mr. Barton, as chargé d'affaires. President Jackson declined to make any explanations of his message, both on the ground that all its statements were justified by the facts, and that the right of a foreign government to ask explanations of or to interfere in any manner in the communications of one branch of the Government of the United States with another could not be admitted. Mr. Barton was instructed to surrender his mission and return home in case the money due was not paid, and, as payment was still withheld, he left France and returned to New York, where he was joined by Mr. Livingston, who went with him to Washington. Meanwhile, however, President Jackson, in his annual message of December 7, 1835, after devoting a long passage to a review of the controversy and maintaining the position which he had previously held, declared that the conception that he had intended "to menace or insult the Government of France was as unfounded as the attempt to extort from the fears of that nation what her sense of justice might deny would be vain and ridiculous." In a special message to Congress of January 8, 1836, he recommended the exclusion of French products and French vessels from the ports of the United States in case the money should continue to be withheld. But all occasion for the consideration of coercive measures soon passed away. The French Government received the expressions in the President's message of December 7, 1835, in regard to his supposed intention to menace France, as a satisfactory explanation. On January 27, 1836, Mr. Bankhead, British chargé d'affaires at Washington, informed the United States that he was instructed to express the hope that, if the parties would agree to refer to the British Government the settlement of the point at issue between them and to abide by its opinion, means might be found of satisfying the honor of each. President Jackson accepted the mediation, with the reservation that no expressions of regret and explanations should be required. On the 15th of February Mr. Bankhead stated that the French Government had declared that the frank and honorable manner in which the President had, in his message of December 6, 1835, expressed himself with regard to the points of difference between the two Governments, had removed the difficulties on the score of national honor, and that the French Govern-

ment was ready to pay the installments due whenever they should be claimed by the United States. The French Government accepted the offer of mediation, but by this declaration, which was made to the British Government as a channel of communication, the necessity of a formal mediation was dispensed with. On May 10, 1836, President Jackson, with many friendly expressions towards France, informed Congress that the first four installments under the treaty had been received. The rest of the money was duly paid.

Moore, Int. Arbitrations, V. 4460–4468, citing H. Ex. Doc. 147, 22 Cong. 2 sess.; act of July 13, 1832, 4 Stat. 574; H. Ex. Docs. 2, 40, 136, and 174, 23 Cong. 2 sess.; H. Ex. Doc. 2, 24 Cong. 1 sess.; S. Ex. Docs. 62, 63, and 187, 24 Cong. 1 sess.; H. Ex. Doc. 254, 24 Cong. 1 sess.; S. Ex. Doc. 351, 25 Cong. 2 sess.; H. Ex. Doc. 417, 25 Cong. 2 sess.; H. Ex. Doc. 183, 26 Cong. 1 sess.

Mr. Clay, in his report from the Committee on Foreign Relations, said:

"The President is under a conviction that the United States ought to insist on a prompt execution of the treaty; and, in case it be refused, or longer delayed, take redress in their own hands. He accordingly recommends that a law be passed authorizing reprisals upon French property, in case provision shall not be made for the payment of the debt at the approaching session of the French Chambers. This measure he deems of a pacific character, and he thinks it may be resorted to without giving just cause of war.

"It is true, that writers on the public law speak and treat of reprisals as a peaceful remedy, in cases which they define and limit. . . . Reprisals do not of themselves produce a state of public war; but they are not unfrequently the immediate precursor of it. When they are accompanied with an authority, from the Government which admits them, to employ force, they are believed invariably to have led to war in all cases where the nation against which they are directed is able to make resistance. It is wholly inconceivable that a powerful and chivalrous nation, like France, would submit, without retaliation, to the seizure of the property of her unoffending citizens, pursuing their lawful commerce, to pay a debt which the popular branch of her legislature had refused to acknowledge and provide for. It cannot be supposed that France would tacitly and quietly assent to the payment of a debt to the United States, by a forcible seizure of French property, which, after full deliberation, the Chambers had expressly refused its consent to discharge. Retaliation would ensue, and retaliation would inevitably terminate in war. In the instance of reprisals made by France upon Portugal, cited by the President, the weakness of this power, convulsed and desolated by the ravages of civil war, sufficiently accounts for the fact of their being submitted to, and not producing a state of general hostilities between the two nations.

"Reprisals so far partake of the character of war, that they are an appeal from reason to force; from negotiation, devising a remedy to be applied by the common consent of both parties, to self-redress, carved out and regulated by the will of one of them; and, if resistance be made, they convey an authority to subdue it, by the sacrifice of life, if necessary.

"The framers of our Constitution have manifested their sense of the nature of this power, by associating it in the same clause with grants to Congress of the power to declare war, and to make rules concerning captures on land and water.

"Without dwelling further on the nature of this power, and under a full conviction that the practical exercise of it against France would involve the United States in war, the committee are of opinion that two considerations decisively oppose the investment of such a power in the President to be used in the contingency stated by him.

"In the first place the authority to grant letters of marque and reprisal being specially delegated to Congress, Congress ought to retain to itself the right of judging of the expediency of granting them under all the circumstances existing at the time when they are proposed to be actually issued. The committee are not satisfied that Congress can, constitutionally, delegate this right. It is true that the President proposes to limit the exercise of it to one specified contingency. But if the law be passed as recommended, the President might, and probably would, feel himself bound to execute it in the event, no matter from what cause, of provision not being made for the fulfillment of the treaty by the French Chambers, now understood to be in session. The committee can hardly conceive the possibility of any sufficient excuse for a failure to make such provision. But, if it should unfortunately occur, they think that, without indulging in any feeling of unreasonable distrust towards the Executive, Congress ought to reserve to itself the constitutional right, which it possesses, of judging of all the circumstances by which such refusal might be attended; of hearing France, and of deciding whether, in the actual posture of things as they may then exist, and looking to the condition of the United States, of France, and of Europe, the issuing of letters of marque and reprisal ought to be authorized, or any other measure adopted."

The report concluded with a resolution that it was "inexpedient, at this time, to pass any law vesting in the President authority for making reprisals on French property."

Report of Mr. Clay, Committee on Foreign Relations, Jan. 6, 1835, S. Doc. 40, 23 Cong. 2 sess. 40; 11 Congressional Debates, part 1, pp. 103, 200.

"In every case, particularly when hostilities are contemplated, or appear probable, no government should commit itself as to what it

will do under certain future contingencies. It should prepare itself for every contingency,—launch ships, raise men and money, and reserve its final decision for the time when it becomes necessary to decide and simultaneously to act. The proposed transfer by Congress of its constitutional powers to the Executive, in a case which necessarily embraces the question of war or no war, appears to me a most extraordinary proposal, and entirely inconsistent with the letter and spirit of our Constitution, which vests in Congress the power to declare war and to grant letters of marque and reprisal."

Mr. Gallatin to Mr. Everett, Jan. 5, 1835, 2 Gallatin's Writings, 475.

See, also, criticism in 3 Phillimore, Int. Law (3d ed.), 41.

"As respects your other query, I must say that I am very adverse to restrictive commercial measures for any purpose whatever. Experience must have taught us, beginning with the non-importation restrictions and agreement which preceded the war of independence, and ending with the various non-intercourse laws which were enacted between December, 1807, and June, 1812, how inefficient measures of this description generally are for the purpose of forcing another country to alter its policy. It is true that they may occasionally offer a pretense for it when that country already wishes to do it and only wants a pretense. Had the official notice of the repeal of the Milan and Berlin decrees (for which repeal some one law of ours had afforded a pretense) reached England two months earlier, it may be that a timely repeal of the orders in council would have prevented the war. Sometimes, also, if restrictions can be applied immediately to the object in dispute (a retaliating tonnage duty) so as to operate as direct reprisal, they may prove effective. In the present instance they can not be so applied, and I would doubt their efficacy towards obtaining a prompt execution of the treaty. It would have been much preferable to have been fully aware of the great and intrinsic difficulties which stood between the signing of the treaty and its being carried into effect, and instead of increasing these to have used some further forbearance, and, without recurring to any coercive or restrictive measures, to have suffered the King of the French to manage the affair in his own way with the Chambers. Had that course been pursued, there is no doubt that he would have continued to make every exertion for obtaining their assent; and I am confident that the treaty must infallibly have been ultimately ratified. The fundamental error, on the part of our Government, consists in not having been sensible that, in the present situation of France, the real power is not with the King, but with the popular branch." (Mr. Gallatin to Mr. Everett, Jan. 1835, 2 Gallatin's Writings, 492.)

In the case of New Hampshire *v.* Louisiana (1882), 108 U. S. 76, a suit was brought in the Supreme Court of the United States by the former State against the latter to secure the payment of defaulted coupons of Louisiana State bonds. To enable the suit to be brought in the name of the State, the legislature of New Hampshire authorized its citizens, who were owners of the bonds, to make assignments to the State and arrange for the payment of costs and expenses without burdening the State treasury. Similar legislation was enacted by the legislature of New York, and a similar suit brought by that

State. Counsel for the plaintiff States, in their argument, contended that the jurisdiction of the Supreme Court in respect of suits by one State against another should be asserted in this manner, for the reason, among others, that the Constitution of the United States had deprived the States of the power to resort to reprisals against one another and thus obtain satisfaction for their citizens *via facti*. Mr. John A. Campbell, ex-justice of the Supreme Court, replying, as counsel for Louisiana, to this argument, said: "The third case cited in respect to reprisals is a message of President Jackson in respect to France. It required the large capacity of Edward Livingston, then minister of the United States in France, and the Senate under a leadership adverse; the interference of Great Britain, and the good sense of the people, to prevent serious complications with France for no offence whatsoever. (2 Writings of Gallatin, 494.) Reprisal is found in the Constitution of the United States. It represents now an obsolete idea among civilized nations. The thing is prevalent among the Comanches, Sioux, Blackfeet, and Cheyennes; and seems to have been thought of in New York, if Knickerbocker can be relied on as a historian. In the 10th and 11th centuries they were usual and prevalent. Those were centuries when robbery and pillage did not offend the general conscience. The law of force was predominant, and men rendered homage to the strong. But every right implies a reciprocity, and inferior force did not surrender its own claims. There were wars, contests, quarrels, combats, reprisals; violence begat violence, and ended at last in equilibrium. Organization, discipline, combinations, laws, caused the formation of States, and banished reprisals to the seas, and since then from recognition as a lawful mode of settling disputes or a proper mode of redress. 4 Muratori Antiq. pp. 49, 52; 5 Ducagne, Glossarium verbo Repræsaliæ; 1 Laurent, Du Droit Int. 260, 261; W. E. Hall, Int. Law, 312; 3 Science du Publiciste (Fritot), pp. 252–5." (Oral argument of John A. Campbell, case of New Hampshire *v.* Louisiana, printed in Baltimore, Md., in 1882.)

The inference should not be drawn from Mr. Campbell's remarks that Edward Livingston adjusted the difference with France at Paris. He asked for his passports and withdrew, April 28, 1835, under instructions, a year before the quarrel was adjusted.

For a brief but excellent narrative of the French incident, see Schurz, Life of Henry Clay, II. 52–58.

"Our Government are in a great alarm lest this dispute between the French and Americans should produce a war, and the way in which we should be affected by it is this: Our immense manufacturing population is dependent upon America for a supply of cotton, and, in case of any obstruction to that supply, multitudes would be thrown out of employment, and incalculable distress would follow. They think that the French would blockade the American ports, and then such obstruction would be inevitable. A system like ours, which resembles a vast piece of machinery, no part of which can be disordered without danger to the whole, must be always liable to interruption or injury from causes over which we have no control; and this danger must always attend the extension of our manufacturing system to the prejudice of other interests; so that, in case of a stoppage or serious interruption to the current in which it flows, the consequences

would be appalling; nor is there in all probability a nation on the Continent (our good ally, Louis Philippe, included) that would not gladly contribute to the humiliation of the power and diminution of the wealth of this country." (Greville's Journal, ed. by Reeve, Dec. 10, 11, 1835, II. 446.)

President Buchanan, in his annual message on December 9, 1859, in view of the political chaos then existing, and which had for so long existed, in Mexico, and of the enormous indebtedness of Mexico to the United States for spoliations, recommended Congress to pass a law authorizing the sending to Mexico a sufficient military force to secure indemnity, which could not be enforced by diplomatic pressure, and to produce security on the border line. Such a step, he argued, would tend, incidentally, to sustain the constitutional Government of Juarez against such aggressions of European sovereigns as the helpless condition of Mexico would be likely to invite. Congress, however, did not act upon this proposal, and shortly afterwards began the intrigues of Napoleon III. which, after our own civil war had relieved him from our active antagonism, resulted in the expedition of Maximilian. On December 14, 1859, however, before the interference began to be perceptible, Mr. McLane, then United States minister at Mexico, signed, under instructions from the President, a treaty of transit and of commerce, which was followed by a convention to enforce treaty obligations, and to aid in producing such order on the border as would best promote the friendly relations of the two countries. Neither treaty nor convention, however, was approved by the Senate of the United States.

See supra, §§ 860, 955.

Reprisals or war will not be resorted to in order to compel payment of damages due for tort to a citizen of the United States by a foreign nation unless no other mode of prosecution remains.

Mr. Seward, Sec. of State, report to the President, Mar. 30, 1861, 8 MS. Report Book, 154.

"When there is a persistent refusal on the part of one government to pay damages claimed by another on behalf of one of its citizens, the only method of redress that exists, if arbitration be not resorted to, is by reprisal, which, in a case such as the present, would inevitably produce war. It certainly would not be claimed that at this period, when the refusal of the British Government to pay the claim has been acquiesced in by administration after administration without even a suggestion of reprisals, reprisals could now be threatened."

Mr. Bayard, Sec. of State, to Messrs. Benedict, Taft, and Benedict, May 18, 1886, 160 MS. Dom. Let. 237.

(2) EXAMPLES.

§ 1096.

"Reprisals, under proper control and attention, come regularly within the scope of the law of nations as observed at present: and although I am aware that there is a great authority for the contrary opinion, yet it is upon the whole settled, that no *private* hostilities, however general, or however just, will constitute what is called a legitimate and public state of war. So far indeed has my Lord Coke carried this point, that he holds, if *all* the subjects of a King of England were to make war upon another country in league with it, but without the assent of the King, there would still be no breach of the league between the two countries.

"In the times before us various were the instances in which individuals possessing no public character, and authorized by no public commission, assumed, and were almost encouraged to assume, the province of redressing the wrongs that were offered them from without. I will select one, which was not less remarkable for the account which it affords us of the sentiments of our ancestors, than it was important in the end, by involving the whole force of two mighty nations in a serious war.

"In 1292 two sailors, the one Norman, the other English, quarrelled in the port of Bayonne, and began to fight with their fists. The Englishman being the weaker, is said to have stabbed the other with his knife. It was an affair which challenged the intervention of the civil tribunals, but being neglected by the magistrates, the Normans applied to their King (*Philip le Bel*), who with neglect still more unpardonable, *desired them to take their own revenge*. They instantly put to sea, and seizing the first English ship they could find, hung up several of the crew, and some dogs at the same time, at the masthead. The English retaliated *without applying to their Government*, and things arose to that height of irregularity, that (with the same indifference on the part of their Kings) the one nation made alliance with the Irish and Dutch; the other with the Flemings and Genoese. *Two hundred* Norman vessels scoured the English seas, and hanged all the seamen they could find. Their enemies in return fitted out a strong fleet, destroyed or took the greater part of the Normans, and giving no quarter, massacred them, to the amount of fifteen thousand men. The affair then became too big for private hands, and the Governments interposing in form, it terminated in that unfortunate war, which by the loss of *Guienne* entailed upon the two nations an endless train of hostilities, till it was recovered."

Ward, Law of Nations (1795), I. 294–296.

The King of Prussia, in 1753, "resorted to reprisals, by stopping the interest upon a loan due to British subjects, and secured by hy-

pothecation upon the revenues of Silesia, until he actually obtained from the British Government an indemnity for the Prussian vessels unjustly captured and condemned" by a British prize court.

2 Halleck's Int. Law (Baker's ed.), 431.

The British Government in 1840 made the capture of several Neapolitan vessels on account of a grant of monopoly for the sulphur produced and worked in Sicily contrary, it was alleged, to the commercial treaty between England and Naples of 1816. The difficulty was settled by the mediation of France.

3 Phillimore, Int. Law, 27.

In the case of Don Pacifico the House of Lords, June 17, 1850, adopted the following resolution: "That while the House fully recognizes the right and duty of the Government to secure to Her Majesty's subjects residing in foreign states the full protection of the laws of those states, it regrets to find, by the correspondence recently laid upon the table by Her Majesty's command, that various claims against the Greek Government, doubtful in point of justice or exaggerated in amount, have been enforced by coercive measures directed against the commerce and people of Greece, and calculated to endanger the continuance of our friendly relations with other powers."

Hansard, Parl. Debates, CXI. 1332.

"But, it is said, M. Pacifico should have applied to a court of law for redress. What was he to do? Was he to prosecute a mob of five hundred persons? Was he to prosecute them criminally, or in order to make them pay the value of his loss? Where was he to find his witnesses? Why, he and his family were hiding or flying, during the pillage, to avoid the personal outrages with which they were threatened. He states, that his own life was saved by the help of an English friend. It was impossible, if he could have identified the leaders, to have prosecuted them with success.

"But what satisfaction would it have been to M. Pacifico to have succeeded in a criminal prosecution against the ringleaders of that assault? Would that have restored to him his property? He wanted redress, not revenge. A criminal prosecution was out of the question, to say nothing of the chances, if not the certainty, of failure in a country where the tribunals are at the mercy of the advisers of the Crown, the judges being liable to be removed, and being often actually removed upon grounds of private interest and personal feeling. Was he to prosecute for damages? His action would have lain against individuals, and not, as in this country, against the hundred. Suppose he had been able to prove that one particular man had

carried off one particular thing, or destroyed one particular article of furniture; what redress could he anticipate by a lawsuit, which, as his legal advisers told him, it would be vain for him to undertake? M. Pacifico truly said, 'If the man I prosecute is rich, he is sure to be acquitted; if he is poor, he has nothing out of which to afford me compensation if he is condemned.'

"The Greek Government having neglected to give the protection they were bound to extend, and having abstained from taking means to afford redress, this was a case in which we were justified in calling on the Greek Government for compensation for the losses, whatever they might be, which M. Pacifico had suffered."

Lord Palmerston, speech in the House of Commons, June 25, 1850, Hansard, Parl. Debates (3d series), CXII. 394–396.

"In 1847, a motion was made in the House of Commons for reprisals, on account of unpaid Spanish bonds. It was conceded that such a course would be justified by the principles of international law, but it was resisted on the ground of expediency. In 1850 reprisals, which afterwards became the subject of parliamentary discussion and of complaint by France, were resorted to by England on account of the claims for property alleged to have been destroyed at Athens by a mob, aided by Greek soldiers and gendarmes, belonging to one Pacifico, a British subject, from being a native of Gibraltar. 'The real question of international law in this case,' says Phillimore, 'was whether the state of the Greek tribunals was such, as to warrant the English foreign minister in insisting upon M. Pacifico's demand being satisfied by the Greek Government before that person had exhausted the remedies which, it must be presumed, are afforded by the ordinary legal tribunals of every civilized state. That M. Pacifico had not applied to the Greek courts of law for redress appears to be an admitted fact.' Though Greece was compelled to accept the conditions of England the commissioners appointed to examine the claim awarded only £150 instead of £21,295 1s. 4d., which was demanded. Phillimore, as to the point whether the state of the courts rendered it a mockery to expect justice at their hands, adds: 'The international jurist is bound to say that the evidence produced does not appear to be of that overwhelming character, which alone could warrant an exception from the well-known and valuable rule of international law upon questions of this description.'"

Lawrence's Wheaton (1863), 509.

For a fuller account of the reprisals on Neapolitan vessels and of the discussion relative to the Spanish bonds, see 1 Halleck's Int. Law (Baker's ed.), 435.

A convention was signed at London on October 31, 1861, between Great Britain, France, and Spain for the purpose of taking forcible measures with a view to obtain redress from Mexico for injuries done

to their subjects in that country. The United States was advised to accede to the arrangement, but declined to do so. After the three Governments had adopted certain measures of force, the British and Spanish Governments withdrew, while France entered upon that course of intervention which resulted in the attempt to establish an empire in Mexico.

See supra, § 956; see, also, Dana's Wheaton, § 76, note 41.

In January, 1885, Dr. Stuebel, German consul-general at Apia, seized or attached the sovereign rights of the Samoan King, Malietoa, in the municipality of Apia and raised the German flag on Mulinuu Point, the seat of the native Government, under the form of reprisals for certain acts of that Government, among which was its refusal to execute a treaty with Germany, which Malietoa signed on November 10, 1884, as the Samoans alleged, under personal duress. The action of the German consul was not sustained by his Government.

For. Rel. 1888, I. 600.

The Nicaraguan Government having declined to comply with a demand of Great Britain for indemnity for injuries inflicted on certain British subjects by authorities of Nicaragua in the Mosquito Reserve, the British naval forces on April 27, 1895, landed at Corinto and took military possession of the place by occupying the custom-house and other Government buildings. The officer in command, Admiral Stephenson, in so doing issued the following proclamation:

"Whereas the Nicaraguan Government having unlawfully seized the persons of Her Britannic Majesty's vice-consul at Bluefields, together with some twenty British subjects, and has either confined them in the town of Managua or expelled them from Nicaraguan territory, I have in consequence received orders from Her Majesty's Government to occupy Corinto, and to seize all vessels carrying the Nicaraguan flag, and to hold the same until such time as the Nicaraguan Government shall have complied with the demands of the British Government. Be it known that during the occupation of Corinto the lives, property, and trade of all will be respected, and the force now landed will occupy only the Government buildings. In the event, however, of any resistance or disturbance arising, I shall be compelled to use the means at my disposal to maintain order. I have constituted Capt. Frederick Percival Trench, of H. M. S. *Royal Arthur*, governor of the port."

On May 5, 1895, the troops were withdrawn, an agreement for the payment of the indemnity having been reached.

For. Rel. 1895, II. 1032–1034.

As to the bombardment of Omoa, Honduras, by British forces, in 1873, see 67 Br. & For. State Papers (1875–76), 955.

In November, 1901, France seized the custom-house at Mytilene in order to enforce compliance by the Turkish Government with demands for the settlement of the Lorando claim, the rebuilding of French schools and institutions destroyed in 1895–96, the official recognition of existing schools and institutions, and the recognition of the Chaldean patriarch.

For. Rel. 1901, 529–530.

6. Pacific Blockade.

§ 1097.

There is much difference of opinion as to whether there exists in international law such a measure as "pacific blockade." It may be said that this difference is suggested by the words themselves, the term "blockade" properly belonging to a well-recognized belligerent operation. Nor is the word "pacific" in itself fortunate as the description of a measure of open force and coercion. But, if we close our eyes to the inappropriateness of the words and consider the nature of the measure which they are intended to describe, the fact may be recognized that we have, under the title of "pacific blockade," merely a form of reprisals. Reprisal is a measure short of war, but is not otherwise "pacific;" and so with pacific blockade. If the measure is not, like blockade in the ordinary sense, attempted to be extended to the citizens and property of third powers, there appears to be in it nothing exceptionable from the legal point of view, so long as the legality of the reprisals continues to be acknowledged.

July 20, 1838, the French minister at Washington asked for the restitution by the United States of the American schooner *Lone*, which was rescued by her master and brought to New Orleans after capture by a French brig of war belonging to the forces then blockading Mexican ports. The Department of State treated the case as one entirely novel. "The writers on international law have not," said the Department, "enumerated blockade as one of the peaceable remedies to which an injured nation might resort, but have classed it among the usual means of direct hostility." It therefore seemed reasonable, said the Department, in the absence of all other rules, to apply to the case those that related to ordinary blockade in time of war. Testing the case by these rules, it was held that the President could not intervene in the matter, but that an application for redress, if any was due, should be made to the courts.

Mr. Vail, Act. Sec. of State, to M. Pontois, French min., Oct. 19, 1838, MS. Notes to French Leg. VI. 32.

See, also, same to same, Oct. 23, 1838, id. 38.

Calvo cites, as the first example of pacific blockade, the action of France, Great Britain, and Russia in blockading, in 1827, the coasts

of Greece, where the Turkish armies were encamped. The representatives of the three powers did not cease to assure the Sultan of their friendship, and to declare that peace was not broken, although the measure which they adopted served to paralyse his armies.

In June, 1831, a French fleet appeared in the Tagus to insist on reparation for injuries done to French subjects in Portugal during the reign of Dom Miguel. The French fleet blockaded a number of points on the coast and captured a large number of Portuguese ships, but it retained its essentially "pacific" character till the signature at Lisbon of the treaty of July 14, 1831, which provided reparation for French subjects and at the same time restored all the Portuguese ships of war and of commerce which had been captured by the French fleet.

Calvo, Droit International, III. secs. 1833, 1834; Hansard, Parl. Debates, CXII. 339.

In 1833 France and Great Britain imposed a blockade on the ports of Holland without terminating pacific relations with that country. The object was to compel the assent of Holland to the recognition of the Kingdom of Belgium under the treaty of London.

In 1838 France blockaded certain ports in Mexico. The Mexican Government resented this act, and declared war, and expelled French subjects from its territory. On the other hand, Mexican men-of-war as well as merchant vessels were seized by the French, and the fortress of San Juan d'Ulloa was reduced. The quarrel between the two countries was terminated by the treaty of March 9, 1839, by which it was agreed to submit to a third power the decision of the questions (1) whether Mexico could claim restitution of the Mexican ships of war captured by the French after the surrender of the fortress of Ulloa or compensation therefor; (2) whether indemnities could be claimed for Frenchmen who had been expelled from Mexico; and (3) whether Mexican ships and cargoes sequestrated during the blockade and subsequently captured by the French in consequence of the declaration of war ought to be considered as legally acquired to the captors. The Queen of Great Britain, who was chosen as arbitrator, decided on August 1, 1844, that, after the departure of the French plenipotentiary from Mexico, followed by hostile operations on the part of the French against the fortress of Ulloa and the Mexican fleet, and the actual declaration of war by the Mexican Government, and the expulsion of French subjects from its territory, there was a state of war between the two countries, and that neither restitution of the vessels and cargoes mentioned nor the payment of indemnities could be exacted.

Moore, Int. Arbitrations, V. 4865–4866.

Hall says that F. de Martens, in his Traité de Droit International, III. 174, has been misled by Hautefeuille into saying that England, in

case of pacific blockade, seizes both the ships of the blockaded powers and neutral ships and confiscates both. Hall declares that this statement is entirely destitute of foundation, and, referring to the French blockade of Mexican ports in 1838, says: "This is believed to be the only occasion on which vessels of third powers have been confiscated; though, if the pacific character of the Formosan blockade had been omitted, and neutral vessels had been seized, they would have been treated, it would seem, in like manner." (Hall, Int. Law (5th ed.), 372, note.)

From the brevity of Hall's reference to the French blockade of Mexican ports in 1838, it is uncertain whether he did not overlook the fact that the pacific blockade was afterwards converted into an avowed hostile blockade.

From 1838 to 1840, France, and from 1845 to 1848, France and England blockaded certain ports on the river Plate. With reference to this blockade, Lord Palmerston, writing in 1846 to the British ambassador at Paris, expressed the opinion that the French and English blockade had been "from first to last illegal," and that, unless a state of war existed, there was no right "to prevent ships of other states" from communicating with the blockaded ports. To this language, says Hall, "there is nothing to add, except an expression of surprise that the subject could have ever presented itself to any mind in a different light. . . . It is only under the supreme necessities of war, . . . that other states can be reasonably asked to forego their right of intercourse with the enemy. . . . The practice, however, assumes a very different aspect when it is so conducted as to be harmless to the interests of third powers. It is a means of constraint much milder than actual war, and therefore, if sufficient for its purpose, it is preferable in itself."

Hall, Int. Law (5th ed.), 374–375.

In 1850 Great Britain, as a punishment for certain alleged injuries inflicted by Greek soldier-police on the officers of the British ship *Fantome* and to compel the payment of certain indemnities, blockaded the ports of Greece. This blockade was withdrawn without resulting in a state of war.

In 1860 Victor Emmanuel, then King of Piedmont, joined the revolutionary government of Naples in blockading ports in Sicily then held by the King of Naples. The relations between the courts of Turin and Naples continued to be legally peaceful.

The British Government demanded reparation from Brazil for the plundering of the British barque *Prince of Wales* on the Brazilian coast in 1861. It also demanded redress for what was termed an outrage on three officers of the British man-of-war *Forte* by the Brazilian guard at Tijuca Hill. As the British demands were refused,

the British admiral instituted a pacific blockade of the port of Rio de Janeiro, and seized and detained five Brazilian vessels as an act of reprisal. It was subsequently arranged that the claim in the case of the *Prince of Wales* should be paid under protest and the captured vessels released, the Brazilian Government assuming responsibility for any losses which might have resulted to the citizens of third countries, and that the case of the *Forte* should be submitted to arbitration.

Moore, Int. Arbitrations, V. 4925; Hall, Int. Law (5th ed.), 372.

Under the head of pacific blockade, Calvo mentions the fact that in February, 1879, Chile blockaded the coast of Bolivia, which was then in alliance with Peru, and that, on the 3d of the following April, war was formally declared by the Chilean chambers. (Calvo, Droit International, III. sec. 1844.) But as Chile was then at war with Peru, it is not clear from this statement that the blockade of the coasts of Peru's ally was supposed to be pacific.

In 1884 France blockaded a portion of the coast of Formosa. "The French Government disavowed any wish to assume the character of a belligerent, but it proposed to treat neutral vessels as liable to capture and condemnation; . . . Lord Granville . . . intimated that he should consider the hostilities which had in fact taken place, together with the formal notice of blockade, to constitute a state of war;" and declared the contention of the French Government that a pacific blockade conferred on the blockading power the right to capture and to condemn the ships of third nations to be "in conflict with well-established principles of international law."

Hall, Int. Law (5th ed.), 372, 373.

See, also, Holland, Studies in International Law, 135.

In 1886 Greece was blockaded by the fleets of Austria, Germany, Great Britain, Italy, and Russia. In this blockade the powers followed the course adopted by England in the blockade of 1850, when Greek vessels only were seized and sequestrated and when even Greek vessels were allowed to enter with cargoes bona fide the property of foreigners, and to issue from ports if chartered before notice of the blockade was given for the conveyance of cargoes wholly or in part belonging to foreigners.

Hall, Int. Law (5th ed.), 372, 373, note.

In 1888–1889 a "very anomalous" blockade of the coasts of Zanzibar was instituted by the British and German admirals, by order of their Governments, but in the name of the Sultan, against the importation of "materials of war and the exportation of slaves." The operation "was in reality a measure of high international police, exercised, directly or indirectly, by all the powers of western Europe

who were interested in the locality, for the prevention of a traffic generally recognized by them as cruel and immoral." Italy and Portugal aided actively in the blockade, and France sent a war ship to visit vessels flying the French flag. Auxiliary steps were taken on the mainland by the Congo State and the Netherlands.

Holland, Studies in Int. Law, 139–140; referring also to M. Rolin-Jaequemyns, in the Rev. de Droit Int. XXI. 207.

See Mr. Wharton, Assist. Sec. of State, to Mr. Pratt, consul at Zanzibar, No. 44, May 10, 1889, 130 MS. Inst. Consuls, 68.

"WASHINGTON, *March 20, 1897.*

"The undersigned, under instructions from their respective Governments, have the honor to notify the Government of the United States that the admirals in command of the forces of Austria-Hungary, France, Germany, Great Britain, Italy, and Russia in Cretan waters have decided to put the island of Crete in a state of blockade, commencing the 21st instant, at 8 a. m.

"The blockade will be general for all ships under the Greek flag. Ships of the six powers or neutral powers may enter into the ports occupied by the powers and land their merchandise, but only if it is not for the Greek troops or the interior of the island. The ships may be visited by the ships of the international fleets.

"The limits of the blockade are comprised between 23° 24′ and 26° 30′ longitude east of Greenwich, and 35° 48′ and 34° 45′ north latitude.

"JULIAN PAUNCEFOTE, *H. B. M. Ambassador.*
"PATENÔTRE, *Ambassadeur de la Republique Francaise.*
"FAVA, *Ambaseiatore d'Italia.*
"THIELMANN, *Etc., Etc., Etc.*
"VON HENGELMULLER, *Etc., Etc., Etc.*
"KOTZEBUE, *Etc., Etc., Etc.*"

Enclosure with Sir Julian Pauncefote, British ambass., to Mr. Sherman, Sec. of State, March 24, 1897, For. Rel. 1897, 254.

"I have the honor to acknowledge the receipt of your note of the 24th instant, transmitting to me a communication under date of March 20, 1897, signed by yourself and the representatives of France, Italy, Germany, Austria-Hungary, and Russia at this capital, relative to certain measures taken by the naval forces of the great powers, signatories of the treaty of Berlin, in the waters of the island of Crete.

"As the United States is not a signatory of the treaty of Berlin, nor otherwise amenable to the engagements thereof, I confine myself to taking note of the communication, not conceding the right to make such a blockade as that referred to in your communication, and reserving the consideration of all international rights and of any ques-

tion which may in any way affect the commerce or interests of the United States."

Mr. Sherman, Sec. of State, to Sir Julian Pauncefote, British amb., March 26, 1897. For. Rel. 1897, 255.

The note of Sir Julian Pauncefote of March 24, 1897, which Mr. Sherman thus acknowledged, was as follows:

"On behalf of my Government and at the request of my colleagues, the representatives of Austria-Hungary, France, Germany, Italy, and Russia, I have the honor to transmit the inclosed communication relative to certain measures taken by the naval forces of the great powers, signatories of the treaty of Berlin, in the waters of the island of Crete.

"I desire to explain that this communication has not been delivered on the date which it bears owing to an accidental delay in the receipt of their instructions by some of my colleagues."

A notice, similar to that communicated to the Department of State in Washington, was published in a supplement of the London Gazette, March 19, 1897, copies of which were officially communicated by the foreign office to the United States embassy, March 20, 1897. (For. Rel. 1897, 253–254.)

Dec. 13, 1898, the British ambassador at Washington transmitted to the Department of State a communication signed by himself, as well as by the representatives of France, Italy, and Russia, saying: "The admirals of the four powers in Cretan waters have issued a notice that the blockade of Crete has been raised from the 5th of December instant, but that the importation of arms and munitions of war is absolutely prohibited."

For. Rel. 1898, 384.

The German ambassador at Washington, in a promemoria of Dec. 20, 1901, referring to the design of his Government to use coercive measures against Venezuela to bring about a settlement of claims, and to this end to employ in the first instance a pacific blockade, said that this blockade "would touch likewise the ships of neutral powers, inasmuch as such ships, although a confiscation of them would not have to be considered, would have to be turned away and prohibited until the blockade should be raised." No response appears to have been made to this notice at the time; but, a year later, when it was announced that Germany and Great Britain would act together, Mr. Hay, on Dec. 12, 1902, directed Mr. Tower, the American ambassador at Berlin, to say that the United States adhered to its position in the case of the Cretan blockade in 1897, and therefore did "not acquiesce in any extension of the doctrine of pacific blockade which may adversely affect the rights of states not parties to the controversy, or discriminate against the commerce of neutral nations," and that the United States reserved all its rights in the premises. The German Government replied that it was at first inclined to a pacific

blockade, but that, yielding to the wishes of Great Britain, which had insisted on establishing a warlike blockade, it would join with that Government in announcing such a blockade in a few days. Mr. Tower also reported that he had been assured that Germany "at present has no intention whatever to declare war or to proceed beyond the establishment of [a] warlike blockade." In response to an inquiry by Mr. Hay as to what was intended by a "warlike blockade without war, especially as regards neutrals," the German Government stated that, although it was not intended to make a formal declaration of war, a state of war would actually exist, and that the warlike blockade would be attended with all the conditions of such a measure, just as if war had been formally declared. A blockade of Puerto Cabello and Maracaibo was proclaimed by Germany on Dec. 20, 1902.

On Dec. 12, 1902, an instruction similar to that sent on the same day to the American ambassador at Berlin was addressed to the American embassy in London. On the 18th of December the embassy reported that the prime minister, Mr. Balfour, had stated in the House of Commons that he agreed with the United States in thinking "there can be no such thing as a pacific blockade;" that "evidently a blockade does involve a state of war," and that a formal notice would be issued in due time for the information of neutrals. Such a notice was published on Dec. 20.

It may be observed that the United States did not take the ground that there could be "no such thing" as a pacific blockade: it stated that it could not acquiesce "in any extension" of the doctrine of pacific blockade so as to affect "the rights of states not parties to the controversy."

For. Rel. 1903, pp. 420, 421, 423, 452, 455, 458.
For the promemoria of the German ambassador, see For. Rel. 1901, 196.

In 1887 the Institute of International Law, twenty-seven members being present, adopted a declaration to the effect that pacific blockade should be recognized as permitted by the law of nations only under the following conditions: (1) That ships under a foreign flag should be allowed freely to enter in spite of the blockade; (2) that the blockade should be declared and notified officially and maintained by a sufficient force; (3) that ships of the blockaded power which should fail to respect the blockade should be sequestered, and that when blockade had ceased they should be restored with their cargoes to their owners, but without any damages for their detention.

Annuaire de l'Institut, 1887–88, 300.

"It has been erroneously stated, even by Dr. Wharton, Digest, vol. iii, p. 408, that the 'Institut' had, in 1875, expressed itself as opposed to pacific blockade for any purpose. The question was never before the 'Institut' in 1875; and the mistake is due to the fact that in a 'Questionnaire' addressed to the members of a committee on private

property at sea, which reported in that year, attention had been incidentally called to the legality of pacific blockades, but without distinguishing between the different modes in which they have been applied. A majority of the members of the committee replied in a sense adverse to the practice, as thus unlimited in its scope. See *Revue de Droit International*, t. vii, p. 611" (Holland, Studies in International Law, 144, note.)

"It is difficult to understand the objections which have been made to the more limited form of the measure," i. e., pacific blockade, when applied only to vessels of the blockaded power. "M. Perels seems to be supported only by M. Heffter [*Völkerrecht der Gegenwart*, § 111] in maintaining that the measure may be lawfully extended so as to affect the ships of third states. . . . The opposite view is taken by F. de Martens, W. E. Hall, Neumann, De Negrin, Oppenheim, Wurm, Glas, Fiore, Calvo, Bluntschli, Wharton, Bulmerincq, Nys, Gessner, Geffcken." The opinions of international lawyers are focused in the resolutions of the Institute of International Law of 1887, which "may be taken as a well-considered expression of expert European opinion."

Holland, Studies in Int. Law, 140, 143–144.

Rivier, after noticing the theoretical objections to the idea of "pacific blockade," says it is hardly possible to deny to the measure the character of an institution of the actual law of nations, and that, with the limitation that it can be applied only to the ships of the blockaded country, it is in substance nothing more than a particular phase of reprisals, such as embargo. The measure of pacific blockade had a powerful advocate in the late Rolin-Jaequemyns.

Rivier, Principes du Droit des Gens, II. 198–199; Rolin-Jaequemyns, in Revue de Droit Int. (1876), VIII. 165.

"Pistoye et Duverdy (Traité des Prises Maritimes, II. 376–8), and Woolsey (§ 119), deny the existence of a right to enforce pacific blockade, but their minds were fixed upon its earlier form. Heffter (§ 111), Calvo (§ 1591), and Cauchy (II. 428) pronounce in favour of it. Bluntschli (§§ 506–7) approves of the practice on condition that the blockade shall be so conducted as not to touch third states. Von Bulmerincq (Holtzendorff's Handbuch, 1889, Vol. IV. § 127) unwillingly admits it as being at any rate a less evil than war. The opinions of many recent writers will be found summarized by Von Bulmerincq." (Hall, Int. Law, 5th ed. 375, note.)

* See, also, H. B. Deane, Law of Blockade, 45–48; Fiore, Droit Int., § 1231; Lawrence's Wheaton (1863), 845.

7. Embargo.

§ 1098.

By a joint resolution of Congress of March 26, 1794, an embargo was laid for thirty days on all ships and vessels in ports of the United States bound for any foreign port or place. The immediate

cause was the British order in council of Nov. 6, 1793, and a reported hostile speech by Lord Dorchester to the Indian tribes which were in hostility with the United States. It was expected that the measure would lead to a restriction of the supply of provisions to the British fleet in the West Indies, though the letter of the act operated equally against the French. Washington, in a message to Congress of March 28, 1794, stated that he had requested the governors of the several States to call out the militia for the detention of vessels, if necessary; and he recommended that the embargo be extended to fishing vessels, to which it had not been held to apply. It was also construed not to apply to armed vessels possessing public commissions, except letters of marque. By a resolution of April 18, 1794, the embargo was extended to May 25, 1794. On April 7, 1794, a resolution was introduced in Congress to suspend intercourse with Great Britain in British productions, but when Jay's mission to England was announced it was dropped. For the same reason the act of June 4, 1794, which was to remain in force till fifteen days after the commencement of the next session of Congress, and by which the President was authorized to lay an embargo whenever in his opinion the public safety should require it, remained unexecuted. By an act of May 22, 1794, however, the exportation of munitions of war was prohibited for a year, and their importation free of duty was authorized for two years.

Resolution March 26, 1794, 1 Stat. 400; message of March 28, 1794, Am. State Pap. For. Rel. I. 429; resolution April 2, 1794, 1 Stat. 401; resolution April 18, 1794, id. 401; act of June 4, 1794, id. 372; act of May 22, 1794, id. 369.

In a special message to Congress of December 18, 1807, President Jefferson, in view of the injuries inflicted on American commerce under Napoleon's Berlin decree of November 21, 1806, and the British decrees of blockade and orders in council, recommended "an inhibition of the departure of our vessels from the ports of the United States." The Senate, in secret session, by a vote of 22 to 6, passed a bill laying an embargo on all shipping, foreign and domestic, in the ports of the United States. The House, with closed doors, passed the bill, after a debate of three days, by a vote of 82 to 44. The bill became a law by the approval of the President on December 22, 1807. To the immediate operation of this measure an exception was made in favor of foreign vessels, which were allowed to depart, either loaded or in ballast, on receiving notice of the act. The embargo was repealed by the act of March 1, 1809, which substituted a policy of nonintercourse.

On April 1, 1812, President Madison sent a message to Congress recommending another embargo. An appropriate act was adopted

on April 6, 1812, and this was followed on the 14th of April by an act prohibiting exportations by land. Mr. Grundy said that he understood that this embargo was "a war measure" and was meant to lead directly to war, and Mr. Calhoun afterwards declared "its manifest propriety as a prelude."

By the act of December 17, 1813, passed while the war with Great Britain was in progress, the exportation of all produce or live stock was prohibited, and for this purpose an embargo was laid upon the coasting trade. On January 18, 1814, the President recommended the repeal of the act, which was found to be very onerous in its operation, and it was repealed by Congress on the 14th of April.

Message of President Jefferson, Dec. 18, 1807, Am. State Papers, For. Rel. III. 25; act of December 22, 1807, 2 Stat. 451, 452. This act was supplemented by the acts of January 9, 1808, 2 Stat. 453; March 12, 1808, 2 Stat. 473; April 25, 1808, 2 Stat. 499; Jan. 9, 1809, 2 Stat. 506. See, also, Moore, Int. Arbitrations, V. 4451–4455; Von Holst's Calhoun, 19; Quincy's Speeches, 31, 53, 247; 5 Jefferson's Works, 227, 252, 258, 271, 289, 336, 341, 352; Lossing's Encyc. of U. S. History, tit. "Embargo;" 1 Ingersoll's Second War, 1st series, 485.

For report of the Senate committee of April 16, 1808, on the British and French aggressions on American shipping and sustaining the policy of the embargo, see Am. State Papers, For. Rel. III. 220.

In 1824 Mr. Jefferson stated that when he sent his message of Dec. 18, 1807, to Congress he had in his possession an English newspaper containing the orders in council of the 11th of November. (Mr. Jefferson to Mr. Madison, July 14, 1824, 7 Jefferson's Works, 373.)

Mr. Clay, Speaker of the House, in a private letter, dated March 15, 1812, addressed to Mr. Monroe, Secretary of State, writes:

"Since I had the pleasure of conversing with you this morning I have concluded, in writing, to ask a consideration of the following propositions:

"That the President recommend an embargo to last, say, 30 days, by a confidential message.

"That a termination of the embargo be followed by war; and

"That he also recommend provision for the acceptance of 10,000 volunteers for a short period, whose officers are to be commissioned by the President.

"The objection to an embargo is that it will impede sales. The advantages are that it is a measure of some vigor upon the heels of Henry's disclosure—that it will give tone to public sentiment—operate as a notification, repressing indiscreet speculation, and enabling the prudent to look to the probable period of the commencement of hostilities, and thus to put under shelter before the storm. It will, above all, powerfully accelerate preparations for the war." (Monroe Papers.)

"When a war with England was seriously apprehended in 1794, I approved of an embargo, as a temporary measure to preserve our seamen and property, but not with any expectation that it would influence England. I thought the embargo, which was laid a year ago, a wise and prudent measure for the same reason, namely to preserve

our seamen and as much of our property as we could get in, but not with the faintest hope that it would influence the British councils. At the same time I confidently expected that it would be raised in a few months. I have not censured any of these measures, because I knew the fond attachment of the nation to them; but I think the nation must soon be convinced that they will not answer their expectations. The embargo and the nonintercourse laws, I think, ought not to last long. They will lay such a foundation of disaffection to the National Government as will give great uneasiness to Mr. Jefferson's successor, and produce such distractions and confusions as I shudder to think of."

Mr. J. Adams to Mr. Varnum, Dec. 26, 1808, 9 John Adams's Works, 606.

For an exposition of the circumstances under which the embargo statutes were repealed, see Mr. Jefferson to Mr. Giles, Dec. 25, 1825, 7 Jefferson's Works, 424.

For William Pinkney's view of the embargo, see 3 Randall's Jefferson, 257.

For the views of Mr. Gallatin, see 1 Gallatin's Works, 478.

Under the embargo act of December 22, 1807, 2 Stat. 451, the words "an embargo be and hereby is laid" not only imposed upon the public officers the duty of preventing the departure of registered or sea-letter vessels on a foreign voyage, but prohibited their sailing, and consequently rendered them liable to forfeiture under the supplementary act of January 9, 1808, 2 Stat. 453.

In such case, if the vessel be actually and bona fide carried by force to a foreign port, she is not liable to forfeiture; but if the capture, under which it was alleged that the vessel was compelled to go to a foreign port, was fictitious and collusive, she was liable to condemnation.

The William King (1817), 2 Wheat. 148.

The embargo act of April 25, 1808, 2 Stat. 499, related only to vessels ostensibly bound to some port in the United States, and a seizure after the termination of the voyage is unjustifiable; and no further detention of the cargo is lawful than what is necessarily dependent on the detention of the vessel. It is not essential to the determination of a voyage that the vessel should arrive at her original destination; it may be produced by stranding, stress of weather, or any other cause inducing her to enter another port with a view to terminate her voyage bona fide.

Otis *v.* Walter (1817), 2 Wheaton, 18.

It was no offense against the embargo act of Jan. 9, 1808, to take goods ... f one vessels and put them into another in the port of Baltimore, unless it be done with an intent to export them.

Juliana *v.* United States (1810), 6 Cranch, 327.

A vessel which proceeded to a foreign port contrary to the act of January 9, 1808, was liable to seizure upon her return, though the act provided for a penalty in case she should not be seized.

United States *v.* Brig Eliza (1812), 7 Cranch, 113.

In a prosecution under section 3 of the embargo act of January 9, 1808, it was held that the evidence of necessity which would excuse a violation of the law must be very clear and positive.

Brig James Wells *v.* United States (1812), 7 Cranch, 22.

This section did not forbid the lading of a vessel by means of craft whose business was confined to rivers, bays, and sounds in the United States.

Schooner Paulina's Cargo *v.* United States (1812), 7 Cranch, 52.

Nor did its prohibition of any vessel to "depart from any port of the United States without a clearance or permit" cover the case of a vessel which had left the wharf and proceeded a mile and a half therefrom with intent to go to sea, but had not actually left the port.

Sloop Active *v.* United States, (1812), 7 Cranch, 100.

It seems that a schooner, which was "originally an American vessel, but had been captured and condemned as prize, and purchased by Hurst, her former master, an American citizen," was forfeited as a foreign vessel, under section 5 of the act of January 9, 1808, on the strength of "the capture, condemnation, and sale, and the Danish burgher's brief, which the master had obtained."

Schooner Good Catharine *v.* United States (1813), 7 Cranch, 349. This case is very imperfectly reported, and no opinion appears to have been delivered.

Semble, that it was a good defense to an action on an embargo bond that it was given for more than double the value of the vessel and cargo, and that the master was constrained to execute it by the refusal of a clearance.

United States *v.* Gordon (1813), 7 Cranch, 287.

Quære: Whether a registered vessel, which had a clearance from one port to another of the United States, was forfeitable under the embargo acts of December 22, 1807, and January 9, 1808, for going to a foreign port. The court was "not convinced" that she was not, but did not decide the point.

Brig Short Staple *v.* United States (1815), 9 Cranch, 55.

A bond was given under the act of December 22, 1807, commonly called the embargo act, to reland certain goods in the United States,

"the dangers of the seas only excepted." Held, that the case of a vessel driven by stress of weather into a port of the West Indies, where the authorities compelled the cargo to be sent ashore and sold, came within the exception.

United States *v.* Hall (1810), 6 Cranch, 171.

A bond taken under section 1 of the embargo act of January 9, 1808, is not void because it was given by consent of parties after the vessel had sailed.

Speake *v.* United States (1815), 9 Cranch, 28.

By section 11 of the embargo act of April 25, 1808, the collectors of customs were "respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinions the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon." It was held that this section did not authorize the seizure of a vessel which had actually arrived at her port of discharge and had received from the collector of the port a permit to land her cargo, and that such a seizure could not be justified by instructions from the Secretary of the Treasury and the confirmation of the President.

Otis *v.* Bacon (1813), 7 Cranch, 589.

Though a voyage may be terminated by stranding, by stress of weather, or by any other cause inducing an honest entry into another port with a view to terminate the voyage, yet a mere colorable entry into such other port will not suffice.

Otis *v.* Walter (1817), 2 Wheat., 18.

Under the eleventh section of the act of the 25th of April, 1808, the collector was justified in detaining a vessel by his honest opinion that there was an intention to violate or evade the provisions of the embargo laws. It was not necessary for him to show that his suspicion was reasonable.

Crowell *v.* McFadon (1814), 8 Cranch, 94.

Under the embargo act of April 25, 1808, it was not necessary to show probable cause for the vessel's detention, but only a bona fide effort to execute the law.

Otis *v.* Walter (1817), 2 Wheat., 18.

Section 11 of the act of April 25, 1808, gave no power to seize the cargo specifically, or to detain it if separated from the vessel.

Slocum *v.* Mayberry (1817), 2 Wheat., 1.
Otis *v.* Walter (1817), 2 Wheat., 18.

8. Nonintercourse.

§ 1099.

June 13, 1798, the President approved an act of Congress to suspend commercial intercourse between the United States and France and her dependencies. This was followed by acts to increase the naval armament of the United States, and to authorize the raising of a provisional army and the defense of American merchant vessels against French depredations, as well as by various other acts which brought about the state of limited hostilities between the United States and France.

Moore, Int. Arbitrations, V. 4426.

See, also, Mr. Pickering, Sec. of State, to Mr. Latimer, Oct. 27, 1798, 10 MS. Dom. Let. 153; Mr. Wagner, chief clerk of Dept. of State, to Mr. Bonamy, Dec. 5, 1798, id. 187; Mr. Pickering, Sec. of State, to Mr. Holmes, April 10, 1799, id. 284; Mr. Pickering, Sec. of State, to Mr. Pinckney, May 16, 1799, id. 329.

In November, 1798, the owner of the American schooner *Juno*, which was then bound for the island of St. Croix, such owner being a resident of the United States, gave bond to the collector of customs at New York against the schooner's being used in violation of the act of Congress of June 13, 1798, establishing nonintercourse with France. At St. Croix the schooner was sold to a resident Danish subject, by whom she was afterwards sent to a French island. Her name was changed to the *Jennett*, under which she subsequently entered the port of New York, where she was seized and detained for an alleged violation of the bond. It was held that the law "did not intend to affect the sale of vessels of the United States, or to impose any disability on the vessel, after a bona fide sale and transfer to a foreigner;" that this point was settled in the case of the *Charming Betsy*, with which decision the court "was well satisfied."

Marshall, C. J. Sands *v.* Knox (1806), 3 Cranch, 499.

September 20, 1808, the ship *Helen* was seized for a violation of the act of Congress of February 28, 1806, 2 Stat. 351, suspending commercial intercourse with certain ports in Santo Domingo. The libel was dismissed on the ground that the act had expired April 25, 1808.

United States *v.* Ship Helen (1810), 6 Cranch, 203.

As to nonintercourse with Santo Domingo, see Moore, Int. Arbitrations, V. 4476–4477.

Where a vessel was condemned and sold, and the money paid over to the United States, under the act prohibiting trade with certain ports of Santo Domingo, the Supreme Court made a general order for

restitution of the property condemned, on its appearing that the act had expired since the proceedings in question.

Rachel *v.* United States (1810), 6 Cranch, 329.

A vessel, libeled for a violation of the nonintercourse act of March 1, 1809, contended that she came into the waters of the United States merely for the purpose of ascertaining whether she might land her cargo. It appearing, however, that she had neglected prior opportunities to inform herself, her condemnation was affirmed.

Brig Penobscot *v.* United States (1813), 7 Cranch, 356.

It was a cause of forfeiture of the vessel under the act of March 1, 1809, to take articles on board at a forbidden port, with the owners' or master's knowledge, with intent to import them into the United States.

The New York (1818), 3 Wheat., 59.

By section 4 of the act of March 1, 1809, it was made unlawful to import into the United States any goods the "produce" of France. Held, that this prohibition applied to wines which, though imported into the United States prior to the act, were exported to the Dutch island of St. Bartholomew's, where they were purchased by the consignee and reshipped to the United States.

Schooner Hoppet *v.* United States (1813), 7 Cranch, 389.

Under the same statute, an American vessel from Great Britain had a right to lay off the coast of the United States to receive instructions from her owners in New York, and, if necessary, to drop anchor and in case of a storm to make a harbor; and if prevented by a mutiny of her crew from putting out to sea again, might wait in the waters of the United States for orders.

United States *v.* The Cargo of the Fanny, 9 Cranch, 181.

The forfeiture of goods for violation of the nonintercourse act of March 1, 1809, took effect upon the commission of the offense, and avoid a subsequent bona fide sale to an innocent purchaser.

United States *v.* 1960 Bags of Coffee (1814), 8 Cranch, 398.

The same rule applied in the case of forfeiture under section 3 of the act of June 28, 1809. (United States *v.* Brigantine Mars (1814), 8 Cranch, 417.)

See the Octavia (1816), 1 Wheat., 20, under the act of June 28, 1809.

The nonintercourse act of March 1, 1809, was, by force of the act of May 1, 1810, and the President's proclamation of November 2, 1810, revived on February 2, 1811.

Brig Aurora *v.* United States (1813), 7 Cranch, 382.

The United States interposed a claim, under the nonintercourse act of March 1, 1809, to a vessel and cargo which had been captured by a privateer and libeled for condemnation for trading with the enemy. Held, that "the municipal forfeiture under the nonintercourse act was absorbed in the more general operation of the law of war;" and that, even were the doctrine otherwise, the prize act of June 26, 1812, sections 4, 6, and 14, granted to the captors all property rightfully captured by commissioned privateers.

The Sally (1814), 8 Cranch, 382.

Prosecutions under the act of March 1, 1809, are causes of admiralty and maritime jurisdiction, and the proceedings may be by libel in the admiralty.

The Samuel (1816), 1 Wheaton, 9.

In a prosecution for condemnation of a vessel for violating the nonintercourse act of June 28, 1809, 2 Stat. 550, the claimants alleged that the vessel was driven out of her course by stress of weather and thus compelled to enter a foreign port. Held, that a person who had violated the statute must, in order to clear his vessel, make out the vis major so clearly "as to leave no reasonable doubt of his innocence."

Brig Struggle *v.* United States (1815), 9 Cranch, 71.

The act of June 28, 1809, requiring a vessel sailing for a permitted port to give bond in "double the value of the vessel and cargo" not to go to a prohibited port, applied to a vessel sailing in ballast.

Ship Richmond *v.* United States (1815), 9 Cranch, 102.

A vessel coming from Great Britain on July 4, 1812, after the repeal of the British orders in council, but before the declaration of war was known, and lying off the coast of the United States to ascertain whether she would be allowed to enter, was not subject to condemnation under the nonintercourse act of June 28, 1809, though she had been forced by stress of weather and a mutiny of her crew to come into territorial waters and wait there.

United States *v.* Cargo of the Fanny (1815), 9 Cranch, 181.

An information was filed against certain merchandise under section 5 of the nonimportation act of March 1, 1809. It appeared that after the merchandise was seized it was released by order of the Secretary of the Treasury, and that later in the day the present information was filed. The district court condemned the property, but the circuit court reversed the decree, holding that the jurisdiction acquired by the original seizure was ousted by the subsequent abandonment. Held, that, by the laws of the United States, the jurisdiction

in revenue proceedings in rem depended upon the place of seizure and not of the offense; that before judicial cognizance can attach upon a forfeiture in rem there must be a seizure; that this seizure must subsist when the libel or information is filed and allowed; and that "if a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. . . . It is, in this respect, like a case of capture, which, although well made, gives no authority to the prize court to proceed to adjudication, if it be voluntarily abandoned before judicial proceedings are instituted."

Story, J., delivering the opinion of the court, The Brig Ann (March 10, 1815), 9 Cranch, 289.

"The English ministry, accordingly, refused to ratify this arrangement [for the suspension of the nonintercourse act]; a resolution which, although fully justified in point of right by Napoleon's violence, and by Mr. Erskine's deviation from his instructions, may now well be characterized as one of the most unfortunate, in point of expediency, ever adopted by the British government: for it at once led to the renewal of the nonintercourse act of the United States; put an entire stop, for the next two years, to all commerce with that country; reduced the exports of Great Britain fully a third, during the most critical and important years of the war; and, in its ultimate results, contributed to produce that unhappy irritation between the two countries, which has never yet, notwithstanding the strong bonds of mutual interest by which they are connected, been allayed."

10 Alison, Hist. of Europe, 650.

CHAPTER XXIII.

WAR.

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1. *DEFINITIONS.*

§ 1100.

Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another, as in the case of reprisals, and yet no state of war may arise. In such a case there may be said to be an act of war, but no state of war. The distinction is of the first impor-

tance, since, from the moment when a state of war supervenes third parties become subject to the performance of the duties of neutrality as well as to all the inconveniences that result from the exercise of belligerent rights. One of the most remarkable illustrations of the distinction here pointed out was the condition of things in China in 1900, when the armed forces of the allies marched to Peking and occupied parts of the country without any resultant state of war.

"Cicero says that war is a contest or contention carried on by force. But usage applies the term, not only to an action [a contest], but to a state or condition: and thus we may say, war is the state of persons contending by force, as such. Hence we do not exclude *private* wars, which preceded public wars, and have the same origin as those. . . . The common use of the word *war* allows us to include private war, though, used generally, it often means specifically *public* war. We do not say that war is a state of *just* contention, because precisely the point to be examined is, whether there be just war, and what war is just."

Grotius, Book I., chap. 1, § 2.

Bynkershoek accepts Grotius's view that war is a state or condition of things rather than an action or contest, but suggests as a more comprehensive definition than that of Grotius: "War is a contest between independent parties by way of force or deceit, for the purpose of pursuing their right." By this definition, as he points out, he excludes the idea of private war, except, perhaps, as to individuals who acknowledge no political superior. (Book I., chap. 1.)

Vattel defines war as the state of things in which a nation prosecutes its right by force. (Book III., chap. 1, § 1.)

For other definitions of war, see Twiss, Law of Nations in Time of War, § 26, p. 49; Martens, Law of Nations, Book VIII., chap. 2, § 1; Hefftter, § 113; Buntschli (by Lardy), art. 510; Phillimore, Int. Law, III., § 49; Calvo, Droit International, (5th ed.) IV. 15.

"20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 150.

II. *KINDS.*

1. Public and General.

§ 1101.

Wheaton and other writers speak of "perfect" and "imperfect" wars, the former being one in which it is said the whole nation is at war with another nation and all the members of each are authorized to commit hostilities against all the members of the other in every case permitted by the laws of war; the latter, a war limited as to places, persons, and things. It may be suggested that it would be more nearly correct to speak of wars in this sense as *general* and *limited*.

See, for Wheaton's classification of wars as "perfect" and "imperfect," Dana's edition, Part IV, sec. 296, p. 374.

Lawrence, in a note preserved by Dana, classes as an imperfect war "the limited hostilities authorized by the United States against France in 1798," citing 2 Dall. 21; 4 id. 37.

"A perfect war is that which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility; the imperfect war is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals."

Case of the Resolution, Federal Court of Appeals, 1781, 2 Dall. 18, 21.

2. Limited.

§ 1102.

See as to French spoliation claims, supra, § 1056.

"And whereas actual hostilities have long been practised on the commerce of the United States by the cruisers of the French Republic under the orders of its Government, which orders that Government refuses to revoke or relax; and hence it has become improper any longer to allow the consul-general, consuls, and vice-consuls of the French Republic above named, or any of its consular persons or agents heretofore admitted in these United States, any longer to exercise their consular functions; these are therefore to declare, that I do no longer recognize the said citizen Letombe as consul-general, or consul, nor the said citizens Rosier and Arcambal as vice-consuls, nor the said citizen Mozard as consul of the French Republic in any part of these United States, nor permit them or any other consular persons or agents of the French Republic, heretofore admitted in the United States, to exercise their functions as such; and I do hereby wholly revoke the *exequaturs* heretofore given to them respectively, and do declare them absolutely null and void, from this day forward."

Proclamation of July 13, 1798, 9 John Adams's Works, 170, 171.

Captain Tingy, of the U. S. S. *Ganges*, libeled for salvage the American ship *Eliza*, which he recaptured March 31, 1799, from a French privateer, after she had been for more than ninety-six hours in the privateer's possession. An allowance was made of one-half the value of the ship and cargo. The propriety of this allowance depended on the application of certain acts of Congress. By an act of June 28, 1798, an allowance of one-eighth was made to a public armed vessel that "recaptured" an American vessel or goods. By an act of March 2, 1799, however, it was provided that if an American ship or goods should be "retaken from the enemy," an allowance of a half should be made, if the retaking occurred above ninety-six hours after the taking; and it was by the same act further provided that all money accruing or accrued "from the sale of prizes" should be a fund for the payment of the half pay of officers and seamen. The propriety of the allowance in the case of the *Eliza*, therefore, depended (1) on whether the act of March 2, 1799, applied only to the event of a future general war, and (2) on whether France was an "enemy" of the United States within the meaning of the law. The judges of the Supreme Court delivered their opinions seriatim.

Moore, J., said that the act of 1799 obviously applied to the present situation with respect to France. How could that situation be otherwise described than as *hostility* or *war*, or the parties engaged in it than as *enemies?* By this description alone could they justify "the scene of bloodshed, depredation and confiscation, which has unhappily occurred."

Washington, J., said that "every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war." It might be a solemn and general, or perfect, war, or, "being limited as to places, persons, and things," might be called an imperfect war. Still, it was a public war, and the parties to the hostilities authorized by the acts of Congress were enemies. Congress had "raised an army; stopped all intercourse with France; dissolved our treaty; built and equipt ships of war; and commissioned private armed ships; enjoining the former, and authorizing the latter, to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to recapture armed vessels found in their possession." "In fact and in law we are at war: an *American* vessel fighting with a *French* vessel, to subdue and make her prize, is fighting with an enemy accurately and technically speaking: . . . The sixth and ninth sections of the act [of 1799] speak of *prizes*, which can only be of property taken at sea from *an enemy*, *jure belli;* and the 9th section speaks of prizes as taken from *an enemy*, in so many words."

Chase, J., said that Congress might "declare a general war," or "wage a limited war." The contest with France was "a limited, partial, war;" but it was also "a public war, on account of the public authority from which it emanates."

Paterson, J., said that the two countries were "in a qualified state of hostility." It was "a war *quoad hoc*." It was "a public war between the two nations," qualified in the manner prescribed by Congress, and the term *enemy* applied to the parties to it. The word "enemy" in the act of March 2, 1799, applied to the past, present, and future.

Mr. Justice Chase referred, in the course of his opinion, to Sir William Scott's observation in the case of the *Santa Cruz*, Rob. Rep. 54, that "in the present state of hostility (if so it may be called) between America and France," it was the practice of the English court of admiralty to restore recaptured American property on payment of salvage. Mr. Justice Chase declared that he could not "perceive the difficulty of the case," since there existed between the two countries "a public qualified war."

Bas *v.* Tingy (1800), 4 Dall. 37.

"Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed. To determine the real situation of America in regard to France, the acts of Congress are to be inspected. . . . One direct and declared object of the war . . . was the protection of the American commerce, . . ." And as there existed a state of war, even though, under the acts of Congress, it was a "limited state of hostilities," a ship of war of the United States had a right to capture any vessel sailing under French colors, though express authority for the capture of such a vessel, as distinguished from a French vessel, was given only to private armed vessels. This right was one of the "incidents growing out of those acts of hostility specifically authorized, which a fair construction of the acts will authorize likewise."

Marshall, C. J., in Talbot *v.* Seeman (1801), 1 Cranch, 1, 28.

In discussing a charge of trading contrary to the nonintercourse act against France of June 13, 1798, Marshall, C. J., used the phrase — "Even if an actual and general war had existed between this country and France," etc.

Hallet & Bowne *v.* Jenks (1805), 3 Cranch, 210.

"I think it is clear, sir, that, whatever misunderstanding existed between the United States and France [from 1798 to 1800], it did not

amount, at any time, to open and public war. It is certain that the amicable relations of the two countries were much disturbed; it is certain that the United States authorized armed resistance to French captures, and the captures of French vessels of war found hovering on our coast; but it is certain, also, not only that there was no declaration of war, on either side, but that the United States, under all their provocations, never authorized general reprisals on French commerce. At the very moment when the gentleman says war raged between the United States and France, French citizens came into our courts, in their own names claimed restitution for property seized by American cruisers, and obtained decrees of restitution. They claimed as citizens of France, and obtained restitution in our courts as citizens of France. . . . This act [May 28, 1798], it is true, authorized the use of force, under certain circumstances, and for certain objects, against French vessels. But there may be acts of authorized force; there may be assaults; there may be battles; there may be captures of ships and imprisonment of persons, and yet no general war. Cases of this kind may occur under that practice of *retorsion* which is justified, when adopted for just cause, by the laws and usages of nations, and which all the writers distinguish from general war. . . . On the same day in which this act passed, . . . Congress passed another act, entitled 'An act authorizing the President of the United States to saise a provisional army;' and the first section declared, that the President should be authorized, '*in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion*,' to cause to be enlisted ten thousand men." Mr. Webster also called attention to the fact that by the act of February 20, 1800, war was still spoken of as a future contingency; and on May 11, 1800, further warlike preparations were stopped.

Mr. Webster's speech on French spoliations, 4 Webster's Works, 163–165.
In accord with this view is Gray, admr., *v.* United States (1886), 21 Ct. Cl. 340, 374. See supra, § 1056.
See, also, Lawrence's Wheaton (1863), 518.

3. Civil.

§ 1103.

"A civil war between the different members of the same society is what Grotius calls a *mixed* war; it is, according to him, *public* on the side of the established government, and *private* on the part of the people resisting its authority. But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations."

Wheaton, Dana's edition, Part IV, sec. 296, p. 374.
See, in the same place, Dana's note on "Belligerent powers exercised in civil war."

"149. Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

Insurrection—Civil war—Rebellion.

"150. Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

"151. The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own.

"152. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

"153. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.

"154. Treating in the field the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

"155. All enemies in regular war are divided into two general classes—that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government.

"The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

"156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens in revolted territories against the hardships of the war as much as the common misfortune of all war admits.

"The commander will throw the burden of the war, as much as lies within its power, on the disloyal citizens, of the revolted portion or province, subjecting them to a stricter police than the noncombatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government.

"Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

"157. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 163.

4. Private.

§ 1104.

"If one citizen has a right to go to war of his own authority, every citizen has the same. If every citizen has that right, then the nation (which is composed of all its citizens) has a right to go to war by the authority of its individual citizens. But this is not true, either on the general principles of society or by our Constitution, which gives that power to Congress alone, and not to the citizens individually. Then the first position was not true, and no citizen has a right to go to war of his own authority; and for what he does without right, he ought to be punished."

Mr. Jefferson, Sec. of State, to Mr. Morris, min. to France, Aug. 16, 1793, Am. State Papers, For. Rel. I. 167, 168; 4 Jefferson's Works, 37. Adopted by Mr. Webster, Sec. of State, report to President (Thrasher's case), Dec. 23, 1851, 6 Webster's Works, 527. (This report is not on record in the Department of State.)

"No hostilities of any kind, except in necessary self-defence, can lawfully be practiced by one individual of a nation, against an individual of any other nation at enmity with it, but in virtue of some public authority. War can alone be entered into by national authority; . . . and each individual on both sides is engaged in it as a member of the society to which he belongs, not from motives of personal malignity and ill will. . . . Even in the case of one enemy against another enemy, therefore, there is no colour of justification for any offensive hostile act, unless it be authorized by some act of the government giving the public constitutional sanction to it."

Mr. Justice Iredell, in Talbot *v.* Janson (1795), 3 Dall. 133, 160.

It is an offense against the law of nations for any persons, whether citizens or foreigners, to go into the territory of Spain with intent to recover their property by their own strength, or in any other manner than that permitted by its laws.

Lee, At. Gen., 1797, 1 Op. 68.

"While noticing the irregularities committed on the ocean by others, those on our own part should not be omitted nor left unprovided for. Complaints have been received that persons residing within the United States have taken on themselves to arm merchant vessels and to force a commerce into certain ports and countries in defiance of the laws of those countries. That individuals should undertake to wage private war, independently of the authority of their country, can not be permitted in a well-ordered society. Its tendency to produce aggression on the laws and rights of other nations and to endanger the peace of our own is so obvious that I doubt not you will adopt measures for restraining it effectually in future."

President Jefferson, annual message, Nov. 8, 1804, Richardson's Messages, I. 370.

A citizen of the United States having intimated his intention to take guano from the Lobos Islands, the Department of State adverted to the fact that in 1842 the Peruvian Government issued two decrees prohibiting foreign vessels, on penalty of confiscation, from removing guano from any of the islands near the coast of Peru without a license from that Government, and said: "Under these circumstances, it is expected that the vessels which have proceeded thither under your auspices will not make use of the arms with which it

appears from your letter of the 16th instant they are provided for the purpose of forcibly resisting the Peruvian authorities. You must be aware that such a resistance would be an act of private war, which can never receive any countenance from this Government. The naval commander of the United States in the Pacific will also, under existing circumstances, be directed to abstain from protecting any vessels of the United States which may visit those islands for the purposes forbidden by the decrees of the Peruvian Government until he shall receive further orders."

Mr. Webster, Sec. of State, to Mr. Jewett, Aug. 21, 1852, 40 MS. Dom. Let. 300.

III. *POWER TO MAKE.*

§ 1105.

"To this state of general peace with which we have been blessed, one only exception exists. Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean, with assurances to that power of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. The measure was seasonable and salutary. The Bey had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger."

President Jefferson, annual message, Dec. 8, 1801, Richardson's Messages, I. 326

On December 6, 1805, President Jefferson, when discussing Spanish depredations on our territory, said: "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided. I have barely instructed the officers stationed in the neighborhood of the aggressions, to protect our citizens from violence, to patrol within the borders actually delivered to us, and not to go out of them but when necessary to repel an inroad, or to rescue a citizen, or his property."

See 2 Am. State Papers, For. Rel. 613.

"The act of March 3, 1815, having premised that the Dey of Algiers had commenced a predatory warfare against the United States, gave to the President the same authority as in the preceding

case of Tripoli, to instruct the commanders of public armed vessels, and to grant commissions to the owners of private armed vessels, to subdue, seize, and make prize of all vessels, goods, and effects of or belonging to the Dey of Algiers or to his subjects. (3 Stat. 230.)"

Lawrence's Wheaton (1863), 507.

A naval officer of the United States can not resort to force to compel delivery to him of American seamen unjustly imprisoned on a vessel in a foreign port. His duty is to demand the delivery of such seamen, and if this is refused, to resort to the civil authorities. He can, however, if there is an attempt forcibly to seize such seamen from their own vessels, forcibly intervene. "The employment of force is justifiable in resisting aggressions before they are complete. But when they are consummated, the intervention of the authority of government becomes necessary if redress is refused by the aggressor."

Mr. Clay, Sec. of State, to Mr. Rebello, Mar. 22, 1827, MS. Notes to Foreign Legs. III. 338.

"But if the claim were never so just, if it had been a case in which this Government were bound officially to interfere and if the amount due to the claimant had been acknowledged by the Hawaiian Government, the President could not employ the naval force of the United States to enforce its payment without the authority of an act of Congress. The war-making power alone can authorize such a measure. The President, therefore, regrets that you should have so far mistaken your powers as to have called upon Commander Du Pont of the *Cyane* in September last and 'inquired of him whether he would consider any directions or instructions from me [you] in my [your] official capacity as at all obligatory upon him in case I [you] should find it necessary to use the force under his command to compel compliance with any demands I [you] should think proper to make on this [Hawaiian] Government.' Commander Du Pont very properly replied in the negative; and informed you that under his general instructions he should feel bound to cultivate the most friendly relations with all the officials of this [the Hawaiian] Government."

Mr. Buchanan, Sec. of State, to Mr. Ten Eyck, comr. to Hawaii, Aug. 28, 1848, MS. Inst. Hawaii, II. 1.

"In the first place, I have to say that the war-making power in this Government rests entirely with Congress; and that the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws. By these no power is given to the Executive to oppose an attack by one independent nation on the possessions of another. We are bound to regard both France and Hawaii as independent states, and equally independent, and though

the general policy of the Government might lead it to take part with either in a controversy with the other, still, if this interference be an act of hostile force, it is not within the constitutional power of the President; and still less is it within the power of any subordinate agent of government, civil or military."

Mr. Webster, Sec. of State, to Mr. Severance, July 14, 1851, MS. Inst. Hawaii, II. 30; H. Ex. Doc. 48, 53 Cong. 2 sess. 342.

"This proposition, looking to a participation by the United States in the existing hostilities against China, makes it proper to remind your lordship that, under the Constitution of the United States, the executive branch of this Government is not the war-making power. The exercise of that great attribute of sovereignty is vested in Congress, and the President has no authority to order aggressive hostilities to be undertaken.

"Our naval officers have the right—it is their duty, indeed—to employ the forces under their command, not only in self-defense, but for the protection of the persons and property of our citizens when exposed to acts of lawless outrage, and this they have done both in China and elsewhere, and will do again when necessary. But military expeditions into the Chinese territory can not be undertaken without the authority of the National Legislature."

Mr. Cass, Sec. of State, to Lord Napier, Apr. 10, 1857, MS. Notes to Great Britain, III. 338.

"I deem it my duty once more earnestly to recommend to Congress the passage of a law authorizing the President to employ the naval force at his command for the purpose of protecting the lives and property of American citizens passing in transit across the Panama, Nicaragua, and Tehuantepec routes against sudden and lawless outbreaks and depredations. I shall not repeat the arguments employed in former messages in support of this measure. Suffice it to say that the lives of many of our people and the security of vast amounts of treasure passing and repassing over one or more of these routes between the Atlantic and Pacific may be deeply involved in the action of Congress on this subject.

"I would also again recommend to Congress that authority be given to the President to employ the naval force to protect American merchant vessels, their crews and cargoes, against violent and lawless seizure and confiscation in the ports of Mexico and the Spanish-American states when these countries may be in a disturbed and revolutionary condition. The mere knowledge that such an authority had been conferred, as I have already stated, would of itself in a great degree prevent the evil. Neither would this require any additional appropriation for the naval service.

"The chief objection urged against the grant of this authority is that Congress by conferring it would violate the Constitution; that it would be a transfer of the war-making, or, strictly speaking, the war-declaring, power to the Executive. If this were well founded, it would, of course, be conclusive. A very brief examination, however, will place this objection at rest.

"Congress possess the sole and exclusive power under the Constitution 'to declare war.' They alone can 'raise and support armies,' and 'provide and maintain a navy.' But after Congress shall have declared war and provided the force necessary to carry it on the President, as Commander in Chief of the Army and Navy, can alone employ this force in making war against the enemy. This is the plain language, and history proves that it was the well-known intention of the framers of the Constitution."

President Buchanan, annual message, Dec. 19, 1859, Richardson's Messages, V. 569.

"'The United States believe it to be their duty, and they mean to execute it, to watch over the persons and property of their citizens visiting foreign countries, and to intervene for their protection, when such action is justified by existing circumstances and by the law of nations.'

"In addition to this general declaration, applicable in all countries, there were some peculiar principles asserted, arising out of the condition of Nicaragua and of the transit route from ocean to ocean across its territory. The right of the United States to take care that the public contracts made with our citizens for the construction and use of that route of intercommunication are faithfully observed was explained and maintained, and so far as the legal power of the Executive extends will be enforced, if necessary. . . . This Government disavowed both the authority and the disposition to determine the conflicting interests of the various claimants, but it required the Government of Nicaragua to act in good faith toward them. And it also announced, that it would not recognize as valid any declaration of forfeiture, past or to come, unless pronounced in conformity with the provisions of the contract, if there are any, or if there is no provision for that purpose, then, unless there has been a fair and impartial investigation in such a manner as to satisfy the United States that the proceeding has been just, and that the decision ought to be submitted to. . . .

"You seem to suppose that the defence of the rights of our country or its citizens, and the avowal that their violation will justify the employment of force, commits the Executive in your case to resort to it, and you accordingly call for the application of 'the armed

force' of the United States for the protection of your rights in Nicaragua.

"The employment of the national force, under such circumstances, for the invasion of Nicaragua is an act of war, and however just it may be, it is a measure which Congress alone possesses the constitutional power to adopt. The President has in three separate messages brought to the attention of that body this subject of the employment of force for the protection of our citizens, and he has stated with equal perspicuity and strength the reasons which imperatively call for the adoption of this policy in various countries upon this continent. In his message to the Senate and House of Representatives of February 18, 1859, the President remarks, referring to a preceding message, that 'the executive government of this country in its intercourse with other nations is limited to the employment of diplomacy alone, when this fails it can proceed no farther.' But these appeals to Congress have produced no result. . . .

"Cases may occur where the circumstances may justify the employment of our naval or military forces, without special legislative provision, for the protection of our citizens from outrage, but it is not necessary to examine the extent or limit of this right, because the principle is inapplicable in your case, where you demand a forcible interposition with the Nicaraguan Government, in order to give effect to the contract to which you refer.

"In the first place, if the President were empowered to use force, before its application some injurious act must have been consummated, and it would also be necessary that all the facts should be investigated in order to ascertain the justice of armed interference. The principles are laid down in the despatch to General Lamar, but their application depends upon the proceedings of the parties."

Mr. Cass, Sec. of State, to Mr. Body, Sec. Am. Atlantic & Pacific Ship Canal Co., March 3, 1860, 52 MS. Dom. Let. 11.

For the instruction to Gen. Lamar, June 3, 1858, see MS. Inst. Am. States, XV. 312, and supra.

As to the action of the President in directing the Navy to protect Santo Domingo during negotiations for annexation, see supra, § 85. Mr. Harlan, in a speech in the Senate, March 29, 1871, defending the President against the criticisms of Mr. Schurz, referred to our Indian wars, to the sending of troops into Utah for the purpose of enforcing the law, to the sending of military forces to the northern boundary during the dispute with Great Britain, to the bombardment of Greytown, to the bombardment of Japanese forts (by the combined navies of the United States, France, and England), and to acts of war committed by foreign fleets within the waters of China. A distinction was drawn in the speeches in defense of the President between mak-

ing war and merely committing acts of war in the sense of acts involving the employment of force.

Congressional Globe, 42 Cong. 1 sess. (1871), pt. 1, pp. 232,250, 294, 305, et seq.; also, pt. 2 and appendix, pp. 51, 62, et seq.

With reference to a request made to an American naval officer to recover by force a quantity of silver belonging to a citizen of the United States, which had been seized by an officer of the Mexican Government in that country, the Department of State said: "If the latter [the American naval officer] had himself seized the bullion by force, as was expected, the Mexican Government would probably have regarded this as an act of hostility for which this Government would have been required to make amends. The President is not authorized to order or approve an act of war in a country with which we are at peace, except in self-defense. This is a peculiarity of our form of government, which at times may be inconvenient, but which is believed to have proved and will in future be found in the long run to be wise and essential to the public welfare."

Mr. Hunter, Act. Sec. of State, to Mr. Turner, consul at La Paz, Mexico, No. 56, Nov. 7, 1876, 84 MS. Desp. to Consuls, 127.

See, also, Mr. Hunter, Second Assist. Sec. of State, to Mr. Wilson, consul at Matamoras, No. 149, Nov. 18, 1876, 84 MS. Desp. to Consuls, 207.

See, further, Mr. Fish, Sec. of State, to Mr. Williamson, min. to Costa Rica, No. 255, Nov. 3, 1876, MS. Inst. Costa Rica, XVII, 303.

"By the Constitution, Congress alone has the power to declare a national or foreign war. It can not declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander in Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

"If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*.' Lord

Stowell (1 Dodson, 247) observes, 'It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other.'"

Grier, J.: The Prize Cases (1862), 2 Black, 668.

IV. *COMMENCEMENT OF WAR.*

1. Declaration.

§ 1106.

"Unfortunately the anticipations of security for their vessels and citizens created by the treaty of 1796 between the United States and Tripoli were by no means realized. On the contrary, the flag of this country on the high seas was still disregarded by Tripolitan cruisers, which captured its vessels and made prisoners and slaves of those found on board of them. The patience of Congress was at length exhausted by such outrages, and the act of the 2nd of February 1802 was passed 'for the protection of commerce and seamen of the United States against the Tripolitan cruisers.' This was virtually a declaration of war against Tripoli. . . . The manner in which the war was prosecuted by this Government and its result, are historical facts too notorious to be expatiated upon. Peace was restored by the treaty of the 4th of June 1805, between the United States and the Bashaw Bey and subjects of Tripoli."

Mr. Fish, Sec. of State, to Aristarchi Bey, Turkish min., Sept. 18, 1876, MS. Notes to Turkey, I. 170.

President Madison, in a special message to Congress, June 1, 1812, after enumerating the grievances against Great Britain, said: "We behold, in fine, on the side of Great Britain, a state of war against the United States; and on the side of the United States, a state of peace toward Great Britain." The message ended without expressly recommending any specific action. It was received in each House with closed doors. On June 3, Calhoun, in a report from the House Committee on Foreign Relations, recommended "an immediate appeal to arms." The House passed a bill declaring war, and on the 5th of June sent it to the Senate with a request that it be considered confidentially. The Senate on June 17 passed the bill with amendments. On June 18 the House concurred, and the bill became a law by the signature of the President.

Message of June 1, 1812, Am. State Papers, For. Rel. III. 405, 407; Calhoun's report of June 3, id. 567; act of June 18, 1812, 2 Stat. 755.

For correspondence in London prior to the war, see Am. State Papers, For. Rel. III. 409.

For subsequent correspondence with a view to arresting hostilities, see id. 585 et seq.

See, also, correspondence in 1 Br. & For. State Papers (1812–1814), 1470 et seq.

The British Government, on receiving the American declaration of war in 1812, directed the commanders of vessels of war and privateers to bring into port American vessels. War had been declared by the United States without knowledge of the fact that the British Government had taken steps to revoke its orders in council, and the foregoing direction was issued in the hope that the United States, on learning what had been done, would suspend hostilities. The measure adopted by the British Government was called an order of embargo and detention. The extension of the authority to seize American vessels to privateers seems to have had no special significance. The privateers were employed merely as part of the maritime force, the nation being already at war. When the British Government, in 1793, adopted measures for the preemption of provisions, orders to bring in neutral vessels were given to privateers as well as to commanders of ships of war. When it was found, in 1812, that the United States would not suspend hostilities, the order of embargo and detention, which was dated July 31, 1812, was followed up by a declaration of war. The order of July 31 exempted from seizure vessels with British licenses, by directing that all American vessels should be detained and brought into port, "except such as may be furnished with British licenses, which vessels are allowed to proceed according to the tenour of the said licenses."

The Eliza Ann, 1 Dodson, 244.

For the order of embargo and detention of American ships of July 31, 1812, see 55 Annual Register (1812), 393.

In 1870 France formally declared war against Prussia. There were no prior hostilities.

2. Hostilities Prior to Declaration.

§ 1107.

President Polk, in a message to Congress May 11, 1846, declared that American blood had been shed by the forces of Mexico on American soil, and that war existed by the act of Mexico. By an act of May 13, 1846, which recited that war existed by the act of Mexico, provision was made for carrying on the conflict. Prior to the passage of the act of Congress the battles of Palo Alto and Resaca de la Palma had been fought.

Message of May 11, 1846, S. Ex. Doc. 337, 29 Cong. 1 sess.; act of May 13, 1846, 9 Stat. 9; The Prize Cases, 2 Black, 635, 668; Moore, Int. Arbitrations, II. 1247.

See, also, Twiss, Law of Nations, Time of War, 60; Abdy's Kent (1878), 172.

"War was formally declared by Japan on August 1, 1894, and the challenge was accepted in a counter-declaration issued by China on the following day. But hostilities were already in progress. On July 25 a Japanese squadron had been engaged with Chinese men-of-war which had been convoying transports carrying reinforcements for Asan, in Korea; and Japanese troops had captured Asan itself on the 29th. A state of war existed therefore between the two countries as early as July 25; and there is nothing irregular in a war thus commenced."

Holland, Studies in Int. Law, 115.

For the Chinese declaration of war, Aug. 1, 1894, see For. Rel. 1894, App. I. 53, 54.

As to the case of the *Kowshing*, see For. Rel. 1894, App. I. 44–47, 48–49, 51, 57; Takahashi, 24; Holland, Studies, 126.

See, generally, Maurice, Hostilities without Declaration of War; Féraud-Giraud, Des Hostilités sans Déclaration de Guerre, Rev. de Droit Int. (1885), 19.

April 20, 1898, the President approved a joint resolution of Congress, by which it was declared (1) that "the people of Cuba are, and of right ought to be, free and independent;" (2) that it was the duty of the United States to demand, and that the United States did thereby demand, that Spain at once relinquish her authority and government in Cuba and withdraw her land and naval forces from the island and its waters; (3) that the President was directed and empowered to use the land and naval forces of the United States and to call into actual service the militia, to such extent as might be necessary to carry these resolutions into effect; and (4) that the United States disclaimed any disposition or intention to exercise sovereignty, jurisdiction, or control over the island except for the pacification thereof, and asserted its determination, when that was accomplished, to leave the government and control of the island to its people.

On the same day the Spanish minister at Washington asked for and obtained his passports, and the text of the joint resolution was cabled by the United States to its minister in Madrid for communication to the Spanish Government. But before it could be so communicated the American minister, on April 21, received from the Spanish Government a note, in which it was stated that the joint resolution was considered as an obvious declaration of war, and that all diplomatic relations consequently were severed. On April 22 the President issued a proclamation, in which, referring to the joint resolution of Congress, he declared a blockade of ports on the north coast of Cuba from Cardenas to Bahia Honda, and of the port of Cienfuegos on the south coast. The blockade was instituted on the same day. By an act of Congress approved April 25, 1898, war was

declared to have existed since April 21, inclusive, and the President was directed and empowered to use the entire land and naval forces of the United States, and to call into actual service the militia for the purpose of carrying it on.

See H. Ex. Doc. 428, 55 Cong. 2 sess.

War between the United States and Spain existed on April 21, 1898, when diplomatic relations were broken off, and Spain, in a communication to the United States minister at Madrid, accepted the resolution of Congress for intervention in Cuba as a declaration of war, although the formal decree by Spain, and the declaration of war by Congress, were not made until afterwards.

The Pedro, 175 U. S. 354, 20 S. Ct. 138, affirming decree the Buena Ventura, 87 Fed. Rep. 927.

It is universally admitted that a formal declaration is not necessary to constitute a state of war. From this principle, however, an unnecessary and perhaps unwarranted inference is often drawn, namely, that a nation may lawfully or properly begin a war at any time and under any circumstances, with or without notice, in its own absolute discretion. Such a theory would seem to be altogether inadmissible. Although a contest by force between nations may, no matter how it may have been begun, constitute a state of war, it by no means follows that nations, in precipitating such a condition of things, are not bound by any principles of honor or good faith. If, for example, a nation, wishing to absorb another, or to seize a part of its territory, should, without warning or prior controversy, suddenly attack it, a state of war would undoubtedly follow, but it could not be said that the principles of honor and good faith enjoined by the law of nations had not been violated. In other words, to admit that a state of war exists is by no means to justify the mode by which it was brought about or begun. Nor is the practice of fraud and deceit permitted by a state of war supposed to be admissible in time of peace.

3. Civil war.

§ 1108.

"The Parliament of Great Britain by statute (16 Geo. 3, c. 5, in 1776) declared that the vessels and cargoes belonging to the people of Virginia and the twelve other colonies found and taken on the high seas should be liable to seizure and confiscation as the property of open enemies, and that the marines and crews should be taken and considered as having voluntarily entered into the service of the King of Great Britain, and that the killing and destroying the persons and

property of the Americans before the passing of the act was just and lawful."

Chase, J., in Ware *v.* Hylton, 3 Dallas, 199, 228.

The late civil war began and terminated at different times in different States. Its commencement may be referred to the proclamation of blockade of the 19th of April, 1861, in those States to which it applied; and to the proclamation of blockade of the 27th of April, 1861, in the States to which it applied. Its termination may be referred, in various States, to the proclamations declaring it closed in those States.

The Protector, 12 Wall, 700; Brown *v.* Hiatts, 15 id. 177; Adger *v.* Alston, id. 555; Batesville Institute *v.* Kauffman, 18 id. 151.

A civil war exists and may be prosecuted on the same footing as if those opposing the Government were foreign invaders whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts cannot be kept open. Civil war begins by insurrection against the lawful authority of the Government, and is never solemnly declared. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence and cast off their allegiance, have organized armies, and commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.

The Prize Cases, 2 Black, 635.

See, also, The Amy Warwick, 2 Sprague, 123. By the majority of the court in the Prize Cases it was held that the war began with the proclamations of blockade of Apr. 19 and Apr. 27, 1861, in the places to which they were respectively applicable. The dissenting judges held that it began with the act of July 13, 1861.

The State of Virginia "engaged in war against the United States" April 17, 1861, on which day the convention passed an ordinance directing the governor to call out volunteers, and he issued his proclamation, and the State authorities took possession of the custom-house in Richmond.

Chesapeake & Ohio Ry. Co. *v.* United States, 19 Ct. of Cl. 300.
See, also, 20 Ct. Cl. 49.

V. *BELLIGERENTS.*

1. Combatants and noncombatants.

§ 1109.

"21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

"22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

"23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

"24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection, and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

"25. In modern regular wars of the Europeans and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, Apr. 24, 1863, War of the Rebellion, Official Records, series 3, III. 150.

"52. No belligerent has the right to declare that he will treat every captured man in arms of a levy en masse as a brigand or bandit.

"If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war and are not entitled to their protection."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 154.

"57. So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 155.

"64. If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

"65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 155.

Partisans—Armed enemies not belonging to the hostile army—Scouts—Armed prowlers—War-rebels.

"81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured they are entitled to all the privileges of the prisoner of war.

"82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

"83. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

"84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

"85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or to armed violence."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 157.

"Article I. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions:

"1. To be commanded by a person responsible for his subordinates;

"2. To have a fixed distinctive emblem recognizable at a distance;

"3. To carry arms openly; and

"4. To conduct their operations in accordance with the laws and customs of war.

"In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army.'

"Article II. The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with Article I., shall be regarded a belligerent, if they respect the laws and customs of war.

"Article III. The armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy both have a right to be treated as prisoners of war."

"Section I.—On Belligerents. Chapter 1.—On the Qualifications of Belligerents," Regulations respecting the Laws and Customs of War on Land, annex to the convention signed at The Hague, July 29, 1899, 32 Stat. II. 1811.

"It is necessary, in order to place the members of an army under the protection of the law of nations, that it should be commissioned by a state. If war were to be waged by private parties, operating according to the whims of individual leaders, every place that was seized would be sacked and outraged; and war would be the pretence to satiate private greed and spite. Hence, all civilized nations have agreed in the position that war to be a defence to an indictment for homicide or other wrong, must be conducted by a belligerent state, and that it can not avail voluntary combatants not acting under the commission of a belligerent. But free-booters, or detached bodies of volunteers, acting in subordination to a general system, if they wear a distinctive uniform, are to be regarded as soldiers of a belligerent army. Mr. Field, in his proposed code, thus speaks: 'The following persons, and no others, are deemed to be impressed with the military character:—(1) Those who constitute a part of the military forces of the nation; and (2) those who are connected with the operations thereof, by the express authority of the nation.' This was accorded to the partisans of Marion and Sumter in the American Revolution, they being treated as belligerents by Lord Rawdon and Lord Cornwallis, who were in successive command of the British forces in South Carolina; by Napoleon to the German independent volunteers in the later Napoleonic campaigns; and by the Austrians, at the time

of the uprising of Italy, to the forces of Garibaldi. (Lawrence's Wheaton's Elem. of Int. Law, 627, pt. iv, chap. ii, § 8; Dana's Wheaton, § 356; Bluntschli, Droit Int. Codifié, § 569, cited by Field, *ut supra.*) There must, however, be a military uniform, and this test was insisted on by the Government of the United States in its articles of war issued in 1863, and by the German Government in its occupation of France in 1871. The same privileges attach to subsidiary forces, camp followers, etc. But ununiformed predatory guerrilla bands are regarded as outlaws, and may be punished by a belligerent as robbers and murderers. (Halleck's Int. Law and Laws of War, 386, 387; Heffter, Droit Int., § 126; 3 Phillimore's Int. Law, § 96; Lieber's Instructions for the Government of Armies of the United States, § iv.) But if employed by the nation, they become part of its forces. (Halleck, 386, § 8; adopted by Field, *ut supra.*)"

Wharton, Com. Am. Law, § 221.

In negotiating a treaty with Russia, Mr. Buchanan was instructed to propose the insertion of two articles to the effect (1) that, in case of war, hostilities should be carried on only by duly commissioned officers and by persons under orders, except in repelling attack or invasion or in defense of property; and (2) that each contracting party should by law provide for the punishment of such of its citizens or subjects, or others under the authority of its laws, as should violate the terms of the proposed convention, particularly the stipulations for the protection of fishermen, husbandmen, and noncombatants and their property, and for preventing breaches of truces and armistices, injuries to prisoners of war, breaches of capitulations, unauthorized hostilities, injuries to the bearers of flags of truce, the massacre of enemies who had surrendered, the mutilation of the dead, injuries to diplomatic agents, the violation of diplomatic correspondence, and all other breaches of provisions, either of the treaty or of the law of nations for preserving peace or lessening the evils of war. It was besides proposed that the contracting parties should agree to enter into further negotiations for mitigating the horrors of war and confining its operations as much as possible to the military forces of the parties. It was stated that the proposed articles were "both of them new in our diplomacy," as well as in that of other nations, but that it was believed that they would, if adopted, be useful to the cause of humanity and civilization.

Mr. Livingston, Sec. of State, to Mr. Buchanan, min. to Russia, No. 2, March 31, 1832, MS. Inst. U. States Ministers, XIII. 281.

February 10, 1904, the Japanese Government, on the outbreak of war with Russia, published regulations which required war correspondents who wished to follow the Japanese army to make appli-

cation to the Japanese war department. The applications of foreign correspondents were required to be sent through their respective ministers or consuls and the department of foreign affairs. The officers of the army were required to accord to correspondents, as far as circumstances permitted, suitable treatment and facilities, and when in the field and in case of necessity to give them food or, when so requested, transportation in vessels or vehicles. A war correspondent violating the criminal law, military criminal law, or the law for the preservation of military secrets was to be adjudged and punished by court-martial according to the military penal code.

For. Rel. 1904, 415; Monthly Consular Reports, May, 1904, LXXV, 393. Regulations were also issued governing naval war correspondents. (Id. 395.)

"By the law of war either party to it may receive and list among his troops such as quit the other, unless there has been a previous stipulation that they shall not be received. But when they [such refugees] have been received, a high moral faith and irrevocable honor, sanctioned by the usages of all nations, gives to them protection personally, and security for all that they have or may possess. They are exempt also from all reproach from the sovereignty to which their services have been rendered. Nothing that they claim as their own can be taken from them, upon the imputation that they had forfeited or meant to relinquish it by the abandonment of their allegiance to the sovereignty which they had left."

Wayne, J., United States *v.* Reading, 18 How. 10.

2. Nonliability for Belligerent Acts.

§ 1110.

An officer of the Army of the United States, whilst serving in the enemy's country during the rebellion, was not liable to an action in the courts of that country for injuries resulting from his military orders or acts; nor could he be required by a civil tribunal to justify or explain them upon any allegation of the injured party that they were not justified by military necessity. He was subject to the laws of war, and amenable only to his own Government.

Dow *v.* Johnson, 100 U. S. 158.

A person voluntarily residing within the Confederate lines cannot maintain an action against a Confederate soldier who, under military orders, burned the former's cotton to prevent it from falling into the hands of the Union forces, such destruction being a justifiable exercise of the rights of war.

Ford *v.* Surget (1878), 97 U. S. 594, 606 (1878).

During the civil war where a United States officer in command of troops, while in an insurgent State, seized property belonging to a citizen thereof and sold it to a third person and the latter was sued after the war by such former owner, Held, that the court had no jurisdiction over the subject-matter, as the seizure was an act of war, and the validity of such acts cannot be tried in a municipal court in a common-law proceeding.

Coolidge *v.* Guthrie, 1 Flip. C. C. 97.

VI. *BELLIGERENT MEASURES.*

1. Permissible Violence.

§ 1111.

A belligerent has in a general sense the right to use all forms of violence against the person and property of his enemy that may be necessary to bring the latter to terms; so that violence, when used to that end, ceases to be permissible only when it is shown to be wanton, or grossly disproportioned to the end to be attained.

Hall, Int. Law (5th ed.), 531.

"14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

"15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the Army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

"16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of

the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

"17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

"18. When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 150.

"68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

"Unnecessary or revengeful destruction of life is not lawful.

"69. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

"70. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

"71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, Id. 155.

2. Sieges and Bombardments.

§ 1112.

"19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, Id. 150.

"ARTICLE XXVI. The Commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1818.

"115. It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles when hospitals are situated within the field of the engagement.

"116. Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared.

"An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

"117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

"118. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 160.

"ARTICLE XXVII. In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

"The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1818.

General Scott, in giving an account of the siege of Vera Cruz, says that ground was broken March 18, 1847, and by the 22d heavy ordnance enough being in position, the governor of the city, who was also governor of the castle, was duly summoned to surrender. Immediately on his refusal, fire on the walls and forts was opened. Some of the shot and shells unavoidably penetrated the city and set fire to many houses. By the 24th additional heavy guns were landed,

and the whole was "in awful activity." The same day came a memorial from the foreign consuls, asking for a truce to enable them and the women and children among the inhabitants to withdraw in safety. "They had," says Scott, "in time been duly warned of the impending danger, and allowed to the 22d to retire, which they had sullenly neglected, and the consuls had also declined the written *safeguards* I had pressed upon them. The season had advanced, and I was aware of several cases of yellow fever in the city and neighborhood. Detachments of the enemy too were accumulating behind us, and rumors spread, by them, that a formidable army would soon approach to raise the siege. Tenderness therefore for the women and children—in the form of delay—might, in its consequences, have led to the loss of the campaign, and, indeed, to the loss of the army—two-thirds by pestilence, and the remainder by surrender. Hence I promptly replied to the consuls that no truce could be allowed except on the application of the governor (General Morales), and *that* with a view to surrender. Accordingly, the next morning General Landero, who had been put in the supreme command for that purpose, offered to entertain the question of submission. Commissioners were appointed on both sides, and on the 27th terms of surrender, including both the city and castle of Ulloa, agreed upon, signed and exchanged. The garrisons marched out, laying down their arms, and were sent home prisoners of war on parole.

"This was better for the consuls, women, and children, as well as for the United States, than the *temporary* truce that I rejected—notwithstanding the ignorant censure cast on my conduct, on that occasion, by Mr. William Jay, in his book—*Review of the Causes and Consequences of the Mexican War*, pp. 202–4."

Scott, Autobiography, II. 426–428.

The minister of the United States in Nicaragua, on his report that revolutionists had bombarded Managua from the sea without warning, killing one person near the American legation and wounding several others, was instructed "to present, either jointly with the other diplomatic representatives or in a separate note to the titular government, a protest against the waging of hostilities without warning, whereby foreigners are endangered." The minister, as it transpired, had already made a protest against the bombardment, as an "act of barbarism," to General Zelaya, president of the revolutionary junta, which was styled "Junta de Gobierno." General Zelaya, besides taking exception to the language of the protest, justified his action on the ground (1) that Managua was a fortified place in which the enemy were entrenched and from which they fired on his forces who, wishing to avert hostilities, in reality remained in front

of the city several hours without firing, and (2) that a messenger with a flag of truce was sent to the officers in command in Managua and was in bad faith detained by them. The minister replied: "Your explanation is a reasonable one, and is accepted in full faith."

Mr. Adee, Act. Sec. of State, to Mr. Baker, min. to Nicaragua, tel., July 25, 1893, For. Rel. 1893, 204.

See, also, For. Rel. 1893, 206–209.

3. Devastation.

§ 1113.

"The measure of permissible devastation is to be found in the strict necessities of war. The right being thus narrowed, it is easy to distinguish between three groups of cases, in one of which devastation is always permitted, while in a second it is always forbidden, and in a third it is permitted in certain circumstances. To the first group belong those cases in which destruction is a necessary concomitant of ordinary military action, as when houses are razed or trees cut down to strengthen a defensive position, when the suburbs of a fortified town are demolished to facilitate the attack or defence of the place, or when a village is fired to cover the retreat of an army. Destruction, on the other hand, is always illegitimate when no military end is served, as is the case when churches or public buildings, not militarily used and so situated or marked that they can be distinguished, are subjected to bombardment in common with the houses of a besieged town. Finally, all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender; it would even be impossible to deny to an invader the right to cut the dykes of Holland to save himself from such a fate; but when, as in the case supposed, the devastation is extensive in scale and lasting in effect, modern opinion would demand that the necessity should be extreme and patent."

Hall, Int. Law (5th ed.), p. 535, citing Manning, ch. v.; Heffter, § 125; Twiss, War, § 65; Bluntschli, § 663; Calvo, § 1919.

At a meeting attended by the Boer generals, at Brussels, Oct. 6, 1902, General Delarey asked of what use was the sum of £3,000,000 promised by England, when their losses were estimated at £75,000,000? General Botha dwelt on the horrors of the concentration camps, the farm burning, and the devastation caused by the English. (London *Times*, weekly, Oct. 10, 1902, p. 646, col. 2.)

4. Retaliation.

§ 1114.

"The British Government, having sent to England, early in 1813, to be tried for treason, twenty-three Irishmen, naturalized in the United States, who had been captured in vessels of the United States,

Congress authorized the President to retaliate. Under this act, General Dearborn placed in close confinement twenty-three prisoners taken at Fort George. General Prevost, under the express directions of Lord Bathurst, thereupon ordered the close imprisonment of double the number of commissioned or uncommissioned United States officers. This was followed by a threat of 'unmitigated severity against the American citizens and villages' in case the system of retaliation was pursued. Mr. Madison having retorted by putting in confinement a similar number of British officers taken by the United States, General Prevost immediately retorted by subjecting to the same discipline all his prisoners whatsoever. The difficulty was aggravated by the denunciation by leading New England Federalists of 'this policy of exposing our own citizens to imprisonment and death for the sake of a set of foreign renegades, as they were bitterly described,' 'and the escape of some of the imprisoned British officers from Worcester jail gave very general satisfaction.' (6 Hildreth's Hist., U. S. 446.) (Mr. Hildreth's attachment to the Federalists, it must be remembered, gives to statements such as this peculiar weight.) In Massachusetts this sentiment took effect in a statute forbidding the use of the State jails to the United States for prisoners of war; and the jailers were directed to discharge all prisoners of war after thirty days' confinement. An act of Congress was at once passed authorizing the United States marshals, when the State jails were refused, to provide other places of confinement, and the legislature of Pennsylvania at once granted its prisons for this purpose. A better temper, however, soon came over the British Government, by whom this system had been instituted. A party of United States officers, who were prisoners of war in England, were released on parole, with instructions to state to the President that the twenty-three prisoners who had been charged with treason in England had not been tried, but remained on the usual basis of prisoners of war. This led to the dismissal on parole of all the officers of both sides."

Wharton, Int. Law Digest, III. 330, citing, as to treatment of prisoners of war in the war of 1812, Am. State Papers, For. Rel. III. 630; Lawrence, Com. sur. Wheaton, III. 229.

"Having been called upon by the governor-general of the Canadas to aid him in carrying into effect measures of retaliation against the inhabitants of the United States for the wanton destruction committed by their army in Upper Canada, it has become imperiously my duty, conformably with the nature of the governor-general's application, to issue to the naval force under my command, an order to destroy and lay waste such towns and districts upon the coast as may be found assailable.

"I had hoped that this contest would have terminated without my being obliged to resort to severities which are contrary to the usage of civilized warfare, and as it has been with extreme reluctance and concern that I have found myself compelled to adopt this system of devastation, I shall be equally gratified if the conduct of the Executive of the United States will authorize my staying such proceedings, by making reparation to the suffering inhabitants of Upper Canada, thereby manifesting that if the destructive measures pursued by their army were ever sanctioned, they will no longer be permitted by the Government."

Vice-Admiral Cochrane to Mr. Monroe, Sec. of State, Aug. 18, 1814, 3 Am. State Papers, For. Rel. 693.

"I have had the honor of receiving your letter of the 18th of August, stating that, having been called on by the governor-general of the Canadas, to aid him in carrying into effect measures of retaliation against the inhabitants of the United States for the wanton desolation committed by their army in Upper Canada, it has become your duty, conformably with the nature of the governor-general's application, to issue to the naval force under your command an order to destroy and lay waste such towns and districts upon the coast as may be found assailable.

"It is seen, with the greatest surprise, that this system of devastation, which has been practiced by the British forces, so manifestly contrary to the usage of civilized warfare, is placed by you on the ground of retaliation. No sooner were the United States compelled to resort to war with Great Britain, than they resolved to wage it in a manner most consonant to the principles of humanity, and to those friendly relations which it was desirable to preserve between the two nations after the restoration of peace. They perceived, however, with the deepest regret, that a spirit, alike just and humane was neither cherished nor acted on by your Government. Such an assertion would not be hazarded if it was not supported by facts, the proof of which has, perhaps, already carried the same conviction to other nations that it has to the people of these States. Without dwelling on the deplorable cruelties committed by the savages in the British ranks, and in British pay at the river Raisin, which to this day have never been disavowed or atoned for, I refer, as more immediately connected with the subject of your letter, to the wanton desolation that was committed at Havre de Grace and at Georgetown, early in the spring of 1813. These villages were burnt and ravaged by the naval forces of Great Britain, to the ruin of their unarmed inhabitants, who saw with astonishment that they derived no protection to their property from the laws of war. During the same season, scenes of invasion and pillage, carried on under the same authority, were

witnessed all along the waters of the Chesapeake, to an extent inflicting the most serious private distress, and under circumstances that justified the suspicion that revenge and cupidity, rather than the manly motives that should dictate the hostility of a high-minded foe, led to their perpetration. The late destruction of the houses of the Government in this city is another act which comes necessarily into view. In the wars of modern Europe, no example of the kind, even among nations the most hostile to each other, can be traced. In the course of ten years past, the capitals of the principal powers of the continent of Europe have been conquered, and occupied alternately by the victorious armies of each other, and no instance of such wanton and unjustifiable destruction has been seen. We must go back to distant and barbarous ages to find a parallel for the acts of which I complain.

"Although these acts of desolation invited, if they did not impose on the Government the necessity of retaliation, yet in no instance has it been authorized.

" The burning of the village of Newark, in Upper Canada, posterior to the early outrages above enumerated, was not executed on that principle. The village of Newark adjoined Fort George, and its destruction was justified by the officers who ordered it, on the ground that it became necessary in the military operations there. The act, however, was disavowed by the Government. The burning which took place at Long Point was unauthorized by the Government, and the conduct of the officer subjected to the investigation of a military tribunal. For the burning at St. David's, committed by stragglers, the officer who commanded in that quarter was dismissed, without a trial, for not preventing it.

" I am commanded by the President distinctly to state, that it as little comports with any orders which have been issued to the military and naval commanders of the United States, as it does with the established and known humanity of the American nation, to pursue a system which it appears you have adopted. This Government owes it to itself, to the principles which it has ever held sacred, to disavow, as justly chargeable to it, any such wanton, cruel, and unjustifiable warfare.

" Whatever unauthorized irregularities may have been committed by any of its troops, it would have been ready, acting on these principles of sacred and eternal obligation, to disavow, and, as far as might be practicable, to repair. But in the plan of desolating warfare which your letter so explicitly makes known, and which is attempted to be excused on a plea so utterly groundless, the President perceives a spirit of deep-rooted hostility, which, without the evidence of such facts, he could not have believed existed, or would have been carried to such an extremity.

"For the reparation of injuries, of whatever nature they may be, not sanctioned by the law of nations, which the military or naval force of either power may have committed against the other, this Government will always be ready to enter into reciprocal arrangements. It is presumed that your Government will neither expect nor propose any which are not reciprocal.

"Should your Government adhere to a system of desolation, so contrary to the views and practice of the United States, so revolting to humanity, and repugnant to the sentiments and usages of the civilized world, whilst it will be seen with the deepest regret, it must and will be met with a determination and constancy becoming a free people contending in a just cause for their essential rights and their dearest interests."

Mr. Monroe, Sec. of State, to Vice-Admiral Cochrane, Sept. 6, 1814, 3 Am. State Papers, For. Rel. 693.

"I have had the honor to receive your letter of the 16th instant this morning, in reply to the one which I addressed to you from the Patuxent.

"As I have no authority from my Government to enter upon any kind of discussion relative to the points contained in your letter, I have only to regret that there does not appear to be any hope that I shall be authorized to recall my general order; which has been further sanctioned by a subsequent request from Lieutenant-General Sir George Prevost.

"A copy of your letter will this day be forwarded by me to England, and, until I receive instructions from my Government, the measures which I have adopted must be persisted in, unless remuneration be made to the inhabitants of the Canadas for the injuries they have sustained from the outrages committed by the troops of the United States."

Vice-Admiral Cochrane to Mr. Monroe, Sec. of State, Sept. 19, 1814, 3 Am. State Papers, For. Rel. 694.

"27. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

"28. Retaliation will therefore never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover cautiously and unavoidably—that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence and the character of the misdeeds that may demand retribution.

"Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 151.

By an order of the President, dated April 21, 1902, a court-martial was convened in the Philippines to try Brigadier-General Jacob H. Smith, U. S. A., on charges based on certain oral orders which he gave in the autumn of 1901 to Major L. W. T. Waller, of the Marine Corps, then serving with a battalion of marines, under his orders as commander of the Sixth Separate Brigade in Samar. The forces under General Smith were then engaged in a punitory movement, rendered necessary by the treacherous massacre of an American force at Balangiga, in Samar, in September, 1901. It was shown that General Smith gave Major Waller the following oral instructions: "I want no prisoners. I wish you to kill and burn; the more you kill and burn the better you will please me." He also declared that "the interior of Samar must be made a howling wilderness," and that he wanted all persons killed who were capable of bearing arms and in actual hostilities against the United States; and, in reply to an inquiry by Major Waller for an age limit, designated the age of ten years. The court-martial found General Smith guilty of conduct to the prejudice of good order and military discipline, and sentenced him to be admonished by the reviewing authority, but appended to the sentence the following explanation:

"The court is thus lenient in view of the undisputed evidence that the accused did not mean everything that his unexplained language implied; that his subordinates did not gather such a meaning; and that the orders were never executed in such sense, notwithstanding that a desperate struggle was being conducted with a cruel and savage foe."

It appeared that General Smith was wont at times to use extravagant expressions, and that this was a matter of common knowledge. His oral instructions to Major Waller acquired notoriety in connection with the subsequent trial of that officer on the charge of having caused certain natives to be put to death without proper trial. Major Waller, however, as it appears, did not defend this act on the ground of any orders received from General Smith, but on the ground that, as commanding officer, he was justified by the laws of war, because of the treachery of the natives in question, who had acted as bearers or guides of one of his expeditions.

President Roosevelt, in reviewing the sentence of the court-martial, besides giving the recommended admonition, directed that General

Smith, who had reached the age of 62 years and was therefore subject under the law to be so dealt with, be retired from the active list. The President's order was as follows:

"The findings and sentence of the court are approved. I am well aware of the danger and great difficulty of the task our Army has had in the Philippine Islands, and of the well-nigh intolerable provocations it has received from the cruelty, treachery, and total disregard of the rules and customs of civilized warfare on the part of its foes. I also heartily approve the employment of the sternest measures necessary to put a stop to such atrocities, and to bring this war to a close. It would be culpable to show weakness in dealing with such foes or to fail to use all legitimate and honorable methods to overcome them. But the very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible positions peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates.

"Almost universally the higher officers have so borne themselves as to supply this necessary check; and with but few exceptions the officers and soldiers of the army have shown wonderful kindness and forbearance in dealing with their foes. But there have been exceptions; there have been instances of the use of torture and of improper heartlessness in warfare on the part of individuals or small detachments.

"In the recent campaign ordered by General Smith, the shooting of the native bearers by the orders of Major Waller was an act which sullied the American name, and can be but partly excused because of Major Waller's mental condition at the time, this mental condition being due to the fearful hardship and suffering which he had undergone in his campaign. It is impossible to tell exactly how much influence language like that used by General Smith may have had in preparing the minds of those under him for the commission of the deeds which we regret. Loose and violent talk by an officer of high rank is always likely to excite to wrongdoing those among his subordinates whose wills are weak or whose passions are strong.

"General Smith has behind him a long career distinguished for gallantry and on the whole for good conduct. Taken in the full, his work has been such as to reflect credit upon the American Army, and therefore upon the nation; and it is deeply to be regretted that he should have so acted in this instance as to interfere with his further usefulness in the Army. I hereby direct that he be retired from the active list."

The foregoing order was accompanied with a report by Mr. Root, Secretary of War. In this report Mr. Root found as a fact that

General Smith's oral instructions "were not taken literally and were not followed," and that "no women or children or helpless persons or noncombatants or prisoners were put to death in pursuance of them." He said:

"An examination of the evidence has satisfied me that the conviction was just, and that the reasons stated for the very light sentence imposed are sustained by the facts. General Smith, in his conversation with Major Waller, was guilty of intemperate, inconsiderate, and violent expressions, which, if accepted literally, would grossly violate the humane rules governing American armies in the field, and if followed would have brought lasting disgrace upon the military service of the United States. Fortunately, they were not taken literally and were not followed. No women or children or helpless persons or noncombatants or prisoners were put to death in pursuance of them.

"An examination of the records and proceedings upon the trial of Major Waller, which immediately preceded that of General Smith, shows that the instructions in question bore no relation to the acts for which Major Waller was tried, and were not alleged by him as justification for those acts. Major Waller was tried for causing certain natives, who had acted as bearers or guides of one of his expeditions, to be put to death for treachery without proper trials; and he defended his action, not upon the ground of any orders received from General Smith, but upon the ground that as commanding officer he was justified by the laws of war.

"General Smith's written and printed orders, and the actual conduct of military operations in Samar, were justified by the history and conditions of the warfare with the cruel and treacherous savages who inhabited the island, and their entire disregard of the laws of war, were wholly within the limitations of General Orders, No. 100, of 1863, and were sustained by precedents of the highest authority. Thus, in 1779, Washington ordered General Sullivan in the campaign against the Six Nations to seek the total destruction and devastation of their settlements. He wrote, 'But you will not by any means listen to overtures of peace before the total ruin of their settlement is effected. . . . Our future security will be in their inability to injure us, the distance to which they are driven, and in the terror with which the severity of the chastisement they receive will inspire them.'

"The Fort Phil Kearny massacre in 1866, for the base treachery, revolting cruelty, and the conditions of serious danger which followed it did not approach the massacre at Balangiga in Samar in September, 1901. There the natives had been treated with kindness and confidence, liberty and self-government had been given to them. Captain Connell, the American commander, was of the same faith

and had been worshipping in the same church with them. With all the assurance of friendship our men were seated at their meal unarmed among an apparently peaceful and friendly community, when they were set upon from behind and butchered and their bodies when found by their comrades the next day had been mutilated and treated with indescribable indignities. Yet there was no such severity by American soldiers in Samar as General Sherman proposed toward the Sioux after Fort Phil Kearny.

"It is due, however, to the good sense and self-restraint of General Smith's subordinates, and their regard for the laws of war, rather than to his own self-control and judgment, that his intemperate and unjustifiable verbal instructions were not followed, and that he is relieved from the indelible stain which would have resulted from a literal compliance with them.

"It is the duty of a general officer whose age and experience have brought him to high command not to incite his subordinates to acts of lawless violence, but to so explain to them the application of the laws of war and the limitations upon their conduct as to prevent transgressions upon their part and supplement their comparative inexperience by his wise control. In this General Smith has signally failed, and for this he has been justly convicted. Although the sentence imposed is exceedingly light, it carries with it a condemnation which, for an officer of his rank and age, is really severe punishment.

"For this reason and for the further reason that General Smith has served his country long and faithfully, has exhibited high courage and good conduct in many battles, has been seriously wounded in the civil war and in the war with Spain, and is about concluding a long and honorable career as a faithful and loyal servant of his country, I recommend that the mild sentence imposed be confirmed.

"Should you approve the findings and sentence of the court in accordance with this recommendation, I feel bound to say, further, that in view of the findings and sentence and of the evident infirmities which have made it possible that the facts found should exist, it is not longer for the interest of the service that General Smith should continue to exercise the command of his rank. His usefulness as an example, guide, and controlling influence for the junior officers of the Army is at an end; and as he is already upward of sixty-two years of age, I recommend that you exercise the discretion vested in you by law and now retire him from active service."

S. Doc. 213, 57 Cong. 2 sess. 2, 3, 5.

5. Deceit.

§ 1115.

Deceit against an enemy is as a rule permitted; but it is clearly understood that this does not embrace the abuse of signs which are employed in special cases to prevent the exercise of force or to secure immunity from it. "Thus information must not be surreptitiously obtained under the shelter of a flag of truce, and the bearer of a misused flag may be treated by the enemy as a spy; buildings not used as hospitals must not be marked with a hospital flag; and persons not covered by the provisions of the Geneva Convention must not be protected by its cross. A curious arbitrary rule affects one class of stratagems by forbidding certain permitted means of deception from the moment at which they cease to deceive. It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it is held that soldiers clothed in the uniforms of their enemy must put on a conspicuous mark by which they can be recognized before attacking, and that a vessel using the enemy's flag must hoist its own flag before firing with shot or shell."

Hall, Int. Law, 5th ed. 537–539, citing Ortolan, Liv. III. chap. I.; Pistoye et Duverdy, I. 231–234; Bluntchli, § 565; The Peacock, 4 Rob. 187.

"101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 159.

"Article XXIV. Ruses of war and the employment of methods necessary to obtain information about the enemy and the country, are considered allowable."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1818.

6. Treatment of Resident Alien Enemies.

§ 1116.

See, as to expulsion, supra, § 559.

Various measures have been adopted by governments in relation to alien enemies residing within their territory. Such persons may, says Rivier, be detained, especially those subject to military service;

or they may be interned in determinate places, or yet may be expelled, a brief delay being allowed them for settling up their affairs. But such measures, although justified by the right of self-preservation, are less and less practiced and are often criticised as not being in harmony with the spirit of modern war.

Rivier, Principes du Droit des Gens, II. 230. In 1755 British subjects were expelled from France; while in 1803 those between the ages of 18 and 60 were declared prisoners of war by Napoleon, ostensibly as an act of reprisals for the capture of French ships. During the Crimean war Russian subjects were permitted to remain in England and France. In 1870 Frenchmen were permitted to remain in Germany. On the contrary, Germans in France were first detained; but afterwards, by an order of Aug. 28, 1870, those residing in Paris or the Department of the Seine, were, on the ground of national defense as well of their personal safety, required to depart within three days, and either to leave the country or to retire to one of the departments below the Loire. By a ukase of May 12, 1877, Turkish subjects in Russia were permitted to continue to reside there and continue their business, subject to the laws. In 1879 Chileans were expelled from Bolivia and their goods confiscated. (Ibid.)

The instructions issued to United States marshals with regard to alien enemies during the war of 1812 were of a general nature. The minor police regulations concerning such aliens were confided to the marshals, respectively, under those general instructions. (Mr. Adams, Sec. of State, to Mr. Cuthbert, M. C., March 1, 1821, 18 MS. Dom. Let. 274.)

By treaties of commerce it has often been stipulated that the citizens of the one country residing within the territories of the other shall, in the event of war, have a certain time within which to collect or dispose of their effects and depart. In yet other cases it has been provided that such persons may during the war continue their residence and business, so long as they behave themselves. See, for example, the treaty between the United States and the Argentine Confederation, July 10, 1853, Article XII.

"Japanese subjects are allowed to continue, under the protection of the Russian laws, their sojourn and the exercise of peaceful occupations in the Russian Empire, excepting in the territories which are under the control of the imperial viceroy in the Far East."

Imperial Russian order, Feb. 14, 1904, For. Rel. 1904, 727; also Monthly Consular Reports, May, 1904, LXXV. 397.

7. Prohibition of Exports.

§ 1117.

A libel was filed against the French privateer *La Vengeance* for forfeiture for exporting arms and munitions of war in violation of the act of May 22, 1793, prohibiting such exportation for a year. The

district court made a decree of forfeiture, which was reversed by the circuit court on the ground that there had been no exportation within the meaning of the statutes. The Supreme Court affirmed the decree of the circuit court with costs, but the next day ordered the words "with costs" to be stricken out, "as there appeared to have been some cause for the prosecution." The question whether costs could in any case be awarded against the United States was left open.

United States *v.* La Vengeance (1796), 3 Dall. 297, 301.

The act of May 22, 1793, was passed, not during war, but in expectation or apprehension of war.

As to the British royal proclamation issued Nov. 30, 1861, in apprehension of hostilities on account of the case of the *Trent*, prohibiting the exportation from the United Kingdom of gunpowder, saltpeter, nitrate of soda, and sulphur, see Moore, Int. Arbitrations, IV. 4379.

April 14, 1862, the Secretary of the Treasury, by order of the President, ordered collectors of customs to "clear no vessel with anthracite coal for foreign ports nor for home ports south of Delaware Bay till otherwise instructed." May 18, 1862, this order was "so far modified as to apply only to ports north of Cape St. Roque, on the eastern coast of South America, and west of the fifteenth degree of longitude east." On July 30, 1864, these orders were modified so far as to permit the exportation of anthracite coal to Canada, except by sea, on condition that the Canadian government should prevent the exportation or use of the article on seagoing vessels. Appropriate action for the fulfillment of this condition was taken by the governor-general of Canada.

Mr. Seward, Sec. of State, to Mr. Stuart, British chargé, Oct. 3, 1862, Dip. Cor. 1862, 296, 302; Mr. Seward, Sec. of State, to Mr. Chase, Sec. of Treas., Mar. 31, 1864, 63 MS. Dom. Let. 555; Mr. F. W. Seward, Assist. Sec. of State, to Mr. Draper, Aug. 5, 1864, 65 MS. Dom. Let. 418; Mr. F. W. Seward, Assist. Sec. of State, to Mr. Harrington, Act. Sec. of Treas., Aug. 8, 1864, 65 MS. Dom. Let. 467; Mr. Seward, Sec. of State, to Mr. Fessenden, Sec. of Treas., Aug. 16, 1864, 65 MS. Dom. Let. 522.

"Until further instructed you will regard as contraband of war the following articles, viz: Cannon, mortars, fire-arms, pistols, bombs, grenades, firelocks, flint, matches, powder, saltpetre, balls, bullets, pikes, swords, sulphur, helmets or boarding caps, sword belts, saddles and bridles, always excepting the quantity of the said articles which may be necessary for the defense of the ship and of those who compose the crew, cartridge-bag material, percussion and other caps, clothing adapted for uniforms, rosin, sail cloth of all kinds, hemp and cordage material, ship lumber, tar and pitch, ardent spirits, military persons in the service of the enemy, despatches of the enemy, and articles of like character with those specially enumerated.

"You will also refuse clearances to all vessels which, whatever the ostensible destination, are believed by you, on satisfactory grounds, to be intended for ports or places in possession or under the control of insurgents against the United States, or that there is imminent danger that the goods, wares, or merchandise, of whatsoever description, will fall into the possession or under the control of such insurgents. And in all cases where, in your judgment, there is ground for apprehension that any goods, wares, or merchandise shipped at your port will be used in any way for the aid of the insurgents or the insurrection, you will require substantial security to be given that such goods, wares, or merchandise shall not in any way be used to give aid or comfort to such insurgents. You will be especially careful, upon applications for clearances, to require bonds with sufficient sureties for fulfilling faithfully all the conditions imposed by law or departmental regulations from shippers of the following articles to the ports opened, or to any other ports from which they may easily be and are probably intended to be reshipped in aid of the existing insurrection, namely, liquors of all kinds, coals, iron, lead, copper, tin, brass, telegraph instruments, wire, porous cups, platinum, sulphuric acid, zinc, and all other telegraph materials, marine engines, screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, fire bars, and every article whatever which is, can, or may become applicable for the manufacture of marine machinery or for the armor of vessels."

Order of the Secretary of the Treasury, May 23, 1862, under the act of May 20, 1862, given in Mr. Seward, Sec. of State, to Mr. Stuart, British chargé, Oct. 3, 1862, Dip. Cor. 1862, 296, 300, 302–303.

May 5, 1864, an Executive order was issued "authorizing and directing a relaxation of the restriction on the exportation of horses, in favor of the exportation of certain horses which have been bought for the personal use of the Emperor of the French and the captain-general of Cuba."

Mr. Seward, Sec. of State, to Mr. Chase, Sec. of Treas., May 5, 1864, 64 MS. Dom. Let. 206.

By a joint resolution of Congress of April 22, 1898, the President was "authorized, in his discretion and with such limitations and exceptions as shall seem to him expedient, to prohibit the export of coal or other material used in war from any seaport of the United States until otherwise ordered" by himself or by Congress. For the purpose of enforcing the provisions of this act, as well as of regulating the subject of exportations generally during the continuance of the war, a circular was issued by the Treasury Department April 27, 1898. Under the regulations and practice of that Depart-

ment, the interested persons were required to apply to the proper collector of customs for permission to clear the coal, stating who were the shippers and who the consignees. They were also required to make affidavit that the coal was not destined directly or indirectly for the enemies of the United States, and to agree to advise the Treasury Department by telegraph of the arrival of the coal at its destination immediately upon such arrival. The Treasury Department reserved the right to require the shipper to give bond for the transportation of the coal to the port for which clearance was asked, and from this bond he was not released till the cargo had arrived at that port or had been satisfactorily accounted for. This requirement was designed to prevent collusive captures, and was not as a rule exacted where the collector recommended the clearance and the standing of all the parties concerned was such as to convince the Treasury that the additional safeguard might be dispensed with. In this and in other particulars the action of the Treasury was largely governed by the circumstances of the case. The restrictions on exportation naturally resulted in a real or apprehended scarcity of coal at places which depended on the United States, in whole or in part, for their supply. At Vera Cruz, for example, where there is a considerable demand for the article for railways, double freight rates were offered for cargoes in the latter part of May.

See Mr. Day, Sec. of State, to Mr. Andrade, Venezuelan min., June 6, 1898, MS. Notes to Venezuelan Leg. II. 22; Mr. Moore, Assist. Sec. of State, to Mr. Chamberlain, Bureau of Navigation, Treasury Dept., May 25, 1898, 227 MMS. Dom. Let. 641.

By a proclamation of Oct. 14, 1905, the President, by virtue of the authority conferred upon him by the joint resolution of April 22, 1898, prohibited the export of arms and munitions of war from the United States or Porto Rico to the Dominican Republic, "until otherwise ordered by the President or by Congress."

See supra, § 962.

8. Protection of Neutral Persons and Property.

§ 1118.

Neutral persons and their property "are as a general principle exposed to the same extent as noncombatant enemy subjects to the consequences of hostilities. . . . To a certain extent however, which is not easily definable, neutral persons taken as individuals are in a more favourable position, relatively to an occupying belligerent, than are the members of the population with which they are mixed." Special measures are often taken to save them, so far as may be practicable, from the injurious effects of military operations.

Hall, Int. Law, 5th ed. 736–738.

During the contest in Mexico between the constitutional government of President Jaurez at Vera Cruz, and the Miramon government occupying the capital, the Government of the United States sent a naval force to the Mexican coast for the protection of the persons and property of American citizens. On March 4, 1860, while the forces of General Miramon were besieging Vera Cruz, Captain Jarvis, of the U. S. S. *Savannah*, in command of the United States naval forces, directed Commander Turner, of the U. S. S. *Saratoga*, to visit General Miramon and ascertain his intentions touching the persons and property of American citizens in Vera Cruz in the event of his taking the city. Commander Turner accordingly called upon General Miramon at the latter's headquarters near Vera Cruz. In response to Commander Turner's inquiries, General Miramon stated that he should respect the persons and property of all foreigners and afford them all the protection which it was in his power to give. Commander Turner then said that, having received this assurance, he was further instructed to say that in the event of an attack upon or of the capture of the city, Captain Jarvis would cause the flag of the United States to be hoisted at the flagstaff of each house covering American citizens and property, in order that they might, as far as possible, be preseved from danger and damage by bombardment and the occupants receive that respect on the part of the troops which General Miramon had expressed his intention to pay. General Miramon signified his concurrence in this arrangement, stating that he should bear it in mind, and expressed the hope that it would be effectual in preserving American citizens and property from injury.

Report of Commander Turner, March 4, 1860, S. Ex. Doc. 29, 36 Cong. 1 sess. 4.

In July, 1898, when the invasion of Porto Rico by the American forces was expected, the captain-general of the island, upon the petition of the foreign consuls, recognized in writing the neutrality of a point selected outside the city of San Juan, where the foreign residents took refuge. On the Government of the United States being advised of this arrangement, the Secretary of War telegraphed to the commander of the American forces as far as practicable to recognize it.

For. Rel. 1898, 799, 800.

9. Prohibited Measures.

(1) particular acts.

§ 1119.

"29. Modern times are distinguished from earlier ages by the existence at one and the same time of many nations and great governments related to one another in close intercourse.

"Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

"The more vigorously wars are pursued the better it is for humanity. Sharp wars are brief.

"30. Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 151.

"11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

"It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

"Offenses to the contrary shall be severely punished, and especially so if committed by officers."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 149.

"Article XXII. The right of belligerents to adopt means of injuring the enemy is not unlimited.

"Article XXIII. Besides the prohibitions provided by special Conventions, it is especially prohibited:

"(a.) To employ poison or poisoned arms;

"(b.) To kill or wound treacherously individuals belonging to the hostile nation or army;

"(c.) To kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion;

"(d.) To declare that no quarter will be given;

"(e.) To employ arms, projectiles, or material of a nature to cause superfluous injury;

"(f.) To make improper use of a flag of truce, the national flag, or military ensigns and the enemy's uniform, as well as the distinctive badges of the Geneva convention;

"(g.) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

Convention respecting the Laws and Customs of War on Land, The Hague, July 20, 1899, 32 Stat. II. 1817.

"148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retalliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 162.

(2) BOMBARDMENT OF UNDEFENDED TOWNS.

§ 1120.

"ARTICLE XXV. The attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1818.

(3) PILLAGE.

§ 1121.

"ARTICLE XXVIII. The pillage of a town or place, even when taken by assault, is prohibited."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1818.

"44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

"A soldier, officer, or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 153.

(4) DENIAL OF QUARTER.

§ 1122.

"60. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners.

"61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

"62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

"63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter."

"66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, Apr. 24, 1863, War of the Rebellion, Official Records, series 3, III. 155.

As protesting against the theory that all "foreigners" invading Mexico with the Texan armies should not be granted quarter, see Mr. Upshur, Sec. of State, to Mr. Thompson, min. to Mexico, July 27, 1843, MS. Inst. Mex. XV. 247. See Retaliation, supra, § 1114.

(5) WANTON DESTRUCTION.

§ 1123.

"Every species of reprisal or annoyance which a power at war employs, contrary to liberality or justice, of doubtful propriety in the estimation of the law of nations, departing from that moderation which, in later times, serves to mitigate the severities of war, by furnishing a pretext or provocation to the other side to resort to extremities, serves to embitter the spirit of hostilities, and to extend its ravages. War is then apt to become more sanguinary, more wasting, and every way more destructive. This is a ground of serious reflection to every nation, both as it regards humanity and policy; to this country it presents itself, accompanied with considerations of peculiar force. A vastly extended seacoast, overspread with defenseless towns, would offer an abundant prey to an incensed and malignant enemy, having the power to command the sea. The usages of modern

war forbid hostilities of this kind; and though they are not always respected, yet, as they are never violated, unless by way of retaliation for a violation of them on the other side, without exciting the reprobation of the impartial part of mankind, sullying the glory and blasting the reputation of the party which disregards them, this consideration has, in general, force sufficient to induce an observance of them."

Letters of Camillus, No. 21, 5 Lodge's Hamilton, 104.

"They [the British] wantonly destroyed the public edifices, having no relation in their structure to operations of war nor used at the time for military annoyance, some of these edifices being also costly monuments of taste and of the arts, and other depositories of the public archives, not only precious to the nation as the memorials of its origin and its early transactions, but interesting to all nations as contributions to the general stock of historical instruction and political science."

President Madison's proclamation of Sept. 1, 1814. Richardson's Messages, I. 545.

"The British Government, immediately after being advised of the conflagration, publicly thanked the officers concerned in it; and on being subsequently informed of the death of General Ross, who was killed, the day after the conflagration, in the abortive march to Baltimore, erected a monument in Westminster Abbey to his memory. But before long it was discovered that the burning of Washington was as impolitic as it was in violation of the law of nations. The sentiment of condemnation that then sprung up is exhibited in a speech of Sir James Mackintosh in the House of Commons on April 11, 1815, in an address to the Prince Regent on the treaty of peace. It was argued by him that the culpable delay of the ministry in opening the negotiations of peace could be explained only 'on the miserable policy of protracting the war for the sake of striking a blow against America. The disgrace of the naval war, of balanced success between the British navy and the new-born marine of America, was to be redeemed by protracted warfare, and by pouring our victorious armies upon the American continent. That opportunity, fatally for us, arose. If the Congress had opened in June, it was impossible that we should have sent out orders for the attack on Washington. We should have been saved from that success, which he considered as a thousand times more disgraceful and disastrous than the worst defeat. . . . It was a success which made our naval power hateful and alarming to all Europe. It was a success which gave the hearts of the American people to every enemy who might rise against England. It was an enterprise which most exasperated a

people and least weakened a government of any recorded in the annals of war. For every justifiable purpose of present warfare it was almost impotent. To every wise object of prospective policy it was hostile. It was an attack, not against the strength or the resources of a state, but against the national honour and public affections of a people. After 25 years of the fiercest warfare, in which every great capital of the European continent had been spared, he had almost said, respected by enemies, it was reserved for England to violate all that decent courtesy towards the seats of national dignity, which, in the midst of enmity, manifest the respect of nations for each other, by an expedition deliberately and principally directed against palaces of government, halls of legislation, tribunals of justice, repositories of the muniments of property, and of the records of history—objects among civilized nations exempted from the ravages of war, and secured, as far as possible, even from its accidental operation, because they contribute nothing to the means of hostility, but are consecrated to purposes of peace, and minister to the common and perpetual interest of all human society. It seemed to him an aggravation of this atrocious measure that ministers had attempted to justify the destruction of a distinguished capital as a retaliation for some violences of inferior American officers, unauthorized and disavowed by their Government, against he knew not what village in Upper Canada. To make such retaliation just, there must always be clear proof of the outrage; in general also, sufficient evidence that the adverse government refused to make due reparation for it, and at least some proportion of the punishment to the offence. Here there was very imperfect evidence of the outrage—no proof of refusal to repair—and demonstration of the excessive and monstrous iniquity of what was falsely called retaliation. The value of a capital is not to be estimated by its houses, and warehouses, and shops. It consisted chiefly in what could be neither numbered nor weighed. It was not even by the elegance or grandeur of its monuments, that it was most dear to a generous people. They looked upon it with affection and pride as the seat of legislation, as the sanctuary of public justice, often as linked with the memory of past times, sometimes still more as connected with their fondest and proudest hopes of greatness to come. To put all these respectable feelings of a great people, sanctified by the illustrious name of Washington, on a level with half a dozen wooden sheds in the temporary seat of a provincial government, was an act of intolerable insolence, and implied as much contempt for the feelings of America as for the common sense of mankind.'"

Wharton, Int. Law Digest, III. 335, citing 30 Hansard Parl. Debates, 526; Dana's Wheaton, § 351; 2 Ingersoll's Historical Sketch of the Second War between the U. S. of America and Great Britain, ser. 1, ch. viii.

"Nothing could be so unwise—to say nothing more of them—as our unmeaning marauding expeditions to Washington and Baltimore—which exasperated without weakening—and irritated all the passions of the nation, without even a tendency to diminish its resources—nay, which added directly to their force, both by the indignation and unanimity which they excited, and by teaching them to feel their own strength, and to despise an enemy, that, with all his preparation and animosity, could do them so little substantial mischief." (24 Edinburgh Rev. 254, Nov., 1814.)

Sir A. Alison, after showing his Tory proclivities by declaring that the "battle" of Bladensburg has done "service to future times, and to the cause of historic truth by demonstrating in a decisive manner the extreme feebleness of the means for national protection which democratic institutions afford," goes on to say that "it is to be regretted that the luster of the victory has been much tarnished to the British arms by the unusual and, under the circumstances, unwarrantable extension which they made of the ravages of war to the *pacific* or ornamental edifices of the capital." (10 Alison Hist. of Europe, 725.)

"When the British forces in 1814 destroyed the Capitol, the President's house, and other public edifices at Washington, the justification of the act was rested by the British admiral on the ground of retaliation for the wanton destruction committed by the troops of the United States in Upper Canada. The correspondence between Mr. Secretary Monroe and Admiral Cochrane on this subject, is interesting and instructive, for it shows that both parties considered such acts of devastation as *abnormal*, and as involving a departure from the ordinary practice of civilized warfare. It is to be regretted that Great Britain retaliated *in kind* on this occasion, for the *lex talionis* is not the rule of modern warfare; and if one of the belligerent parties should have placed itself in the wrong by having recourse to exceptional measures, the balance can not be redressed in the right manner by the adversary having recourse to identical measures, and so placing himself *in pari delicto*. When Prince Blucher proposed to blow up the bridge of Jena, and to overthrow the column of Austerlitz upon the allied powers entering Paris, he sought to retaliate upon the French nation the acts of wanton destruction and desolation, which they had inflicted upon the Prussian nation; but the allied powers wisely and prudently withstood Prince Blucher's desire. An example of a wiser practice was shown by the Emperor Francis of Austria in regard to the arch of Simplon, which Napoleon had erected in Milan to commemorate his victories over the Austrians. The history of those victories was given in a series of bas reliefs, the last of which represented Napoleon dictating peace to the Emperor Francis in Vienna. The Emperor Francis directed the historical series of bas reliefs to be completed, and opposite to the bas relief representing the Emperor Napoleon dictating peace to the Austrians at Vienna, the arch at present

exhibits a bas relief representing Napoleon's subsequent abdication at Fontainebleau."

Twiss, Law of Nations, War (2d ed.), § 69, pp. 133–134.
See Retaliation, supra, § 1114, for the correspondence between Mr. Monroe and Admiral Cochrane, referred to by Twiss.

"The destruction of the towns of Newark and York by the American troops during their retreat from Canada in 1813 and of the public buildings of Washington by the English in 1814 may be classed together as wholly unnecessary and discreditable. The case of Washington so far differs from the former that it may perhaps be not unreasonably defended as an act of reprisals. The latter case [of Washington] was warmly animadverted upon by Sir J. Mackintosh in the House of Commons; and since that time not only have no instances occurred, save by indulgence in an exceptional practice to be mentioned presently, but opinion has decisively laid down that, except to the extent of that practice, the measure of permissible devastation is to be found in the strict necessities of war."

Hall, Int. Law (5th ed.), 534, citing Ann. Register, 1814, 145, 177; Hansard, XXX. 527; Manning, ch. v.; Heffter, § 125; Twiss, War, § 65; Bluntschli, § 663; Calvo, § 1919.

It appears that President Balmaceda, of Chile, February 13, 1891, issued an order to the intendente of Tarapacá, directing him, in case of losing possession of Iquique and of the line of the nitrate railway, completely to destroy all the nitrate factories in the province.

February 23, 1891, Mr. Kennedy, British minister at Santiago, though not then aware of the existence of this order, telegraphed to Lord Salisbury that the Chilean minister for foreign affairs had declared to him on two or three occasions that, in case the opposition fleet should succeed in taking possession of Iquique, the Government would order the destruction of all the machinery and working gear of the nitrate factories in the province of Tarapacá, in order to deprive the fleet of the revenues afforded by the export duties on nitrate. Most of the "officinas" belonged to British subjects.

February 26 Lord Salisbury telegraphed Mr. Kennedy to state that Chile would be "held responsible by Her Majesty's Government for any losses which may fall upon British subjects in consequence of wanton destruction or injury of private property."

This instruction was carried out by Mr. Kennedy in a note to Señor Godoy of March 4, 1891. In this note Mr. Kennedy, in conformity with his instructions, entered "a formal and emphatic protest" against any proposal to destroy British nitrate factories, and announced that his Government would hold Chile responsible "for losses to British subjects arising out of acts of unnecessary and wholesale

destruction." In a subsequent interview with Señor Godoy, Mr. Kennedy intimated that the destruction of British property in the northern provinces would cost Chile about 10,000,000*l.* Señor Godoy replied that Chile could and would pay it, and that, in the event of the capture of Iquique or of the commencement of serious hostilities, orders had been given for the destruction of all property which might afford resources to the opposition for the maintenance of the revolution.

Blue Book, Chile, No. 1 (1892), 17, 18, 104–105, 261.

"Dealing with the question of the Peking astronomical instruments, Count von Bülow explained that they had not been restored because the Chinese Government attached no importance to their possession and in reply to German inquiries had placed them at the disposition of the German Government. Another consideration was that in accordance with the peculiar views of the Chinese the great mass of that people would have supposed that the instruments were restored by order of the Chinese Government, which would have damaged the German position in East Asia. The Dowager Empress of China, a very clever woman who understood the political situation, would have been distinctly offended, while the masses would have thought that Germany had sustained some terrible defeats. The instruments ought now to be placed in that category of presents from government to government which had long been customary on both sides in intercourse with the Chinese Government. (Interruptions on the left. The President rang his bell.)"

The London *Times*, weekly, March 7, 1902, p. 148.

"35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

"36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

"In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 152.

(6) PROHIBITED IMPLEMENTS.

§ 1124.

"On the whole it may be said generally that weapons are illegitimate which render death inevitable or inflict distinctly more suffering than others, without proportionately crippling the enemy. Thus poisoned arms have long been forbidden, and guns must not be loaded with nails or bits of iron of irregular shape. To these customary prohibitions the European powers, except Spain, have added as between themselves the abandonment of the right to use explosive projectiles weighing less than fourteen ounces; and in the declaration of St. Petersburg, by which the renunciation of the right was effected in 1868, they took occasion to lay down that the object of the use of weapons in war is 'to disable the greatest possible number of men, that this object would be exceeded by the employment of arms which needlessly aggravate the sufferings of disabled men, or render their death inevitable, and that the employment of such arms would therefore be contrary to the laws of humanity.'"

Hall, Int. Law (5th ed.), 531–532.

The plenipotentiaries at the Peace Conference at The Hague, "duly authorized to that effect by their Governments, inspired by the sentiments which found expression in the declaration of St. Petersburg of the 29th November (11th December), 1868, declare that: The Contracting Powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of similar nature. The present Declaration is only binding on the Contracting Powers in case of war between two or more of them. It shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents is joined by a non-Contracting Power."

Declaration signed at The Hague, July 29, 1899, between Austria-Hungary, Belgium, China, Denmark, France, Germany, Greece, Italy, Japan, Luxemburg, Mexico, Montenegro, the Netherlands, Persia, Portugal, Roumania, Russia, Servia, Siam, Spain, Sweden and Norway, Switzerland, Turkey, the United States, and Bulgaria. (32 Stat. II. 1839.)

Provision was made for the adhesion of nonsignatory powers. (Id. 1840.)

See For. Rel. 1899, 513, 519.

In the programme of The Hague Conference, embraced in the Russian circular of Dec. 30, 1898, there were the following articles: "2. Interdiction of the employment in armies and fleets of new firearms of every description and of new explosives, as well as powder more powerful than the kinds used at present, both for guns and cannons. 3. Limitation of the use in field fighting of explosives of a formidable power, such as now in use, and prohibition of the discharge of any kind of projectiles or explosives from balloons or by similar means. 4. Prohibition of the use in naval battles of submarine or diving

torpedo boats, or of other engines of destruction of the same nature; agreement not to construct in the future warships armed with rams."

"The second, third, and fourth articles, . . . seem lacking in practicability, and the discussion of these propositions would probably prove provocative of divergence rather than unanimity of view. It is doubtful if wars are to be diminished by rendering them less destructive, for it is the plain lesson of history that the periods of peace have been longer protracted as the cost and destructiveness of war have increased. The expediency of restraining the inventive genius of our people in the direction of devising means of defense is by no means clear, and considering the temptations to which men and nations may be exposed in a time of conflict, it is doubtful if an international agreement to this end would prove effective. The dissent of a single powerful nation might render it altogether nugatory. The delegates are, therefore, enjoined not to give the weight of their influence to the promotion of projects the realization of which is so uncertain." (Instructions to the United States delegates to The Hague Conference, April 18, 1899, For. Rel. 1899, 511, 512.)

"As to that portion of the work of the first committee which concerned the limitations of invention and the interdiction of sundry arms, explosives, mechanical agencies, and methods heretofore in use or which might possibly be hereafter adopted, as regards warfare by land and sea, namely, articles 2, 3, and 4, the whole matter having been divided between Captains Mahan and Crozier so far as technical discussion was concerned, the reports made by them from time to time to the American commission formed the basis of its final action on these subjects in the first committee and in the conference at large.

"The American commission approached the subject of the limitation of invention with much doubt. They had been justly reminded in their instructions of the fact that by the progress of invention, as applied to the agencies of war, the frequency, and, indeed, the exhausting character of war had been, as a rule, diminished rather than increased. As to details regarding missiles and methods, technical and other difficulties arose which obliged us eventually, as will be seen, to put ourselves on record in opposition to the large majority of our colleagues from other nations on sundry points. While agreeing with them most earnestly as to the end to be attained, the difference in regard to some details was irreconcilable. We feared falling into evils worse than those from which we sought to escape. The annexed reports of Captains Mahan and Crozier will exhibit very fully these difficulties and the decisions thence arising." (Report of the United States delegates to The Hague Conference to the Secretary of State, July 31, 1899, For. Rel. 1899, 513, 515.)

The conference also adopted a declaration prohibiting the use of projectiles having as their sole object the diffusion of asphyxiating or deleterious gases. This, for reasons given in a special report, the American delegates did not sign. It was signed by sixteen delegations, as follows: Belgium, Bulgaria, Denmark, France, Greece, Mexico, Montenegro, the Netherlands, Persia, Portugal, Roumania, Russia, Siam, Spain, Sweden and Norway, and Turkey.

For. Rel. 1899, 513, 519–520.

A declaration was adopted by The Hague Conference prohibiting the use of bullets which expand or flatten easily in the human body, as illustrated by certain given details of construction. This, for technical reasons stated in a separate report, the American delegates did not sign. It was signed by fifteen delegations, as follows: Belgium, Bulgaria, Denmark, France, Greece, Mexico, Montenegro, the Netherlands, Persia, Roumania, Russia, Siam, Spain, Sweden and Norway, and Turkey.

For. Rel. 1899, 513, 520.

The Hague Conference adopted the following resolution: "The conference expressed the wish that questions relative to muskets and marine artillery, such as have been examined by it, should be made the subject of study on the part of the governments with a view of arriving at an agreement concerning the adoption of new types and calibres."

The American delegates voted for this resolution, but a few powers abstained from voting.

For. Rel. 1899, 513, 520.

(7) UNCIVILIZED WARFARE.

§ 1125.

Cass of Arbuthnot and Ambrister.

"'When at war' (says Vattel) 'with a ferocious nation which observes no rules, and grants no quarter, they may be chastised in the persons of those of them who may be taken; they are of the number of the guilty; and by this rigor the attempt may be made of bringing them to a sense of the laws of humanity.' And again: 'As a general has the right of sacrificing the lives of his enemies to his own safety, or that of his people, if he has to contend with an inhuman enemy, often guilty of such excesses, he may take the lives of some of his prisoners, and treat them as his own people have been treated.' The justification of these principles is found in their salutary efficacy for terror and for example.

"It is thus only that the barbarities of Indians can be successfully encountered. It is thus only that the worse than Indian barbarities of European imposters, pretending authority from their governments, but always disavowed, can be punished and arrested. . . .

"The two Englishmen executed by order of General Jackson were not only identified with the savages, with whom they were carrying on the war against the United States, but that one of them was the mover and fomenter of the war, which, without his interference, and false promises to the Indians of support from the British Government, never would have happened. The other was the instrument of war

against Spain as well as the United States, commissioned by McGregor, and expedited by Woodbine, upon their project of conquering Florida with these Indians and negroes; that, as accomplices of the savages, and, sinning against their better knowledge, worse than savages, General Jackson, possessed of their persons and of the proofs of their gulit, might, by the lawful and ordinary usages of war, have hung them both without the formality of a trial; that, to allow them every possible opportunity of refuting the proofs, or of showing any circumstance in extenuation of their crimes, he gave them the benefit of trial by a court-martial of highly respectable officers; that the defence of one consisted solely and exclusively of technical cavils at the nature of part of the evidence against him, and the other confessed his guilt."

Mr. Adams, Sec. of State, to Mr. Erving, min. to Spain, Nov. 28, 1818, 4 Am. State Papers, For. Rel. 539, 544; adopted and approved in Lawrence's Wheaton (1863) 588, note 185.

"The court-martial in the case of Arbuthnot and Ambrister consisted of Maj. Gen. E. P. Gaines, president; members, Colonel King, Colonel Williams, Lieutenant-Colonel Gibson, Major Muhlenberg, Major Montgomery, Captain Vashan, Colonel Dyer, Lieutenant-Colonel Lindsay, Lieutenant-Colonel Elliott, Major Fanning, Major Minton, Captain Crittenden, Lieutenant Glassel.

"'The commanding general approves the finding and sentence of the court in the case of A. Arbuthnot, and approves the finding and first sentence of the court in the case of Robert C. Ambrister, and disapproves the reconsideration of the sentence of the honorable court in this case.

"'It appears from the evidence and pleading of the prisoner that he did lead and command, within the territory of Spain (being a subject of Great Britain), the Indians at war against the United States, these nations being at peace. It is an established principle of the law of nations, that any individual of a nation making war against the citizens of any other nation, they being at peace, forfeits his allegiance and becomes an outlaw and pirate. This is the case with Robert C. Ambrister, clearly shown by the evidence adduced.'

"If the ruling of the court-martial rests upon the reason given by General Jackson when affirming it, it cannot be sustained. It is not a violation of the law of nations for a subject of a peaceful neutral power to volunteer his services to a belligerent; nor does such a volunteer, by taking part in belligerent warfare, 'forfeit his allegiance or become' an outlaw and pirate. There has been no war in which a part of the combatants on both sides have not been drawn from states at peace with both of the belligerents. This was eminently the case with the American Revolution; the British army be-

ing largely manned by foreign auxiliaries, the Army of the United States taking some of its most eminent officers from France and Germany.

"It does not follow, however, that the action of General Jackson may not be sustained when applied to savage warfare. Such a warfare had been waging between the United States and the Indians whom the defendants were charged with inciting to war. On November 30, 1817, not five months before the court-martial, a boat, containing forty soldiers of the United States, under the command of Lieutenant Scott, seven soldiers' wives, and five little children, while on its way up the Appalachicola River, not far from Fort Scott, reached a point where a large body of Seminoles were in ambush. A volley of shot was fired on the boat, by which Lieutenant Scott was killed and all his command either killed or wounded. The assailants, who had previously been not only unseen but unsuspected, plunged into the water and boarded the boat, which was close to the shore. Those on board who were still living were massacred, with the exception of one woman, who was carried away by the Indians, and of four men, who escaped by swimming to the opposite shore, two of them only, however, succeeding in reaching Fort Scott. All the others were scalped, and the children were snatched by the heels and their heads crushed by being dashed against the boat. Nor was this all. In the course of the following week an attack was made, in the same way, on other boats which were ascending the river, and it was not till after two men were killed and thirteen wounded that the survivors succeeded in making their way to Fort Scott. This was the kind of 'war' which Arbuthnot and Ambrister were charged with inciting. It was, therefore, an organized system of assassination and rapine, not war, and those who incited it might well be regarded, not prisoners of war, but accessories before the fact to such assassination and rapine, and justly condemned to death. Whether these two defendants were guilty of this offense is a question of fact, dependent, not merely on the evidence as reported to us, but upon conditions which were notorious at the time, and which, therefore, did not require proof. It was established that the savages not only received the arms by which their massacres were effected from foreign aid, but were under the belief that they were supported by Englishmen in their uprising; and in the evidence that is reported to us, there is much to show that Arbuthnot and Ambrister dexterously fanned the flames as well as supplied the fuel. Two important circumstances, also, are to be considered in forming our estimate of the finding of the court. First, the members of the court were men of high character, who, from their participation in this very campaign, were cognizant of the kind of warfare which the accused were

charged with instigating; secondly, the British Government, after a careful investigation of the facts, if not acquiescing in the rightfulness of the action of the court-martial, at least made no complaint of it as involving a violation of international law."

Wharton, Int. Law Digest, § 348[a] III. 328. See Parton, Life of Jackson, II. ch. 34.

"The necessity of my reviewing with particularity the proofs against each of these unhappy sufferers (Arbuthnot and Ambrister) had been superseded, I observed, by what had passed at our interview (Mr. Rush and Lord Castlereagh) on the seventh. This Government itself had acquiesced in the reality of their offenses. I would content myself with superadding that the President believes that these two individuals, in connection with Nicholls and Woodbine, had been the prime movers in the recent Indian war. That without their instigation it never would have taken place, any more than the butcheries which preceded and provoked it; the butchery of Mrs. Garrett and her children; the butchery of a boat's crew, with a midshipman at their head, deputed from a national vessel, and ascending in time of peace the Appalachicola on a lawful errand; the butchery in time of peace at one stroke, upon another occasion, of a party of more than thirty Americans, amongst which were both women and children, with many other butcheries alike authentic and shocking."

Mr. Rush, min. at London, to Mr. J. Q. Adams, Sec. of State, Jan. 12, 1819. MS. Despatches, Great Britain.

"*As matters now stand*, we shall have no difficulty whatever with the *British Cabinet* respecting these executions. . . . I perceive, from some proceedings in Congress, as well as in our newspapers, what might be considered as a little curious, had not analogous things occurred before in the history of parties among us. I mean, a strenuous denunciation of these executions, by some of our own people, at a time when the British government itself is refusing to stretch out its hand in behalf of the offenders."

Mr. Rush, minister at London, to Mr. Monroe, President, Jan. 17, 1819 (unofficial). MS. Monroe Papers.

"The execution of Arbuthnot and Ambrister is also making much nois, I mean only out of doors; for I am happy to add that, as yet, this government has taken no part whatever, so far as is known to me, in these senseless and premature clamors."

Same to same, Aug. 13, 1818, ibid.

"Out of doors the excitement seemed to rise higher and higher. Stocks experienced a slight fall, under an apprehension of war with

the United States. The newspapers kept up their fire. Little acquainted with the true character of the transaction, they gave vent to angry declamation. They fiercely denounced the Government of the United States. Tyrant, ruffian, murderer, were among the epithets applied to their commanding general. He was exhibited in placards through the streets of London. The journals, without any distinction of party, swelled the general chorus; the Whig and others in opposition, taking the decided lead, whilst those in the Tory interest, although more restrained, gave them countenance. In the midst of all this din of passion, the ministry stood firm. Better informed, more just, they had made up their minds not to risk the peace of the two countries on ground so untenable. It forms an instance, a remarkable one, of the intelligence and strength of a government, disregarding the first clamours of a powerful press, and first erroneous impulses of an almost universal public feeling. At a later day of my mission, Lord Castlereagh said to me, that a war might have been produced on this occasion, '*if the ministry had but held up a finger.*"

Rush, Memoranda of a Residence at the Court of London (1883), 450, 45.

"The only question for the British Government was, if the case was one which called for retribution, and whether they should interfere for the protection of British subjects who engage, without the consent of their Government, in the service of states at war with each other, but at peace with their Government. Any British subject who engages in such foreign service, without permission, forfeits the protection of his country, and becomes liable to military punishment, if the party by whom he is taken chooses to carry the rights of war to that cruel severity. This is a principle admitted by the law of nations, and which, in the policy of the law of nations, has been frequently adopted. It is obvious that if it were to be maintained, that a country should hold out protection to every adventurer who enters into foreign service, the assertion of such a principle would lead it into interminable warfare. The case of Ambrister stands on the ground that he was taken aiding the enemy, and although General Jackson's conduct was most atrocious in inflicting upon him a capital punishment, and contrary to the sentence of the court-martial, that was a question between the General and his Government. Arbuthnot's case stands on a different ground. He was not taken in arms, but he was proved—as a political servant rather than as a military agent—to have afforded equal aid and assistance to the enemy, and could not be held to be exempt from punishment; he had placed himself in the same position as if he bore arms. And it was on these considerations, that the above-mentioned motion was negatived."

2 Halleck's Int. Law (Baker's ed.), 70. The above is part of a note by Sir S. Baker.

For a full vindication of General Jackson's action, see Mr. J. Q. Adams's instruction to Mr. Erving, of Nov. 28, 1818, quoted in part at the beginning of this section.

In 6 Br. & For. State Papers (1818–19), 326, will be found the correspondence with Great Britain relative to the war with the Seminole Indians, in which the proceedings against Arbuthnot and Ambrister are reviewed. The extracts include (inter alia) the instructions of Mr. Adams, Sec. of State, to Mr. Erving, Nov. 18 and Dec. 2, 1818, General Jackson's letter to the governor of Pensacola, together with full notes of the trial of Arbuthnot and Ambrister, letters from Arbuthnot, and subsequent correspondence with General Jackson and General Gaines.

10. Question as to Concentration.

§ 1126.

See supra, § 1038.

"The civilized code of war has been disregarded, no less so by the Spaniards than by the Cubans. . . . The cruel policy of concentration was initiated February 16, 1896. The productive districts controlled by the Spanish armies were depopulated. The agricultural inhabitants were herded in and about the garrison towns, their lands laid waste and their dwellings destroyed. This policy the late cabinet of Spain justified as a necessary measure of war and as a means of cutting off supplies from the insurgents. It has utterly failed as a war measure. It was not civilized warfare. It was extermination. Against this abuse of the rights of war I have felt constrained on repeated occasions to enter the firm and earnest protest of this Government."

President McKinley, annual message, Dec. 6, 1897, For. Rel. 1897, xii.

"Referring to the conversation which the Assistant Secretary, Mr. Day, had the honor to have with you on the 8th instant, it now becomes my duty, obeying the direction of the President, to invite through your representation the urgent attention of the Government of Spain to the manner of conducting operations in the neighboring Island of Cuba.

"By successive orders and proclamations of the captain-general of the Island of Cuba, some of which have been promulgated while others are known only by their effects, a policy of devastation and interference with the most elementary rights of human existence has been established in that territory tending to inflict suffering on innocent noncombatants, to destroy the value of legitimate investments, and to extinguish the natural resources of the country in the apparent hope of crippling the insurgents and restoring Spanish rule in the island.

"No incident has so deeply affected the sensibilities of the American people or so painfully impressed their Government as the proclamations of General Weyler, ordering the burning or unroofing of dwellings, the destruction of growing crops, the suspension of tillage, the devastation of fields, and the removal of the rural population from their homes to suffer privation and disease in the overcrowded and ill-supplied garrison towns. The latter aspect of this campaign of devastation has especially attracted the attention of this Government, inasmuch as several hundreds of American citizens among the thousands of concentrados of the central and eastern provinces of Cuba were ascertained to be destitute of the necessaries of life to a degree demanding immediate relief through the agencies of the United States, to save them from death by sheer starvation and from the ravages of pestilence.

"From all parts of the productive zones of the island, where the enterprise and capital of Americans have established mills and farms, worked in large part by citizens of the United States, comes the same story of interference with the operations of tillage and manufacture, due to the systematic enforcement of a policy aptly described in General Weyler's bando of May 27 last as 'the concentration of the inhabitants of the rural country and the destruction of resources in all places where the instructions given are not carried into effect.' Meanwhile the burden of contribution remains, arrears of taxation necessarily keep pace with the deprivation of the means of paying taxes, to say nothing of the destruction of the ordinary means of livelihood, and the relief held out by another bando of the same date is illusory, for the resumption of industrial pursuits in limited areas is made conditional upon the payment of all arrears of taxation and the maintenance of a protecting garrison. Such relief can not obviously reach the numerous class of concentrados, the women and children deported from their ruined homes and desolated farms to the garrison towns. For the larger industrial ventures, capital may find its remedy, sooner or later, at the bar of international justice, but for the labor dependent upon the slow rehabilitation of capital there appears to be intended only the doom of privation and distress.

"Against these phases of the conflict, against this deliberate infliction of suffering on innocent noncombatants, against such resort to instrumentalities condemned by the voice of humane civilization, against the cruel employment of fire and famine to accomplish by uncertain indirection what the military arm seems powerless to directly accomplish, the President is constrained to protest, in the name of the American people and in the name of common humanity. The inclusion of a thousand or more of our own citizens among the victims of this policy, the wanton destruction of the legitimate investments of Americans to the amount of millions of dollars, and the

stoppage of avenues of normal trade—all these give the President the right of specific remonstrance; but in the just fulfillment of his duty he can not limit himself to these formal grounds of complaint. He is bound by the higher obligations of his representative office to protest against the uncivilized and inhumane conduct of the campaign in the island of Cuba. He conceives that he has a right to demand that a war, conducted almost within sight of our shores and grievously affecting American citizens and their interests throughout the length and breadth of the land, shall at least be conducted according to the military codes of civilization.

"It is the President's hope that this earnest representation will be received in the same kindly spirit in which it is intended. The history of the recent thirteen years of warfare in Cuba, divided between two protracted periods of strife, has shown the desire of the United States that the contest be conducted and ended in ways alike honorable to both parties and promising a stable settlement. If the friendly attitude of this Government is to bear fruit it can only be when supplemented by Spain's own conduct of the war in a manner responsive to the precepts of ordinary humanity and calculated to invite as well the expectant forbearance of this Government as the confidence of the Cuban people in the beneficence of Spanish control."

Mr. Sherman, Sec. of State, to Mr. Dupuy de Lôme, Spanish min., June 26, 1897, For. Rel. 1897, 507.

In another note to Mr. Dupuy de Lôme, of Aug. 24, 1897, Mr. Sherman stated that the mortality among the "concentrated" citizens of the United States who were receiving relief in Sagua la Grande and Santa Clara amounted in two months to the normal rate for a whole year. (For Rel. 1897, 508.)

In yet another note of Nov. 6, 1897, Mr. Sherman, after representing that a conservative estimate placed the number of deaths in the province of Matanzas, outside the city of that name, at more than 22,000 since the reconcentration began, said: "The local authorities are represented to be powerless to cope with the situation. The cities and towns are virtually bankrupt, and can give no appreciable relief to the starving thousands forced upon them. These facts but substantiate the representations which reach this Government from other quarters of the island. They abundantly justify the earnest representations which this Government has felt constrained to make in the common cause of humanity and justice. It is no merely sentimental or interested consideration which moves this Government to raise its voice in earnest remonstrance against so harsh and so futile a policy as this, which, to the inevitable hardships and woes of war, superadds extermination by starvation. The situation bears no analogy to the case heretofore suggested by you of the sufferings caused in a besieged town. These innocent agriculturists, their wives and children, have been herded by the act of the military commanders within towns unbesieged and wholly within Spanish control, without provision for their wants and without any apparent effort to alleviate the inevitable consequences of destitution, lack of shelter, and disease." (For. Rel. 1897, 509.)

Mr. Dupuy de Lôme, in a note of Nov. 10, 1897, stated that General Blanco, who had succeeded General Weyler as governor-general of Cuba, had adopted measures for the organization of extensive zones of cultivation, for furnishing food and work, and for the formation of provincial protective boards, while a decree had been promulgated which not only permitted agricultural operations, but counseled them and offered civil and military protection therein, thus changing the policy of General Weyler. (For. Rel. 1897, 510.)

An arrangement was subsequently made under which charitable contributions from the United States for the relief of the reconcentrados were admitted into Cuba free of duty. (For. Rel. 1897, 511–514.)

VII. *PRISONERS OF WAR.*

1. Who Are, and Who Are Not.

§ 1127.

"49. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

"All soldiers, of whatever species of arms; all men who belong to the rising en masse of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

"50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

"The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war.

"51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy, en masse to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

"53. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses, and servants, if they fall into the hands of the American Army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire,

they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 154.

"ARTICLE XIII. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1814.

In May, 1898, two American newspaper men named Thrall and Jones, one a correspondent and the other an artist, were arrested in Havana on a charge of being spies. The Secretary of the Navy sent a dispatch boat to Havana under flag of truce to propose the exchange of Spanish officers for the men.

Mr. Adee, Second Assist. Sec. of State, to Sir Julian Pauncefote, British ambass. (unofficial), May 15, 1898, MS. Notes to British Leg. XXIV. 189.

"99. A messenger carrying written dispatches or verbal messages from one portion of the army or from a besieged place to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured while doing so in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

"100. A messenger or agent who attempts to steal through the territory occupied by the enemy to further in any manner the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 158.

War prisoners.

A subject of a foreign power, acting under a commission from the hostile government, should be treated as an enemy, and confined as a prisoner of war,

Lee, At. Gen., 1798, 1 Op. 84.

The Government of the United States having acknowledged the independence of Texas, and Texas being at war with Mexico, if a citizen of the United States captured when with a Texas army by Mexican forces should be treated in Mexico as a rebel and not as a prisoner of war, on the ground that Mexico had not acknowledged Texas as a belligerent, "after his release has been demanded by this Government, consequences of the most serious character would certainly ensue."

Mr. Webster, Sec. of State, to Mr. Thompson, Apr. 5, 1842, 6 Webster's Works, 427, 435, in relation to the Santa Fé expedition.

For acknowledgment of liberation of such prisoners, see same to same, Sept. 5, 1842.

See supra, § 481.

"By the law and practice of civilized nations, enemies' subjects taken in arms may be made prisoners of war; but every person found in the train of an army is not to be considered as therefore a belligerent or an enemy. In all wars, and in all countries, multitudes of persons follow the march of armies, for the purpose of traffic or from motives of curiosity, or the influence of other causes, who neither expect to be, nor reasonably can be, considered belligerents. Whoever, in the Texan expedition to Santa Fé, was commissioned or enrolled for the military service of Texas, or, being armed, was in the pay of that Government, and engaged in an expedition hostile to Mexico, may be considered as her enemy, and might lawfully, therefore, be detained as prisoner of war. This is not to be doubted; and, by the general practice of modern nations, it is true that the fact of having been found in arms with others admitted to be armed for belligerent purposes raises a presumption of hostile character. In many cases, and especially in regard to European wars in modern times, it might be difficult to repel the force of this presumption. It is still, however, but a presumption; because it is nevertheless true that a man may be found in arms with no hostile intentions. He may have assumed arms for other purposes, and may assert a pacific character, with which the fact of his being more or less armed would be entirely consistent. In former and less civilized ages, cases of this sort existed without number in European society. When the peace of communities was less firmly established by efficient laws, and when, therefore, men often traveled armed for their own defence, or when individuals, being armed according to the fashion of the age, yet often journeyed under the protection of military escorts or bodies of soldiers; the possession of arms was no evidence of hostile character, circumstances of the times sufficiently explaining such appearances consistently with pacific intentions. And circumstances of the country may repel the presumption of hostility, as well as circumstances of the times, or the manners of a particular age. . . .

"There would be no meaning in that well-settled principle of the law of nations which exempts men of letters and other classes of non-combatants from the liability of being made prisoners of war, if it were an answer to every claim for such exemption to say that the person making it was united with a military force, or journeying under its protection. As to the assertion that it is against the law of Mexico for foreigners to pass into it across the line of Texas, it is with no little surprise that the Mexican secretary of state is found to assign this reason for making Mr. Kendall a prisoner."

Mr. Webster, Sec. of State, to Mr. Thompson, Apr. 5, 1842, 6 Webster's Works, 427, 432.

"54. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

"55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, Apr. 24, 1863, War of the Rebellion, Official Records, series 3, III. 154.

2. Treatment.

§ 1128.

"Prisoners of war are to be considered as unfortunate and not as criminal, and are to be treated accordingly, although the question of detention or liberation is one affecting the interest of the captor alone, and therefore one with which no other government ought to interfere in any way; yet the right to detain by no means implies the right to dispose of the prisoners at the pleasure of the captor. That right involves certain duties, among them that of providing the prisoners with the necessaries of life and abstaining from the infliction of any punishment upon them which they may not have merited by an offense against the laws of the country since they were taken."

Mr. Webster, Sec. of State, to Mr. Ellis, Feb. 26, 1842, MS. Inst. Mex. XV. 151.

"The law of war forbids the wounding, killing, impressment into the troops of the country, or the enslaving or otherwise maltreating of *prisoners of war*, unless they have been guilty of some grave crime; and from the obligation of this law no civilized state can discharge itself."

Mr. Webster, Sec. of State, to Mr. Thompson, min. to Mexico, Apr. 5, 1842, Webster's Works, VI. 427, 437.

"On the announcement of the ratification of the treaty of Ghent there was naturally some disorder among the American prisoners of war confined at Dartmoor, near Plymouth, who were not as yet released. On April 6, 1815, there was some slight disturbance, and indications of an attempt, at least of one or two, to break loose. The captain on guard directed the alarm bell to be sounded, which caused a rush of prisoners, most of whom had no part whatever in the disorder, to the place of alarm. He then ordered the prisoners to their yards, and directed a squad of soldiers to charge them. The crowd of prisoners was great; they would not, and indeed, in the crush of the narrow passage in which they were, could not, immediately retreat; and it was said by some of the witnesses that stones were thrown from among them at the soldiers, though this last fact was negatived by a great preponderance of testimony. An order to fire was given, though by whom it was not clearly shown, and this firing, on a perfectly defenseless crowd, was continued until seven persons were killed, thirty dangerously and thirty slightly wounded. A commission consisting of Mr. F. S. Larpent, representing the British Government, and Mr. Charles King, deputed by the American mission in London, having visited the scene of action and examined into the facts, reported that 'this firing (at the outset) was justifiable in a military point of view,' but that 'it is very difficult to find any justification for the further renewal and continuance of the firing,' which is attributed to 'the state of individual irritation and exasperation on the part of the soldiers who followed the prisoners into their yards. Lord Castlereagh, on receiving this report, expressed, on May 22, 1815, the 'disapprobation' of the Prince Regent at the conduct of the troops, and his desire 'to make a compensation to the widows and families of the sufferers. Mr. Monroe, Secretary of State, on being informed of this action, sent, on December 11, 1815, to Mr. Baker, British chargé d'affaires at Washington, a note in which he said: 'It is painful to touch on this unfortunate event, from the deep distress it has caused to the whole American people. This repugnance is increased by the consideration that our Governments, though penetrated with regret, do not agree in sentiment respecting the conduct of the parties engaged in it. Whilst the President declines accepting the provision contemplated by His Royal Highness the Prince Regent, he nevertheless does full justice to the motives which dictated it.'"

Wharton, Int. Law Digest, § 348c, III. 331, citing 4 Am. State Papers, For. Rel. 2 et seq.

"56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional inflicting of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity."

"59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

"All prisoners of war are liable to the infliction of retaliatory measures."

"67. The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant."

"72. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American Army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

"Nevertheless, if large sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the Army, under the direction of the commander, unless otherwise ordered by the Government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they have been placed in the private luggage of the prisoners.

"73. All officers, when captured, must surrender their side arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored can not wear them during captivity.

"74. A prisoner of war, being a public enemy, is the prisoner of the Government and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The Government alone releases captives, according to rules prescribed by itself.

"75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

"76. Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

"They may be required to work for the benefit of the captor's government, according to their rank and condition.

"77. A prisoner of war who escapes may be shot, or otherwise killed, in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

"If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

"78. If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

"79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

"80. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information, or to punish them for having given false information."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 154.

"Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them.

"They must be humanely treated.

"All their personal belongings, except arms, horses, and military papers remain their property.

"ARTICLE V. Prisoners of war may be interned in a town, fortress, camp, or any other locality, and bound not to go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, Chap. II., on Prisoners of War, Art. IV., 32 Stat. II. 1812.

"ARTICLE VI. The State may utilize the labor of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations.

"Prisoners may be authorized to work for the Public Service, for private persons, or on their own account.

"Work done for the State shall be paid for according to the tariffs in force for soldiers of the national army employed on similar tasks.

"When the work is for other branches of the Public Service or for private persons, the conditions shall be settled in agreement with the military authorities.

"The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

"ARTICLE VII. The Government into whose hands prisoners of war have fallen is bound to maintain them.

"Failing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them.

"ARTICLE VIII. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State into whose hands they have fallen.

"Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary.

"Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment.

"Prisoners who, after succeeding in escaping are again taken prisoners, are not liable to any punishment for the previous fight.

"ARTICLE IX. Every prisoner of war, if questioned, is bound to declare his true name and rank, and if he disregards this rule, he is liable to a curtailment of the advantages accorded to the prisoners of war of his class."

"ARTICLE XIV. A Bureau for information relative to prioners of war is instituted, on the commencement of hostilities, in each of the belligerent States, and, when necessary, in the neutral countries on whose territory belligerents have been received. This Bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to keep an individual return for each prisoner of war. It is kept informed of interments and changes, as well as of admissions into hospital and deaths.

"It is also the duty of the Information Bureau to receive and collect all objects of personal use, valuables, letters, &c., found on the battlefields or left by prisoners who have died in hospital or ambulance, and to transmit them to those interested.

"ARTICLE XV. Relief Societies for prisoners of war, which are regularly constituted in accordance with the law of the country with the object of serving as the intermediary for charity, shall receive from the belligerents for themselves and their duly accredited agents

every facility, within the bounds of military requirements and Administrative Regulations, for the effective accomplishment of their humane task. Delegates of these Societies may be admitted to the places of interment for the distribution of relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an engagement in writing to comply with all their Regulations for order and police.

"ARTICLE XVI. The Information Bureau shall have the privilege of free postage. Letters, money orders, and valuables, as well as postal parcels destined for the prisoners of war or dispatched by them, shall be free of all postal duties both in the countries of origin and destination, as well as in those they pass through. . . .

"ARTICLE XVII. Officers taken prisoners may receive, if necessary, the full pay allowed them in this position by their country's regulations, the amount to be repaid by their Government.

"ARTICLE XVIII. Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities.

"ARTICLE XIX. The wills of prisoners of war are received or drawn up on the same conditions as for soldiers of the National Army.

"The same rules shall be observed regarding death certificates, as well as for the burial of prisoners of war, due regard being paid to their grade and rank."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1812, 1815.

"Gifts and relief in kind for prisoners of war shall be admitted free of all duties of entry and others, as well as of payments for carriage by the Government railways."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, Annex, Art. XVI, 32 Stat. II. 1816.

In response to an inquiry prompted by the United States, the British consul at Santiago telegraphed that he had seen Constructor Hobson and the seven seamen of the *Merrimac* in barracks near the town. They were supplied with as good food as the general scarcity permitted. Lieutenant Hobson expressed satisfaction at everything, and he was well lodged. The lodging provided for the seamen was not so good. In case of an attack by land it was quite possible that the prisoners would be exposed, as would be everybody else.

For. Rel. 1898, 981.

November 11, 1899, the British ambassador at Washington was advised that the state secretary of the Transvaal had notified the United

States consul at Pretoria, who was exercising good offices in behalf of British subjects, that all requests for the payment of money to British prisoners and all inquiries concerning them must in future come through military channels at the front, and that he would not further recognize the United States consul "in any British official capacity."

The British Government desired it to be pointed out to the Transvaal Government that, in declining the good offices of the consul in behalf of British prisoners, they were "departing from the usual practice;" that during the Crimean war moneys for British prisoners in Russia and for Russian prisoners in England were distributed through the Danish representatives in St. Petersburg and London; that during the Franco-German war moneys were handed to the French prisoners in Germany through the British representative at Berlin, and letters sent from them to persons in France through the British foreign office. It was added that reciprocal privileges would be allowed to Boer prisoners in British hands.

The consul subsequently reached an understanding, which he set forth in a note to Mr. Reitz, the state secretary, as follows:

"1. The Government of the South African Republic objects to recognizing the United States (or any other) consular officer as the official representative of the British Government during the present war.

"2. The Government of the South African Republic objects to the transmission by the United States consul of—

"(*a*) Official communications from the British Government and addressed to the Government of the South African Republic.

"(*b*) Official communications from the British Government and addressed to British prisoners here.

"(*c*) Moneys or funds sent by the British Government to British prisoners here.

"On the other hand, I understand that the Government of the South African Republic will have no objection to the performance by the United States consul at this capital of the following services on behalf of the British prisoners of war and their friends:

"1. The forwarding of letters and papers sent by friends or relatives of the prisoners.

"2. The distribution of funds (under the supervision of the war office of the South African Republic) sent to the British prisoners by their friends or relatives.

"Provided that these services are reciprocal and that the Government of the South African Republic will have the right to request the similar services of the United States consular officers in the British possessions and on behalf of the Boer and Afrikander prisoners of war that are now in the hands of the British authorities.

"I further understand that the Government of the South African Republic reserves to itself the right to revoke any or all of the privileges to receive letters, money, and parcels now enjoyed by the British prisoners of war in this Republic, and that the fact that Boer or Afrikander prisoners of war in the hands of the British authorities are not receiving kind and humane treatment, or are denied privileges similar to the privileges now allowed to British prisoners of war in the South African Republic, will, if proven to your satisfaction, be deemed sufficient cause and reason for such action on the part of your honorable Government."

Mr. Reitz replied that this stated with perfect correctness "the attitude in accordance with which this Government has acted and will continue to act."

It was subsequently stated that British prisoners were allowed to receive parcels of tobacco and other things, including newspapers, if sent by their friends, through the consulate.

The British Government, in expressing its thanks for the success which had attended the efforts of the consul in behalf of the British prisoners, stated, as regards the treatment of Boer prisoners by British authorities, "that telegrams, books, clothing, and luxuries are freely transmitted to them after inspection; that small amounts of money are given to them direct, while larger amounts are handed to the commandant to issue in small sums, and that clothing is issued at the public expense to prisoners who are in great need of it."

For. Rel. 1900, 619, 621–622, 622, 623.

With reference to a report that a number of prisoners captured by the British troops in South Africa had been deported to Ceylon, and that among them were twenty-two men claiming American citizenship, the Department of State instructed the American ambassador in London to ask an early inquiry into the truth of the statement, and said: "If it be confirmed, the Government of the United States could not view without concern the risk of life and health involved in sending any unacclimated American citizens, taken under the circumstances described, to so notoriously insalubrious a place as the island of Ceylon. The principles of public law which exclude all rigor or severity in the treatment of prisoners of war beyond what may be needful to their safety, imply their non-subjection to avoidable danger from any cause. These admitted principles have found conventional expression in treaties, as in article 24 of the treaties of 1785 and 1799 between the United States and Prussia, and the enlightened practice therein specified to be followed with respect to the custody of prisoners of war is believed to represent the general view of mod-

ern nations, as it certainly does the sentiment of humanity and the law of nature on which it claims to rest.

"If it prove that citizens of the United States, captured while temporarily serving in the armies of the South African Republic and the Orange Free State, have in fact been transported to distant and noxious places, you will represent the expectation of this Government that they be at once removed to some more healthful station, if indeed the situation at this time shall not permit their discharge, freely or on parole. The number of these Americans who have taken temporary service under another flag is represented to be small."

Mr. Hay, Sec. of State, to Mr. Choate, ambass. to London, No. 468, October 16, 1900, MS. Inst. Great Britain, XXXIII. 477.

After the outbreak of war between Russia and Japan, the Russian Government, through the French minister at Tokio, requested the Japanese Government to furnish regularly a list of the Russian prisoners of war who might fall into the hands of the Japanese army, and, in case of the death of such prisoners, to inform the French legation or consulates of the fact. The Japanese Government promised to furnish the desired information every ten days, so far as practicable, provided that the Russian Government would give to the United States embassy or consulates in Russia similar information concerning Japanese prisoners. This arrangement was mutually agreed upon.

For. Rel. 1904, 716, 719.

3. Exchange.

§ 1129.

It was formerly the practice for the state to leave to each prisoner, at least during the war, the care of redeeming himself, and the captor had a lawful right to demand a ransom for the release of his prisoners. The present usage of civilized nations is, however, to exchange prisoners of war or to release them on their parole or word of honor not to serve against the captor again for a definite period, during the war, or till properly exchanged. An agreement between belligerents for the exchange (and formerly for the ransom) of prisoners of war is called a cartel, and a vessel commissioned for the exchange of prisoners of war or to carry proposals from one belligerent to the other under a flag of truce is sometimes called a cartel ship.

Halleck, Int. Law (3d ed. by Baker), II. 326–330.

As to the disability of an alien enemy to sue on a ransom bill, see Anthon *vs.* Fisher, 2 Douglas, 649. See, however, Lawrence's Wheaton (1863), 695; I Pistoye et Duverdy, 280.

"105. Exchanges of prisoners take place—number for number—rank for rank—wounded for wounded—with added condition for added condition—such, for instance, as not to serve for a certain period.

"106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the government, or of the commander of the army in the field.

"107. A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange, nor a higher rank, for the purpose of obtaining better treatment.

"Offenses to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

"108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries.

"Such arrangement, however, requires the sanction of the highest authority.

"109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it can not be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

"A cartel is voidable as soon as either party has violated it.

"110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, Apr. 24, 1863, War of the Rebellion, Official Records, series 3, III, 159.

"The next act in the war thrilled not alone the hearts of our countrymen but the world by its exceptional heroism. On the night of June 3d, Lieutenant Hobson, aided by seven devoted volunteers, blocked the narrow outlet from Santiago Harbor by sinking the collier *Merrimac* in the channel, under a fierce fire from the shore batteries, escaping with their lives as by a miracle, but falling into the hands of the Spaniards. It is a most gratifying incident of the war that the bravery of this little band of heroes was cordially appreciated by the Spanish admiral, who sent a flag of truce to notify Admiral Sampson of their safety and to compliment them on their daring act. They were subsequently exchanged July 7th."

President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, lix.

4. Parole.

§ 1130.

"119. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

The Parole.

"120. The term parole designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

"121. The pledge of the parole is always an individual, but not a private act.

"122. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

"123. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

"124. Breaking the parole is punished with death when the person breaking the parole is captured again.

"Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

"125. When paroles are given and received there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

"126. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

"127. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

"128. No paroling on the battlefield; no paroling of entire bodies of troops after a battle; and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

"129. In capitulations for the surrender of strong places or fortified camps the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war unless exchanged.

"130. The usual pledge given in the parole is not to serve during the existing war unless exchanged.

"This pledge refers only to the active service in the field against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

"131. If the government does not approve of the parole, the paroled officer must return into captivity, and should the enemy refuse to receive him he is free of his parole.

"132. A belligerent government may declare, by a general order, whether it will allow paroling and on what conditions it will allow it. Such order is communicated to the enemy.

"133. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war or to parole all captured officers, if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

"134. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and upon their failure to give it he may arrest, confine, or detain them."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 160.

"Article X. Prisoners of war may be set at liberty on parole if the laws of their country authorize it, and, in such a case, they are bound, on their personal honour, scrupulously to fulfill, both as regards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

"In such cases, their own Government shall not require of nor accept from them any service incompatible with the parole given.

"Article XI. A prisoner of war can not be forced to accept his liberty on parole; similarly the hostile Government is not obliged to assent to the prisoner's request to be set at liberty on parole.

"Article XII. Any prisoner of war, who is liberated on parole and recaptured, bearing arms against the Government to whom he had pledged his honor, or against the allies of that Government, forfeits his right to be treated as a prisoner of war, and can be brought before the courts."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II, 1811.

"In pursuance of the suggestion made by General Lee, the Department asked for the issuance of instructions that you be released from imprisonment on the condition that you would leave the Island of Cuba and not return until the present war is terminated. Upon your signing an agreement to that effect you were released. The Department regards the condition of your release as a binding parole engagement between yourself and the Government of Spain for the infringement of which you would alone be responsible."

Mr. Sherman, Sec. of State, to Mr. Sanguily, Feb. 1, 1898, 225 MS. Dom. Let. 123, enclosing copy of S. Doc. 104, 54 Cong. 2 sess.

5. Repatriation.

§ 1131.

"After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible."

Article XX., Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1817.

The United States having agreed under the capitulation of Santiago de Cuba to return the Spanish troops to Spain, an understanding was sought through the British ambassador at Madrid with the Spanish Government that the transports would be considered as neutralized, both on the inward and on the outward voyage, no belligerent act to be committed by or upon them; and that they would not be subjected to port charges, unless pilotage, as to which an express understanding was desired.

Immediately afterwards an offer for the transportation of the Spanish prisoners was received from the Spanish Trans-Atlantic Line. The United States agreed to give to the ships of that line having only such armament as merchant ships usually carry, safe conduct on the inward and the outward voyage, provided that they committed no unneutral act. But, whatever the nationality of the ships, the United States proposed that Spain should provide medical and surgical attendance for prisoners on the transports; that the United States should furnish medical supplies and rations; but that Spain should designate one officer for each ship as commissary to see that the rations were sufficient, and that Spanish officers should assume the police regulation of the ships.

The Spanish Government agreed to these terms, including the exemption of the transports from port dues, except pilotage. It was also agreed that if American or neutral ships were employed, a quarantine station, in case of contagion, should be established on shore, so that the ships could depart promptly.

A formal understanding with the Spanish Government was subsequently rendered unnecessary by the contract entered into with the Spanish Trans-Atlantic Company, under which the company agreed to take the officers and men from Santiago de Cuba to Spain for a certain sum for each individual, covering transportation, subsistence, and delivery on shore. The United States, on the other hand, gave to the ships while sailing under the contract to Santiago de Cuba and thence to Spain safe conduct against the acts of persons under the jurisdiction of the United States.

For. Rel. 1898, 990, 992.

As to the repatriation of prisoners under the treaty of peace between the United States and Spain of Dec. 10, 1898, see supra, § 887.

6. Spies, War-Traitors, War-Rebels.

§ 1132.

"88. A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.

"The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 158.

"89. If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

"90. A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

"91. The war-traitor is always severely punished. If his offense consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

"92. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offense.

"98. All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

"Foreign residents in an invaded or occupied territory or foreign visitors in the same can claim no immunity from this law. They

may communicate with foreign parts or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 158.

"93. All armies in the field stand in need of guides, and impress them if they can not obtain them otherwise.

"94. No person having been forced by the enemy to serve as guide is punishable for having done so.

"95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor, and shall suffer death.

"96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

"97. Guides, when it is clearly proved that they have misled intentionally, may be put to death."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 158.

"102. The law of war, like the criminal law regarding other offenses, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

"103. Spies, war-traitors, and war-rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, at a great distance from it, by the chief commander of the army in the field.

"104. A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 159.

"Article 88 of the United States 'Instructions for the Government of Armies in the Field,' promulgated April 24, 1863, . . . reads: '88. A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy. The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.' Bluntschli, while embodying this rule in his tentative code, comments [Droit Int. Codifié, sec. 628] on it thus: 'The penalty should not, however, be applied except in the more dangerous

cases; it would in most cases be out of all proportion with the crime. The usage has become less barbarous, and it suffices the more frequently to condemn them [spies] to close confinement or other analogous penalties.' He further says, speaking of the German military regulations of 1870, and apparently on the authority of Rolin Jaequemyns: 'The menace of death is often not avoidable, but should not however be applied except in cases where the culpability is really grave.' From these citations it may be inferred Bluntschli holds that the severity of the punishment in each particular case should depend upon the resultant danger, a test which a military tribunal may naturally be presumed to apply to the facts upon which it reaches a decision. It does not appear practicable to draw a line between the more dangerous and less dangerous cases, and our own Regulations of 1863 do not attempt it."

Mr. Gresham, Sec. of State, to Mr. Denby, min. to China, No. 1033, March 21, 1895, MS. Inst. China, V. 162.

"ARTICLE XXIX. An individual can only be considered a spy if, acting clandestinely, or on false pretences, he obtains, or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

"Thus, soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly, the following are not considered spies: Soldiers or civillians, carrying out their mission openly, charged with the delivery of despatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in baloons to deliver despatches, and generally to maintain communication between the various parts of an army or a territory.

"ARTICLE XXX. A spy taken in the act can not be punished without previous trial.

"ARTICLE XXXI. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1818, 1819.

On April 15, 1904, Count Cassini, Russian ambassador at Washington, stated, by instruction of his Government, that "in case neutral vessels, having on board correspondents who may communicate war news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off the coast of Kwantung or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies and the vessels provided

with wireless telegraph apparatus shall be seized as lawful prize." Mr. Hay, Secretary of State, in taking note of this declaration said that the United States did not waive any right which it might have in international law in the case of any American citizen who might be arrested or of any American vessel that might be seized.

For. Rel. 1904, 729.

The British Government made a similar reservation. (For. Rel. 1904, 332, 333.)

"A spy is a person sent by one belligerent to gain secret information of the forces and defenses of the other, to be used for hostile purposes. According to practice, he may use deception under the penalty of being lawfully hanged if detected. To give this odious name and character to a confidential agent of a neutral power, bearing the commission of his country, and sent for a purpose fully warranted by the law of nations, is not only to abuse language but also to confound all just ideas, and to announce the wildest and most extravagant notions, such as certainly were not to have been expected in a grave diplomatic paper; and the President directs the undersigned to say to Mr. Hülsemann that the American Government would regard such an imputation upon it by the cabinet of Austria, as that it employed spies, and that in a quarrel none of its own, as distinctly offensive, if it did not presume, as it is willing to presume, that the word used in the original German was not of equivalent meaning with 'spy' in the English language, or that in some other way the employment of such an opprobrious term may be explained. Had the Imperial Government of Austria subjected Mr. Mann to the treatment of a spy it would have placed itself without the pale of civilized nations, and the cabinet of Vienna may be assured that if it had carried, or attempted to carry, any such lawless purpose into effect in the case of an authorized agent of this Government, the spirit of the people of this country would have demanded immediate hostilities to be waged by the utmost exertion of the power of the Republic, military and naval."

Mr. Webster, Sec. of State, to Mr. Hülsemann, Dec. 21, 1850. MS. Notes German States, VI. 265. See further as to Mr. Mann's case, supra, § 72.

As to André's case, see 3 Phill. Int. Law (3d ed.), 168.

7. Deserters.

§ 1133.

"48. Deserters from the American Army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture or being delivered up to the

American Army; and if a deserter from the enemy, having taken service in the Army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, vol. III. 154.

VIII. *TREATMENT OF THE WOUNDED.*

§ 1134.

Geneva Convention, 1864.

"ARTICLE I. Ambulances and military hospitals shall be acknowledged to be neuter, and, as such, shall be protected and respected by belligerents so long as any sick or wounded may be therein.

"Such neutrality shall cease if the ambulances or hospitals should be held by a military force.

"ART. II. Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality, whilst so employed, and so long as there remain any wounded to bring in or to succor.

"ART. III. The persons designated in the preceding article may, even after occupation by the enemy, continue to fulfill their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the crops to which they belong.

"Under such circumstances, when these persons shall cease from their functions, they shall be delivered by the occupying army to the outposts of the enemy.

"ART. IV. As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals can not, in withdrawing, carry away any articles but such as are their private property.

"Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

"ART. V. Inhabitants of the country who may bring help to the wounded shall be respected, and shall remain free. The generals of the belligerent Powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and of the neutrality which will be the consequence of it.

"Any wounded man entertained and taken care of in a house shall be considered as a protection thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempted from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

"ART. VI. Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong.

" Commanders-in-chief shall have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement when circumstances permit this to be done, and with the consent of both parties.

" Those who are recognized, after their wounds are healed, as incapable of serving, shall be sent back to their country.

" The others may also be sent back, on condition of not again bearing arms during the continuance of the war.

" Evacuations, together with the persons under whose directions they take place, shall be protected by an absolute neutrality.

"ART. VII. A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuations. It must, on every occasion, be accompanied by the national flag. An arm-badge (brassard) shall also be allowed for individuals neutralized, but the delivery thereof shall be left to military authority.

" The flag and the arm-badge shall bear a red cross on a white ground.

"ART. VIII. The details of execution of the present convention shall be regulated by the commanders-in-chief of belligerent armies, according to the instructions of their respective governments, and in conformity with the general principles laid down in this convention.

ART. IX. The high contracting Powers have agreed to communicate the present convention to those Governments which have not found it convenient to send plenipotentiaries to the International Conference at Geneva, with an invitation to accede thereto. The protocol is for that purpose left open."

Convention for the amelioration of the condition of the wounded in the field, signed at Geneva, Aug. 22, 1864.

The original signatories were Switzerland, Baden, Belgium, Denmark, Spain, France, Hesse, Italy, Netherlands, Portugal, Prussia, Würtemberg.

The adhesion of the United States was proclaimed by President Arthur, July 26, 1882.

"ARTICLE XXI. The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention of the 22nd August, 1864, subject to any modifications which may be introduced into it."

Convention respecting the Laws and Customs of War on Land. The Hague, July 29, 1899, 32 Stat. II. 1817.

The Hague Conference adopted a resolution as follows: " The conference, taking into consideration the preliminary steps taken by the Federal Government of Switzerland for the revision of the conven-

tion of Geneva, expresses the wish that there should be in a short time a meeting of a special conference having for its object the revision of that convention." This resolution was voted unanimously.

For. Rel. 1899, 513, 520.

Bill (S. 2931) to incorporate the American National Red Cross and to protect its insignia. Report of Mr. Money, Com. on For. Rel., Feb. 14, 1900, S. Rept. 391, 56 Cong, 1 sess.

Report of Mr. Gillett, Com. on For. Aff., March 23, 1900, H. Rept. 758, 56 Cong. 1 sess.

IX. *INTERRUPTION OF COMMERCIAL RELATIONS.*

1. Suspension of Intercourse.

§ 1135.

After a declaration of war, all intercourse, and not merely trading, is forbidden; and an American citizen can not lawfully send a vessel to the enemy's country to bring away his property.

The Rapid (1814), 8 Cranch, 155.

In war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government or in the exercise of the rights of humanity.

The Julia (1814), 8 Cranch, 181.

Fat cattle are provisions, or munitions of war, within the meaning of the act of Congress of July 6, 1812 (2 Stat. 778), "to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes."

United States *v.* Barber (1815), 9 Cranch, 243.

By section 2 of the act of July 6, 1812 (2 Stat. 778), it was made a misdemeanor for any citizen or inhabitant of the United States to transport any "naval or military stores, arms or the munitions of war, or any article of provision," from the United States to upper or lower Canada, Nova Scotia, or New Brunswick. Held, "that fat cattle are provisions, or munitions of war, within the true intent and meaning of the act."

United States *v.* Barber (1815), 9 Cranch, 243.

Though, as was held in United States *v.* Barber, fat cattle were "provisions or munitions of war" under the act of July 6, 1812, yet it was decided that the driving such cattle on foot was not a "transportation" of them within the meaning of the act.

United States *v.* Sheldon (1817), 2 Wheat. 119.

"86. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

"Exceptions to this rule, whether by safe-conduct or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government or by the highest military authority.

"Contraventions of this rule are highly punishable.

"87. Ambassadors, and all other diplomatic agents of neutral powers accredited to the enemy may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the State, and not by subordinate officers."

Instructions for the Government of Armies of the United States in the Field. General Orders, No. 100, April 24, 1863. War of the Rebellion. Official Records, series 3, III. 157.

Purchases by neutrals, though bona fide for value, from persons who had purchased in contravention of the statute of July 13, 1861, and the subsequent proclamation of the President, making all commercial intercourse between any part of a State where insurrection against the United States existed and the citizens of the rest of the United States "unlawful," were invalid, and the property so purchased was liable to capture.

The Ouachita Cotton, 6 Wall. 521.

Commercial intercourse between States at war with each other is interdicted. It needs no special declaration on the part of the sovereign to accomplish this result, for it follows from the very nature of war that trading between the belligerents should cease.

United States *v.* Lane, 8 Wall. 185; McKee *v.* United States, id. 163.

Every kind of trading or commercial dealing or intercourse, whether by transmission of money or of goods, or orders for the delivery of either between two countries at war, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, is prohibited.

Quoted in Montgomery *v.* United States, 15 Wall. 395, from Kershaw *v.* Kelsey, 100 Mass. 561; United States *v.* Lapène, 17 Wall. 601.

The Government of the United States has power to permit limited commercial intercourse with an enemy in time of war, and to impose such conditions thereon as it sees fit; this power is incident to the power to declare war, and to carry it on to a successful termination. And it would seem that the President alone, who is constitutionally invested with the entire charge of hostile operations, may exercise this power; but whether so or not, there is no doubt that, with the concurrent authority of the Congress, he may exercise it according to his discretion.

Hamilton *v.* Dillin, 21 Wall. 73.

A resident of a loyal State, after the 17th of July, 1861, and just after the civil war had become flagrant, procured a pass from the proper military authorities of the United States permitting him to go through the army lines into the insurrectionary territory, and under it went into the Confederate States and remained there, engaged in business, until the latter part of 1864, when he returned to his old domicil. Prior to his return he purchased a large quantity of cotton (724 bales), which he stored in Savannah, and which fell into the hands of the forces of the United States when that place was captured by them. It was held, on a question whether he had been trading with the enemy, that he had not lost his original domicil, and accordingly that he had been so trading.

Mitchell *v.* United States, 21 Wall. 350.

It was not until the 16th of August, 1861, that all commercial intercourse between the States designated as in rebellion and the inhabitants thereof, with certain exceptions, and the citizens of other States and other parts of the United States, became unlawful.

Matthews *v.* McStea, 91 U. S. 7.

"A non-resident alien need not expose himself or his property to the dangers of a foreign war. He may trade with both belligerents or with either. By so doing he commits no crime. His acts are lawful in the sense that they are not prohibited. So long as he confines his trade to property not hostile or contraband, and violates no blockade, he is secure both in his person and his property. If he is neutral in fact as well as in name, he runs no risk. But so soon as he steps outside of actual neutrality, and adds materially to the warlike strength of one belligerent, he makes himself correspondingly the enemy of the other. To the extent of his acts of hostility and their legitimate consequences, he submits himself to the risk of the war into whose presence he voluntarily comes. If he breaks a blockade or engages in contraband trade, he subjects himself to the chances of the capture and confiscation of his offending property. If he thrusts

himself inside the enemies' lines, and for the sake of gain acquires title to hostile property, he must take care that it is not lost to him by the fortune of war. While he may not have committed a crime for which he can be personally punished, his offending property may be treated by the adverse belligerent as an enemy property. He has the legal right to carry, to sell, and to buy; but the conquering belligerent has a corresponding right to capture and condemn. He enters into a race of diligence with his adversary, and takes the chances of success. The rights of the two are in law equal. The one may hold if he can, and the other seize."

Young *v.* United States (1877), 97 U. S. 39, 63.

A guardian's liability is not terminated by a state of war. It is suspended only until the return of peace, he being, during the war, an enemy of the country or state wherein his liability was created.

Lamar *v.* Micou, 112 U. S. 452; s. c. 114 U. S. 218.

Certain goods were condemned under section 5 of the act of July 13, 1861, and section 1 of the act of August 6, 1861, on the ground that they were transferred from Alexandria in Virginia to a part of the State then in insurrection. Exceptions were taken by the claimant at the trial. These exceptions, however, seem to have been abandoned, and a motion was made in the appellate court in behalf of the plaintiff in error to dismiss the case, on the ground that the war had ceased and that this circumstance produced the same effect as would have followed the repeal of the statutes on which the prosecution was founded. The court said that this proposition was denied, after full consideration, in the case of United States *v.* The Schooner Reform, 3 Wallace 617. The judgment of the court below was affirmed with costs.

Duvall *v.* United States (1866), 154 U. S. 548.

By the law of nations, where a war exists between two distinct and independent powers, there must be a suspension of all commercial intercourse between their citizens; but this principle has not been applied to the States which joined the so-called Southern Confederacy.

United States *v.* Six Boxes of Arms, 1 Bond, 446.

As to the acts of Congress, proclamations, etc., during the civil war, see Gay's Gold, 13 Wall. 358; United States *v.* The Henry C. Homeyer, 2 Bond, 217.

During the war the legislature of Virginia enacted that an act performed by the one of two or more joint fiduciaries who lived in Virginia, the others living in the Union States, should have the

same effect as though all had joined. Held, that the enactment was illegal, and that a man who took a deed from one of the two trustees under such circumstances, the will having created a joint trust, took no title.

Lipse *v.* Spear, 4 Hughes, C. C. 535.

In the United States act of 1861, prohibiting intercourse between the loyal and the insurgent States, gold coin is included in the words "goods and chattels, wares and merchandise," and therefore is forfeited by an attempt to carry it into one of the insurgent States.

United States *v.* A Canoe, etc., 5 Hughes, C. C. 490.

The act of Congress of 1861, interdicting intercourse between the States in rebellion and the loyal States, did not prevent legal transactions between residents of different States of the Confederacy.

Bond *v.* Owen, 7 Baxter (Tenn.), 340.

A. moved from Georgia to the North in 1862, leaving money with an agent, who invested it in county bonds. The county pleaded, in defense to A.'s suit on the bonds, United States Revised Statutes, section 5301, prohibiting intercourse between the North and the South. Held, that A. could recover.

Commrs. of Bartow County *v.* Newell, 64 Ga. 699.

By the strict laws of war all trading between enemies is prohibited. On April 27, 1898, the Treasury Department issued to collectors of customs certain instructions, which were prepared in consultation with the Department of State. These instructions forbade the clearance of an American vessel for a Spanish port, but the only restriction they placed upon the clearance of any other vessel for such a port was that the vessel should not carry cargo of contraband of war or of coal. Thus the clearance of a neutral ship with an American-owned cargo for a Spanish port was permitted, and to this extent trading between enemies was allowed.

"Your attention is directed to the following act of Congress, approved April 28, 1898, entitled 'An act declaring that war exists between the United States of America and the Kingdom of Spain':

"'*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

"'First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

"'Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval

forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry this act into effect.'

"The following instructions are issued for your guidance:

"First. Clearance will be refused to any vessel for a port or place blockaded by the United States. (The President, on April 25th, proclaimed a blockade on the north coast of Cuba, including ports on said coast between Cardenas and Bahia Honda and the port of Cienfuegos on the south coast of Cuba.)

"Second. Clearance will be refused to any vessel carrying goods which are contraband of war for any Spanish port.

"Third. Clearance will be refused to any vessel carrying coal for any Spanish port.

"Fourth. Clearance will be refused to any American vessel for any Spanish port.

"Fifth. Up to and including May 21, 1898, clearance will be granted to any Spanish merchant vessel now in any port or place of the United States for any foreign port, except a port blockaded by the United States, provided that such vessel shall not have on board any officer in the military or naval service of Spain, or any coal (except such as may be necessary for the voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government. Collectors will issue a certificate to any such vessel on clearance, reciting that said vessel has complied with the provisions of the proclamation of the President of the United States, signed April 26, 1898, and by virtue of that proclamation is entitled to continue her voyage if met at sea by any United States ship, except to a blockaded port. To the certificate shall be attached a copy of the proclamation aforesaid.

"Clearance in ballast will be granted to any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, as soon as her cargo is discharged, for any foreign port, except a port blockaded by the United States, provided such vessel shall not have on board any officer in the military or naval service of Spain, or any dispatch of or to the Spanish Government. Collectors will issue a certificate to any such vessel on clearance, reciting that said vessel has complied with the provisions of the proclamation of the President of the United States, signed April 26, 1898, and by virtue of that proclamation is entitled to continue on her voyage if met at sea by a United States ship, except to a blockaded port. To the certificate shall be attached a copy of the proclamation aforesaid.

"Sixth. Clearance will be granted to any American or neutral vessel destined for a neutral port, with a cargo also destined for a neu-

tral port, without regard to the kind of cargo, on compliance with the provisions of law.

"Where officers of customs have reason to believe that coal or articles considered contraband of war are destined for the use of enemies of the United States, clearance will be withheld until a report has been forwarded to, and instructions issued by the Department.

"Seventh. Clearance will be issued in all other cases in compliance with the provisions of law.

"Eighth. Collectors in doubt in any particular application for clearance will telegraph promptly the facts to the Department and withhold clearance until instructed.

"Ninth. The Department declines to give general advice to masters and owners of vessels, shippers, consignees, etc. Any specific case requiring action by the Department must be submitted by those concerned to the proper officer of the customs, who, if in doubt, will communicate with the Department and await instructions before taking action."

Circular of the Acting Secretary of the Treasury to collectors of customs, April 27, 1898, For. Rel. 1898, 1172.

"It has always been the aim of this Government, since the days of Franklin, to promote the increase and diffusion of scientific knowledge, and likewise the aim to shield peaceful pursuits and the progress of art and science as far as possible from the evil effects of war.

"In obedience to this policy and in the absence of special reasons to the contrary, I can perceive no cause for changing the conduct of the Smithsonian Institution in regard to sending scientific papers and journals abroad and even to Spain and her colonies. Owing, however, to the present state of hostilities it would of course be prudent that some care be taken as to the nature of the published material which is sent to Spain and her colonies at present, and, that knowledge and information relative to new scientific discoveries, or advances in military and naval warfare and kindred subjects, should not be furnished."

Mr. Adee, Act. Sec. of State, to Mr. Langley, Sec. of Smithsonian Institution, April 27, 1898, 228 MS. Dom. Let. 52.

On the ground that hostilities between nations "suspend intercourse and deprive citizens of the hostile nations of rights of an international character previously enjoyed," it was advised that so long as a state of war existed between the United States and Spain, Spanish subjects would have "no right to the privileges of copyright conferred upon Spanish citizens by proclamation prior to the declaration of war;" but that, when a treaty of peace should have been concluded, it would, if the treaty was silent on the subject, "be

competent for the United States, through its executive officers, to resume the exercise of such rights and privileges as previously existed and have not been definitely declared terminated," and would be "entirely proper for the Librarian of Congress to admit Spanish subjects after the conclusion and ratification of the treaty to the same copyright privileges that they enjoyed prior to the declaration of war."

Griggs, At. Gen., Dec. 2, 1898, 22 Op. 268.

2. Contracts.

(1) limitations on the power to contract.

§ 1136.

The citizens of one belligerent state are incapable of contracting with the citizens of the other belligerent state.

Scholefield *v.* Eichelberger, 7 Pet. 586.

During the occupation of New Orleans by the Federal forces during the rebellion, a loyal citizen of that place, describing himself as the agent of a certain planter, who was an enemy, residing on a plantation in the rebellious region, agreed to sell to a British subject, domiciled in New Orleans, a crop belonging to the said planter, and described as his (the planter's) property. It was ruled that the sale was void.

It appeared that the loyal citizen had, prior to the war, made advances to the planter, and it was argued that he had a lien on the property and a power to sell it for the repayment of the advances, and that the sale ought to be regarded as his, and not as a sale by the planter. The court held, however, that the real parties to the transaction were the vendee and a public enemy, at the same time observing that there was nothing in the case inconsistent with the doctrine that a resident in the territory of one belligerent may have in times of war an agent residing in the territory of the other belligerent, to whom his debtor may pay a debt, or deliver property in discharge of it, such payments or deliveries involving no intercourse between enemies.

Montgomery *v.* United States, 15 Wall. 395.

The fact that seven months after a ten years' lease was made, a "general order" from the military department of Louisiana, forbade the several bureaus of the municipal government of the city, created by military authority, from disposing of any of the city property for a term extending beyond a period when the regular civil government

of the city might be established, was held not to have invalidated the lease.

New Orleans *v.* Steamboat Company, 20 Wall. 387.

In February, 1864, a citizen of Massachusetts, residing in Mississippi, took a lease for one year of a cotton plantation in that State, agreeing to pay a rent of $10,000, half in cash and half "out of the first part of the cotton crop, which is to be fitted for market in reasonable time." Whether the lessee went to Mississippi before or after the beginning of the war did not appear. He paid the first instalment of rent, and took possession of the plantation and sowed the crops, but early in March, 1864, was driven away by Confederate soldiers and soon afterwards returned to Massachusetts, where he remained. The lessor then resumed charge of the plantation and raised a crop of cotton, which he delivered in Mississippi to the lessee's son, by whom it was sent in the autumn of 1864 to the lessee, who sold it and retained the profits, amounting to nearly $10,000. After the war the lessor sued the lessee in Massachusetts for the unpaid installment of rent. The lessee contended that, as the lease was made during the civil war, it was, by virtue of the act of 1861 and the President's proclamation thereunder, illegal and void. The court unanimously held, Gray, J., delivering the opinion, that the law of nations prohibited all intercourse between citizens of the two belligerents which was "inconsistent with the state of war;" that this included "any act of voluntary submission to the enemy, or receiving his protection," as well as "any act or contract which tends to increase his resources," and "every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or by order for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy;" but that "beyond the principle of these cases the prohibition has not been carried by judicial decision." The court accordingly held that the contract in question, made between persons both at the time within the Confederate territory and to be performed there, was legal, and that, although the forwarding of the cotton by the lessee's son to Massachusetts may have been unlawful, this could not affect the validity of the agreements contained in the lease, which neither involved nor contemplated the transmission of money or property or other communication between the belligerent territories.

Kershaw *v.* Kelsey (1868), 100 Mass. 561.

In May, 1862, after New Orleans came into the possession of the United States forces, a conveyance of real property in that city, for

value, was made between persons who were at the time within the Confederate lines, and who were active supporters of the Confederate cause in the legislative and military branches. It was argued that the conveyance was inoperative and void, on the ground that as the parties were at the time "engaged in the rebellion against the United States, and were within the enemies' country," they could not lawfully transfer title to property situated within the Federal lines. "But," said the court, "we do not think the position at all tenable. The character of the parties as rebels or enemies did not deprive them of the right to contract with and to sell to each other. As between themselves, all the ordinary business between people of the same community in buying, selling, and exchanging property, movable and immovable, could be lawfully carried on, except in cases where it was expressly forbidden by the United States, or where it would have been inconsistent with or have tended to weaken their authority. It was commercial intercourse and correspondence between citizens of one belligerent and those of the other, the engaging in traffic between them, which were forbidden by the laws of war and by the President's proclamation of nonintercourse. So long as the war existed, all intercourse between them inconsistent with actual hostilities was unlawful. But commercial intercourse and correspondence of the citizens of the enemy's country among themselves were neither forbidden nor interfered with so long as they did not impair or tend to impair the supremacy of the national authority or the rights of loyal citizens. No people could long exist without exchanging commodities, and, of course, without buying, selling, and contracting. And no belligerent has ever been so imperious and arbitrary as to attempt to forbid the transaction of ordinary business by its enemies among themselves. No principle of public law and no consideration of public policy could be subserved by any edict to that effect; and its enforcement, if made, would be impossible. . . .

"The sale in the case at bar can only be impeached, if at all, by reason of the situation of the property within the Federal lines. And from that circumstance it would not be impeached, unless the sale, if upheld, in some way frustrated the enforcement of the right of seizure and confiscation possessed by the United States. . . . A conveyance in such case would pass the title subject to be defeated, if the Government should afterwards proceed for its condemnation. And to declare this liability was the object of the provision in the confiscation act, enacting that 'all sales, transfers, and conveyances' of property of certain designated parties made subject to seizure should be null and void. The invalidity there declared was limited and not absolute. It was only as against the United States that the transfers of property liable to seizure were null and void. They were not void as between private parties, or against any other party

than the United States. This was held in the case of Corbett *v.* Nutt, reported in the 10th of Wallace. . . .

"This case is much stronger than that of Fairfax's Devisee *v.* Hunter's Lessee, reported in the 7th of Cranch, which received great consideration by this court. There a devise to an alien enemy resident in England, made during our Revolutionary war by a citizen of Virginia, and there residing at the time, was sustained, and held to vest a title in the devisee which was good until office found. . . .

"If an alien enemy can, by devise or purchase from a loyal citizen or subject, take an estate in the country of the other belligerent and hold it until office found, there would seem to be no solid reason for refusing a like efficacy to a conveyance from one enemy to another of land similarly situated. A different doctrine would unsettle a multitude of titles passed during the war between residents of the insurrectionary territory temporarily absent therefrom whilst it was dominated by the Federal forces."

Conrad *v.* Waples (1877), 96 U. S. 279, 286–290.

W., a resident of Memphis, purchased, on April 12, 1865, in Mobile, from B., a resident of that city, both cities being then in the occupancy of the national forces, cotton which was then in the military lines of the insurgent forces in Alabama and Mississippi, the inhabitants whereof had been declared to be in insurrection. Between June 30 and December 1 of that year, a portion of the cotton, while it was in the hands of the planters from whom it had been originally purchased by the Confederate Government, the agent of which had sold it in Mobile to B. on the 5th of April, was seized by Treasury agents of the United States and sold. The proceeds were paid into the Treasury and W. sued to recover them. It was ruled that his purchase being in violation of law, no right arose therefrom which can be enforced against the United States.

Walker's Executors *v.* United States, 106 U. S. 413.

A bill in equity was filed in a county court in the State of South Carolina to foreclose a mortgage made by McB. to H. of real estate in that State. Subsequently one of the parties to the suit obtained a removal of the cause to the circuit court of the United States for the district of South Carolina under the act of March 3, 1875. 18 Stat. 470. The apparent ground of the removal of the cause was that of a diversity in the citizenship of the parties, and, this diversity having been disproved, the circuit court made an order remanding the case to the State court. From this order an appeal was taken on the ground among others that when the mortgage was made H., the mortgagee, was a citizen of the State of New York, and McB.,

the mortgagor, a citizen of the State of South Carolina whose people were then in rebellion against the United States, and consequently that the suit came within the act of 1865, for the purposes of removal, as a case "arising under the Constitution or laws of the United States." The order of the circuit court was affirmed, the court saying:

"The fact that a mortgage was made in enemy territory to a loyal citizen of the United States does not necessarily imply unlawful intercourse between the parties contrary to the proclamation of the President of the date of August 16, 1861, 12 Stat. 1262, under the authority of the act of July 13, 1861, c. 3, § 5, 12 Stat. 257. That transactions within Confederate lines affecting loyal citizens outside were not all unlawful was decided in United States *v.* Quigley, 103 U. S. 595. To make a case for removal the answer should have set forth the facts which rendered the mortgage void under the nonintercourse act and the proclamation thereunder. There has been no attempt to do this."

Carson *v.* Dunham (1887), 121 U. S. 421, 429.

Charles S. Morehead, a citizen of Kentucky, owned two plantations in Mississippi. In the spring of 1861, when the civil war began, he was on these plantations, but in the following May or June, when a long struggle seemed inevitable, he placed one in charge of his son and the other in charge of an overseer and returned to Kentucky. It did not appear that afterwards during the continuance of the war he had any communication with either of those persons. In April, 1862, being then in Kentucky, he sold to another citizen of the State, in payment of indebtedness, the cotton to be grown on the plantations during that year; but there was no agreement to transport and deliver it across the lines separating the insurrectionary States from those that adhered to the Union. The year's crop, however, or the greater part of it, was afterwards captured and sold by the United States forces and the proceeds paid over or accounted for to the Treasury.

"Though at the time the sale, or assignment, as it is termed in the act of Congress [June 4, 1888, 25 Stat. 1075, c. 348], was made . . . , the late civil war was flagrant, there was no rule of law arising from the existence of hostilities between the different sections of the country which in any respect impaired the validity of the transaction. [The court then quoted Conrad *v.* Waples, 96 U. S. 279, 286, *supra.*] . . .

"The property in this case [Conrad *v.* Waples] was real estate, but we do not perceive how that fact would alter the validity of a transaction, if it could be affected by the character of the parties. If residents of the enemy's country may contract for property situated within it, there would seem to be no objection to similar transactions

by persons residing outside of the Confederate lines and adhering to the National Government, so long as no intercourse or connection is kept up with the inhabitants of the enemy's country. As stated in the case from which we have cited, it was commercial intercourse and correspondence between citizens of one belligerent and the other, and the engagement in traffic between them, leading to the transmission of money or property from one belligerent country to the other, which was forbidden.

"There was, therefore, nothing in the sale of the cotton on the plantations or of cotton to be raised thereon, there being no agreement respecting its movement across the border of the contending sections, which brought the transaction within the prohibitions of any rule of international law or the proclamations of the President of the United States in 1861. (12 Stat. 257, 1262; 13 Stat. 731.)

"Those who may desire to examine the decisions of the courts as to the nature and extent of the prohibitions upon transactions beeween subjects of countries at war, or between subjects of the same country respecting property situated in the enemy's country, will find in the opinion of the supreme judicial court of Massachusetts, in Kershaw *v.* Kelsey, 100 Mass. 561, the subject ably and exhaustively considered, with an analysis of the most important decisions of the English and American courts."

Briggs *v.* United States (1892), 143 U. S. 346, 351, 353.

In April, 1862, during the civil war in the United States, Charles S. Morehead, a citizen of Kentucky, by a bill of sale sold to C. M. Briggs, a citizen of the same State, the cotton to be grown during that year on two plantations belonging to the former in Mississippi. It having been determined that the transaction was not invalid as a case of trading between enemies, the question arose whether the sale was sufficient to pass title to the cotton, existing or to be raised. The court said:

"The delivery of the crops was not essential to pass the title as between Morehead and Briggs. The law on the subject of the sale of personal property does not require impossibilities, as would be a delivery in a case of that kind. The cotton was not at the time grown, and even if the sale be deemed incomplete until the actual appearance of the crop, it could not then be removed from the soil for delivery; besides, it was within the limits of a recognized enemy's country, and any attempt to transport it to the Union side for delivery would have been unlawful.

"By the common law a sale of personal property is complete and the title passes as between vendor and vendee when the terms of transfer are agreed upon, without actual delivery."

Briggs *v.* United States (1892), 143 U. S. 346, 354.

The act of July 17, 1862 (12 Stat. 589), to suppress insurrection and for other purposes, had no effect on sales or transfers of the estate and property of persons in rebellion after September 23, 1862, except as against the United States. As against that Government, the transfers of property liable to seizure were null and void, but they were not void as between private parties or against any other party than the United States.

Williams *v.* Paine (1897), 169 U. S. 55, 75.

It is within the power of a citizen within the United States lines to give to an enemy within the enemy's lines an evidence of debt which shall be valid on the return of peace.

Hart *v.* United States, 15 Ct. Cl. 414.

In 1862, A, domiciled in Athens, Ala., agreed to sell B, of Nashville, Tenn., a plantation, with the personal property thereon, situated in Tennessee. At the time of the agreement of sale, Athens, Nashville, and the plantation were all within the lines of the military forces of the United States. At the time the deed was made Athens and the plantation were within the Confederate lines, as was the place of B's residence at the time. Held, that neither contract nor deed was invalid.

Brown *v.* Gardner, 4 Lea (Tenn.) 145.
See Ware *v.* Jones (1878), 61 Ala. 288.

A contract made in 1862 by a county court within the Confederate lines, and under the control of the government of Virginia at Richmond, is valid and binding on such county (now forming a part of the State of West Virginia), where such contract was made under the Virginia statute of May 9, 1862, authorizing counties to purchase salt to be disposed of to the people, and the salt was actually delivered.

Stuart, Buchanan & Co. *v.* County of Greenbrier, 16 W. Va. 95.

Contracts made by prisoners of war in the enemy's country for the purpose of obtaining subsistence are binding.

Crawford *v.* The William Penn, 3 Wash. C. C. 484.

(2) SUSPENSION OR DISSOLUTION OF CONTRACTS.

§ 1137.

The effect of war is to dissolve a partnership between citizens of hostile nations.

The William Bagaley, 5 Wall. 377.
See, also, Griswold *v.* Waddington (1819), 16 Johns. 438.
As to exceptions, see Matthews *v.* McStea (1875), 91 U. S. 7.

A transfer of property to a creditor by an enemy debtor, though made to an agent of the creditor and in payment of a debt contracted before the war, is void, and can not be made lawful by any ratification.

United States *v.* Grossmayer, 9 Wall. 72.

A sale of real estate during the rebellion, under a power in a deed of trust previously given to secure the payment of promissory notes of the grantors in the deed, is valid, though said grantors at the time of the sale were citizens and residents of one of the States declared to be in insurrection.

University *v.* Finch, 18 Wall. 106.

In May, 1859, Lieutenant R., of the United States Army, who was then stationed at Carlisle Barracks, in Pennsylvania, and his wife, executed a power of attorney to the latter's brother to convey their interest in certain lands in the city of Washington, D. C. After the civil war broke out, R., who was a native of North Carolina, resigned his commission and entered the Confederate service. His wife accompanied him to the South. Her brother remained with the United States Army, of which he was an officer. During the war the lands were sold and a deed for them was given by him under the power of attorney. The purchase money was duly paid and the share of Mrs. R. was paid over to her while she was within the lines of the Southern army with her husband. Some years afterwards, after the death of R. and his wife, a bill was filed by their children to have the deed executed by Mrs. R.'s brother under the power of attorney declared null and void as a cloud upon the title of the complainants in the property. In support of this petition it was argued, among other things, that the power of attorney was revoked by the war which existed between the sections in which the principals and the agent, respectively, lived. It was held, however, that the war did not revoke the power of attorney. War did not, said the court, necessarily revoke every agency existing between inhabitants of the contending countries. Certain kinds of agencies were undoubtedly revoked by the breaking out of hostilities. It had been held that the agent of an insurance company came within the rule (Insurance Company *v.* Davis, 95 U. S. 425, 429); and Mr. Justice Bradley, in delivering the opinion in that case, had said that, in order that the agency might subsist during the war, it must have the assent of the parties. This remark was made with reference to the case then before the court in which the agent of a New York company, who resided in Virginia, entered the Confederate service and thereafter refused to receive premiums, on the ground that he had no receipts from the company, and that the money, if received by him, would be confiscated by the Confederate government. A claim was

subsequently made for the insurance, on the ground that the insured was guilty of no laches and that at the close of the war the policy revived. The court held that the agency was revoked by the war, since its continuance would have involved an active and continuous business of such a nature that it could not be carried on during the war, where the principal and the agent resided in different belligerent countries. The general subject of contracts and business between the citizens of States at war was examined with great care in Kershaw *v.* Kelsey, 100 Massachusetts, 561, by Mr. Justice Gray, who held that, while the law of nations prohibited all contracts involving intercourse between citizens of the two belligerents, the prohibition would not be carried further, and that the court was not disposed to declare unlawful contracts such as had not previously been adjudged to be inconsistent with a state of war. The Supreme Court thought that the power of attorney in the present case was not revoked by the war, and that, as it was manifestly the interest of the principal that the agency constituted before the war should continue, his assent to its continuance would be presumed. And the act of the agent was ratified by the receipt by the principal of the money obtained by the sale.

Williams *v.* Paine (1897), 169 U. S. 55; opinion by Mr. Justice Peckham.

During the war, a sale of land within the Union lines was made under a deed of trust given before the war to secure the payment of a debt. The grantor, at the time of the sale, was a resident within the Confederate lines. Held, that the sale was valid.

Mitchell *v.* Nodaway County, 80 Mo. 257.

With regard to life insurance contracts, it was held that, as the companies elected to insist upon the conditions of time as to the payment of premiums, the payment of which had been prevented by the existence of war, the policies must be considered as extinguished by nonpayment of the premiums, but that the insured were entitled ex æquo et bono to recover the equitable value of the policies, with interest from the close of the war.

New York Life Ins. Co. *v.* Statham (1876), 93 U. S. 24.

See Semmes *v.* Hartford Ins. Co. (1871), 13 Wall. 158; New York Life Ins. Co. *v.* Davis (1877), 95 U. S. 425; Abell *v.* Penn Mutual Life Ins. Co. (1881), 18 W. Va. 400.

(3) Cessation of Interest.

§ 1138.

Interest did not run during war on a mortgage debt due by an inhabitant of the United States to a British subject. The reporter

in a note states that this had been the uniform holding in the courts of Pennsylvania.

Hoare *v.* Allen, Supreme Court of Pa., 1789, 2 Dall. 102. This principle was affirmed in the case of Foxcraft and Galloway *v.* Nagle, Supreme Court of Pa., 1791, 2 Dall. 132.

See, to the same effect, Brown *v.* Hiatts, 15 Wall. 177.

See Moore, Int. Arbitrations, IV. 4313.

There should be no abatement of interest on a judgment during the war, the counties in which the plaintiff and defendant respectively lived being judicially known not to be in territories which were hostile to one another.

Kent, Paine & Co. *v.* Chapman, 18 W. Va. 485.

3. Judicial Remedies.

(1) suspension and revival.

§ 1139.

An alien enemy is not permitted to sue.

Wilcox *v.* Henry, 1 Dall. 69; Matthews *v.* McStea, 91 U. S. 7; Sanderson *v.* Morgan, 39 N. Y. 231; Perkins *v.* Rogers, 35 Ind. 124; Rice *v.* Shook, 27 Ark. 137; Grinnan *v.* Edwads, 21 W. Va. 347; Haymond *v.* Camden, 22 W. Va. 180; Sturm *v.* Flemming, 22 W. Va. 404; Stephens *v.* Brown, 24 W. Va. 234.

This rule obviously does not operate as to alien enemies who are by treaty permitted to continue their residence and business, on condition of observing the laws.

The existence of war does not prevent the citizens of one belligerent power from taking proceedings for the protection of their own property, in their own courts, against the citizens of the other, whenever the latter can be reached by process; and where an alien enemy is thus sued, he may defend himself in the action.

McVeigh *v.* United States, 11 Wall. 259; United States *v.* Shares of Stock, 5 Blatchf. 231; Lee *v.* Rogers, 2 Sawyer, 549; Seymour *v.* Bailey, 66 Ill. 288; Buford v. Speed, 11 Bush. 338.

The right to sue revives after peace.

Hanger *v.* Abbott, 6 Wall. 532; Stiles *v.* Eastley, 51 Ill. 275. See, also, Wilcox *v.* Henry, 1 Dall. 68.

Citizens of the loyal States were not prevented from suing citizens of the Confederate States in the Federal courts in those States as soon as such courts were opened. Before any official proclamation of the end of the civil war was made courts of the United States were held in the several States which had been engaged in rebellion, and their

jurisdiction to hear and determine the cases brought before them as well before as after such proclamation is not open to controversy.

Masterson *v.* Howard, 18 Wall. 99.
As to the time when the civil war ceased in different places, see infra, § 1163.

The fact that a defendant in a suit, during the war, left the State and joined the United States Army, affords no ground for maintaining a bill to reverse the proceedings had in the suit during his absence.

Rodgers and Smith *v.* Dibrell, 6 Lea (Tenn.), 69.

(2) SUSPENSION OF STATUTE OF LIMITATIONS.

§ 1140.

The treaty of peace with Great Britain prevents the operation of the statute of limitations of Virginia on British debts which were incurred before the treaty.

Hopkirk *v.* Bell, 3 Cranch, 454.

Where a citizen of a State adhering during the war of the rebellion to the national cause brought suit, after the war, against a citizen residing during the war within the limits of an insurrectionary State, it was held that the period during which the plaintiff was prevented from suing by the state of hostilities should be deducted from the time necessary to bar the action under the statute of limitations.

Hanger *v.* Abbott, 6 Wall. 532.
See, also, The Protector, 12 Wall. 700; Semmes *v.* Hartford Ins. Co., 13 Wall. 150; Brown *v.* Hiatts, 15 Wall. 177; University *v.* Finch, 18 Wall. 106.

4. LICENSES.

§ 1141.

Licenses are sometimes granted by a belligerent State to its own citizens, to those of the enemy, or to neutrals, to carry on a trade which is interdicted by the laws of war. Such documents must be respected by the officers and tribunals of the State under whose authority they are issued, though they may be considered by the adverse belligerent as a ground of capture and confiscation. They are to be construed fairly but strictly.

Licenses are general and special. A general license relaxes the exercise of the rights of war, generally or partially, in relation to any community or individuals liable to be affected by their operation. A special license is one given to individuals for a particular voyage for the importation or exportation of particular goods.

Licenses to trade must, as a general rule, emanate from the supreme authority of the State. But there are exceptions to this rule, growing out of the particular circumstances of the war in particular places. Thus, the governor of a province, the general of an army, or the admiral of a fleet, may grant licenses to trade within the limits of their own commands. But such licenses afford no protection beyond the limits of the authority of those who issue them.

Halleck, Int. Law (3d ed., by Baker), II. 343 et seq.
See, as to licenses to trade, The Sea Lion, 5 Wall. 630; Coppell *v.* Hall, 7 Wall. 542; Hamilton *v.* Dillin, 21 Wall. 73; United States *v.* One Hundred Barrels of Cement, 27 Fed. Cases, 292.

"I have to acknowledge the receipt or your letter of the 9th instant, in which you state that you desire, as counsel for the Equitable Life Assurance Society of the United States, to obtain from this Government authority for your company to apply to the Spanish Government for a license that will enable it to protect its real estate and other assets in Spain.

"In this relation, the Department desires to refer to Article XIII. of the treaty between the United States and Spain, concluded at San Lorenzo el Real, October 22, 1795.

"The provisions of the article are as follows:

"'For the better promoting of commerce on both sides, it is agreed, that if a war shall break out between the said two nations one year after the proclamation of the war shall be allowed to the merchants in the cities and towns where they shall live, for collecting and transporting their goods and merchandises; and if anything be taken from them or any injury be done them within that term, by either party, or the people or subjects of either, full satisfaction shall be made for the same by the Government.'

"If the obligations of this article, which expressly refer to a state of war, were recognized by the Spanish Government, it is probable that they would be so construed as to accomplish, for the present, the object which you desire to attain, so far at least as the protection of any personal property is concerned. The Department, however, is advised that the Spanish Government has, as its public proclamations imply, declared all the treaty stipulations between the two countries, even though such stipulations expressly refer to a state of war, to be annulled by the existing hostilities.

"In this position the Government of the United States does not acquiesce; and while it considers the action of the Spanish Government as releasing it from any obligation to observe the stipulations in question, it is unwilling to lend any countenance to that Government's contention. With this reservation, however, it is not disposed, in such a case as is now presented, to stand in the way of its citizens

obtaining, by special license of the Spanish Government, the protection which the treaty was designed to secure to them. The Department therefore grants the request of the Equitable Life Assurance Society of the United States for permission to obtain from the Spanish Government a license which will enable the company to protect its assets in Spain. It is, however, to be understood that this permission is granted upon the condition that the company will perform its duties as a citizen of the United States and confine itself in its action in Spain to the protection of its legitimate interests, and that the permission is revocable at the will of this Government."

Mr. Moore, Assist. Sec. of State, to Messrs. Alexander and Green, May 19, 1898, 228 MS. Dom. Let. 586.

5. Interference with Means of Communication.

§ 1142.

In the summer of 1893, in view of political disturbances, the Government of Brazil prohibited the use of cipher words in commercial messages sent to that country. The minister of the United States at Rio was instructed to try to have the restriction removed altogether, but, if this was impossible, as a last resort to suggest the expedient of lodging the cipher codes with the Government. The interdiction was subsequently removed. After the revolt of the squadron under Admiral Mello, telegraphic communication for commercial purposes was altogether prohibited, but the restriction was almost immediately modified so as to allow messages to be sent in plain language, with the visé of the minister of the treasury.

For. Rel. 1893, 38–39, 41–43, 49–50, 62, 145.

During the war between the United States and Spain, a censorship was established, under General A. W. Greely, Chief Signal Officer, of cable messages sent from the United States. No cipher messages were permitted to pass without special authority in each case; but such authority was given for the messages of diplomatic representatives officially addressed and signed. In this relation, however, it was observed that, "should the exigencies of war require, this Department could oppose no objection to the complete prohibition of all cipher messages, whether of foreign representatives or others."

Mr. Adee, Act. Sec. of State, to Sec. of War, April 27, 1898, 228 MS. Dom. Let. 62.

See, also, Mr. Adee, Act. Sec. of State, to Sec. of War, April 27, 1898, 228 MS. Dom. Let. 58; Mr. Moore, Act. Sec. of State, to Sec. of War, May 3, 1898, 228 MS. Dom. Let. 243; Mr. Moore, Act. Sec. of State, to Mr. Oliveira Lima, "personal," May 28, 1898, MS. Notes to Brazilian Leg. VII. 181.

The censorship was suspended on the signing of the armistice of August 12, 1898. (Mr. Day, Sec. of State, to Mr. Hay, ambass. to England, tel., Aug. 15, 1898, MS. Inst. Gr. Br. XXXII. 625.)

By the Universal Postal Convention of Vienna, Art. IV., which was in force during the war between the United States and Spain, "the right of transit" of the mails was guaranteed "throughout the entire territory" of the countries forming the Universal Postal Union, of which both the United States and Spain are members. No international discussion as to the disposition of mails arose during the war in question. The stipulation just quoted was, however, said "to insure the safe transit under any conditions of closed mails passing from one country of the Postal Union to another country of the Union," but to have "no bearing on mails passing from one post-office to another post-office in the same country."

Mr. Smith, Postmaster-General, to Sec. of State, June 1, 1898, MS. Misc. Let.

Regulations adopted by China during the war with Japan, which required all ships entering the port of Shanghai, after seven o'clock at night, to anchor outside the harbor until the following morning, were considered as being "in the nature of a defensive measure to which objection could not well be taken."

Mr. Gresham, Sec. of State, to Mr. Denby, jr., chargé, No. 951, Sept. 28, 1894, MS. Inst. China, V. 95.

"In respect to the extinguishment of lighthouses, the Department is of opinion that such a measure, where it is fraught with danger to foreign vessels navigating the waters adjacent to the coast, may be resorted to only when there is good ground to believe that the lights would facilitate an impending attack at a particular point."

Mr. Gresham, Sec. of State, to Mr. Denby, jr., chargé at Peking, Sept. 28, 1894, MS. Inst. China, V. 95.

X. *MILITARY OCCUPATION.*

1. Occupied Territory and Its Administration.

§ 1143.

See supra, § 21.

Belligerent occupation — De facto government.

"Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose,

they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark."

Thirty Hogsheads of Sugar *v.* Boyle (March 3, 1815), 9 Cranch, 191.
See, as to military occupation, Féraud-Giraud, Occupation militaire: Recours à raison des dommages causés par la guerre; Delerot, Versailles pendant l'occupation; Verneville, De l'occupation comme mode d'acquisition de la propriété en droit des gens.

The territory of Castine, by the conquest and occupation by Great Britain, passed under the temporary allegiance and sovereignty of the British sovereign. The sovereignty of the United States over the territory was suspended during such occupation, so that the laws of the United States could not be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. But a territory conquered by an enemy is not to be considered as incorporated into the dominions of that enemy without a renunciation in a treaty of peace, or a long and permanent possession. Until such incorporation it is still entitled to the full benefit of the law of postliminy.

United States *v.* Rice, 4 Wheat. 246; United States *v.* Hayward, 2 Gallison, 485.

On the occupation of New Mexico in 1846, General Kearny, commanding the American forces, established a provisional government. "By this substitution," says Mr. Justice Daniel, delivering the opinion of the court, "of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the Government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain. Amongst the consequences which would be necessarily incident to the change of sovereignty, would be the appointment or control of the agents by whom and the modes in which the government of the occupant should be administered—this result being indispensable, in order to secure those objects for which such a government is usually established."

In this relation, the opinion cites The Fama, 5 Robinson's Rep. 106; Vattel, bk. 3, chap. 13, sec. 200; United States *v.* Percheman, 7 Pet. 86, 87; Mitchel *v.* United States, 9 Pet. 711; 1 Kent's Comm. 177.

General Kearny, among other things, established courts and a code of laws. The present action was brought in one of those courts and under a provision of the code. Congress, by an act approved Sept.

9, 1850 (9 Stat. 446), established a Territorial government for New Mexico. The legislative assembly of the Territory, by an act of July 14, 1851, provided for the transfer of suits and processes of the Kearny courts to the new courts, and this was done in the present case.

No question was made by counsel as to the validity of the Kearney ordinances, said the court, "with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation, these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them." But it was contended that all rights of the occupying conqueror, as such, were terminated by the close of the war, and that the prior institutions, which were overthrown or suspended, were revived and reestablished. "The fallacy of this pretension," said the court, "is exposed by the fact, that the territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this, too, under the settled purpose of the United States never to relinquish the possession acquired by arms. We conclude, therefore, that the ordinances and institutions of the provisional government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress, or by that of the Territorial government in the exercise of powers delegated by Congress."

In reality, however, the opinion of the court on these points was *obiter*, since the case went off on a mere question of pleading, the opinion declaring that the record presented a matter "not within the appellate or revisory power" of the court.

Leitensdorfer *v.* Webb (1857), 20 How. 176.
See, also, Cross *v.* Harrison, 16 How. 164, 190.

While New Orleans was occupied by the United States forces during the civil war, a lease of water-front property was made to a steamship company by the city authorities appointed by the commanding general. The lease was for ten years on payment of an annual rental, and the company entered into possession and proceeded to improve the property. Some months later the commanding general forbade the military city authorities to grant rights extending beyond the reestablishment of civil government, and soon afterwards the city government was transferred to the proper civil authorities, who undertook to remove by force a part of the company's property, maintaining that the military government had no power to lease property held in trust by the city for public uses, and that whatever

rights or powers the military authorities possessed ended with the termination of hostilities. The company applied for an injunction and damages. It was held that the powers of a military occupant in the exercise of the functions of government were limited only by the laws and usages of war; that a contract for the use of a part of the water front of the city was within the scope of the military occupant's authority; that the question therefore arose whether the contract under discussion represented a fair and reasonable exercise of such authority; that, considering the provisions of the lease, this question was to be answered in the affirmative; that the lease therefore did not fall when the military jurisdiction ended, and that the law of post liminium had no application to the case. The court added, however: "We do not intend to impugn the general principle that the contracts of the conqueror touching things in conquered territory lose their efficacy when his dominion ceases. We decide the case upon its own peculiar circumstances, which we think are sufficient to take it out of the rule."

New Orleans *v.* Steamship Co., 20 Wall. 387.

Cited by Knox, At. Gen., Oct. 17, 1901, 23 Op. 551, 561, holding that sec. 3 of the joint resolution of May 1, 1900, 31 Stat. 715, imposing certain restrictions on the grant of franchises in Porto Rico, did not affect an antecedent license issued by the Secretary of War for the building and maintenance of a wharf at San Juan.

"In New Orleans *v.* Steamship Co., 20 Wall. 387, 393, it was said, with respect to the powers of the military government over the city of New Orleans after its conquest, that it had 'the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has the right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject."

Mr. Justice Brown, delivering the opinion of the court, Dooley *v.* United States (1901), 182 U. S. 222, 231.

The Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in

conquered portions of the insurgent States. The establishment of such courts was the exercise of the ordinary rights of conquest.

Mechanics and Traders' Bank v. Union Bank, 22 Wall. 276.

Petitioner, a resident native of Porto Rico, and a civilian, was tried, convicted, and sentenced in March, 1899, for a crime committed in that island, by a military tribunal of the United States established during the occupancy of the island by the forces of the United States as conquered territory of Spain. *Held*, that so long as a state of war existed between Spain and the United States, and the island remained Spanish territory, which was until April 11, 1899, when ratifications of the treaty of peace and of cession were exchanged, such tribunal had jurisdiction to try offenses, and, no objection being made to the formal regularity of the proceedings, the petitioner was not entitled to discharge on a writ of habeas corpus.

Ex parte Ortiz, 100 Fed. Rep. 955.

The court has never gone further in protecting the property of citizens residing during the rebellion in the Confederate States from judicial sale than to declare that where such citizen has been driven from his home by a special military order and forbidden to return, judicial proceedings against him were void.

University *v.* Finch, 18 Wall. 106.

"The capitulation of the Spanish forces in Santiago de Cuba and in the eastern part of the province of Santiago and the occupation of the territory by the forces of the United States render it necessary to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.

"The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to announce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or by honest submission, cooperate with the United States in its efforts to give effect to

this beneficent purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible.

"Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. The judges and other officials connected with the administration of justice may, if they accept the supremacy of the United States, continue to administer the ordinary law of the land, as between man and man, under the supervision of the American commander-in-chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupations will be abridged only when it may be necessary to do so.

"While the rule of conduct of the American commander in chief will be such as has just been defined, it will be his duty to adopt measures of a different kind if, unfortunately, the course of the people should render such measures indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether; to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary. In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice.

"One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the government of the country in its own right, and all arms and supplies and other movable property of such government, may be seized by the military occupant and converted to his own use. The real property of the state he may hold and administer, at the same time enjoying the revenues thereof, but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways, and boats, belonging to the state, may be appropriated to his use, but, unless in case of military necessity, they are not to be destroyed. All churches and buildings devoted

to religious worship and to the arts and sciences, and all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or works of science or art is prohibited, save when required by urgent military necessity.

"Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained.

"While it is held to be the right of the conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expense of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army.

"Private property taken for the use of the army is to be paid for, when possible, in cash at a fair valuation, and when payment in cash is not possible receipts are to be given.

"All ports and places in Cuba which may be in the actual possession of our land and naval forces will be opened to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the prescribed rates of duty which may be in force at the time of the importation."

Order of President McKinley to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces, Correspondence relating to War with Spain I. 159.

As a matter of power, it is within the legitimate function of the War Department to establish and maintain its own telegraph line between Santiago and Havana, Cuba, and to transmit private messages over it, although the transaction of business of that nature may be in conflict with the vested rights of the International Ocean Telegraph Company. In the maintenance and operation of such line the military officers of the United States in Cuba are exercising a war power under a military occupation of territory wrested by arms from a belligerent. The question whether the business of the International

Ocean Telegraph Company is thereby injuriously affected in contravention of its concession is one, the authority to determine which is not vested in the Attorney-General.

Syl., Griggs, At. Gen., March 18, 1901, 23 Op. 425.

For a report on the draft of a proposed order of the military government of Cuba authorizing the organization of railroad companies in the island and the construction, maintenance, and operation of railroads there, see Magoon's Reports, 391.

As to the exercise of the pardoning power under the military government in New Mexico and the orders of the military government of Cuba relating to the exercise of the same power under that government, see Magoon's Reports, 501.

After the raising of the siege of Peking, Aug. 14, 1900, a number of foreigners began to take possession of and to endeavor to purchase much of the burned and abandoned property in what was necessarily to be the future legation quarter. As Peking was not a treaty port where foreigners might buy land at will, and as there was danger that the entire Chinese-owned property in the quarter mentioned would be preoccupied so that the legation grounds could not be extended, the diplomatic body on Nov. 6, 1900, resolved and announced "that no purchase of ground from the Chinese since the commencement of the siege, in the quarter occupied by the legations, will be of any value without the consent of the foreign representatives." The Government of the United States, while recognizing the "exceptional character" of this resolution, considered it to be "justified in view of the inconvenience that might result from permitting foreigners to speculate in land intended to be occupied by the foreign legations, taken in conjunction with the fact that Peking is not a treaty port where foreigners may purchase land at will." As to its application, the American minister was instructed: "The Department would enjoin the withholding for the present of authorization of the acquisition of the land in question by private individuals. As regards bona fide purchases made before the action taken by the foreign representatives, it may be necessary to inquire into the circumstances of such purchases, before dispossession is resorted to, if that should ultimately prove necessary."

Mr. Hill, Act. Sec. of State, to Mr. Rockhill, special comr. to China, May 3, 1901, For. Rel. 1901, App., p. 100.

Mr. Conger in a report of March 4, 1901, in regard to the resolution, said: "On November 6 the allied powers, through their representatives, gave the notice embodied in the resolution quoted above. This was a restriction or qualification of private ownership and a limitation of the right of alienation which, during the military occupation, the dominant powers had a right to exercise, and no transfers within the time designated could be valid as against the United States or other powers represented here. The restriction was authorized by

public law and necessary to prevent the acquisition of the property needed by private individuals for speculative or other purposes. It does not imply the forcible acquisition of property for legation purposes by the United States; but is a precautionary measure against the vesting of intermediate rights." (For. Rel. 1901, App., p. 97.)

See, also, Mr. Adee, Act. Sec. of State, to Mr. Rockhill, special comr. to China, Aug. 3, 1901, For. Rel. 1901, App., p. 241.

"26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 151.

"39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war—such as judges, administrative or political officers, officers of city or communal governments—are paid from the public revenue of the invaded territory until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 152.

"ARTICLE XLII. Territory is considered occupied when it is actually placed under the authority of the hostile army.

"The occupation applies only to the territory where such authority is established, and in a position to assert itself."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1821.

"ARTICLE XLIII. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1821.

2. Civil War Cases.

§ 1144.

See supra, § 22.

Where the President, at the close of hostilities, appointed a military governor of one of the States, the people whereof had been in rebellion against the United States, held, that such appointment did not change general laws of the State then in force for the settlement of the estates of deceased persons, nor remove from office those who were at the time engaged by law with public duties in that behalf.

Ketchum *v.* Buckley, 99 U. S. 188.

A commanding general of the Federal forces at Memphis, in 1862, had the right to collect rents belonging to a citizen who had remained within the lines of the enemy, and hold them subject to such disposition as might thereafter be made of them by the devisions of the proper tribunals.

Gates *v.* Goodloe, 101 U. S. 612.

January 1, 1856, one citizen of Virginia gave to another in payment for certain lands eight bonds secured by mortgage and payable, one on the first of January in each year from 1857 to 1864, inclusive. All payments of principal and interest up to and including January 1, 1861, were made presumably in lawful money. The payments due in 1861 and 1862 were made in Confederate treasury notes, which at the time constituted the principal if not the only circulating medium of the locality. The payments due in 1863 and 1864 were made in what was commonly called Virginia money; that is to say, Virginia bank notes issued prior to the civil war. The payments up to January 1, 1861, inclusive, were made to the mortgagee; those due after that time were made to his personal representatives, the mortgagee himself having died; and in every case the bond so paid was delivered up. When the last bond was paid the personal representatives of the mortgagee gave a written order to the trustee in the mortgage or deed of trust directing the release of the lien created by that instrument. The trustee accordingly made a deed of release, which was subsequently recorded. In 1880 one of the children of the mortgagee brought suit to compel the payment "in good, lawful money" of such of the bonds as had been paid in Confederate notes and Virginia money, and in support of the action alleged that the obtaining of the bonds from the personal representatives of the mortgagee was done in execution of a fraudulent scheme on the part of the mortgagor to pay them off with "worthless, or next to worthless Confederate money." Held, that the whole transaction was conducted in good faith and with full acquiescence of all the parties,

and that the children of the mortgagee, by having accepted and acquiesced in it for so long a time, had, independently of any statute of limitations, and apart from any question as to the legality of the payment of the bonds in Confederate money or Virginia bank notes, forfeited their right to invoke the aid of a court of equity.

Washington *v.* Opie (1892), 145 U. S. 214.

A sale of a railroad under the provisions of the general improvement law of Florida (act of Jan. 6, 1855), made during the war of the rebellion by the persons acting as governor and officers of the State, in their capacity as ex officio trustees of the general improvement fund, must be recognized as valid, under the settled doctrine that the act of the rebellious States in their individual capacities—executive, legislative, and judicial—so far as they do not tend to impair the supremacy of the national authority or the constitutional rights of citizens, are to be treated as valid and binding.

Johnson *v.* Atlantic G. & W. I. Transit Co., 156 U. S. 618, 15 S. Ct. 520.

An officer in the United States Army, assigned to the command of a military district, had no authority, as military commander, to issue an order to the sheriff of the county, requiring him to place a person in possession of a plantation and personal property which were, at the time, in the possession of another person. But where he issued such an order on the application of H., who claimed to be the true owner of the property, and was sued by W., who was dispossessed by the execution of the order, for damages for such dispossession, it was held that he could justify under such order if H. was the true owner and was entitled to the possession.

Whalen *v.* Sheridan, 17 Blatchf. 9.

A decree in an attachment case, begun in the South during the war by seizure of property and publication of notice, is void as against a loyal citizen, and can be impeached collaterally.

Dorr *v.* Gibboney, 2 Hughes, C. C. 382.

The appointment of an administrator, though made during the war between the States, is valid.

Allen *v.* Kellam, 69 Ala. 442.

During the late war the State of Mississippi levied a tax on land for military purposes. Held, that an executor paying such a tax upon land of his testator should be reimbursed, although the tax would now be considered as invalid, and, if a sale of the land had been made therefor, it would not be upheld.

Hudson *v.* Gray, 58 Miss. 882.

The orders of military commanders exercising authority under the Federal Government in North Carolina, immediately after the war, relating to the administration of civil affairs, had no further efficacy than such as they drew from the force which upheld them.

Varner and Dorsett *v.* Arnold, 83 N. C. 206.

The State of Tennessee is bound to receive in payment of taxes bills of the Bank of Tennessee issued after May 6, 1861, provided the same were not issued in support of the rebellion; and the burden of proving that certain bills tendered in payment of taxes were thus illegally issued is upon him to whom the tender is made. (Overruling State *v.* Sneed, 9 Baxter (Tenn.), 472.)

Keith *v.* Clarke, 4 Lea (Tenn.), 718.

The fact that the act of Dec. 15, 1863, to encourage the erection of certain machinery by donation of land and otherwise was enacted during the rebellion does not render it void, as having been enacted in aid of the rebellion, its language not warranting such construction. 25 S. W. 705, affirmed.

McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044.

In 1790 a fund bequeathed in trust for the poor of a county in Virginia was loaned on real estate security. In 1863 the legislature authorized the payment of amount and it was paid in Confederate currency. Held, that the legislation was constitutional, and that the lien was discharged and could not be reinstated.

Prince William School Board *v.* Stuart and Palmer, 80 Va. 64.

In 1861 the city of Richmond, under an ordinance, issued small notes to circulate as currency. At that time it was a penal offense to issue such notes, but it was claimed that the issue was validated by the legislature the following year, while the city claimed that the notes were void, as issued in aid of rebellion against United States. The memorial of the council to the legislature, urging it to legalize the issue, recited that the council had been compelled to take measures for the relief of the people, and their defense against the threatened war, and that the law prohibiting it from issuing such notes ought not to stand in the way of providing resources for the protection against unscrupulous enemies. It showed that the expense of the city had been increased by the war. Two members of the council which issued the notes testified that one of the objects of the issue was to provide small change, but the principal object was to meet the expenses expected to arise out of the war. Two other members testified that the only object of the issue was to provide small change, but one of these witnesses was discredited by its being shown that he

offered for adoption the memorial to the legislature. Held, that the evidence sufficiently showed that one of the objects of the issue of the notes was to aid the rebellion, and that consequently they were void.

Isaac *v.* City of Richmond (Va.), 17 S. E. 760.

Where, during the civil war, the clerk of a county court went with the Confederates when they abandoned the county, taking the records with him, and the Federal forces took possession of the county, held, that no one could administer the duties of the office in the Federal lines as deputy for the clerk while the latter was within the Confederate lines.

Herring *v.* Lee, 22 W. Va. 661.

3. Regulation of Commerce.

§ 1145.

"Entertaining no doubt that the military right to exclude commerce altogether from the ports of the enemy in our military occupation included the minor right of admitting it under prescribed conditions, it became an important question, at the date of the order, whether there should be a discrimination between vessels and cargoes to belonging to citizens of the United States and vessels and cargoes belonging to neutral nations.

"Had the vessels and cargoes belonging to citizens of the United States been admitted without the payment of any duty, while a duty was levied on foreign vessels and cargoes, the object of the order would have been defeated. The whole commerce would have been conducted in American vessels, no contributions could have been collected, and the enemy would have been furnished with goods without the exaction from him of any contribution whatever, and would have been thus benefited by our military occupation, instead of being made to feel the evils of the war. In order to levy these contributions and to make them available for the support of the army, it became, therefore, absolutely necessary that they should be collected upon imports into Mexican ports, whether in vessels belonging to citizens of the United States or to foreigners.

"It was deemed proper to extend the privilege to vessels and their cargoes belonging to neutral nations. It has been my policy since the commencement of the war with Mexico to act justly and liberally toward all neutral nations, and to afford to them no just cause of complaint: and we have seen the good consequences of this policy by the general satisfaction which it has given."

President Polk, special message, Feb. 10, 1848, Richardson's Messages, IV. 571.

"It is doubted, in the last edition of Kent's Commentaries that was published during the author's life, as to the validity of the powers claimed by the President in his official letter of March 31, 1847, to the Secretary of the Navy. He exercised, as being charged by the Constitution with the prosecution of the war, the right of levying military contributions upon the enemy for the purposes of war, and of opening the Mexican ports to neutral trade, the whole execution of these commercial regulations being placed under the control of the military and naval forces. 'These fiscal and commercial regulations would,' it is said, 'seem to press strongly upon the constitutional powers of Congress to raise and support armies, to lay and collect taxes, and to regulate commerce with foreign nations, and to declare war and make rules for the government and regulation of the land and naval forces, and concerning captures on land and water, and to define offenses against the law of nations. Though the Constitution vests the executive power in the President and declares him Commander-in-Chief of the Army and Navy of the United States, these powers must necessarily be subordinate to the legislative power in Congress. It would appear to me to be the policy or true construction of this simple and general grant of power to the President, not to suffer it to interfere with those specific powers of Congress which are more safely deposited in the legislative department, and that the powers thus assumed by the President do not belong to him but to Congress.' (1 Kent Com. 292, note *b*.)"

Lawrence's Wheaton (ed. 1863), 1014.

"Upon the occupation of the country [Porto Rico] by the military forces of the United States, the authority of the Spanish Government was superseded, but the necessity for a revenue did not cease. The government must be carried on, and there was no one left to administer its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties. In adopting this method, General Miles was fully justified by the laws of war."

Dooley *v.* United States (1901), 182 U. S. 222, 230, citing Halleck, Int. Law, II. 444; New Orleans *v.* Steamship Co., 20 Wall. 387, 393; Thirty Hogsheads of Sugar *v.* Boyle, 9 Cr. 191; Fleming *v.* Page, 9 How. 603; American Ins. Co. *v.* Canter, 1 Pet. 511; Cross *v.* Harrison, 16 How. 164.

While the power of the military commander occupying a conquered country is "necessarily despotic, this must be understood rather in an administrative than in a legislative sense. While in legislating for a conquered country he may disregard the laws of that country, he is not wholly above the laws of his own. For instance,

it is clear that while a military commander during the civil war was in the occupation of a Southern port, he could impose duties upon merchandise arriving from abroad, it would hardly be contended that he could also impose duties upon merchandise arriving from ports of his own country. His power to administer would be absolute, but his power to legislate would not be without certain restrictions—in other words, they would not extend beyond the necessities of the case. Thus in the case of the *Admittance*, Jecker *v.* Montgomery, 13 How. 498, it was held that neither the President, nor the military commander, could establish a court of prize, competent to take jurisdiction of a case of capture, whose judgments would be conclusive in other admiralty courts. It was said that the courts established in Mexico during the war 'were nothing more than agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property, while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize,' although Congress, in the exercise of its general authority in relation to the national courts, would have power to validate their action. (The Grapeshot, 9 Wall. 129, 133.)

"So, too, in Mitchell *v.* Harmony, 13 How. 115, it was held that, where the plaintiff entered Mexico during the war with that country, under a permission of the commander to trade with the enemy and under the sanction of the executive power of the United States, his property was not liable to seizure by law for such trading, and that the officer directing the seizure was liable to an action for the value of the property taken. To the same effect is Mostyn *v.* Fabrigas, 1 Cowp. 161.

"In Raymond *v.* Thomas, 91 U. S. 712, a special order, by the officer in command of the forces in the State of South Carolina, annulling a decree rendered by a court of chancery in that State, was held to be void. In delivering the opinion, Mr. Justice Swayne observed: 'Whether Congress could have conferred the power to do such an act is not the question we are called upon to consider. It is an unbending rule of law, that the exercise of military power, where the rights of the citizens are concerned, shall never be pushed beyond what the exigency requires.'

"Without questioning at all the original validity of the order imposing duties upon goods imported into Porto Rico from foreign countries, we think the proper construction of that order is, that it ceased to apply to goods imported from the United States from the moment the United States ceased to be a foreign country with respect

to Porto Rico, and that until Congress otherwise constitutionally directed, such merchandise was entitled to free entry.

"An unlimited power on the part of the Commander-in Chief to exact duties upon imports from the States might have placed Porto Rico in a most embarrassing situation. The ratification of the treaty and the cession of the island to us severed her connection with Spain, of which the island was no longer a colony, and with respect to which she had become a foreign country. The wall of the Spanish tariff was raised against her exports, the wall of military tariff against her imports, from the mother country. She received no compensation from her new relations with the United States. If her exports, upon arriving there, were still subject to the same duties as merchandise arriving from other foreign countries, while her imports from the United States were subjected to duties prescribed by the Commander-in-Chief, she would be placed in a position of practical isolation, which could not fail to be disastrous to the business and finances of an island. It had no manufactures or markets of its own, and was dependent upon the markets of other countries for the sale of her productions of coffee, sugar and tobacco. In our opinion the authority of the President as Commander-in-Chief to exact duties upon imports from the United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject.

"The judgment of the circuit court is therefore reversed and the case remanded to that court for further proceedings in consonance with this opinion."

Mr. Justice Brown, delivering the opinion of the court, Dooley *v.* United States (1901), 182 U. S. 222, 234–236.

With reference to restrictions placed by the American military authorities on commerce with the Sulu Islands, the Government of the United States took the ground that, as the islands were then subject to military occupation, it was the right of the commander of the occupying forces to regulate or prohibit trade with the territory so occupied. The fact was also pointed out that the military forces of the United States were engaged in suppressing an insurrection in a part of the Philippine Archipelago accessible from the Sulu Islands, and that the military authorities conducting the operations against the insurrection were at one time of opinion that a military necessity existed for prohibiting commercial intercourse between the Sulu Islands and the outside world. To that end Admiral Dewey, in June, 1899, issued an order prohibiting all trade with the Philippines, except with the ports of Manila, Iloilo, Cebu, and Bakalota. Subsequently this order was modified and new orders were substituted, under which such restrictions on trade with the Sulu Islands

were enforced as were deemed essential to meet the military necessity occasioned by the insurrection. These restrictions were emergency measures, and were not intended as an evidence of what the permanent policy of the United States would be when peace was restored in the Philippines.

Mr. Adee, Act. Sec. of State, to Count Quadt, German chargé, No. 481, Oct. 19, 1900, MS. Notes to German Leg. XII. 500.

The right of the military occupant to regulate, as an incident of military government, trade with the inhabitants of the territory subject to his jurisdiction is well established by the laws and usages of nations.

Mr. Magoon, law officer, Division of Insular Affairs, War Department, Oct. 24, 1899, Magoon's Reports, 302, citing Birkhimer on Military Government and Martial Law, 204; Fleming *v.* Page, 9 How. 615. See, also, report of Oct. 8, 1900, Magoon's Reports, 316, 325.

4. Treatment of the Inhabitants.

§ 1146.

Though "a subject can not divest himself of the obligation of a citizen, and wantonly make a compact with the enemy of his country, stipulating a neutrality of conduct," yet, where his country is no longer able to give him protection, he may be warranted in making the best terms he can; e. g., he may be warranted in pledging himself to neutrality of conduct for the purpose of protecting his property in a place surrendered by his government to the enemy.

Case of The Resolution, Federal Court of Appeals, 1781, 2 Dall. 1, 10.

June 4, 1846, Marcy sent to General Taylor a proclamation in Spanish to be signed by Taylor and circulated in Mexico. Taylor was instructed to use his "utmost endeavors to have pledges and promises therein contained carried out to the fullest extent." In this proclamation the causes of the war are recited, and it is declared: "This war . . . will be prosecuted with vigor and energy against your army and rulers; but those of the Mexican people who remain neutral will not be molested. . . . We come to obtain reparation for repeated wrongs and injuries; we come to obtain indemnity for the past and security for the future; we come to overthrow the tyrants who have destroyed your liberties; but we come to make no war upon the people of Mexico, nor upon any form of free government they may choose to select for themselves. . . . Your religion, your altars and churches, the property of your churches and citizens, the emblems of your faith and its ministers, shall be protected and remain

inviolate. Hundreds of our army, and hundreds of thousands of our people, are members of the Catholic Church. . . . We come among the people of Mexico as friends and republican brethren, and all who receive us as such shall be protected, whilst all who are seduced into the army of your dictator shall be treated as enemies. We shall want from you nothing but food for our army, and for this you shall always be paid in cash the full value."

H. Ex. Doc. 119, 29 Cong. 2 sess. 14–17.

"33. It is no longer considered lawful—on the contrary, it is held to be a serious breach of the law of war—to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 152.

"32. A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

"The commander of the Army must leave it to the ultimate treaty of peace to settle the permanency of this change."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, ibid.

"37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

"This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and the churches, for temporary and military uses."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, ibid.

"Article XLIV. Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1821.

"ARTICLE XLV. Any pressure on the population of occupied territory to take the oath to the hostile Power is prohibited."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1822.

"ARTICLE XLVI. Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected.

"Private property can not be confiscated.

"ARTICLE XLVII. Pillage is formally prohibited."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, ibid.

"ARTICLE L. No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it can not be regarded as collectively responsible."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, ibid.

5. MARTIAL LAW.

§ 1147.

Martial law—Military jurisdiction.

"1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

"The presence of a hostile army proclaims its martial law.

"2. Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief, or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

"3. Martial law in a hostile country consists in the suspension by the occupying military authority of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

"The commander of the forces may proclaim that the administration of all civil and penal law shall continue either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

"4. Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

"5. Martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist or are expected and must be prepared for. Its most complete sway is allowed—even in the commander's own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

"To save the country is paramount to all other considerations.

"All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.

"7. Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government. . . .

"10. Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the Army, its safety, and the safety of its operations. . . .

"12. Whenever feasible martial law is carried out in cases of individual offenders by military courts; but sentences of death shall be executed only with the approval of the Chief Executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

"13. Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

"In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the Rules and Articles

of War or the jurisdiction conferred by statute on courts-martial, are tried by military commissions."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 148, 149.

These instructions were, as announced in the order, "prepared by Francis Lieber, LL. D., and revised by a board of officers, of which Major-General E. A. Hitchcock is president."

"8. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to martial law in cases of urgent necessity only; their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 149.

"9. The functions of ambassadors, ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 149.

"47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, id. 153.

Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the Army, and is under his supreme control.

United States *v.* Diekelman, 92 U. S. 520.

A merchant vessel of one country visiting, for the purpose of trade, a port of another where martial law has been established, under belligerent right, subjects herself to that law while she is in such port.

United States *v.* Diekelman, 92 U. S. 520.

See, to the same effect, Mr. Seward, Sec. of State, to Baron von Gerolt, Prussian min., Oct. 11, 1862, MS. Notes to Prussian Leg. VII. 146.

6. Law as to Public Property.

§ 1148.

"31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or of that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete."

"34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 151.

"Article LIII. An army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property of the State which may be used for military operations."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1823.

"Article LV. The occupying State shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of usufruct.

"Article LVI. The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property.

"All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings."

Convention respecting the Laws and Customs of War on Land, The Hague, July 20, 1899, id. 1824.

January 23, 1899, the British banking firm of Smith, Bell & Co., whose principal place of business was at Manila, Philippine Islands,

sold by its branch house at Legaspi, island of Luzon, a draft for $100,000, drawn in favor of Mariano Trias, who was custodian of the funds, or treasurer, of the Philippine insurgents. On learning the facts the military authorities of the United States called upon the firm at its Manila office to pay over to them the funds represented by the draft. The firm complied under protest and applied to the British Government to obtain relief. The firm represented that it had, in the island of Luzon, numerous branches where its agents were in the power of the natives, who might compel them by force again to pay the $100,000 if the draft, the original of which was not in the possession of the United States authorities, was presented for payment. It subsequently appeared that the draft, after passing through the hands of several influential Filipinos, came into the possession of a person in Manila, who was informed that if he attempted to collect it, or let it pass out of his possession, his house and lands would be confiscated to the United States.

Advised, that the United States authorities were justified in requiring the bank to pay to them the funds due to the insurgents, and that the right of the United States to do so did not depend upon the possession or surrender of the draft issued by the bank when the money was received by it.

Mr. Magoon, law officer, Division of Insular Affairs, War Dept., Oct. 10, 1899, Magoon's Reports, 261, citing the case of the Elector of Hesse-Cassel, Phillimore's Int. Law, III. 841; Halleck's Int. Law (3d ed.), chap. 34, sec. 29; Hall's Int. Law (4th ed.). 588; Snow's Cases in Int. Law, 381. The transaction in question, it may be pointed out, took place between the signing Dec. 10, 1898, of the treaty of peace between the United States and Spain, by which the Philippines were ceded to the former, and the exchange of ratifications of the treaty, which was not effected till the following April.

"I have the honor to acknowledge the receipt of your letter dated July 31, 1901, transmitting a copy of a bill for 'An act providing for the sale of Spanish copper coins now in the insular treasury,' which proposed act is transmitted prior to its adoption by the Commission, pursuant to resolution of the Commission passed July 22, 1901, copy of which is attached to your letter.

"I note the objections to the proposed act offered by Major-General MacArthur, military governor, and the statement in your letter that 'Personally, I have very grave doubts upon the point' involved.

"In response to your request for an 'authoritative expression of opinion' by the War Department, permit me to say that, upon consideration of the matters and questions involved, determination is made as follows:

"1. The property rights acquired by the seizure as prize of war of the moneys found in the Spanish treasuries in Manila upon that city being occupied by the military forces of the United States belong to

the people of the United States in their federated capacity, and the authority to dispose of property so acquired is vested in Congress. Neither the military authorities of the United States nor the officials administering the government of civil affairs in the Philippines are authorized to divest the United States of its title to said property.

"I therefore am of opinion that the adoption by the Philippine Commission of the proposed 'Act providing for the sale of Spanish copper coins in the insular treasury' is inadvisable until authorized by Congress.

"I am also of opinion that the order heretofore issued by Major-General Otis while he was military governor directing the insular treasurer to exchange $600 of this coin per week for local currency at par should be rescinded, and have so advised Major-General Chaffee. (Copy inclosed.)

"The questions presented herein were referred to the law officer, Division of Insular Affairs, War Department, for report. I inclose copy of his report, to which your attention is directed."

Mr. Sanger, Act. Sec. of War, to Mr. Taft, civil governor of the Philippines, Oct. 15, 1901, Magoon's Reports, 624–625.

7. Law as to Private Property.

(1) taxes; contributions; requisitions.

§ 1149.

"Article XLVIII. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do it, as far as possible, in accordance with the rules in existence and the assessment in force, and will in consequence be bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.

Taxes.

"Article XLIX. If, besides the taxes mentioned in the preceding Article, the occupant levies other money taxes in the occupied territory, this can only be for military necessities or the administration of such territory."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1822.

"Article LI. No tax shall be collected except under a written order and on the responsibility of the commander-in-chief.

"This collection shall only take place, as far as possible, in accordance with the rules in existence and the assessment of taxes in force.

"For every payment a receipt shall be given to the taxpayer."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, id. 1822.

Contributions and requisitions.

The regulated seizure of private property is effected by the levy of contributions and requisitions. Contributions are such payments in money as exceed the produce of the taxes, the latter being appropriated as public property. Requisitions refer to the taking of articles needed by the army for consumption or temporary use, such as food for men and animals, and clothes, wagons, horses, railway material, boats, and other means of transport, and of the compulsory labor, whether gratuitous or otherwise, of workmen to make roads, drive carts, and to perform other such services. The amount both of contributions and of requisitions is fixed at the will of the invader; the commander of any detached body of troops being authorized under the usual practice to requisition objects of immediate use, such as food and transport, while superior officers are alone permitted to make demands for clothing and other articles for effecting the supply of which some time is necessary; and contributions can be levied only by the commander in chief or by the general of a corps acting independently. Receipts or "bons de requisition" are given in acknowledgment of the sums or quantities exacted, in order that other commanders may not make fresh impositions without knowing the extent of those already levied, as well as to facilitate the recovery by the inhabitants from their own government of the amounts paid if the latter determines on the conclusion of peace to spread the loss suffered over the nation as a whole.

The English on entering France in 1813, the United States Army in Mexico, and the English and French forces in the Crimea, abstained wholly or in the main from the seizure of private property in either manner. But the United States expressly affirmed the right to levy contributions and requisitions in its instructions to its commanding officers in Mexico. In the Franco-German war the right to levy contributions and requisitions was put in force with more than usual severity. By the declaration of Brussels, of 1874, the right is restricted to the necessities of war, and this rule has been followed in The Hague convention.

Hall, Int. Law (5th ed.), 427–431. See Thomas, Henri, Des requisitions militaires et des logement des gens de guerre en France. Paris, 1889.

"3. . . . The commander of the forces is particularly desirous that the inhabitants should be well treated; and that private property must be respected as it has been hitherto.

"4. The officers and soldiers of the army must recollect that their nations are at war with France solely because the ruler of the French nation will not allow them to be at peace, and is desirous of forcing them to submit to his yoke; and they must not forget that the worst of the evils suffered by the enemy, in his profligate invasion of Spain

and Portugal, have been occasioned by the irregularities of the soldiers, and their cruelties, authorised and encouraged by their chiefs, towards the unfortunate and peaceful inhabitants of the country.

"5. To revenge this conduct on the peaceable inhabitants of France would be unmanly and unworthy of the nations to whom the commander of the forces now addresses himself; and, at all events, would be the occasion of similar and worse evils to the army at large than those which the enemy's army have suffered in the Peninsula; and would eventually prove highly injurious to the public interests.

"6. The rules, therefore, which have been observed hitherto, in requiring, and taking, and giving receipts for supplies from the country, are to be continued in the villages on the French frontier; and the commissaries, attached to each of the armies of the several nations, will receive the orders from the commander in chief of the army of their nations, respecting the mode and period of paying for such supplies."

Order issued by the Duke of Wellington at Irurita, July 9, 1813, Gurwood's Dispatches of the Duke of Wellington, XI. 168, 169.

October 26, 1846, General Taylor, acknowledging the receipt of instructions of Mr. Marcy, Secretary of War, of September 22, 1846, stated that it had been impossible up to that time to sustain the army to any extent by forced contributions of money or supplies. The country between the Rio Grande and the Sierra Madre was poor, furnishing only corn and beef. These articles had been obtained by paying for them at moderate rates, but, if a different system had been adopted, it was certain that they could not have been procured in sufficient quantities. The prompt payment in cash had, besides, neutralized much of the unfriendly feeling with which the Americans were regarded and had contributed greatly to facilitate their operations. The people had it in their power at any time to destroy their crops, and would undoubtedly do so rather than see them taken forcibly. Moreover, if their crops were so taken they would have no inducement to plant again.

Accompanying the report of the Secretary of War of December 2, 1847, there is a collection of the orders given by the United States respecting military contributions and requisitions during the war with Mexico. In these orders the subjects of contributions and requisitions are treated more or less indiscriminately with that of military occupation and administration, the lines of theoretical distinction since drawn not being clearly discernible.

The first order, signed by President Polk and addressed to the Secretary of the Treasury, bears date March 23, 1847. After referring to the repeated rejection by Mexico of offers of negotiation, it declares the right of the conqueror to levy contributions upon the

enemy and apply the proceeds to defray the expenses of the war, as well as to establish a temporary military government, and either to exclude trade or to allow it on such conditions as he may see fit to prescribe, including the exaction of duties. It further declared that all the Mexican territory in possession of the United States land and naval forces should be opened, while their military occupation lasted, to the commerce of all neutral nations, in articles not contraband of war, upon the payment of prescribed rates of duties, which should be made known and enforced by the military and naval commanders; and the Secretary of the Treasury was directed to examine the existing Mexican tariff and report a schedule of articles of trade, to be admitted at such rates of duty on goods and on tonnage as would be likely to produce the greatest amount of revenue.

Mr. Walker, Secretary of the Treasury, March 30, 1847, made a report to the President, accompanied with a scale of duties, as well as with a scheme of regulations. He had, he said, found it to be impossible to adopt as a basis the tariff of Mexico, because the duties were extravagantly high. There were also sixty articles the importation of which was forbidden by that tariff, among these articles being sugar, rice, cotton, boots, coffee, soap, and many other articles of daily use. He recommended that the Mexican Government monopoly in tobacco should be abolished, so as to diminish the resources of that Government and augment those of the United States by collecting the duty on all imported tobacco. The Mexican interior transit duties were also to be abolished, as well as the internal Government duty on coin and bullion. The prohibition of exports and the duties on exports should be annulled.

March 31, 1847, President Polk communicated Mr. Walker's report to the Secretary of the Navy, with instructions to carry its recommendations into effect. April 3, 1847, Mr. Mason, Secretary of the Navy, enclosed to the President a copy of instructions which he had on that day, after consultation with the Secretary of War, addressed to the officers commanding the naval forces of the United States in the Pacific Ocean, and in the Gulf of Mexico, respectively. These instructions stated that on the occupation of California Commodore Stockton was, on November 5, 1846, instructed to admit the commerce of Americans and neutrals, except contraband, into places in actual military occupation, on the payment of moderate duties, within the limits prescribed by the tariff laws of the United States. After the occupation of Matamoras, and subsequently of Tampico, instructions were given by which the moderate trade at those places was confined to cargoes in American bottoms which had paid duties in a custom-house of the United States; but, as Mexico still refused to negotiate for peace, the President had determined to place the trade of all occupied places on a footing more favorable to neutral commerce

and better calculated to secure a contribution to be used in carrying on the war and in relief of the United States Treasury. It was expressly pointed out that the orders in this regard derived no authority from the Treasury Department, which had no control over the subject, but from the President, who, as Commander in Chief, had determined to cause them to be carried into effect by the officers of the Army and Navy.

A communication, similar to that addressed to the Secretary of the Navy, was, March 31, 1847, addressed to Mr. Marcy, Secretary of War, who, April 3, 1847, addressed to General Scott the following instructions:

"As the Mexicans persist in protracting the war, it is expected that, in the further prosecution of it, you will exercise all the acknowledged rights of a belligerent, for the purpose of shifting the burden of it from ourselves upon them. The views of the Government, in this respect, were presented to General Taylor in a despatch from this Department of the 22d September, 1846, a copy of which, so far as relates to this subject, is herewith sent to you, with the direction that these views may be carried out under a discretion similar to that given to him. The enemy should be made to realize that there are other inducements to make them desire peace besides the loss of battles, and the burden of their own military establishments. The right of an army, operating in an enemy's country, to seize supplies, to forage, and to occupy such buildings, private as well as public, as may be required for quarters, hospitals, storehouses, and other military purposes, without compensation therefor, can not be questioned; and it is expected that you will not forego the exercise of this right to any extent compatible with the interest of the service in which you are engaged."

Referring to these instructions, General Scott, in a letter of April 28, 1847, dated at Jalapa, said that he had endeavored to reach that place, where he might obtain as many essential supplies as possible, such as clothing, ammunition, medicines, breadstuffs, beef, mutton, sugar, coffee, rice, beans, and forage. For these they must pay or they would be withheld, concealed, or destroyed by the owners, whose national antipathy to the Americans remained unabated. Again, on May 20, 1847, he wrote that, if it was expected at Washington that the army was to support itself by forced contributions levied upon the country, it might ruin and exasperate the inhabitants and starve itself. Not a ration for a man or horse would be brought in except by the bayonet, and this would oblige the troops to spread themselves out many leagues to the right and left in search of subsistence, and to stop all military operations.

On Sept. 1, 1847, Mr. John Y. Mason, Acting Secretary of War, and on Oct. 6, 1847, Mr. Marcy wrote to General Scott urging a

change of his policy in order that the burden of sustaining the American forces might, so far as possible, be shifted to the Mexican people. In both communications anxiety was betrayed by reason of the futility of the efforts that had been made to bring the war to a close, and an apprehension that the Mexican authorities were encouraged to continue the conflict by that portion of the population which had not been made to feel its hardships.

By General Order, No. 358, Nov. 25, 1847, General Scott gave notice that a change of system would be begun by stopping, as soon as the contracts would permit, all rents for houses or quarters occupied by officers or troops of the American Army in any city or village in Mexico. He directed that in future the necessary quarters, both for officers and troops, where the public buildings were insufficient, should first be demanded of the civil authorities of the several places occupied by the troops, so as to equalize the inconvenience imposed upon the inhabitants.

Dec. 15, 1847, General Scott in Mexico ordered that, on the occupation of the principal point or points in any State, the payment of all the usual taxes due to the Mexican Government should be demanded of the proper civil authorities for the support of the army of occupation, except the rent derived from lotteries, the continuance of which he prohibited.

General Orders, No. 376, Dec. 15, 1847. H. Ex. Doc. 56, 30 Cong. 1 sess. 240. See, also, S. Ex. Doc. 1, 30 Cong. 1 sess. 558–563.

By a supplemental order of Dec. 31, 1847, he fixed the amounts which the several States already occupied, and others as they were or should be assessed, by the year. This assessment was the quadruple of the direct taxes paid by the several States to the Federal Government in 1843 or 1844, but all transit taxes were abolished, together with the national lotteries, and it was stated that the tobacco monopoly would soon be done away with; and the receipts of the post-offices, together with the playing card and stamped paper monopolies, were relinquished to the States. (General Orders, No. 395, Dec. 31, 1847, H. Ex. Doc. 56, 30 Cong. 1 sess. 253.)

In a report to the President, January 31, 1848, Marcy stated that no particular instructions had been given to General Scott for the issuance of General Orders, No. 376, but that it was supposed he had taken that step in consequence of the general instructions given him on the subject of levying contributions and of making the resources of the enemy's country available as far as might be, within the rules of civilized warfare, for the maintenance of the American troops in Mexico and defraying the expenses incident to the state of hostilities. (S. Ex. Doc. 19, 30 Cong. 1 sess.)

"No principle is better established than that a nation at war has the right of shifting the burden off itself and imposing it on the enemy by exacting military contributions. The mode of making such exactions must be left to the discretion of the conqueror, but it should

be exercised in a manner conformable to the rules of civilized warfare.

"The right to levy these contributions is essential to the successful prosecution of war in an enemy's country, and the practice of nations has been in accordance with this principle. It is as clearly necessary as the right to fight battles, and its exercise is often essential to the subsistence of the army."

President Polk, special message, Feb. 10, 1848, Richardson's Messages, IV. 571.

In October, 1864, during the advance of the Confederate army under General Sterling Price towards St. Louis, thirteen bridges were destroyed on the lines of the Pacific Railroad Company, a corporation under the laws of Missouri. Some were destroyed by the forces of the United States and others by the forces of the Confederacy. All were rebuilt by the company except four, two of which were destroyed by order of the commander of the Federal forces and two presumably by the Confederate forces. These four were rebuilt by the United States military authorities, as the quickest and surest way of restoring railway communication as a military measure. Subsequently the Government of the United States sought to deduct the cost of the restoration of the four bridges from the amounts due to the company from the United States for the transportation of passengers and freight. Held, that such a charge against the company could not properly be made, the court saying:

"While the Government can not be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties can not be charged for works constructed on their lands by the Government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the Government, or to pay for such works when erected by the Government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the Government."

United States *v.* Pacific Railroad (1887), 120 U. S. 227, 239.

"38. Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States.

"If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity."

Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 152.

"ARTICLE LII. Neither requisition in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

"These requisitions and services shall only be demanded on the authority of the Commander in the locality occupied.

"The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.

"ARTICLE LIII. An army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property of the State which may be used for military operations.

"Railway plant, land telegraphs, telephones, steamers, and other ships, apart from cases governed by maritime law, as well as depôts of arms and, generally, all kinds of war material, even though belonging to Companies or to private persons, are likewise material which may serve for military operations, but they must be restored at the conclusion of peace, and indemnities paid for them.

"ARTICLE LIV. The plant of railways coming from neutral States, whether the property of those States, or of Companies, or of private persons, shall be sent back to them as soon as possible."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1823.

Private property may be taken by a military commander for public use, in cases of necessity, or to prevent it from falling into the hands of the enemy, but the necessity must be urgent, such as will admit of no delay, or the danger must be immediate and impending. But in such cases the government is bound to make full compensation to the owner.

Mitchell *v.* Harmony, 13 How. 115.

Where private property is impressed into public use during an emergency, such as a war, a contract is implied on the part of the government to make compensation to the owner.

United States *v.* Russell, 13 Wall. 623.

(2) CONFISCATION.

§ 1150.

When the British evacuated Philadelphia, Congress decided that public property left by the British should belong to the United

States, and that private property belonging to British subjects should belong to the State of Pennsylvania.

Wilcox *v.* Henry, 1 Dallas, 69, supreme court of Pennsylvania, 1782.

British subjects adhering to the British Government during the war of American independence "became *personally* answerable for the conduct of that Government, of which they remained a part; and their property, wherever found (on land or water) became liable to confiscation. On this ground Congress, on the 24th of July, 1776, confiscated *any British* property taken on the *seas*. See 2 Ruth. Inst. lib. 2, c. 9, s. 13, p. 531, 559. Vatt. lib. 2, c. 7, s. 81, & c. 18, s. 344; lib. 3, c. 5, s. 74, & c. 9, s. 161 & 193."

Ware *v.* Hylton (1796), 3 Dallas, 199, 225, opinion of Chace, J.

By the law of nations the debts, credits, and corporal property of an enemy, found in the country on the breaking out of war, are confiscable.

Cargo of ship Emulous, 1 Gallison, 562.

British property found in the United States, on land, at the commencement of hostilities with Great Britain, can not be condemned as enemy's property without a legislative act authorizing its confiscation. The act of the legislature declaring war is not such an act. Timber floating into a salt-water creek which is not navigable, but where the tide ebbs and flows, leaving the ends of the timber resting on the mud at low water, and secured and prevented from floating away at high tide by booms and stakes, is to be considered as landed.

Brown *v.* United States (1814), 8 Cranch, 110.

Dana, in a note to Wheaton, says that, in the case just cited, it was "decided primarily and unequivocally that, by the law of nations, the right exists to seize and confiscate any property of an enemy found in the country on the happening of war." This statement, though it is of the same import as the commentary made by many other writers, is not justified by the facts. If it should be said that the court expressed an opinion, or uttered a *dictum*, to the effect alleged, the statement would be quite correct; but the only point *decided* by the court was that the property before it was not subject to confiscation.

See Dana's Wheaton, § 304, note 156.

See, also, Wharton's Com. on Am. Law, § 216.

As to the actual practice of the United States, as illustrated in the civil war, see the subject of the abandoned and captured property act, infra, § 1152.

The seizure of enemy property by the United States as prize of war on land, jure belli, is not authorized by the law of nations, and can be upheld only by an act of Congress.

United States *v.* Seventeen hundred and fifty-six Shares of Capital Stock, 5 Blatchf. 231.

The humane maxims of the modern law of nations, which exempt private property of noncombatant enemies from capture as booty of war, found expression in the abandoned and captured property act of March 12, 1863. "No titles were divested in the insurgent States unless in pursuance of a judgment rendered after due legal proceedings. The government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of noncombatant enemies from capture as booty of war."

Chase, C. J., United States, *v.* Klein, 13 Wall. 128, 137. See, to same general effect, Lamar *v.* Browne, 92 U. S. 194.

See the abandoned and captured property cases, and particularly the letter of the Secretary of the Treasury to Chief Justice Nott, infra, § 1152.

After the surrender of New Orleans to General Butler, and the issuing of his proclamation of May 1, 1862, declaring that "all rights of property of whatever kind will be held inviolate, subject only to the laws of the United States," private property in the district under his command was not subject to military seizure as booty of war, though not exempt from confiscation under the acts of Congress as enemies' property, if in truth it was such.

Planters' Bank *v.* Union Bank, 16 Wallace, 483.

It is no bar to the recovery of a claim that it was confiscated during the rebellion by a Confederate court because due to a loyal citizen.

Stevens *v.* Griffith, 111 U. S. 48.

The funds of the Treasury derived from the property captured anterior to the abandoned or captured property act have never been treated as booty coming within the rule of international warfare by either the executive or legislative branches of the Government.

Goodman *v.* United States, 14 Ct. Cl. 547.

Land forces which make captures on land can not be considered as making maritime captures merely because they are transported a part of the way to their destination by vessels in the service of the Government.

United States *v.* 269½ Bales of Cotton, Woolworth, 236, cited with approval in Oakes *v.* United States (1899), 174 U. S. 778, 787.

"45. All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

"Prize money, whether on sea or land, can now only be claimed under local law.

"46. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offenses to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offense may require; if by soldiers, they shall be punished according to the nature of the offense."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 153.

The question of the right of the United States to confiscate the property of enemies in the Philippine Islands is discussed in a report of Mr. Magoon, law officer, Division of Insular Affairs, War Department, February 1, 1901, Magoon's Reports, 264.

By a decree of January 30, 1891, President Balmaceda, of Chile, issued a decree forbidding registrars of real estate in the Republic to inscribe sales or mortgages of property belonging to certain specified persons. The decree recited as the reason for its issuance that the participation of some persons in the disturbance of public order, begun by the rising of the navy, rendered it necessary to provide for the indemnification of the losses caused to the State and private persons by that disturbance.

Blue Book, Chile, No. 1 (1892), 43. This decree became brutum fulmen by the fall of the government that issued it.

(3) CONFISCATION ACTS, 1861, 1862.

§ 1151.

The only acts of Congress providing for the confiscation of property belonging to persons in rebellion were the act of August 6, 1861, which applied only to property acquired with intent to use or employ it, or to suffer it to be used or employed, in aiding or abetting the insurrection or in resisting the laws; and the act of July 17, 1862, 12 Stat. 589, which authorized seizure and confiscation only for future acts.

Conrad *v.* Waples (1877), 96 U. S. 279.

The declaration that "all sales, transfers, and conveyances" of property of certain classes of persons, which by the act was made subject to seizure, should be null and void, invalidated such trans-

actions only as against the United States, and not as against any other party.

Conrad *v.* Waples (1877), 96 U. S. 279, 288, citing Corbett *v.* Nutt, 10 Wallace.

Where, under act of Congress, August 6, 1861, ch. 60, entitled "An act to confiscate property used for insurrectionary purposes," lands were seized and condemned, it was held that the purchaser of them under a decree took an estate in fee.

Kirk *v.* Lynd, 106 U. S. 315.
See. also, Kirk *v.* Lewis, 4 Woods C. C. 100.

If a bank holds on general deposit collections made for another bank, the relations of the banks are those of debtor and creditor, and an assignment of the debt by the creditor bank vests in the assignee a right to the amount assigned paramount to that given by confiscation proceedings instituted under the acts of 1861 and 1862, after the execution of the assignment; and especially is this so where the confiscation proceedings were irregular for want of proper process upon the debtor bank.

Phoenix Bank *v.* Risley (1884), 111 U. S. 125. The conclusions of the Supreme Court rested on the grounds (1) that the money against which the confiscation proceedings were directed was the money of the debtor, and not of the creditor, bank, and (2) that no such seizure or attachment was made of the debt, if any existed, as gave the court, by which the decree of confiscation was entered, jurisdiction of the debt.

The act of August 6, 1861, was passed by Congress in the exercise of its power "to make rules concerning captures on land and water," and was aimed exclusively at the seizure and confiscation of property used in aid of the insurrection. The act of July 17, 1862, proceeded upon the entirely different principle of confiscating property without regard to its use, by way of punishing the owner for being engaged in rebellion and not returning to his allegiance.

Oakes *v.* United States (1899), 174 U. S. 778, 790–791.

The fact that, prior to the passage of the act of 1862, a person was "engaged in the rebellion, as a member of the Confederate Congress, and giving constant aid and comfort to the insurrectionary government," did not affect his title to or power to dispose of his property. "Until some provision was made by law, the courts of the United States could not decree a confiscation of his property, and direct its sale. This follows from the doctrine declared in Brown *v.* The United States, reported in the 8th of Cranch."

Conrad *v.* Waples (1877), 96 U. S. 279, 284.

By section 5 of the act of July 17, 1862, 12 Stats. 589, provision was made for the confiscation of the estates of certain persons then in rebellion and by joint resolution 63 of the same date, 12 Stats. 627, it was provided that proceedings under the act should not be so construed as to work the forfeiture of the real estate of the offender beyond his natural life. During the war certain lands in Cincinnati, Ohio, belonging to one J., who had entered the Confederate army, were confiscated, and J.'s life estate therein was sold under this legislation to C. Subsequently, after the close of the war, J. conveyed his fee in the lands to C. by a deed with covenants of general warranty. Thereafter an action of ejectment was brought against C. by the children and only heirs of J., then deceased, who claimed that the conveyance of the fee was unlawful.

In the case of Wallach *v.* Van Riswick, 92 U. S. 202, and in subsequent cases, it was held that the confiscation and sale of the life interest under the act, while it left in the owner a naked fee, disabled him from conveying his reversionary interest, although on his death his heirs would take the property from him by descent. This doctrine was affirmed and amplified in Avegno *v.* Schmidt, 113 U. S. 292, and Shields *v.* Schiff, 124 U. S. 351. Held, that the deed of warranty, accompanied with a covenant of seizin, estopped J. and all persons claiming under him from asserting title to the land against the grantee and his heirs and assigns, or from conveying it to other parties, and that this conclusion was to be especially maintained in view of the proclamation of pardon and amnesty made by the President December 25, 1868, upwards of three years after the deed, since the amnesty and pardon, in removing the disability, if any, which rested upon J. in respect of his estate, created an enlargement of it, the benefit of which inured equally to his grantee, though it did not affect the right of the purchaser under the decree of confiscation.

Jenkins *v.* Collard (1892), 145 U. S. 546.

That the forfeiture under the act of July 17, 1862, and the joint resolution of the same date, was only for the life of the offender, see French *v.* Wade, 102 U. S. 132; Waples *v.* Hays, 108 U. S. 6; Wallach *v.* Van Riswick, 3 MacArthur, 168; Ledoux's Heirs *v.* Lavedan (1900), 52 La. An. 311, 27 So. Rep. 196; Menger *v.* Carruthers (Kan. App.), 44 Pac. Rep. 1096.

See Szymanski *v.* Zunts, 20 Fed. Rep. 361.

A petition was filed in the Court of Claims to recover from the United States a sum of money, the alleged value of a lot which had been condemned for the use of the Government in the city of Washington. It appeared that the lot, prior to its condemnation, had been confiscated and sold under the act of July 17, 1862, and the joint resolution of the same date. On the proceedings for condemnation, the lot was in due course appraised and the amount was duly paid by

the Government into court. The court subsequently paid the whole of the money to the heirs of the person who held the title acquired at the confiscation sale. Neither the original owner nor his heirs were represented in the condemnation proceedings, and it was contended by the heirs, by whom the petition was presented, that the condemnation proceedings were as to them invalid, since neither they nor their ancestors had had or could have had a day in court in respect of those proceedings, which were carried on when their ancestor was still alive, and, under the doctrine laid down in Wallach *v.* Van Riswick, 92 U. S. 202, unable to exercise any right whatever concerning the property. Held, that the doctrine in Wallach *v.* Van Riswick, as to the complete divestiture of proprietary right, was too broadly stated; that the sounder view was that intimated in Illinois Central Railroad *v.* Bosworth, 133 U. S. 92, and Jenkins *v.* Collard, 145 U. S. 546, that the fee remained in the owner, though without power of alienation during his life, unless the disability was removed; that the condemnation proceedings, of which due and legal notice was presumed to have been given, were binding upon the original owner and his heirs; that, even if after the confiscation he held only a naked title without the power of alienation, the President's proclamation of amnesty and pardon of December 25, 1868, prior to the proceedings to condemn, removed his disability and restored to him the right to make such use of the remainder as he saw fit; and that if, under the circumstances, the court made a mistake in the distribution of the condemnation money—a question on which the court would pronounce no opinion—the United States was under no liability in the matter.

United States *v.* Dunnington (1892), 146 U. S. 338.

Property was sold under the confiscation act of 1862, as A.'s. It appeared that A. had, in fact, no interest in the property, he having parted with before the passage of the confiscation act. Held, that the United States was not bound to return to the purchaser, at the confiscation sale, his money.

Waples *v.* United States, 110 U. S. 630.

Where property is libeled for confiscation under the act of 1862, and the record of the proceedings does not show an executive order of seizure, the proceedings and a judgment of confiscation rendered thereunder will be treated as void by another court, and the owner of the property libeled may recover its value from the United States, notwithstanding that the proceeds of sale have been distributed among others.

Duncan *v.* United States, 18 Ct. Cl. 230.
See, also, Mason *v.* Tuttle, 75 Va. 105.

One who voluntarily leaves his home to engage in rebellion can not, nor can his heirs, complain that, in his absence, his land was sold in judicial proceedings which, had he remained at home, he might have defended.

Jenkins *v.* Hannan, 26 Fed. Rep. 657.

A confiscation under the act of 1862 does not affect the rights of mortgage in favor of third persons on the property which goes to the Government or to the purchaser cum onere.

Avegno *v.* Schmidt & Ziegler, 35 La. An. 585.

The heirs of blood of a person whose property has been confiscated under the act of 1862 are not third parties as to such property during the life estate; hence they are bound by the divestiture of the title through foreclosure of a preexisting mortgage, and can not urge the nullity of the decree on the grounds which the expropriated party could not be allowed to set up if he were living and restored to all his former rights.

Shields *v.* Shiff, 36 La. An. 644.

An incorporated bank in Georgetown, So. Carolina, having in May, 1861, a deposit with its New York correspondent, the Phenix Bank, derived from deposits and collections, assigned a part of it and gave the assignee a check or order on the Phenix Bank for the amount assigned. This transaction took place before the passage of the United States confiscation acts. The order was not presented by the assignee to the Phenix Bank till January 4, 1865, but the bank recognized its validity and undertook to pay it on identification of the assignee. Next day, before it was paid, the debt due by the Phenix Bank to the Georgetown bank was attached under the confiscation acts. The money was paid over to the United States marshal, and the United States district court subsequently entered a decree of confiscation, awarding one half to the United States and the other half to the informer. The assignee sued the Phenix Bank for what was due on his assignment. Held, that the money on deposit in the Phenix Bank was its property and not the property of the Georgetown bank; that the assignment by the latter transferred to the assignee a valid claim to the amount assigned; that the proceedings under the confiscation acts were not strictly in rem, and affected the interest only of the defendant, the Phenix Bank, which interest had, as to the amount assigned, passed from it, and, finally (citing Planters' Bank *v.* Union Bank, 16 Wall. 496), that the property of a corporation was not confiscable under the acts of Congress. It was, therefore, further held that the assignee (Risley) was entitled to recover from the Phenix Bank.

Risley *v.* Phenix Bank (1881), 83 N. Y. 318.

This decision was affirmed by the Supreme Court of the United States in Phœnix Bank *v.* Risley (1884), 111 U. S. 125. As has been seen, supra, p. 291, the decision of this court proceeded on other grounds than that of the corporate character of the defendant. That the property of a corporation was not subject to the operation of the acts was held in Ellis v. Phenix Bank, 12 Daly (N. Y.) 177.

Proceedings under the confiscation acts of Congress of 1861 and 1862 were not simply in rem, but the right to condemn property under them depended upon the delictum of the owner, whom it was necessary to bring into court in some manner so that he could have a hearing. (Reversing s. c. 44 N. Y. Superior Ct. 340.)

Chapman *v.* Phœnix Bank, 85 N. Y. 437.

(4) ABANDONED AND CAPTURED PROPERTY ACT.

§ 1152.

"The Government of the United States, in passing the abandoned and captured property act, availed itself of its just rights as a belligerent, and at the same time recognized to the fullest extent its duties under the enlightened principles of modern warfare. The capture of cotton, and certain other products peculiar to the soil of the Confederacy, had become one of the actual necessities of the war. In no other way could the resources of the enemy be so effectually crippled. In fact, as was said in Lamar *v.* Browne [92 U. S. 187], 'It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men.' 'It [cotton] was the foundation upon which the hopes of the rebellion were built.'

"Under such circumstances, it might have been destroyed, if necessary, as it often was by the insurgents; but as the destruction of property should always be avoided, if possible, Congress provided for its capture, preservation, and sale. . . .

"While all residents within the Confederate territory were in law enemies, some were in fact friends. In the indiscriminate seizure of private property, it seemed to Congress that friends might sometimes suffer. Therefore, to save them, it was provided that property, when captured, should be sold, and the proceeds paid into the Treasury of the United States. That being done, any person claiming to have been the owner might, at any time within two years after the close of the rebellion, bring suit in the Court of Claims for the proceeds; and on proof 'of his ownership of said property, of his right to the proceeds thereof, and that he has [had] never given aid or comfort to the present rebellion,' receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said

property, and any other lawful expenses attending the disposition thereof.' (12 Stat. 820.) As to all persons within the privileges of the act, the proceeds were held in trust, but as to all others the title of the United States as captor was absolute."

Young *v.* United States (1877), 97 U. S. 39, 60.

British subjects enjoyed the benefits of the act. United States *v.* O'Keefe, 11 Wall 178; Carlisle *v.* United States, 16 id. 147.

The proclamation of pardon and amnesty issued by the President December 25, 1868, 15 Stat. 711, so operated, in the case of claimants under the abandoned and captured property act, who owed allegiance to the United States, as to make proof of pardon a complete substitute for proof that the claimant gave no aid or comfort to the rebellion. United States *v.* Padelford, 9 Wall. 531. But it did not so operate in the case of a claimant who was during the war a nonresident alien, and who, as such, though he gave aid or comfort, did not commit a crime or offense against the laws of the United States.

Young *v.* United States (1877), 97 U. S. 39, 65.

"The rightful capture of movable property on land transfers the title to the government of the captor as soon as the capture is complete, and it is complete when reduced to 'firm possession.' There is no necessity for judicial condemnation. In this respect, captures on land differ from those at sea."

Young *v.* United States (1877), 97 U. S. 39, 60; case of capture on land.

"It [the Court of Claims] proceeded upon the doctrine that the Confederate States and the States which adhered to the Union were engaged in a civil war, having such proportions as to be attended with the incidents of an international war, and that therefore the United States could treat all property within the Confederate lines as enemy's property, and in the exercise of their belligerent rights seize and appropriate to their own use any of it which could be of service to them in the prosecution of the war; and that the property which was most beneficial to the Confederacy in furnishing funds was cotton, and it was for that reason particularly sought by the national forces for capture. The Court of Claims recognized the doctrine, also, that the right of capture extended to the products of the soil, whether owned by citizens of the Confederacy or strangers to both belligerents, and that the capture of movable property within the Confederacy transferred the title when reduced to firm possession; and it therefore held that when the cotton for the proceeds of which this action is brought was captured by the national forces and sold and the proceeds paid into the Treasury of the United States, the title to the property and proceeds passed absolutely to the General Government.

"This decision . . . would have been correct, and been sustained, had the Government of the United States confined its action simply to the enforcement of its rightful powers as a belligerent, and had not surrendered its rights as a belligerent to appropriate property of a particular kind taken in the enemy's country, belonging to a loyal citizen.

"In Brown *v.* United States, 8 Cranch, 110, 122, 123, the court said that it was conceded that war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, and observed that the mitigations of this rigid rule, which the humane and wise policy of modern times had introduced into practice, might more or less affect the exercise of this right, but could not impair the right itself.

"Substantially the same thing was said in Young *v.* United States, 97 U. S. 39, 60: 'All property,' was the language of the court in that case, 'within enemy territory is in law enemy property, just as all persons in the same territory are enemies. A neutral, owning property within the enemy's lines, holds it as enemy property, subject to the laws of war; and, if it is hostile property, subject to capture.'

"But in another case, that of Mrs. Alexander's Cotton, 2 Wall. 404, 419, this court said that 'this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted "to special cases dictated by the necessary operation of the war," and as excluding, in general, "the seizure of the private property of pacific persons for the sake of gain."' . . .

"The act of Congress of March 12, 1863, providing for the collection of abandoned and captured property in the insurrectionary territory, (12 Stat. 820, c. 120,) declared that all such property might be appropriated to the public use or sold. But it also said, in substance, that the property of friend and foe can not at the time be separated; and all the property of that kind found within the Confederate lines will be taken, sold, and when sold its proceeds will be deposited in the Treasury; but if afterwards within two years after the suppression of the rebellion the owner can establish to the satisfaction of the Court of Claims his title to the property thus taken, and his loyalty to the Union cause, then the portion of the proceeds belonging to him shall be restored, after deducting the expenses attendant upon its capture, removal and custody. United States *v.* Anderson, 9 Wall. 56, 67. . . . The records of the Court of Claims show a multitude of cases where this law has been administered, and many loyal people have had the proceeds of their property returned to them, which had been captured because of the fact that it was situated within hostile territory.

"In the present case, the petitioner was allowed [by act of Congress, June 4, 1888, 2 Stat. 1075, c. 348] the same right to present his claim for the proceeds of the property belonging to his testator which would have been allowed if the testator himself had presented his claim within two years after the capture. The question was as to the loyalty of the testator of the claimant, and also as to his ownership of the cotton. His loyalty was found by the court, and also the bona fides of the sale of the property. After these facts had been established the only question that could have been properly considered was the amount of the proceeds which the petitioner should receive. That was not considered by the Court of Claims."

The judgment of the Court of Claims was accordingly reversed.

Briggs *v.* United States (1892), 143 U. S., 346, 355–358.

Where, during the civil war, cotton situated in Mississippi passed into the possession of the Federal Government by fair capture, the only legal right which the owners possessed was that of having it disposed of according to the provisions of the abandoned or captured property act. And when it was turned over by the officer in charge to third persons, the owners were deprived of their legal right, and their indemnification for such deprivation is a proper subject for legislative discretion.

Vance *v.* United States, 30 Ct. Cl. 252.

"I have the honour to acknowledge the receipt of your letter of the 12th inst., in which you state that a friend in England makes inquiry 'whether confiscations were made after the civil war; and, if so, to what extent.'

"While the inquiry is limited to what was done after the close of the war, it may interest your correspondent to know what policy was pursued by the Government during the war.

"By the act of Congress approved March 12, 1863, the Secretary of the Treasury was authorized to appoint special agents to collect captured and abandoned property in the States in insurrection. The Southern Confederacy had agents in all the cotton States, buying cotton and paying for it in Confederate bonds or currency. The cotton so purchased by the Confederate agents comprised almost the only property 'captured' by the United States Treasury agents during the war. If a mistake was made by these Treasury agents in taking possession of property wrongfully, the Secretary of the Treasury, upon appeal, released the property; or, if it had been sold, the proceeds. Under the above act, the Treasury agents took possession of abandoned plantations, but they were all returned to their owners, some during the war, others afterward, and no proceedings to confiscate this property were instituted. If such had been the

policy and action of the Government, the real estate of such a distinguished Confederate as John Slidell, minister to France, whose property was in the possession of the Treasury agents during the war, would have been among the first to be confiscated. The liberal terms granted to General Lee, when he surrendered to General Grant, are part of the history of this country, and need not be repeated here.

"The rebellion had not been suppressed in all parts of the South when, on the 29th of May, 1865, the President of the United States issued a proclamation granting 'to all persons who have, directly or indirectly, participated in the existing rebellion, except as hereinafter excepted, amnesty and pardon, with restoration of all rights of property, except to slaves.' No 'political conditions were laid down.' There were excepted cases in the proclamation, but the parties were afterward pardoned, either by the President or by acts of Congress.

"It is true in some cases private property was taken and used by the Union armies, without compensation at the time, but Congress, by the act of March 3, 1871, provided a commission to adjudicate these claims.

"You are aware that the act of March 3, 1863, which provided for the appointment of special agents to collect captured and abandoned property, provided also that 'any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims.'

"Thus, during the war and until August 20, 1868 (the rebellion was officially declared suppressed August 20, 1866) your honorable court had jurisdiction of all claims for captured and abandoned property. The records of your court will show that judgments were entered for large sums in favour of persons who had been active and prominent in the rebellion.

"A large amount of cotton was seized by the Treasury agents after the rebellion had collapsed but had not been entirely suppressed.

"The right to file claims in the Court of Claims having ceased August 20, 1868, Congress provided another remedy for those who claimed that cotton had been wrongfully seized, and passed the act of May 18, 1872, which provided that the Secretary of the Treasury should return the proceeds derived from the sale of cotton illegally seized after June 30, 1865. A large number of claims were filed under this act, but in nearly all cases it was found that the claimants had sold the cotton to the Confederacy, and it was, therefore, Confederate cotton when it was seized.

"In reply to the specific inquiry of your correspondent I will state that confiscation through the courts, as near as can be ascertained, amounted to less than $200,000.

" You state that my reply will not be made public without my consent. As the facts above stated are public history, you are at liberty to use this reply as you may deem proper."

Letter of Mr. Shaw, Sec. of Treasury, to Mr. Nott, Ch. J. of the Court of Claims, Feb. 18, 1902.

This letter was sent by Chief Justice Nott to his correspondent in England, Mr. George F. Parker, by whom it was published in the London *Times*. (*The Times*, weekly, April 4, 1902.)

With regard to abandoned and captured property, the sale and proceeds thereof, and the claims allowed, see Treasury Department Circular No. 4, Jan. 9, 1900; and the reports of Lewis Jordan, esq., Chief of the Miscellaneous Division, Treasury Department, Nov. 28, 1894, and Dec. 14, 1901.

For the reports of the Southern Claims Commission, see the following documents:

First General Report, Dec. 11, 1871, H. Mis. Doc. 16, 42 Cong. 2 sess.

Additional Report, case of Madame Bertinetti, Dec. 18, 1871, H. Mis. Doc. 21, 42 Cong. 2 sess.

Letter from the Commissioners, case of Waddy Thompson, May 7, 1872, H. Mis. Doc. 213, 42 Cong. 2 sess.

Second General Report, Dec. 9, 1872, H. Mis. Doc. 12, 42 Cong. 3 sess.

Third General Report, Dec. 8, 1873, H. Mis. Doc. 23, 43 Cong. 1 sess.

Letter of Commissioners, case of Mrs. James K. Polk, April 8, 1874, H. Mis. Doc. 251, 43 Cong. 1 sess.

Fourth General Report, Dec. 14, 1874, H. Mis. Doc. 18, 43 Cong. 2 sess.

Additional Report, case of Marie P. Evans, Jan. 16, 1875, H. Mis. Doc. 18, 43 Cong. 2 sess., part 2.

Fifth General Report, Dec. 20, 1875, H. Mis. Doc. 30, 44 Cong. 1 sess.

Eleven special reports, Jan. 3, 1876, H. Mis. Doc. 30, 44 Cong. 1 sess., part 2.

Sixth Annual Report, Dec. 4, 1876, H. Mis. Doc. 4, 44 Cong. 2 sess.

Seventh General Report, Dec. 5, 1877, H. Mis. Doc. 4, 45 Cong. 2 sess.

Report on case of Urcilla Fondren, Jan. 31, 1878, H. Mis. Doc. 4, 45 Cong. 2 sess., part 2.

(5) COTTON.

§ 1153.

" Being enemies' property, the cotton was liable to capture and confiscation by the adverse party. (Prize Cases, 2 Black, 687.) It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted 'to special cases dictated by the necessary operation of war,' (1 Kent, 92), and as excluding, in general, 'the seizure of the private property of pacific persons for the sake of gain' (id. 93). The commanding general may determine in what special cases its more stringent application is required by military emergencies; while considerations of public policy and positive provisions of law, and the general spirit of legislation, must indicate the

cases in which its application may be properly denied to the property of non-combatant enemies.

"In the case before us, the capture seems to have been justified by the peculiar character of the property and by legislation. It is well known that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. It is matter of history, that rather than permit it t ocome into the possession of the national troops, the rebel government has everywhere devoted it, however owned, to destruction. The value of that destroyed at New Orleans, just before its capture, has been estimated at eighty millions of dollars. It is in the record before us, that on this very plantation of Mrs. Alexander, one year's crop was destroyed in apprehension of an advance of the Union forces. The rebels regard it as one of their main sinews of war; and no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain, in case of the withdrawal of the Union troops, an element of strength to the rebellion."

Chase, Ch. J., Mrs. Alexander's Cotton, 2 Wall. 404, 419.

Where, after active hostilities had ceased in Georgia, cotton, as private property, was seized there by the military forces of the United States, in obedience to an order of the commanding general, during their occupation and actual government of that State, it was held to have been taken from hostile possession within the meaning of that term, and was, without regard to the status of the owner, a legitimate subject of capture.

Lamar *v.* Browne, 92 U. S. 187.

"All property within enemy territory is in law enemy property, just as all persons in the same territory are enemies. A neutral, owning property within the enemy's lines, holds it as enemy property, subject to the laws of war; and, if it is hostile property, subject to capture. It has never been doubted that arms and munitions of war, however owned, may be seized by the conquering belligerent upon conquered territory. The reason is that, if left, they may, upon a reverse of the fortunes of war, help to strengthen the adversary. To cripple him, therefore, they may be captured, if necessary; and whether necessary or not, must be determined by the commanding general, unless restrained by the orders of his government, which alone is his superior. The same rule applies to all hostile property."

Young *v.* United States (1877), 97 U. S. 39, 60.

The act of the Confederate Congress of March 6, 1862, by which it was declared to be the duty of all military commanders in the

service of the Confederate States to destroy all cotton, tobacco, and other property that might be useful to the forces of the United States, whenever, in their judgment, it should be about to fall into their hands, "assumed to confer upon such commanders no greater authority than, consistently with the laws and usages of war, they might have exercised, without the previous sanction of the Confederate legislative authorities, as to any cotton within their military lines likely to fall into the hands of the Federal forces. They had the right, as an act of war, to destroy private property within the lines of the insurrection, belonging to those who were co-operating, directly or indirectly, in the insurrection against the Government of the United States, if such destruction seemed to be required by impending necessity for the purpose of retarding the advance or crippling the military operations of the Federal forces. . . . Whether the redress here sought could, consistently with the provisions of the Federal Constitution, be denied to one who, by the laws of war, is to be deemed an enemy to the lawful government, solely by reason of residence within the insurrectionary district pending the struggle, but who, in point of fact, was a loyal citizen, adhering to the United States, giving no voluntary aid or comfort to the rebellion, it is not necessary for us now to decide. No such question is here presented, and we forbear any expression of opinion upon it."

Ford *v.* Surget (1878), 97 U. S. 594, 606, 607. This was an action for damages by the owner of the cotton against the person who, under military orders, destroyed it.

As cotton, within the military lines of the Confederacy, being "the chief reliance of the rebels for means to purchase the munitions of war in Europe" (Young *v.* United States, 97 U. S. 39; Mrs. Alexander's Cotton, 2 Wall. 404), was "not only enemy, but hostile property," and as such liable to seizure or destruction by the Federal Army, without regard to the individual sentiments of the owner, for the purpose of strengthening that army or of crippling the enemy, it would seem to be a "logical deduction" that "the destruction of the same cotton, under the orders of the Confederate military authorities, for the purpose of preventing it from falling into the hands of the Federal Army, was, under the circumstances alleged in the special pleas, an act of war upon the part of the military forces of the rebellion, for which the person executing such orders was relieved from civil responsibility at the suit of the owner voluntarily residing at the time within the lines of the insurrection."

Ford *v.* Surget (1878), 97 U. S. 594, 605.

Bills of sale given by the owners of cotton given to the purchasing agents of the Confederate Government, found in the rebel archives

in Washington, are evidence to show that the title of the property passed to the Confederate Government and vested in the United States a right of conquest.

Gilmer *v.* United States, 14 Ct. Cl. 184.

"The loan made by European capital is a direct engagement with the armed insurgents who have assumed to control, supply, and deliver cotton for the reimbursement of the money advanced, with interest. You will give notice to Earl Russell that this transaction necessarily brings to an end all concessions, of whatever form, that have been made by this Government for mitigating or alleviating the rigor of the blockade in regard to the shipment of cotton and tobacco. Nor will any title of any person, whether citizen of the United States or subject of a foreign power, to any cotton or merchandise, which title is derived from or through any pretended insurgent authority or other agency hostile to the United States, be respected by this Government."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, April 10, 1863, Dip. Cor. 1863, I. 210, 211.

As to blockade-running, see S. Ex. Doc. 11, 41 Cong. 1 sess. I. 719.

Cotton was "made use of by the Confederacy in carrying on the war, both by accumulating it in large quantities for sale, when it could be passed through the lines, and by destroying it when in danger of being seized by the United States troops; in this way aiding a cotton famine in foreign countries, so as to stimulate and secure recognition of the Confederacy as a separate member of the family of nations.

"Cotton was useful as collateral security for loans negotiated abroad by the Confederate States government, or, as in the present case, was sold by it for cash to meet current expenses, or to purchase arms and munitions of war. Its use for such purposes was publicly proclaimed by the Confederacy, and its sale interdicted except under regulations established by, or contract with, the Confederate government. Cotton was thus officially classed among war supplies, and, as such, was liable to be destroyed when found by the Federal troops or turned to any use which the exigencies of war might dictate.

"The military importance of cotton to the Confederacy is shown by the fact that as early as February, 1861, an act passed by the provisional government of the Confederate States 'to raise money for the support of the government and to provide for the defense of the Confederate States of America' levied a duty on all cotton in the raw state exported from the Confederate States; and in May of the same year an act was passed prohibiting the export of cotton from the Confederate States, except through the ports of said States.

"In the same year (1864) in which the claimants made their contract, the Confederate war department officially recognized cotton as being one of the chief munitions of war by advising that large amounts of Confederate bonds should be issued for the separate use of that department in purchasing cotton and steamers with which to obtain military supplies from abroad."

Mr. Bayard, Sec. of State, to Mr. de Muruaga, Spanish min., June 28, 1886, For. Rel. 1887, 1006.

"The cotton within the Confederate States was publicly recited in their obligations and bonds as a security for their payment; its exportation and sale controlled and regulated by statute, and it thus became officially and publicly classified among the war assets and supplies of that government, and its destruction was authorized, wherever found, whenever military exigencies rendered it advisable to avoid capture by United States forces."

Mr. Bayard, Sec. of State, to Mr. de Muruaga, Spanish min., Dec. 3, 1886, For. Rel. 1887, 1015.

(6) SLAVES.

§ 1154.

Article VII. of the treaty of peace with Great Britain of September 3, 1783, provided for the withdrawal of the British forces from the United States "without causing any destruction, or carrying away any negroes or other property of the American inhabitants." When the British forces withdrew from New York, they sent away in advance 3,000 negroes, whom they claimed to have emancipated. Claims were put forward on behalf of the owners for compensation and were pressed against the British Government; but they were merged in the Jay treaty, and abandoned.

The treaty of Ghent contained (Art. I.) a similar clause, and again many negroes were taken away by the British forces. Claims were put forward for compensation, and the question of liability was referred to the Emperor of Russia, who rendered, April 22, 1822, an award in favor of the United States. Under the convention of November 13, 1826, Great Britain paid the sum of $1,204,960 in satisfaction of the claims.

See Moore, Int. Arbitrations, I. 350–390.

During the war of 1812 an American privateer captured slaves on an English ship. Held, that, especially as the law prohibited the importation of slaves, they should not be deemed prize; that the court should not however assume the responsibility of declaring them pris-

oners of war; but that the question of their disposition should be left to the government, to be treated as a matter of state policy.

Re Certain Slaves, 5 Hughes, C. C. 55.

The British Government, in the argument submitted by it to the Emperor of Russia, as to whether its forces had, by carrying away slaves, violated the obligations of Article I. of the treaty of Ghent against carrying away American property, broadly asserted the right of emancipating slaves as a legitimate right of war. "This is utterly incomprehensible on the part of a nation whose subjects hold slaves by millions and who in this very treaty [of Ghent] recognized them as private property. No such right is acknowledged as a law of war, by writers who admit any limitation. The right of putting to death all prisoners in cold blood and without special cause might as well be pretended to be a law of war. . . . You will present the argument against it, in all its force, and yet without prolixity."

Mr. Adams, Sec. of State, to Mr. Middleton, min. to Russia, No. 6, Nov. 6, 1820, MS. Inst. United States Ministers, IX. 57.

"The emancipation of an enemy's slaves is not among the acts of legitimate war. As relates to the owners, it is a destruction of private property not warranted by the usages of war." (Mr. Adams, Sec. of State, to Mr. Rush, min. to England, July 7, 1820, MS. Inst. United States Ministers, IX. 148.)

As to the proceedings before the Russian Emperor, and his decision, see Moore, Int. Arbitrations, I. 350.

"40. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

"41. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

"42. Slavery, complicating and confounding the ideas of property (that is, of a thing), and of personality (that is, of humanity), exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that 'so far as the law of nature is concerned, all men are equal.' Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

"43. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection

of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or state can have, by the law of postliminy, no belligerent lien or claim of service."

"58. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

"The United States can not retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion Records, series 3, III. 153, 155.

The emancipation proclamation is decisive as to what was deemed the "seat of war" by the President, as it was a military measure against private property.

Blanchard *v.* United States (1897), 32 Ct. Cl. 444.

As to the proceedings of the Joint High Commission of 1871, refusing claims for emancipated slaves, see Moore, Int. Arbitrations, I. 686.

(7) DEBTS.

§ 1155.

Public debts.

By the testimony of publicists and the practice of nations, the principle is established that the obligation of a state for the payment of its debts is not affected by war even though such debts be held by citizens or subjects of the enemy. It is true that in certain early writers, who reiterated the stern rules of the law of Rome, sweeping generalizations may be found in which the right is asserted on the part of enemies to seize all property and confiscate all debts. The same writers, upon the same authority, assert the lawfulness of treating all subjects of the belligerent as enemies, and as such of killing them, including women and children. These generalizations, even at the time when they were written, neither expressed nor purported to express the actual practice of nations, and it is superfluous to declare that the law of the present day is not to be found in them; for, with the change in the practice of nations, growing out of the advance in human thought, the law also has changed.

With the law of the present day as to private debts, we are not now concerned; but, as to the law touching public debts, the current of opinion is unvarying. Vattel, writing in the last century, declared: "The state does not so much as touch *the sums which it owes to the enemy:* money lent to the public is everywhere exempt from confiscation and seizure."

This principle, says Phillimore, "is one which now may happily be said to have no gainsayers."

The act of the King of Prussia, in 1752, in stopping, as an act of reprisal, the payment of interest due by him to English creditors on the Silesian loan is conspicuous not more by reason of its solitariness than by reason of the unanimity with which publicists have disapproved it. The payment of the interest was in fact resumed, but, while the question was still pending, the King of Prussia presented in justification of his course a memorial. To this memorial a famous answer was prepared for the British Government by Sir George Lee, judge of the prerogative court; Dr. Paul, the advocate-general; Sir Dudley Ryder, and Mr. Murray, afterward Lord Mansfield. In this answer there is the following passage:

"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 a private man. 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 honor, because a prince can not be compelled, like other men, 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 debt was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours."

It will be observed that Spain is here referred to as one of the powers by whose conduct the inviolability of the public faith in respect of debts was more than a century and a half ago established.

Vattel described the British answer as "an excellent bit of the law of nations" (un excellent morceau de droit des gens), while Montesquieu pronounced it "an answer without a rejoinder" (une réponse sans réplique). It is commended by Twiss, by Calvo, and generally by other publicists.

Says Pradier-Fodéré: "States can not confiscate to their profit that which they ought themselves to pay to subjects of the enemy, as by seizing the rents of the public debt. How, indeed, can it be admitted that a state may deprive of their due individuals who, under the guarantee of the law and the public faith, have confided to it their capital."

Fiore asserts the same principle in almost the same words, and adds: "All that we could excuse in case of extreme necessity would

be the suspension of payments during the war when the want of money rendered that measure indispensable and when the state would have no other means less ruinous of providing for the urgent necessity of the war. But even that expedient, which may be excusable if the Government afterwards makes the payments which were postponed at the conclusion of peace, would always be disastrous, because it would undermine the base of the economic life of the state—the public credit."

Finally, without unnecessarily multiplying authorities on a point which is undisputed, we may quote from Hall the following passage:

"Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation; but its different kinds are not protected by customs of equal authority, and although seizure would always now be looked upon with extreme disfavour, it would be unsafe to declare that it is not generally within the bare rights of war.

"In one case a strictly obligatory usage of exemption has no doubt been established. Money lent by individuals to a state is not confiscated, and the interest payable upon it is not sequestrated. Whether this habit has been dictated by self-interest, or whether it was prompted by the consideration that money so lent was given 'upon the faith of an engagement of honor, because a prince can not be compelled like other men in an adverse way by a court of justice,' it is now so confirmed that in the absence of an expressed reservation of the right to sequestrate the sums placed in its hands on going to war a state in borrowing must be understood to waive its right, and to contract that it will hold itself indebted to the lender and will pay interest on the sum borrowed under all circumstances."

Vattel, Law of Nations, book iii. ch. v. sec. 78 (Phila. ed. 1858), 323; Phillimore, Int. Law (2d ed.), III. 148; Answer to the Prussian Memorial, Collectanea Juridica, I. 154; Vallel, book ii. ch. vii. sec. 84, n; Phillimore, III. 34; Twiss, Law of Nations, Time of War (1863), 110–114; Calvo, Droit Int. (4th ed.), IV. 55, sec. 1917; Pradier-Fodéré, Traité de Droit Int. Public (1894), VI. 740; Fiore, Nouveau Droit Int. Pub. (1886), III. 226, sec. 1392; Hall, Int. Law (4th ed.), 453.

See, also, Pomeroy, Int. Law, 260, § 213; Pillet, Les Lois actuelles de la Guerre, 82, § 46; Hamilton, Letter of Camillus, No. XIX., Hamilton's Works (J. C. Hamilton's ed.), VII. 332, 336; Emerigon, Meridith's Trans. 438; Maine's Int. Law, 203–206; Martens, Causes Célèbres (2nd ed.), II. 97, 153.

Pradier-Fodéré narrates, on the authority of M. Michel Chevalier (Revue des deux Mondes, IV. 1856, p. 856), that, after the battle of Eylau, Napoleon, on the groundless supposition that the cabinet of London intended to confiscate securities (les fonds) of the English public debt belonging to Frenchmen, directed the minister of finance to look

into the question of retaliation. Napoleon said: "The matter is very delicate; I do not wish to set an example; but, if the English do it, I must use reprisals." The Count Mollien doubted both the accuracy of Napoleon's information and the policy of retaliation, and sent him a memoir of Hamilton on the subject of the confiscation of debts. Napoleon did not recur to the subject. (Traité de Droit Int. Pub. VI. 750.)

Private debts.

War does not extinguish debts due from the citizens of one belligerent to those of another; it merely suspends the remedy for their recovery.

The State of Georgia *v.* Brailsford, 3 Dall. 1.

"Every nation at *war* with another is justifiable, *by the general and strict law of nations*, to seize and confiscate all *moveable* property of its enemy, (of any kind or nature whatsoever), *wherever found*, whether within its territory or not."

Chace, J., in Ware *v.* Hylton (1796), 3 Dall. 199, 226, citing Bynkershoek, Q. J. P., lib. 1, c. 7, pp. 175, 177; Lee on Capt., c. 8, pp. 111, 118; 2 Burl. p. 207, s. 12, p. 219, s. 2, p. 221, s. 11; Vatt. lib. 4, s. 22; Sir Thomas Parker's Rep. p. 267 (11 William 3d).

Marshall was of counsel in this case, and, as counsel for the defendant in error, supported the confiscation under the Virginia statutes.

The relaxation by the commercial nations of Europe of the strict war right to confiscate debts is founded on custom only, and as such is not binding on any nation which has not adopted such custom, e. g., on the State of Virginia during the Revolutionary war.

Chace, J., in Ware *v.* Hylton (1796), 3 Dall. 199, 227. Iredell, J., seemed to incline to the same opinion, though he refrained from deciding it.

"By every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable."

Wilson, J., in Ware *v.* Hylton (1796), 3 Dall. 199, 281.

"The confiscation of debts is at once unjust and impolitic; it destroys confidence, violates good faith, and injures the interests of commerce; it is also unproductive, and in most cases impracticable. . . . In the war that broke out between *France* and *Spain* in the year 1684, His Catholic Majesty endeavored to seize the effects of the subjects of *France* in his Kingdom; but the attempt proved abortive, for not one *Spanish* agent or factor violated his trust, or betrayed his *French* principal or correspondent. . . . Confiscation of debts is considered a disreputable thing among civilized nations of the present day; and indeed nothing is more strongly evincive of this truth, than that it has gone into general desuetude, and whenever put

into practice, provision is made by the treaty, which terminates the war, for the mutual and complete restoration of contracts and payment of debts."

Paterson, J., in Ware *v.* Hylton (1796), 3 Dall. 199, 254, 255, A. D. 1796.

"The war of the Revolution has been sometimes appealed to as countenancing the sequestration of debts and the confiscation of property. This was denied by Mr. Hamilton, in his argument on the 10th article of the British treaty of 1794. He said, in reply to those 'who represent the confiscation or sequestration of debts as our best means of retaliation and coercion, as our most powerful, and sometimes as our only means of defense. So degrading an idea will be rejected with disdain by every man who feels a true and well-informed national pride; by every man who recollects and glories, that in a state of still greater immaturity we achieved independence without the aid of this dishonorable expedient. The Federal Government never resorted to it; and a few only of the State governments stained themselves with it. It may, perhaps, be said that the Federal Government had no power on the subject: but the reverse of this is truly the case. The Federal Government alone had power. The State governments had none, though some of them undertook to exercise it. This position is founded on the solid ground that the confiscation or sequestration of the debts of an enemy is a high act of reprisal and war, necessarily and exclusively incident to the power of making war, which was always in the Federal Government.' (Hamilton's Works, vol. VII. p. 329, Camillus No. XVIII.)"

Lawrence's Wheaton (ed. 1863), 610.

"It is an interesting fact that, prior to his appointment as Chief Justice, Marshall had appeared only once before the Supreme Court, and on that occasion he was unsuccessful. This appearance was in the case of Ware *v.* Hylton, 3 Dallas, 199, which was a suit brought by a British creditor to compel the payment by a citizen of Virginia of a pre-Revolutionary debt, in conformity with the stipulations of the treaty of peace. During the Revolutionary war various States, among which was Virginia, passed acts of sequestration and confiscation, by which it was provided that, if the American debtor should pay into the State treasury the debt due to his British creditor, such payment should constitute an effectual plea in bar to a subsequent action for the recovery of the debt. When the representatives of the United States and Great Britain met at Paris to negotiate for peace, the question of the confiscated debts became a subject of controversy, especially in connection with that of the claims of the loyalists for the confiscation of their estates. Franklin and Jay, though they did

not advocate the policy of confiscating debts, hesitated, chiefly on the ground of a want of authority in the existing National Government, to override the acts of the States. But when John Adams arrived on the scene, he delivered one of those dramatic strokes of which he was a master, and ended the discussion by suddenly declaring, in the presence of the British plenipotentiaries, that, so far as he was concerned, he 'had no notion of cheating anybody;' that the question of paying debts and the question of compensating the loyalists were two; and that, while he was opposed to compensating the loyalists, he would agree to a stipulation to secure the payment of debts. It was therefore provided, in the fourth article of the treaty, that creditors on either side should meet with no lawful impediment to the recovery in full sterling money of *bona fide* debts contracted prior to the war. This stipulation is remarkable, not only as the embodiment of an enlightened policy, but also as perhaps the strongest assertion to be found in the acts of that time of the power and authority of the National Government. Indeed, when the British creditors, after the establishment of peace, sought to proceed in the State courts, they found the treaty unavailing, since those tribunals held themselves still to be bound by the local statutes. In order to remove this difficulty, as well as to provide a rule for the future, there was inserted in the Constitution of the United States the clause declaring that treaties then made, or which should be made, under the authority of the United States, should be the supreme law of the land, binding on the judges in every State, anything in the constitution or laws of any State to the contrary notwithstanding. On the strength of this provision, the question of the debts was raised again, and was finally brought before the Supreme Court, in the case of Ware *v.* Hylton. Marshall appeared for the State of Virginia, to oppose the collection of the debt. He based his contention on two grounds: First, that by the law of nations the confiscation of private debts was justifiable; second, that, as the debt had by the law of Virginia been extinguished by its payment into the State treasury, and had thus ceased to be due, the stipulation of the treaty was inapplicable, since there could be no creditor without a debtor.

"It is not strange that this argument was unsuccessful. While it doubtless was the best that the cause admitted of, it may serve to illustrate the right of the suitor to have his case, no matter how weak it may be, fully and fairly presented for adjudication. On the question of the right of confiscation the judges differed, one holding that such a right existed, while another denied it, two doubted, and the fifth was silent. But, as to the operation of the treaty, all but one agreed that it restored to the original creditor his right to sue, without regard to the validity or the invalidity of the Virginia statute . . .

"It is not alone upon his decisions on questions of constitutional law that Marshall's fame as a judge rests. So marked was his supremacy in that domain, and so profoundly did his opinions affect the course of the national development, that we are accustomed to think of him in the United States only as the expounder of the Constitution. This is not, however, his sole title to fame. He is known in other lands as the author of important opinions on questions which deeply concern the welfare and intercourse of all nations. In the treatment of questions of international law he exhibited the same traits of mind, the same breadth and originality of thought, the same power in discovering and the same certainty in applying fundamental principles, that distinguished him in the realm of constitutional discussions; and it was his lot in more than one case to blaze the way in the establishment of rules of international conduct . . .

"It is not, however, by any means essential to Marshall's preeminence as a judge, to show that his numerous opinions are altogether free from error or inconsistency. In one interesting series of cases, relating to the power of a nation to enforce prohibitions of commerce by the seizure of foreign vessels outside territorial waters, the views which he originally expressed, in favor of the existence of such a right (Church *v.* Hubbart, 2 Cranch, 187), appear to have undergone a marked, if not radical, change in favor of the wise and salutary exemption of ships from visitation and search on the high seas in time of peace (Rose *v.* Himely, 4 Cranch, 241)—a principle which he affirmed on more than one occasion. (The Antelope, 10 Wheaton, 66.) In the reasoning of another case, though not in its result, we may perhaps discern traces of the preconceptions formed by the advocate in the argument concerning the British debts. (Supra, § 1150.) This was the case of Brown *v.* United States, 8 Cranch, 110, which involved the question of the confiscability of the private property of an enemy on land, by judicial proceedings, in the absence of an act of Congress expressly authorizing such proceedings. On the theory that war renders all property of the enemy liable to confiscation, Mr. Justice Story, with the concurrence of one other member of the court, maintained that the act of Congress declaring war of itself gave ample authority for the purpose. The majority held otherwise, and Marshall delivered the opinion. Referring to the practice of nations and the writings of publicists, he declared that, according to 'the modern rule,' 'tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated;' that 'this rule' seemed to be 'totally incompatible with the idea that war does of itself vest the property in the belligerent

government;' and, consequently, that the declaration of war did not authorize the confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that 'war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found,' and that the 'mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice,' though they 'will more or less affect the exercise of this right,' 'can not impair the right itself.' Nor were the two declarations quite consistent. The supposition that usage may render unlawful the exercise of a right, but can not impair the right itself, is at variance with sound theory. Between the effect of usage on rights and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immutability or immunity from the fact that the practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the dictum in question to the influence of preconceptions, and turn for the true theory of the law to an opinion of the same great judge, delivered twenty years later, in which he denied the right of the conqueror to confiscate private property, on the ground that it would violate 'the modern usage of nations, which has become law.' (United States *v.* Percheman, 7 Peters, 51.)"

John Marshall, an address, by J. B. Moore, 16 Political Science Quarterly (Sept., 1901), 400–402, 404–405, 408–410.

See, as to the development of law, The Paquete Habana, 175 U. S. 677, supra, § 1, I. 7–8.

Debts due by one belligerent state to the citizens of the other are not extinguished by the war.

72 Stanbery, At. Gen., 1866, 12 Op. 72.

It is by no means to be admitted that a conquering power may compel private debtors to pay their debts to itself, and that such payments extinguish the claims of the original creditor. The principle of international law, that a conquering state, after the conquest has subsided into government, may exact payment from the state debtors of the conquered power, and that payments to the conqueror discharge the debt, so that when the former government returns the debtor is not compellable to pay again, has no applicability to debts not due to the conquered state.

Planter's Bank *v.* Union Bank, 16 Wall. 483.

"When a rebellion becomes organized, and attains such proportions as to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights,

This concession is made in the interests of humanity, to prevent the cruelties which would inevitably follow mutual reprisals and retaliations. But belligerent rights, as the terms import, are rights which exist only during war; and to what extent they shall be accorded to insurgents depends upon the considerations of justice, humanity, and policy controlling the government. The rule stated by Vattel, that the justice of the cause between two enemies being by the law of nations reputed to be equal, whatsoever is permitted to the one in virtue of war is also permitted to the other, applies only to cases of regular war between independent nations. It has no application to the case of a war between an established government and insurgents seeking to withdraw themselves from its jurisdiction or to overthrow its authority. Halleck's Inter. Law, c. 14, sect. 9. The concession made to the Confederate government in its military character was shown in the treatment of captives as prisoners of war, the exchange of prisoners, the recognition of flags of truce, the release of officers on parole, and other arrangements having a tendency to mitigate the evils of the contest. The concession placed its soldiers and military officers in its service on the footing of those engaged in lawful war, and exempted them from liability for acts of legitimate warfare. But it conferred no further immunity or any other rights. It in no respect condoned acts against the government not committed by armed force in the military service of the rebellious organization; it sanctioned no hostile legislation; it gave validity to no contracts for military stores; and it impaired in no respect the rights of loyal citizens as they had existed at the commencement of hostilities. Parties residing in the insurrectionary territory, having property in their possession as trustees or bailees of loyal citizens, may in some instances have had such property taken from them by force; and in that event they may perhaps be released from liability. Their release will depend upon the same principles which control in ordinary cases of violence by an unlawful combination too powerful to be successfully resisted.

"But, debts not being tangible things subject to physical seizure and removal, the debtors can not claim release from liability to their creditors by reason of the coerced payment of equivalent sums to an unlawful combination. The debts can only be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority. Any sum which the unlawful combination may have compelled the debtors to pay to its agents on account of debts to loyal citizens can not have any effect upon their obligations; they remain subsisting and unimpaired. The concession of belligerent rights to the rebellious organization yielded nothing to its pretensions of legality. If it had succeeded in its contest, it would have protected the debtor from further claim for the debt; but, as it failed, the creditor may have recourse to the courts of the country as prior to the rebel-

lion. It would be a strange thing if the nation, after succeeding in suppressing the rebellion and reestablishing its authority over the insurrectionary district, should, by any of its tribunals, recognize as valid the attempt of the rebellious organization to confiscate a debt due to a loyal citizen as a penalty for his loyalty."

Williams *v.* Bruffy (1877), 96 U. S. 176, 186–188.

XI. *CONQUEST.*

§ 1156.

"Conquest gives only an inchoate right, which does not become perfect till confirmed by the treaty of peace, and by a renunciation or abandonment by the former proprietor."

Opinion of Mr. Jefferson, Sec. of State, to the President, Mar. 18, 1792, Am. State Papers, For. Rel. I. 252; 7 Jefferson's Works, 572.

As to the question of conquest, see the case of the *Georgiana* and the *Lizzie Thompson*, Moore, Int. Arbitrations, II. 1593 et seq.

See Heimweh, Droit de conquête et plebiscite.

In the International American conference at Washington, in 1889–1890, an interesting discussion took place of the subject of conquest, which bore, in its final disposition, a vital relation to the plan of arbitration adopted by that body.

The delegates of the Argentine Republic and Brazil offered, January 15, 1890, a series of resolutions, the eighth article of which reads as follows: "Acts of conquest, whether the object or the consequence of the war, shall be considered to be in violation of the public law of America."

The resolutions were referred to the committee on general welfare, which, April 18, 1890, recommended the adoption of the following declarations:

"1. That the principle of conquest shall never hereafter be recognized as admissible under American public law.

"2. That all cessions of territory made subsequent to the present declaration shall be absolutely void if made under threats of war or the presence of an armed force.

"3. Any nation from which such cessions shall have been exacted may always demand that the question of the validity of the cessions so made shall be submitted to arbitration.

"4. Any renunciation of the right to have recourse to arbitration shall be null and void whatever the time, circumstances, and conditions under which such renunciation shall have been made."

These declarations were subscribed by three members of the committee, respectively, representing the Argentine Republic, Bolivia, and Venezuela. Three other members, representing Colombia, Brazil, and Guatemala, stated that they adopted only the first of the declarations.

Mr. Varas, a delegate from Chile, stated that the delegation from that country would abstain from voting or taking part in the debate on the resolutions.

Mr. Henderson, a delegate from the United States, offered, as expressing the views of the United States delegation, the following resolution:

"WHEREAS, In the opinion of this conference, wars waged in the spirit of aggression or for the purpose of conquest should receive the condemnation of the civilized world; therefore,

"*Resolved*, That if any one of the nations signing the treaty of arbitration proposed by the conference shall wrongfully and in disregard of the provisions of said treaty prosecute war against another party thereto, such nation shall have no right to seize or hold property by way of conquest from its adversary."

After a long discussion, in which the delegate from Peru supported the recommendation of the committee as a whole, the report was adopted by a majority of 15 to 1. The delegations voting affirmatively were Hayti, Nicaragua, Peru, Guatemala, Colombia, Argentine Republic, Costa Rica, Paraguay, Brazil, Honduras, Mexico, Bolivia, Venezuela, Salvador, and Ecuador. The United States voted in the negative, while Chile abstained from voting.

Further discussion then took place, after which a recess was held in order that an agreement might be arrived at which would secure the vote of the United States delegation. On the session being resumed Mr. Blaine presented the following plan:

"1. That the principle of conquest shall not, during the continuance of the treaty of arbitration, be recognized as admissible under American public law.

"2. That all cessions of territory made during the continuance of the treaty of arbitration, shall be void if made under threats of war or in the presence of an armed force.

"3. Any nation from which such cessions shall be exacted may demand that the validity of the cessions so made shall be submitted to arbitration.

"4. Any renunciation of the right to arbitration, made under the conditions named in the second section, shall be null and void."

The conference unanimously agreed to accept this as a substitute for the former report, Chile abstaining from voting. But, as the plan of arbitration never became effective, the declaration against conquest, which was made an integral part of it, can now be cited only as an expression of opinion.

International American Conference, Reports of Committees and Discussions, II. 1122, 1123, 1146.

The broad and extreme rights of conquest which have often been asserted by writers were in reality qualified by the doctrine of postliminium. Under this doctrine, which is analogous to the jus postliminii of the Roman law, where territory occupied by the enemy comes again during the war into the power of the titular sovereign, the legal state of things existing prior to the hostile occupation is reestablished. The same doctrine is applied to property susceptible of appropriation, which, after being captured by the enemy, is recaptured before the moment at which it so becomes the property of the captor that third parties can receive from him a transfer of it.

As a general rule, the right of postliminium in the case of occupied territory goes no further than to revive the exercise of rights from the moment at which it comes into operation, so that it does not, as a rule, invalidate acts of the invader which he was competent to perform, such as judicial or administrative acts not of a political complexion, and acts done by private persons under the sanction of municipal law. When an invader exceeds his legal power, as where, supposing himself to have effected a permanent conquest, he assumed to alienate the domains of the state or the landed property of the sovereignty, his acts are null and against a legitimate government.

In the case of captured vessels it is usual to return the captured property to the owner on payment of salvage.

Hall, Int. Law (5th ed.) 486–495.

See, also, Phillimore, Int. Law (3d ed.) III. 841; Woolsey, Int. Law, 6th ed., 234, 248–252.

"The *jus postliminii*, derived from the Roman law, and regulated in modern times by statute or treaty, or by the usage of civilized nations, has been rested by eminent jurists upon the duty of the sovereign to protect his citizens and subjects and their property against warlike or violent acts of the enemy. Vattel's Law of Nations, lib. 3, c. 14, § 204; Halleck's International Law, c. 35, §§ 1, 2. He is under no such obligation to protect them against unwise bargains, or against sales made for inadequate consideration, or by an agent or custodian in excess of his real authority. The *jus postliminii* attaches to property taken by the enemy with the strong hand against the will of its owner or custodian, and not to property obtained by the enemy by negotiation or purchase."

Oakes v. United States (1899), 174 U. S. 778, 792–793.

XII. *PACIFIC INTERCOURSE OF BELLIGERENTS.*

1. Flags of Truce.

§ 1157.

For the purpose of communicating between enemy forces in position, or on the march, or in action, use is made of flags of truce. If the flag proceeds from the enemy's lines during a battle, the ranks which it leaves must halt and cease their fire. When the bearer displays his flag, he will be signaled by the opposing force, either to advance or to retire; if the former, the forces he approaches will cease firing; if the latter, he must instantly retire, since, if he should not, he may be fired upon.

Halleck, Int. Law (3d ed., by Baker), II. 333–334, citing Scott, Military Dictionary, 304.

"111. The bearer of a flag of truce can not insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

"112. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

"113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

"114. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

"So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of Rebellion, Official Records, series 3, III. 159.

"Article XXXII. An individual is considered as bearing a flag of truce who is authorized by one of the belligerents to enter into communication with the other, and who carries a white flag. He has a right to inviolability, as well as the trumpeter, bugler, or drummer, the flag bearer, and the interpreter who may accompany him.

"Article XXXIII. The Chief to whom a flag of truce is sent is not obliged to receive it in all circumstances.

"He can take all steps necessary to prevent the envoy taking advantage of his mission to obtain information.

"In case of abuse, he has the right to detain the envoy temporarily.

"ARTICLE XXXIV. The envoy loses his rights of inviolability if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1819.

A communication from the Spanish consul, at Charleston, to Mr. Tassara, Spanish minister at Washington, was delivered, sealed, by the Confederate authorities to the military authorities of the United States, under flag of truce. The latter, in conformity with military practice, opened the parcel, and it was sent in that condition to Mr. Seward, who transmitted it to Mr. Tassara. Mr. Tassara remonstrated against the opening of the parcel, but at the same time requested Mr. Seward to convey an official communication from him to the consul. Mr. Seward answered (1) that he would "direct the conveyance by flag of truce of any unsealed official communication;" (2) that, while he approved the military order requiring the conductor of a flag of truce to open all communications received by him, he held in such high respect Mr. Tassara and his Government that he would in any case forbear to read any official communications between officers of that Government which might come, sealed or unsealed, into his hands; (3) that, in view of Mr. Tassara's complaint and remonstrance, the military authorities of the United States conducting flags of truce would be instructed "neither to receive nor to convey any communications whatever issuing from or directed to any Spanish authority or agent, unless the same shall be unsealed."

Mr. Seward, Sec. of State, to Mr. Tassara, Dec. 17, 1864, MS. Notes to Spanish Leg. VIII. 23.

A report having been received in Washington that President Balmaceda, of Chile, had threatened to shoot envoys of the Congressional party if they should be found within his jurisdiction, the American minister at Santiago was instructed by telegraph, May 14, 1891, that, if they should come within such jurisdiction, relying on an offer of mediation or on an invitation of the mediators (of whom the American minister was one), he would "insist that under any circumstances they should have ordinary treatment of flag of truce."

For. Rel. 1891, 123.

A safe conduct was given by the Chilean Government, May 2, 1891, to representatives of the Congressional party to confer with the mediating diplomatic representatives. It seems that the report that the envoys would be shot grew out of a vague threat of the minister of the interior, made under excitement, after a bomb had been thrown

at some of the members of the cabinet. The minister of foreign affairs wrote an explanation and apology to the mediators, and President Balmaceda and his cabinet disavowed any intention of molesting the envoys and afforded them every facility to leave the country. It appears that before the negotiations the envoys were concealed in Santiago. (For. Rel. 1891, 123, 126, 130.)

In March, 1904, the Japanese Government sought permission from the Russian Government, as soon as navigation was opened, to send a neutral ship to Korsakov, Saghalien Island, to bring away two members of the Japanese consular staff and 600 Japanese subjects, who were detained there by ice, and who were believed to be suffering from scarcity of food. The Russian Government replied that, under the rules of war adopted by it on February 14, 1904, the departure of the Japanese from Korsakov would be permitted; that arrangements might be made for a neutral vessel to proceed there when navigation opened, about the 1st of May, and that facilities would be given for direct communication with all Japanese subjects in Siberia as soon as information concerning their whereabouts could be obtained. In accordance with this permission a neutral vessel, early in May, arrived at Vladivostok, and four days later left with 326 Japanese from Korsakov.

For. Rel. 1904, 432–433, 434–435, 436, 715, 718, 720.

See, also, as to other Japanese subjects permitted to leave Russia, For. Rel. 1904, 436.

2. Passports and Safe Conducts.

§ 1158.

A passport or safe conduct is a document granting persons or property a specified exemption for the time being from the operations of war. The term passport is applied to personal permission given to friends on ordinary occasions, both in peace and war, to go where they wish; while the term safe conduct is usually given to an authority to an enemy or an alien to go into places where they would otherwise be in danger or to carry on a trade forbidden by the laws of war. The word passport, however, is more generally applied to persons, and safe conduct to both persons and things.

See Halleck, Int. Law (3d ed., by Baker), II. 323–325.

General Scott, referring to approaching meeting of the new Federal Congress, after his capture of the City of Mexico, says: "I have seen and given safe conduct through this city to several of its members." He also gave Santa Anna's wife a passport to enable her to follow her husband.

Scott, Autobiography, II. 532, 537.

3. Safeguards.

§ 1159.

Safeguards are protections granted by a general or other officer for persons or property within the limits of his command against the operations of his own troops. Sometimes they are delivered to the parties whose persons or property are to be protected; at others, they are posted upon the property itself, as upon a church, museum, library, public office, or private dwelling. They are particularly useful in the assault of a place, or immediately after its capture, or after determination of a battle, to protect persons and property of friends from destruction by an excited soldiery. Violation of such instruments are usually punished with the utmost severity. A guard of men is sometimes called a safeguard when detached to enforce the safety of the persons and property of those protected. A safeguard, when used to denote a kind of passport or safe conduct, is to be construed according to the rules of interpretation applicable to such instruments.

Halleck, Int. Law (3d ed. by Baker), II. 325–326.

4. Capitulations.

§ 1160.

"*Capitulations* are agreements entered into by a commanding officer for the surrender of his army, or by the governor of a town, or a fortress, or particular district of country to surrender it into the hands of the enemy. Capitulations usually contain stipulations with respect to the inhabitants of the place which is surrendered, the security of their religion, property, privileges and franchises, and also with respect to the troops or garrison, either allowing them to march out with their arms and baggage, with the honours of war, or requiring them to lay down their arms and surrender as prisoners of war."

Halleck, Int. Law (3d ed., by Baker), II. 319–320.

A capitulation entered into by a belligerent in regard to the surrender of one of its possessions binds its allies.

Case of The Resolution, Federal Court of Appeals, 1781, 2 Dall. 1, 15.

"In April, 1865, General Grant wrote to General Lee that he proposed to receive the surrender of the Army of Northern Virginia on the following terms, viz:

"1. That rolls of all the officers and men were to be made in duplicate, one copy to be given to an officer of the selection of the former, the other to be retained by whomsoever the latter might appoint.

"2. That the officers give their individual paroles not to take arms against the Government of the United States until properly exchanged, and each commander of a company or regiment to sign a like parole for his men. The arms, artillery, and public property to be parked and stacked, and turned over to the officers appointed by the former to receive them. That this do not include the side-arms of the officers, nor their private horses or baggage.

"3. That, this being done, each officer and man shall be allowed to return to his home, and shall not be disturbed by the United States authority so long as they observe their paroles and the laws in force where they reside.

"General Lee accepted these terms on the same day, and the other rebel armies subsequently surrendered on substantially the same terms.

"By an agreement made the same month between General Johnston, commanding the Confederate army, and Major-General Sherman, commanding the Army of the United States, the Confederate armies then in existence were to be disbanded and conducted to their several State capitals, therein to deposit their arms and public property in the State arsenal; and each officer and man to agree to cease from acts of war, and to abide the action of both State and Federal authorities. The number of arms and munitions of war to be reported to the Chief of Ordnance at Washington, subject to the future action of the Congress of the United States, and in the meantime to be used solely to maintain peace and order within the borders of the different States. The Executive of the United States to recognise the several State governments, on their officers and legislatures taking the oaths prescribed by the Constitution of the United States. The Federal courts in the several States to be reestablished; the people and inhabitants of those States to be guaranteed their political rights and franchise so far as the Executive could do so. The executive authority of the Government of the United States not to disturb any of the people by reason of the war, so long as they lived in peace and quiet. In fact, a general amnesty to be established."

Halleck, Int. Law (3d ed., by Baker), II. 321.

"First. The Spanish Government is of the opinion that the occupation by the American forces of the city, bay, and harbor of Manila must be considered in virtue of the provisions of Article III. of the protocol of August 12, and not in virtue of what was agreed to in the capitulation of the 14th of the same month, which is absolutely null by reason of its having been concluded after the belligerents had signed an agreement declaring the hostilities to be suspended.

"Second. By virtue of the agreement, the Spanish Government is of the opinion that the occupation of the city, harbor, and bay of

Manila by the Americans does not confer upon the United States the faculty of altering the Spanish laws there in force, but that they are to respect these laws and provisions and maintain all the civil, administrative, judicial, and political institutions until the final treaty of peace shall determine the régime (control), disposition, and government of the Philippine Islands for the future, since it is a matter of occupation in which Spain has acquiesced without renouncing her sovereignty, and not of territory conquered *manu militari*.

"Third. The Government of His Majesty, considering the Spanish troops that were garrisoned at Manila as free, proposes to avail itself of them during the suspension of hostilities by transporting them, with their colors, arms, and ammunition, to other parts of the island of Luzon which are not occupied by the Americans, or other islands in the archipelago, with a view of putting down rebellion, maintaining order, and protecting the lives and property of its subjects and of foreigners, in accordance with its rights and duties as a sovereign.

"Fourth. The Spanish Government is also confident that the Government of the United States will not, during the period preceding the ratification of the treaty of peace, bring any change into the economics and fiscal administration of Manila, and that it will not divert for other purposes the customs revenues which are applied to the discharge of lawfully incurred obligations. Were it otherwise, legitimate private interests would be injuriously affected.

"Fifth. The Spanish Government requests that the Federal Government will demand of the Tagal rebels the surrender of the Spanish prisoners now held by them, in order either to release them, as humane sentiments should suggest, or to hold them on the honor and guaranty of the United States. The Spanish prisoners are made to suffer every description of ill-treatment at the hands of the Tagal rebels, and inasmuch as the latter have not been recognized as belligerents, they can not be allowed the right to hold prisoners on territory which is, as a matter of fact, occupied by the American forces. Mercy demands the cessation of a condition of things repugnant to morality.

"Sixth. The Spanish Government holds that the rebels in the Philippines, not having been recognized as belligerents, have also no right to charter armed vessels and to display on such vessels a flag that possesses no kind of international representation, to the end of engaging in acts of aggression and in depredations on Spanish territorial land and waters. Consequently they will be considered by Spain as pirates and tried as such. In order to repel and chastise the attacks of such rebel vessels on Spanish merchant ships that may visit the Philippines, the Government of His Majesty has decided to provide said ships with adequate armament, and hopes that the Government of the United States will admit that this is a necessary and fair measure."

Note of the Duke of Almodovar, minister of state, communicated by the French embassy to the Department of State of the United States, Sept. 11, 1898, For. Rel. 1898, 813.

"The first four paragraphs of the communication now under consideration may be said to depend upon the opinion now expressed by the Spanish Government that the American forces must be considered to hold the city, bay, and harbor of Manila by virtue of the provisions of Article III. of the protocol of August 12, and not by virtue of the capitulation of the 14th of the same month, since the protocol provided for the suspension of hostilities.

"The Department is unable to concur in the opinion of the Spanish Government that the capitulation of Manila was null and void because after the signature of the protocol. It was expressly provided in the protocol that notice should be given of the suspension of hostilities, and it is the opinion of this Government that the suspension is to be considered as having taken effect at the date of the receipt of notice, which was immediately given by this Government. Indeed, it would seem that the suggestion made in the present communication of the nullity of the capitulation is in the nature of an afterthought, since nothing of the kind was suggested in the communications of the 29th of August and the 3d of September, which specifically related to the situation in the Philippines.

"As to the nature of the right by which the United States holds the city, bay, and harbor of Manila, it is the opinion of this Government that it is immaterial whether the occupation is to be considered as existing by virtue of the capitulation or by virtue of the protocol, since in either case the powers of the military occupant are the same.

"As to what is stated in the communication of the Duke of Almodovar in relation to the treatment of Spanish prisoners, it is proper to say that the information of the Department is that such prisoners have for the most part been well treated. Within the last few days it has been reported that some of the prisoners have been released."

Mr. Day, Sec. of State, to M. Cambon, French ambass., Sept. 16, 1898, For. Rel. 1898, 814.

"The minister of state at Madrid . . . has just requested me to lay the following observations before you:

"1. The Spanish Government rejects, as contrary to international law and to the history of wars between civilized countries, the theory which the Federal Government announced in its note of September 16 relative to the effects of the protocol of August 12 and the capitulation of the 14th of that month concerning the occupation of Manila.

"2. In opposition to this theory the Spanish Government maintains that, according to the terms of Article VI. of the protocol, any act of

hostility committed subsequently to the signing of that instrument is morally without legal value. If the belligerent forces could not be at once notified of the agreement made, this was merely due to a material impossibility, owing to the cutting by the Federal authorities of the cable whereby telegraphic communication was maintained between Manila and Asia.

"Under these circumstances the Spanish Government persists in its conviction that the capitulation of August 14 is null and void, and will consider it useless to make any reference thereto until certain acts of the American authorities at Manila shall come to its knowledge.

"3. The Federal Government has expressed the opinion that it is unimportant whether the occupation of Manila originated in the protocol or the capitulation. The Spanish Government is unable to share this view. If the capitulation were really valid the United States would have all the rights which are conferred upon them by the clauses of that instrument; on the contrary, according to the terms of Article III. of the protocol, the United States can not exercise, in the city, port, and bay of Manila, over which the sovereignty of Spain has not been relinquished, anything more than the jurisdiction which is indispensable to secure public order until the conclusion of the treaty of peace. Under these circumstances (as the Spanish Government remarked in paragraphs 2 and 4 of the note delivered to the Department of State by the ambassador of France on the 11th ultimo) the American authorities would not be justified in changing the laws, institutions of good order, the economical and fiscal régime established by Spain in the Philippines, or in devoting to other objects the customs revenues which have been set apart for the payment of legally contracted obligations.

"4. According to recent information the Spanish prisoners who are in the hands of the Tagals continue to be subjected to the worst treatment, even in the territory occupied by the Americans. The Spanish Government is concerned about what the Federal Government proposes to do for the protection of these prisoners, and insists, in the name of humanity, that a stop be put to their sufferings. . . .

"5. The Spanish Government has been informed that several insurgent vessels are navigating in the waters of the Visayas for the purpose of stirring up the natives of the country to rebellion, and that 1,500 Tagals have landed at Panay with sundry pieces of artillery. General Rios is obliged to oppose these rebels with insufficient forces. This information naturally causes deep anxiety to the Royal Government, and fully justifies the proposition made by the minister of state through this embassy (note of August 29, 1898), to transport to those points of the archipelago that are menaced by the insurrection either the troops who have been rendered inactive by the capitulation of

Manila or troops sent directly from the Peninsula. The Spanish Government can but regret that the refusal of the United States to allow Spain to utilize her troops has contributed to the extension of the insurrection, and deems it to be its duty to refer to these facts in order that it may not be held responsible for the results."

Mr. Thiébaut, French chargé, to Mr. Hay, Sec. of State, Oct. 4, 1898, For. Rel. 1898, 815.

"I had the honor duly to receive the note which you addressed to me on the 4th instant, in which, at the request of the minister of state of Spain, you lay before me certain observations of the Spanish Government made in reply to this Department's notes to Mr. Cambon of the 5th, 8th, and 16th ultimo.

"Among these observations are included several subjects which are now under discussion by the peace commission at Paris, and for that reason the Government of the United States does not think it convenient to discuss them here.

"I deem it proper, however, to say:

"1. That the Government of the United States is not able to accept the interpretation placed by the Government of Spain upon the respective effects in law and in fact of the proctocol of August 12 and the capitulation of August 14 upon the military situation at Manila.

"2. That the President has given orders to the American authorities in the Philippines to use their good offices, wherever possible, to prevent any excesses of the insurgents or any cruel treatment of prisoners or Spanish subjects."

Mr. Hay, Sec. of State, to Mr. Thiébaut, French chargé, Oct. 29, 1898, For. Rel. 1898, 817.

"144. So soon as a capitulation is signed, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition, in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of Rebellion, Official Records, series 3, III, 162.

"Article XXXV. Capitulations agreed on between the Contracting Parties must be in accordance with the rules of military honour.

"When once settled, they must be scrupulously observed by both the parties."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1820.

5. Suspensions of Arms.

§ 1161.

Belligerent states and their armies and fleets often have occasion during the continuance of war to enter into agreements of various kinds for the general or partial suspension of hostilities. All such agreements are included under the general name of compacts and conventions. If the cessation of hostilities is only for a very short time, or at a particular place, or for a temporary purpose, such as a parley, a conference, the removal of the wounded, or the burial of the dead, it is called a suspension of arms. Such a compact may be formed between the immediate commanders of the opposing forces, and is obligatory on all persons under their respective commands. Even commanders of detachments may enter into such a compact. But it binds in such a case only the detachment itself, and can not affect the operation of other troops.

Halleck, Int. Law (3d ed., by Baker), II. 311.

"After a truce to allow of the removal of noncombatants protracted negotiations continued from July 3d until July 15th, when, under menace of immediate assault, the preliminaries of surrender were agreed upon. On the 17th General Shafter occupied the city. The capitulation embraced the entire eastern end of Cuba. The number of Spanish soldiers surrendering was 22,000, all of whom were subsequently conveyed to Spain at the charge of the United States."

President McKinley, annual message, Dec. 5, 1898. For. Rel. 1898, LXI.

6. Truces or Armistices.

§ 1162.

If the suspension of hostilities is for a more considerable length of time or for a more general purpose, it is called a truce or armistice. Such suspension is either partial or general. A partial truce is limited to particular places or to particular force, as a suspension of hostilities between a town or fortress and the forces by which it is invested, or between two hostile armies or fleets. But a general truce or armistice applies to the general operations of war, and whether it be for a longer or shorter time extends to all the forces of the belligerent states and restrains the state of war from producing its proper effects, leaving the contending parties and the questions between them in the same situation in which it found them. Such a truce has sometimes been called a temporary peace, though in such case the word peace is used only in opposition to acts of war and not in opposition to a state of war. Such a general suspension of hos-

tilities throughout the nation can be made only by the sovereignty of the state, either directly or by authority specially delegated.

Halleck, Int. Law (3d ed., by Baker), II. 311–312.

See, also, as to truces, Hall, Int. Law (5th ed.), 544–549; Calvo, §§ 2434, 2436, 2446; Heffter, Bergson's ed., 330; Rivier, Principes, II. 364–365; Woolsey, § 157; Pradier-Fodéré, VII. § 2900.

"135. An armistice is the cessation of active hostilities for a period agreed between belligerents. It must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.

"136. If an armistice be declared without conditions it extends no further than to require a total cessation of hostilities along the front of both belligerents.

"If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

"137. An armistice may be general, and valid for all points and lines of the belligerents; or special—that is, referring to certain troops or certain localities only.

"An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

"138. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, does in no way affect the character of the armistice itself."

"140. Commanding officers have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

"141. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

"If nothing is stipulated the intercourse remains suspended, as during actual hostilities.

"142. An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

"143. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this

subject that the besieger must cease all extension, perfection, or advance of his attacking works as much so as from attacks by main force.

"But as there is a difference of opinion among martial jurists, whether the besieged have a right to repair breaches or to erect new works of defense within the place during an armistice, this point should be determined by express agreement between the parties."

"145. When an armistice is clearly broken by one of the parties, the other party is released from all obligation to observe it.

"146. Prisoners taken in the act of breaking an armistice must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

"147. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice; in the latter case the war is carried on without any abatement."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III. 161, 162.

"ARTICLE XXXVI. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties can resume operations at any time, provided always the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

"ARTICLE XXXVII. An armistice may be general or local. The first suspends all military operations of the belligerent States; the second, only those between certain factions of the belligerent armies and in a fixed radius.

"ARTICLE XXXVIII. An armistice must be notified officially, and in good time, to the competent authorities and the troops. Hostilities are suspended immediately after the notification, or at a fixed date.

"ARTICLE XXXIX. It is for the Contracting Parties to settle, in the terms of the armistice, what communications may be held, on the theatre of war, with the population and with each other.

"ARTICLE XL. Any serious violation of the armistice by one of the parties gives the other party the right to denounce it, and even, in case of urgency, to recommence hostilities at once.

"ARTICLE XLI. A violation of the terms of the armistice by private individuals acting on their own initiative, only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for the losses sustained."

Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. II. 1820, 1821.

"If there is one rule of the law of war more clear and peremptory than another, it is that compacts between enemies, such as truces and capitulations, shall be faithfully adhered to; and their non-observance is denounced as being manifestly at variance with the true interest and duty, not only of the immediate parties, but of all mankind."

Mr. Webster, Sec. of State, to Mr. Thompson, Apr. 5, 1842, 6 Webster's Works, 438.

"This I shall add by the way, that truces, and such like agreements, do immediately oblige both parties consenting from the time they are concluded: but the subjects on both sides then begin to be bound, when the truce receives the form of law, that is, when it has been solemnly notified, which being done, it immediately begins to have the power to bind the subjects. But that power, if the publication is made only in one place, shall not at that instant extend itself throughout the whole dominion; but upon a convenient time allowed, to give notice in every place. And if any thing in the mean time be done by the subjects contrary to the truce, they shall not be punishable for it. The contracting parties, however, are not the less bound to repair those damages."

Grotius, De Jure Belli ac Pacis, Book III., cap. xxi. § v.

"A truce, or suspension of arms, does not terminate the war, but it is one of the *commercia belli* which suspends its operations. These conventions rest upon the obligation of good faith, and as they lead to pacific negotiations, and are necessary to control hostilities, and promote the cause of humanity, they are sacredly observed by civilised nations.

"A particular truce is only a partial cessation of hostilities, as between a town and an army besieging it. But a general truce applies to the operations of the war; and if it be for a long or indefinite period of time, it amounts to a temporary peace, which leaves the state of the contending parties, and the questions between them, remaining in the same situation as it found them."

Abdy's Kent, 377.

"Sec. 402. A suspension of hostilities binds the contracting parties, and all acting immediately under their direction, from the time it is concluded; but it must be duly promulgated in order to have a force of legal obligation with regard to the other subjects of the belligerent states; so that if, before such notification, they have committed any act of hostility, they are not personally responsible, unless their ignorance be imputable to their own fault or negligence. But as the supreme power of the state is bound to fulfill its own engagements, or those made by its authority, express or implied,

the government of the captor is bound, in the case of a suspension of hostilities by sea, to restore all prizes made in contravention of the armistice. To prevent the disputes and difficulties arising from such questions, it is usual to stipulate in the convention of armistice, as in treaties of peace, a prospective period within which hostilities are to cease, with a due regard to the situation and distance of places.

"SEC. 403. Besides the general maxims applicable to the interpretation of all international compacts, there are some rules peculiarly applicable to conventions for the suspension of hostilities. The *first* of these peculiar rules, as laid down by Vattel, is that each party may do within his own territory, or within the limits prescribed by the armistice, whatever he could do in time of peace. Thus either of the belligerent parties may levy and march troops, collect provisions and other munitions of war, receive re-enforcements from his allies, or repair the fortifications of a place not actually besieged.

"The *second* rule is, that neither party can take advantage of the truce to execute, without peril to himself, what the continuance of hostilities might have disabled him from doing. Such an act would be a fraudulent violation of the armistice. For example:—In the case of a truce between the commander of a fortified town and the army besieging it, neither party is at liberty to continue works, constructed either for attack or defence, or to erect new fortifications for such purposes. Nor can the garrison avail itself of the truce to introduce provisions or succors into the town, through the passages or in any other manner which the besieging army would have been competent to obstruct and prevent, had hostilities not been interrupted by the armistice.

"The *third* rule stated by Vattel, is rather a corollary from the preceding rules than a distinct principle capable of any separate application. As the truce merely suspends hostilities without terminating the war, all things are to remain in their antecedent state in the places, the possession of which was specially contested at the time of the conclusion of the armistice.

"It is obvious that the contracting parties may, by express compact, derogate in any and every respect from these general conditions."

Dana's Wheaton, §§ 402–403, pp. 498–499.

"139. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence."

Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III, 162.

"The agreement for an armistice should contain a clear announcement of the exact time when it begins and ends. As a rule the terms of these instruments are precise, but in default of definite stipulations on various points we may extract a certain amount of guidance from the general rules of international law. They lay down that as soon as an armistice is concluded it should be notified to all concerned, and add that if no definite time has been fixed for the suspension of hostilities, they cease immediately after the notification."

Lawrence, Principles of International Law, 455.

By Article II. of the treaty of Guadalupe Hidalgo, it was stipulated that immediately upon the signature of the treaty a suspension of hostilities should be arranged, and that the constitutional order should be reestablished so far as the circumstances of military occupation permitted. A military convention for this purpose was concluded in the City of Mexico, February 29, 1848, and was ratified by Major-General Butler on the 5th of the following month, and was proclaimed the next day. It provided for the absolute and general suspension of arms and hostilities, stipulating that the troops of neither side should advance beyond the positions then occupied by them. The convention consisted of seventeen articles, and entered into much detail.

One of the most remarkable examples of a suspension of hostilities which, though in terms temporary, was in effect permanent, was the armistice concluded between Spain and the allied republics on the west coast of South America, at Washington, in 1871. By this armistice the contracting parties were forbidden to renew hostilities against each other, except on three years' notice given through the Government of the United States of an intention to do so, and it was further stipulated that during the continuance of the armistice all restrictions on neutral commerce which were incident to a state of war should cease.

See supra, § 1067.

By the protocol between the United States and Spain signed at Washington August 12, 1898, provision was made for the immediate suspension of hostilities as a preliminary to the conclusion of peace. The blockades were immediately raised, and on August 17, 1898, the Department of State, in response to inquiries made on behalf of the Spanish Government, declared (1) that no obstacle would be interposed to the reestablishment of the postal service by Spanish steamers between Spain on the one side and Cuba, Porto Rico, and the Philippines on the other; (2) that no objection would be made to the importation of supplies in Spanish bottoms to Cuba and the

Philippines, but that it had been decided to reserve the importation of supplies from the United States to Porto Rico to American vessels; and (3) that a Spanish steamer, chartered by French merchants and then lying at Havre, would be permitted to proceed to Philadelphia and to take mineral oil for industrial purposes, provided it was not to be transported to Porto Rico. These answers, it was added, were given with the understanding that American vessels would not for the time being be excluded from Spanish ports, as well as upon the understanding that, if hostilities should at any time be renewed, American vessels that might happen to be in Spanish ports would be allowed thirty days in which to load and depart with noncontraband cargo, and that any American vessel which, prior to the renewal of hostilities, should have sailed for a Spanish port would be permitted to enter such port and discharge her cargo, and afterwards forthwith to depart without molestation, and, if met at sea by a Spanish ship, to continue her voyage to any port not blockaded. These conditions were accepted by the Spanish Government, and commercial intercourse was accordingly restored.

Mr. Moore, Act. Sec. of State, to M. Cambon, French ambass., Aug. 17, 1898, For. Rel. 1898, 802; M. Cambon to Mr. Moore, Sept. 6, 1898, id. 811.

"Immediately upon the conclusion of the protocol I issued a proclamation of August 12th suspending hostilities on the part of the United States. The necessary orders to that end were at once given by telegraph. The blockade of the ports of Cuba and San Juan de Porto Rico was in like manner raised. On the 18th of August the muster out of 100,000 volunteers, or as near that number as was found to be practicable, was ordered."

President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, LXV.

After the conclusion of the protocol of Aug. 12, 1898, the United States, answering an inquiry made by the French ambassador in behalf of the captain-general of Cuba, stated that it did not, under the existing circumstances, object to officers of the Spanish army returning singly to Spain by way of the United States.

For. Rel. 1898, 808, 809.

Notwithstanding the signing of the protocol and the suspension of hostilities, a state of war still exists between this country and Spain, as peace can only be declared pursuant to the negotiations between the authorized peace commissioners.

In the distribution of supplies to the destitute inhabitants of Cuba, the commanding officers may use either the officers of the Army or such other volunteer agencies as may be available for the purpose.

The field of their operations is not necessarily restricted to the territory over which they exercise actual control.

Griggs, At. Gen., Aug. 24, 1898, 22 Op. 190.

Aug. 29, 1898, the French embassy at Washington, acting on behalf of the Spanish Government, represented that, according to advices received at Madrid, the insurrection was spreading and becoming more active in the Philippines, and stated that the Spanish Government thought that the situation might be remedied either by placing at the disposal of Spain for use against the insurgents the Spanish troops whom the capitulation at Manila had reduced to inaction, or, if the United States objected to that measure, by the dispatch of troops directly from the Peninsula to the archipelago.

The United States, in view of the fact that Manila was, some time before its surrender, besieged by the insurgents by land while it was blockaded by the forces of the United States by sea, declined to consider the first alternative, and, as to the second, said: "It will be a matter for regret if it should be adopted on the strength of rumors, some of which have been shown to be groundless, while others yet are unconfirmed. The Government of the United States will, through its military and naval commanders in the Philippines, exert its influence for the purpose of restraining insurgent hostilities pending the suspension of hostilities between the United States and Spain. It would be unfortunate if any act should be done by either Government which might, in certain aspects, be inconsistent with the suspension of hostilities between the two nations, and which might necessitate the adoption of corresponding measures of precaution by the other Government."

Mr. Moore, Act. Sec. of State, to Mr. Thiébaut, French chargé, Sept. 5, 1898, For. Rel. 1898, 810, 811.

"Almost on the day following that on which the Royal Government received communication of this reply, various organs of the European press announced that the American armored vessels *Oregon* and *Iowa* were to be sent to Manila. The Government of Her Majesty refuses to believe that the United States Government has really resolved to increase its land and sea forces in the Philippines, after having opposed the measures which Spain proposed to take in order to repress, as is its right and its duty, the progress of the insurgents in its possessions. If, according to the aforesaid reply of the honorable Mr. Moore, a shipment of Spanish troops to General Rios, who is attacked by superior forces, appears to the Federal Government to be inconsistent with the suspension of hostilities, is not the case the same with the shipment of reinforcements to Admiral Dewey, who is threatened by no enemy? In expressing the hope that each of the

two Governments would abstain from any act that might 'necessitate the adoption of corresponding measures of precaution by the other Government,' did not your honorable predecessor assume, in a manner, for the United States the engagement not to modify the status quo in any way? Under these circumstances, Her Majesty's Government deems it to be its duty to cause a statement to be rectified which it can not but consider as being without foundation."

Observations of the Spanish minister of state, communicated to the Department of State, Washington, by M. Thiébaut, French chargé, Oct. 4, 1898, For. Rel. 1898, 815, 817.

"The American men-of-war to which your note referred as having been ordered to Manila are actually under orders to visit the coast of Brazil and afterwards to proceed to the Hawaiian Islands."

Mr. Hay, Sec. of State, to M. Thiébaut, French chargé, Oct. 29, 1898, For. Rel. 1898, 817.

Many neutral powers treated the armistice between the United States and Spain, concluded at Washington, August 12, 1898, as a practical end of the war, and permitted American public ships freely to enter their ports for the purpose of docking and taking in supplies.

Mr. Hay, Sec. of State, to Mr. Newel, min. to the Netherlands, No. 195, Feb. 8, 1899, MS. Inst. Netherlands, XVI. 401.

See, however, Mr. Buck, min. to Japan, to Mr. Day, Sec. of State, No. 190, Sept. 6, 1898, MS. Desp. from Japan.

XIII. *END OF WAR.*

§ 1163.

Treaty of peace.

"Notwithstanding that treaties only become definitely binding on the states between which they are made on being ratified, a treaty of peace, whether it be in the form of a definitive treaty or of preliminaries of peace, is so far temporarily binding from the date of signature, unless some other date for the commencement of its operation is fixed by the treaty itself, that hostilities must immediately cease. It acts as an armistice if no separate armistice is concluded."

Hall, Int. Law, 4th ed., 581; 5th ed., 559.

"Acts of war done subsequently to the conclusion of peace, or to the time fixed for the termination of hostilities, although done in ignorance of the existence of peace, are necessarily null. They being so, the effects which they have actually produced must be so far as possible undone, and compensation must be given for the harm suffered through such effects as can not be undone. Thus, territory

which has been occupied must be given up; ships which have been captured must be restored; damage from bombardment or from loss of time or market, &c., ought to be compensated for; and it has been held in the English courts, with the general approbation of subsequent writers, that compensation may be recovered by an injured party from the officer through whose operations injury has been suffered, and that it is for the government of the latter to hold him harmless. It is obvious, on the other hand, that acts of hostility done in ignorance of peace entail no criminal responsibility."

Hall, 4th ed., 585; 5th ed., 564, citing Halleck, II. 262–4; Phillimore, III. § dxviii; Bluntschli, § 709; Calvo, § 2964; The Mentor, 1 C. Rob. 183.

"Following the exchange of ratifications of the treaty of peace the two governments accredited ministers to each other, Spain sending to Washington the Duke of Arcos, an eminent diplomatist, previously stationed in Mexico, while the United States transferred to Madrid Hon. Bellamy Storer, its minister at Brussels. This was followed by the respective appointment of consuls, thereby fully resuming the relations interrupted by the war. In addition to its consular representation in the United States, the Spanish Government has appointed consuls for Cuba, who have been provisionally recognized during the military administration of the affairs of that island.

"Judicial intercourse between the courts of Cuba and Porto Rico and of Spain has been established, as provided by the treaty of peace. The Cuban political prisoners in Spanish penal stations have been and are being released and returned to their homes, in accordance with Article VI. of the treaty."

President McKinley, annual message, Dec. 5, 1899, For. Rel. 1889, xxx.

The Duke of Arcos was presented to the President June 3, 1899. (For. Rel. 1899, 680–682.)

Mr. Storer was received by the Queen Regent of Spain June 16, 1899. (Id. 679–680.)

End de facto, or by proclamation.

"It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances.

"The proceedings of Spain and Chili which have been referred to, although conclusive, require an explanation on the part of either of those powers which shall insist that the condition of war still exists.

Peru, equally with Spain, has as absolute a right to decline the good offices or mediation of the United States for peace as either has to accept the same. The refusal of either would be inconclusive as an evidence of determination to resume or continue the war. It is the interest of the United States, and of all nations, that the return of peace, however it may be brought about, shall be accepted whenever it has become clearly established. Whenever the United States shall find itself obliged to decide the question whether the war still exists between Spain and Peru, or whether that war has come to an end, it will make that decision only after having carefully examined all the pertinent facts which shall be within its reach, and after having given due consideration to such representations as shall have been made by the several parties interested."

Mr. Seward, Sec. of State, to Mr. Goñi, Spanish min., July 22, 1868, Dip. Cor. 1868, II. 32, 34.

"I have yet to learn that a war in which the belligerents, as was the case with the late civil war, are persistent and determined, can be said to have closed until peace is conclusively established, either by treaty when the war is foreign, or when civil by proclamation of the termination of hostilities on one side and the acceptance of such proclamation on the other. The surrender of the main armies of one of the belligerents does not of itself work such termination; nor does such surrender, under the law of nations, of itself end the conqueror's right to seize and sequestrate whatever property he may find which his antagonist could use for a renewal of hostilities. The seizure of such property, and eminently so when, as in the present case, it is notoriously part of the war capital of the defeated government, is an act not merely of policy and right, but of mercy, in proportion to the extent to which the party overthrown is composed of high-spirited men who are ready to submit only when their military resources are wholly exhausted, and not until then. This, in the summer of 1865, was the condition of things in the Southern and Southwestern States of this nation. The period was one in which the maintenance of military rule and the taking into the possession of the United States of all the property capable of use as military resources of those States was essential to the permanent restoration of order, peace, and a common municipal law. This was so from the nature of things, and such was the course of public action. It is in accordance with this principle that the Supreme Court of the United States has formally decided that the late civil war terminated in the particular sections of the United States at the period designated in the proclamations of the President of the United States. (Brown *v.* Hiatts, 15 Wall. 177; Adger *v.* Alston, ibid. 555; Batesville Institute *v.* Kauffman, 18 Wall. 151.) And by the President's procla-

mation of April 2, 1866, 'the insurrection which heretofore existed in the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida is at an end, and is henceforth to be so regarded.' Up to and before that date the insurrection in those States was held to exist. After that date it was held to be at an end."

Mr. Bayard, Sec. of State, to Mr. Murnaga, Span. min., Dec. 3, 1886, For. Rel. 1887, 1015, 1019. As to termination of Indian wars, see Mr. Evarts, Sec. of State, to Sir E. Thornton, May 27, 1879, For. Rel. 1879, 496.

See, also, The Protector, 12 Wall. 700.

XIV. *CODIFICATIONS OF THE LAWS OF WAR.*

§ 1164.

Various attempts have been made to codify the laws of war. Of these, one of the most celebrated is that known as General Orders, No. 100, April 24, 1863, being instructions for the government of armies of the United States in the field. This code was drafted by Dr. Francis Lieber, and was revised by a board of army officers.

The work of the Brussels Conference of 1874, although the code framed by it was not ratified by the powers, has had a lasting effect.

The early literature of the laws of war is reviewed in Holland's Studies in International Law, chapter ii.

As to war, generally, see Fiore, Droit Int. Public, I. 1–145; Pillet, Les Lois Actuelles de la Guerre; Rivier, Principes du Droit des Gens.

Of writers on the philosophy of war, a large proportion are Germans, who are divided into two schools, the military and the juridical. The military writers are represented by Gen. J. von Hortmann, Militärische Nothwendigkeit und Humanität, I. 878; and, in briefer form, in Rodenberg's Deutscher Rundschau, XIII. 1877, s. 111 et seq., 450 et seq.; XIV. 1878, s. 71 et seq. See, also, Gen. Carl. von Clausewitz, Vom Kriege.

The names of other military writers and their works are given in Holtzendorff's Handbuch des Völkerrechts, IV. 191.

Bluntschli's Code, and Lueder's Treatise in Holtzendorff's Handbuch are the most important writings of the juridical school.

In English, the laws of war are ably discussed by Halleck, Hall, Holland, and Westlake.

We may mention, in French, the essays of Prof. Henri Brocher, of Lausanne, in the Revue de Droit Int. IV. 1, 381; V. 321, 566.

The Government of the United States explained the fact that it was not represented at the Brussels Conference of 1874 on the ground (1) that it was its established policy to refrain from participating "in international congresses for the discussion and determination of either dynastic questions or of abstract questions of general policy," and that "the proposed convention was looked upon as one of Euro-

pean states, to be held in conformity with a custom not unusual with them, but not in accordance with the habits or policy of this Government;" and (2) that, even had it been consistent with the policy of the United States to take part in the congress, the official invitation was received too late to permit the sending of a representative and the preparation of suitable instructions.

Mr. Fish, Sec. of State, to the diplomatic officers of the United States, circular, July 27, 1874, MS. Circulars, I. 666.

The programme of the Hague Conference, as embodied in the Russian circular of Dec. 30, 1898, contained the following article:

"7. Revision of the declaration concerning the laws and customs of war elaborated in 1874 by the conference of Brussels, and not yet ratified."

The American delegates to The Hague were instructed to give their earnest support to "any practicable propositions" based on this article.

A convention on the subject was adopted by the conference. The American delegates, although they approved the convention, thought it best to withhold their signatures and to refer it to their Government, with the recommendation that it be submitted to the proper authorities for special examination and signed, unless such examination should disclose imperfections not apparent to the American commission. It was afterwards signed by the United States, ratified, and put into operation.

See For. Rel. 1899, 511, 512, 516.

The convention respecting the laws and customs of war on land signed at The Hague July 29, 1899, by the plenipotentiaries in the peace conference refers in its preamble to the Brussels conference of 1874. It is in reality like all other international arrangements on the same subject since that time, but a revision of the project adopted by the Brussels conference, a body whose discussions and conclusions were marked by high intelligence and great practical wisdom. The Hague convention does not purport to provide for all cases and to cover all questions that arise in the conduct of war. In this relation, however, it declares that it is not the intention of the contracting parties that the cases not provided for shall "be left to the arbitrary judgment of the military commanders," but that "until a more complete code of the laws of war is issued," the "populations and belligerents," in the cases not included in the convention, "remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."

For the proceedings of the Brussels Conference and correspondence relating thereto, see British Parl. Papers, Miscellaneous, No. 1 (1874), No. 2 (1874), No. 1 (1875), No. 2 (1875), No. 3 (1875).

"ARTICLE I. The High Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the 'Regulations respecting the Laws and Customs of War on Land' annexed to the present Convention.

"ARTICLE II. The provisions contained in the Regulations mentioned in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them.

"These provisions shall cease to be binding from the time when, in a war between Contracting Powers, a non-Contracting Power joins one of the belligerents."

"ARTICLE IV. Non-Signatory Powers are allowed to adhere to the present Convention.

"For this purpose they must make their adhesion known to the Contracting Powers by means of a written notification, addressed to the Netherlands Government, and by it communicated to all the other Contracting Powers.

"ARTICLE V. In the event of one of the High Contracting Parties denouncing the present Convention, such denunciation would not take effect until a year after the written notification made to the Netherlands Government, and by it at once communicated to all the other Contracting Powers.

"This denunciation shall affect only the notifying Power." (Convention respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. 11. 1808–1809.)

XV. *INDIAN WARS.*

§ 1165.

The question whether an Indian tribe, some of whose members have committed depredations upon the property of persons subject to the authority of the United States, was "in amity" with the United States, within the meaning of the act of March 3, 1891 (26 Stat. 851), so as to entitle the claimants to a judgment against the United States and the tribe for the value of the property, is a question of fact, depending upon whether the tribe was in the relation of actual peace with the United States, and not upon whether there was a subsisting treaty between it and the United States which had never been formally abrogated by a declaration of war by either party.

Marks *v.* United States, 161 U. S. 297.

The existence of hostilities and military operations constitutes an Indian war, without formal declaration by Congress or proclamation by the President.

Marks *v.* United States, 28 Ct. Cl. 147.

Where a party of bad white men or bad Indians engage in rapine or murder, and the rest of the community or tribe do not take up arms, it is crime, not war; but where every man on the one side is ready to kill any man on the other, and military operations take the place of peaceful intercourse, amity ceases to exist, and the purpose of the statute allowing indemnity is at an end.

Dobbs *v.* United States, 33 Ct. Cl. 308.

The treaty of the Creek Nation with the rebel government abrogated the treaty with the United States, and the provisions in the treaty of 1866, wherein the United States reaffirmed and reassumed all obligations existing under the earlier treaty, can not be held to cover the period during which the Creeks were in rebellion.

Connor *v.* United States, 19 Ct. Cl. 675.

A public war, within the Constitution and the rules and articles of war, has existed with the Seminoles since the day Congress recognized their hostilities and appropriated money to suppress them.

Butler, At. Gen., 1838, 3 Op. 307.

CHAPTER XXIV.

MARITIME WAR.

I. *COAST WARFARE.*

1. The American Revolution.

§ 1166.

During the year 1776 John Paul Jones, in command of the sloop-of-war *Providence*, 14 guns and 107 men, on a cruise ranging from the Bermudas to Nova Scotia, made several incursions ashore for the purpose of seizing British stores, releasing American prisoners, and destroying British shipping.[a]

Two descents were made by Jones on the British isles, at Whitehaven and St. Mary's Island. The purpose of the descent at Whitehaven was the destruction of the shipping; of that at St. Mary's Island, the seizure of the Earl of Selkirk as a hostage for the better treatment of American prisoners then in England. The Earl was not at home at the time. Plate, taken from his castle by some of the landing party, was afterwards restored by Jones at his own expense. Whitehaven was defended by two small forts. As to the case of the Earl of Selkirk, Mr. Buell, Jones's biographer, expresses the opinion that "a project to seize the person of a noncombatant nobleman with a view of holding him as a hostage or of coercing him to use his

[a] Buell, Paul Jones, Founder of the American Navy, I, 52; Captain Mahan, Scribner's Magazine, July, 1898, XXIV, 22.

influence with his government for the better treatment of prisoners of war, fairly captured, can hardly be brought within the most liberal definition of civilized warfare," and that "the fact that it had many examples in the conduct of British landing parties on our own coast is no justification," as "two wrongs do not make one right."[a]

2. War of 1812.

§ 1167.

The later stages of the war of 1812 were marked by incursions of the British naval forces at various points on the coast of the Chesapeake Bay, in retaliation for acts of the United States troops in Canada.[b] The threat of Admiral Cochrane to enter upon such a course was the subject of a correspondence between him and Mr. Monroe, then Secretary of State, in August and September, 1814.[c] But in April and May, 1813, several towns along the Chesapeake were devastated by the forces under Rear-Admiral Cockburn, when the plea of retaliation was not alleged.[d] It appeared that Cockburn's orders were to destroy everything that could serve a warlike purpose, and to interrupt, as far as possible, communication along the shore.[e] On April 28 he reached Frenchtown, a village of a dozen buildings, where he drove away the few Americans who made a show of resistance and burned a quantity of property, "consisting of much flour, a large quantity of army clothing, of saddles, bridles, and other equipments for cavalry, etc., together with various articles of merchandise," besides five vessels lying near the place.[f]

The first destruction of the town itself took place at Havre de Grace, a place of some sixty houses. The immediate object of the attack was the destruction of a battery lately erected there. The British forces "met with only resistance enough to offer an excuse for pillage."[g] The battery was soon silenced, and the boat's crew, having landed, drove the militia to the further extremity of the town, where, according to Cockburn's report, "no longer feeling themselves equal to an open and manly resistance, they commenced a teasing and irritating fire from behind the houses, walls, trees, etc., from which, I

[a] Buell, I. 109–114. Landings at different points on the British coast were planned for the expedition in the *Bon Homme Richard* in 1779, but in deference to French wishes these were abandoned and a cruise against commerce in the open sea made instead. (Captain Mahan, Scribner's Mag., XXIV. 34.)

[b] Adams's History of the United States, VIII. 124–128.

[c] Am. State Papers, For. Rel., III. 693–694.

[d] Report of Rear-Admiral Cockburn to Admiral Warren, James's History of the War in America, II. 404–411.

[e] Adams, VII. 266, citing London Gazette, July 6, 1813.

[f] Adams, VII. 266–267, citing the London Gazette.

[g] Adams, VII. 267.

am sorry to say, my gallant first lieutenant received a shot through his hand whilst leading the pursuing party; he, however, continued to head the advance, with which he soon succeeded in dislodging the whole of the enemy from their lurking places and driving them for shelter to the neighboring woods. . . . After setting fire to some of the houses, to cause the proprietors (who had deserted them and formed part of the militia who had fled to the woods) to understand and feel what they were liable to bring upon themselves by building batteries and acting towards us with so much useless rancor, I embarked."[a] According to an American account of the affair the militia, on the killing of a man by a rocket, fled precipitately, and the marines then proceeded to plunder and burn the houses, of which about forty were destroyed. This account gives the impression that there was little, if any, firing from the houses.[b]

Subsequently the villages of Georgetown and Fredericktown were destroyed. In his report concerning them Admiral Cockburn makes no mention of irregular firing. He says:

"I sent forward the two Americans in their boat to warn their countrymen against acting in the same rash manner the people of Havre de Grace had done, assuring them, if they did, that their towns would inevitably meet with a similar fate; but, on the contrary, if they did not attempt resistance, no injury should be done to them or their towns; that vessels and public property only would be seized; that the strictest discipline would be maintained; and that, whatever provisions or other property of individuals I might require for the use of the squadron, should be instantly paid for in its fullest value. . . . I am sorry to say, I soon found the more unwise alternative was adopted; for on our reaching within about a mile of the town, between two projecting elevated points of the river, a most heavy fire of musketry was opened on us from about 400 men, divided and entrenched on the two opposite banks, aided by one long gun. The launches and rocket boats smartly returned this fire with good effect, and with the other boats and marines, I pushed ashore immediately above the enemy's position, thereby ensuring the capture of the town or the bringing him to a decided action. He determined, however, not to risk the latter, for the moment he discerned we had gained the shore, and that the marines had fixed their bayonets, he fled with his whole force to the woods, and was neither seen nor heard of afterwards, although several parties were sent out to ascertain whether he had taken up any new position, or what had become of him. I gave him, however, the mortification of seeing, from wherever he had hid himself, that I was keeping my word with respect to the towns, which (excepting the houses of those who had

[a] James, II. 406. [b] North Am. Rev., V. (July, 1817) 157.

continued peaceably in them, and had taken no part in the attack made upon us) were forthwith destroyed."

In these affairs Admiral Cockburn seemed to have acted on the old idea that where a useless defense is made, those who resist are not entitled to the privileges of belligerents. "Where he met no resistance he paid in part for what private property he took."[a]

3. Bombardment of Greytown.

§ 1168.

In March, 1852, the Mosquito authorities, by a proclamation issued by the British consul, called on the people of "Greytown," a name which had been given to the town of San Juan del Norte, in Nicaragua, to form a constitution and set up a government. This government came into power on May 1, 1852, the Mosquito authorities surrendering their functions and retiring from office. A controversy soon broke out between the new authorities and the Accessory Transit Company, an organization composed of citizens of the United States who held a charter from Nicaragua, as to the occupation by the company of a portion of land on the north side of the harbor known as Punta Arenas, over which jurisdiction was claimed by the municipality. Greytown was regarded by the United States as being within the limits of Nicaragua. It was understood to claim independence under a charter from the Mosquito King; but the United States never recognized the Mosquito King nor the independence of the town, though American naval officers were instructed to respect the police regulations of any de facto authorities there, and not to molest such authorities unless they should attempt to disturb the rights of American citizens.

February 8, 1853, the city council passed a resolution notifying the Accessory Transit Company to remove certain buildings within five days and its entire establishment within thirty days, and declaring that if this was not done summary measures would be taken, as the land was needed for public uses. The buildings were not removed; and on February 21 they were demolished by a party of armed men, who, accompanied by the marshal of Greytown, and under the joint command of a member of the city council and "Major" Lyons, a colored resident, "acted in a most outrageous manner, not even permitting the clerks of the company to save the property in the house, and actually imprisoned and fined one of them for attempting to rescue some valuable articles from destruction."[b] When, a few days

[a] Adams, Hist. of the United States, VII. 269; North Am. Rev. V. 157, July, 1817.

[b] Capt. Hollins to the Secretary of the Navy, March 30, 1853, Br. & For. State Papers, XLVII. 1033–1044.

later, Mr. Baldwin, the agent of the company, went to Greytown to invoke the protection of a British man-of-war, he was arrested and held some time in custody.[a]

March 10, 1853, Capt. Hollins, of the U. S. S. *Cyane*, arrived at Greytown. The agent of the company immediately invoked his protection, and he promptly advised the mayor of the town that he could not permit any depredations on the property of the company. The mayor replied that no "depredations" had been or would be made upon the property of the company, but that he should proceed to eject the company according to law unless illegally prevented by a superior force. It was afterwards learned that a force from the town was under arms, preparing to proceed against Punta Arenas and the Accessory Transit Company, and that the destruction of the company's property by fire was threatened. Capt. Hollins then placed a marine guard on Punta Arenas, with instructions to inform the "marshal" that the property could not be molested. When the marshal landed he was so advised, and he then mustered his "posse of carpenters" and returned to Greytown. In consequence of many threats and manifest excitement among the citizens of the town, Capt. Hollins continued the guard at Punta Arenas and warned the citizens of Greytown of his intention to protect the persons and property of citizens of the United States against molestation. His proceedings were approved by the Secretary of the Navy.[b]

In consequence of the dispute as to jurisdiction over Punta Arenas, the difficulties between the municipality and the Accessory Transit Company continued. Early in May, 1853, some men, who were then or had previously been employed by the company, ran off with some of its property in a boat to Greytown. They were pursued by employees of the company, who, while attempting to arrest the fugitives, were compelled by the municipal police to desist. Subsequently a clerk of the company who, under orders of the agent, sought to recover the boat was forcibly interrupted by the police, and was obliged to leave behind some of the stolen property, which afterwards disappeared. On the same day a warrant was issued for the arrest, on a charge of assault and battery, of one of the employees who had endeavored to seize the fugitives. The agent of the company, on jurisdictional grounds, refused to allow the service of the warrant at Punta Arenas, but the marshal returned and effected the arrest with a force of armed men. The prisoner, whose name was Sloman, was taken to Greytown, where Mr. Fabens, the United States commercial agent, procured his discharge under bond. The company's agent was afterwards arrested at Greytown and held to

[a] Br. & For. State Papers, XLVII, 1019.

[b] Br. & For. State Papers, XLVII, 1011-1018.

bail on a charge of having obstructed Sloman's arrest at Punta Arenas.[a]

Disputes also existed as to the payment of dues and port charges by the steamers of the Accessory Transit Company. The agent of the company finally instructed the officers of the steamers to pay no more port charges at Greytown and to take no letters or packages or freight for its inhabitants. This action much exasperated the people of the town.

On the evening of May 16, 1854, a difficulty of more serious import occurred. The population of Greytown then numbered about 300 persons, consisting of a few Englishmen, Frenchmen, Germans, and men from the United States, but mainly of negroes from Jamaica and some natives of the Mosquito shore. On the day mentioned the steamer *Routh*, of the Accessory Transit Company, arrived at Punta Arenas under the command of Capt. T. T. Smith, and took her position alongside the steamer *Northern Light* to deliver her passengers. About dusk a bungo, having on board 25 or 30 armed men, mostly Jamaica negroes, headed by a mulatto as marshal, came over from Greytown and ran alongside the *Routh*. The marshal, accompanied by several armed men, then jumped on board and announced their purpose to arrest Captain Smith under a warrant from the mayor of Greytown on a charge of murder, based upon the shooting by Captain Smith of a native boatman.

At this stage of the proceedings Mr. Borland, United States minister to Central America, who was on board the *Northern Light* on his way to the United States, was appealed to. He went on board the *Routh* and found Capt. Smith standing at his cabin door, keeping the marshal and his men at bay. Mr. Borland informed the marshal that the United States did not recognize the authority of the municipality at Punta Arenas to arrest an American citizen, and ordered him with his men to withdraw. Meanwhile, loud and threatening language was used by the men on the bungo, and several of them rushed on board the steamer. A further invasion was prevented by Mr. Borland taking a rifle and warning the men on the bungo to keep off.

Early in the evening Mr. Borland went to Greytown to call upon Mr. Fabens, the United States commercial agent. He then learned that, at a meeting of the people of the town, it had been resolved to arrest him. This meeting was presided over by the mayor, a Frenchman named Siguad, who, though he afterwards disavowed responsibility for what took place, was said to have been present when it was proposed by Martin, the ex-mayor, to make the arrest. The attempt was made. A body of men, consisting in part of the regular police

[a] Brit. and For. State Papers, 859.

of the town, armed with muskets, and headed by a Jamaica negro, went to Mr. Fabens's house and announced that they came by order of the mayor to arrest Mr. Borland for preventing the arrest of Capt. Smith. Mr. Borland appeared and warned them against the consequences of what they proposed, and called several gentlemen who were in an upper room to witness the threatened assault upon him. The leader of the armed force then summoned Martin, the ex-mayor, as if to consult him, but Martin not answering, they drew off a little way from the door. The mayor then came up and assured Mr. Borland that the proceedings had been taken without his order and authority; and while the conversation was going on some one from the crowd threw a broken bottle at Mr. Borland, slightly wounding him in the face. The person who threw the missile was not recognized. Soon afterwards the crowd dispersed. At Mr. Borland's request, Mr. Fabens proceeded in a boat to the *Northern Light* in order if possible to obtain aid. On deliberation, it was decided that a committee of three passengers should return with Mr. Fabens to Greytown, communicate with Mr. Borland and agree upon a proper course to be taken. The boat bearing them, though notice was given that the consul was on it, was fired on and not allowed to land, and was thus compelled to return to the *Northern Light*. During the night the town was occupied by armed men, whose sentinels, stationed between the American consulate, where Mr. Borland was, and the harbor, challenged all who attempted to pass, prevented boats from landing or leaving the shore, and thus kept Mr. Borland a prisoner all night. On the following morning, between seven and eight o'clock, Mr. Borland, taking advantage of a momentary lull in the excitement, procured a boat and returned to the *Northern Light*, where it was decided, at a meeting of the passengers, to engage the services of fifty men to act as an armed guard at Punta Arenas till the United States Government could be informed of the state of affairs.[a]

Mr. Marcy, who was then Secretary of State, on June 3, 1854, informed Mr. Fabens that a man-of-war would be ordered to visit San Juan, that the conduct of the people there had attracted the attention of the Government of the United States and would not pass unnoticed, and that the inhabitants of the place would be expected to make reparation for the wrongs and outrages they had committed. On the 9th of June he advised Mr. Fabens that Capt. Hollins would immediately proceed to San Juan. The Government, said Mr. Marcy, was embarrassed by the rumor that the pretended civil and political authority of the place had dissolved; nevertheless, should there be no organized body upon which a demand for redress could

[a] 46 Br. & For. State Papers, 866–872.

be made, the individuals who had participated in the infliction of the wrongs could not escape from responsibilities resulting from the conduct of the late political organization. The people of San Juan were expected to repair the injury they had caused to the Accessory Transit Company by withholding from it the property which had been stolen and taken to San Juan and by protecting persons who were guilty of felony. Moreover, the indignity to Mr. Borland could not, declared Mr. Marcy, pass unnoticed. If done by order of the authorities of the place, they must answer for it in their assumed political character, and nothing short of an apology for the outrage would save the place from the infliction that such an act merited. If it was committed by lawless individuals, without the authority or connivance of the town, then it was clearly the duty of those who exercised the civil power in San Juan to inflict upon them exemplary punishment. The nominal magistrates there, in neglecting to bring them to justice, would impliedly sanction their acts and assume responsibility for them.[a]

The instructions of Mr. Dobbin, Secretary of the Navy, to Capt. Hollins bear date June 10, 1854. They refer to the two incidents of the stealing of the company's property and the indignity to Mr. Borland. Capt. Hollins was to consult freely with Mr. Fabens. It was, declared the instructions, very desirable that the people of Greytown "should be taught that the United States will not tolerate these outrages, and that they have the power and determination to check them. It is, however, very much to be hoped that you can effect the purposes of your visit without a resort to violence and destruction of property and loss of life. The presence of your vessel will, no doubt, work much good. The Department reposes much in your prudence and good sense."[b]

July 12, 1854, Mr. Fabens informed Capt. Hollins, who had then arrived at San Juan, that he had demanded, on behalf of the United States, an indemnity for the property feloniously taken from the Accessory Transit Company. He had also renewed the demand for indemnity for the destruction of the company's property in March, 1853. He had learned that, although a second demand for satisfaction had been made, no redress would be given nor would any apology be made by the town or its authorities for the insult to Mr. Borland, nor would any steps be taken to bring the perpetrators to justice. He added that the chief actors and instigators were in undisputed possession of the town, its arms and ammunition, and the people were thus virtually countenancing and approving the indignity.[c]

On July 12 Capt. Hollins, at 9 o'clock in the morning, issued a

[a] 46 Br. & For. State Papers, 847.
[b] 46 Br. & For. State Papers, 875.
[c] 46 Br. & For. State Papers, 877.

proclamation announcing that, if the demands for satisfaction presented by Mr. Fabens were not forthwith complied with, he would, at 9 o'clock a. m. of the following day, proceed to bombard the town. The particular demands in question were those specified in a letter of Mr. Fabens of July 11, addressed "To those now or lately pretending to and exercising authority in, and to the people of, San Juan del Norte." They comprised the immediate payment of $24,000 as an indemnity for injuries to the Accessory Transit Company and for outrages perpetrated on the persons of American citizens and an apology for the indignity to Mr. Borland, together with satisfactory assurances of future good behavior.

After the issuance of the proclamation, a force went ashore from the *Cyane* and secured the arms and ammunition on shore. At the same time foreigners generally, and persons favorable to the United States, were notified that a steamer would be in readiness on the morning of the bombardment to convey them to a place of safety. An offer was also made to Commander Jolley, of the British war schooner *Bermuda*, of assistance in removing any British persons or property. He responded with the following protest:

"The inhabitants of this city, as well as the houses and property, are entirely defenseless and at your mercy. I do, therefore, notify you, that such an act will be without precedent among civilized nations; and I beg to call your attention to the fact that a large amount of property of British subjects, as well as others, which it is my duty to protect, will be destroyed; but the force under my command is so totally inadequate for this protection against the *Cyane*, I can only enter this my protest.

Capt. Hollins at once replied:

"The people of San Juan del Norte have seen fit to commit outrages upon the property and persons of citizens of the United States after a manner only to be regarded as piratical, and I am directed to enforce that reparation demanded by my Government. Be assured I sympathize with yourself in the risk of English subjects and property under the circumstances, and regret exceedingly the force under your command is not doubly equal to that of the *Cyane*."

A steamer was sent to the town at daylight on the morning of the 13th to take away such persons as desired to go. A few only accepted the opportunity, and these were conveyed to Punta Arenas. The majority of the inhabitants either had left or were willing to remain and risk the consequences. It was hoped that the show of determination on the part of the ship would at this stage have brought about a satisfactory adjustment of differences, but none of the inhabitants called upon Capt. Hollins, and no explanation or apology was attempted.

At 9 o'clock in the morning of the 13th the batteries of the *Cyane* were opened on the town with shot and shell for three-quarters of an hour. After an intermission of the same length they were opened again for half an hour, and this was followed by an intermission of three hours, after which the firing was renewed for twenty minutes, and then the bombardment ceased. The object of the several intervals in the bombardment was to afford an opportunity to the people of the town to treat and arrange matters. No advantage was taken of it, and at four o'clock p. m. a force was sent ashore to complete the destruction of the town by fire, though instructions were given to exempt from destruction, if possible, the property of a Frenchman named De Bardwell, who was understood to have held aloof from the action of the people. No lives were lost, although an attack was made by an armed party on the men who were sent ashore, but on the volley being returned the assailants fled. "The execution," says Capt. Hollins, "done by our shot and shell amounted to the almost total destruction of the buildings, but it was thought best to make the punishment of such a character as to inculcate a lesson never to be forgotten by those who have for so long a time set at defiance all warnings, and satisfy the whole world that the United States have the power and determination to enforce that reparation and respect due to them as a Government in whatever quarter the outrages may be committed." [a]

This transaction was fully discussed in President Pierce's second annual message of Dec. 4, 1854, which contains the following comments:

"This pretended community, a heterogeneous assemblage gathered from various countries, and composed for the most part of blacks and persons of mixed blood, had previously [to the mobbing of Mr. Borland] given other indications of mischievous and dangerous propensities. Early in the same month property was clandestinely abstracted from the depot of the Transit Company and taken to Greytown. The plunderers obtained shelter there, and their pursuers were driven back by its people, who not only protected the wrongdoers and shared the plunder, but treated with rudeness and violence those who sought to recover their property. . . . I could not doubt that the case demanded the interposition of this Government. Justice required that reparation should be made for so many and such gross wrongs, and that a course of insolence and plunder, tending directly to the insecurity of the lives of numerous travelers and of the rich treasure belonging to our citizens passing over this transit way, should be peremptorily arrested. Whatever it might be in other

[a] 46 Br. & For. State Papers, 878 et seq.

respects, the community in question, in power to do mischief, was not despicable. It was well provided with ordnance, small arms, and ammunition, and might easily seize on the unarmed boats, freighted with millions of property, which passed almost daily within its reach. It did not profess to belong to any regular government, and had, in fact, no recognized dependence on or connection with anyone to which the United States or their injured citizens might apply for redress or which could be held responsible in any way for the outrages committed. Not standing before the world in the attitude of an orgaized political society, being neither competent to exercise the rights nor to discharge the obligations of a government, it was, in fact, a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages depredating on emigrant trains or caravans and the frontier settlements of civilized states. . . . No individuals, if any there were, who regarded themselves as not responsible for the misconduct of the community adopted any means to separate themselves from the fate of the guilty. The several charges on which the demands for redress were founded had been publicly known to all for some time, and were again announced to them. They did not deny any of these charges; they offered no explanation, nothing in extenuation of their conduct, but contumaciously refused to hold any intercourse with the commander of the *Cyane*. By their obstinate silence they seemed rather desirous to provoke chastisement than to escape it. . . . When the *Cyane* was ordered to Central America it was confidently hoped and expected that no occasion would arise for a 'resort to violence and destruction of property and loss of life.' Instructions to that effect were given to her commander, and no extreme act would have been requisite had not the people themselves, by their extraordinary conduct in the affair, frustrated all the possible mild measures for obtaining satisfaction. . . .

"This transaction has been the subject of complaint on the part of some foreign powers, and has been characterized with more of harshness than of justice. If comparisons were to be instituted, it would not be difficult to present repeated instances in the history of states standing in the very front of modern civilization where communities far less offending and more defenseless than Greytown have been chastised with much greater severity, and where not cities only have been laid in ruins, but human life has been recklessly sacrificed and the blood of the innocent made profusely to mingle with that of the guilty."

The Government of the United States declined to entertain the claims of French subjects, growing out of the bombardment, on the

ground that persons domiciled at Greytown must look to that community for protection.[a]

It is to be noticed that President Pierce, in the passages above quoted, clearly assumed the position that the inhabitants of Greytown were not, as a body, entitled to be treated as a civilized and responsible community.

4. Crimean War.

§ 1169.

In the *Moniteur* of May 6, 1854, is given the report of the French admiral on the bombardment of Odessa, which had taken place on April 22. It was claimed that a flag of truce had been fired on and that the bombardment was in retaliation. The bombardment was directed at the public establishments, the public vessels, and the fortifications, the city itself and the merchant vessels being spared. The admiral mentions the fact that his orders had directed him to spare open towns.

At pp. 331–347 of the British Expedition to the Crimea, by W. H. Russell, the London *Times* correspondent, is given the history of the expedition to the Sea of Azov. During this expedition numerous landings were made along the shore, and extensive plundering was engaged in. These proceedings are referred to by a writer in the *Times*, Aug. 31, 1888, who signs *Haud Ignarus Mali*. He states that at various places on the Sea of Azov large stores of corn, private property, were burnt, and that the English press approved rather than condemned what was done.

5. Bombardment of Valparaiso.

§ 1170.

The series of events which culminated in the bombardment of Valparaiso by a Spanish squadron, March 31, 1866, originated in a controversy between Spain and Peru, known as the "Talambo" question, and involving alleged delays, defaults, and denials of justice in the administration of the criminal law by the tribunals of the latter country.[b] On the refusal of Peru to comply with certain demands for redress, as well as to receive and negotiate with a new diplomatic agent of Spain, on whose life attempts were alleged to have been made by Peruvians, a Spanish squadron took possession of the Chincha Islands. Any design against the territorial integrity of Peru was

[a] Mr. Marcy, Sec. of State, to Count Sartiges, French min., Feb. 26, 1857, S. Ex. Doc. 9, 35 Cong. 1 sess.; Lawrence's Wheaton (1863), 173, note 59.

[b] Dip. Cor. 1864, IV. 15, 18.

afterwards disclaimed, but the seizure of the islands was accompanied with a manifesto in which it was intimated that, as Spain had never acknowledged the independence of Peru, she might rightfully reassert her ancient title to them.[a]

When intelligence of these things reached Chile it produced great excitement. May 4, 1864, Señor Tocornal, then minister for foreign affairs, addressed to the governments of America a circular, protesting against the Spanish manifesto; but, as his circular was not considered sufficiently demonstrative, he resigned and was succeeded by Señor Covarrubias. It was understood that orders were issued to officials along the coast to refuse supplies and coal to Spanish men-of-war, and in September, 1864, a decree was promulgated declaring coal to be contraband of war and directing that supplies of it be withheld from public vessels of a state employed in hostilities against another state.[b]

The relations between Spain and Chile were soon disturbed by other incidents. In a note of May 13, 1865, Mr. Tavira, the Spanish minister at Santiago, set forth the grievances of his Government, embracing popular affronts to the Spanish flag, at which officials were alleged to have connived; Mr. Tocornal's circular of May 4; the permission given to the Peruvian war steamer *Lerzundi* to obtain munitions of war and supplies and to enlist men, while obstacles were placed in the way of sending supplies to the Spanish squadron; the failure to prevent unlawful expeditions; the refusal to allow Spanish steamers to take coal, and the decree declaring coal to be contraband of war, with the object of prejudicing Spain; the subsequent permission given to Peru to purchase horses, which were contraband of war by the law of nations; and the failure to bring actions for certain libels in the press. Of these causes of complaint Mr. Covarrubias gave explanations, which Mr. Tavira pronounced satisfactory. The Spanish Government, however, repudiated his action as being in conflict with his instructions, which required a disavowal of or apology for the acts complained of, and a salute to the Spanish flag. If these demands were refused, Admiral Pareja, commanding the Spanish forces in the Pacific, was directed to address a circular to the Spanish-American republics, assuring them that Spain had no designs on their territory or independence, and then to blockade the whole Chilean coast, and if, after a month, this should not prove to be effectual, to take any and every other measure legitimate in war. The point on which Spain specially insisted was the salute to her flag. Sept. 17, 1865, Admiral Pareja sent the Chilean Government an ultimatum. It was rejected, and a blockade was proclaimed. Chile

[a] Dip. Cor. 1864, IV. 23, 32, 35, 87, 89.

[b] Dip. Cor. 1864, IV. 179–183, 189–190.

responded by a declaration of war.[a] The Spanish naval operations proved to be a failure. The man-of-war *Covadonga* was captured by the Chileans, and was incorporated into a joint Chilean-Peruvian fleet, which was fitting out at the island of Chiloe. Admiral Pareja died, and was succeeded by Señor Castro Mendez Nuñez, of the ironclad *Numancia*, the most formidable of the Spanish ships. About the middle of March, 1866, an alliance having meanwhile been concluded between Chile, Peru, Ecuador, and Bolivia, Admiral Nuñez received, with a formal appointment as commander-in-chief and plenipotentiary, peremptory instructions. General Kilpatrick, then United States minister to Chile, and Commodore John Rodgers, commanding a special United States squadron at Valparaiso, labored in vain to bring about a pacific adjustment. Admiral Nuñez stated that the only terms which his instructions would permit him to accept were (1) a note disclaiming an intention to insult Spain, and declaring that the treaty of peace was only interrupted, not broken, by the declaration of war, and in proof of this the return of the *Covadonga*, and all other prizes; (2) a responsive declaration by Spain of a return of friendship, together with a disclaimer of any desire for conquest in America or of exclusive influence in American republics, and in proof of this the return of all prizes in the possession of the Spanish squadron; (3) after this exchange of notes, a reciprocal salute of 21 guns, the first gun to be fired from the Chilean forts, when, this accomplished, he would proceed to Santiago and present his credentials as envoy extraordinary and minister plenipotentiary and enter into negotiations for a permanent settlement.

On the morning of March 27 Admiral Nuñez notified the diplomatic corps, the dean of the consular body at Valparaiso, and the intendente of the city that he would open his batteries on the morning of Saturday, the 31st, thus allowing four days to noncombatants for removing their effects, and that he would endeavor to injure only public property. In a manifesto he declared that repeated and ineffectual attempts to engage the allied fleet, which sheltered itself from attack in the shallow waters of Chiloe, and "the persistence of Chile in refusing the amends justly demanded of her, imposed upon Spain the painful but unavoidable duty of making her feel all the weight of rigor to which that country exposes itself which absolutely refuses to recognize the duties imposed upon the civilized communities of the universe."

The foreign residents of various nationalities addressed petitions and sent deputations to the foreign ministers and to the commanders of the foreign naval forces, praying for protection against the bombardment. Gen. Kilpatrick convoked a meeting of the diplomatic

[a] Dip. Cor. 1865, II. 545–552, 556, 557; 1866, II. 345, 349–362, 364–365.

corps, but only the representatives of Italy and Prussia appeared; and it was decided that it was inexpedient for the American naval forces to make any physical opposition, in view of the course of the ministers of England and France. "Had those representatives," says Gen. Kilpatrick, "asked that our forces cooperate with those of England to that end, and thus given us moral support in our contemplated action, neither Commodore Rodgers nor myself would have hesitated to have used force to prevent the destruction of this city."

All the consular body, except the representatives of the Argentine Republic, Belgium, England, and France, joined in a protest to Admiral Nuñez, "In the face of the civilized world, against the consummation of an act which is in contradiction with the civilization of the age." The consuls of England, France, and the Argentine Republic made a joint and similar protest. The Belgian consul protested separately.

General Kilpatrick, in a written communication to Admiral Nuñez, said: "While belligerent rights permit a recourse to extreme measures for the carrying out of legitimate military operations, they do not include the wanton destruction of private property, where no result advantageous to the lawful ends of the war can be attained. International law expressly exempts from destruction purely commercial communities, such as Valparaiso, and the undersigned would beg his excellency to consider most earnestly the immense loss to neutral residents, and the impossibility of removing, within the brief term allotted to them, their household goods, chattels, and merchandise. If, however, his excellency persists in his intention, . . . it only remains for the undersigned to reiterate, in the clearest manner, in the name of his Government, his most solemn protest against the act as unusual and unnecessary, and in contravention of the laws and customs of civilized nations; reserving to his Government the right to take such action as it may deem proper in the premises."[a]

The British minister, Mr. Thomson, in a similar protest drew attention to the large neutral interests at stake and the impossibility of withdrawing them in four days, and to the futility of the proposed measure from a military point of view; and, reserving all the rights of his Government in the premises, he declared: "In attacking an open and undefended town an act will be committed against the laws and usages of war, against the rules established by international law, and against the laws of humanity."[b]

The diplomatic representatives of France, Italy, and Prussia also protested.[c]

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[a] Dip. Cor. 1866, II. 386–393.

[b] Br. & For. State Papers, LVI. 966.

[c] Dip. Cor. 1866, II. 404.

On the morning of March 29 General Kilpatrick advised Mr. Covarrubias that Admiral Nuñez was disposed to say to the intendente of Valparaiso that, inasmuch as it was a purely commercial and unfortified port, the magnanimity of Spain would not permit its destruction if Chile, in reply, would state that she yielded to magnanimity what she refused to yield to force. Mr. Covarrubias answered by proposing that, as Admiral Nuñez had given as a reason for the bombardment that he could not meet the vessels of the allies, their squadron should be placed 10 miles from Valparaiso, there to engage an equal force from the Spanish fleet (the *Numancia* being excluded), Commodore Rodgers to match the ships and act as umpire. Admiral Nuñez declined this proposal, saying that as a military man he knew the superiority of his forces, and should, of course, avail himself of it.[a]

On the morning of March 31 the bombardment took place, lasting three hours. The shots were chiefly directed at the public buildings—the bonded warehouses, the intendencia, and the railway station. Four of the warehouses were destroyed, containing neutral property valued at $10,000,000. White flags were at the Admiral's request placed on the hospitals and churches, but some of these were struck. A part of the streets Planhada and Cocharne, extending from the intendencia toward the customs stores, was destroyed by fire, and some twenty-five private dwellings were consumed. The total loss was estimated at $15,000,000, less than 5 per cent of which fell on Chileans. Two or three persons were killed and as many wounded.[b]

Mr. Seward, in acknowledging General Kilpatrick's dispatches, said: "The conclusion at which you arrived . . . that it was not your duty to advise or instruct Commodore Rodgers to resist the bombardment by force, is accepted and approved."[c] Subsequently Mr. Seward, in a letter to the Attorney-General, expressed the opinion that citizens of the United States domiciled in Valparaiso would have no claim for indemnity either against Spain or against Chile,[d] and the Attorney-General gave to this view his sanction.[e]

Mr. Welles, Secretary of the Navy, in his annual report of Dec. 3, 1866, stated that Commodore Rodgers "was not required to interpose his force against or for either party;" that it was "his duty, even while endeavoring to mitigate the harsh severities of war, to main-

[a] Dip. Cor. 1866, II. 391, 392.

[b] Dip. Cor. 1866, II. 386–393; 56 Br. & For. State Papers, 971. For a circular of Mr. Covarrubias of April 1, 1866, on the bombardment, see Dip. Cor. 1866, II. 421.

[c] Dip. Cor. 1866, II. 411–412.

[d] Mr. Seward, Sec. of State, to Mr. Stanbery, At. Gen., Aug. 24, 1866, 74 MS. Dom. Let. 64.

[e] Stanbery, At. Gen., 1866, 12 Op. 21.

tain a strict neutrality;" and that, "the officers of other neutral powers having declined to unite in any decided steps to protect the city, no alternative remained for him to pursue consistently with the position of this Government towards the parties than that which he adopted."[a]

Lord Clarendon, on hearing of the bombardment, described it in a communication designed for the Spanish Government as "a wanton destruction unparalleled in modern times and unjustifiable on any grounds, of a vast amount of neutral property stored up in the magazines of a defenceless town, without any material damage to the enemies of Spain, but with most disastrous consequences for those whom Spain professes to regard as friends." It appears, however, that Admiral Denman had been instructed "not to transgress the limits permissible to the representative of a neutral power, or to associate himself with any proceedings of the United States commodore which might be inconsistent with the neutral character."[b]

The opinion of publicists is expressed by Hall, who declares that "the act gave rise to universal indignation at the time, and has never been defended."[c]

The bombardment practically ended hostilities in Chile; but, to the great inconvenience of neutral powers and particularly of the United States, it effectually blocked the way to the conclusion of a peace.[d] At length, after repeated efforts at mediation, a conference between representatives of Spain and the allies was opened at Washington Oct. 29, 1870, under the presidency of Mr. Fish. April 11, 1871, an armistice was concluded whereby the de facto suspension of hostilities was converted into an indefinite truce, which was not to be broken by any of the belligerents except on three years' notice, given through the Government of the United States; and so long as the truce lasted all restrictions on neutral commerce were to cease. The last session of the conference took place January 24, 1872. Mr. Fish renewed his entreaties for a permanent peace. The Spanish minister declared this to be the desire of his Government. The Chilean minister, with the support of the ministers of Peru and Ecuador, replied that peace would be made if Spain would "remove the obstacle" by making reparation for the bombardment of Valparaiso. The Spanish minister declined to enter into a discussion which could produce "no beneficial result." At this announcement Mr. Fish expressed his disappointment, declaring that the United States had hoped that

[a] Messages and Documents, 1866–67, Abridgment, 703.

[b] 56 Br. & For. State Papers, 942, 953–954, 987.

[c] Int. Law (4th ed.) 556. See Calvo, Droit Int. (5th ed.) VI, § 428.

[d] Military necessity "does not permit . . . the doing of any hostile act that would make the return of peace unnecessarily difficult." (Stockton, Naval War Code, art. 3.)

in view of the great changes which had taken place in the executive government of Spain, "the present sovereign . . . might not be held morally accountable for the severe act of his predecessor in the assault on Valparaiso, but might satisfy the natural sensitiveness of Chile by expressing regret that the Government of Isabel II. had omitted to offer Chile satisfactory explanations on that subject." Nearly twenty years elapsed before treaties were made by Spain with Peru and Bolivia, the first of the allies with which she was able to conclude a formal peace.[a]

In 1879 the ministers of France, the United States, Great Britain, Italy, and Germany, in Peru, addressed a remonstrance to the admiral of the Chilean squadron against the bombardment of unfortified commercial towns, as illustrated in the proceedings of the squadron in Mollendo and Pisagua, and in a lesser degree at Iquique. The American minister declined to sign the document till it had been so altered as to make the protest dependent on the truth of the facts assumed in it. Mr. Evarts commended the prudence of the minister in this regard, as it was subsequently alleged that the firing on one of the places mentioned was in retaliation for the firing on a flag of truce. In regard to the law applicable to the bombardment of unfortified places, Mr. Evarts referred to and inclosed a copy of the opinion of Attorney-General Stanbery, of August 31, 1866, 12 Op. 21, holding that no claim for compensation of private individuals grew out of the bombardment of Valparaiso by the Spanish fleet on March 31, 1866.

Mr. Evarts, Sec. of State, to Mr. Christiancy, min. to Peru, No. 20, June 18, 1879, For. Rel. 1879, 883. For the remonstrance, see id. 873.

As to the Mello insurrection in Brazil, in 1893, see supra, § 70.

As to efforts to secure the neutrality of Shanghai during the war between China and Japan, in 1894, see For. Rel. 1894, App. I. 58.

As to the threatened bombardment of Port au Prince by a German man-of-war in 1897, see Mr. Powell, min. to Hayti, to Mr. Sherman, Sec. of State, tel., Dec. 4, 1897, 223 MS. Dom. Let. 165; and supra, § 954.

6. British-French Discussions, 1882, 1888.

§ 1171.

British French Discussions.

A discussion of the subject of coast warfare was started in 1882 by Admiral Aube, of the French navy, who, in an article against the proposed discontinuance of Rochefort as a military port, argued that "as wealth is the sinews of war, all that strikes at the wealth of the enemy, *a*

[a] Moore, Int. Arbitrations, V. 5048–5056. As to a resolution of the Chamber of Commerce of New York on the bombardment of Valparaiso, see Mr. F. W. Seward, Acting Sec. of State, to Mr. Wilson, May 22, 1866, 73 MS. Dom. Let. 139.

fortiori all that strikes at the sources of his wealth, becomes not only legitimate, but imposes itself as obligatory. It must therefore be expected to see the fleets, mistresses of the sea, turn their power of attack and destruction, instead of letting the enemy escape from their blows, against all the cities of the coast, fortified or not, peaceful or warlike, to burn them, to ruin them, and at least ransom them without mercy. This was the former practice; it ceased; it will prevail again."[a] Similar views were expressed by other French writers.[b] Contrary opinions were maintained by Admiral Bourgois, who deprecated any suggestion of repudiating "the principles of the law of nations which protect inoffensive citizens, noncombatants, and open and undefended towns against the horrors of war."[c]

The effect of these discussions was reflected in the British naval maneuvers of July and August, 1888, in which the enemy's fleet shelled "fine marine residences and watering places" and levied ransoms on undefended towns.[d] These proceedings were objected to by Holland, on the ground that they might be cited as giving an implied sanction to such a mode of hostilities.[e] They were also condemned by Hall, who declared that "the plea . . . that every means is legitimate which drives an enemy to submission . . . would cover every barbarity that disgraced the wars of the seventeenth century;" that the proposal to revive in maritime hostilities a practice which had been "abandoned as brutal in hostilities on land" was "nothing short of astounding;" but that, before such things were done, "states are likely to reflect that reprisals may be made, and that reprisals need not be confined to acts identical with those which have called them forth."[f]

7. Chilean Revolution, 1891.

§ 1172.

As to the insurrection in Brazil, 1893, see supra, § 70.

January 16, 1891, during the contest between the government of Balmacedo and the Congressionalists, two forts at Valparaiso fired

[a] Revue des Deux Mondes, L. 314, March 15, 1882.

[b] M. Etienne Lamy, Revue des Deux Mondes, LIII. 320, Sept. 15, 1882; M. Gabriel Charmes, "La Réforme Maritime," Revue des Deux Mondes, LXVI. 872, LXVIII. 127, 770, Dec. 15, 1884; March 1, 1885; April 15, 1885.

[c] "Les Torpilles et Le Droit des Gens," La Nouvelle Revue, April 1, 1886, 494; "La Défense des Côtes et Les Torpilleurs," Dec. 1, 1887, 489, and Feb. 1, 1888, 453. In the same publication, June 1, 1886, 474, there is a reply to Admiral Bourgois's first article by "Un ancien officer de marine."

[d] The London *Times*, Aug. 7, 1888.

[e] Studies in Int. Law, 96 et seq.

[f] Int. Law (4th ed.), 556.

on the Congressionalist man of war *Blanco Encalada*, killing and wounding a number of persons on board. The attack "was not returned for reasons of humanity toward the people and the town."[a]

February 16, 1891, a report having reached Iquique that the government troops had been defeated on the pampas near that place, the intendente surrendered the town to the Congressionalists, who occupied it with their naval forces. Early in the morning of February 19 government troops, about 250 strong, surprised the city, and the marines retired into the custom-house, where they were supported by the squadron. Firing continued all day, and two fires broke out. Late in the afternoon a British naval officer, at the request of the revolutionary leaders on the *Blanco Encalada*, went ashore under a flag of truce, and arranged a suspension of arms to enable foreigners and noncombatants to leave the town. But for this, said the British Admiral, Hotham, "Iquique would have disappeared, and with 250 drunken Chilean soldiers, no discipline nor police, and supplemented by roughs, the sufferings, and worse, of noncombatants, especially women and children, may be imagined."[b]

March 26, 1891, Mr. Tracy, Secretary of Navy, addressed to Rear-Admiral Brown instructions in relation to the protection of American interests in Chile during the revolution then going on. With reference to the fleet of the Congressional party, whose belligerency had not been recognized by the United States, Mr. Tracy said:

"Should the bombardment of any place, by which the lives or property of Americans may be endangered, be attempted or threatened by such ships, you will, if and when your force is sufficient for the purpose, require them to refrain from bombarding the place until sufficient time has been allowed for placing American life and property in safety. You will enforce this demand if it is refused, and if it is granted, proceed to give effect to the measures necessary for the security of such life or property."[c]

July 7, 1891, Mr. Kennedy, British minister at Santiago, inclosed to Lord Salisbury a correspondence relating to the then recent bombardment of the town of Pisagua without provocation or notice of any kind by the Chilean Government ships *Almirante Condell* and *Imperial*, on June 8, 1891. Among the inclosures there was a protest of the consular body at Pisagua, which stated that the vessels came close into the port about 2 o'clock in the afternoon, and without notice of any kind began to fire their guns into the town, causing much damage. On July 7th Mr. Kennedy addressed a protest to

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[a] Blue Book, Chile, No. 1 (1892), 24. This abstention on the part of the Congressionalists is said to have been due to the influence of Captain St. Clair, of H. M. S. *Champion*. (Id. 83.)

[b] Blue Book, Chile, No. 1 (1892), 82–83.

[c] H. Ex. Doc. 91, 52 Cong. 1 sess. 245. See, also, id. 237, 244.

the Chilean Government characterizing the proceeding as being "opposed to the recognized principles of international law or of civil warfare." He also reserved all rights of British subjects as to property destroyed.

August 25, 1891, Mr. Kennedy's protest was approved by Lord Salisbury.[a]

8. Rules of Institute of International Law, 1896.

§ 1173.

The question of the bombardment of open towns by naval forces was considered by the Institute of International Law at Cambridge in 1895, and at Venice in 1896. At the latter session rules were adopted which were designed to supplement, in regard to this question, the Manual of the Laws of War previously resolved upon at the session at Oxford. The rules, which were adopted September 29, 1896, were as follows:[b]

"Art. 1. There is no difference between the rules of the law of war as to bombardment by military forces on land and that by naval forces.

"Art. 2. Consequently there apply to the latter the general principles enunciated in art. 32 of the Manual of the Institute—i. e., it is forbidden (*a*) to destroy public or private property, if such destruction is not commanded by the imperious necessity of war; (*b*) to attack and bombard localities which are not defended.

"Art. 3. The rules enunciated in arts. 33 and 34[c] of the Manual are equally applicable to naval bombardments.

"Art. 4. In virtue of the foregoing principles, the bombardment by a naval force of an open town—i. e., one not defended by fortifications or other means of attack or of resistance for immediate defense, or by detached forts situated in proximity to it, for example, at the maximum distance of from 4 to 10 kil., is inadmissible, except in the following cases:

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[a] Blue Book, Chile, No. 1 (1892), 198, 218. See Calvo, Droit Int. (5th ed.) VI, § 428 et seq.

[b] Annuaire, XV, 313.

[c] 33. The commander of the attacking troops ought, except in case of assault, before beginning a bombardment, to do all he can to advise the local authorities.

34. In case of bombardment all needful measures shall be taken to spare, if it be possible to do so, buildings devoted to religion and charity, to the arts and sciences, hospitals, and depots of sick and wounded. This on condition, however, that such places be not made use of, directly or indirectly, for purposes of defense.

It is the duty of the besieged to designate such buildings by suitable marks or signs, indicated in advance to the besieger.

"(1) In order to obtain by means of requisitions or of contributions what is necessary for the fleet.

"Nevertheless, such requisitions and contributions must remain within the bounds prescribed by arts. 56 and 58 [a] of the Manual of the Institute.

"(2) In order to destroy dockyards, military establishments, depots of munitions of war, or vessels of war found in a port.

"Moreover, an open town which is defended against the entrance of troops or of disembarked marines may be bombarded in order to protect the landing of soldiers and of marines if the open town attempts to prevent it, and as an auxiliary measure of war in order to facilitate an assault made by the troops and disembarked marines, if the town defends itself.

"There are specially forbidden bombardments whose sole object is to exact a ransom (*Brandschatz*), and, with greater reason, those destined only to induce the submission of the country by the destruction, without other motive, of peaceable inhabitants or their property.

"ART. 5. An open town may not be exposed to bombardment by the sole fact:

"(1) That it is the capital of a state or the seat of government (but, naturally, these circumstances give it no guarantee against bombardment).

"(2) That it is actually occupied by troops, or that it is ordinarily garrisoned by troops of various arms, destined to rejoin the army in time of war."

9. DISCUSSIONS IN THE HAGUE CONFERENCE.

§ 1174.

By Article XXV. of the "Regulations respecting the Laws and Customs of War on Land," adopted at The Hague July 29, 1899, "the attack or bombardment of towns, villages, habitations, or buildings which are not defended is prohibited."

In the deliberations of the second committee, the delegate from Italy proposed that this article should be made applicable to bombardments by naval forces. Objections were made to this proposal (1)

[a] 56. Impositions in kind (requisitions), levied upon communes, or the residents of invaded districts, should bear direct relation to the generally recognized necessities of war, and should be in proportion to the resources of the district. Requisitions can only be made, or levied, with the authority of the commanding officer of the occupied district.

58. The invader can not levy extraordinary contributions of money, save as an equivalent for fines or imposts not paid or for payments not made in kind. Contributions in money can only be imposed by the order, and upon the responsibility, of the general in chief, or that of the superior civil authority established in the occupied territory; and then, as nearly as possible, in accordance with the rule of apportionment and assessment of existing imposts.

because of the incompatibility of an absolute prohibition with the possible necessities of a naval force in regard to obtaining supplies, and (2) because of the inopportuneness of the proposal. The committee, on motion of its president, then expressed the opinion that the matter should be examined by a future conference. The British delegate, however, adverted to the fact that his Government had refused to take part in the Brussels Conference (1874) except on condition that naval questions should remain outside the deliberations. He added that he did not desire to touch the merits of the question, but to declare that for the reason indicated it was impossible for him to associate himself with the committee's expression of opinion; and at his request the fact that he abstained from voting on it was entered on the record.

The conference, in its final act, July 29, 1899, voted certain wishes, among which was the following:

"The conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent conference for consideration."

This wish formed one of five which "were voted unanimously, saving some abstentions," the English delegates having abstained from voting.

Conférence Internationale de la Paix, III. 27–28; Blue Book, Misc. No. 1 (1899), 289; For. Rel. 1899, 513, 520.

II. *MINES AND TORPEDOES.*

§ 1175.

In February, 1866, Admiral Nuñez, then in command of the Spanish fleet before Valparaiso, Chile, on hearing that an attempt would be made from the town to destroy his vessels with torpedoes, caused the Chilean Government to be informed that if such an attempt was made he would instantly open fire on the town.

March 3, 1866, Admiral Denman wrote to the Lords Commissioners of the Admiralty that he intended to use two of his ships to enforce twenty-four hours' delay before the Spanish squadron should open fire on Valparaiso, in the event of the use of torpedoes against the Spanish ships. This intention the lords considered "not to be justified by any rule of international law." April 16, 1866, Lord Clarendon instructed the British minister in Chile that he had consulted the law officers of the Crown on the subject, and that in the opinion of Her Majesty's Government the course which the Spanish admiral had declared he would pursue would, under the circumstances stated, "be justifiable by international law." "Her Majesty's Government," said Lord Clarendon, "think it impossible to deny the

belligerent right of Chile to employ torpedoes against the Spanish squadron; and equally impossible to deny the belligerent right of Spain to bombard the town which those instruments are employed to protect. In the opinion of Her Majesty's Government, however, it would be highly impolitic on the part of the Chilean Government to give cause to the Spanish commodore to put his threat into execution."

56 Brit. & For. State Papers (1865–1866), 937, 939.

"The employment of torpedoes is so recent a belligerent device that it is believed the powers as yet have had no opportunity to consider the general regulations, if any, to which they should be subjected. For this reason I now forbear to express any opinion upon the proceeding to which you advert," i. e., the indiscriminate placing by order of Turkey of torpedoes in the bed of the Danube during the war with Russia.

Mr. Evarts, Sec. of State, to Mr. Shishkin, Russian min., June 12, 1877, For. Rel. 1877, 476.

In 1880 the British minister at Lima reported to his Government that the Peruvians had, during the then pending war with Chile, made use of boats containing explosive materials, with the object of destroying the enemy's ships, and that in some instances these boats had been set adrift on the chance of their being fallen in with by some of the Chilean blockading squadron. The British minister was instructed by Lord Granville "to protest in the strongest manner against a practice which is fraught with so much danger to the vessels of neutral powers in the free navigation of the high seas, and to state that Her Majesty's Government will hold the Peruvian Government responsible for any damage which may be caused to British vessels by the practice in question."

Sir Edward Thornton, British min., to Mr. Evarts, Sec. of State, Jan. 17, 1881, MS. Notes from Great Britain.

With reference to the report that Peru had made use of "boats containing explosive materials," which had "in some instances been sent adrift *on the chance* of their being fallen in with by some of the Chilean blockading squadron," the American minister at Lima was instructed, should he find on inquiry the report to be well founded, to make a "strong representation" to the Peruvian Government, and to say that the United States must hold Peru responsible for any damage done to American vessels. A means of warfare so dangerous to neutrals, if it had been adopted, should, it was said, "be at once checked, not only for the benefit of Peru, but in the

interest of a wise and chivalrous warfare, which should constantly afford to neutral powers the highest possible consideration."

Mr. Evarts, Sec. of State, to Mr. Christiancy, No. 119, Jan. 25, 1881, For. Rel. 1881, 857.

During the insurrection in Brazil in 1893 the American minister at Rio de Janeiro reported that the commanders of foreign vessels had asked the insurgents to cease firing while they searched the harbor for floating torpedoes. The American minister asked whether he might join with his colleagues of the diplomatic corps to the end of securing like action on the part of the Government forts. The Department of State instructed him "to join in the request, which should be made to both parties, if the floating torpedoes are proving a damage to neutral vessels, that they permit the removal of those torpedoes."

Mr. Gresham, Sec. of State, to Mr. Thompson, min. to Brazil, tel., Nov. 17, 1893, For. Rel. 1893, 75.

"Under the direction of the Chief of Engineers submarine mines were placed at the most exposed points. Before the outbreak of the war permanent mining casemates and cable galleries had been constructed at nearly all important harbors. Most of the torpedo material was not to be found in the market, and had to be specially manufactured. Under date of April 19, district officers were directed to take all preliminary measures, short of the actual attaching of the loaded mines to the cables, and on April 22 telegraphic orders were issued to place the loaded mines in position.

"The aggregate number of mines placed was 1,535, at the principal harbors from Maine to California. Preparations were also made for the planting of mines at certain other harbors, but owing to the early destruction of the Spanish fleet these mines were not placed."

President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, LVI.

As to the notice given of the mines in New York Harbor, see Mr. Day, Sec. of State, to Sir J. Pauncefote, British ambass., May 11, 1898, MS. Notes to British Leg. XXIV. 183.

Accompanying the notice given by the United States of the placing of mines there were regulations for the navigation of the entrances to harbors, pending war.

At the conference at The Hague, in 1899, the president of the second subcommittee of the second committee suggested for discussion the subject of the use of submarine torpedo boats, intimating at the same time that if one nation adopted these terrible weapons all should be free to do so.

Capt. Siegel thought that, if other nations would agree not to adopt ships of this kind, Germany would adhere to the understanding.

Capt. Mahan reserved his opinion and that of his Government.

The Austro-Hungarian delegate said that his Government had no such boats which were not sufficiently developed to be of practical use. Personally he thought they might be employed for the defense of ports and roads and render very appreciable service.

The Danish delegate thought his Government would agree to forbid, if others would.

The French delegate thought they had an eminently defensive object, and it was not necessary to prohibit them.

The British delegate thought his Government would consent to forbid them if all the Great Powers would agree to do so.

The delegates of Italy and Japan expressed an opinion similar to that of Capt. Siegel.

The Netherlands delegate considered the submarine torpedo boat an arm of the feeble, and that it could not be forbidden.

The Russian delegate, with a reserve as to unanimity, was for prohibition.

The Siamese delegate reserved the question, (1) as he was instructed to adhere as far as possible to humane measures, but (2) as he thought it necessary seriously to consider the necessities of the defense of weak states.

The delegate of Sweden and Norway concurred with The Netherlands delegate.

The Turkish delegate wished to reserve the use of the weapon as a means of defense.

Conférence Internationale de la Paix, 1899, part 2, p. 88.

Captain Mahan, in his report on disarmament, with reference to navies, observes, in respect of his opposition to the proposal to forbid the use of projectiles the sole purpose of which was, on bursting, to spread asphyxiating or deleterious gases:

"3. That it was illogical, and not demonstrably humane, to be tender about asphyxiating men with gas, when all were prepared to admit that it was allowable to blow the bottom out of an ironclad at midnight, throwing four or five hundred into the sea, to be choked by water, with scarcely the remotest chance of escape." (Holls, 495.)

III. *CUTTING OF CABLES.*

§ 1176.

Article X. of the convention of 1884 for the protection of submarine cables outside territorial waters provides that, when there is reason to believe that an infraction of the convention has been "committed by a vessel other than a vessel of war," the master of the suspected vessel may be required to exhibit the official evidence of its nationality. Article XV. provides: "It is understood that the stipulations of this convention shall in nowise affect the liberty of action of belligerents." Lest there might, even after this article, be room

for misunderstanding, Lord Lyons offered in behalf of the British Government the following declaration: "Her Majesty's Government understands Article XV. in this sense, that, in time of war, a belligerent, a signatory of the convention, shall be free to act in regard to submarine cables as if the convention did not exist." The Belgian delegates submitted a declaration of the same tenor.

Submarine Telegraphic Cables in their International Relations, by George Grafton Wilson, Naval War College, Aug. 1901, 13.

During the war with Spain, officers of the United States on several occasions cut submarine cables owned by neutrals, in order to prevent the adversary from making use of them in furtherance of hostile designs. The protection of submarine cables outside territorial waters is regulated by the international convention signed at Paris, March 14, 1884. This convention, to which the United States is a party, expressly provides that its stipulations "shall in nowise affect the liberty of action of belligerents." The precedents as to such action, prior to the war with Spain, were not numerous, since communication by cables is a comparatively recent thing. On the outbreak of the war, the Government of the United States considered "the advantage of declaring telegraph cables neutral," and to that end directed its naval forces in Cuban waters to refrain from interfering with them till further orders. This inhibition evidently was soon revoked. Early in May, 1898, two out of three cables were cut near Cienfuegos, with a view to sever connection with Havana. On May 16, an unsuccessful effort was made to cut the Santiago de Cuba-Jamaica cables; and two days later one of them was severed 1.3 miles off Morro Castle. May 20, the cable connecting Cuba and Hayti was broken outside the marine league off Mole St. Nicholas. July 11, the cable connecting Santa Cruz del Sur, Trinidad, Cienfuegos, and Havana, with Manzanillo and the east of Cuba, was cut; as was also, five days later, the line connecting Santa Cruz and Jucaro. All or nearly all the cables were the property of neutrals. The neutral (British) cable from Bolinao, in the Philippines, to Hong Kong was cut by Admiral Dewey. In all these cases the object of the interruption was to confuse and frustrate the military operations, whether offensive or defensive, of the enemy.

Naval Operations of the War with Spain, 176, 186, 208, 209, 210, 211, 244, 255; and supra, § 1039.

IV. *PRISONERS.*

§ 1177.

"The Attorney-General of the United States has given it as his opinion, and in it I concur, that any American citizen, being a

pilot, may lawfully exercise his usual functions as pilot on board of any vessel of war; and if during his employment on board an engagement shall take place, his being on board is not to be considered as criminal, but accidental and innocent."

Mr. Randolph, Sec. of State, to Mr. Fauchet, Sept. 17, 1794, 7 MS. Dom. Let. 268.

A French decree "that every foreigner found on board the vessels of war or of commerce of the enemy is to be treated as a prisoner of war, and can have no right to the protection of the diplomatic and commercial agents of his nation," is in contravention of the law of nations.

Mr. Madison, Sec. of State, report, Jan. 25, 1806, 15 MS. Dom. Let. 70.

"9. The crews of blockade runners are not enemies and should be treated not as prisoners of war, but with every consideration. Any of the officers or crew, however, whose testimony before the prize court may be desired, should be detained as witnesses."

Instructions to U. S. Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781.

See Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, May 5, 1864, 64 MS. Dom. Let. 207.

Count Bismarck in 1870 denied that sailors on captured merchant vessels could be made prisoners of war, and threatened and executed reprisals on France for acting on that principle. (Hall, Int. Law, 5th ed. 407.)

After the outbreak of war between the United States and Spain in 1898, various Spanish merchant vessels, captured as prize by the American naval forces, were sent to Key West for judicial proceedings. The officers and crews, in order to afford them subsistence, were turned over to the military authorities and were "harbored and protected" at the Key West barracks. June 24, 1898, the United States, being desirous of making an arrangement for sending them away, notified the French ambassador, who was charged with the care of Spanish interests, that it would give instructions for their subsistence and protection on their way to a place of embarcation. June 30, 1898, notice was given that they would be sent to New York, where it was requested that they should be committed to the care of the consul-general of Austria-Hungary, to whom the protection of Spanish interests at that port was entrusted.

In a case where a Spanish brig flying the flag of Honduras was captured while attempting to run the blockade of Havana, and was condemned and ordered to be sold, the United States, while disclaiming any desire to detain the persons found on board, stated that it did not think itself under "any obligation to provide them with the means of transportation, especially as the devices resorted to by the

brig for the purpose of escaping lawful capture must have been known to those on board."

For. Rel. 1898, 789, 795–800.

The Spanish steamer *Panama*, while on a voyage from New York to Havana, was, after the outbreak of war, between the United States and Spain, captured as prize by the American naval forces. Among those found on board was a Spanish subject, who gave his name as Mr. Jiminez Zapatero. As he had in his possession a lot of coast charts, which he threw overboard, and as he had in his trunk epaulets and a sword, and admitted that he had some years before been an officer in the Spanish navy, he was held as a military person and was sent to Fortress Monroe as a prisoner of war. Orders were given to furnish him with accommodations and treat him according to the rank that he should claim, but, as he refused to make any statement beyond giving his name, he was held as a private. After the conclusion of the protocol of Aug. 12, 1898, as a preliminary to the conclusion of a peace, he was released.

For. Rel. 1898, 794, 798, 809.

During the war between the United States and Spain, in 1898, the officers and crews of various Spanish vessels which were captured as prize by the American forces were, while in the custody of the latter, allowed to send to and receive from their families in Spain open communications, as well as to correspond in the same manner with the owners of the vessels.

For. Rel. 1898, 789–790, 792, 793, 794.

In July, 1898, the United States proposed to allow 1,600 Spanish sailors held at Portsmouth, N. H., as prisoners of war, to return on parole if the Spanish Government would send a neutral ship for them.

The Spanish Government declined the offer on the ground that the Spanish naval code imposed a penalty upon prisoners of war who obtain their release by giving their promise not to bear arms again against the enemy. The Spanish Government added that, although this restriction would seem to apply rather to officers than to common seamen, from whom such an engagement was not generally expected, the ministry of marine did not feel itself in a position to consent to the adoption of a course with regard to one class of naval forces which would be punished as a fault with regard to another.

For. Rel. 1898, 996–998.

It was stated by the Japanese minister in Washington, on April 9, 1904, that his Government had released all the passengers on board

of Russian merchant vessels captured by Japanese cruisers, and even the officers and members of the crew, except those whose presence was deemed necessary in the trial before the admiralty court.

For. Rel. 1904, 433, 434.

In May, 1904, the Japanese Government sought the return by Russia of the crew of a Japanese vessel which had been sunk by the Russian fleet off the coast of Corea, as had been done by the Russians in the case of another Japanese vessel. The matter was submitted to the viceroy who, "for considerations pertaining to the war," declined to grant the request. (For. Rel. 1904, 435, 436, 721.)

V. *TREATMENT OF SICK AND WOUNDED.*

§ 1178.

Additional articles to the Geneva Convention.

By a convention signed at Geneva, Oct. 20, 1868, by representatives of North Germany, Austria, Baden, Bavaria, Belgium, Denmark, France, Great Britain, Italy, The Netherlands, Sweden and Norway, Switzerland, Turkey, and Wurtemburg, fifteen articles were proposed to be added to the convention of Aug. 22, 1864. Of these articles, ten (VI.–XV., inclusive) related to marine warfare.

In the subsequent discussions, an amendment to Art. IX. was proposed by France; and in a correspondence between England and France, Art. X. was elucidated. The fifteen articles, commonly called the "additional articles of 1868," with the French amendment to Art. IX. in brackets, and the elucidations of Art. X. annexed to the text, are as follows:

"Article I. The persons designated in Article II of the Conventon shall, after the occupation by the enemy, continue to fulfil their duties, according to their wants, to the sick and wounded in the ambulance or the hospital which they serve. When they request to withdraw, the commander of the occupying troops shall fix the time of departure, which he shall only be allowed to delay for a short time in case of military necessity.

"Art. II. Arrangements will have to be made by the belligerent powers to ensure to the neutralized person, fallen into the hands of the army of the enemy, the entire enjoyment of his salary.

"Art. III. Under the conditions provided for in Articles I. and IV. of the Convention, the name 'ambulance' applies to field hospitals and other temporary establishments, which follow the troops on the field of battle to receive the sick and wounded.

"Art. IV. In conformity with the spirit of Article V. of the Convention, and to the reservations contained in the protocol of 1864, it is explained that for the appointment of the charges relative to the quartering of troops, and of the contributions of war, account only

shall be taken in an equitable manner of the charitable zeal displayed by the inhabitants.

"ART. V. In addition to Article VI. of the Convention, it is stipulated that, with the reservation of officers whose detention might be important to the fate of arms and within the limits fixed by the second paragraph of that article, the wounded fallen into the hands of the enemy shall be sent back to their country after they are cured, or sooner, if possible, on condition, nevertheless, of not again bearing arms during the continuance of the war.

"ARTICLES CONCERNING NAVAL FORCES.

"ART. VI. The boats which, at their own risk and peril, during and after an engagement pick up the shipwrecked or wounded, or which, having picked them up, convey them on board a neutral or hospital ship, shall enjoy, until the accomplishment of their mission, the character of neutrality, so far as the circumstances of the engagement and the position of the ships engaged will permit.

"The appreciation of these circumstances is entrusted to the humanity of all the combatants. The wrecked and wounded thus picked up and saved must not serve again during the continuance of the war.

"ART. VII. The religious, medical, and hospital staff of any captured vessel are declared neutral, and, on leaving the ship, may remove the articles and surgical instruments which are their private property.

"ART. VIII. The staff designated in the preceding article must continue to fulfil their functions in the captured ship, assisting in the removal of the wounded made by the victorious party; they will then be at liberty to return to their country, in conformity with the second paragraph of the first additional article.

"The stipulations of the second additional article are applicable to the pay and allowance of the staff.

"ART. IX. The military hospital ships remain under martial law in all that concerns their stores; they become the property of the captor, but the latter must not divert them from their special appropriation during the continuance of the war.

"[The vessels not equipped for fighting, which, during peace, the government shall have officially declared to be intended to serve as floating hospital ships, shall, however, enjoy during the war complete neutrality, both as regards stores, and also as regards their staff, provided their equipment is exclusively appropriated to the special service on which they are employed.]

"ART. X. Any merchantman, to whatever nation she may belong, charged exclusively with removal of sick and wounded, is protected by neutrality, but the mere fact, noted on the ship's books, of the

vessel having been visited by an enemy's cruiser, renders the sick and wounded incapable of serving during the continuance of the war. The cruiser shall even have the right of putting on board an officer in order to accompany the convoy, and thus verify the good faith of the operation.

"If the merchant ship also carries a cargo, her neutrality will still protect it, provided that such cargo is not of a nature to be confiscated by the belligerents.

"The belligerents retain the right to interdict neutralized vessels from all communication, and from any course which they may deem prejudicial to the secrecy of their operations. In urgent cases special conventions may be entered into between commanders-in-chief, in order to neutralize temporarily and in a special manner the vessels intended for the removal of the sick and wounded.

"ART. XI. Wounded or sick sailors and soldiers, when embarked, to whatever nation they may belong, shall be protected and taken care of by their captors.

"Their return to their own country is subject to the provisions of Article VI. of the Convention, and of the additional Article V.

"ART. XII. The distinctive flag to be used with the national flag, in order to indicate any vessel or boat which may claim the benefits of neutrality, in virtue of the principles of this Convention, is a white flag with a red cross. The belligerents may exercise in this respect any mode of verification which they may deem necessary.

"Military hospital ships shall be distinguished by being painted white outside, with green strake.

"ART. XIII. The hospital ships which are equipped at the expense of the aid societies, recognized by the governments signing this Convention, and which are furnished with a commission emanating from the sovereign, who shall have given express authority for their being fitted out, and with a certificate from the proper naval authority that they have been placed under his control during their fitting out and on their final departure, and that they were then appropriated solely to the purpose of their mission, shall be considered neutral as well as the whole of their staff. They shall be recognized and protected by the belligerents.

"They shall make themselves known by hoisting, together with their national flag, the white flag with a red cross. The distinctive mark of their staff, while performing their duties, shall be an armlet of the same colors. The outer painting of these hospital ships shall be white, with red strake.

"These ships shall bear aid and assistance to the wounded and wrecked belligerents, without distinction of nationality.

"They must take care not to interfere in any way with the movements of the combatants. During and after the battle they must do their duty at their own risk and peril.

"The belligerents shall have the right of controlling and visiting them; they will be at liberty to refuse their assistance, to order them to depart, and to detain them if the exigencies of the case require such a step.

"The wounded and wrecked picked up by these ships can not be reclaimed by either of the combatants, and they will be required not to serve during the continuance of the war.

"ART. XIV. In naval wars any strong presumption that either belligerent takes advantage of the benefits of neutrality, with any other view than the interest of the sick and wounded, gives to the other belligerent, until proof to the contrary, the right of suspending the Convention as regards such belligerent.

"Should this presumption become a certainty, notice may be given to such belligerent that the Convention is suspended with regard to him during the whole continuance of the war.

"ART. XV. The present act shall be drawn up in a single original copy, which shall be deposited in the archives of the Swiss Confederation.

"An authentic copy of this Act shall be delivered, with an invitation to adhere to it, to each of the signatory Powers of the Convention of the 22d of August, 1864, as well as to those that have successively acceded to it."

The interpretation placed by France and England on Art. X. is to the following effect:

"The question being raised as to whether, under Article X., a vessel might not avail herself of the carrying of sick or wounded to engage with impunity in traffic otherwise hazardous under the rules of war, it was agreed that there was no purpose in the articles to modify in any particular the generally admitted principles concerning the rights of belligerents; that the performance of such services of humanity could not be used as a cover either for contraband of war or for enemy merchandise; and that every boat which or whose cargo would, under ordinary circumstances, be subject to confiscation can not be relieved therefrom by the sole fact of carrying sick and wounded.

"Question being raised as to whether, under Article X., an absolute right was afforded to a blockaded party to freely remove its sick and wounded from a blockaded town, it was agreed that such removal or evacuation of sick and wounded was entirely subject to the consent of the blockading party. It should be permitted for humanity's sake where the superior exigencies of war may not inter-

vene to prevent, but the besieging party might refuse permission entirely."

The full text of the French interpretation is as follows:

"The second paragraph of the additional Article X. reads thus: 'If the merchant ship also carries a cargo, her neutrality will still protect it, provided that such cargo is not of a nature to be confiscated by the belligerent.'

"The words 'of a nature to be confiscated by the belligerent' apply equally to the nationality of the merchandise and to its quality.

"Thus, according to the latest international conventions, the merchandise of a nature to be confiscated by a cruiser are—

"First. Contraband of war under whatever flag.

"Second. Enemy merchandise under enemy flag.

"The cruiser need not recognize the neutrality of the vessel carrying wounded if any part of its cargo shall, under international law, be comprised in either of these two categories of goods.

"The faculty given by the paragraph in question to leave on board of vessels carrying wounded a portion of the cargo is to be considered as a facility for the carriage of freight, as well as a valuable privilege in favor of the navigability of merchant vessels if they be bad sailors when only in ballast; but this faculty can in no wise prejudice the right of confiscation of the cargo within the limits fixed by international law.

"Every ship the cargo of which would be subject to confiscation by the cruiser under ordinary circumstances is not susceptible of being covered by neutrality by the sole fact of carrying in addition sick or wounded men. The ship and the cargo would then come under the common law of war, which has not been modified by the convention except in favor of the vessel exclusively laden with wounded men, or the cargo of which would not be subject to confiscation in any case. Thus, for example, the merchant ship of a belligerent laden with neutral merchandise and at the same time carrying sick and wounded is covered by neutrality.

"The merchant ship of a belligerent carrying, besides wounded and sick men, goods of the enemy of the cruiser's nation or contraband of war is not neutral, and the ship, as well as the cargo, comes under the common law of war.

"A neutral ship carrying, in addition to wounded and sick men of the belligerent, contraband of war also is subject to the common law of war.

"A neutral ship carrying goods of any nationality, but not contraband of war, lends its own neutrality to the wounded and sick which it may carry.

"In so far as concerns the usage which expressly prohibits a cartel ship from engaging in any commerce whatsoever at the point of

arrival, it is deemed that there is no occasion to specially subject to that inhibition vessels carrying wounded men, because the second paragraph of Article X. imposes upon the belligerents, equally as upon neutrals, the exclusion of the transportation of merchandise subject to confiscation.

"Moreover, if one of the belligerents should abuse the privilege which is accorded to him, and under the pretext of transporting the wounded should neutralize under its flag an important commercial intercourse which might in a notorious manner influence the chances or the duration of the war, Article XIV. of the convention could justly be invoked by the other belligerent.

"As for the second point of the British Government, relative to the privilege of effectively removing from a city, besieged and blockaded by sea, under the cover of neutrality, vessels bearing wounded and sick men, in such a way as to prolong the resistance of the besieged, the convention does not authorize this privilege. In according the benefits of a neutral status of a specifically limited neutrality to vessels carrying wounded, the convention could not give them rights superior to those of other neutrals who can not pass an effective blockade without special authorization. Humanity, however, in such a case, does not lose all its rights, and, if circumstances permit the besieging party to relax the rigorous rights of the blockade, the besieged party may make propositions to that end in virtue of the fourth paragraph of Article X."

In 1870 the French and North German Governments, although the additional articles had not become internationally effective, provisionally accepted them, together with the English-French interpretations of Articles IX. and X., as a modus vivendi applicable, by land and by sea, to the war then in progress.

The Spanish Government, by a note of Sept. 7, 1872, declared its readiness to adhere to the articles.

The President of the United States, March 1, 1882, acceded both to the convention of 1864 and the additional articles of 1868; but, in his proclamation of July 26, 1882, promulgating the convention of 1864, the promulgation of the accession to the additional articles was reserved till the signatory powers should render them internationally effective by the exchange of ratifications. By an instruction to its minister at Berne, Jan. 20, 1883, the United States reserved the right to omit the bracketed amendment to Art. IX. of the additional articles, and to make "any other necessary corrections" if the exchange of ratifications should be completed between the signatory and adhering powers. This instruction apparently was suggested by the discovery that the amendment, which appeared in brackets in the English text in the possession of the Department of State, was not to be found in the original French text adopted at Geneva, Oct. 20,

1868. It seems that the United States was never furnished with the amendment and elucidations till May 4, 1898.

On the breaking out of hostilities with Spain, however, in April, 1898, the United States commissioned the ambulance ship *Solace* to accompany the Atlantic fleet as a noncombatant hospital ship, to render aid to the sick, wounded, and dying, according to the spirit of the additional articles. To this end the Government issued the following order:

"General Orders, No. 487. } Navy Department, *Washington, April 27, 1898.*

"The *Solace* having been fitted and equipped by the Department as an ambulance ship for the naval service under the terms of the Geneva Convention is about to be assigned to service.

"The Geneva Cross flag will be carried at the fore whenever the national flag is flown.

"The neutrality of the vessel will, under no circumstances, be changed, nor will any changes be made in her equipment without the authority of the Secretary of the Navy.

"No guns, ammunition, or articles contraband of war, except coal or stores necessary for the movement of the vessel, shall be placed on board; nor shall the vessel be used as a transport for the carrying of dispatches, or officers or men not sick or disabled, other than those belonging to the medical department.

"Information as to the special work for which the *Solace* is intended will be communicated to the commander in chief of the squadron by the Department.

"John D. Long, *Secretary.*"

Contemporaneously the Swiss Government, as the organ of the signatories of the Geneva Convention, proposed both to the United States and to Spain that they adopt the additional articles as a modus vivendi during the existence of hostilities. This proposal was accepted by both Governments with the amendments of Art. IX. and the elucidation of Article X., above noted.

For. Rel. 1898, 1148, 1150, 1151, 1155; U. S. Treaty Vol. (1776–1887), 1155.

As to the use of the American hospital ship *Maine* in Chinese waters in 1900, see For. Rel. 1900, 31–33.

The Hague Convention.

The Russian circular of Dec. 30, 1898, embodying the programme of The Hague Conference, contained the following articles:

"5. Adaptation to naval war of the stipulations of the Geneva Convention of 1864, on the basis of the additional articles of 1868.

"6. Neutralization, for the same reason, of boats or launches employed in the rescue of the shipwrecked during or after naval battles."

The American delegates to the conference were instructed to give their "earnest support" to "any practicable propositions" based on those articles.

A convention on the subject was adopted by the conference, but, although the "general purpose" of the convention "elicited the especial sympathy" of the American delegates, a neglect of what seemed to them "a question of almost vital importance, namely, the determination of the status of men picked up by the hospital ships of neutral states or by other neutral vessels," led them to refrain from signing the convention and to submit the matter with full explanations to the Department of State. The convention was afterwards signed by the United States, with a reservation as to Art. X. The same reservation was made by Germany, Great Britain, and Turkey.

For. Rel. 1899, 512, 515–516, 535–536.

All the signatory powers being in favor of the exclusion of Art. X. of the convention of The Hague for the application of the Geneva Convention to maritime warfare, the Russian Government suggested that the text of the article be superseded by the word "excluded," leaving the number of the articles unchanged. This was done.

Mr. Hay, Sec. of State, to Baron Gevers, No. 3, May 1, 1900, MS. Notes to Netherlands Leg. VIII. 434.

Art. X. reads as follows: "The shipwrecked, wounded, or sick, who are landed at a neutral port with the consent of the local authorities, must, failing a contrary agreement between the neutral State and the belligerents, be guarded by the neutral State, so that they can not again take part in the military operations.

"The expenses of entertainment and interment shall be borne by the State to which the shipwrecked, wounded, or sick belong." (For. Rel. 1899, 535.)

"Article I. Military hospital ships, that is to say, ships constructed or assigned by States specially and solely for the purpose of assisting the wounded, sick or shipwrecked, and the names of which shall have been communicated to the belligerent Powers at the beginning or during the course of hostilities, and in any case before they are employed, shall be respected and can not be captured while hostilities last.

"These ships, moreover, are not on the same footing as men-of-war as regards their stay in a neutral port.

"Article II. Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognized relief Societies, shall likewise be respected and exempt from capture, provided the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the com-

mencement of or during hostilities, and in any case before they are employed.

"These ships should be furnished with a certificate from the competent authorities, declaring that they had been under their control while fitting out and on final departure.

"ARTICLE III. Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognized Societies of neutral countries, shall be respected and exempt from capture, if the neutral Power to whom they belong has given them an official commission and notified their names to the belligerent powers at the commencement of or during hostilities, and in any case before they are employed.

"ARTICLE IV. The ships mentioned in Articles I., II., and III. shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents independently of their nationality.

"The Governments engage not to use these ships for any military purpose.

"These ships must not in any way hamper the movements of the combatants.

"During and after an engagement they will act at their own risk and peril.

"The belligerents will have the right to control and visit them; they can refuse to help them, order them off, make them take a certain course, and put a Commissioner on board; they can even detain them, if important circumstances require it.

"As far as possible the belligerents shall inscribe in the sailing papers of the hospital ships the orders they give them.

"ARTICLE V. The military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a metre and a half in breadth.

"The ships mentioned in Articles II. and III. shall be distinguished by being painted white outside with a horizontal band of red about a metre and a half in breadth.

"The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

"All hospital ships shall make themselves known by hoisting, together with their national flag, the white flag with a red cross provided by the Geneva Convention.

"ARTICLE VI. Neutral merchantmen, yachts, or vessels, having, or taking on board, sick, wounded, or shipwrecked of the belligerents, can not be captured for so doing, but they are liable to capture for any violation of neutrality they may have committed.

"ARTICLE VII. The religious, medical, or hospital staff of any captured ship is inviolable, and its members can not be made prisoners of war. On leaving the ship they take with them the objects and surgical instruments which are their own private property.

"This staff shall continue to discharge its duties while necessary, and can afterwards leave when the commander-in-chief considers it possible.

"The belligerents must guarantee to the staff that has fallen into their hands the enjoyment of their salaries intact.

"ARTICLE VIII. Sailors and soldiers who are taken on board when sick or wounded, to whatever nation they belong, shall be protected and looked after by the captors.

"ARTICLE IX. The shipwrecked, wounded, or sick of one of the belligerents who fall into the hands of the other, are prisoners of war. The captor must decide, according to circumstances, if it is best to keep them or send them to a port of his own country, to a neutral port, or even to a hostile port. In the last case, prisoners thus repatriated can not serve as long as the war lasts.

"ARTICLE X. (Excluded.)

"ARTICLE XI. The rules contained in the above articles are binding only on the Contracting Powers, in case of War between two or more of them.

"The said rules shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents is joined by a non-Contracting Power.

"ARTICLE XII. The present Convention shall be ratified as soon as possible.

"The ratifications shall be deposited at The Hague.

"On the receipt of each ratification a *procès-verbal* shall be drawn up, a copy of which, duly certified, shall be sent through the diplomatic channel to all the Contracting Powers.

"ARTICLE XIII. The non-Signatory Powers who accepted the Geneva Convention of the 22nd August, 1864, are allowed to adhere to the present convention.

"For this purpose they must make their adhesion known to the Contracting Powers by means of a written notification addressed to the Netherlands Government, and by it communicated to all the other Contracting Powers.

"ARTICLE XIV. In the event of one of the High Contracting Parties denouncing the present Convention, such denunciation shall not take effect until a year after the notification made in writing to the Netherlands Government, and forthwith communicated by it to all the other Contracting Powers.

"This denunciation shall only affect the notifying Power."

Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864, signed at The Hague, July 29, 1899; ratification advised by the Senate May 4, 1900; proclaimed Nov. 1, 1901, 32 Stat. II. 1827.

VI. *COMMERCIAL INTERCOURSE.*

1. Right of Neutrals to Trade.

§ 1179.

Neutrals have the right to continue during war to trade with the belligerents, subject to the law relating to contraband and blockade. The existence of this right is universally admitted, although on certain occasions it has been in practice denied. Of those occasions the most memorable are the wars growing out of the French Revolution, and the Napoleonic wars that succeeded the breach of the peace of Amiens, when French decrees and British orders in council assumed to dictate the trade in which neutrals should be permitted to engage or to prohibit them from trading with belligerents altogether.

As to the British orders in council of 1793–1795, see Moore, Int. Arbitrations, Chap. X., Neutral Rights and Duties, Vol. I., p. 299.

As to the French decrees of 1793–1798, see Moore, Int. Arbitrations, V. 4399 et seq., and supra, § 821.

As to the French decrees and British orders in council during the Napoleonic wars, see Moore, Int. Arbitrations, V. 4447–4456, and supra, § 821.

In discussing the controversy in 1810–11 between Great Britain and the United States in respect to the orders in council, the Edinburgh Review thus speaks:

"It was long the anxious business of the American minister, as appears from the documents before us, to procure by persuasion an abandonment of the measures hostile to the American trade. He urged his case on views of justice and of general policy; he calmly combated the pretexts by which he was met; he boldly and pointedly asserted, that the claims of this country must, sooner or later, be abandoned; and he added, what ought never to be forgotten, that they were unjust, and that time, therefore, could do nothing for them. His representations were met by declarations of 'what His Majesty owed to the honour, dignity, and essential rights of his crown,' and by all the other sounding commonplaces usual on such occasions. These sentiments were afterwards explained at greater length, and promulgated to the world in the deliberate record of a state paper. But in spite of the honour of Majesty thus pledged to these obnoxious measures, *they were repealed*. A laborious investigation into their merits ended in their unqualified reprobation and abandonment; their authors were unable to look in the face the scenes of beggary, disorder and wretchedness, which their policy had brought on the country; they were borne down by the cries of suffering millions; and they yielded at length to necessity, what they had formerly refused to justice. This was clearly, therefore, an act of unwilling submission. It

bore not the stamp of conciliation; and the only inference to be drawn from it was, that the plotters of mischief, being fairly caught in their own snare, were glad to escape, on any terms, from the effects of their ill-considered measures. . . . There is not a man in the Kingdom who can doubt, that if the orders in council had been rescinded six months sooner, the war might have been entirely avoided, and all other points of difference between the countries adjusted upon an amicable footing."

20 Edinburgh Review (Nov. 1812), 453, 459.

See, as to rights of trade, Hennebicq, Principes de droit maritime comparé; Schaps, Das Deutsche Seerecht.

2. Rule of 1756; "Continuous Voyages."

§ 1180.

Under the rule of colonial monopoly that universally prevailed in the eighteenth century, the trade with colonial possessions was exclusively confined to vessels of the home country. In 1756 the French, being, by reason of England's maritime supremacy, unable longer to carry on trade with their colonies in their own bottoms, and being thus deprived of colonial succor, issued licenses to Dutch vessels to take up and carry on the prostrate trade. Thereupon the British minister at The Hague, by instruction of his Government, announced to the Government of the Netherlands that Great Britain would in future enforce the rule that neutrals would not be permitted to engage in time of war in a trade from which they were excluded in time of peace. The restriction thus announced was enforced by the British Government through its prize courts. It has since been known as "the rule of the war of 1756." It was against it that the first article of the declaration of the Empress of Russia of 1780, which formed the basis of the armed neutrality, was leveled, in affirming the right of neutrals to trade from port to port on the coasts of the powers at war.

In the wars growing out of the French Revolution, in which the rule was revived, American vessels, which had then come upon the seas as neutral carriers, sought to avoid its application by first bringing the cargo to the United States and thence carrying it on to its European or colonial destination, as the case might be. To thwart this mode of prosecuting the trade, Sir William Scott applied what was called the doctrine of continuous voyages.

Wheaton, in a note to the first volume of his reports, p. 507, Appendix, discusses the rule of the war of 1756, and quotes a long passage from William Pinkney's Memorial to Congress from the Merchants of Baltimore. For this able document, see Chitty's Law of Nations, App.; Wheaton's Life of Pinkney, 372; Pinkney's Life of Pinkney, 158.

"The doctrine of continued or continuous voyages, which Sir W. Scott, afterwards Lord Stowell, originated, deserves to be noticed, and may be noticed here, although it first arose in reference to colonial trade with another country, carried on by neutrals. As the English courts condemned such trade, the neutrals in the first part of this century, especially shippers and captains belonging to the United States, tried to evade the rule by stopping at a neutral port and seeming to pay duties, and then, perhaps, after landing and relading the cargoes, carried them to the mother country of the colony. The motive for this was, that if the goods in question were *bona fide* imported from the neutral country, the transaction was a regular one. The courts held, that if an original intention could be proved of carrying the goods from the colony to the mother country, the proceedings in the neutral territory, even if they amounted to landing goods and paying duties, could not overcome the evidence of such intention; the voyage was really a continued one artfully interrupted, and the penalties of law had to take effect. Evidence, therefore, of original intention and destination was the turning point in such cases."

Woolsey, Int. Law, § 207, p. 355, citing The Polly, 2 Rob. 361–372; The Martin, 5 Rob. 365–372; The William, id. 385–406.

The advantages claimed to be derived by Great Britain from the adoption of the rule of continuity, and the injury inflicted on neutrals by the application of this restriction, are thus stated in the London Quarterly Review: "It will be sufficient for our purpose to observe, that so far was the rule of 1756 relaxed, that the ports of the United States of America became so many entrepôts for the manufactures and commodities of France, Spain, and Holland, from whence they were reexported, under the American flag, to their respective colonies; they brought back the produce of those colonies to the ports of America; they reshipped them for the enemies' ports of Europe; they entered freely all the ports of the United Kingdom, with cargoes brought directly from the hostile colonies; thus, in fact, not only carying on the whole trade of one of the belligerents, which that belligerent would have carried on in time of peace, but superadding their own and a considerable part of ours. Valuable cargoes of bullion and specie and spices were nominally purchased by Americans, in the eastern colonies of the enemy, and wafted under the American flag to the real hostile proprietors. One single American house contracted for the whole of the merchandise of the Dutch East India Company at Batavia, amounting to no less a sum than one million seven hundred thousand pounds sterling. The consequence was, that, while not a single merchant ship belonging to the enemy crossed the Atlantic, or doubled the Cape of Good Hope, the

produce of the eastern and western worlds sold cheaper in the markets of France and Holland than in our own. . . . The commerce of England became every month more languid and prostrate, till reduced, as justly observed by a member of the House of Commons, 'to a state of suspended animation.'"

7 London Quarterly Review (March, 1812), 5, 8.

"The British rule, proclaimed in 1756, by which 'direct trade with the enemies' colonies was made subject to restrictions,' is discussed in a work under the title of 'An examination of the British doctrine which subjects to capture a neutral trade, not open in time of peace,' written by Mr. Madison. (See 2 Madison's Works, 229.) The British view of the question is stated in a pamphlet, by Mr. James Stephen, entitled 'War in Disguise.' The object of the British Government, in which it was zealously supported by Sir W. Scott, was to stamp with illegality voyages from French or Dutch colonies to the United States and from thence to France or Holland. To sustain this the doctrine of 'continuity of voyages' was invented, a doctrine which was caught up and applied in the case of the *Springbok*. The doctrine, as applied by the British admiralty courts in 1801, was that unless a ship from a French colony landed her goods and paid her duties in the port of the United States to which she intermediately resorted on her way to France, her voyage to the United States was to be held to be continuous with that from the United States to France. In 1805, however, it was held in the case of the *Essex*, that if the duties were not actually paid, but were provided for by means of debentures, the importation into the United States was not *bona fide*, and the voyage was held to be continuous, notwithstanding the goods were disembarked in New York. But aside from the technical difficulties attending the doctrine of continuous voyages, as thus stated, and the ruin to which it subjects neutral interests, it is repugnant to those principles of sovereignty which are at the basis of international law. A sovereign has a right to regulate his trade as he chooses. He may impose tariffs, embargoes, nonintercourse, as he deems best. He may say, 'At peace no one shall trade with my colonies but myself.' If he has power to impose one kind of limitation in peace, he can impose another kind of limitation in war. Since no one disputes a neutral's right to trade between ports of the mother country, it is difficult to see on what ground rests the denial of a neutral's right to trade between the port of a colony and that of the mother country. War necessarily greatly abridges neutral commerce by exposing it to confiscation for contraband and for blockade-running. To permit one belligerent to shut out neutrals from a commerce which the other belligerent may open to them, such commerce not being in contraband of war or in evasion of blockade, would

impose upon neutrality burdens so intolerable as to make war, on its part, preferable to peace. The doctrine of 'continuous voyages,' also, as thus interpreted, is open to all the objections of a paper blockade; it enables a belligerent cruiser to seize all neutrals going to a belligerent port if they hold produce of the colonies of that belligerent, though there be no pretense of a blockade of either colony or the mother state. Great Britain, also, it was urged, had no right to complain of this relaxation by a hostile sovereign of his colonial regulations, since she had repeatedly varied in war her colonial policy of trade, relaxing it so as to enable her colonies to have the advantage of neutral commerce."

Wharton Int. Law Digest, III. 501, § 388, citing 2 Lyman's Diplomacy of the United States, chap. i.

The following proposal was made: "And it is to be particularly understood that under the denomination of enemy's property is not to be comprised the merchandise of the growth, produce, or manufactures of the countries or dominions at war which shall have been acquired by the citizens or subjects of the neutral power, and shall be transported for their account, which merchandise can not in any case or on any pretext be excepted from the freedom of the neutral flag."

On this Mr. Madison makes the following observations:

"This enumeration of contraband articles is copied from the treaty of 1781 between Great Britain and Russia. It is sufficiently limited, and that treaty is an authority more likely than any other to be respected by the British Government. The sequel of the article, which protects the productions of an hostile colony converted into neutral property, is taken from the same model, with the addition of the terms 'in any case or on any pretext.' This addition is meant to embrace more explicitly our right to trade freely with the colonies at war with Great Britain and between them and all parts of the world in colonial productions, being at the time not enemy's but neutral property; a trade equally legitimate in itself with that between neutral countries directly and in their respective vessels and such colonies, which her regulations do not contest.

"In support of this right, in opposition to the British doctrine that a trade not allowed by a nation in time of peace can not be opened to neutrals in time of war, it may be urged that all nations are in the practice of varying more or less in time of war, their commercial laws from the state of these laws in time of peace, a practice agreeable to reason as well as favorable to neutral nations; that the change may be made in time of war on considerations not incident to a state of war, but on such as are known to have the same effect in time of peace; that Great Britain herself is in the regular practice of changing her navigation and commercial laws in times of war, particularly

in relation to a neutral intercourse with her colonies; that at this time she admits a trade between neutral countries and the colonies of her enemies, when carried on directly between them or between the former and herself, interrupting only a direct trade between such colonies and their parent state, and between them and countries in Europe, other than those to which the neutral trade may respectively belong; that as she does not contest the right of neutrals to trade with hostile colonies within these limitations, the trade can be and actually is carried on indirectly between such colonies and all countries, even those to which the colonies belong; and consequently that the effect of her doctrine and her practice is not to deprive her enemy of their colonial trade, but merely to lessen the value of it in proportion to the charges incident to the circuitous course into which it is forced, an advantage to her which, if just in itself, would not be sufficiently so to balance the impolitic vexations accruing to neutral and friendly nations."

Mr. Madison, Sec. of State, to Mr. Monroe, min. to England, Jan. 5, 1804, MS. Inst. U. States Ministers, VI. 161.

"With respect to the particular rights to be placed under the guaranty of a general treaty of peace, it will naturally occur that the one having the first place in the wishes of the United States is that which is at present violated by the British principle subjecting to capture every trade opened by a belligerent to a neutral nation during war, . . . It will be recollected that this right stands foremost in the list comprised in the two plans of armed neutrality in 1780 and 1800. In general it is to be understood that the United States are friendly to the principles of those conventions, and would see with pleasure all of them effectually and permanently recognized as principles of the established law of nations."

Mr. Madison, Sec. of State, to Mr. Armstrong, min. to France, March 14, 1806, MS. Inst. U. States, Ministers, VI. 322.

An action was brought on certain policies of insurance on the brig *Salmon* and her cargo, in which policies it was declared (1) that the assurance was made only against the capture by the British, and (2) that the brig was warranted to be an American bottom and her cargo American property. It appeared that the brig when captured had just left Port au Paix, whither she had carried a cargo of flour from Philadelphia under a contract with the French minister. At Port au Paix she was compelled to take on board a French officer and a few soldiers, all of whom were invalids, to bring them for their health to America. The brig when captured was taken to Bermuda, where with her cargo she was condemned. The libel set forth various causes of condemnation, but the decree of condemnation was

general and specified no particular cause of forfeiture. McKean, C. J., delivering the opinion of the court, said the first ground of defense to the action was that the vessel was engaged in trade with the French islands, which, being unlawful before the war, must be regarded as unneutral afterwards. He rejected this view, maintaining that there was no violation of neutrality. The mere acceptance of a bounty to commerce, such as the opening of a free port or the relinquishment of duties, was not an act of partiality or unneutral. The colonial governments of Great Britain herself had even invited in time of war the trade which was forbidden in time of peace. The true rule, said Chief Justice McKean, was that the neutral power should not do any act in favor of the commercial or military operations of one of the belligerents; or, in other words, it should not by treaty afford succor or grant a privilege which was not stipulated for previously to the war. The second ground of defense was that the decree of condemnation alleged the property to be French, and that this was conclusive. This could not be admitted. The libel contained various allegations, but as the decree of condemnation was general it could not be said to have affirmed any particular one. Evidence might be received to establish the American ownership. The court observed that an American citizen might lawfully at any time carry flour and other articles of provision or despatches for a French minister from an American to a French port. The third ground of defense was that there was a concealment of material facts in regard to the risk. The court held that this was not supported by the testimony. The court observed that the cargo was at the risk of the plaintiff till it was actually delivered; and he had "never heard of any law, in any civilized nation, that deemed it contraband, or unlawful, to carry a few, unarmed, invalid sodliers, to a neutral country, in pursuit of health and refreshment." The fourth ground of defense was that some household furniture on board, belonging to the passengers, came within the description of cargo, and that the warranty therefore had not been strictly performed. The court said that household furniture could not be regarded as baggage and must constitute a part of the cargo, but that the exception could not be admitted under the peculiar circumstances of the shipment in question. In conclusion the court held that the plaintiff was entitled to recover.

Vasse *v.* Ball, Supreme Court of Pa., 2 Dall. 270.

An American vessel in April, 1812, before the declaration of war by the United States against Great Britain, sailed from Boston, with a cargo of merchandise, to Liverpool and the north of Europe, and thence directly or indirectly to the United States. Having discharged her cargo, she sailed from England in June, 1812, with

another cargo, to St. Petersburg, under a British license authorizing her to import a return cargo into England. In October, 1812, with knowledge of the declaration of war, she sailed with a cargo from St. Petersburg for London. In May, 1813, having discharged her cargo, she sailed from England for the United States in ballast and with a British license. Having been captured, her restitution was claimed on the ground, among others, that she was not taken in delicto, having finished her "offensive voyage" at London. "It is not denied," said Washington, J., delivering the opinion of the court, "that if she be taken during the same voyage in which the offense was committed, though after it was committed, she is considered as being still *in delicto*, and subject to confiscation; but it is contended that her voyage ended at London; and that she was, on her return, embarked on a new voyage. This position is directly contrary to the facts in the case. The voyage was an entire one from the United States to England, thence to the north of Europe, and thence directly or indirectly to the United States. Even admit that the outward and homeward voyages could be separated, so as to render them two distinct voyages, which is not conceded, still it can not be denied that the *termini* of the homeward voyage were St. Petersburg and the United States. The continuity of such a voyage can not be broken by voluntary deviation of the master for the purpose of carrying on an intermediate trade. That the going from St. Petersburg to London was not undertaken as a new voyage, is admitted by the claimants, who allege that it was undertaken as subsidiary to their voyage to the United States. It was, in short, a voyage from St. Petersburg to the United States by the way of London; and, consequently, the vessel, during any part of that voyage, if seized for conduct subjecting her to confiscation as prize of war, was seized *in delicto*."

The Joseph (1814), 8 Cranch, 451, 454.

The American ship *Grotius* sailed from Portsmouth, New Hampshire, March 2, 1812, on a voyage to one or more southern ports, from thence to one or more ports in Europe, and back to her port of discharge in the United States, and to Portsmouth, if required. Not long afterwards she sailed with a cargo of American merchandise from New York for St. Petersburg. Arriving at Cronstadt June 17, 1812, she discharged her cargo and received on the credit of it a return cargo. But before she sailed the French armies entered Russia; and the shippers of the return cargo, who were also the consignees of the original cargo, becoming apprehensive lest by the seizure of the latter their security for the former might be lost, refused to permit the ship to depart unless the master would agree to proceed to London and to deliver the cargo there to their order. Meanwhile news of the war between the United States and Great

Britain reached St. Petersburg, and the American ships at Cronstadt, fifty or sixty in number, with the approbation of Mr. John Quincy Adams, then American minister to Russia, sailed for England with British licenses, as the only means of enabling them to get home. The *Grotius* was one of the number, and after wintering in Sweden she proceeded to London, where she arrived in May, 1813. She discharged her cargo, and in the following month departed for the United States in ballast. The court, Washington, J., delivering the opinion, said, that this case did not materially differ from that of the *Joseph*, except as to the question whether she was actually captured by the alleged captor, in regard to which further proof was ordered.

The Grotius (1814), 8 Cranch, 456.

V., a citizen of the United States, having settled up as administrator an estate in England the heirs to which were in America, invested, after the repeal of the orders in council, but before news of the declaration of war by the United States, a large part of the proceeds in British merchandise, which, early in August, 1812, he shipped in the American brig *Mary* from Bristol to the United States. The brig, having suffered damage in a storm, was forced to put into Waterford, in Ireland, where she was detained by an embargo and the necessity of repairs till April, 1813, when she sailed again for the United States. Soon afterwards she was captured by an American privateer and libeled for forfeiture, together with the cargo; and it was contended that although the voyage was in its inception induced by the repeal of the orders in council, and would, if it had continued directly from Bristol to America, have fallen within the President's instructions of August 28, 1812, yet it was to be considered as having been broken by the delay at Waterford, so that the latter became the real point of departure. Marshall, C. J., delivering the opinion of the court, said:

"It is not denied that, in a commercial sense, this is one continued voyage, to take its date at the departure of the *Mary* from Bristol. But it is urged that where the rights of war intervene, a different construction must take place. The court does not accede to the correctness of this distinction. The *Mary* was forced into Waterford by irresistible necessity, and was detained there by the operation of causes she could not control. Had her departure been from a neutral port, and she had been thus forced, during the voyage, into a hostile port, would it be alleged that she had incurred the liabilities of a vessel sailing from a port of the enemy? It is believed that this allegation could not be sustained, and that it would not be made. But as between the captors and the captured in this case, the voyage was, in its commencement, as innocent as if made from a friendly port. The detention at Waterford, then, can no more affect the character of the voyage in the one case than in the other. But it is said that the

owners of the cargo ought to have applied to the American Government for a license to bring it into the United States. So far as respects the captors, there could be no necessity for a license, since the vessel was already protected from them by the orders of the President under which they sailed; and for any other purpose a license was unnecessary, provided the importation, if the voyage had been immediate and direct from Bristol, could be justified. If a cargo be innocently put on board in an enemy country, if at that time it be lawful to import it into the United States, the importation can not be rendered unlawful by a detention occasioned, in the course of the voyage, either by the perils of the sea, or the act of the enemy, unless this effect be produced by some positive act of the legislature."

The Mary (Feb. 20, 1815), 9 Cranch, 126, 148.

Whatever might be the right of the Swedish sovereign, acting under his own authority, we are of opinion that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It is perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us.

Story, J., The Commercen, 1 Wheat. 382; Chief Justice Marshall dissenting.

3. Prohibition of Trade Between Enemies.

§ 1181.

Jabez Harrison, a citizen of the United States, having purchased some goods in England, deposited them on an English island, called Indian Island, near the line between Nova Scotia and the United States. Subsequently, war having broken out, Harrison hired in Boston the American fishing vessel *Rapid* to bring the goods away. She sailed from Boston July 3, 1812, and, after leaving Harrison at Eastport, Maine, proceeded to Indian Island and got the goods. On July 8, while returning, she was captured on the high seas by the privateer *Jefferson*, and brought into Salem; and the goods were condemned as prize on the ground that "trading with the enemy" had made them confiscable as enemy's property. An appeal was taken to the Supreme Court of the United States, by which the sentence was affirmed.

The Rapid (1814), 8 Cranch, 155.

See, also, Rush, At. Gen., 1814, 1 Op. 175.

See, on the general question, Meyer (Pierre), De l'Interdiction du commerce entre les belligérants, Paris, 1902.

The brig *Alexander* sailed from Naples June 22, 1812, with a British license to carry her cargo to England. She touched at Gibraltar and, having left there a part of her cargo, sailed for the United States; but, subsequently hearing of the war between the United States and Great Britain, changed her course for England. On the way she was captured by the British and sent into Cork, Ireland, where, after acquittal, she disposed of her cargo. From Cork she proceeded in ballast to Liverpool, where she obtained a cargo, with which she sailed May 9, 1813, for Boston. June 2 she was seized by an American privateer. This brig and cargo, which were both American, were brought into Massachusetts and condemned. This sentence was affirmed on appeal.

The Alexander (1814), 8 Cranch, 169.

An American vessel, upward of two weeks after the declaration of war by the United States against Great Britain, surreptitiously took a cargo of salt at St. Andrews, N. B. The court, citing the case of the *Rapid*, condemned both vessel and cargo.

The Sally (1814), 8 Cranch, 382.

Property engaged in an illicit intercourse with the enemy is to be condemned to the captors and not to the United States, the municipal forfeiture under the laws of the United States being absorbed in the more general operation of the law of war.

The Sally, 8 Cranch, 382.

By instructions of August 28, 1812, the President directed American privateers not to interrupt "any vessels belonging to citizens of the United States coming from British ports to the United States laden with British merchandise, in consequence of the alleged repeal of the British orders in council." It was argued that a certain vessel did not come within this exemption, "because she was engaged in an illicit intercourse with the enemy, under an enemy passport, and therefore was *quasi* enemy property." It appeared, however, that she was duly documented as an American vessel, and was coming to the United States from a British port. Held, that the vessel came within the exemption; that the mere act of illicit intercourse did not in itself divest the property of an American citizen, but only rendered the property "liable to be condemned as enemy property, or as adhering to the enemy, if rightfully captured during the voyage."

The Thomas Gibbons (1814), 8 Cranch, 421.

The notice of Aug. 28, 1812, was as follows: "The public and private armed vessels of the United States are not to interrupt any vessels belonging to citizens of the United States coming from British ports to the United States laden with British merchandise, in consequence

of the alleged repeal of the British Orders in Council; but are, on the contrary, to give aid and assistance to the same, in order that such vessels and their cargoes may be dealt with on their arrival as may be decided by the competent authorities." (*National Intelligencer* of Aug. 29, 1812.)

A shipment made, even after knowledge of the war, might be considered as having been made in consequence of the repeal of the British orders in council, if made within such a period thereafter as would admit of a reasonable presumption that the goods were shipped with the idea that the repeal of the orders in council would induce a suspension of hostilities on the part of the United States. It was also held that the words "British merchandise" were intended to protect all such merchandise, including any owned by a British shipper.

The Thomas Gibbons (1814), 8 Cranch, 421.

In April, 1813, ten months after the declaration of war by the United States against Great Britain, an American vessel arrived at Liverpool from Sweden with a cargo of merchandise. In May she sailed for the United States, with a cargo belonging chiefly to British merchants, under a license issued by the privy council. Held, citing the case of the *Rapid*, that she was condemnable for trading with the enemy.

The St. Lawrence (1814), 8 Cranch, 434.

A vessel of the United States, which went to England after the war was known, and brought thence a cargo belonging chiefly to British subjects, condemned.

The St. Lawrence (1814), 8 Cranch, 434.

In April, 1812, the American vessel *Joseph* sailed from Boston, with a cargo of merchandise, to Liverpool and the north of Europe, and then directly or indirectly to the United States. She discharged her cargo at Liverpool, and in June, 1812, sailed, with another cargo, from Hull to St. Petersburg, under a British license, authorizing the importation of a return cargo into England. In October, 1812, after receiving news of the war between the United States and Great Britain, she cleared with a cargo from St. Petersburg for London, and, after wintering in Sweden, proceeded in the spring of 1813, under convoy instructions from the British ship *Ranger*, to her destination. Having arrived in London and discharged her cargo, she sailed in May for the United States, in ballast and under a British license. On the voyage she was captured and libelled as prize. The claimant maintained that the taking of freight from the north of

Europe to England was necessary in order to obtain money to pay the ship's debts at St. Petersburg, where the master had been unable to sell her cargo, and that the master consulted the minister of the United States at St. Petersburg, who advised him that such a course would be lawful, and who sent despatches by the vessel to the United States. Held, citing the cases of the *Rapid* and *Alexander*, that the allegations of the claimant, though they presented, if true, a case of "peculiar hardship," afforded no "legal excuse" for trading with the enemy.

The Saint Lawrence, 9 Cranch, 120.

If, upon the breaking out of a war with this country, our citizens have a right to withdraw their property from the enemy's country, it must be done within a reasonable time. Eleven months after the declaration of war is too late.

The St. Lawrence, 9 Cranch, 120.

A detention in the enemy's country by perils of the sea, or an act of the enemy, does not render unlawful a voyage lawful in its inception.

The Mary, 9 Cranch, 126.

"The language of Mr. Justice Story in the cases of the *Rapid* and the *Mary*, in the circuit court, amounts to a clear denial of the existence of the right in question [withdrawal of property of one belligerent from the territory of the other], under any circumstances; although in the case of the *St. Lawrence*, subsequently decided in the Supreme Court, where the opinion of the court was given by the same distinguished judge, any direct decision of this question was studiously avoided, and that case was decided on the ground that the property had not been withdrawn from the enemy's country *within reasonable time* after the knowledge of the war. This exact question, as already remarked, has never been determined by the Supreme Court of the United States, nor is its decision involved, as a necessary consequence, in the cases which have been adjudicated before that tribunal. In a case decided in the supreme court of the State of New York, it was held that a citizen of one belligerent *may* withdraw his property from the country of the other belligerent, provided he does it within a reasonable time after the declaration of the war, and does not himself go to the enemy's country for that purpose. In delivering the opinion of the court in this case (Amory *v.* McGregor) Chief Justice Thompson remarks, that, from the guarded and cautious manner in which the Supreme Court of the United States had reserved itself upon this particular question, there was reason to conclude that when it should be distinctly presented, it would be considered as not

coming within the policy of the rule that renders all trading or intercourse with the enemy illegal."

Halleck, Int. Law (3d. ed., by Baker), II. 131.

When a vessel sails, with colorable papers, as a pretended neutral, from a port in a belligerent country, of which her true owner is a citizen and inhabitant, to a port in the enemy country, the offense of trading with the enemy is complete at the moment of sailing.

The Rugen (1816), 1 Wheat. 62.

The rule is inflexible that trade between citizens or subjects of nations at war is forbidden, and property on the high seas, intended for an enemy's port, is lawful prize.

Jecker *v.* Montgomery, 13 How. 498; 18 id. 110.

The sending to a stronghold of the enemy, of an enemy vessel carrying provisions, constitutes, under the laws of war, illicit intercourse with the enemy, subjecting the property to capture as a prize.

The Benito Estenger, 176 U. S. 568.

A declaration of war does not dissolve a shipping contract between domestic ports. Nor does the voluntary placing of a vessel at the disposal of the government dissolve such contract.

Graves *v.* Miami S. S. Co., 61 N. Y. S. 115, 29 Misc. 645.

4. Acceptance of Enemy's License or Protection.

§ 1182.

As to goods on an armed enemy vessel, see Visit and Search, infra, § 1203.

"A *license* is a kind of safe-conduct, granted by a belligerent state to its own subjects, to those of its enemy, or to neutrals, to carry on a trade which is interdicted by the laws of war, and it operates as a dispensation from the penalties of those laws, with respect to the state granting it, and so far as its terms can be fairly construed to extend. The officers and tribunals of the state under whose authority they are issued, are bound to respect such documents as lawful relaxations of the ordinary state of war; but the adverse belligerent may justly consider them as *per se* a ground of capture and confiscation. Licenses are necessarily *stricti juris*, and cannot be carried beyond the evident intention of those by whom they are granted; nevertheless, they are not construed with pedantic accuracy, nor will their fair effect be vitiated by every slight deviation from their terms and conditions. Much, however, will depend upon the nature of the terms which are not complied with. Thus a variation in the *quality* or

character of the goods will often lead to more dangerous consequences than an excess of *quantity*. Again, a license to trade, though safe in the hands of one person, might become dangerous in those of another; so, also, with respect to the limitations of *time* and *place* specified in a license. Such restrictions are often of material importance, and cannot be deviated from with safety. . . . In the United States, as a general rule, licenses are issued under the authority of an act of Congress, but in special cases and for purposes immediately connected with the prosecution of a war, they may be granted by the authority of the President, as Commander-in-Chief of the military and naval forces of the United States."

Halleck Int. Law (3d. ed., by Baker), II. 343.

The sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views and interests, subjects the ship and cargo to confiscation as prize of war.

The Julia, 8 Cranch, 181; The Aurora, 8 Cranch, 203.
For a very full note by Wheaton on the subject of licenses, see 3 Wheaton, 207.

The objections to the accepting of licenses from an enemy are thus stated by Judge Story in the *Julia* (1 Gall. 233; 8 Cranch, 181, 193, 197). The principle, he states, is that "in war all intercourse between the subjects and citizens of the billigerent countries is illegal, unless sanctioned by the authority of the Government, or in the exercise of the rights of humanity." He insists that a license from an enemy must be regarded as an agreement with such enemy that the licensee will conduct himself in a neutral manner, and avoid any hostile acts toward such enemy, and he holds, therefore, that acting under such a license is a violation of the laws of war, and of a citizen's duties to his own government. "Can an American citizen," he asks, "be permitted in this manner to carve out for himself a neutrality on the ocean, when his country is at war? Can he justify himself in refusing to aid his countrymen, who have fallen into the hands of the enemy on the ocean, or decline their rescue? Can he withdraw his personal services, when the necessities of the nation require them? Can an engagement be legal, which imposes upon him the temptation or necessity of deeming his personal interest at variance with the legitimate objects of his Government?" He declares that incompleteness of a voyage, under license from the enemy, is no defense, for the vessel is liable to capture at the instant the voyage under such license is commenced. Wherever the object of the voyage is prohibited, its inception with the illegal intent completes the offense to which the legal penalty attaches. This case of illegal trading, under a license from the enemy, is only a particular application of a universal rule. Nor can

it be a defense that the trade is not subservient to the enemy's interest, as the condemnation of such licensed vessel and cargo rests upon the broad ground of the illegality of such voyage.

See Halleck Int. Law (3d. ed. by Baker), II. 138 et seq.

It is not necessary, in order to subject the property to condemnation, that the person granting the license should be duly authorized to grant it, provided the person receiving it takes it with the expectation that it will protect his property from the enemy.

The Aurora, 8 Cranch, 203.

On August 5, 1812, Admiral Sawyer addressed to the British consul at Boston a letter stating that, it being important to insure a constant supply of flour and other dry provisions to Spain and Portugal and to the West Indies, he (the Admiral) had been instructed to direct the officers under his command not to molest American vessels unarmed and so laden, bona fide bound to Portugese and Spanish ports, whose papers should be accompanied by a certified copy of a letter under the consul's official seal. The consul then addressed a similar communication to the commanders of British ships of war and privateers, accompanied with a certified copy of the Admiral's letter. American vessels thus licensed naturally threw themselves, as soon as possible, into the hands of British cruisers for the purpose of obtaining protection against American capture for sailing under the enemy's license. Such vessels, when captured by American cruisers, were condemned.

The Hiram, 8 Cranch, 444; The Hiram, 1 Wheaton, 440.
See Upton's Maritime Warfare and Prize (2d ed.), 137.

The sailing under the enemy's license constitutes, of itself, an act of illegality, which subjects the property to confiscation, without regard to the object of the voyage or the port of destination.

The Ariadne, 2 Wheat. 143.
See, also, Patton *v.* Nicholson, 3 Wheat. 204.

A vessel which has been rendered liable to capture as enemy's property by sailing under the license or pass of the enemy, or for trading with the enemy, may still be seized and condemned as prize of war after her return to the United States, by virtue of the general authority of the Government to seize all enemies' property coming into our ports during war. And as a general rule, any person may seize any property forfeited to the use of the Government, either by the municipal law or by the law of prize, for the purpose of enforcing the forfeiture; and it depends upon the Government itself whether

it will act upon the seizure. If it proceeds to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure.

The Caledonian, 4 Wheat. 100.

The fact of a vessel having been sent into an enemy's port for adjudication, and afterwards permitted to resume her voyage, was held to raise a violent presumption that she had a license; and, the claimant having produced no evidence to repel the presumption, condemnation was pronounced.

The Langdon Cheves, 4 Wheat. 103.

When a ship is captured in time of war, it is not to be presumed, from the fact that she carries an enemy's license, that she intends proceeding to the port of the enemy. The license may be carried for the purpose of deceiving the enemy.

The Matilda, 5 Hughes, C. C. 544.

A contract made by a consul of a neutral power with a citizen of a belligerent state, that he will "protect," with his neutral name, from capture by the belligerent, merchandise which such citizen has in the enemy's lines, is against public policy and void.

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

"A United States consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation."

The Benito Estenger, 176 U. S. 568; citing The Amodo, Newberry, 400; The Hope, 1 Dodson, 226, 229; The Joseph, 8 Cranch, 451; Les Cinq Frères, 4 Lebeau's Nouveau Code de Prises, 63; The Maria, 6 C. Rob. 201.

VII. *ENEMY'S PROPERTY.*

1. Liability to Seizure.

§ 1183.

The Continental Congress, by a resolution of December 9, 1781, enacted that all ships, with their cargoes, which should be seized by their crews, should be deemed lawful prize to the captors, the object being to tempt the navigators of enemy vessels to bring them into American ports. Subsequently, during the war, a British ship, bound to New York, then in the possession of the British, was compelled by stress of weather to enter a port in North Carolina; and the master, with a view to save his ship from confiscation, made an agreement with the crew to seize the vessel and cargo and have them condemned,

with the understanding that the crew were to have their wages, and that the residue of the proceeds were to remain in the master's hands as trustee for the owners. This agreement was signed by the master and crew, and, after the condemnation of the vessel and cargo, was carried into effect. After the war was over, the owners of the vessel and cargo filed a bill in equity in the circuit court of the United States for the district of Georgia against the master, praying for an accounting. The bill was dismissed on demurrer, and a writ of error was then obtained from the Supreme Court. This court held, Marshall, C. J., delivering the opinion, that while the scheme to save the ship and cargo, under the semblance of a condemnation, was a stratagem of war, and not in itself an immoral act, it was a fraud upon the resolution of Congress, and therefore could not be enforced by the courts of the United States.

Hannay *v.* Eve (1806), 3 Cranch, 242.

The circumstance that a ship is found in the possession of the enemy affords prima facie evidence that it is his property. But if it was originally of a friendly or neutral character, and has not been changed by a sentence of condemnation, or by such possession as nations recognize as firm and effectual, it will be restored absolutely or conditionally, as each case requires.

Schooner Adeline, 9 Cranch, 244.

Some goods, captured by an American privateer and libelled as British property, were claimed by A, an American merchant. The original order for the goods did not appear, but the evidence contained (1) an invoice, (2) a bill of lading, and (3) two letters. The invoice stated that the goods were bought by B, a merchant of Birmingham, "by order and for account and risk" of A, and forwarded on March 4, 1811, to the care of certain merchants at Liverpool, and that they were "the property" of C, a banker of Birmingham, to whom the amount of the invoice was to be remitted. The bill of lading, which was in the usual form, stated that the goods were shipped by the Liverpool merchants to be delivered to A, or his assigns, in New York. The letters in question were both addressed to A, and were dated, respectively, at Birmingham, July 8 and July 9, 1812. The first was from B, and stated that, in consequence of the revocation of the orders in council, he had lost no time "in shipping the goods sent to Liverpool so long since, agreeable to your (A's) kind order." The second letter, which was referred to in the first, was from C, who stated that he had extended assistance to B, who had been embarrassed, and that he had therefore obtained from the latter "an assignment of certain quantities of

goods" which B "had provided on account of A . . . previous to the 2nd of February, 1811." Marshall, C. J., delivering the opinion of the court, said that, in the usual course of trade, if the purchasing and shipping merchant were the same, there would rarely be any actual change of property between the purchase and the shipment. But, in the state of the relations between the United States and Great Britain during the existence of the nonimportation acts, the transaction often became divided. Goods were procured under a general order to purchase, but were not to be shipped till a future uncertain event should occur; and if they were, in the meantime, to remain the property of the agent, they would probably be retained at the place of purchase under his immediate control and inspection. Their conveyance to a seaport, there to be stored till their importation into the United States should be allowed, would indicate an actual investment of the property in the person by whose order and for whose use the goods were purchased and stored. The evidence in the present case indicated that the goods when stored in Liverpool were the property of A, subject to that control which B would have as purchaser and intended shipper, who had advanced the purchase money. This control, while affording security to B, could not be wantonly used to the destruction of A's property in the goods, and, in the case of a conveyance to a person having notice of A's rights, should be construed to operate consistently with them, so far as the two rights could consist with each other. The words in the invoice representing the goods as the property of C evidently were introduced merely for the purpose of securing the payment of the purchase money to him. On the whole, the majority of the court was of opinion that the goods were shipped in pursuance of A's orders, and became his property when delivered, for his use, to the master of the vessel, "if not at an earlier period," i. e., "on being stored in Liverpool, if not at an antecedent time." The goods must, therefore, be restored.

The Susan & Mary (1816), 1 Wheaton, 25.

A ship and cargo, captured as British, were claimed by a Russian as neutral. It appeared that the ship, documented as Russian, was placed under the control of a British house, which dispatched her to Havana, where she was loaded under the directions of one M., ostensible agent of the Russian owner; and that she then cleared apparently for a Russian port, but with orders to call at a British port, and terminate her voyage there under the orders of the British house. Evidence was lacking to show either the relations between the Russian owner and the British house, or the dependence of M. on the Russian owner for authority, instructions, and resources. All the

material papers touching the transaction were concealed in a billet of wood, and their presence was betrayed by one of the crew. They tended to show that the adventure was undertaken by the British house alone; that the cargo was purchased with their funds, and that M. was their agent. As to the ship, nothing was produced to show her neutral character but the formal papers that always accompany fictitious as well as real transactions. There was no charter-party, no original correspondence, no instructions, even, directing the master to obey the orders of the British house. Held, that both ship and cargo should be condemned, the court (Johnson, J., delivering the opinion) saying that in any case a neutral shipowner's lending his name to cover a fraud with regard to the cargo would alone subject the ship to condemnation.

The Fortuna (Feb. 26, 1818), 3 Wheaton, 236. The court referred to the case of the St. Nicholas, 1 Wheaton, 417, as similar in circumstances.

The American ship *Merrimack*, a few days before the declaration of war by the United States against Great Britain was known in the latter country, sailed from Liverpool for Baltimore with a cargo of goods shipped by a Britislr subject and consigned to citizens of the United States. She was captured on the voyage by an American privateer, who libelled her cargo as prize. Four claimants appeared, as follows:

1. McKean and Woodland, American merchants, claimed certain articles which were purchased on their orders by merchants in Sheffield. At the moment of shipment the British merchants learned that the partnership between McKean and Woodland had been dissolved, and, having no instructions as to how the goods should be shipped, consigned them to an American merchant residing in the same city as McKean and Woodland, for the latters' use. Held, that the property vested in McKean and Woodland, and consequently was not liable to condemnation as enemy property. There was nothing in the case to throw any suspicion on the fairness of the transaction.

2. Kimmel and Albert, merchants of Baltimore, claimed certain articles. The shippers, who were British merchants, consigned the articles in question to their agent in the United States with instructions not to deliver them in a certain contingency except for cash. On the ground that the property remained in the shippers, the goods were condemned.

3. The facts in this claim were substantially the same as in number 2, and the goods were condemned.

4. W. & J. Wilkins, merchants of Baltimore, claimed certain goods, which were purchased, as were the goods in cases 1, 2, and 3, on orders given long before the war. In the present case, however, the shipper

was a manufacturing company consisting of two members, one of whom resided in Great Britain, and the other, who was an American citizen, in the United States. The bill of sale, which served as an invoice, was in the name of W. & J. Wilkins; the bill of lading was in the name of Edward Harris, the American member of the manufacturing company, who was the consignee. On the evidence, which included various letters, the court was of opinion that the property in the goods had been transferred to the claimants, independently of the control of the shipper or his agent, except so far as the right to stop in transitu interfered, and that the claimants were entitled to the goods.

The Merrimack (1814), 8 Cranch, 317.

The liability of property, the product of an enemy country, and coming from it during war, to capture, being irrespective of the status domicilii, guilt or innocence of the owner, such property is as much liable to capture when belonging to a loyal citizen of the country of the captors as if owned by a citizen or subject of the hostile country or by the hostile government itself. The only qualification of this rule is that where, upon the breaking out of hostilities or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it.

The Gray Jacket, 5 Wall. 342.
Where the war (a civil war) broke out in April, 1861, a removal on the 30th of December, 1863, was held to be too late. (Ibid.)

Ships in time of war are bound by the character impressed upon them by the government from which their documents issue and under whose flag and pass they sail.

The share of a citizen in a ship sailing under an enemy's flag and papers, there having been ample time and opportunity to dispose of the same, but no attempt made to do so, is subject to capture and condemnation equally with the shares of enemies in the same ship. And where the cargo and ship are owned by the same person the cargo follows the fate of the ship.

The William Bagaley, 5 Wall. 377.

A vessel and cargo whose papers, supported by the testimony, show that both belonged to a subject of the King of Spain, held, lawful prize of war, having been captured by a United States cruiser while on a voyage from one port of the enemy to another.

The Maria Dolores, 88 Fed. Rep. 548.

A mail steamship carrying mail of the United States is not for that reason exempt from capture as an enemy vessel. The *Buena Ventura* (1898), 87 Fed. Rep. 927, affirmed.

The Panama, 176 U. S. 535.

The *Carlos F. Roses*, a Spanish bark, was condemned as enemy's property, but a question was raised as to the enemy or neutral character of the cargo. This depended chiefly on the effect of the indorsement of the bills of lading to neutrals. The cargo was claimed by Kleinwort Sons & Co., British merchants, of London. It consisted of jerked beef and garlic, and was shipped at Montevideo in March, 1898, by Gibernau & Co., merchants of that place, but citizens of the Argentine Republic. The invoices stated that the goods were shipped "to order for account and risk and by order of the parties noted below." In the invoice of jerked beef the consignees noted below were "the expedition or voyage of the *Carlos F. Roses*" and "Mr. Pedro Pagés, of Havana," all concerned being Spanish subjects; the consignees of the garlic were "Mr. Pedro Pagés" and "the undersigned," Gibernau & Co. There were three sets of bills of lading issued by the master to Gibernau & Co., one for that part of the shipment of jerked beef made for account of the vessel, another for that part made for account of Pagés, and the third for the shipment of garlic for the joint account of Pagés and Gibernau & Co. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. In the ship's manifest the destination of the cargo was stated thus: "Shipped by Pla Gibernau Co. To order." The visé of the Spanish consul read: "Good for Havana, with a cargo of jerked beef and garlic." There was no charter party. On the face of the papers the court held that the goods, when delivered to the vessel, became the property of the consignees named in the invoices, and that, as Gibernau & Co. had not appeared and claimed any interest, the whole cargo, which the claimants in fact admitted to be "ultimately destined for Don Pedro Pagés, of Havana," must be condemned as enemy property unless cause to the contrary was shown. Such cause Kleinwort & Co. endeavored to establish, on the ground that after the shipment of the cargo they made advances upon it to the amount of about $30,000, in consideration of which the bills of lading, indorsed in blank by Gibernau & Co., were delivered to them with the intent that they should take title to the bills and the cargo, and on the arrival of the latter at its destination hold it as security, with the right to dispose of it and reimburse themselves with the proceeds. They contended that in this way they became the lawful owners both of the bills and of the cargo. It appeared, however, that in neither of the two bills

of exchange, which were drawn on Kleinwort & Co. for the amount of the advances, was any reference made to the cargo, and that while two of the bills of lading were alleged to have been delivered to the firm at the time of its acceptance of the bills of exchange, the third, for the greater part of the jerked beef, was not delivered till long afterwards. On these and other circumstances the court held that the cargo never bona fide passed to Kleinwort & Co., but remained the property of Spanish subjects, and was liable to condemnation.

The Carlos F. Roses, 177 U. S. 655.

Mr. Justice Shiras delivered a dissenting opinion, in which Mr. Justice Brewer concurred.

2. Title to Property in Transit.

§ 1184.

If a British merchant purchase with his own funds two cargoes of goods, in consequence of but not in strict conformity with the orders of an American house, and ship them to America, giving the consignors an option within 24 hours after receipt of his letter to take or reject both cargoes, and if they give notice within the time that they will take one cargo, but will consider as to the other, this puts it in the power of the British merchant either to cast the whole upon the American house, or to resume his property, and make them accountable for that which came to their hands; and, therefore the right of property in cargo, does not, in transitu, vest in the American house, but remains in the British subject, and is liable to condemnation, he being an enemy.

The Frances (1815), 9 Cranch, 183.

See, also, The Frances, 8 Cranch, 354, 358, 359; 1 Gallison, 445.

See, further, as to title of property in transitu, The Vrow Margharetha, 1 C. Rob., 336; The Sally, 3 C. Rob., 300, note; The packet De Bilboa, 2 Rob., 133; The Anna Catharina, 4 C. Rob., 107; The Jan Frederick, 5 C. Rob., 128; The Ship Anna Green, 1 Gallison, 274.

"In the ordinary course of mercantile transactions, a delivery to a ship-master is a delivery to the consignee. Bue it is evident that this delivery must be absolute or qualified, and that the effect of it must vary accordingly. A voluntary agent has the option either to enter upon his agency in strict conformity with the instructions of his principal, or with such reservations or conditions as he may think proper to prescribe; and the only consequence is, that, in the latter case, he leaves his principal at liberty to adopt or repudiate his acts. The shipper who purchases goods on his own credit or with his own funds, is not acting in the ordinary capacity of a factor. If he were, the goods, even before shipment, would be the property of the indi-

vidual on whose order the purchase is made. Such shipments are in the nature of a merchantile credit, and the shipper always retains the uncontrolled exercise of discretion in extending it."

The Frances (1815), 9 Cranch, 183.

Property in transit from a belligerent to a neutral is subject to capture and condemnation, if it has not vested at the time of the capture in the neutral consignees.

The St. Jose Indiano, 1 Wheat. 208.
See, also, 2 Gallison, 268.

"Goods were shipped by D. B. & Co., of Liverpool, on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed 'consigned to Messrs. D. B. & F., by order and for account of J. L.' In a letter accompanying the invoice from the shippers to the consignees, they say, 'For Mr. J. L. we open an account in our books here, and debit him, &c. We can not yet ascertain the proceeds of his hides, &c., but we find his order for goods will far exceed the amount of these shipments; therefore we consign the whole to you, that you may come to a proper understanding with him.' It was held that the goods were, during their transit, the property, and at the risk of the enemy shippers, and, therefore, subject to condemnation."

The St. Joze Indiano (1816), 1 Wheat., 208, Wheaton's Syllabus.

"This Department is not disposed to deny the rule of law which forbids the transfer of an enemy's property to a neutral when on its way to the enemy's country. The leading case on this subject is that of the *Sally*, Griffiths, master, reported in the third volume of Robinson's Admiralty Reports, page 300. The case was decided against the claimants by the British House of Lords on the 12th of December, 1795. It is not easy to see how it could have been differently decided, in view of the fact that there were in evidence certain letters of Mr. Ternant, the minister of France in this country, showing that he was commissioned by his Government to purchase on its account and to forward to France the very property which was captured."

Mr. Bayard, Sec. of State, to Mr. Godoy, Chilean min., April 11, 1885, MS. Notes to Chilean Leg. VI. 337.

With reference to an application in behalf of a German subject for the return of goods shipped by him on the Spanish steamer *Pedro*, which had been condemned, the Department of State, referring to a report of the Attorney-General, said that the goods in question were consigned to a Spanish firm in Cuba "without any reservations, and

were consequently subject to the general rule of law that goods in the course of transportation from one place to another, if they are shipped on account and at the risk of the consignees, are considered as the goods of the latter during the voyage."

Mr. Hay, Sec. of State, to Mr. Von Holleben, German ambass., No. 178, Jan. 18, 1899, MS. Notes to German Leg. XII. 247.

It did not even appear by the papers in the case that there was any agreement between the consignors and consignees that the property in the goods in question should remain in the former until delivery. (Ibid.)

3. Produce of the Enemy's Soil.

§ 1185.

The Danish island of Santa Cruz having been seized by and surrendered to the British, B., an officer of the Danish Government and an owner of land in the island, withdrew and went to Denmark, leaving his estate in the care of an agent, who afterwards shipped 30 hogsheads of sugar, the produce of the estate, on a British ship, to a house in London, on B.'s account and risk. On her passage the ship was captured by an American privateer and brought into the United States, where, in spite of a claim by B. to the sugar, both the ship and her cargo were condemned.

Harper, counsel for B., contended that the British rule that the produce of a plantation in an enemy's country was to be considered, while the produce remained the property of the owner of the soil, as enemy property, was modern, and that, besides, it did not apply to the case of B. By the cases of the Phœnix, 5 Rob. 26, the Diana, 5 Rob. 60, and the Vrow Anna Catharina, 5 Rob. 161, it appeared that the reason of the rule was that the proprietor of the soil had incorporated himself with the permanent interests of the nation. B. had never incorporated himself with the interests of the British nation, either permanently or temporarily; the character was forced upon him against his will; he was born and continued to be a Dane; he did not purchase a plantation in an enemy country, Denmark being, at the time of his purchase, neutral; the British occupation was temporary, and ended with the war. But, even if the case were within the rule, the rule was merely a British rule, never recognized by Denmark, and not a part of the law of nations, and should not be adopted by the United States.

Pinkney, contra, maintained that Santa Cruz, on its capture, immediately became a British colony, and during the occupation, which, though not perpetual, was indefinite, so remained; that, this being so, the sugar in question was, under the rule in the case of the *Phœnix*, enemy property; that, according to the opposite argument, if the land

was purchased before the capture of the island, the owner would not be considered an enemy, though the island should remain permanently British; that, in reality, it was immaterial when the estate was acquired, if the owner continued to hold it after the island came into possession of the enemy. Such was the rule of the English prize courts, and it did not appear that any of the nations of Europe had protested against it. It was not harsher than the rule of domicil, to which it was analogous.

Marshall, C. J., delivering the opinion of the court, said:

"Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

"Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy, property?

"In arguing this question, the counsel for the claimants has made two points:

"1. That this case does not come within the rule applicable to shipments from an enemy country, even as laid down in the British courts of admiralty.

"2. That the rule has not been rightly laid down in those courts, and consequently will not be adopted in this.

"1. Does the rule laid down in the British courts of admiralty embrace this case?

"It appears to the court that the case of the *Phœnix* is precisely in point. In that case a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam.

"The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimants did not controvert this position. They admitted it; but endeavored to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his opinion, Sir William Scott lays down the general rule thus: 'Certainly nothing can be more decided and fixed, as the principle of this court and of the supreme court, upon very solemn arguments, than 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 the superior court, that it is no longer open to discussion. No question can be made on the point of law, at this day.'

"Afterwards, in the case of the *Vrow Anna Catharina*, Sir William Scott lays down the rule, and states its reason. 'It can not be doubted,' he says, 'that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. 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, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation.'

"This rule laid down with so much precision, does not, it is contended, embrace Mr. Bentzon's claim, because he has not 'incorporated himself with the permanent interests of the nation.' He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

"This distinction does not appear to the court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British.

"The general commercial or political character of Mr. Bentzon could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was, at that time, British; and though as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy: he could ship his produce to Great Britain in perfect safety.

"The case is certainly within the rule as laid down in the British courts. The next enquiry is: How far will that rule be adopted in this country?

"The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British courts, and of those established in the courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention that we can not entirely disregard. The United States having, at one time, formed a component part of the British Empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it.

"It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts, will be considered as forming a rule for the American courts, or that any recent rule of the British courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

"The rule laid down in the *Phœnix* is said to be a recent rule, because a case solemnly decided before the lords commissioners in 1783 is quoted in the margin as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

"The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, is an opinion which certainly prevails very extensively. It it not an unreasonable opinion. Personal property may follow the person any where; and its character, if found on the ocean, may depend on the domicil of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion

of principle, nor is it a violent offence to the course of human opinion, to say that the proprietor, so far as respects his interests in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzon as enemy property, this court is of opinion that there was no error, and the sentence is affirmed with costs."

Thirty Hogsheads of Sugar *v.* Boyle (1815), 9 Cranch, 191.
See, also, The Prize Cases (1862), 2 Black, 635, 671; Rivier, Principles, II. 344–345; Hall (4th ed.), 168.

4. Property in the Enemy's Service.

§ 1186.

The neutral owners of a ship may, by taking a decided part with the enemy, expose such ship to seizure and confiscation as enemy's property.

Darby *v.* The Erstern, Federal Court of Appeals (1782), 2 Dallas, 34.

"Neutrals who place their vessels under belligerent control, and engage them in belligerent trade; or permit them to be sent with contraband cargoes, under cover of false destination, to neutral ports, while the real destination is to belligerent ports; impress upon them the character of the belligerent in whose service they are employed, and the vessels may be seized and condemned as enemy property."

Chase, Ch. J., The Hart, 3 Wall. 559.
See, also, The Baigorry, 2 Wall. 474.

Where several witnesses stated facts tending to prove that a vessel was in the employment of an enemy government, and that part, at least, of her return cargo was enemy property; but the statement of others made it probable that the vessel was what she professed to be, a merchant steamer, belonging to neutrals; that her outward cargo was consigned in good faith by neutral owners for lawful sale; that the return cargo was purchased by neutrals, and on neutral account—the court directed restitution, without costs or expenses to either party as against the other.

The Sir William Peel, 5 Wall. 517.

"The voyage of the *Haytian Republic* was commenced on October 4 from the United States, with peaceful and lawful intent, and with no knowledge of Haytian disorders or desire to mingle in Haytian disputes.

"On her voyage from Port de Paix to Gonaïves, on October 15–16; from Gonaïves to Miragoâne, on October 16–17; and from the latter port to Aux Cayes, on October 17–18, it is true that she transported as passengers persons variously armed, and, as is supposed, in sym-

pathy with those in possession of the districts in which the ports above named are situated. In such transportation she met with no interference or protest, and merely acted as a common carrier of passengers whom she found awaiting transportation in the ports at which she traded. Such action can not be regarded as constituting complicity in Haytian disorders; and, at the time that the vessel was seized by the *Dessalines* in the service of Provisional President Légitime, at Port au Prince, the persons whom she had thus carried had been left at their ports of destination and she was proceeding on her voyage."

Mr. Bayard, Sec. of State, to Mr. Preston, Haytian min., Nov. 28, 1888, For. Rel. 1888, I. 1001, 1005.

"Referring to your despatch No. 113 of the 19th instant, I have now to acknowledge the receipt of your despatch No. 196 of November 12th ultimo, with its accompanying enclosures, covering your correspondence with the minister for foreign affairs of Ecuador on the subject of the steamer *Washington* and its ramifications.

"The enclosed memorandum or report on the case, which has been prepared by my direction, after taking into consideration not only your despatch No. 196, but also the whole of your previous correspondence with this Department upon the same subject, will, with the instructions hitherto given you, govern your future proceedings in the conduct of the case as it at present stands, and it is sincerely hoped that you will be enabled by adopting the suggestions made in the report now transmitted to you, to bring the question to a successful and amicable termination." . . .

Mr. Seward, Sec. of State, to Mr. Hassaurek, min. to Ecuador, Dec. 28, 1865, MS. Inst. Ecuador, I. 184.

"*Memorandum as to the case of the steamer Washington, condemned, in the first instance, by the supreme court of Ecuador as lawful prize of war.*

"The parties complaining of the detention and use by the Ecuadorian Government of the *Washington* are American citizens long domiciled in its territory, and owning less than one-half of the vessel, the remaining interest being owned by native subjects of Ecuador.

"The vessel is employed, not in maritime commerce, but in an *internal river traffic*, and is therefore peculiarly subject to the municipal law of Ecuador.

"The steamer was admittedly engaged in hostility to Ecuador and was captured in actual fight.

"Her condemnation is based on these facts and, if correct, establishes a title which relates to the time of the capture.

"We may dismiss all consideration of the *use* of the steamer, intermediate the capture and condemnation. If the latter is valid, it justifies that use. If not, the claimants are entitled to the value of the vessel when converted.

"So we may dismiss all consideration of the *delay* in bringing on the trial and decision. If there was any wrong in this, it is merged in the greater one.

"Upon the conceded facts thus far stated the propriety of the condemnation admits of no serious question.

"It is said however that restitution to the owners should have been decreed because the *Washington* passed into the hostile service by the barratry of her master, and 2d that the seizure and employment of her by the insurgents were piratical.

"It is not denied that the master of the *Washington* was in conspiracy with the revolutionists to whom he voluntarily surrendered her.

"Assuming that the owners of the steamer were guiltless of any complicity with the master, the question is how does his conduct, criminal both as respects the Ecuadorian Government and the owners, affect the rights of the latter?

"It is doubtless true that the owners of a ship are often held responsible for offences committed by the master against belligerent rights, so as to involve the forfeiture of the vessel and sometimes even *personal* damages in addition, although they neither commanded nor knew of them.

"I think, however, that such cases will be found to have in them this element, viz. that the acts were such as the master could have supposed himself to be doing in the course of his general employment, and in the interest of his owners. The *abandonment* of the ship to pirates or to mere insurgents can hardly be brought into this category. Then these are *maritime* instances, and it seems to me there is such a difference between the very large authority and discretion necessarily entrusted to the master of a seagoing vessel, and that which suffices for short river voyages, as to justify a corresponding distinction in the liability of the owners for his acts. At sea, out of reach of his owners, and of courts, he may be taken to represent them in a much ampler sense than on a river.

"I am bound to say however that this view of the case does not strike me as so irresistible that I could characterize an opposite determination by any judicial tribunal as manifesting such flagrant disregard of law and justice, as to lose its title to respect and submission.

"Let us suppose that we had permitted a steamer, owned about half by English residents of Baltimore, and commanded by such a resident, to ply between that port and City Point, at the time of the outbreak of the late rebellion; the steamer to have been surrendered by him to rebels in the James River; to have been armed by them and to have captured one of our small cruisers in the Potomac; to have been subsequently captured by us and brought before a prize court. The evidence wholly failing to inculpate the owners who intervene and ask a restitution of the vessel, the court may be supposed to say:

"'Public policy requires that those who entrust a steamer, capable of the mischief which this has wrought, with the power to put her into a position to do that mischief, should be answerable for the consequences of his acts, though not contemplated, or approved by them. True, we find no evidence of their complicity, and this act, as it turns out, was manifestly opposed to their interests. But, if the captain was acting in conformity with their secret instructions, or with their real, though unexpressed desire, it would always be a matter of the greatest ease to conceal the proofs. A consideration of the general interest in having a plain rule capable of ready practical application, must override that of occasional hardship to the innocent.'

"Would such a decision be so manifestly outrageous, as to authorize Great Britain to declare that it could not have proceeded from *error* but must have been dictated by interest, malice or wilful disregard of universal principles of justice? I think not.

"I attribute no consequence whatever to the fact that the Ecuadorian Government denounced the seizure as *piratical*, nor does it seem important to enquire whether in truth it was piratical either under the municipal law, or the law of nations. It was a naval operation for a political insurrection. That it so overstepped the limits which nations prescribe to themselves in the prosecution of war, as to be *piratical* also, does not seem to me so to restrict the rights which the capturing government may assert in its discretion, or *waive* in its generosity.

"This I think disposes of any question under article 10 of our treaty with Ecuador. That must I think be understood to refer to cases of simple piracy, unconnected with insurrection or belligerency in any form.

"I understand the rule to be that before a nation intervenes in behalf of its citizens domiciled abroad whose rights have been passed upon by a judicial tribunal, it is required, 1st.—That he should have defended those rights *himself* and done what was in his power to enlighten the court. 2d.—That he should prosecute the case through all the appellate tribunals to that of last resort, so that it may appear that no farther remedy is left to him in the courts. 3d.—That the final decision should be not merely *erroneous*, but so flagrant as to shock the moral sense and beget the conviction that the court could not be supposed to have acted from mistake of judgment but have wilfully disregarded plain rights.

"Our citizens who go to reside under foreign jurisdictions, go there to take such law, and such modes of administering it, as are dealt to native subjects, however imperfect they may be—except in such countries as China, Japan, &c., where special treaties relieve them of the obligation.

"In this case there is no pretence that the injustice alleged is aimed at American citizens as such, for a majority of the owners of the *Washington* are Ecuadorians.

"On the whole, I think, that our minister should desist from farther discussion until, after final judgment in the court of last resort, he has reported its decision and the reasons it may assign, and has received such instructions as the case may then seem to require.

"If it were practicable to advise the American owners of the *Washington*, I should recommend them to *offer* to the Ecuadorian Government the same salvage (⅓ of the value) which that Government offered for the recapture of its warship captured by the *Washington*, and ask restitution on those terms, before the prize court had reviewed the judgment in the first instance. It is *unreasonable* (dismissing all question of legal rights) that the government should bear the expense of restoring to the owners a ship of which they had been deprived *by their own agent*. The salvage is probably quite insufficient to reimburse Ecuador for the expenses to which it has been subjected.

"Approved.

"WILLIAM H. SEWARD."

"15. A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure; but not when she is a mail packet and carries them in the regular and customary manner, either as a part of the mail in her mail bags, or separately, as a matter of accommodation and without special arrangement or remuneration. The voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

Instructions to United States Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781.

"When a person belonging to a neutral state takes permanent civil or military service with a foreign state he identifies himself so fully with it that he becomes the enemy of its enemies for every purpose. When he merely contracts to do specific services, he becomes an enemy to the extent, and for the purposes, of those services." So a neutral may so identify himself or his property with a possible or intending belligerent that hostilities may even be opened by an attack on him or by the capture of his property.

Hall, Int. Law (5th ed.), 501, 502.

On July 25, 1894, about 7 a. m., a Japanese squadron, cruising off the Corean coast, before declaration of war, was attacked by Chinese warships which had been convoying reinforcements to Asan. About 9 a. m. the *Kowshing*, a British vessel, carrying further Chinese reinforcements for Asan, appeared on the scene. The Japanese cruiser *Naniwa* signaled her to stop and sent a boat aboard, and, finding that she was carrying 1,200 Chinese troops, with several generals, including the German major, von Hanneken, asked the captain to follow the *Naniwa* to Japan. The captain assented, but the Chinese officers by force and threats restrained him. The *Naniwa*, then, after some parleying, warned those on board to quit the vessel, and afterwards fired into and sank her. Most of the Europeans were picked up by the boats of the *Naniwa*. As soon as the facts could be fully ascertained, Professors Holland and Westlake both took the ground, in the face of much popular excitement, that at the time of the sinking of the *Kowshing* a state of war de facto existed between China and Japan; that the *Kowshing*, as a neutral ship engaged in the transport service of a belligerent, was liable to be visited and taken in for adjudication, with the use of so much force as might be necessary; that, as one of a fleet of transports and men-of-war engaged in carrying reinforcements to the Chinese troops on the mainland, she was clearly part of a hostile expedition, or one which might be treated as hostile, which the Japanese were entitled by all needful force to arrest; that the force used did not appear to be excessive, either for

the capture of an enemy's neutral transport or for barring the progress of a hostile expedition, and that, as the rescued officers were duly set at liberty, no apology was due to the British Government and no indemnity to any person.

Holland, Studies in Int. Law, 126 et seq.

5. Transfer of Enemy Ships to Neutrals.

(1) public ship.

§ 1187.

A bona fide purchase for a commercial purpose by a neutral in his own home port, of a ship of war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was bona fide dismantled prior to the sale, and afterward fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent.

The Georgia, 7 Wall. 32.
See, also, The Georgia, 1 Lowell, 96.

(2) merchant vessels.

§ 1188.

It was alleged that a violation of the act of February 27, 1800, suspending commercial intercourse between the United States and France, had been committed by selling an American vessel to an innabitant of St. Thomas, with a view to its being used in trade with the French island of Guadaloupe. Marshall, C. J., delivering the opinion of the court, said that the building of vessels in the United States for sale to neutrals during war was a profitable business which, in the absence of a clear intention, it could not be supposed that Congress intended to prohibit. He further declared that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." He held that no violation of the act of Congress had been committed.

Murray *v.* Schooner Charming Betsey (1804), 2 Cranch, 64, 118.

A citizen of the United States may purchase a ship of a belligerent power, at home or abroad, in a belligerent port, or on the high seas, provided the purchase be made bona fide, and the property be passed absolutely and without reserve; and the ship so purchased becomes

entitled to bear the flag and receive the protection of the United States.

Neutrals have a right to purchase ships of belligerents.

Cushing, At. Gen., 1854, 6 Op. 638; 1855, 7 Op. 538.

"The law of nations secures to neutrals unrestricted commerce with the belligerents, except in articles contraband of war, and trade with blockaded or besieged places. With these exceptions commerce is as free between neutrals and belligerents as if it were carried on solely between neutral nations; and it is difficult to conceive upon what principle an exception can be made and the neutral deprived of the rights secured in regard to the purchase of merchant vessels.

" It is true a regulation of France has been referred to in support of the doctrine avowed by the Imperial Government, but it is hardly necessary to observe that a municipal law of that country can only affect persons under its control, and can have no binding force beyond its territorial limits. The parties who made the contract for the sale and purchase of the ship *St. Harlampy* were not under the jurisdiction of the municipal law of France; on the contrary, they were both within the jurisdiction of the United States as well as the property which formed the subject of the transaction. The validity or invalidity of the transaction can be determined only by the local or international law. It was a contract authorized by the laws of this country and the law of nations; and it was supposed to be universally conceded that such a contract would be respected everywhere. Certainly no government except that under which the contract was made could interpose to destroy or vary the obligations which its provisions impose if not contrary to the law of nations. This is the doctrine of the European publicists, and it is especially sustained by Hautefeuille, whose authority will, I doubt not, be recognized by the Emperor's Government. He says, 'It is impossible to recognize such a right as that claimed by the regulation of France.' 'Commerce,' he adds, 'is free between the neutral and belligerent nations; this liberty is unlimited except [by] the two restrictions relative to contraband of war, and to places besieged, blockaded, or invested; it extends to all kinds of provisions, merchandise, and movable objects without exception. Pacific nations can then, when they judge proper, purchase the merchant ships of one of the parties engaged in hostilities, without the other party having the right to complain, without, above all, that it should have power to censure, to annul these sales, to consider and treat as an enemy, a ship really neutral and regularly recognized by the neutral Government as belonging to its subjects. To declare null and without obligation a contract, it is indispensable that the legislator should have jurisdiction over the contracting

parties. It is then necessary, in order that such a thing should take place, to suppose that the belligerent possesses the right of jurisdiction over neutral nations. That is impossible; the pretension of the belligerents is an abuse of force, an attempt against the independence of pacific nations, and consequently a violation of the duties imposed by divine law upon nations at war.'

"However long may be the period during which this doctrine has formed part of the municipal code of France, it is manifestly not in harmony with her maritime policy, and it is confidently believed by this Government that France will not assert it not only against the practice of other nations but against the authority of her most enlightened writers on public law."

Mr. Marcy, Sec. of State, to Mr. Mason, Feb. 19, 1856, MS. Inst. France, XV. 321.

"The principle, therefore, that the neutral has a perfect right to purchase the merchant vessels of the belligerents has been maintained by England, by Russia, and by the United States, and it is inconsistent with these historical facts to say that the contrary doctrine avowed by France has had the sanction of the chief maritime nations, or that 'it forms a part of the whole doctrine of maritime law.'"

Mr. Marcy, Sec. of State, to Mr. Mason, Feb. 19, 1856, MS. Inst. France, XV. 321. See, also, 11 Wait's State Papers, 203.

Mr. Marcy's position, as above stated, is in harmony with the English rule, but is contested in France, where it is held, under the regulations of July 26, 1778, that enemy-built vessels can not be made neutral by a sale to a neutral after hostilities break out. (See 2 De Pistoye et Duverdy, Prises Maritime, 1, 503.) In Russia the French rule is said to be applied. (See Courrier des Etats Unis, Oct. 27, 1855, cited in Lawrence's Wheaton (ed. 1863), 581, 582.) The English rule, like that adopted by Mr. Marcy, requires that the sale should be bona fide. (The Sechs Geschwistern 4 C. Rob. 100; see 2 Wildman's Int. Law, 88, 90.)

In 1883, during the war between France and China, many Chinese vessels were sold to citizens of the United States, and after the war was over were resold to Chinese. The validity of this transaction does not seem to have been tested by France. (See President Arthur, annual message, Dec. 1, 1884, For. Rel. 1884, iv.)

"Inquiries having been addressed to this Department as to the right of a citizen of the United States to purchase a vessel of a belligerent during the existing war in Europe, I have to inform you that a similar question arose during the late Crimean war, was deliberately and carefully investigated by the Administration for the time being, and resulted in a conviction, that a vessel so purchased, in good faith, becomes the property of the purchaser, and is entitled to the protection of the flag of the United States, though a special

act of Congress would be necessary to enable her to obtain a register from the proper Department.

"These views are entirely concurred in by the existing executive government of the United States, and will be maintained whenever there may be occasion therefor."

Mr. Cass, Sec. of State, to U. S. consuls, circular, No. 10, June 1, 1859, MSS. Dept. of State.

See, also, Mr. Cass, Sec. of State, to Mr. Mason, June 20, 1859, 50 MS. Dom. Let. 414; Mr. Cass, Sec. of State, to Mr. Gittings, June 24, 1859, id. 429.

The Consular Regulations "stated that 'foreign-built vessels, purchased and wholly owned by citizens of the United States, whether purchased of belligerents or neutrals, during a war to which the United States are not a party, or in peace, of foreign owners, are entitled to the protection and flag of the United States as the property of American citizens.' The same instructions, however, require that the purchase should have been in good faith. The purpose of the authority to consuls in the matter obviously was to enable citizens of the United States residing abroad to buy foreign-built vessels for lawful trade. It was not intended to sanction a simulated purchase of such vessels, to be employed in hostile operations against countries with which the United States are at peace. Although, if the purchase in this instance was a *bona fide* transaction, it may be that a vessel so employed by the purchaser may not have technically violated the neutrality law of the United States, still her employment in the business in which those vessels engaged, while flying the flag of this country, was contrary to the spirit of that act, and at variance with the friendship then existing between the United States and the King of the Two Sicilies. In point of fact, the examination which has been made has given rise to a doubt whether the alleged purchase of the vessels referred to was a *bona fide* transaction for a valuable consideration, or was only simulated in order that the flag of the United States might be used to screen them from capture by the Neapolitan navy on their way to and from Sicily. It can not be doubtful how far the authority or the countenance of this Government should be employed in behalf of a claim if it should prove to be of this latter character."

Mr. Fish, Sec. of State, to Mr. Marsh, Jan. 29, 1877, MS. Inst. Italy, II. 11.

"Can a foreign vessel be purchased by a citizen of the United States? . . .

"In reply . . . I have to observe that the *natural right* to acquire property by purchase has been held by high authority to be unaffected, so far as neutrals are concerned, by the mere fact that a

state of war exists between two or more belligerent powers from the citizens or subjects of one of which the purchase is made. Such right is subject, however, to the restrictions imposed by international law, by treaty, or by the belligerent powers, respectively, as to the property of their own citizens or subjects during the existence of such war.

"This principle is stated by one of the former Attorneys-General of the United States as follows: 'The state of war interrupts no contract of purchase and sale, or of transportation, as between neutral and belligerent, except in articles contraband of war.' (6 Op. 647, Cushing, At. Gen.)"

Open letter of Mr. Boutwell, Sec. of Treas., to Mr. Washburne, min. to France, May 23, 1871, sent to Mr. Fish, Sec. of State, on the same day. (MS. Misc. Letters.)

"It is notorious that a maritime war scarcely ever occurs when at least one of the belligerents does not seek to protect more or less of its shipping by a neutral flag. In some instances this may honestly be done, but sales of vessels of belligerents to neutrals in apprehension of war, or when hostilities may have actually broken out, are always more or less liable to suspicion, and such transactions justify the strictest inquiry on the part of the belligerent who thereby may have been defrauded of his right to capture enemy's property. There are various circumstances tending to show the good faith, or the reverse, of such transfers. Prominent among these is the ability of the alleged purchaser to pay for his bargain.

"If, prior to the sale, he was notoriously incapable of making any such purchase, or if his previous pursuits did not fit him for the use of the property, these and other obvious circumstances will tend to show a want of that good faith which alone can impart the rights of a neutral to a vessel so acquired. I am sorry to say that instances are not wanting where impecunious citizens of the United States have claimed to be the purchasers of foreign craft, and in some of them have actually had the hardihood to apply to this Department for its interposition, when the terms of their contract may not, in their opinion, have been complied with by the other party.

"The acceptance of the pretended ownership of a foreign-built ship has undoubtedly proved profitable to many American citizens. This was particularly the case during the great wars between maritime states, growing out of the French Revolution, when the United States were at peace. Ship-owners of this country, also, probably found a neutral flag a convenient cover for their property during our last war with Great Britain, and especially during the war of the rebellion in this country. It is understood, however, that when these hostilities were brought to a close, Congress rejected the application of parties

who asked to have those of their vessels renationalized which had been transferred under the circumstances referred to. . . .

" It must be confessed that the regulatons in authorizing a consul to authenticate and record a bill of sale of a foreign-built vessel, bestow a great power and responsbility on that officer in making him, in the first instance, at least, the sole judge of the good faith of the transaction. There must have been, and may be, times and occasions when the temptation to abuse such a power may have been, and may be, irresistible. Although the validity of the transfer may, in the end, be judicially inquired into, much harm might result from a simulated sale, before a final decision on the subject could be reached. Still the possible abuse of power by a consul is not a sufficient reason for abrogating the power, especially if Congress should abstain from forbidding the purchase and use abroad of foreign-built ships by American citizens."

Mr. Evarts, Sec. of State, to Mr. Christiancy, min. to Peru, June 20, 1879, For. Rel. 1879, 884.

" The right of Americans to buy foreign-built vessels, and to carry on commerce with them, is clear and undoubted. A reference to paragraphs 220 and 221 of the Consular Regulations will show how perfectly this right is recognized and how clearly the exercise of it is defined. It has existed as stated in instruction to your legation, No. 11, of May 8, ever since the origin of this Government. The fact that it is possible for collusion to take place between consuls and American merchants in foreign countries in connection with these transactions is not a sufficient reason to invalidate a right which exists independently of statute law and which is advantageous to the interests of American commerce and enterprise. As a consequence and adjunct of this right, the flying of the American flag can not be absolutely prohibited. As stated before in the above-mentioned instruction, if circumstances justify on the part of the consular officer an opinion that the sale was honest, and that the vessel has really become the property of a citizen, she may properly fly the flag of the owner's country as an indication of such ownership, and an emblem of the owner's nationality.

" The duty of the consul, in reference to these transactions, is clearly enough indicated in Article XVII. of the Consular Regulations. He is forbidden by law to grant any marine document or certificate of ownership, but he may properly make record of the bill of sale in his office, authenticate its execution, and deliver to the purchaser a certificate to that effect, and also certify that the owner is a citizen of the United States. A considerable discretion and responsibility rests upon consuls in regard to determining the good faith of such transactions. They are not to conclude, as a matter of course, that all such

transactions are genuine and honest. They are to take notice of any circumstances which would indicate that the transfer is fraudulent, and in all such cases it is their duty to refuse the certificates referred to. But on the other hand, they are certainly not required to consider the mere fact of the transfer of a foreign-built vessel to an American citizen as an evidence of bad faith. The presumption is rather on the other side, as in all transactions in civilized countries. In the absence of any indication of fraud, a sale in the regular way, with the usual business formalities, is to be regarded by the consul as made in good faith.

"When such transactions have been perfected, and when a consul, thoroughly satisfied of the good faith of the parties, has given his certificate of the transfer of a foreign-built vessel to an American citizen, and a vessel furnished with such consular certificate has been regularly cleared from the port where the consul referred to is stationed, and has come within the jurisdiction of another consular officer or diplomatic representative of the United States, it should require very strong evidence of fraud to induce the second consular officer to deny the American character of the vessel, to refuse the regular and necessary clearance to enable the vessel to pursue its voyage, and still more, to insist upon such a vessel hauling down its flag. In cases where a consular officer or diplomatic representative is thoroughly convinced that a vessel has no right to an American certificate of sale, and consequently no right to the use of the American colors, he will be justified in going to the extent indicated; but this discretionary power should be used with the utmost caution and reserve.

"Vessels in these circumstances, of course, can not claim the privileges and immunities and the thorough protection which are accorded to regularly registered American vessels plying between ports of the United States and those of foreign countries. The American owners domiciled abroad, engaging in business of this sort, take upon themselves all the risks incident to such traffic. If they are seized by the war vessels of one or the other belligerent and carried into courts of admiralty as prizes, they have no right to demand from the diplomatic officers of the United States that they shall be accorded anything more than fair treatment in such courts; that is to say, the fact that they are provided with consular certificates of American ownership secures for them only a presumption that such is the fact, and they are not necessarily for that reason entitled to demand from the legations of the United States anything more than that protection afforded to every other species of property belonging to American citizens domiciled in foreign countries.

"In the absence of any statutory provisions in regard to these important and delicate matters, it seems to be the duty of the executive branch of the Government to prevent, as far as possible, any dam-

age or danger to American interests, and in addition, to guard and cherish, to the extent of its power, the right of neutrals to carry on honest commerce between nations engaged in hostilities, reducing to the least possible degree the hindrances to neutral trade which inevitably arise from a state of war."

Mr. Evarts, Sec. of State, to Mr. Christiancy, min. to Peru, Dec. 26, 1879, For. Rel. 1879, 894. A similar instruction was at the same time sent to Mr. Osborn, minister to Chile.

In the case of the *Itata*, which, after being transferred by a Chilean corporation to Mr. Henry L. Stevens, an American citizen resident in Chile, entered Callao under the American flag, with a regular clearance from Valparaiso, the United States legation at Lima directed the consul to return the ship's papers and cause her to haul down the American flag. Under the suspicious circumstances of the case, the action of the legation was approved. (For. Rel. 1879, 861, 867, 894–897.)

It being subsequently reported that the *Itata* and her consorts were about to resume the American flag, Mr. Evarts said: "It will be the duty of the consul, under the direction of the legation, in that country where the ships first display American colors, to inquire strictly into the circumstances of the alleged transfers, and refuse or grant clearances, according to the merits of each particular case. This being done, it is obvious that the act of one American consul or minister should not be challenged or reversed by another except upon the strongest proof of mistake or collusion." (For. Rel. 1879, 897.)

For the instruction No. 11, May 8, 1879, referred to by Mr. Evarts, see For. Rel. 1879, 874.

In reply to a request for some sanction or approval of the proposed transfer of enemy vessels to a neutral in a blockaded Cuban port in 1898, the Department of State said that it could not "give desired permission or concede any privilege because of transfer from belligerent to neutral in a blockaded port. Vessels might be allowed to sail subject to capture and to adjudication by prize court of bona fides of transaction and of effect, if any, of mortgage, on national character of vessels, prior to transfer."

Mr. Moore, Assist. Sec. of State, to Messrs. Butler, Notman, Joline, and Mynderse, May 10, 1898, 228 Dom. Let. 378.

"This Government is in receipt of information that ships carrying the Spanish flag have been, or are about to be, furnished with British or other neutral papers upon colorable transfers of ownership, made for the purpose of avoiding belligerent capture. It is desired that any such cases coming to your notice should receive your immediate attention, and that steps should be taken to prevent the colorable and void transfers of vessels under the Spanish flag to a neutral flag."

Circular, Mr. Day, Sec. of State, to the Diplomatic and Consular Officers of the United States, July 1, 1898, For. Rel. 1898, 1176.

Capt. Henry Glass, U. S. N., when captain of the port of Manila, in August and September, 1898, before the treaty of peace between the United States and Spain had been signed, allowed the transfers of a large number of steamers from the Spanish to the American flag, on presentation of a regular bill of sale to an American citizen properly certified by the American consul, and issued a provisional register to each vessel, as the captain of the port was authorized to do under the Spanish law. The main object of the transaction was to protect the vessels from the insurgents and maintain trade between the islands while they were yet under Spanish sovereignty.

The *Benito Estenger* was captured by the United States steamship *Hornet* June 27, 1898, off Cape Cruz, on the south side of the island of Cuba. December 7, 1898, she was condemned by the United States district court for the southern district of Florida as enemy property. The claimant appealed on the ground, among others, that she was a British merchant ship, duly documented and entitled to the protection of the British flag, and lawfully owned and registered by a British subject domiciled in Great Britain. It appeared that prior to June 9, 1898, the vessel was the property of Enrique de Messa, a Spanish subject resident in Cuba, and that on that day a bill of sale was made by de Messa to the claimant, Beattie, a British subject, and the vessel registered as a British vessel, at Kingston, in accordance with the requirements of British law. She had been engaged in trade with the island of Cuba, and more particularly between the ports of Kingston and Montego, Jamaica, and the port of Manzanillo, Cuba. She left Kingston June 23, and proceeded with a cargo of flour, rice, corn meal, and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo on June 27 for Montego, and thence for Kingston, and was captured on the same day off Cape Cruz.

According to de Messa's story, he was compelled to sell the steamer in order to get money to live on, and he made the sale for $40,000, for the whole or a large part of which credit was given on an indebtedness to the firm of which Beattie was a member, and that he was employed by Beattie to go on the vessel as his representative and business manager. Beattie in his testimony said that the sale was *bona fide*, but declined to state of what the payment of the purchase money consisted. The consul of the United States at Kingston testified that Beattie in conversation, while insisting that the transfer was absolute, admitted that it was effected for the purpose of protecting the vessel. Apparently no money passed. The Spanish master and crew remained in charge. De Messa went on the voyage as supercargo; and in the brief of the claimant's counsel it was declared that the transfer was obviously made to protect the steamer as neutral property from Spanish seizure, while it was admitted that de Messa "still retained a beneficial interest after this sale and transfer of

flags." On this statement of facts the court observed that "transfers of vessels *flagrante bello* were originally held invalid," but that the rule had been "modified." The court quoted from Hall's International Law, 4th edition, page 525, as containing the correct rule of law, the following passage: "In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war." The burden of proof, said the court, was on the claimant. In conclusion, the court held that the requirements of the law of prize were not satisfied by the proofs in question, and that the condemnation was proper.

The Benito Estenger, 176 U. S. 568.

The court cited Story's Notes on the Principles and Practice of Prize Courts (Pratt's ed.) 63; 2 Wheat., App. 30; the Sechs Geschwistern, 4 C. Rob. 100; the Jemmy, 4 C. Rob. 31; The Omnibus, 6 C. Rob. 71; The Island Belle, 13 Fed. Cases, 168; The Baltica, Spinks's Prize Cases, 264; The Soglasie, Spinks's Prize Cases, 104; The Ernst Merck, Spinks's Prize Cases, 98.

Justices Shiras, White, and Peckham dissented.

The President did "not find himself justified in exercising clemency" in this case. (Mr. Hill, Act. Sec. of State, to Attorney-General, Feb. 13, 1901, 250 MS. Dom. Let. 651.)

"Merchant vessels acquired from a hostile power or its subjects by persons of neutral nationality are acknowledged to be hostile vessels unless it is proven that the acquisition must be considered, according to the laws of the nation to whom the purchasers belong, as having actually taken place before the purchasers received news of the declaration of war, or that the vessels acquired in the manner mentioned, although after the receipt of such news, were acquired quite conscientiously, and not for the purpose of covering hostile property."

Russian Prize Regulations, March 27, 1895, § 7, For. Rel. 1904, 736.

VIII. *ENEMY CHARACTER.*

1. Belligerent Domicil.

§ 1189.

The domicil of a merchant, and not his natural allegiance, determines the neutral or unneutral character of his trade.

Chester *v.* Experiment, Federal Court of Appeals (1787), 2 Dall. 41.

See, also, the Harmony (1800), 2 C. Rob. 322; The Herman, 4 C. Rob. 228; Jonge Klassina, 5 C. Rob. 302; Wilson *v.* Marryat, 8 T. R. 45; Bell *v.* Reid, 1 Maul. & Selw. 726; The Abo, 1 Spinks, 349; The Gerasimo, 11 Moo. P. C. 88; The Baltica, id. 141.

While a citizen of the United States by settling permanently abroad for business purposes, so as to acquire a commercial domicil in such place of settlement, may impress upon his property found on the ocean the legal liabilities of such domicil, it does not follow from this that he becomes expatriated, so as to divest himself of the responsibilities and liabilities of citizenship of the United States.

United States *v.* Gillies, Pet. C. C. 159.

An American citizen, residing in a foreign country, may acquire the commercial privileges attached to his domicil; and, by making himself the subject of a foreign power, he places himself out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance.

Murray *v.* The Charming Betsey, 2 Cranch, 64.
See, also, United States *v.* Cargo of El Telegrafo, 1 Newb. Adm. 383.

A Spanish subject, who comes to the United States in time of peace to carry on trade, and remains here engaged in trade after a war has been begun between Spain and Great Britain, is to be deemed an American merchant by the law of domicil, although by the law of Spain the trade in which he was engaged could be carried on only by a Spanish subject; his neutral character depending, not on the kind of trade in which he was engaged, but on his domicil.

Livingston *v.* Maryland Ins. Co. (1813), 7 Cranch, 506.
See, also, the Pizarro (1817), 2 Wheat. 227.

Where a naturalized citizen of the United States, of British origin, was, on the declaration of war by the United States against Great Britain, domiciled within the dominions of the latter power, it was held that his property, shipped from England after the declaration of war, but before the declaration was known there, was subject to capture and condemnation as enemy's property.

The Venus (1814), 8 Cranch, 253.
Marshall, C. J., dissented, and his dissent is approved by Chancellor Kent (1 Com. 79), and by Mr. Duer (1 Duer on Insurance 496–498).

James Thompson, a native of Scotland, came to the United States in 1793, and resided there, carrying on trade, till 1801. In 1797 he was naturalized. In 1801 he went to France on the business of his house; he afterwards went to England on similar business. In 1803 he settled in Glasgow, where he continued to attend to the business of his partnership till 1812, when the United States declared war. After knowledge of that event, he transacted no commercial business whatever, but applied himself to arranging his affairs so as to return to the United States. This accomplished, he engaged passage in

August, 1813, on a cartel ship from Liverpool to New York, but, being stopped by orders of the Government, went over to Ireland and privately embarked for the United States, where he arrived in November, 1813. There were affidavits to show that he always considered the United States his permanent place of residence, and that he uniformly expressed his intention to return. His letters manifested the same intention. His business was complicated, and required his attention after he ceased to engage in new adventures. He appeared as the claimant of certain goods of British manufacture, consigned to various persons in the United States and shipped on the ship *Frances*, which sailed from Greenock, Scotland, for New York, July 19, 1812. The *Frances* was captured by an American privateer, war having been declared by the United States against Great Britain, June 18, 1812. The goods were shipped without knowledge of the war. Held, on the authority of the case of the *Venus*, that, as the rights of Thompson depended on his national commercial character, the goods must be condemned.

The Frances (1814), 8 Cranch, 335.

Certain goods belonged to Colin Gillespie, a native of Great Britain, who emigrated to the United States in 1793 and was naturalized in 1798. He went to Great Britain on commercial business in 1794 and 1796; was in the United States in 1795 and 1797; returned to Great Britain in 1799 and married there; went, in the same year, with his wife, to New York, and remained there till June, 1802; then revisited Great Britain and resided there till November, 1805, when he returned to the United States and formed a partnership in New York; returning in the same year to Glasgow, he continued in business there, both while his partnership lasted and after its dissolution, till July 2, 1813, when he returned to the United States with his family. He kept house at Glasgow, and built a warehouse there, which he still owned, and in which he kept his counting house. He deposed that he determined to return to the United States when he heard of the declaration of war, but was prevented from immediately doing so by engagements and commercial affairs, some of which he finally left unarranged. Held, on the authority of the case of the *Venus*, that the goods must be condemned as enemy property.

The Frances (1814), 8 Cranch, 363.
See The St. Lawrence, 1 Gall. 467; The Frances, id. 314.

A merchant having a fixed residence, and carrying on business at the place of his birth, does not acquire a foreign commercial character by occasional visits to a foreign country.

The Nereide, 9 Cranch, 388.

Goods, the property of merchants actually domiciled in the enemy's country at the breaking out of the war, are subject to capture and confiscation as prize.

The Mary and Susan, 1 Wheat. 46.
See, particularly, a note by Mr. Wheaton to this case.

A Frenchman who had resided thirteen years in Mexico was held to have acquired a domicil in the enemy's country, subjecting him, so far as his property was concerned, to all the disabilities of an alien enemy.

Rogers *v.* The Amado, 1 Newb. Adm. 400.

All persons, whether foreigners or not, residing within the territory occupied by the hostile party in the civil war in the United States, are liable to be treated as enemies.

The Prize Cases, 2 Black, 635; The Venice, 2 Wall. 258; The William Bagaley, 5 Wall. 377; The Gray Jacket, 5 Wall. 342; The Pioneer, Blatchf. Prize Cas. 61; The Prince Leopold, id. 89; The Lilla, 2 Sprague, 177.

Property left in a hostile country by an owner who, abandoning such country, returns to his proper allegiance, becomes, unless a prompt effort is made to remove it, impressed with a hostile character, and is liable to the consequences attaching to enemy's property.

The William Bagaley, 5 Wall. 377.

The court reaffirms the ruling in the William Bagaley (5 Wall. 377), that a resident of a section in rebellion should leave it as soon as practicable and adhere to the regular established government; and furthermore holds that one who, abandoning his home, enters the military lines of the enemy and is in sympathy and cooperation with those who strive by armed force to overthrow the Union, is, during his stay there, an enemy of the Government, and liable to be treated as such, both as to his person and property.

Gates *v.* Goodloe, 101 U. S. 612.

"As to strangers, those who settle in the enemy's country after a war is begun, of which they had previous notice, may justly be looked upon as enemies, and treated as such. But in regard to such as went thither before the war, justice and humanity require that we should give them a reasonable time to retire; and if they neglect that opportunity, they are accounted enemies."

Burlamaqui, Principles of Natural and Politic Law (translated by Nugent, 1763) II. 281, adopted, as far as quoted, by Mr. Pinkney as commissioner in the case of the Betsey, Wheaton's Life of Pinkney, 251.

"According to Chancellor Kent, the principle that 'for all commercial purposes the domicil of the party, without reference to the place of birth, becomes the test of national character, has been repeatedly and explicitly admitted in the courts of the United States.' 'If he resides' (here 'domicil' and 'residence' are treated as convertible by Chancellor Kent, which, if the latter term be regarded as defining the rule, would largely extend belligerent rights) 'in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade.' (1 Kent Com. 75; The Chester, 2 Dall. 41; Maley *v.* Shattuck, 3 Cranch, 458; The Venus, 8 id. 253. To the same effect, see The William Bagaley, 5 Wall. 377; The Cheshire, 3 Wall. 231.) Sir Robert Phillimore, on the other hand, evidently accepts this position with reluctance (4 Phill. 169), though it is reaffirmed by Mr. Dicey, who states the distinction to be as follows: 'A commercial domicil is such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there.' (Dicey on Domicil, 345; see further Whart. Confl. of Laws, § 70.) This is clearly put; and if we accept the position that an enemy's goods may be seized at sea wherever found, gives us at least a line of demarkation readily understood and easily applied. It is, however, to be regretted that the term 'domicil' should be adapted to conditions so different as residence with intention to establish a permanent home, and residence with intention to engage in business. The rejection of this distinction renders still more objectionable the claim of belligerents to seize an enemy's goods at sea. If by an 'enemy' is to be considered any one who by his business contributes to the resources of an enemy's country, it would be hard for any goods on the high seas, in any way related to a belligerent country, to escape the meshes of the net of the other belligerent. And even were we to holds that a commercial 'domicil' of this kind stamps the party accepting it with the political character of the country in which he does business, the more reasonable view is that if he engage in such business in time of peace, this 'domicil,' if not adopted as final, ceases when the sovereign of such country enters into a war which could not have been contemplated by the party when he engaged in the business. This is the position taken by Marshall, C. J., in The

Venus (8 Cranch, 253), dissenting in this respect from the majority of the court, who held to the English view. Chancellor Kent (Com. i. 79) and Mr. Duer (Ins. i. 498), vindicate the dissenting opinion of the Chief Justice; Chancellor Kent saying 'there is no doubt of its superior solidity and justice.' And even by the English courts a person doing business in a land in which he is not naturalized is allowed, on the breaking out of war, a reasonable time to leave such land, and dissolve his business relations. The Gerasimo, 11 Moore, P. C. 88; The Ariel, id. 119; see, for parallel cases in this country, The William Bagaley, 5 Wall. 377; The Gray Jacket, 5 Wall. 342. But where a merchant elects to put his goods in a country engaged in war, he impresses such goods, according to the English view, with the political character of such country; and this 'allows a merchant to act in two characters, so as to protect his property connected with his house in a neutral country, and to subject to seizure and forfeiture his effects belonging to the establishment in the belligerent country.'"

Wharton, Int. Law Digest, III. 344.

2. Immateriality of Personal Disposition.

§ 1190.

"It is said, that though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore can not be regarded as enemy property; but this court can not inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States, must be regarded as enemies, until, by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed."

Chase, C. J., Mrs. Alexander's Cotton, 2 Wall. 404, 419.

Prize-enemy character.

An attempt was made to prevent the condemnation of a vessel, captured by an American cruiser in June, 1898, as enemy's property, on the ground that the alleged owner, one de Messa, though a Spanish subject, should not be treated as an enemy of the United States. It was argued that the vessel when captured was engaged in a voyage in behalf of the local Cuban junta at Kingston, Jamaica, allies of the United States, and was thus captured in the service of the United States in the performance of friendly offices to the United States forces in Cuba. There was "evidence tending to show that Messa sympathized with the Cuban insurgents, but no proof that he was himself a Cuban rebel

or that he had renounced his allegiance to Spain." The cargo of the vessel when captured consisted chiefly of flour, and there was evidence to show that this flour, when landed at Manzanillo, was immediately transferred to the Spanish Government warehouse. The court referred to Manzanillo as a "Spanish stronghold," and observed that the delivery of the provisions to the Spanish Government constituted, under the laws of war, illicit intercourse with the enemy. It was alleged, however, that de Messa had rendered important service to the United States; that he was the friend and not the enemy of the United States, and that there was an agreement between him and the United States consul which operated to protect the vessel from capture. It appeared that de Messa had endeavored to cultivate friendly relations with the United States consul at Kingston, and had given him an old government plan of the province of Santiago, and an especially prepared chart of the harbor, in return for which he endeavored to obtain from the consul a letter of protection for the voyage which he was about to undertake. The consul declined to furnish the letter, but on June 23 wrote to Admiral Sampson that de Messa offered to give certain information that might be valuable, and proposed to be off Cape Cruz on June 30, adding: "You quite understand that in dealing with those people, one is always more or less liable to imposition. I therefore make no recommendation of Messa to you." The claimant asserted, while the consul denied, that protection was given to the voyage by his letter. With reference to this contention, the court said that there was nothing to show that the voyage was undertaken on the strength of the letter, or that it in any way contributed to the capture; nor that the admiral intended to avail himself of the suggestion made in it; "but," said the court, "we do not go at length into this matter because we think that no engagement with the United States nor any particular service to the United States was made out in that connection, and so far as appears the vessel was captured in the ordinary course of cruising duty at a time and under circumstances when her liability was not to be denied. Moreover, a United States consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation." Referring to the same subject in another place, the court said: "Messa's status was that of an enemy, as already stated, and this must be held to be so notwithstanding individual acts of friendship, certainly since there was no open adherence to the Cuban cause, and allegiance could have been shifted with the accidents of war."

The Benito Estenger, 176 U. S. 568.

3. Consuls.

§ 1191.

The ship *Indian Chief*, belonging to Mr. Johnson, a citizen of the United States, who had lately been American consul in London, was seized at Cowes, and libeled as a droit of the admiralty. Her cargo, which was taken at Batavia, belonged to Mr. Millar, American consul at Calcutta, and she had called at Cowes to receive orders concerning its delivery. The question of condemnation depended upon whether Messrs. Johnson and Millar were to be regarded as having a commercial domicil in British territory. In the case of the former, it was found that he had taken steps to regain his American character, and the ship was restored. As to Mr. Millar, is was held that he was, in spite of his consular character, to be considered as a British (domiciled) merchant, and the cargo was condemned.

The Indian Chief (1801), 3 C. Rob. 12.

"As connected with this subject, it is proper that I should inform you that a ship belonging to Mr. Johnson, late our consul here, laden with a cargo belonging to Mr. Miller, our consul at Calcutta, and bound from Batavia to Hamburgh, touched a few weeks since at Cowes, where she was detained and has since been libelled as a droit of Admiralty. Upon my application for her release, I have been answered that it is thought proper to make this case the subject of a judicial decision; that Johnson and Miller were both domiciled as alien merchants within the British dominions, that being so domiciled they no longer possessed the commercial rights of the citizens of the nation to which they belonged, but were subject to the laws of Great Britain, which prohibit every person settled within the British dominions from trading with any nation with whom Great Britain is at war. I have on a former occasion stated to you the law as it is here interpreted concerning the consuls of neutral nations residing and carrying on trade in belligerent nations. In this case I observed among other things to Sir Wm. Scott that both Johnson and Miller were in their consular commissions named as American citizens and their exequatur must be considered as an admission thereof on the part of the Crown; that it therefore seemed unreasonable to confound the case of consuls who, for the benefit of the commerce of their nation, are sent to reside within the British dominions with that of other foreigners who for the mere sake of trade might come to settle there. The Advocate-General replied that the recognition of a consul was relative merely to his consular or official character, and could not be intended to grant any commercial privileges to the person named as consul; that the contrary doctrine would be introductory of great mischief, and that the law upon this subject has been long settled. I have recommended to the gentlemen who represent Mr. Johnson and Mr. Miller to contest this law, tho' Doctor Nicholl gives me little encouragement to hope that the decision of the court will be in our favour. Perhaps the circumstance that Johnson had quitted London and probably was in America at the time of the seizure may operate

in his favour. At any rate it is suitable that you should be acquainted with a transaction that so materially affects the economical views of our consular system." (Mr. King, min. to England, to the Secretary of State, No. 60, December 28, 1797, MS. Desp. England.)

"The French practice is so far different that the property of a neutral subject, consul for a neutral state in a belligerent country, and carrying on trade in the latter, is held to be itself neutral." (Hall, Int. Law, 5th ed. 501, citing Le Hardi contre la Voltigeante, Pistoye et Duverdy, I. 321; La Paix, ib.)

Certain tobacco belonging to the Portuguese vice-consul at Gibara, Cuba, was seized by the United States and condemned as prize, together with the Spanish vessel of which it formed the cargo. It was asserted that a claim for the tobacco was not directly and formally presented owing to certain correspondence between the Departments of State and Justice and the Portuguese minister. Held, that the precedents would have led to the condemnation of tobacco so owned, so shipped, so originating, and that its condemnation was not illegal and tortious, and that the demand of this merchant, whose status was not effected by his consular character, is without substantial merit.

Griggs, At. Gen., Feb. 10, 1899, 22 Op. 327.

4. Interests of Partners.

§ 1192.

The share of a partner in a neutral house is, jure belli, subject to confiscation where his own domicil is in a hostile country.

The Antonia Johanna (1816), 1 Wheat. 159.

See The Jonge Classina, 5 C. Rob. 302; The Anna Catherina, 4 C. Rob. 119; The Portland, 3 C. Rob. 44; Calvo, § 1719—cited in Hall, Int. Law, 5th ed. 501.

The property of a house of trade established in the enemy's country is condemnable as prize, whatever may be the personal domicil of the partners.

The Friendschaft, 4 Wheat. 105.

If there be a house of trade established in the enemy's country, the property of all the partners in the house is condemnable as prize, notwithstanding some of them have a neutral residence. But such connection will not affect the other separate property of the partners having a neutral residence.

The San José Indiano, 2 Gall. 268.

The property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize, though some of the partners may have a neutral domicil.

The Cheshire, 3 Wall. 231.

The presumption of the law of nations is against an owner who suffers his property to continue in the hostile country for a considerable length of time. If a person, abandoning a hostile country, has had his property in partnership with citizens thereof, it is his duty to withdraw or dispose of his interest in the firm. If he neglects to do so, his property becomes liable as enemy's property.

The William Bagaley, 5 Wall. 377.

The taint of belligerent domicil does not reach the separate property of a partner having a neutral domicil, see the Sally Magee, Blatch. Pr. Cas. 382; The Aigburth, id. 635.

5. Change of Domicil.

§ 1193.

If a native citizen of the United States emigrate, before a declaration of war, to a neutral country and acquire a domicil there, and afterwards return, during the war, to the United States and reacquire his domicil here, he becomes a redintegrated American citizen, and can not flagrante bello separate himself from his character as such and acquire a neutral character by returning to his adopted country.

The Dos Hermanos (1817), 2 Wheat. 76.

The native character does not revert, by a mere return to his native country, to a merchant who is domiciled in a neutral country at the time of a capture, and after the capture leaves his commercial establishment in the neutral country to be conducted by his clerks in his absence, visiting his native country merely on mercantile business, and intending to return to his adopted country. His neutral domicil still continues.

The Friendschaft, 3 Wheat. 14.

British subjects residing in Portugal, though allowed great privileges, do not retain their native character, but acquire that of the country where they reside and carry on their trade. (Ibid.)

A neutral, who has resided in an enemy's country, resumes his neutral rights as soon as he puts himself and his family in itinere to return home to reside, and has a right to take with him money he has earned, as the means of support for himself and his family. Such property, it was further held, is not forfeited by a breach of blockade

by the vessel on board of which he has taken passage if he personally is in no fault.

United States *v.* Guillem, 11 How. 47. See this case considered in dispatch from Mr. Hoffman, Apr. 14, 1879, For. Rel. 1879, 913; Wharton, Com. Am. Law, § 219.

The question how far a temporary residence of a neutral merchant in an enemy's country imposes on such merchant the enemy's liability to capture at sea is discussed at large by Mr. Pinkney, as commissioner, under the treaty of 1794, Wheaton's Life of Pinkney, 245 et seq.

6. Corporations.

§ 1194.

There is no legal difference, as to a plea of alien enemy, between a corporation and an individual.

Society, etc., *v.* Wheeler, 2 Gall. 105.

See, also, The Danckebaar Africaan, 1 Rob. 107; Martine *v.* Int. Life Ins. Soc., 53 N. Y. 339.

See Nigel Gold Mining Co., Lim., *v.* Hoade (1901), 17 T. L. R. 711, and the comments thereon in 15 Harvard Law Review, 237.

IX. *EXEMPTIONS FROM CAPTURE.*

1. Goods on Neutral Vessels.

§ 1195.

By international law up to the present time the ships of an enemy are lawful prize, but their cargoes may or may not be subject to condemnation. On the other hand, ships of a neutral are not in themselves good prize, but may become so as the result of unneutral conduct—such as the attempt to break a blockade; and their cargoes, like those of enemy ships, may or may not be subject to confiscation, according to circumstances. As to the treatment of cargo, the following rules have been acted upon:

1. The goods of an enemy may be seized and confiscated whether found in an enemy or in a neutral ship.

2. Goods of an enemy, contraband of war excepted, are exempt from seizure and confiscation when on board of a neutral ship. This is known as the rule of "free ships, free goods."

3. The goods partake of the character of the ship: If the ship is neutral, they are free; if the ship belongs to an enemy, they are condemned. This is known as the rule of "free ships, free goods; enemy ship, enemy goods."

The last rule is enforced only under special treaty stipulations. The great contest has been waged between the first and second rules. The first, that the fate of the goods is determined by the belligerent

or neutral character of the owner, without regard to whether the ship is enemy or neutral, was at one time the common law of Europe. It was laid down in the *Consolato del Mare* and was universally accepted. But about the middle of the seventeenth century a new rule began to be introduced, and it was stipulated in various treaties that the goods of an enemy should be free when on board a neutral ship. This rule was in time embodied in the marine ordinances of France. It was strenuously advocated by the Dutch. It was embraced in the declaration of the Empress of Russia of 1780, which formed the basis of the first armed neutrality. Great Britain generally adhered to the old rule, and in the maritime wars of the eighteenth century the new rule was little observed. Eventually, however, Great Britain came to accept the new rule. When the Crimean war broke out she joined France in proclaiming that enemy property on board a neutral ship would be respected. Then, at the close of the war, came the famous Declaration of Paris of April 16, 1856, the second and third rules of which, as we have seen, read as follows:

"2. The neutral flag covers an enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag."

The position of the United States with reference to these rules has often been misapprehended. The rule that neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag, has always been acted upon by the United States, save in case of special treaty stipulations to the contrary; but, with the rule that free ships make free goods, the case is different. Mr. Seward, referring to this rule, as embodied in the Declaration of Paris, once said: "We have always practiced on the principles of the declaration."[a] Similar expressions may be found in the works of publicists, but they are inaccurate. Although American statesmen had advocated the adoption of the rule, the American courts, except where a treaty prescribed a different rule, had uniformly confiscated enemy property, even when it was seized under a neutral flag. And what is to be said as to our treaties? In only ten of them, made with seven powers—Algiers, 1816; Morocco, 1787 and 1836; Prussia, 1785 and 1828; Spain, 1795; Tripoli, 1796 and 1805; Tunis, 1797; and Venezuela, 1860—had the rule of "free ships, free goods" been stipulated for unconditionally, contraband always excepted. In six treaties—Russia, 1854; Two Sicilies, 1855; Peru, 1856; Bolivia, 1858; Hayti, 1864; and the Dominican Republic, 1867—the principle of "free ships, free goods" was recognized as "permanent and im-

[a] Instruction to Mr. Dayton, min. to France, Sept. 10, 1861, Diplomatic Correspondence 1861, 233–235.

mutable," but the contracting parties engaged to apply it only to the commerce and navigation of such powers as should "consent to adopt" it as "permanent and immutable." Of these treaties, those with the Dominican Republic and the Two Sicilies have ceased to be in force, and that with Peru had been superseded. In our treaty with Spain of 1819 the principle of "free ships, free goods" was acknowledged, but only in regard to the property of enemies whose governments recognized it. Similar stipulations may be found in our treaties with Italy of 1871 and Peru of 1887, and indeed in the first treaty ever concluded by the United States—the treaty of amity and commerce with France of February 6, 1778. But in the treaty with France they were coupled with yet another stipulation restrictive of neutral commerce, namely, that the goods of the citizens of the contracting parties should be confiscated, if laden on the ship of an enemy, unless they were shipped before the declaration of war, or within a certain time afterwards in ignorance of the declaration. These associated stipulations are found more generally than any others in our treaties relating to neutral rights, as may be seen by the following list: Brazil, 1828; Central America, 1825; Chile, 1832; Colombia, 1824 and 1846; Ecuador, 1839; France, 1800; Guatemala, 1849; Mexico, 1831; the Netherlands, 1782; Peru, 1851; Peru-Bolivia, 1836; Salvador, 1850 and 1870; Sweden, 1783; Sweden and Norway, 1816 and 1827; and Venezuela, 1836. But at the outbreak of the war with Spain all these treaties, except those with Colombia (1846), Salvador (1870), and Sweden and Norway (1827), had ceased to be in force. With Great Britain we had had no engagement on the subject except that embodied in the treaty of 1794, which acknowledged the rule of the common law.

"I believe it can not be doubted, but that, by the general law of nations, the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. Upon this principle, I presume, the British armed vessels have taken the property of French citizens found in our vessels, in the cases above mentioned, and I confess I should be at a loss on what principle to reclaim it. It is true, that sundry nations, desirous of avoiding the inconveniences of having their vessels stopped at sea, ransacked, carried into port, and detained, under pretence of having enemy goods on board, have, in many instances, introduced, by their special treaties, another principle between them, that enemy bottoms shall make enemy goods and friendly bottoms friendly goods—a principle much less embarrassing to commerce, and equal to all parties in point of gain and loss; but this is altogether the effect of particular treaty, controlling, in special cases, the general principle of

the law of nations, and therefore taking effect between such nations only as have so agreed to control it."

Mr. Jefferson, Sec. of State, to Mr. Genet, July 24, 1793, 1 Am. State Papers, For. Rel. 166; 1 Wait's State Papers, 134.

To same effect see Mr. Jefferson to Mr. Morris, min to France, Aug. 16, 1793, 1 Wait's State Papers, 148; 1 Am. State Papers, For. Rel. 167, 170. And Mr. Hamilton in "Camillus," 5 Lodge's Hamilton, 218.

"Mr. Jefferson's assertion (supra) of the principle that enemy's property is liable to capture and condemnation in the vessel of a friend is not absolute. His words are, 'I believe it can not be doubted.'" (6 J. Q. Adams's Memoirs, 162.)

See Mr. Jefferson to Mr. Everett, Feb. 24, 1823, 7 Jefferson's Works, 271. See, also, 3 Rives's Madison, 347, 348.

As to the early adherence of the United States to the rule of the common law, see 3 Phillimore (3rd ed.), 315; 44 N. Am. Review, 24; 37 London Quarterly Review, 286, cited in 2 Gallatin's Works, 400.

For a survey of the development of the rule of free ships, free goods, see Hall Int. Law, 5th ed. 684–690.

The maxim "free ships make free goods" is not an accepted principle of the law of nations, but was introduced as an exception thereto in the 23d section of the first French-American commercial treaty. "This stipulation was intended to operate (indeed it was its sole object, and otherwise could have no operation at all) when one of the parties should be at war with a nation or nations with whom the other should be at peace." The maxim, however, was set aside by France during her war with England in 1796–97.

Mr. Pickering, Sec. of State, to Mr. J. Q. Adams, July 17, 1797, 2 Am. State Papers, For. Rel. 559.

"It is possible that, in the pending negotiations for peace [July, 1797, between Great Britain and France] this principle of *free ships making free goods* may be adopted by all the great maritime powers; in which case, the United States will be among the first of the other powers to accede to it, and to observe it as a universal rule."

Mr. Pickering, Sec. of State, to Mr. J. Q. Adams, July 17, 1797, 2 Am. State Papers, For. Rel. 250.

"The principle of making free ships protect enemy's property has always been cherished by the maritime powers who have not had large navies, though stipulations to that effect have been in all wars more or less violated. In the present war, indeed, they have been less respected than usual, because Great Britain has held more uncontrolled the command of the sea, and has been less disposed than ever to concede the principle; and because France has disclaimed most of the received and established ideas upon the laws of nations, and considered

herself as liberated from all the obligations towards other states which interfered with her present objects, or the interests of the moment."

Mr. J. Q. Adams, min. at Berlin, to the Sec. of State, Oct. 31, 1797, 2 Am. State Papers, For. Rel. 251.

"This day Mr. Van Polanen, minister resident from the United Netherlands, called at my office and verbally informed me that he was instructed by his Government to state to the Government of the United States of America the dissatisfaction with the treaty of amity, commerce and navigation betwen the said United States and Great Britain, in respect to the stipulations relating to enemies goods in neutral ships, and to articles contraband of war because the former were admitted to be subject to capture, and the list of the latter increased by the addition of ship timber and naval stores and articles for the equipment of ships.

"Early in the past winter, or about the close of the last autumn, Mr. Van Polanen formally made a similar verbal representation. In both cases I immediately communicated the same to the President of the United States."

Mr. Pickering Sec. of State, memorandum, May 15, 1797, 10 MS. Dom. Let. 41.

This referred to the Jay treaty. As to the dissatisfaction of France, see supra, § 821.

"It is a general rule, that war gives to a belligerent power a right to seize and confiscate the goods of his enemy. However humanity may deplore the application of this principle, there is, perhaps, no one to which man has more universally assented, or to which jurists have more uniformly agreed. Its theory and its practice have unhappily been maintained in all ages. This right, then, may be exercised on the goods of an enemy wherever found, unless opposed by some superior right. It yields by common consent to the superior right of a neutral nation to protect, by virtue of its sovereignty, the goods of either of the belligerent powers, found within its jurisdiction. But can this right of protection, admitted to be possessed by every Government within its mere limits, in virtue of its absolute sovereignty, be communicated to a vessel navigating the high seas?

"It is supposed that it can not be so communicated; because the ocean being common to all nations, no absolute sovereignty can be acquired in it. The rights of all are equal, and must necessarily check, limit, and restrain each other. The superior right, therefore, of absolute sovereignty, to protect all property within its own territory, ceases to be superior when the property is no longer within its own territory, and may be encountered by the opposing acknowledged right of a belligerent power to seize and confiscate the goods of his

enemy. If the belligerent permits the neutral to attempt, without hazard to himself, thus to serve and aid his enemy, yet he does not relinquish the right of defeating that attempt whenever it shall be in his power to defeat it. Thus it is admitted that an armed vessel may stop and search at sea a neutral bottom, and may take out goods which are contraband of war, without giving any cause of offence, or being supposed in any degree to infringe neutral rights; but this practice could not be permitted within the rivers, harbors, or other places of a neutral, where its sovereignty was complete. It follows, then, that the full right of affording protection to all property whatever, within its own territory, which is inherent in every government, is not transferred to a vessel navigating the high seas. The right of a belligerent over the goods of his enemy within his reach, is as complete as his right over contraband of war; and it seems a position not easily to be refuted, that a situation that will not protect the one, will not protect the other. A neutral bottom, then, does not, of right, in cases where no compact exists, protect from his enemy the goods of a belligerent power."

Note of Messrs. Pinckney, Marshall, and Gerry to the French minister of foreign affairs, M. de Talleyrand, Jan. 17, 1798, 2 Am. State Papers, For. Rel. 171. Quoted, with approval, by Sir W. Vernon Harcourt, in Historicus on Int. Law, 208.

"The question, whether neutral ships shall protect enemy's property, is indeed important. It is of so much importance, that if the principle of *free ships, free goods* were once really established and honestly observed, it would put an end forever to all maritime war, and render all military navies useless. However desirable this may be to humanity, how much soever philosophy may approve it and Christianity desire it, I am clearly convinced it will never take place. The dominant power on the ocean will forever trample on it. The French would despise it more than any nation in the world, if they had the maritime superiority of power, and the Russians next to them."

President Adams to Mr. Marshall, Sec. of State, Oct. 3, 1800, 9 John Adams's Works, 86.

"When Europe assumed the general form in which it is occupied by the nations now composing it, and turned its attention to maritime commerce, we found among its earliest practices, that of taking the goods of an enemy from the ship of a friend: and that into this practice every maritime state went sooner or later, as it appeared on the theatre of the ocean. If, therefore, we are to consider the practice of nations as the sole and sufficient evidence of the law of nature among nations, we should unquestionably place this principle among those of the natural laws. But its inconveniences, as they affected

neutral nations peaceably pursuing their commerce, and its tendency to embroil them with the powers happening to be at war, and thus to extend the flames of war, induced nations to introduce by special compacts, from time to time, a more convenient rule, 'that free ships should make free goods;' and this latter principle has by every maritime nation of Europe been established, to a greater or less degree, in its treaties with other nations; insomuch, that all of them have, more or less frequently, assented to it, as a rule of action in particular cases. Indeed, it is now urged, and I think with great appearance of reason, that this is the genuine principle dictated by national morality; and that the first practice arose from accident, and the particular convenience of the states which first figured on the water, rather than from well-digested reflections on the relations of friend and enemy, on the rights of territorial jurisdiction, and on the dictates of moral law applied to these. Thus it has never been supposed lawful, in the territory of a friend to seize the goods of an enemy. On an element which nature has not subjected to the jurisdiction of any particular nation, but has made common to all for the purposes to which it is fitted, it would seem that the particular portion of it which happens to be occupied by the vessel of any nation, in the course of its voyage, is for the moment, the exclusive property of that nation, and, with the vessel, is exempt from intrusion by any other, and from its jurisdiction, as much as if it were lying in the harbor of its sovereign. In no country, we believe, is the rule otherwise, as to the subjects of property common to all."

President Jefferson to Mr. Livingston, Sept. 9, 1801, 4 Jefferson's Works, 408.

"The United States can not, with the same consistency as some other nations, maintain the principle [of free ships, free goods] as already a part of the law of nations, having on one occasion admitted and on another stipulated the contrary. They have, however, invariably maintained the utility of the principle, and whilst, as a pacific and commercial nation, they have as great an interest in the due establishment of it as any nation whatever, they may with perfect consistency promote such an extension of neutral rights. The northern powers, Russia among the rest, having fluctuated in their conduct, may also be under some restraints on the subject. Still they may be ready to renew their concurrence in voluntary and conventional arrangements for giving validity to the principle, and drawing Great Britain into them."

Mr. Madison, Sec. of State, to Mr. Armstrong, min. to France, March 14, 1806, MS. Inst. United States, Ministers, VI. 322.

See, also, President Madison to Mr. Ingersoll, July 28, 1814, 2 Madison's Writings, 585.

"It is also desirable to stipulate with the British Government that free ships shall make free goods, though it is proper to remark that the importance of this rule is much diminished to the United States by their growth as a maritime power, and the capacity and practice of their merchants to become the owners of the merchandise carried in our vessels. It is nevertheless still important to them, in common with all neutral nations, as it would prevent vexatious seizures by belligerent cruisers, and unjust condemnations by their tribunals from which the United States have sustained such heavy losses."

Mr. Monroe, Sec. of State, to Mr. Adams, May 21, 1816, MS. Inst. U. States Ministers, VIII. 61.

The rule that enemy goods found in a neutral vessel are prize of war, and that neutral goods found in an enemy vessel are to be restored, is not indivisible in the sense that the alteration of one part implies the alteration of the other. Hence, the stipulation in Article 15 of the treaty with Spain of 1795, that free ships shall make free goods, is to be regarded only as a concession made by the belligerent to the neutral for the purpose of enlarging the sphere of neutral commerce and of giving to the neutral flag a capacity not given to it by the law of nations. So, on the other hand, a stipulation subjecting neutral property in an enemy bottom to condemnation is to be regarded as a concession made by the neutral to the belligerent, and as narowing the sphere of neutral commerce. The stipulation therefore that free ships shall make free goods does not imply that enemy ships shall make enemy goods, nor vice versa.

Marshall, Ch. J., delivering the opinion of the court in The Nereide (1815), 9 Cranch, 388, 412, 422.

It was contended by the captor in this case that the stipulation in question should in the present instance be construed to imply that an enemy ship should make enemy goods, because certain ordinances of Spain would subject American property, under similar circumstances, to confiscation. The ordinances in question were not produced; nor was it shown that, even if they had a permanent existence, they were applicable to the United States. But, said Marshall, Ch. J., the court was "decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. It is for the consideration of the government not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics."

The capture of a neutral ship having enemy's property on board is a strictly justifiable exercise of the rights of war. It is no wrong done to the neutral, even though the voyage be thereby defeated. The captors are not therefore answerable in pœnam to the neutral for the losses which he may sustain by a lawful exercise of belligerent rights. It is the misfortune of the neutral and not the fault of the belligerent.

By the capture the captors are substituted in lieu of the original owners, and they take the property cum onere. They are, therefore, responsible for the freight which then attached upon the property, of which the sentence of condemnation ascertains them to be the rightful owners, succeeding to the former proprietors. So far the rule seems perfectly equitable, but to press it further and charge them with the freight of goods which they have never received, or with the burden of a charter party into which they have never entered, would be unreasonable in itself and inconsistent with the admitted principles of prize law. It might, in case of a justifiable capture by the condemnation of a single bale of goods, lead the captors to their ruin with the stipulated freight of a whole cargo.

The Antonia Johanna, 1 Wheat. 159.

Does the rule "free ships, free goods" protect a citizen of the captor's country who has been trading with the enemy in respect of the goods in controversy? Story, J., delivering the opinion of the court, said that as the ship was Spanish, it was unnecessary, in view of the treaty with Spain of 1795, which provided that free ships should make free goods, to inquire into the proprietary interest of the cargo, "unless so far as to ascertain that it does not belong to citizens of the United States; for the treaty would certainly not protect the property of American citizens trading with the enemy in Spanish ships." There was nothing in the case, however, to show that the property was American, and it was restored, it being apparently either British or Spanish in ownership.

The Pizarro (Mar. 5, 1817), 2 Wheat. 227, 246.

"It is obvious that the privilege of the neutral flag of protecting enemy's property, whether conferred by treaty or by the ordinances of belligerent powers, can not extend to a fraudulent use of the flag to cover enemy's property in the ship as well as the cargo. The Minerva, 1 Marriott's Adm. Dec. 235. The Cittade de Lisboa, 6 Rob. 358. The Eendraught, id., note (*a*). During the war of the American Revolution the United States, recognising the principles of the armed neutrality, exempted by an ordinance of Congress all neutral vessels from capture, except such as were employed in carrying contraband goods, or soldiers, to the enemy; it was held that this exemption did not extend to a vessel which had been guilty of grossly

unneutral conduct, in taking a decided part with the enemy, by combining with his subjects to wrest out of the hands of the United States and of France the advantages they had acquired over Great Britain, by the rights of war in the conquest of Dominica. By the capitulation of that island, all commercial intercourse with Great Britain was interdicted. In the case in question, the vessel was purchased by neutrals in London, who supplied her with false and colourable papers, and assumed on themselves the ownership of the cargo, for a voyage from London to Dominica. The continental court of appeals, in pronouncing the vessel and cargo liable to condemnation, observed, 'Had she been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be prize; because Congress had said, by their ordinance, that the rights of neutrality should extend protection to such effects and goods of an enemy. But, if the neutrality were violated, Congress have not said, that such a *violated neutrality* shall give such *protection:* nor could they have said so, without confounding all the distinctions between right and wrong.' The Estern, 2 Dall. 36. The only treaties now subsisting between the United States and foreign powers, containing the stipulation that free ships shall make free goods, are the above treaty with Spain, that of 1782 with the Netherlands, (which, it is presumed, still subsists, notwithstanding the changes in the political situation of that country,) and the treaties with the Barbary States. The conventions between the latter and Christian powers always contain the stipulation, that the flag and pass shall protect the cargo sailing under it. In the memorable case of The Nereide, 9 Cranch, 388, it was contended by the counsel for the captors, that this stipulation in the Spanish treaty, taken in connexion with the law of Spain, necessarily implied the converse proposition, that *enemy's ships makes enemy's goods*, which is not expressed in the treaty. But this argument was overruled by the court, who held that the treaty did not contain, either expressly or by implication, a stipulation that enemy's ships shall make enemy's goods. Id. 418. See Ward on the Relative Rights and Duties of Belligerent and Neutral Powers, 145."

The Pizarro (1817), 2 Wheat. 227, 247, note by Wheaton.

"On the question whether the principle of 'free bottoms making free goods, and enemy bottoms enemy goods,' is now to be considered as established in the law of nations, I will state to you a fact within my own knowledge, which may lessen the weight of our authority as having acted in the war of France and England on the ancient principle 'that the goods of an enemy in the bottom of a friend are lawful prize, while those of a friend in an enemy bottom are not so.' England became a party in the general war against France on the 1st of

February, 1793. We took immediately the stand of neutrality. We were aware that our great intercourse with these two maritime nations would subject us to harassment by multiplied questions on the duties of neutrality, and that an important and early one would be which of the two principles above stated should be the law of action with us. We wished to act on the new one of 'free bottoms, free goods;' and we had established it in our treaties with other nations, but not with England. We determined therefore to avoid, if possible, committing ourselves on this question until we could negotiate with England her acquiescence in the new principle. Although the cases occurring were numerous, and the ministers, Genet and Hammond, eagerly on the watch, we were able to avoid any declaration until the massacre of St. Domingo. The whites, on that occasion, took refuge on board our ships, then in their harbor, with all the property they could find room for; and on their passage to the United States, many of them were taken by British cruisers, and their cargoes seized as lawful prize. The inflammable temper of Genet kindled at once, and he wrote, with his usual passion, a letter reclaiming an observance of the principle of 'free bottoms, free goods,' as if already an acknowledged law of neutrality. I pressed him in conversation not to urge this point; that although it had been acted on by convention, by the armed neutrality, it was not yet become a principle of universal admission; that we wished indeed to strengthen it by our adoption, and were negotiating an acquiescence on the part of Great Britain; but if forced to decide prematurely, we must justify ourselves by a declaration of the ancient principle, and that no general consent of nations had as yet changed it. He was immovable, and on the 25th of July wrote a letter, so insulting, that nothing but a determined system of justice and moderation would have prevented his being shipped home in the first vessel. I had the day before answered his of the 9th, in which I had been obliged in our own justification, to declare that the ancient was the established principle, still existing and authoritative. Our denial, therefore, of the new principle, and action on the old one, were forced upon us by the precipitation and intemperance of Genet, against our wishes, and against our aim; and our involuntary practice, therefore, is of less authority against the new rule."

Mr. Jefferson to Mr. Everett, Feb. 24, 1823, 7 Jefferson's Works, 270, 271.

While "by the general usage of nations, independent of treaty stipulations, the property of an enemy is liable to capture in the vessel of a friend," it is "not possible to justify this rule upon any sound principle of the law of nations, for by that law the belligerent party has no right to pursue or attack his enemy without the jurisdiction of either of them. The high seas are a general jurisdiction common to all, qualified by a special jurisdiction of each nation over its own

vessels. . . . This is universally admitted in time of peace. War gives the belligerent a right to pursue his enemy within the jurisdiction common to both, but not into the special jurisdiction of the neutral power."

Mr. Adams, Sec. of State, to Mr. Anderson, min. to Colombia, May 27, 1823, MS. Inst. United States Ministers, IX. 274.

"This search for and seizure of the property of an enemy in the vessel of a friend is a relic of the barbarous warfare of barbarous ages, the cruel, and, for the most part, now exploded system of *private* war. As it concerns the enemy himself, it is inconsistent with the mitigated usage of modern wars, which respects the private property of individuals on the land. As relates to the neutral, it is a violation of his natural right to pursue, unmolested, his peaceful commercial intercourse with his friend. Invidious as is its character in both these respects, it has other essential characteristics equally obnoxious. It is an uncontrolled exercise of authority by a man in arms over a man without defense; by an officer of one nation over the citizen of another; by a man intent upon the annoyance of his enemy; responsible for the act of search to no tribunal, and always prompted to balance the disappointment of a fruitless search by the abusive exercise of his power, and to punish the neutral for the very clearness of his neutrality. It has, in short, all the features of unbridled power stimulated by hostile and unsocial passions."

Mr. Adams, Sec. of State, to Mr. Canning, June 24, 1823, MS. Notes to For. Legs. III. 141.

"In 1824, upon disputes on kindred subjects arising during the revolts of the Spanish colonies, Mr. Ingersoll wrote to Mr. Adams, then Secretary of State, proposing that 'we should proclaim and enforce a new and liberal American law of nations, and particularly that free ships should make free goods.' Mr. Adams, whose opinions evidently inclined the same way, read this letter at a meeting of the Cabinet, but it was determined not to resort to force at that time, and the point in dispute was apparently settled in some more quiet way."

Life of Charles Jared Ingersoll, by Wm. M. Meigs, 326; cites Diary of J. Q. Adams, VI. 384.

By article 2 of a decree issued by the Republic of Peru, April 17, 1825, it was declared that "all vessels which may be found with Spanish property of any kind shall be declared lawful prize by the competent tribunals," while by article 3 it was provided that the ownership of the property should be inferred and determined to be Spanish from the fact of its Spanish origin, no matter how many intermediate sales or transfers should have taken place. Considered

as a mere municipal regulation to be enforced only within the jurisdictional limits of Peru, the decree was regarded as one of great rigor, and the hope was expressed that the Peruvian Government would annul it. But, if the decree was intended to be enforced beyond Peruvian jurisdiction, notice was to be given to the Peruvian Government that its execution on vessels of the United States would be resisted; and in the performance of this duty the American naval commanders were to consider themselves authorized "not only to defend any American vessel whose capture in virtue of that decree shall be attempted in his presence, or within the reach of his power, beyond the Peruvian jurisdiction," but also to "recapture any vessel of the United States seized under that decree at any time before it is actually carried within that jurisdiction."

Mr. Clay, Sec. of State, to Mr. Southard, Sec. of Navy, Dec. 24, 1825, 21 MS. Dom. Let. 226.

See, in a cognate sense, Mr. Brent, Act. Sec. of State, to Chevalier Tacon, Spanish min., Aug. 2, 1828, MS. Notes to For. Leg. IV. 46.

When Mr. Buchanan went as minister to Russia, he was instructed to offer to that Government a project of a treaty in which the rule of free ships free goods was coupled with the stipulation that neutral property found in enemy's ships should be good prize. In a private letter to the President Mr. Buchanan raised a question with regard to this stipulation, with the result that the President directed Mr. Livingston to make a report on the subject for the consideration of the Cabinet. Such a report was made, and, after the opinions of the heads of departments were taken, the President directed that Mr. Buchanan's instructions should be amended, "it being his determination to recur to the principles which governed our first treaties in this respect, so far as to stipulate that free ships shall make free goods, as between the parties, without any condition, but not to carry out the principle that the flag shall give its character to the cargo." In case Russia should desire to stipulate that neutral property should be good prize, if shipped in an enemy's vessel after knowledge of the war, the ground was to be taken that this would constitute "a decided alteration of the existing law of nations," and that it was "a false theory, founded on a misconstruction of the principal rule." The rule that free ships shall make free goods rests not upon "any fanciful idea that the cargo is supposed to be neutral because it is covered by a neutral flag," but was adopted "for the purpose of protecting the merchant ships of the parties from vexatious visits, seizures, and arrests." The rule would be more correctly expressed by saying that "the neutral flag shall protect hostile property."

Mr. Livingston, Sec. of State, to Mr. Buchanan, min. to Russia, No. 4, Nov. 22, 1832, MS. Inst. U. States Mins. XIII. 327.

"It will rarely happen that, as a neutral nation, we shall ever find it convenient to use the vessels of a belligerent as our carriers. But it is our interest to give every possible extension and freedom to commerce; therefore, although you are to endeavor to procure the last-mentioned modification, yet you are not to make it a point in your negotiation should the principle in its full extent that the neutral flag shall protect hostile property be admitted, and that, on the contrary, neutral property found in an enemy's ship shall be safe. Then it will be well to make a positive stipulation of both parts of the rule (as is done in all our treaties with the Barbary powers), because, although by the acknowledged law of nations neutral property in a hostile bottom is protected, yet in a case arising between two powers who had acknowledged the principle that free ships make free goods by treaty, the same process of erroneous reasoning I have pointed out might perhaps be employed to show that, as between them, the false consequence should follow of making neutral property good prize in an enemy's ship."

Mr. Livingston, Sec. of State, to Mr. Buchanan, min. to Russia, No. 4, Nov. 22, 1832, MS. Int. U. States Ministers, XIII. 327.

"The necessity, however, for urging either the treaty with Colombia or that of 1795 with Spain as a justification of the demand in this case will be obviated if we reflect that the principle of the law of nations violated by the capture of the *Morris* [the principle that free ships make free goods] is one the soundness whereof has always been contended for by the United States and of which no doubt is now entertained."

Mr. Forsyth, Sec. of State, to Mr. Semple, chargé d'affaires to New Granada, No. 7, Feb. 12, 1839, MS. Inst. Colombia, XV. 58.

On the outbreak of the Crimean war, in 1854, Great Britain and France, acting together, announced the rule as the guide of their conduct during that conflict, at the close of which it was incorporated in the Declaration of Paris, to which they were both parties.

Lawrence's Wheaton (1863), 770–771, note 228; Dana's Wheaton, § 475, note 223.

"The propositions submitted to you—the same, I presume, which Mr. Crampton has confidentially submitted to me—are, 1st, That free ships make free goods, except articles contraband of war; and, 2d, That neutral property, not contraband, found on board enemies' ships is not liable to confiscation. The United States have long favored the doctrine that the neutral flag should protect the cargo, and endeavored to have it regarded and acted on as a part of the law of nations. There is now, I believe, a fair prospect of getting this sound and salutary principle incorporated into the international code.

"There can be, I presume, no doubt that France cheerfully concurs with Great Britain in adopting this principle as the rule of conduct in the pending war. I have just received a dispatch from Mr. Mason, in which he details conferences he has had with the French ministers on the subject of neutral rights; but it does not appear from the accounts he has given of them that the French Government had intimated to him the course it intended to pursue in regard to neutral ships and neutral property on board enemy's ships. I have no doubt, however, that France has more readily acquiesced in the indicated policy than Great Britain."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Apr. 13, 1854, H. Ex. Doc. 103, 33 Cong. 1 sess.

"Russia has always been foremost among the maritime European powers to respect neutral rights, and this Government does not entertain a doubt that she will in the present conflict maintain the liberal spirit which has hitherto distinguished her conduct towards neutral powers. In the earliest period of this Republic, attempts were made to procure the recognition of the doctrine that 'free ships make free goods' as a principle of international law; but those attempts were unavailing, and up to this time enemies' property on board of a neutral vessel has been held liable to seizure and confiscation. Russia has the merit of having favored the liberal view of this question; France has been willing to concede the doctrine, but Great Britain strenuously resisted. Her maritime ascendency has inclined her to maintain extreme doctrines in regard to belligerent rights. It may now be regarded as a settled principle of maritime law that a neutral flag does not protect all the property under it. Notwithstanding this rule it is now quite certain that both Great Britain and France in the war in which they are likely to be engaged will consent to refrain from the seizure of any property which may be found under the flag of a neutral nation except articles that are contraband of war. They will also respect the property, if not contraband, of a neutral owner found on board of an enemy's ship. This, however, is no concession to neutrals, for the international code protects their property thus situated." (Mr. Marcy, Sec. of State, to Mr. de Stoeckl, Apr. 14, 1854, MS. Notes to Russia, VI. 53.)

"You will observe that there is a suggestion in the inclosed for a convention among the principal maritime nations to unite in a declaration that free ships should make free goods, except articles contraband of war. This doctrine has had heretofore the sanction of Russia, and no reluctance is apprehended on her part to becoming a partner to such an arrangement. Great Britain is the only considerable power which has heretofore made a sturdy opposition to it. Having yielded it for the present in the existing war, she thereby recognizes the justice and fairness of the principle, and would hardly be consistent if she should withhold her consent to an agreement to have it hereafter regarded as a rule of international law." (Mr. Marcy, Sec. of State, to Mr. Seymour, May 9, 1854, MS. Inst. Russia, XIV. 111.)

"The Government of the United States, as you are aware, has strenuously contended for the doctrine that free ships make free goods, contraband articles excepted. There is not, I believe, a maritime

power which has not incorporated it in some of its treaties; but Great Britain, which is the most considerable of them, has constantly refused to regard it as a rule of international law. Her admiralty courts have rejected it and ours have followed after them. When Great Britain and France, at the commencement of the present war with Russia, agreed to act upon that principle for the time being, this Government believed that a fair occasion was presented for obtaining the general consent of commercial nations to recognize it as a principle of the law of nations." (Mr. Marcy, Sec. of State, to Mr. Buchanan, Aug. 7, 1854, MS. Inst. Great Britain, XVI. 308. See, to the same effect, Mr. Marcy, Sec. of State, to Mr. Mason, min. to France, Aug. 7, 1854, MS. Inst. France, XV. 206.)

"Long experience has shown that, in general, when the principal powers of Europe are engaged in war the rights of neutral nations are endangered. This consideration led, in the progress of the War of our Independence, to the formation of the celebrated confederacy of armed neutrality, a primary object of which was to assert the doctrine that free ships make free goods, except in the case of articles contraband of war—a doctrine which from the very commencement of our national being has been a cherished idea of the statesmen of this country. At one period or another every maritime power has by some solemn treaty stipulation recognized that principle, and it might have been hoped that it would come to be universally received and respected as a rule of international law. But the refusal of one power prevented this, and in the next great war which ensued—that of the French Revolution—it failed to be respected among the belligerent states of Europe. Notwithstanding this, the principle is generally admitted to be a sound and salutary one, so much so that at the commencement of the existing war in Europe Great Britain and France announced their purpose to observe it for the present; not, however, as a recognized international right, but as a mere concession for the time being. The cooperation, however, of these two powerful maritime nations in the interest of neutral rights appeared to me to afford an occasion inviting and justifying on the part of the United States a renewed effort to make the doctrine in question a principle of international law, by means of special conventions between the several powers of Europe and America. Accordingly, a proposition embracing not only the rule that free ships make free goods, except contraband articles, but also the less contested one that neutral property other than contraband, though on board enemy's ships, shall be exempt from confiscation, has been submitted by this Government to those of Europe and America.

"Russia acted promptly in this matter, and a convention was concluded between that country and the United States providing for the observance of the principles announced, not only as between them-

selves, but also as between them and all other nations which shall enter into like stipulations. None of the other powers have as yet taken final action on the subject. I am not aware, however, that any objection to the proposed stipulations has been made, but, on the contrary, they are acknowledged to be essential to the security of neutral commerce, and the only apparent obstacle to their general adoption is in the possibility that it may be encumbered by inadmissible conditions.

"The King of the Two Sicilies has expressed to our minister at Naples his readiness to concur in our proposition relative to neutral rights and to enter into a convention on that subject."

President Pierce, annual message, Dec. 4, 1854, Richardson's Messages, V. 275. See 144 Edinburgh Review (Oct. 1876), 352–369.

"With respect to the protection of the vessel and cargo by the flag which waves over them, the United States look upon that principle as established, and they maintain that belligerent property, on board a neutral ship, is not liable to capture; and from existing indications they hope to receive the general concurrence of all commercial powers in this position. . . . It is not necessary that a neutral power should have announced its adherence to this declaration [of Paris of 1856] in order to entitle its vessels to the immunity promised. Because the privilege of being protected is guaranteed to belligerents coparties to that memorable act, and protects their property from capture wherever it is found on board a vessel belonging to a nation not engaged in hostilities, . . . such an immunity withheld from this country would in fact operate as a premium, granted to other nations, and would be almost destructive of that important branch of our national industry, the carrying trade."

Mr. Cass, Sec. of State, to Mr. Mason, min. to France, No. 190, June 27, 1859, MS. Inst. France, XV. 455.

This extract is from a comprehensive instruction on neutral rights, which was communicated to the principal European powers, with the object of securing their concurrence in the views therein expressed as well as their influence and cooperation in bringing about their general adoption. See Mr. Cass, Sec. of State, to Mr. Dallas, min. to England, No. 185, June 29, 1859, MS. Inst. Great Britain, XVII. 205; Mr. Cass, Sec. of State, to Mr. Pickens, min. to Russia, Nos. 18 and 21, June 29 and Oct. 4, 1859, MS. Inst. Russia, XIV. 163, 165; Mr. Cass, Sec. of State, to Mr. Daniel, min. to Sardinia, No. 35, Nov. 1859, MS. Inst. Italy, I. 106; Mr. Cass, Sec. of State, to Mr. Preston, min. to Spain, No. 18, Oct. 6, 1859, MS. Inst. Spain, XV. 228; Mr. Cass, Sec. of State, to Mr. Morgan, min. to Portugal, No. 13, Nov. 16, 1859, MS. Inst. Portugal, XIV. 201.

The liability of property, the product of an enemy country, and coming from it during war, to capture, being irrespective of the

status domicilii, guilt or innocence, of the owner, such property is as much liable to capture, when belonging to a loyal citizen of the country of the captors, as if owned by a citizen or subject of the hostile country or by the hostile government itself. The only qualification of this rule is that, where, upon the breaking out of hostilities or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it.

The Gray Jacket, 5 Wallace, 342.

"As will be seen by a survey of the above cases, the right to seize enemy's goods sailing under neutral flag has been sustained in The Julia, 8 Cranch, 181; The Nereide, 9 Cranch, 388; The Ariadne, 2 Wheat. 143. See The Caledonian, 4 Wheat. 100; The Hart, 3 Wall. 559; S. C., Bl. Pr. Ca. 379. That shipping goods in an enemy's ship gives presumption that goods belong to enemy, see The London Packet, 1 Mason, 14; The Amy Warwick, 2 Blatch. 635. On the other hand, the executive department of the Government, to use Mr. Marcy's language (Mr. Marcy to Mr. Mason, Aug. 7, 1850), 'has strenuously contended that free ships made free goods, articles contraband of war excepted,' and that this was then regarded by the Executive as the generally accepted rule is evidenced by Mr. Marcy's statement in the next sentence, that 'Great Britain is believed to be almost the only maritime power which has constantly refused to regard this as a rule of international law.' Even in the strain of the late civil war, Mr. Seward, when proposing to accede to the declaration of Paris on this point, did so on the ground that the declaration did not make a new rule, but established an old one, which the United States has maintained as a part of international law. This difference of opinion between the judicial and executive departments of the Government may be attributed, in the main, to the distinct political training of the two departments. The executive, from the time of the administration of Mr. Jefferson, inclined to the liberal view of international law which became then prevalent among political economists; and though Mr. Jefferson, when Secretary of State, at first thought the weight of authority was the other way, he changed his mind as to this, and took the lead, as President, in recommending as the best rule, that free ships should make free goods. The same doctrine was vindicated with great elaboration by Mr. Madison, and has been accepted, more or less conspicuously, whenever occasion arose, by succeeding Presidents. While, however, the executive department continued to accept these distinctive views

of international law, of which Mr. Jefferson and Mr. Madison were the exponents, it was otherwise with the judiciary. In part this may be attributed to the strong antagonism of Chief Justice Marshall to Mr. Jefferson, and to the scheme of public law of which Mr. Jefferson was the leading exponent. But aside from this, and aside from the strong bias towards English law and English precedent, which arose from the prior political bias of that great judge, and of his earlier associates, it is impossible not to forget the effect produced, even on professional minds entirely impartial, by the reverence and affection all American lawyers must feel for English judicial literature. If this be the case now—if such literature charm us now, often influencing our judgment, amid the great mass which we possess of legal literature of our own—how much greater must have been the influence when the sole text book at hand was Blackstone, and when Sir William Scott's attractive and lucid judgments were the only sources from which prize law could be studied in the English tongue."

Note of Dr. Wharton, Wharton's Int. Law Digest, III. 309, § 342.

During the war with Chile the Peruvian Government issued a circular in which it was stated that, as Chile had seized the nitrates on the Peruvian coast, which Peru claimed as her own, and was exporting their products in neutral vessels, the Peruvian cruisers would not respect a neutral flag detected in that business. The American minister at Lima was instructed to remind the Peruvian Government of Article XVIII. of the treaty with the United States of 1870, which stipulated that free ships should make free goods, and to say that if a Peruvian cruiser should capture an American vessel whose cargo, in whole or in part, should consist of the nitrates referred to, the treaty would be violated and the Peruvian Government would certainly be held accountable for such violation.

Mr. Evarts, Sec. of State, to Mr. Christiancy, min. to Peru, March 1, 1880, For. Rel. 1880, 836.

In a subsequent instruction, Mr. Evarts remarked that Peru's title to the nitrate in question "was annulled, or at least suspended, by the armed occupation by Chile of the region whence the article was taken. The attempt of Peru, therefore, to avenge upon neutrals her want of good fortune in the contest will not, it is to be feared, add to her reputation for magnanimity or regard to public law, and certainly will not be acquiesced in by the governments of neutrals, whose interests may thereby be affected." (Same to same, March 2, 1880, For. Rel. 1880, 837.)

On the outbreak of the war with Spain, a step was taken which legally fixed the position of the United States as an adherent of the rule of free ships free goods. By a telegraphic instruction to the diplomatic representatives of the United States, on April 22, 1898,

the Department of State declared that, in the event of hostilities, the Government would act upon the second, third, and fourth rules of the Declaration of Paris as "recognized rules of international law."

This position was confirmed by a proclamation issued by the President on April 26, 1898, by which certain rules were promulgated for the observance of officers of the United States during the conflict. Of these, the first two were as follows:

"1. The neutral flag covers enemy's goods, with the exception of contraband of war.

"2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

For the proclamation of April 26, 1898, see Proclamations and Decrees issued during the War with Spain, 77.

2. Vessels in or Sailing for Port at Outbreak of War.

§ 1196.

It was formerly the practice not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war, so that, if war should come, they might be confiscated. A rule of precisely the opposite effect has been enforced in recent wars.

"On the declaration of a war beween the Ottoman Porte and Russia, in October, 1853, a notice was issued by the latter Government to the effect that, as the Porte had not imposed an embargo on Russian vessels in its ports, &c., the Russian Government, on its part, granted liberty to Turkish vessels in its ports to return to their destination, till the 10th (22nd) of November. After the declaration of hostilities by France and England against Russia, similar declarations were made by these powers. That of France, dated March 27, 1854, declares: 'Art. 1. Six weeks from the present date are granted to Russian ships of commerce to quit the ports of France. Those Russian ships which are not actually in our ports, or which may have left the ports of Russia previously to the declaration of war, may enter into French ports, and remain there for the completion of their cargoes, until the 9th of May, inclusive.' The declaration of England, to the same effect, was dated March 29, 1854. Still further indulgences were afterward declared to Russian vessels, which had sailed prior to May 15, 1854, for English and French ports. Russia allowed English and French vessels six weeks from April 25, 1854, to take on board their cargoes and sail from Russian ports in the Black Sea, the Sea of Azof, and the Baltic, and six weeks from the opening of navigation to leave the ports of the White Sea."

Halleck, Int. Law (3d ed., by Baker), I. 532–533, note.

"Austrian merchant vessels which are now in Prussian ports, or whose masters, unaware of the breaking out of the war, may enter Prussian ports, shall, on condition of reciprocity, have six weeks reckoned from the day of their entry into port to land their cargo and to go away with a new cargo, contraband of war excepted. On the expiration of this term they must leave port. Austrian merchant vessels whose masters were aware of the breaking out of the war are not permitted to enter a Prussian port."

Prussian ministerial declaration, June 21, 1866, enclosed with Baron von Gerolt, Prussian min., to Mr. Seward, Sec. of State, Aug. 7, 1866, MS. Notes from Prussia.

A similar course was taken by the French Government. (Halleck, Int. Law (3d ed., by Bakėr), I. 532.

"Merchant vessels belonging to the enemy which were actually in the French ports, or which entered the ports in ignorance of the war, were allowed a delay of thirty days for leaving, and safe-conducts were given them to return to their port of despatch or of destination. Vessels which took in cargoes for France, or on French account, in enemies' or neutral ports before the declaration of war, were not subject to capture, but were allowed to disembark their freights in the French ports, and afterwards received safe-conducts to return to their ports of despatch."

Halleck, Int. Law (3d ed., by Baker), I. 532, note.

Among the rules laid down by the President in his proclamation of April 26, 1898, for the government of officers of the United States during the war with Spain, the fourth read as follows:

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government."

Proclamations and Decrees during the War with Spain, 77.

The rules to be observed by the Spanish Government were embodied in the royal decree of April 23, 1898. This decree allowed only five days from the date of its publication for the departure of American ships from Spanish ports. It did not in terms prohibit the capture of such ships after their departure, nor did it provide for the entrance and

discharge of American ships sailing for Spanish ports before the war. (Id. 93.) As no captures were made by Spain, no opportunity occurred for the judicial construction of the rules which that Government announced for its guidance.

A list of all the prizes made by the United States naval forces on the North Atlantic stations may be found in the Naval Operations of the War with Spain, 316–325.

In the case of the *Buena Ventura* an important application was made of rule 4 of the proclamation of April 26. The *Buena Ventura* was a Spanish merchant steamship, which was captured by the United States steamship *Nashville*, eight or nine miles off the Florida coast. On the 27th of May she was condemned by the United States district court for the southern district of Florida as enemy property. This sentence was reversed by the Supreme Court of the United States. It appeared that the *Buena Ventura* was, at the time of her capture, on a voyage from Ship Island, in the State of Mississippi, to Rotterdam, by way of Norfolk, Virginia, with a cargo of lumber. She arrived at Ship Island March 31, 1898, and sailed for Rotterdam on April 19, with a permit, obtained in accordance with the laws of the United States, to call at Norfolk for a supply of bunker coal. She was captured on the morning of April 22. She made no resistance, had on board no military or naval officer, and carried no arms or munitions of war. It was undisputed that when captured she was on her way to Norfolk and that her papers for that purpose were in due form. The opinion of the Supreme Court was delivered by Mr. Justice Peckham. The question at issue was whether she could be brought within the exemption of the fourth rule of the proclamation of April 26 as to "Spanish merchant vessels, in any ports or places within the United States." In the course of his opinion Mr. Justice Peckham observed that the vessel in question, as a merchant vessel of the enemy carrying on an innocent commercial enterprise at or just prior to the time when hostilities began, belonged to a class which the United States had always desired to treat with great liberality, and which civilized nations had in their later practice in fact so treated. The President's proclamation should therefore receive "the most liberal and extensive interpretation" of which it was capable, and where two or more interpretations were possible, the one most favorable to the belligerent in favor of whom the proclamation was issued. The provision that "Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing," might, said the learned justice, be held to include (1) only vessels in port on the day when the proclamation was issued, namely, April 26, or (2) those in port on April 21, the day on which war was declared by Congress to have begun, or (3) not only those then in port, but also any that had

sailed therefrom on or before May 21, whether before or after the commencement of the war or the issuing of the proclamation. The court adopted the last interpretation. While the proclamation did not in so many words include vessels which had sailed from the United States before the commencement of the war, such vessels were, said Mr. Justice Peckham, clearly within its "intention," under the liberal construction which the court felt bound to give it. In view of the fact, however, that, at the time of the capture, the proclamation of April 26, without which the vessel would have been liable to condemnation, had not been issued, restitution was awarded without damages or costs.

The Buena Ventura, 175 U. S. 384; reversing Buena Ventura et al., 87 Fed. Rep. 927.

The Chief Justice and Justices Gray and McKenna dissented from the decision of the court.

The effect of the fourth rule of the proclamation of April 26 was again considered in the case of the Spanish steamship *Panama*. This vessel was condemned by the court of original jurisdiction as enemy property, and the decree was confirmed by the Supreme Court. The *Panama*, a steamship of 1,432 tons register, owned by the Compania Transatlantica, a Spanish corporation of Barcelona, Spain, and carrying the Spanish flag, sailed from New York on April 20, 1898, for Havana, Cuba, and certain Mexican ports, with a general cargo and passengers and mails. April 25, when about twenty-five miles from Havana, she was captured by a United States man-of-war. The *Panama* had a commission as a royal mail ship from the Spanish Government and a crew of seventy-one men, who had been shipped at various times at Havana, and she carried twenty-nine passengers, all of whom, with the exception of one Frenchman, were Spaniards. Mr. Justice Gray, who delivered the opinion of the Supreme Court, said that the case of the *Buena Ventura* would be decisive of that of the *Panama*, but for the mails and the arms carried by the latter vessel and the contract under which she sailed. Under that contract, which was entered into in 1886, the Spanish Government had the right to take possession of the steamer in case of war; and it was required that the ships belonging to the line should be specially adapted to use in war, and that every mail steamer should carry a certain armament "for her own defense." The officers and crew, and so far as possible the engineers, were to be Spaniards. When captured the *Panama* carried two breech-loading Hontoria guns of nine-centimeter bore, one mounted on each side of the ship; one Maxim rapid-fire gun on the bridge; twenty Remington and ten Mauser rifles, with ammunition for all the guns and rifles; and thirty or forty cutlasses. The guns had been put on board three years

before, and the small arms or ammunition a year or more; and all her armament was carried in compliance with the mail contract, except the Maxim gun and the Mauser rifles. It might be assumed, said the court, that the primary object of the steamer's armament, and in time of peace its only object, was that of defense. The armament, however, was not in itself inconsiderable, and after the capture of the vessel her arms and ammunition were delivered over for the use of the United States Navy. The ship was therefore enemy property, bound to an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, on arriving in that port, to be appropriated by the enemy for such purposes. The intent of the proclamation, continued the court, was to exempt for a time from capture peaceful commercial vessels, and not to assist the enemy in obtaining weapons of war; and it could not be reasonably construed as exempting from capture "a Spanish vessel owned by a subject of the enemy; having an armament fit for hostile use; intended, in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy and employed as an auxiliary cruiser in the enemy's navy."

The Panama, 176 U. S. 535.

In the proclamation of the President of April 26, 1898, concerning maritime law in the war with Spain, there was the following rule:

"5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded."

Proclamations and Decrees during the War with Spain, 77, 78.

The *Pedro*, which was a British-built ship, and for several years sailed under a British registry, was transferred in 1887 to a Spanish corporation of Bilbao, Spain, and was duly registered as a Spanish vessel. Thereafter she sailed under the Spanish flag and was officered and manned by Spaniards, though she was employed for the transportation of merchandise for hire under the management of a Liverpool firm. Her usual course was to take cargo in Europe for Cuban ports and, after discharging there, to proceed to the United States and obtain cargo for Europe, the round trip occupying about three months. On March 18, 1898, while she was loading in Antwerp for Cuba, she was chartered by an American firm to proceed to Pensacola, Florida, or Ship Island, Mississippi, for a cargo of lumber for Rotterdam or Antwerp. Soon afterwards she left Antwerp

with about two thousand tons of merchandise of various kinds for Havana and Cienfuegos. She arrived at Havana on April 17 and, after discharging most of her cargo, sailed on the 22d for Santiago, Cuba, with a small quantity of general merchandise taken at Havana. On the same day she was captured a few miles off Havana by a cruiser of the United States blockading fleet. Her condemnation was resisted on the ground, among others, that her true destination was a port in the United States, so that she fell within the exemption contained in rule five. The court, Chief Justice Fuller delivering the opinion, declined so to hold. The Chief Justice observed that the *Pedro* remained at Havana from the 17th of April to the 22d, and left on the latter day, which was the day after the war began; that she then had no cargo for any port in the United States, but only for Santiago and Cienfuegos, in Cuba. She had not left a foreign port in ignorance of the "perilous condition of affairs," but must be assumed to have been advised of the imminency of hostilities; nor was she bringing a cargo to the United States for the increase of its resources and the convenience of its citizens. On the contrary, she was captured while trading from one enemy port to another, being herself an enemy vessel. Under these circumstances, the fact that she was under contract ultimately to proceed to a port of the United States to take cargo for Europe did not, said the Chief Justice, bring her within the exemption of the fifth rule; and he declared that the doctrine of continuous voyages, as laid down by the court on various occasions, did not apply to the case. The decree of condemnation was therefore affirmed.

The Pedro, 175 U. S. 354.

The Chief Justice discussed and distinguished the following cases: The Circassian, 2 Wall. 135; The Bermuda, 3 Wall. 514; The Springbok, 5 Wall. 1; The Joseph, 8 Cranch, 451; The Argo, Spinks's Prize Cases, 52.

Mr. Justice White delivered a strong dissenting opinion, in which Justices Brewer, Shiras, and Peckham concurred. In this opinion it was argued that the principal voyage of the vessel was from Antwerp to the United States, the calling at Cuban ports being merely incidental; that, although Congress afterwards declared that war should be considered as having existed on and after April 21, it was neither conceived nor known, when she left Havana on the 22d, that a state of war existed; that, just before her departure from Havana, one American ship was allowed to sail from that port, and, shortly after her departure, another; and that the reference to the fact that the *Pedro* had no cargo for the United States ignored the enlightened moral purpose of the proclamation, and particularly the provisions of the fourth rule, which allowed enemy ships not only to depart from the United States, but also to load and take away cargo either for a neutral port or for a port of the enemy not blockaded. Mr. Justice White also contended that the decision of The Argo, Spinks's Prize Cases, 53, was a decision in consimili casu, and should be

treated as an authority for the restoration of the *Pedro*. The case of The Guido, 175 U. S. 382, was decided on the strength of the *Pedro* without an extended opinion.

A Spanish vessel which sailed from England Apr. 9, 1898, touched at Corunna, Spain, April 16, and then sailed for ports in Porto Rico, did not come within the proclamation of Apr. 26, but was, after the outbreak of war, subject to capture as enemy property. (The Rita 87 Fed. Rep. 925; S. P., The Maria Dolores, 88 Fed. Rep. 548.)

"7. In accordance with the rule adopted by the United States in the existing war with Spain, neutral vessels found in port at the time of the establishment of a blockade will, unless otherwise ordered by the United States, be allowed thirty days from the establishment of the blockade to load their cargoes and depart from such port."

Instructions to United States Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780.

"ARTICLE I. Russian merchant ships which happen to be moored in any Japanese port at the time of the issue of the present rules may discharge or load their cargo and leave the country not later than February 16.

"ARTICLE II. Russian merchant ships which have left Japan in accordance with the foregoing article and which are provided with a special certificate from the Japanese authorities shall not be captured if they can prove that they are steaming back direct to the nearest Russian port, or a leased port, or to their original destination; this measure shall, however, not apply in case such Russian merchant ships have once touched at a Russian port or a leased port.

"ARTICLE III. Russian steamers which may have left for a Japanese port before February 16 may enter our ports, discharge their cargo at once, and leave the country. The Russian steamers coming under the above category shall be treated in accordance with Article II.

"ARTICLE IV. Russian steamers carrying contraband of war of any kind whatever shall be excluded from the above rules."

Imperial Japanese Ordinance, No. 20, Feb. 9, 1904, For. Rel. 1904, 414; Monthly Consular Reports (May, 1904), LXXV, 393.

"Japanese trading vessels which were in Russian ports or havens at the time of the declaration of the war are authorized to remain at such ports before putting out to sea with goods which do not constitute articles of contraband during the delay required in proportion to the cargo of the vessel but which in any case must not exceed forty-eight hours from the time of the publication of the present declaration by the local authorities."

Imperial Russian Order, Feb. 14, 1904, For. Rel. 1904, 727-728; Monthly Consular Reports (May, 1904), LXXV, 397.

3. Particular Exemptions.

§ 1197.

A cargo, the product of the island of Dominica, was held to be protected from British capture under the capitulation under which Great Britain surrendered the island to France, though the cargo was at the time at sea, and its owners were resident in England.

Case of The Resolution, Federal Court of Appeals, 1781, 2 Dallas, 1.

"In the case of a collection of Italian paintings and prints captured by a British vessel during the war of 1812, on their passage from Italy to the United States, the learned judge (Sir Alexander Croke) of the vice-admiralty court at Halifax, directed them to be restored to the Academy of Arts in Philadelphia, on the ground that the arts and sciences are admitted amongst all civilised nations to form an exception to the severe rights of war, and to be entitled to favour and protection. They are considered not as the *peculium* of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species; and that the restitution of such property to the claimants would be in conformity with the law of nations, as practised by all civilised countries."

Twiss, Law of Nations at War (2d ed.), 132.

"Fishing boats have also, as a general rule, been exempt from the effects of hostilities.* Henry VI. issued orders on the subject of fishing vessels in 1403 and 1406. In 1521, while war was raging between Charles V. and Francis, embassadors from these two sovereigns met at Calais, then English, and agreed that, whereas the herring fishery was about to commence, the subjects of both belligerents engaged in this pursuit should be safe and unmolested by the other party, and should have leave to fish as in time of peace. In the war of 1800, the British and French Governments issued formal instructions exempting the fishing boats of each other's subjects from seizure. This order was subsequently rescinded by the British Government, on the ground that some French fishing boats were equipped as gun boats (it being intended by the French to form a flotilla of some 500 or 600 of them to employ against England), and that some French fishermen, who had been prisoners in England, had violated their parole, and had gone to join the French fleet at Brest. The British restriction was afterwards withdrawn, and the freedom of fishing was again allowed on both sides. Emerigon refers to ordinances of France and Holland, in favor of the protection of fishermen during war. Fishermen were included in the treaty between the United States and Prussia in 1785, as a class of non-combatants not to be

molested by either side. French writers consider this exemption as an established principle of the modern law of war; it has been so recognised in the French courts, which have restored such vessels when captured by French cruisers, and the French Government, for the last forty years, has absolutely prohibited their capture. The United States made a like prohibition during the Mexican war. The doctrine, however, of the English courts is that such exceptions form a rule of comity only: for fishing vessels fall under the description of ships employed in the enemy's trade, and as such may be condemned as prize."

2 Halleck's Int. Law (3d ed. by Baker), 106–107.

"Coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war."

The Paquete Habana, 175, U. S. 677, 708; The Lola, Id. See supra, § 1, I. 7.

4. Proposed General Immunity.

§ 1198.

". . . And all women and children, scholars of every faculty, cultivators of the earth, artizans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power by the events of war they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price. And all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessaries, conveniencies, and comforts of human life more easy to be obtained, and more general, shall be allowed to pass free and unmolested; and neither of the contracting powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels or interrupt such commerce."

Article XXIII, Treaty with Prussia, signed Sept. 10, 1785, on the part of the United States by Franklin, Jefferson, Adams; on the part of Prussia, by De Thulemeier.

See comment in the special message of President J. Q. Adams of Mar. 15, 1826, Richardson's Messages, II, 329.

Mr. C. J. Ingersoll, in "A View of the Rights and Wrongs, Power and Policy, of the United States of America," a pamphlet published in November, 1808, while denouncing paper blockades and impressment, asserted his conviction that the world would come in time to maintain the immunity of all private property in war on the ocean. "If," he said, "a concert with Russia, France, Holland, and Spain, all of whom with Denmark must desire it, could be effectuated for freeing the ocean of privateers and search ships, and directing by common agreement the operations of war against ships of war, leaving the merchantman to the peaceable pursuit of his traffic, and if such a system could be secured without our being drawn into hostilities, it certainly were a consummation devoutly to be wished." Mr. Ingersoll urged the same policy on the floor of the House during the war of 1812, as well as in a letter to Mr. Madison of July, 1814. Mr. Madison, it is said, "replied that Mr. Jefferson had rather taken the other view in his correspondence with Genet, but that he himself thought the principle good and desirable, and that unarmed vessels, like ploughs, ought not to be molested."

Meigs' Life of Charles Jared Ingersoll, 324–326.

"It has been remarked that by the usages of modern war the private property of an enemy is protected from seizure and confiscation as such; and private war itself has been almost universally exploded *upon the land*. By an exception, the reason of which it is not easy to perceive, the private property of an enemy *upon the sea* has not so fully received the benefit of the same principle. Private war, banished by the tacit and general consent of Christian nations from their territories, has taken its last refuge upon the ocean, and there continued to disgrace and afflict them by a system of licensed robbery, bearing all the most atrocious characters of piracy. To a Government intent, from motives of general benevolence and humanity, upon the final and total suppression of the slave trade, it cannot be unreasonable to claim her aid and cooperation to the abolition of private war upon the sea.

"From the time when the United States took their place among the nations of the earth, this has been one of their favorite objects.

"'It is time,' said Dr. Franklin, in a letter of 14 March, 1785, 'it is high time for the sake of humanity that a stop were put to this enormity. The United States of America, though better situated than any European nation to make profit by privateering, are, as far as in them lies, endeavoring to abolish the practice by offering in all their treaties with other powers an article engaging solemnly that in case of future war no privateer shall be commissioned on either side, and that unarmed merchant ships on both sides shall pursue their voyages

unmolested. This will be a happy improvement of the law of nations. The humane and the just can not but wish general success to the proposition.'"

Mr. Adams, Sec. of State, to Mr. Rush, min. to England, July 28, 1823, MS. Inst. U. States Ministers, X. 68.

This proposal was sent to the leading maritime powers, but was not carried into effect.

An example, given by Mr. Adams himself, of that private war on the sea, which he so strongly deprecated and condemned, may be found in the following letter addressed by him to Mr. Justice William Johnson, of the Supreme Court, in 1820:

"I have had the honor of receiving your letter communicating information of the decease of Mr. Parker, late U. S. district attorney for the district of South Carolina, and also your two letters of the 26th ultimo, with the enclosures in one of them. The first was immediately transmitted to the President, and the last two will be forwarded to him as soon as possible.

"The agent of the United States now on his way to Angostura, has been instructed to demand the revocation of the commission of Captain Almeida, and satisfaction for his repeated outrages upon the laws of the United States. But Almeida is a citizen of the United States and has never ceased for many years to be an inhabitant of Baltimore, excepting when he has been a sea rover under South American flags and commissions. As captain of the *Louisa* he was a Buenos Ayrean; as captain of the *Wilson*, alias *Bolivar*, he is a *Colombian*, but the Republic of Colombia has no hold upon him, and if they revoke his commission he can buy one of Artigas for a few dollars. The liberality of this Government in admitting into our ports armed vessels of the South American revolutionists, has not been well requited. They have in fact neither ships, officers, nor seamen of their own. They disavow piracies commited in their names, but they commission foreigners with blank commissions. They require neither residence nor citizenship as qualifications for their officers, and they authorize adjudications upon their captures, out of their own territories. The court at Margaritta, is a mockery upon judicial proceedings, and in a discussion which we have had with the Venezuelan authorities, they assumed as a principle that irregularities of their tribunals were merely errors of form, and that when the property captured was *de facto* that of their enemies they had a right to keep it, however, it might have got into their power, and however informal their administration of admiralty court justice might be. We have been these three years remonstrating with them as gently and amicably as possible against these prevarications, but their governments are Chinese shadows; they rise upon the stage and pass off like the images of Banquo's descendants in Macbeth. Before a dispatch can be transmitted, and an answer received, a new set of performers appear upon the stage, who acknowledge no responsibility for the acts of their predecessors, and vanish in their turn to make way for others. We hope for better things in future, but in the meantime all the justice we can obtain must be by the execution of our own laws and the decisions of our own tribunals." (Mr. Adams, Sec. of State, to Mr. Justice Johnson, U. S. Supreme Court, Sept. 5, 1820, 18 MS. Dom. Let. 132.)

"Among the subjects included in the power, are those of navigation and commerce between the two countries, *and the principles of maritime war and neutrality.* An attempt for a negotiation with Great Britain will be made, with a view to the eventual *abolition of private war upon the sea.* This, like the abolition of the African slave trade, will require for its accomplishment, the concurrence of all the great maritime powers. You will at an early period, be further instructed concerning it. For the present you will merely give notice of the reason for including it in the power. It is altogether distinct from the others, which may be discussed and adjusted without any reference to it whatever."

Mr. Adams, Sec. of State, to Mr. Middleton, min. to Russia, No. 18. July 29, 1823. X. 163.

"The principle upon which the Government of the United States now offers this proposal to the civilized world is, that the same precepts of justice, of charity, and of peace, under the influence of which Christian nations have, by common consent, exempted private property on shore from the destruction or depredation of war, require the same exemption in favor of private property upon the sea. If there be any objection to this conclusion, I know not in what it consists; and if any should occur to the Russian Government, we only wish that it may be made a subject of amicable discussion." (Mr. Adams, Sec. of State, to Mr. Middleton, Aug. 13, 1823, MS. Inst., U. States Ministers, X. 97.)

"I called at the President's with the draft of instructions to R. Rush, to accompany the project of a convention to regulate neutral and belligerent rights in time of war. The President had suggested a single alteration in the draft of a convention which I had sent him on Saturday.

"Mr. Calhoun came in while I was reading to the President the draft of the instruction, and, after I had finished, started several doubts as to the propriety of proposing this project at all. He was confident it would not be accepted by Great Britain; and I have no expectation that it will at this time. But my object is to propose it to Russia and France, and to all the maritime powers of Europe, as well as to Great Britain. We discussed for some time its expediency. I appealed to the primitive policy of this country as exemplified in the first treaty with Prussia. I said the seed was then first sown, and had borne a single plant, which the fury of the revolutionary tempest had since swept away. I thought the present a moment eminently auspicious for sowing the same seed a second time, and, although I had no hope it would now take root in England, I had the most cheering confidence that it would ultimately bear a harvest of happiness to mankind and of glory to this Union.

"Mr. Calhoun still suggested doubts, but no positive objections, and the President directed me to send the draft of the articles round

to the members of the Administration, and to call a meeting of them for to-morrow at one. I was not surprised at Mr. Calhoun's doubts. My plan involves nothing less than a revolution in the laws of war—a great amelioration in the condition of man. Is it the dream of a visionary, or is it the great and practicable conception of a benefactor of mankind? I believe it the latter; and I believe this to be precisely the time for proposing it to the world. Should it even fail, it will be honorable to have proposed it. Founded on justice, humanity, and benevolence, it can in no event bear bitter fruits."

6 J. Q. Adams's Memoirs, 164, July 28, 1823.

"Mr. Calhoun told me that upon reflection he thought better of my project for abolishing private war upon the sea than he had at first.

"The important labor of the month has been the preparation of instructions to R. Rush and to H. Middleton upon the Northwest Coast question, and upon the project of a convention for the regulation of neutral and belligerent rights. These are both important transactions, and the latter especially one which will warrant the special invocation of wisdom from above. When I think, if it possibly could succeed, what a real and solid blessing it would be to the human race, I can scarcely guard myself from a spirit of enthusiasm, which it becomes me to distrust. I feel that I could die for it with joy, and that, if my last moments could be cheered with the consciousness of having contributed to it, I could go before the throne of Omnipotence with a plea for mercy, and with a consciousness of not having lived in vain for the world of mankind. It has been for more than thirty years my prayer to God that this might be my lot upon earth, to render signal service to my country and to my species. For the specific object, the end, and the means, I have relied alike upon the goodness of God. What they were, or would be, I knew not. For 'it is not in man that walketh to direct his steps.' I have rendered services to my country, but not such as could satisfy my own ambition. But this offers the specific object which I have desired. And why should not the hearts of the rulers of mankind be turned to approve and establish it? I have opened my soul to the hope, though with trembling."

6 Memoirs of J. Q. Adams, 166, July 31, 1823.
See, also, Id. 169–171, 225.

The project of a convention, containing a clause exempting merchant vessels and their cargoes, being private property, from capture in time of war, was communicated to the Russian Government in February, 1824. Count Nesselrode showed by his answer that the proposition had been received by the Emperor in the "kindest spirit,"

but at the same time intimated that it could be made effectual only by the universal consent of nations, without which it would lead to no practical results. It does not appear that the subject was then further discussed.

Mr. Adams, Sec. of State, to Mr. Middleton, min. to Russia, Aug. 13, 1823, MS. Inst. U. States Mins. X. 97; Mr. Van Buren, Sec. of State, to Mr. Randolph, min. to Russia, No. 2, June 18, 1830, MS. Inst. U. States Mins. XIII. 127.

"The articles of the draft are all adapted to one purpose—that of mitigating the rigor and the miseries of war, by withdrawing from the sphere of its operations private property upon the sea, as, by the modern usages and law of nations, *founded on the precepts of Christianity*, private property upon the land already has been." (Mr. Adams, Sec. of State, to Mr. Middleton, min. to Russia, Aug. 13, 1823, MS. Inst. U. States Mins. X. 97.)

See, in this relation, Mr. Adams, Sec. of State, to Count de Menon, French chargé, July 31, 1823, MS. Notes to For. Legs. III. 147.

The "novel character" of the proposition to exempt private property at sea from capture; "the very important bearings its adoption must have upon the interests, perhaps the safety, of the United States; the deep question of policy it involves, and the very doubtful expediency of restricting our means of marine warfare to our young navy alone, are considerations which would make the President pause before committing his country upon a subject of so deep importance to its security. But, convinced by the answer of the Russian minister to Mr. Middleton's proposition that the time has not yet arrived when any definite results could be expected from its renewal, he has thought it expedient to leave it out of our view for the present, and to confine the negotiations within the limits traced out by the acknowledged principles of the neutral leagues of 1780 and 1800."

Mr. Van Buren, Sec. of State, to Mr. Randolph, min. to Russia, No. 2, June 13, 1830, MS. Inst. U. States Ministers, XIII. 127.

A project of a convention was enclosed embracing the points included in the armed neutrality.

See, in this relation, memoranda, April 4, 1829, and April 16, 1829, MS. Inst. Special Missions, I. 34, 35.

"Should the leading powers of Europe concur in proposing as a rule of international law, to exempt private property upon the ocean from seizure by public armed cruisers, as well as by privateers, the United States will readily meet them upon that broad ground."

President Pierce, annual message, Dec. 4, 1854, Richardson's Messages, V. 277.

See, to the same effect, Mr. Marcy, Sec. of State, to Baron Gerolt, Prussian min., Dec. 9, 1854, MS. Notes to Pruss. Leg. VII. 28.

November 10, 1867, the Chevalier Cerruti, Italian minister at Washington, invited the United States to renew Mr. Marcy's propo-

sition, addressed to the representatives of Austria, France, Prussia, Russia, and Sardinia, on July 28, 1856, to amend the first article of the Declaration of Paris so as to exempt from seizure the property of citizens of a belligerent power on the high seas, except in the cases of contraband. This invitation was extended by the Chevalier Cerruti in behalf of his Government, under the belief that the moment had come for establishing by universal law the immunity of private property at sea in time of war. Mr. Seward answered that "after Mr. Marcy's proposition was made and declined," the United States had the misfortune to experience "the evils of sedition, insurrection and rebellion;" that at this critical juncture the United States offered to waive the Marcy amendment and accede to the Declaration of Paris without reserve, but that some of the parties to that declaration declined to receive her accession except on condition "that they should be at liberty to recognize the United States rebels as a maritime power equal under the treaty of Paris to the United States themselves," and that under these circumstances the Government of the United States did not think the time convenient "for renewing the debate" upon the questions which arose on the conclusion of the Declaration of Paris.

Mr. Seward, Sec. of State, to the Chevalier Cerruti, Italian min., Dec. 11, 1867, MS. Notes to Italy, VI. 344.

"We must still defer any proceeding to commit this Government, for the reason that, in the present condition of our relations with one of the European powers, any proposition to a foreign state for the inviolability of private persons and property on the high seas could not be expected to find favor with the Senate of the United States or with the country. The principle which Franklin proposed is widely cherished, and there exists an earnest desire among us to give it vitality, thus at once vindicating Franklin's philanthropical foresight and securing to ourselves and to our country a new distinction for humanity and benevolence. It is not to be understood that the President thinks that the time has not arrived, but only that the immediate condition is unfavorable. . . . The cable has a statement that your treaty upon the naturalization question is complete. I hope that it may be followed by prompt action on the part of Great Britain. In that case I will again bring your proposition concerning the inviolability of private property in war to the consideration of the President and his constitutional advisers." (Mr. Seward, Sec. of State, to Mr. Bancroft, min. to Prussia, No. 46, Feb. 25, 1868, MS. Inst. Prussia, XIV. 504.)

"On the proposition of my ministry, I order that in case of war merchant vessels belonging to subjects of hostile states shall not be subject to detention and capture by my ships of war so long as reciprocity is observed by the hostile states. The foregoing decree has no application to those vessels which would be subject to detention and capture even if they were neutrals."

Prussian royal order, May 19, 1866, enclosed with Baron von Gerolt, Prussian min., to Mr. Seward, Sec. of State, Aug. 7, 1866, MS. Notes from Prussian Leg.

By a ministerial declaration of June 21, 1866, it was declared that this exemption applied to the cargo as well as to the vessel, and that, as Austria had made known that she also in consideration of reciprocity held to the principles set forth in the royal decree of May 19, its provisions were fully applicable to Austria during the war. (Ibid.)

Baron von Gerolt also enclosed a copy of an Austrian imperial mandate of May 13, 1866, containing the following provisions:

"Article I. Merchant vessels and their lading may not, on the ground that they belong to a country with which Austria is at war, be detained at sea by Austrian vessels of war, nor be declared good prize by Austrian prize courts; provided the hostile power observes reciprocity toward Austrian merchant vessels. The observance of reciprocity will be presumed until notice of the contrary is received, while equally favorable treatment is extended to Austrian merchant vessels on the part of the hostile power, either in accordance with the settled principles of its legislation, or guaranteed by their explanations at the commencement of hostilities.

"Article II. The provisions of Article I. have no application to merchant vessels carrying contraband of war or violating blockades lawfully binding."

Baron von Gerolt also enclosed copies of Articles 211 and 212 of the Italian code of the merchant marine of June 25, 1865, part I. title 4, chapter 2, enacting the exemption of merchant vessels from hostile capture on condition of reciprocity, except in cases of contraband or blockade.

In compliance with the request of Baron Von Gerolt, these various provisions were published by the Department of State for the information of the public in the United States. (Mr. Hunter, Second Assist. Sec. of State, to Baron von Gerolt, Prussian min., Aug. 28, 1866, MS. Notes to Prussian Leg. VII. 470.)

July 19, 1870, Baron Gerolt, German minister at Washington, communicated to Mr. Fish a telegram from Count Bismarck, saying that private property on the high seas would be exempt from seizure by German ships without regard to reciprocity. Mr. Fish, in expressing gratification with this announcement, referred to the treaty with Prussia of 1785, and to the attitude of the Administration of President Pierce in offering to exempt private property upon ocean from capture if the leading powers of Europe would concur. On October 28, 1870, Mr. Bancroft, then American minister at Berlin, was authorized to obtain the recognition, in pending treaty negotiations with the North German Union, of the principle of exemption. On January 14, 1871, Baron Gerolt notified Mr. Fish that the German Government, in view of France's treatment of German merchant ships, was obliged to revoke, after four weeks' notice, the exemption previously extended to French merchant vessels "not carrying contraband of war," from capture. In acknowledging the receipt of this communi-

cation Mr. Fish, on January 14, 1871, observed that the notice related only to French merchant vessels and made no mention of American merchant ships, and he inquired whether the latter would continue to be exempt from seizure or whether they would be relegated to their rights under Article XIII. of the treaty with Prussia of 1799, which was revived by Article XII. of the treaty of 1828, and which provided that contraband might be detained or preempted, but should not be confiscated. On February 9, 1871, Baron Gerolt communicated to Mr. Fish a telegram from Count Bismarck, saying that the action of Germany in relation to American vessels would of course be governed by the treaty of 1799.

Baron Gerolt to Mr. Fish, July 19, 1870, For. Rel. 1870, 216; Mr. Fish to Baron Gerolt, July 22, 1870, id. 217; Mr. Fish to Mr. Bancroft, No. 257, Oct. 28, 1870, id. 194; Baron Gerolt to Mr. Fish, Jan. 14, 1871, For. Rel. 1871, 403; Mr. Fish to Baron Gerolt, Jan. 14, 1871, id. 403; Baron Gerolt to Mr. Fish, Feb. 9, 1871, id. 407.

As to the question of the present application of Art. XIII. of the treaty of 1799, see Mr. Hay, Sec. of State, to Mr. White, ambass. to Germany, No. 990, Jan. 2, 1900, MS. Inst. Germany, XXI. 129.

"The high contracting parties agree that, in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party: it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party."

Art. XII. Treaty between the United States and Italy, Feb. 26, 1871.

In 1894, after the outbreak of war between China and Japan, a Japanese bark, the *Tenkio Maru*, arrived at Taku, China, loaded with railway timber. She was at once seized by the Chinese. They offered, however, to release her if Japan would refrain from molesting Chinese merchant vessels. The Japanese Government agreed to do so, except as to "ships carrying troops, or other contraband of war, or attempting to break blockade." The Chinese authorities signified their willingness to accept these terms, but expressed a desire for a statement from Japan as to what would be considered contraband of war. The Japanese Government declined to define contraband of war, and inquired whether that part of the Chinese declaration of war of August 1, 1894, which directed that Japanese ships entering Chinese ports should be destroyed, would be revoked. The Tsung-li-Yamên, on grounds of national dignity, as well as from an apprehension that the privilege of entering Chinese ports might be perverted to hostile purposes, answered that no part of the

imperial edict could be revoked. The negotiations then ended. The Tsung-li-Yamên, while admitting that vessels carrying troops or breaking a blockade would be subject to seizure, desired that, in view of Japan's refusal to define contraband, vessels should be exempted from search for carrying it; but the legation of the United States at Peking refused to submit this proposal to the Japanese Government. It seems the Viceroy Li assented to the proposal of Japan, except as to Japanese vessels being allowed to visit Chinese ports. The Chinese Government, however, decided to restore to her owners the bark *Tenkio Maru*, which had cleared for Taku before war was declared.

For. Rel. 1894, 169–175.

Judge Brawley, of the United States district court for the district of South Carolina, in the case of the Spanish steamer *Rita*, condemned by the decree of the court as enemy's property, June 2, 1898, said:

"As this vessel was enemy property, . . . it is by the law of nations subject to condemnation and forfeiture. Under the influence of the milder sentiments of recent years, the private property of noncombatants upon land is generally held not liable to seizure as booty by an invading army; and it is to the credit of the Government of the United States that it has sought, on several occasions, to have embodied into the law of nations the more mild and mitigated practice of exempting merchant vessels from capture; but except in isolated cases, provided for by treaty, this policy has not met with general acceptance."

Brawley, J., The Rita (1898), 87 Fed. Rep. 925, 926.

"Since the conference has its chief reason of existence in the heavy burdens and cruel waste of war, which nowhere affect innocent private persons more severely or unjustly than in the damage done to peaceable trade and commerce, especially at sea, the question of exempting private property from destruction or capture on the high seas would seem to be a timely one for consideration.

"As the United States has for many years advocated the exemption of all private property not contraband of war from hostile treatment, you are authorized to propose to the conference the principle of extending to strictly private property at sea the immunity from destruction or capture by belligerent powers which such property already enjoys on land as worthy of being incorporated in the permanent law of civilized nations."

Instructions to the American delegates to The Hague Conference, April 18, 1899, For. Rel. 1899, 511, 513.

"It now remains to report the proceedings of the conference, as well as our own action, regarding the question of immunity of private property not contraband from seizure on the seas in time of war. From the very beginning of our sessions it was constantly insisted by leading representatives from nearly all the great powers that the action of the conference should be strictly limited to the matters specified in the Russian circular of December 30, 1898, and referred to in the invitation emanating from the Netherlands ministry of foreign affairs.

"Many reasons for such a limitation were obvious. The members of the conference were from the beginning deluged with books, pamphlets, circulars, newspapers, broadsides, and private letters on a multitude of burning questions in various parts of the world. Considerable numbers of men and women devoted to urging these questions came to The Hague or gave notice of their coming.

"It was very generally believed in the conference that the admission of any question not strictly within the limits proposed by the two circulars above mentioned would open the door to all these proposals above referred to, and that this might lead to endless confusion, to heated debate, perhaps even to the wreck of the conference, and consequently to a long postponement of the objects which both those who summoned it and those who entered it had directly in view.

"It was at first held by very many members of the conference that under the proper application of the above rule the proposal (?) made by the American commission could not be received. It required much and earnest argument on our part to change this view, but finally the memorial from our commission, which stated fully the historical and actual relation of the United States to the whole subject, was received, referred to the appropriate committee, and finally brought by it before the conference.

"In that body it was listened to with close attention, and the speech of the chairman of the committee, who is the eminent president of the Venezuelan arbitration tribunal now in session at Paris, paid a hearty tribute to the historical adhesion of the United States to the great principle concerned. He then moved that the subject be referred to a future conference. This motion we accepted and seconded, taking occasion in doing so to restate the American doctrine on the subject, with its claims on all the nations represented at the conference. The commission was thus, as we believe, faithful to one of the oldest of American traditions, and was able at least to keep the subject before the world. The way is paved also for a future careful consideration of the subject in all its bearings and under more propitious circumstances."

Report of the American delegates to The Hague Conference to the Secretary of State, July 31, 1899, For. Rel. 1899, 513, 518–519.

The Hague conference adopted a resolution expressing the wish that a proposition having for its object the declaration of immunity of private property in war on the high seas should be referred for examination to another conference. The American delegates voted for this resolution, but a few of the powers abstained from voting.

For. Rel. 1899, 513, 520.

See an address on The Position of the United States in Regard to the Freedom of Private Property on the Sea from Capture During War, by Charles Henry Butler, before the International Law Association, Aug. 31, 1899.

"In President McKinley's annual message of December 5, 1898, he made the following recommendation:

"'The experiences of the last year bring forcibly home to us a sense of the burdens and the waste of war. We desire, in common with most civilized nations, to reduce to the lowest possible point the damage sustained in time of war by peaceable trade and commerce. It is true we may suffer in such cases less than other communities, but all nations are damaged more or less by the state of uneasiness and apprehension into which an outbreak of hostilities throws the entire commercial world. It should be our object, therefore, to minimize, so far as practicable, this inevitable loss and disturbance. This purpose can probably best be accomplished by an international agreement to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States Government has for many years advocated this humane and beneficent principle, and is now in a position to recommend it to other powers without the imputation of selfish motives. I therefore suggest for your consideration that the Executive be authorized to correspond with the governments of the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers.'

"I cordially renew this recommendation.

"The Supreme Court, speaking on December 11, 1899, through Peckham, J., said:

"'It is, we think, historically accurate to say that this Government has always been, in its views, among the most advanced of the governments of the world in favor of mitigating, as to all noncombatants, the hardships and horrors of war. To accomplish that object it has always advocated those rules which would in most cases do away with the right to capture the private property of an enemy on the high seas.'

"I advocate this as a matter of humanity and morals. It is anachronistic when private property is respected on land that it

should not be respected at sea. Moreover, it should be borne in mind that shipping represents, internationally speaking, a much more generalized species of private property than is the case with ordinary property on land—that is, property found at sea is much less apt than is the case with property found on land really to belong to any one nation. Under the modern system of corporate ownership the flag of a vessel often differs from the flag which would mark the nationality of the real ownership and money control of the vessel; and the cargo may belong to individuals of yet a different nationality. Much American capital is now invested in foreign ships; and among foreign nations it often happens that the capital of one is largely invested in the shipping of another. Furthermore, as a practical matter, it may be mentioned that while commerce destroying may cause serious loss and great annoyance, it can never be more than a subsidiary factor in bringing to terms a resolute foe. This is now well recognized by all of our naval experts. The fighting ship, not the commerce destroyer, is the vessel whose feats add renown to a nation's history and establish her place among the great powers of the world."

President Roosevelt, annual message, Dec. 7, 1903, For. Rel. 1903, xx.

X. *VISIT AND SEARCH.*

1. A Belligerent Right.

§ 1199.

As to the claim of impressment, see supra, §§ 317–320.
See, also, supra, §§ 309–316.

"The sea is open to all nations; no nation has an exclusive property in the sea."

Case of The Resolution, Federal Court of Appeals (1781), 2 Dallas, 19, 22.
As to the ancient practice, described in French as "voyage de conserve" (Greek, ὁμοπλοία), in accordance with which several vessels navigated together, under formal contract as to exertion and risk, for purposes of common protection (conservaginm facere) against lawless attacks, see Cauchy, Droit Maritime, 1. 152, 335–337.

To detain for examination is a right which a belligerent may exercise over every vessel, not a national vessel, that he meets with on the ocean.

The Eleanor (1817), 2 Wheat. 345.

"What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so? or to indulge

the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character. . . . It [the right of search] has been truly denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may be legally exercised without search, the right of search can never rise or come into question."

Marshall, Ch. J., The Nereide (1815), 9 Cranch, 388, 427.

"As neither China nor Japan has made known an intention to exercise the belligerent right of visitation and search on the high seas, it is hoped that neutral commerce may escape the inconvenience and obstruction which the exercise of that right must necessarily entail."

Mr. Gresham, Sec. of State, to Mr. Denby, jr., chargé at Peking, Sept. 28, 1894, MS. Inst. China, V. 95.

China and Japan, however, both claimed and exercised the right of search during the war of 1894, of course with the acquiescence of the powers.

For. Rel. 1894, App. I. 69; Takahashi, International Law during the Chino-Japanese War, 57, 64, 75, 76, 108.

As to the exercise by France of the right of search in the Tonquin war, see Mr. Frelinghuysen, Sec. of State, to Mr. Chandler, Sec. of Navy, Feb. 5, 1885, 154 MS. Dom. Let. 166.

"12. The belligerent right of search may be exercised without previous notice, upon all neutral vessels after the beginning of war, to determine their nationality, the character of their cargo, and the ports between which they are trading."

Instructions to U. S. Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781.

In the French Chamber, Nov. 24, 1899, Mr. de Montaign complained that a steamer belonging to the French Navigation Company (the *Chargeurs Réunis*) had lately been stopped and searched by a British man-of-war.

Mr. Delcassé, minister of foreign affairs, replied that in time of war a belligerent possessed the right of search, and that, if the steamer had been searched by the British, they had accomplished an act which was not prohibited by any convention. Concerning the incident itself, however, he had no precise information.

The Standard (London), Nov. 25, 1899.

2. Mode of Exercise.

§ 1200.

In the draft convention suggested on January 5, 1804, by Mr. Madison, Secretary of State, to Mr. Monroe, minister to England, occurs the following:

"Article III. If the ships of either of the parties shall be met with, sailing either along the coasts or on the high seas, by any ship of war, or other public or private armed ships of the other party, such ships of war, or other armed vessels shall, for avoiding all disorder in visiting and examining the same, remain out of cannon shot unless the state of the sea, or the place of meeting render a nearer approach necessary; and shall in no case compel or require such vessel to send her boat, her papers, or any person from on board to the belligerent vessel; but the belligerent vessel may send her own boat to the other, and may enter her to the number of two or three men only, who may, in an orderly manner, make the necessary inquiries concerning the vessel and her cargo; and it is agreed that effectual provision shall be made for punishing violations of any part of this article."

On this Mr. Madison makes the following observations:

"This regulation is conformable to the law of nations, and to the tenor of all treaties, which define the belligerent claim of visiting and searching neutral vessels. No treaty can be cited, in which the practice of compelling the neutral vessel to send its boat, its officers, its people or its papers, to the belligerent vessel, is authorized. British treaties, as well as those to which she is not a party, in every instance where a regulation of the claim is undertaken, coincide with the article here proposed. The article is in fact almost a transcript of the —— article of the treaty of 1786 between Great Britain and France.

"The regulation is founded in the best reasons: 1st. It is sufficient for the neutral that he acquiesces in the interruption of his voyage, and the trouble of the examination, imposed by the belligerent commander. To require a positive and active co-operation on his part in behalf of the latter, is more than can be justified on ony principle. 2d. The belligerent party can always send more conveniently to the neutral vessel, than this can send to the belligerent vessel; having neither such fit boats for the purpose, especially in a rough sea, nor being so abundantly manned. 3d. This last consideration is enforced by the numerous and cruel abuses committed in the practice of requiring the neutral vessel to send to the belligerent. As an example, you will find in the documents now transmitted a case where neither the smallness and leakiness of the boat, nor the boisterous state of the weather, nor the pathetic remonstrances of the neutral commander,

had any effect on the imperious injunctions of the belligerent, and where the task was performed at the manifest peril of the boat, the papers, and the lives of the people. The limitation of the number to be sent on board the neutral vessel is a reasonable and usual precaution against the danger of insults and pillage."

Am. State Papers, For. Rel. III. 81, 82, 87.

"Another unjustifiable measure is the mode of search practised by British ships, which, instead of remaining at a proper distance from the vessel to be searched, and sending their own boat with a few men for the purpose, compel the vessel to send her papers in her own boat, and sometimes with great danger from the condition of the boat and the state of the weather."

Mr. Madison, Sec. of State, report, Jan. 25, 1806, Am. State Papers, For. Rel. II. 728.

As a belligerent right it can not be questioned, but it must be conducted with as much regard to the rights and safety of the vessel detained as is consistent with a thorough examination of the character and voyage. Any detention of the vessel beyond what is necessary is unlawful, as is also any transgression of the bounds within which the examination should be confined.

The Anna Maria, 2 Wheat. 327.

It is lawful, in order to facilitate the exercise of the right of search, to assume the guise of a friend or of an enemy. If, in consequence of the use of this stratagem, the crew of the vessel detained abandon their duty before they are actually made prisoners of war, and the vessel is thereby lost, the captors are not responsible.

The Eleanor, 2 Wheat. 345.

The modern usages of war authorize the bringing of one of the principal officers on board the cruising vessel, with his papers, for examination. But in a case of detention merely for search, where the vessel is never actually taken out of the possession of her own officers, the captain of the cruiser may detain the vessel by orders from his own quarter-deck, and the officers of the captured vessel must obey at their peril.

The Eleanor, 2 Wheat. 345.

A cruiser of one nation has a right to know the national character of any strange ship he may meet at sea, but this right is not a perfect one, and the violation of it can not be punished by capture and condemnation, nor even by detention. The party making the inquiry must put up his own colors, or in some other way make himself fully

known, before he can lawfully demand such knowledge from the other vessel. If this be refused, the inquiring vessel may fire a blank shot, and, in case of further delay, a shotted gun may be fired across the bows of the delinquent, by way of positive *summons*. Any measures beyond the summoning shot, which the commander of an armed ship may take for the purpose of ascertaining the nationality of another vessel, must be at his peril; for the right of a ship to pass unmolested depends upon her actual character, and not upon that which was erroneously attributed to her, even though her own conduct may have caused the mistake. The latter may affect the amount of reparation, but not the lawfulness of the act. The right of a public ship to hail or speak with a stranger must be exercised within the same limits as that of any other authorized armed vessel. When a vessel thus interrogated answers either in words or by hoisting her flag, the response must be taken for true, and she must be allowed to keep her way. But this right of inquiring can be exercised only on the high seas, and is limited to time of peace.

Black, At. Gen., 1860, 9 Op. 455.

The captain of a merchant steamer when brought to by a man-of-war is not privileged from sending his papers on board, if so required, by the fact that he has a Government mail in his charge. On the contrary, he is bound by that circumstance to strict performance of neutral duties and to special respect for belligerent rights.

The Peterhoff, 5 Wall. 28.

Early in August, 1862, Mr. Stuart, British chargé d'affaires ad interim, represented to Mr. Seward, on the strength of information received from British naval officers, that a British steamer had been chased and fired on by a United States cruiser without display of her colors, and had then been captured without any search, and that the senior United States naval officer present had declared that the American cruisers had orders to seize any British vessels whose names had been forwarded to them from the Government at Washington. Mr. Stuart protested against these instructions as being "entirely at variance with the recognized principles of international law." On the 9th of August Mr. Seward communicated to Mr. Stuart a copy of a letter which he had addressed on the preceding day to Mr. Welles, Secretary of the Navy, conveying the direction of the President that certain instructions, which were set forth in the letter, should be issued to naval officers. Instructions were issued by Mr. Welles August 18, 1862. They embodied the substance of Mr. Seward's draft with certain amendments. They contained the following clauses:

"First. That you will exercise constant vigilance to prevent supplies of arms, munitions, and contraband of war from being conveyed

to the insurgents, but that under no circumstances will you seize any vessel within the waters of a friendly nation.

"Secondly. That, while diligently exercising the right of visitation on all suspected vessels, you are in no case authorized to chase and fire at a foreign vessel without showing your colors and giving her the customary preliminary notice of a desire to speak and visit her. . . .

"You are specially informed that the fact that a suspicious vessel has been indicated to you as cruising in any limit which has been prescribed by this Department does not in any way authorize you to depart from the practice of the rules of visitation, search, and capture prescribed by the law of nations."

Blue Book, North America, No. 5 (1863); Official Records of the Union and Confederate Navies, Ser. I., vol. 1, p. 417.

For the letter of Mr. Seward to Mr. Welles of August 8, 1862, see Parl. Papers, North America, No. 5 (1863), 3.

October 21, 1888, the American steamer *Haytian Republic*, while coming out of the Bay of St. Marc, in Hayti, was stopped by the Haytian war steamer *Dessalines* for an alleged attempt to break a blockade. The commander of the man-of-war then sent a boat load of armed men alongside the *Haytian Republic* and ordered her master to repair on board the *Dessalines* with his papers. No officer was sent on board the *Haytian Republic* to examine her papers, nor were the papers, ship, or cargo examined. The first officer of the *Haytian Republic* was, on the contrary, taken on board the *Dessalines* with the passenger list and a statement as to the voyage of the vessel; and he was detained on the *Dessalines* as a prisoner till her arrival at Port au Prince, when he was sent to the office of the captain of the port, where he was held till set at liberty at the request of the United States minister. By article 24 of the treaty between the United States and Hayti, of November 3, 1864, it was provided that where a ship of war of one of the contracting parties should meet with a neutral vessel of the other the former should remain at a convenient distance and might send its boats, with two or three men only, to examine the papers relating to the ownership and cargo of the vessel, without causing any extortion, violence, or ill-treatment; and that in no case should the neutral party be required to go on board the examining vessel for the purpose of exhibiting his papers or for any other purpose whatever. By article 27 it was further provided that it should not be lawful to remove the master, commander, or supercargo of any captured vessel from on board thereof during the time the vessel might be at sea after her capture, or pending the proceedings against her or her cargo, and that in no case should her officers, passengers, and crew be imprisoned. It was therefore held that the

proceedings of the Haytian authorities were in clear violation of the express terms of the treaty, and wholly improper and inadmissible.

Mr. Bayard, Sec. of State, to Mr. Preston, Haytian min., Nov. 28, 1888, For. Rel. 1888, 1001.

"13. This right should be exercised with tact and consideration, and in strict conformity with treaty provisions, wherever they exist. The following directions are given, subject to any special treaty stipulations: After firing a blank charge, and causing the vessel to lie to, the cruiser should send a small boat, no larger than a whaleboat, with an officer to conduct the search. There may be arms in the boat, but the men should not wear them on their persons. The officer wearing only his side arms, and accompanied on board by not more than two men of his boat's crew, unarmed, should first examine the vessel's papers to ascertain her nationality and her ports of departure and destination. If she is neutral, and trading between neutral ports, the examination goes no further. If she is neutral, and bound to an enemy's port not blockaded, the papers which indicate the character of her cargo should be examined. If these show contraband of war, the vessel should be seized; if not, she should be set free, unless, by reason of strong grounds of suspicion, a further search should seem to be requisite."

U. S. Instructions to Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781.

As to the exercise of visit and search by Spanish cruisers, see War Decree of Spain, April 23, 1898, London *Gazette*, May 3, 1898, For. Rel. 1898, 775, 776.

3. Mail Steamers and Mails.

§ 1201.

In the postal treaty between the United States and Great Britain of 1848 it was provided that in case of war between the two nations the mail packets should be unmolested for six weeks after notice by either Government that the mail service was to be discontinued, in which case they should have safe conduct to return.

9 Stat. 969.

"During the Mexican war, British mail steamers were allowed by the United States forces to pass in and out of Vera Cruz." (Dana's Wheaton, § 504, note 228, p. 659.)

"The *Trent*, though she carried mails, was a contract, or merchant vessel, a common carrier for hire. Maritime law knows only three classes of vessels—vessels of war, revenue vessels, and merchant vessels. The *Trent* falls within the latter class. Whatever disputes have existed concerning a right of visitation or search in time of

peace, none, it is supposed, has existed in modern times about the right of a belligerent in time of war to capture contraband in neutral and even friendly merchant vessels, and of the right of visitation and search in order to determine whether they are neutral and are documented as such according to the law of nations."

Mr. Seward to Lord Lyons, Dec. 26, 1861, 55 Br. & For. State Papers 627, 631.

"Lushington (Naval Prize Law, Introd., p. xii) says, that to give up altogether the right to search mail steamers and bags, when destined to a hostile port, is a sacrifice which can hardly be expected from belligerents; citing Desp. of Earl Russell to Mr. Stuart, November 20, 1862, Parliamentary Papers, No. Amer., Nov. 5, 1863."

Field, Int. Code, § 862.

"The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

Proclamation of the President, Apr. 26, 1898, Proclamations and Decrees during the War with Spain, 77, 78.

At the time of the breaking out of the recent war with Spain, a Spanish mail steamship was on a voyage from New York to Havana, carrying a general cargo, passengers, and mails, and having mounted on board two breech-loading Hontoria guns of 9 centimeter bore, and one Maxim rapid-firing gun, and having also on board twenty Remington rifles and ten Mauser rifles, with ammunition for all the guns and rifles, and thirty or forty cutlasses. Her armament had been put on board more than a year before for her own defense, as required by her owner's mail contract with the Spanish Government, which also provided that in case of war that Government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel, and in these and other provisions contemplated her use for hostile purposes in time of war. Held, that she was not exempt from capture as prize of war by the fourth clause of the President's proclamation of April 26, 1898.

The Panama (1900), 176 U. S. 535.

"Fourthly. That, to avoid difficulty and error in relation to papers which strictly belong to the captured vessel, and mails that are carried, or parcels under official seals, you will, in the words of the law, 'preserve all the papers and writings found on board and transmit the whole of the originals unmutilated to the judge of the district to which such prize is ordered to proceed;' but official seals, or locks,

or fastenings of foreign authorities, are in no case, nor on any pretext, to be broken, or parcels covered by them read by any naval authorities, but all bags or other things covering such parcels, and duly seized and fastened by foreign authorities, will be, in the discretion of the United States officer to whom they may come, delivered to the consul, commanding naval officer, or legation of the foreign government, to be opened, upon the understanding that whatever is contraband or important as evidence concerning the character of a captured vessel will be remitted to the prize court, or to the Secretary of State at Washington, or such sealed bag or parcels may be at once forwarded to this Department, to the end that the proper authorities of the foreign government may receive the same without delay."

Instructions issued by the Secretary of the Navy, Aug. 18, 1862, to naval officers of the United States, Official Records of the Union and Confederate Navies, Ser. I., vol. 1, pp. 417, 418.

The foregoing instructions were based on a letter of Mr. Seward to Mr. Welles of August 8, 1862.

On October 31, 1862, as the result of discussions with the British legation at Washington, Mr. Seward wrote to Mr. Welles saying that it had been thought expedient, where merchant vessels were captured, that "the public mails of any friendly or neutral power, duly certified or authenticated as such, shall not be searched or opened, but be put as speedily as may be convenient on the way to their designated destinations." Mr. Seward added, however, that this was not to protect "simulated mails verified by forged certificates or counterfeited seals." A copy of this letter was communicated by Mr. Seward to the British legation, but Mr. Welles took no notice of it. In April, 1863, Lord Lyons claimed that the course laid down in Mr. Seward's letter should be observed in the case of mails captured on the British vessel *Peterhoff*. On the 13th of April Mr. Welles wrote to Mr. Seward declining to comply with the request. It appears that when the *Peterhoff* was brought in, the court at first directed the mails found on board to be opened in the presence of the British consul, who was to select such letters as seemed to him to relate to the culpability of the cargo, and to reserve the rest to be forwarded to its destination. The British consul refused to take such action, protesting that the mail should be forwarded unopened. It was at this juncture that Lord Lyons appealed to Mr. Seward. As Mr. Welles refused to yield to Mr. Seward's wishes, the latter appealed to the President, who addressed a series of interrogatories to each of the two officials. They both responded, but it seems that Mr. Welles was not advised of the contents of Mr. Seward's answer. But on April 21, 1863, Mr. Seward wrote to Mr. Adams at London that the *Peterhoff's* mail would be forwarded unopened, and at the same time set forth

his views as to the desirableness of "arriving at some regulation" that would at once save the mails of neutrals from unnecessary interruption and exposure and at the same time prevent them from being made use of as auxiliaries to unlawful designs of irresponsible persons seeking to embroil friendly states in the calamities of war.

Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, Oct. 31, 1862, Dip. Cor. 1863, I. 402; Mr. Seward to Mr. Stuart, British chargé, Nov. 3, 1862, id. 402; Mr. Welles to Mr. Seward, April 13, 1863, Welles's Lincoln and Seward, 92; Dana's Wheaton, § 504, note 228.

For Mr. Seward's letter to Mr. Welles of Aug. 8, 1862, see Blue Book, North America, No. 5 (1863), 3.

"With very great deference for your views, I must confess that I remain of the opinion that there is no recognized sanction of the principle that a *bona fide* authenticated and sealed public mail of a friendly or neutral power, found on board of a commercial vessel navigating between two neutral ports, can be violated lawfully either by a naval officer or a prize court, merely because the vessel on which it is found is searched and seized as contraband; that the general terms in which the act of Congress is couched do not contemplate *bona fide* authenticated public government mails, among the papers which are directed to be delivered to the prize court and opened by them; that it is an unfavorable time to raise new questions or pretensions under the belligerent right of search, and that to insist upon opening the mails of the *Peterhoff* would be to raise such a question irritating to an extreme degree, not only in reference to the British Government but to all neutral commercial states. I think farther that the reservation in my note to you of the 31st of October, in regard to simulated or forged mails, is sufficient for ample protection to the rights of the United States, and that it would be inexpedient and injurious to the public welfare to search the mails of the *Peterhoff* unless there is reason to believe that they are spurious and simulated.

"I have therefore, to recommend that in this case, if the district attorney has any evidence to show that the mails are simulated and not genuine, it shall be submitted to the court. If there be no reasonable grounds for that belief, then, that they be put on their way to their original destination."

Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, April 15, 1863, 60 MS. Dom. Let. 234.

"In reply to your note of the 18th instant on the subject of the mails of the *Peterhoff*, it seems proper for me to say that when the question of detaining the public mails found on board of vessels

visited and searched by the blockading forces of the United States was presented to this Department last year, I took the instructions of the President thereupon. Not only the note which I addressed to you on the 8th day of August last, but also the note which I addressed to you on the 31st of October last, concerning this question was written with the approval and under the direction of the President. The views therein expressed were then communicated to the British Government by authority of the President, as defining the course of proceedings which would be pursued when such cases should occur thereafter. On receiving your note of the 13th instant, intimating a view of the policy to be pursued differing from what had thus been determined by the President on the 31st of October last, I submitted to him that note together with all the previous correspondence bearing upon the subject, together with the act of Congress to which you have called my attention. I then asked his instructions in the case of the mails of the *Peterhoff*. The note which I addressed to you on the 15th was the result of these instructions and, having been read and approved by him, it was transmitted to you by his direction. I was also directed to communicate the contents thereof to the district attorney of the United States for the southern district of New York, and also to announce to Lord Lyons, for the information of the British Government, that the mails of the *Peterhoff* would be forwarded to their destination. I was also directed by the President to make some special representations to the British Government on the general subject of the mails of neutrals which are now in preparation. I need hardly to say, that no part of my note of the 15th instant was intended or was understood by me as imputing to you the having raised or being disposed to raise new questions. What was said on that subject, was said by way of showing that a course of proceedings, different from what I was recommending, would involve, on the part of this Government, the raising of a question which had been waived by it in my correspondence with the British Government in October last."

Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, April 20, 1863, 60 MS. Dom. Let. 267.

"I have the honor to acquaint you that, by the President's direction, I have had a conference with Lord Lyons, Her Britannic Majesty's minister accredited to this Government, on the subject of public mails found on board of vessels captured for a breach of the blockade. In the course of the interview, by the authority of the President, I informed his lordship that, until notice should be given after further experience, such mails would not be opened, but would be forwarded to their destination. The President consequently di-

rects that instructions to this effect be transmitted to the several officers commanding United States blockading squadrons."

Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, May 21, 1863, 60 MS. Dom. Let. 475.

"The rule in Mr. Seward's instructions of 31st October, 1862, relates only to public mails duly authenticated; and the capturing government reserves the right to make sure of the genuineness of the authentication. When the vessel is a private one, but carrying mails under a government contract, like the Cunard or Peninsula and Oriental steamers and the lines subsidized by the United States for that purpose, a government mail agent is usually on board, having them in charge. Although this fact does not in law protect the mails from search, yet it affords opportunity for general arrangements between nations, and makes special arrangements between the captors and the mail agent, in particular cases, more probable."

Dana's Wheaton, § 504, note 228, p. 660.

In May, 1898, a sealed package of mails from the Spanish consulate at Ponce, Porto Rico, addressed to the Spanish consulate at New York, found its way into the hands of the postmaster in New York City. The Postmaster-General expressed the opinion that the postal treaties had no bearing upon the question of its disposition. With reference to the general question of the disposition of mails found on board captured vessels, the Postmaster-General said: "Our treaty obligations in connection with them are contained in the Universal Postal Convention of Vienna, . . . Article IV. (sec. 1) of which provides that 'the right of transit is guaranteed throughout the entire territory of the Union.' This provision is held to insure the safe transit under any conditions of closed mails passing from one country of the Postal Union to another country of the Union; but has no bearing on mails passing from one post-office to another post-office in the same country."

Mr. Smith, P. M. Gen., to the Sec. of State, June 1, 1898, MS. Misc. Letters. See, also, Mr. Moore, Act. Sec. of State, to Sec. of Navy, May 28, 1898, 229 MS. Dom. Let. 13; Mr. Moore, Acting Sec. of State, to P. M. Gen., May 28, 1898, 229 MS. Dom. Let. 17.

4. Resistance to or Evasion of Search.

§ 1202.

"A persistent resistance by a neutral vessel to submit to a search renders it confiscable, according to the settled determinations of the English Admiralty. It would be much to be regretted if any of our

vessels should be condemned for this cause, unless under circumstances which compromitted their neutrality."

Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, April 13, 1854, H. Ex. Doc. 103, 33 Cong. 1 sess, 12, 13.

"A vessel under any circumstances resisting visit, destroying her papers, presenting fraudulent papers, or attempting to escape, should be sent in for adjudication."

U. S. Instructions to Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780.

"14. Irrespective of the character of the cargo, or her purported destination, a neutral vessel should be seized if she—

"(1) Attempts to avoid search by escape; but this must be clearly evident.

"(2) Resists search with violence.

"(3) Presents fraudulent papers.

"(4) Is not supplied with the necessary papers to establish the objects of search.

"(5) Destroys, defaces, or conceals papers.

"The papers generally to be expected on board of a vessel are:

"(1) The register.

"(2) The crew list.

"(3) The log book.

"(4) A bill of health.

"(5) A charter party.

"(6) Invoices.

"(7) Bills of lading."

Instructions to U. S. Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781.

Stockton, in his Naval War Code, art. 23, gave the following as the "papers generally expected to be on board of a vessel:" (1) Register (2) crew and passenger list, (3) log book, (4) bill of health, (5) manifest of cargo, (6) charter-party, if the vessel is chartered, (7) invoices and bills of lading.

The British steamship *Regulus* was seized off Sagua la Grande, Cuba, by a United States cruiser. It appeared that the steamer was cleared for Vera Cruz, Mexico, or Kingston, Jamaica, and not for Sagua la Grande; that certain of the papers were missing, and that the master, when the vessel was seized, refused to state what was the nature of the cargo delivered by him to the Spanish authorities at Sagua la Grande. It subsequently developed that his orders were to proceed to Sagua la Grande, if not blockaded, and otherwise to Kingston, in accordance with his clearance, for orders. The United States district attorney agreed to the release of the vessel on the pay-

ment by her of costs and expenses. The Department of Justice, although holding that under the circumstances the condemnation should not be enforced, expressed the opinion that the seizure was justified, and that the costs and expenses were properly imposed on the vessel, but agreed, as the prize court had very full discretion as to costs, to resubmit the question of costs to the court.

Mr. Day, Sec. of State, to Sir Julian Pauncefote, British amb., No. 1179, Sept. 12, 1898, MS. Notes to British Leg. XXIV. 317.

If a vessel has a Spanish register, and sails under Spanish colors, and has on board accounts describing her as Spanish property, there is probable cause for seizing her as belonging to Spanish subjects.

Del Col *v.* Arnold, 3 Dall. 333.

"It is certainly the duty of neutrals to put on board of their ships sufficient papers to show the real character of the property, and if their conduct be fair and honest, there can rarely occur an occasion to use disguise, or false documents. At all events, when false or colouring documents are used, the necessity or reasonableness of the excuse ought to be very clear and unequivocal to induce a court of prize to rest satisfied with it. To say the least of it, the excuse is not, in this case, satisfactory; for the disguise is as strongly pointed to elude American, as British or Spanish capture."

The Dos Hermanos (1817), 2 Wheat. 76, 89, Mr. Justice Story delivering the opinion of the court.

Under the Spanish treaty of 1795, stipulating that free ships shall make free goods, the want of such a sea letter, passport, or such certificates as are described in the seventeenth article of the treaty, is not a substantive ground of condemnation. It only authorizes capture and sending in for adjudication, and the proprietary interest in the ship may be proven by other equivalent testimony. The Spanish character of the ship being ascertained, the proprietary interest of the cargo can not be inquired into, unless so far as to ascertain that it does not belong to citizens of the United States, whose property, engaged in trade with the enemy, is not protected by the treaty.

The Pizarro, 2 Wheat. 227.

"A certificate under the authority of the United States must be taken by foreign powers as genuine, and can be impeached by them only by application to the Government of the United States."

Wharton, Int. Law Digest, § 409, quoted in The Conrad (1902), 37 Ct. Cl. 459.

Though under the treaty of amity and commerce with France of 1788 (arts. 25, 27) an American ship on the high seas having a pass-

port and manifest was exempt from search, a ship without either is not subject to condemnation, being simply without the benefits of the treaty, but subject to the rules of international law.

The Venus (1892), 27 Ct. Cl. 116; Cole *v.* United States, ibid.

The act of Congress of July 9, 1798, 1 Stat. 578, which authorized merchant vessels to carry arms for protection, could not change the rule of international law which gave a belligerent the right of search, nor save a vessel from lawful confiscation for resisting such right.

The Jane (1901), 37 Ct. Cl. 24.

It was held in this case that where an American vessel attempted flight from an unknown vessel, but, after discovering that the latter was a French cruiser, hove to, and, after being fired into with ball and musketry, returned the fire, it was resistance to search.

5. Use by Neutral of Armed Enemy Ship.

§ 1203.

P., a Spanish subject, chartered a British ship, called the *Vereide*, mounting ten guns and manned by sixteen men, to make a voyage from London to Buenos Ayres and return, with cargo each way. It was stipulated that she should, after taking in cargo, sail with the first convoy from Great Britain for Buenos Ayres; and she sailed accordingly, under convoy, in November, 1813, with a cargo belonging partly to P. and partly to British subjects. The *Vereide*, however, became separated from the convoy, and in December, 1813, was captured, after an action of fifteen minutes, by a United States privateer. P. was at the time on board, but he retired into the cabin at the beginning of the action and took no part in it. He had taken no part in equipping or arming the ship; but it was maintained that his conduct had been such as to impress upon him a hostile character—that, as charterer of the whole ship, he was responsible for her resistance to capture. The evidence showed, however, that the only control which P. had over the ship ended with her lading, and that otherwise she remained under the direction of the owner; and, as he took no part in the action, the case was reduced to the question whether a neutral might put his goods on board an armed belligerent merchantman.

Marshall, C. J., delivering the opinion of a majority of the court, said it was admitted that a neutral might lawfully place his goods on board a belligerent ship for conveyance, and the rule was laid down in terms which comprehended an armed as well as an unarmed vessel. Indeed, as belligerent merchant vessels rarely sailed unarmed, the exception, if any existed as to armed vessels, would be greater

than the rule: and it was noteworthy that the rule related back to a time when almost every merchantman was in a condition for self-defense. The belligerent had a perfect right to arm in his own defense, and this right did not interfere with that of the neutral to transport his goods in a belligerent vessel. But, it was argued that by depositing goods on an armed belligerent the right of search might be impaired, perhaps defeated. The right of search was, however, but a means to an end; and, if the property was neutral, what mischief was done by escaping its exercise? While the neutral could not justify the use of force or fraud, he might avail himself of means, lawful in themselves, to "escape this vexatious procedure." Nor was it true that the neutral assumed a hostile character by placing his goods in an armed vessel of the enemy. Whether the vessel was armed or unarmed, his object was merely the transportation of his goods; and in either case he paid freight. So, in either case, it was the duty of the carrier to avoid capture and to prevent a search; and in neither case was any resistance on the part of the vessel chargeable to the goods or their owner, he having taken no part in it. In the case of the Swedish convoy, all that was decided was that a neutral may arm, but can not by force resist a search. The case of the *Catharine Elizabeth* approached more nearly to that of the *Vereide*, because in that case there were neutral goods and a belligerent vessel. But it was the reasoning of the judge, and not his decision, of which the claimants would avail themselves. The judge distinguished between the effect which the employment of force by a belligerent owner or by a neutral owner would have on neutral goods; and from a marginal note it appeared that the reporter understood the case to decide in principle that resistance by a belligerent vessel would not confiscate the cargo. Moreover, if the neutral character of the goods was forfeited by the resistance of the belligerent vessel, why was not the neutral character of the passengers forfeited by the same cause? On the whole, the property of P. must be restored.

Johnson, J., delivered a concurring opinion. He said that he would not express an opinion upon the abstract case of an individual neutral to all the world. P. was liable to capture both by the French and the Carthagenians. This justified him in placing himself under British protection; and if in so doing he had incidently impaired the exercise of the United States' right of seizure for adjudication, there was nothing to complain of. The charter party gave him the occupation of the hold of the ship, and of two berths in the cabin, but no more. Though he had an incidental interest, as a freighter, in the defense of the vessel and in her fate, he had no power over the conduct of the master and crew: nor did it appear that he had ever acted under the impression that he possessed such power.

The Nereide (1815), 9 Cranch, 388.

Story, J., dissenting maintained that there was a clear distinction between putting goods on an armed and on an unarmed vessel, though the elementary writers, whose works were deficient in many important doctrines of every-day application, might not have expressed it. The neutral must preserve a perfect impartiality. He must submit to the belligerent right of search; and if he resisted it, or, with a view to resist it, sought "the protection of an armed neutral convoy," he was treated as an enemy. (The Maria, 1 Rob. 340; the Elsebe, 5 Rob. 173.) The argument that he might avail himself of "the resistance of a belligerent ship" or convoy, because such resistance was *lawful*, assumed the very ground of controversy. An act perfectly lawful in a belligerent, might be flagrantly wrongful in a neutral. A belligerent may lawfully resist search; a neutral is bound to submit to it, and the character of the act was to be judged not merely by that of the parties who immediately committed it, but also by the character of those who, having cooperated in, assented to, or sought protection from it, would yet withdraw themselves from its penalties. The principle that the resistance of a neutral convoy communicated itself to all the associated ships as an unlawful opposition to the right of search, applied a fortiori to the case of a belligerent convoy, for the resistance must be presumed to be more obstinate and the search more perilous. The sailing under convoy is "an act *per se* inconsistent with neutrality." (See case of the Sampson, Barney, observations of Sir W. Scott; also argument of Sir W. Scott, then advocate-general, in Sugart *v.* Wolff, 3 T. R. 323, 332.) Such seemed to be the sense of the European sovereigns, as might be inferred from the fact that none of them had called in question the assertion of the principle by Denmark in the case of the American vessels captured while under British convoy. (State Papers, 1811, p. 527.) "It might, with as much propriety, be maintained that neutral goods, guarded by a hostile army in their passage through a country, or voluntarily lodged in a hostile fortress, for the avowed purpose of evading the municipal rights and regulations of that country, should not in case of capture be lawful plunder (a pretension never yet asserted), as that neutral property on the ocean should enjoy the double protection of war and peace."

A British armed ship was captured in 1814 on a voyage from Bordeaux to Pensacola by the United States man-of-war *Wasp*, and sent to Savannah, Georgia, where she was liable to condemnation as prize. The cargo, which was claimed for a French merchant, was also condemned, but, on appeal, the circuit court ordered further proof, and then decreed restitution. From this decree an appeal was taken to the Supreme Court. Marshall, C. J., delivering the opinion of the court, said that the case did not differ essentially from that of the *Nereide;* that the opinion then given by three judges was retained by them; that the "principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be, and probably will be changed, or so impaired as to leave no object to which it is applicable;" but that, so long as the principle should be acknowl-

edged, the court "must reject constructions which render it totally inoperative."

Mr. Justice Johnson, who delivered a concurring opinion in the case of the *Nereide*, said that it had always been the rule with him never to decide more in any case than what the case itself necessarily required. Accordingly, he had declined in the case of the *Nereide* to express an opinion upon the general question, because the cargo, considered as Spanish property, was exposed to capture by the Carthagenian and other privateers, and, considered as belonging to a revolted colony, was liable to Spanish capture. The neutral shipper, therefore, could not be charged with evading the belligerent rights of the United States in availing himself of the protection of an armed belligerent when sailing between "Scylla and Charybdis." But the cause now before the court was one "of a vessel at peace with all the world." He thought that the evils which were apprehended from allowing neutrals to put their goods in armed belligerent vessels were "visionary." It was not likely that a belligerent's armed ships would be converted into carriers. Nothing could be more desired by the enemy. The subject had not altogether escaped the notice of publicists. He alluded to a dictum of Casaregis, saying "that if a vessel laden with neutral merchandise attack another vessel, and be captured, her cargo shall not be made prize, unless the owner of the goods, or his supercargo, engage in the conflict." Mr. Justice Johnson thought the present case different from that of vessels under neutral convoy, a case which had been so often invoked. Such a convoy might be considered as an association of neutrals for a hostile object. But the hostile vessel had a right to resist. It did not impair any right of search, or of capture, or of adjudication. The right of capture applied only to enemy ships or goods; the right of search to enemy goods on board a neutral carrier. Neither of these rights was impaired. Nor was the right of adjudication impaired. The neutral did not deny the right of the belligerent to decide the question of proprietary interest. If the property was really neutral, it did not matter to the belligerent who carried it.

> The Atalanta, Mar. 4, 1818, 3 Wheat., 409. Further proof was ordered on the question of proprietary interest. Justices Todd and Duvall did not sit in the case.

"The Supreme Court of the United States has held that there is no valid distinction of right between the act of a neutral merchant who loads his goods on board an enemy merchant ship, and the act of a neutral merchant who ships his goods in an armed vessel belonging to the enemy. The opinion of Chief Justice Marshall, who with the majority of the court decided in the case of the *Nereide*, 'that a neutral merchant had a right to charter and lade his goods on board

a belligerent armed vessel without forfeiting his neutral character," is entitled to great weight, not merely from the authority which attaches to the opinions of that eminent judge, but also from the solidity of the reasoning upon which his judgment in that case proceeded. But the opinion of Mr. Justice Story was the other way, and coincided with the view of Lord Stowell. The Supreme Court of the United States, in February term, 1818, maintained the same view in the case of the *Atalanta* as it had previously maintained in the *Nereide;* so that the decisions of the highest tribunal of the United States is on this point in direct conflict with the judgment of the English high court of admiralty."

Twiss, Law of Nations in War (2d ed.), 188.

Sir William Scott drew a clear distinction between the case of neutral goods on an enemy merchantman and that of neutral goods on an enemy armed vessel. In the former case, he held that the resistance of the master to search did not render the neutral goods liable to capture, for the double reason (1) that the master had the full right to save himself from capture if he could, and (2) that the neutral could not be assumed to have calculated or intended that the master should resist visit. (The Catharina Elizabeth, 5 C. Rob. 232.) "But," said the same judge, "if he [the neutral] puts his goods on board a ship of force, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he could not do by putting them on board a mere merchant vessel, and so far as he does this he adheres to the belligerent; . . . If a party acts in association with a hostile force, and relies upon that force for protection, he is, *pro hâc vice*, to be considered as an enemy." (The Fanny, 1 Dodson, 443, 448.)

A merchant vessel which was armed strictly for defense, and whose only object was trade, was not liable to seizure by French cruisers and to condemnation as prize, although she was licensed to carry arms by the act of Congress of June 25, 1798, or by the act of July 9, 1798, authorizing her to capture armed French vessels, and to recapture American vessels captured by the French.

Hooper *v.* United States, 22 Ct. Cl. 408; Cushing *v.* United States, 22 Ct. Cl. 1.

6. Convoy.

(1) Neutral.

§ 1204.

The neutral claim of convoy "was not included in the armed neutrality of 1780, but forms an article in that of 1800. Although the United States can not but befriend it as favorable to the security and interest of neutral commerce, yet the plausible objections made to the

claim by Great Britain in its indefinite extent, and her probable inflexibility in the objections, may render it expedient to substitute the modifications already admitted by Russia in the treaty of June, 1801. With such modifications the right seems to be sufficiently valuable to deserve a place in a general provision for neutral rights."

Mr. Madison, Sec. of State, to Mr. Armstrong, min. to France, Mar. 14, 1806, MS. Inst. U. States Ministers, VI. 322.

It was stated by Baron Krudener, Russian minister at Washington, in 1829, by direction of his Government, that "subsequent events" had annulled the treaty between Russia and Great Britain of 1801. (Mr. Van Buren, Sec. of State, to Mr. Randolph, min. to Russia, No. 2, June 18, 1830, MS. Inst. U. States Ministers, XIII. 127.)

That the right of convoy is denied by the English prize courts, see the Maria, 1 C. Rob. 340; Hall, Int. Law, 5th ed. 719; The Sea Nymph (1901), 36 Ct. Cl. 369.

"Calhoun asked [at a Cabinet meeting on October 26, 1822] if we could authorize the merchant vessel itself to resist the belligerent right of search. I said, no; and the British claimed the right of searching convoyed vessels, but that we had never admitted that right, and that the opposite principle was that of the armed neutrality. They maintained that a convoy was a pledge on the part of the convoying nation that the convoyed vessel has no articles of contraband on board, and is not going to a blockaded port; and the word of honor of the commander of the convoy to that effect must be given. But, I added, if we could instruct our officer to give convoy at all, we can not allow him to submit to the search by foreigners of a vessel under his charge; for it is placing our officer and the nation itself in an attitude of inferiority and humiliation.

"The President agreed with this opinion, and Mr. Calhoun declared his acquiescence in it; and it was determined that the instructions to Biddle should be drawn accordingly."

6 J. Q. Adam's Mem. 86.

"It is an ordinary duty of the naval force of a neutral, during either civil or foreign wars, to convoy merchant vessels of the nation to which it belongs to the ports of the belligerents. This, however, should not be done in contravention of belligerent rights as defined by the law of nations or by treaty. The only limitations of the right to convoy recognized by the treaty between the United States and Mexico are those contained in the 24th article, which declares that when vessels are under convoy, the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and, when they are bound to an enemy's port, that they have no contraband goods on board

shall be sufficient. With these conditions the United States have at all times been ready to comply."

Mr. Forsyth, Sec. of State, to Mr. Monasterio, May 18, 1837, MS. Notes to Mexico, VI. 74.

Mr. Seward, replying, August 12, 1861, to an inquiry of the Dutch minister as to whether the United States recognized the rule of convoy embraced in the instructions of the Netherlands to the commander of its naval forces bound to North American waters, said: "No objection is entertained to a recognition of the rule so far as it may apply to merchant vessels proceeding under convoy to ports not blockaded. No merchant vessels of the Netherlands, however, or of any other power, will be allowed to enter a port blockaded by the naval forces of the United States, whether such vessel be under convoy or without it."

Mr. Seward, Sec. of State, to Mr. Von Limburg, Aug. 12, 1861, MS. Notes to Netherlands Leg. VI. 175.

The right of neutral convoy is recognized in Stockton's Naval War code, which was issued June 27, 1900, but revoked Feb. 4, 1904.

"Merchant vessels sailing under military convoy of an allied or neutral power are not subjected to examination, provided the commander of the convoy furnishes a certificate as to the number of vessels being convoyed, their nationality, and the destination of the cargoes, and also as to the fact that there is no contraband of war on the vessels. The stoppage and examination of these vessels is permitted only in the following cases: (1) When the commander of the convoy refuses to give the certificate mentioned; (2) when he declares that one or another vessel does not belong to the number of those sailing under his convoy, and (3) when it becomes evident that a vessel being convoyed is preparing to commit an act constituting a breach of neutrality."

Russian Regulations on Maritime Prize, March 27, 1895, § 6, For. Rel. 1904, 736.

(2) BELLIGERENT.

§ 1205.

Rufus King, American minister in London, having expressed disapproval of a proposal of the British Government to order convoys for American vessels trading from Great Britain to the United States as a protection against French capture, Mr. Pickering said that Mr. King's action at the time it was taken was very proper, so far as concerned American vessels sailing from the ports of Great Britain, but that the recent "piratical conduct" of French privateers

"in the American seas, and even on the coast of Spain, must render any measures of *protection* and *defence* both eligible and lawful," and that under the changed conditions, in which danger to American commerce had greatly increased, convoys were "certainly not to be refused." In the West Indies, said Mr. Pickering, "the French agents and privateers capture and condemn every American they meet, if bound to or from a British port, or even to their own ports, in a variety of instances, and strip and abuse our citizens. These have, for some months past, been in the practice of accepting British convoys. And what *legal* consequence can result from accepting a convoy in any case, except that of its being a cause of condemnation in case of capture, although the vessel should really be neutral? It would then seem to be a matter of calculation whether to accept or decline a convoy."

Mr. Pickering, Sec. of State, to Mr. King, min. to England, May 9, 1797, MS. Inst. U. States Ministers, IV. 49; Am. State Papers, For. Rel. VI. 89.

In the course of representations designed to secure the removal of the British export tax, first levied in 1798, in the form of a duty ostensibly designed to defray the cost of furnishing British convoy to vessels carrying goods from that country, Mr. Madison said: "Even during war the exports are generally made as American property and in American vessels, and therefore, with a few exceptions only, a convoy which would subject them to condemnation, from which they would otherwise be free, would not be a benefit but an injury."

Mr. Madison, Sec. of State, to Mr. Monroe, min. to England, Mar. 6, 1805, MS. Inst. U. States Ministers, VI. 271.

"The act of sailing under belligerent or neutral convoy is of itself a violation of neutrality, and the ship and cargo if caught *in delicto* are justly confiscable; and further, that if resistance be necessary, as in my opinion it is not, to perfect the offence, still that the resistance of the convoy is to all purposes the resistance of the associated fleet. . . . I am unable to perceive any solid foundation on which to rest a distinction between the resistance of a neutral and of an enemy master. . . .

"I can not bring my mind to believe that a neutral can charter an armed enemy ship, and victual and man her with an enemy crew, . . . with the avowed knowledge and necessary intent that she should resist every enemy; that he can take on board hostile shipments on freight, commissions and profits; . . . that he can be the entire projector and conductor of the voyage, and cooperate in all the plans of the owner to render resistance to search secure

and effectual; and that yet, notwithstanding all this conduct, by the law of nations he may shelter his property from confiscation, and claim the privileges of an inoffensive neutral."

Story, J., The Nereide, 9 Cranch, 388, 445, 453, 454, dissenting opinion. This is followed by the Court of Claims, as to belligerent convoy, in the Nancy (1892), 27 Ct. Cl. 99; the brig Sea Nymph (1901), 36 Ct. Cl. 369.

That the acceptance by a neutral vessel of the convoy of a belligerent man-of-war is an illegal act, and in itself affords good ground for condemnation, if the vessel, while under such convoy, be captured by the other belligerent, is maintained by the English courts and English writers, and also by leading publicists of the United States, among whom may be mentioned Kent, Duer, Woolsey, and Dana.

On the other hand, the Government of the United States on one occasion took the opposite ground, maintaining, in a controversy with Denmark, which arose in 1810, that so long as the association of the neutral vessel with the belligerent convoy was not attended with any attempt at concealment or deceit, nor with any participation in the actual resistance of the convoying force, she did not lose her neutral character. In this controversy the United States was ultimately represented by Mr. Wheaton, who thus became committed to that view. But, while it was contended by Mr. Wheaton that the mere association, though voluntary, of the neutral vessel with the belligerent convoy did not justify condemnation, yet it was not denied by him that such association afforded ground for bringing in the vessel for adjudication, although he intimated in the course of his argument that in at least some of the cases before him there was no other association than that which resulted from an accidental and temporary coincidence of routes.

Mr. William Beach Lawrence, referring to the negotiation with Denmark, says: "That the success of the negotiation was, in a great degree, to be attributed to the personal character and special qualities of Mr. Wheaton can not be doubted by any one who reads the passages which we have cited from eminent publicists." In the passages thus referred to the view opposite to that expounded by Mr. Wheaton is maintained, and it appears to be supported by the preponderance of recent opinion. Snow, referring to the question "whether neutral vessels who place themselves under the convoy of a belligerent cruiser are liable to capture and confiscation," states that "the weight of opinion favors the doctrine that such acts are sufficient to condemn the vessel." Says Rivier: "A neutral merchant vessel which sails under enemy convoy violates neutrality: its seizure and confiscation would be legitimate."

Dana's Wheaton, 708, note 245; Lawrence's Wheaton (1863), 871; Stockton's Snow, 163; Rivier, Principes du Droit des Gens. II. 424.

The controversy between the United States and Denmark grew out of the enforcement of certain revised instructions which were issued to the Danish men-of-war and privateers, Mar. 28, 1810. By one clause of these instructions all vessels were declared to be good prize which had "made use of British convoy either in the Atlantic or the Baltic." Under this clause 18 American vessels were seized in 1810, out of a total of 122 captures of American vessels by Danish cruisers in that year.

The convoy cases were first discussed on the part of the United States by Mr. George W. Erving, who was sent as special minister to Copenhagen in 1811. In the course of a comprehensive general report of June 23, 1811, on the Danish captures, he thus referred to the convoy cases: "The ground on which they stand, I am aware, is not perfectly solid, yet I did not feel myself authorized to abandon them, and therefore have taken up an argument which may be difficult, but which I shall go as far as possible in maintaining." The Danish Government, however, contended "that neutral vessels that make use of the convoy or protection of the vessels of war of Great Britain are to be considered as good prize if the Danish privateers capture them under convoy." Such was the construction given by Denmark to the convoy clause, which, as thus interpreted, that Government refused to modify. The principle on which the clause was justified was, as stated by Mr. de Rosenkrantz, Danish minister of foreign affairs, "that he who causes himself to be protected, by that act ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantages attached to the character of friend to him against whom he seeks the protection. If Denmark should abandon this principle, the navigators of all nations would find their account in carrying on the commerce of Great Britain under the protection of English ships of war, without running any risk. We every day see that this is done; the Danish Government not being able to place in the way of it sufficient obstacles." (Am. State Papers, For. Rel. III. 329, 521, 524, 526.)

After May, 1811, few American vessels were molested by the Danes, and between May, 1812, when Mr. Christopher Hughes's special mission ended, and 1827, when Mr. Wheaton was sent as minister to Denmark, little serious effort was made to effect a settlement of any of the claims against that Government.

Mr. Wheaton's principal argument in relation to the convoy cases was made in a note of Nov. 24, 1829. (H. Doc. 249, 22 Cong. 1 sess. 34–88; Moore, Int. Arbitrations, V. 4555 et seq.) He assumed the following grounds:

1. That under the convoy clause vessels and cargoes were condemned by the high court of admiralty, although in most, if not in all, such cases there was satisfactory proof that the vessels had been compelled to join the British convoy, and although the Danish prize ordinance was not known at St. Petersburg when they sailed from that port. This, it may be observed, was in the nature of a confession and avoidance, since, while admitting the presence of the vessels with the convoy, it suggested as excuses want of notice and coercion.

2. But it was, said Mr. Wheaton, less material to dwell on this aspect of the case, since the United States wholly denied the principle on which the clause was founded. This clause, as construed by the Danish tribunals, involved, so Mr. Wheaton declared, "the application of a principle (to say the least) of *doubtful* authority," and, as interpreted by the Danish tribunals, made "the fact of having navigated under the enemy's convoy . . . *per se* a justifiable cause (not of capture merely, but) of condemnation."

From this argument of Mr. Wheaton's it is to be inferred that the Danish tribunals gave to the clause in question a more extensive effect than that ascribed to it by the Danish Government. The construction of that Government, expressed in the correspondence with Mr. Erving, was, as has been seen, that vessels seized on the ground of accepting British protection were "good prize if the Danish privateers capture them under convoy;" while, as stated by Mr. Wheaton, "the fact of having sailed under belligerent convoys" was held by the tribunals to be in itself a cause of condemnation.

3. Mr. Wheaton also contended that as Denmark had, when neutral, asserted the right to protect her commerce against belligerent visitation and search by means of armed convoys of her own public ships, she was a fortiori precluded from asserting a right to condemn neutral vessels for sailing under belligerent convoy. Great Britain treated navigating under the convoy of a neutral ship as a ground of condemnation, because it tended to defeat the lawful right of belligerent search and render every attempt to exercise it a contest of violence. But the belligerent, continued Mr. Wheaton, had a right to resist; and the masters of vessels under his convoys, not participating in his resistance, could no more be involved in the legal consequences of resistance than could the neutral shipper of goods on a belligerent vessel or the neutral owner of goods found in a belligerent fortress. This branch of Mr. Wheaton's argument embraces the questions of (1) neutral convoy and (2) neutral goods shipped on an armed enemy vessel. As to the first question, it may be observed that the conception of neutral convoy by nations which recognize and practice it is not that of resistance to search, but of the substitution for the process of search of a responsible governmental guarantee. As to the second question, Mr. Wheaton's contention, and to a great extent his language, were drawn from the case of The Nereide, 9 Cranch, 388, in which neutral goods on an armed vessel that resisted search were held to be exempt, Mr. Justice Story and one other justice dissenting, while two others were absent. (Dana's Wheaton, 638, note 243.) It is, besides, to be noticed that in a subsequent case the Supreme Court sharply distinguished the case of lading goods on an armed enemy vessel from that of the acceptance of belligerent convoy. (The Atalanta, 3 Wheat., 409.) Mr. Wheaton himself, in his treatise on International law, thus summarizes the court's reasoning on the subject of belligerent convoy: "A convoy was an asssociation for a hostile object. In undertaking it, a state spreads over the merchant vessels an immunity from search which belongs only to a national ship; and by joining a convoy, every individual vessel puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine. If, then, the association be voluntary, the neutral, in suffering the fate of

the entire convoy, has only to regret his own folly in wedding his fortune to theirs; or if involved in the resistance of the convoying ship, he shares the fate to which the leader of his own choice is liable in case of capture." (Dana's Wheaton, 698.)

4. Mr. Wheaton further contended that, in view of the multiplied ravages to which American commerce was then exposed on every sea, from the sweeping decrees of confiscation fulminated by the great belligerent powers, the conduct of the vessels in question might be sufficiently accounted for without resorting to the supposition that they meant to resist, or even to evade, the exercise of the belligerent rights of Denmark. Even admitting that the neutral American had no right to put himself under convoy in order to avoid the exercise of the right of visitation and search by a *friend*, as Denmark professed to be, he had still a perfect right, said Mr. Wheaton, to defend himself against his *enemy*, as France had shown herself to be, by her conduct, and the avowed principles upon which she had declared open war against all neutral trade.

With regard to this contention, it may be suggested that, while it assumes that the British convoy was accepted for protection against French and not against Danish cruisers, and therefore (contrary to contention 1) deliberately, it also assumes that a neutral vessel may, at the expense of the rights of one belligerent, seek from another that protection which its own government may fail to give against the exorbitant pretensions of a third belligerent. In order to support this contention, it should seem that the facts would in any event have to be clearly established.

5. But, finally, even supposing that it was the intention of the American shipmaster, in sailing with the British convoy, to escape from Danish as well as French cruisers, that intention had, Mr. Wheaton further contended, failed of its effect; and it might be asked what belligerent right of Denmark had been practically injured by such an abortive attempt? "If any," said Mr. Wheaton, "it must be the right of visitation and search. But the right of visitation and search is not a substantive and independent right, with which belligerents are invested by the law of nations for the purpose of wantonly vexing and interrupting the commerce of neutrals. It is a right, growing out of the greater right of capturing enemy's property or contraband of war, and to be used as a means to an end to enforce the exercise of that right. Here the exercise of the right was never, in fact, opposed, and no injury has accrued to the belligerent. But it may be said that it might have been opposed, and entirely defeated, had it not have been for the accidental circumstance of the separation of these vessels from the convoying force, and that the entire commerce of the world with the Baltic Sea, might thus have been effectually protected from Danish capture. And, it might be asked in reply, what injury would have resulted to the belligerent rights of Denmark from this circumstance? If the property be neutral, and the voyage lawful, (as they were in the present instance,) what injury would result from the vessels escaping from examination? On the other hand, if the property was that of the enemy, its escape must be attributed to the superior force of the enemy, which, though a *loss*, would not be an *injury*, of which Denmark would have a legal right to complain."

With regard to this special phase of the case, it may be observed that the contention that, whether or no the vessel was enemy's property or otherwise subject to capture, no injury was done to the belligerent whose exercise of the right of search was prevented, is merely a reassertion of one view of the controversy, since it obviously assumes the point at issue, viz, whether such prevention was an injury of which the belligerent had a right to complain, or, in other words, a substantial injury.

Considering Mr. Wheaton's argument as a whole, it appears (1) that it was directed against the condemnation and not against the capture of the vessels; (2) that it was chiefly designed to show that the condemnations were, under the special circumstances of the case, improper; (3) that it alleged that the condemnations proceeded upon a construction of the instructions of 1810, which was, as has been pointed out, more extensive in its effect than that which was originally given to them by the Danish Government; (4) that it nowhere suggests that the acceptance of belligerent convoy did not create an adverse presumption which justified the sending in of the vessels for adjudication.

On March 28, 1830, a convention was signed by which the King of Denmark, while renouncing all claims against the United States, agreed to pay a lump sum of 650,000 Spanish-milled dollars "on account of the citizens of the United States, who have preferred claims relating to the seizure, detention, condemnation, or confiscation of their vessels, cargoes, or property whatsoever, by the public or private armed ships, or by the tribunals of Denmark, or in the States subject to the Danish sceptre," during the maritime war in question. And it was further stipulated that "the intention of the two high contracting parties being solely to terminate, definitely and irrevocably, all the claims which have hitherto been preferred, they expressly declare that the present convention is only applicable to the cases therein mentioned, and, having no other object, can never hereafter be invoked by one party or the other as a precedent or rule for the future."

A neutral vessel, though liable to capture without search when sailing under belligerent convoy, is not liable to capture or condemnation for sailing under such convoy after she has, voluntarily or involuntarily, separated from it.

The Galen (1901), 37 Ct. Cl. 89.

X. *CAPTURE.*

1. What Constitutes.

§ 1206.

An American vessel, bound for an American port, having been seized by an American privateer, the captor entered into an understanding with the master by which it was arranged that the captor should preserve his claim to any British goods which might be found on board, the residue to belong to the claimants. A single man,

but no prize crew, was then put on board the vessel. Subsequently, on the arrival of the vessel in port, all the goods, as well as the vessel, were libelled, on the ground of a trading with the enemy. The claimants of the vessel and goods contended that there was no capture; that the prize master alone was unable to secure the vessel against a rescue should one be attempted; that he was unable to bring her into port without the assistance of the original crew; and that even if it should be held that there was a capture it extended only to the British goods. The vessel and cargo were, however, condemned. Marshall, Ch. J., delivering the opinion of the court, said: "That the *American* [privateer] took possession of the *Alexander* with the intention of making prize of that part of her cargo which might be deemed British, is not controverted. How was this intention to be executed . . ." if it was not by capture? "And if such part of the cargo as might eventually be British, was captured, and the whole remained together in the vessel, how can the capture be considered as partial? But it has been truly observed that it is not non-capture, but abandonment, for which the complainants in fact contend. But while the whole cargo remains together, claimed by the captor, if it be enemy property, how can any part of it be said to be abandoned? If it was entirely abandoned, for what purpose was one of the crew of the *America* put on board the *Alexander?* The inability of the prize master to secure the captured vessel against a rescue, should one be attempted, his inability to bring in the vessel without the aid of the hands belonging to her, is, in reason, no proof of abandonment. If the circumstances of the captured vessel be such as to do away [with] all apprehension of rescue, and inspire confidence that the crew will bring her into port, no reason is perceived why the property of the captor, may not be retained as well by a prize master alone, as by a considerable detachment from his crew."

The Alexander (1814), 8 Cranch, 169.

To constitute a capture some act should be done indicative of an intention to seize and retain as prize; and it is sufficient if such intention is fairly to be inferred from the conduct of the captor.

The Grotius, 9 Cranch, 368.

A tortious possession under an illegal capture can not make a valid title by a sale.

The Fanny, 9 Wheat. 658.

Though a superior physical force is not necessary to make a seizure, there must be an open, visible possession claimed, and a submission to the control of the seizing officer. If a seizure be voluntarily aban-

doned it becomes a nullity, and it must be followed up by appropriate proceedings to be effectual in conferring rights of property.

The Josefa Segunda, 10 Wheat. 312.

Where a vessel seized as contraband of war is lost while in the hands of its captors, without their fault, they are not liable therefor.

The Caroline Wilmans, 27 Ct. Cl. 215.

Where the illegality of a seizure is shown, the owners are entitled to indemnity.

The Nancy, 37 Ct. Cl. 401.

"I am just informed that two American seamen, Daniel Tripe and Benjamin Yeaton, are in prison at Point Peter, Guadaloupe, and that the government of that place refuses to exchange them and threatens to punish them as criminals. The offence committed is said to have been the rescue of their vessel, in doing which the prize master was killed.

"As the fact is completely justifiable by the laws and usages of war, it will not authorize the revenge which the government of Guadaloupe proposes to exercise on these prisoners. Nor will the Government of the United States permit such practices to remain unpunished; however retaliation may wound the feelings of humanity, a just regard for the lives of our citizens and a sound policy will compel us to resort to it.

"I must therefore request that you will endeavor to have these men exchanged, and that, if it is pretended that they ought to be detained as criminals and to be punished as murderers, you remonstrate against an act alike lawless and inhuman, and make such declarations as you may believe will be productive of good, of the certainty that the American Government will retaliate."

Mr. Marshall, Sec. of State, to Mr. Clarkson, Aug. 1, 1800, MS. Inst. U. States Ministers, V. 346.

Rescue.

"In reference to your letter of the 2d February last, I soon after took occasion to intimate to you what appeared to be the President's way of thinking on the subject. I have now the honor to state to you that while, by the law of nations, the right of a belligerent power to capture and detain the merchant vessels of neutrals, on just suspicion of having on board enemy's property, or of carrying to such enemy any of the articles which are contraband of war, is unquestionable, no precedent is recollected, nor does any reason occur which should require the neutral to exert its power in aid of the right of the belligerent nation in such captures and detentions. It is conceived that, after warning its citizens or

subjects of the legal consequences of carrying enemy's property or contraband goods, nothing can be demanded of the sovereign of the neutral nation but to remain passive. If, however, in the present case, the British captors of the brigantine *Experience*, Hewit, master; the ship *Lucy*, James Conolly, master, and the brigantine *Fair Columbia*, Edward Carey, master, have any right to the possession of those American vessels or their cargoes, in consequence of their capture and detention, but which you state to have been rescued by their masters from the captors, and carried into ports of the United States, the question is of a nature cognizable before the tribunals of justice, which are opened to hear the captors' complaints; and the proper officer will execute their decrees."

Mr. Pickering, Sec. of State, to Mr. Liston, British min., May 3, 1800, Dip. Cor. 1802, 149.

See, as to the case of the *Emily St. Pierre*, Moore on Extradition, I. 596.

The crew of a captured vessel, in charge of a prize crew of inferior force, are not bound to attempt a rescue, since such attempt would in case of recapture expose the vessel, though otherwise innocent, to condemnation.

Brig Short Staple *v.* United States (1815), 9 Cranch, 55.

The right of search carries with it the correlative duty of submitting to search; hence, where a vessel has been seized by a belligerent and is being sent in for adjudication, her rescue by her master and crew is unlawful.

The Mary (1901), 37 Ct. Cl. 33.

It is the duty of the captors to place an adequate force upon the captured vessel, and the omission to do so is at their own risk.

Grundy, At. Gen. (1838), 3 Op. 377.

2. Who may Make.

§ 1207.

Restitution of property was claimed on the ground that the captain of the privateer which made the capture was an alien. Johnson, J., delivering the opinion of the court, said that this circumstance, if it could have any bearing at all on the question of condemnation, would only lead to the condemnation of the captain's interest to the Government as a droit of admiralty. The owners and crew of the privateer were as much parties to the suit as the commander, and his national character could not affect their rights. But the court saw "no reason why an alien enemy should not be commissioned as commander of a privateer. There is no positive law prohibiting it; and

it has been the universal practice of nations to employ foreigners, and even deserters to fight their battles. Such an individual knows his fate should he fall into the hands of the enemy; and the right to punish in such cases is acquiesced in by all nations. But, unrestrained by positive law, we can see no reason why this Government should be incapacitated to delegate the exercise of the rights of war to any individual who may command its confidence, whatever may be his national character."

The Mary and Susan (1816), 1 Wheat. 46, 57.

Claimants of property which is liable to condemnation can not litigate the question of the captor's commission. They have no standing before the court to assert the rights of the United States. If the capture was without a commission, the condemnation must be to the United States generally; if, with a commission as a national vessel, it must still be to the United States, but the proceeds are to be distributed by the court among the captors according to law.

The Dos Hermanos, 2 Wheat. 76; The Amiable Isabella, 6 Wheat. 1, 66.

The capture of a Spanish vessel and cargo, made by a privateer commissioned by the province of Carthagena while it had an organized government and was at war with Spain, can not be interferred with by the courts of the United States.

The Neustra Señora de la Caridad, 4 Wheat. 497.

The commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character; and the courts of a foreign country will not inquire into the means by which the title to the property has been acquired.

The Santissima Trinidad, 7 Wheat. 283.

W., a loyal citizen of the United States, residing in Illinois, owned three-fifths of a vessel called the *Eastport*, which early in the civil war was tied up at Paducah, Kentucky, her home port, in consequence of the blockade of the Mississippi River by the United States. Subsequently, without W.'s knowledge or consent, the vessel was taken by her master within the Confederate lines and apparently sold by him to the Confederate forces, who proceeded to convert her into a gunboat. Before the conversion was completed the vessel, which was lying under the bank of the Tennessee River, near Cerro Gordo, Tennessee, was captured by detachments of men in small boats from three United States gunboats, commanded by a lieutenant in the Navy, and forming part of the United States naval forces on the western waters, under command of Captain Foote. Captain Foote reported the capture to the Secretary of the Navy, and the vessel, on Captain

Foote's recommendation, was converted by the United States into a gunboat, which was afterwards sunk by running upon a torpedo and was then blown up to prevent her capture by the Confederates.

The capture of the *Eastport* by the United States forces took place February 26, 1862, and she was commissioned as a gunboat about August of the same year. She was destroyed in April, 1864. She and all other vessels of the Navy serving on western waters were under the control of the War Department till October 1, 1862, when they were turned over to the Navy Department under the act of Congress of July 16, 1862. (12 Stat. 587.) In the army appropriation act of July 17, 1861, the sum of one million dollars was appropriated for "gunboats on the western rivers."

The court said: "We are not prepared to hold that the capture was made by the Army, and not by the naval forces of the United States, although the latter, at the time and place, were under the general control of the War Department."

Oakes *v.* United States (1899), 174 U. S. 778, 782, 788–789.

3. Rights of Captor.

§ 1208.

If a captured vessel is abandoned at sea by the captors, and being thus derelict is taken possession of by a neutral and brought into a neutral port and libeled for salvage, the district court has jurisdiction to entertain such libel, and, ex necessitate, may also adjudicate upon the conflicting claims of the captors and former owners to the surplus. In such a case the claim of the captors was allowed, as no neutral nation can impugn or destroy the right vested in the belligerent by the capture.

McDonough *v.* Dannery, 3 Dall. 188.

The right of the captor in the captured property vests at the time of the capture, and can be taken away only on act of supreme legislative power, a statute, or a treaty.

The Mary and Susan (1816), 1 Wheat. 46.

Causes of prize are usually heard, in the first instance, upon the papers found on board the vessel, and the examination taken in preparatorio; and it is in the discretion of the court to order further proof. The prima facie effect of a bill of lading being to vest the ownership of the goods in the consignee named in it, where the consignee so named is an enemy the goods are prima facie liable to condemnation. Capture at sea of enemy's property clothes the captors with all the rights of the owner at the commencement of the voyage; and no lien

created after the capture, or after the commencement of the voyage, can deprive the captors of their rights.

The Sally Magee, 3 Wall. 451.

By the treaty between the United States and France of 1800, Article VI., it was provided that "property captured, and not yet definitively condemned, or which may be captured before the exchange of ratifications (contraband goods destined to an enemy's port excepted), shall be mutually restored." This provision was upheld by the Supreme Court.

United States *v.* The Schooner Peggy, 1 Cranch, 103.

See opinions of Lincoln, At. Gen., 1 Op. 111, 114, 119.

On several occasions during the war with Spain the President of the United States ordered captured vessels to be released prior to the institution of judicial proceedings.

4. Probable Cause.

§ 1209.

Where a vessel, alleged to be Danish property, was seized as French property, on the south side of the island of St. Domingo, and while proceeding for an examination, under the protection of the American flag, was seized by a British armed ship and taken into Jamaica and there condemned, and a claim was made by the Danish subject upon the Government of the United States for compensation, it was advised that the first captors were not liable for the first capture and detention for examination, there being probable cause for the seizure, nor for the second capture; and that the Government of the United States was not bound for the unlawful captures of its subjects.

Lincoln, At. Gen., 1802, 1 Op. 106.

Capture is justified only where the circumstances afford it probable cause of guilt; but a public officer, executing according to the best of his judgment, the orders he has received, even though those orders exceed the law, ought not to be assessed "vindictive or speculative damages."

Murray *v.* Schooner Charming Betsy (1804), 2 Cranch, 64, 124.

During the Revolutionary war the schooner *George* was captured by the American privateer *Addition*, and was condemned by the court of admiralty for the State of New Jersey. This sentence was reserved by the Continental court of appeals, and restitution was ordered but never obtained. In May, 1790, the owner of the sloop, one Jennings, a Dutch subject, domiciled in the island of St. Eustatius, filed a bill in the district court of the United States for the

district of Pennsylvania against the owner of the privateer, praying for relief. It appeared that while the appeal to the Continental court of appeals was pending the vessel was sold, but that the proceeds were held by the marshal, and never, in fact, came into the hands of the owner of the privateer. It was therefore held that the decree of restitution operated upon the marshal and not upon the captors. It was argued, however, in behalf of Jennings, that at any rate the captors were wrongdoers, responsible for all the losses which had been produced by their "tortious" act, and that they were bound to grant relief. This argument the court refuses to accept. A belligerent cruiser who, with probable cause, seized a neutral and took her in for adjudication was not, said the court, a wrongdoer. The act was not "tortious." The order of restoration proved that the property was neutral, not that it was taken without probable cause. Indeed, the testimony in the record showed that there was cause for the seizure and the decree of the Continental court of appeals, though it ordered restoration, did not award damages for the capture and detention nor allow costs in the suit below.

Jennings *v.* Carson (1807), 4 Cranch, 2.

It being contended that "probable cause" meant "*prima facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation" of goods seized for violation of the revenue laws, Marshall, C. J., said: "This argument has been very satisfactorily answered. . . . The term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion."

Locke *v.* United States (1813), 7 Cranch, 339.

A belligerent cruiser who, with probable cause, seizes a neutral and takes her into port for adjudication, and proceeds regularly, is not a wrongdoer.

Jennings *v.* Carson (1807), 4 Cranch, 2.

Where a party, whose national character does not appear, gives his money to a neutral house, to be shipped with money of that house and in their name, and an attorney in fact, on capture of the money and libel of it as prize, states that such neutral house are the owners thereof, and that "no other persons are interested therein," the capture and sending in will be justified; though in the absence of proof of an enemy's character in the party shipping his money with the neutral's, a condemnation may not ensue. Where a vessel has been guilty

of carelessness and a portion of her cargo is of a supicious nature, the costs and expenses of the capture may be ratably apportioned between the vessel and the suspicious portion of the cargo, though both are restored.

The Dashing Wave, 5 Wall. 170.

5. Wrongful Capture.

§ 1210.

During the state of limited war between the United States and France, 1798–1800, the Danish ship *Mercator* was captured at sea by Captain Maley, commanding the U. S. S. *Experiment*. The capture of the vessel was due to the suspicion that she was in reality an American vessel engaged in violating the nonintercourse with France. A suit was subsequently brought by the owners against Captain Maley for damages for the wrongful seizure of the vessel, and judgment was recovered. The United States district attorney at Philadelphia was instructed to appear in behalf of Captain Maley, and the judgment was paid by the United States.

Maley *v.* Shattuck (1806), 3 Cranch, 458.

For the instructions to the district attorney to appear in the case, see Mr. Madison, Sec. of State, to Mr. Dallas, June 15, 1802, 14 MS. Dom. Let. 25.

For the appropriation for the payment of the judgment, see act of Feb. 2, 1813, 6 Stat., Private Laws, 116–117.

For a summary of diplomatic correspondence concerning the case, see Moore, Int. Arbitrations, V. 4553.

This case establishes the rule that the commanding officer of a man-of-war may be sued in damages for the alleged wrongful capture of a vessel, but this does not signify that such officer is personally answerable for the damages. On the contrary, the design of the rule is to promote justice. As the Government could not be directly sued in its own courts, suit was permitted to be maintained against its individual officer; but the Government was supposed to stand behind its servant, as in reality it did, and save him from personal liability. In this way a mode was established of obtaining damages from the Government through judicial proceedings. No doubt an officer might, by malicious acts done outside the scope of his duty and unauthorized by any instructions, render himself personally liable for his wrongs, but this is in no wise incompatible with what has been stated as to the meaning and purpose of the rule laid down in Maley *v.* Shattuck.

Two vessels, sailing from Halifax, Nova Scotia, in November, 1813, with British licenses and cargoes of British goods destined for the United States, were captured on the same day near the Ragged Islands by a small American privateer. Their crews were put ashore on the islands and the vessels were conducted one into Salem and the other into Plymouth, Massachusetts. They were apparently of for-

eign nationality, but had on board Swedish papers which were admitted to be false and simulated. Immediately on their arrival they were seized by the collectors at Salem and Plymouth for an alleged violation of the nonimportation act; prize proceedings were also begun by the captors. The court, deeming the capture collusive, condemned the vessels and their cargoes to the United States and dismissed the captor's libel. The captor appealed, but the circuit court affirmed the condemnation, and the case was then brought before the Supreme Court. Johnson, J., delivering the opinion of a majority of the court, said that while the voyage of the vessels was "loaded with infamy," yet the evidence was not sufficient to fasten on the captor a participation in the fraud. Almost every feature in the case might be "indifferently pronounced the lineament of guilt or innocence." In such a case the court "must pronounce in favor of innocence." The decree below was therefore reversed, and the vessels and cargoes adjudged to the captor.

The Bothnea and Jahnstoff (Mar. 4, 1817), 2 Wheat. 169. In this decision great weight was given to the circumstances, as evidence in favor of the captors, that nine out of fifteen members of the privateer's crew were to praticipate as joint owners in her prizes. This was stated by Mr. Justice Johnson, delivering the opinion of the court in the case of the *George*, in which the fact that the privateer's crew were all engaged on wages was accepted as adverse to the captor. (The George, Mar. 14, 1817, 2 Wheat. 278.)

The schooner *George* (see report in 1 Wheat. 408, where further proof was ordered) was condemned to the United States on the ground that her capture by the American privateer *Fly* was collusive. Johnson, J., delivering the opinion of the court, said that during the restrictive system and the ensuing war, English manufactures in immense quantities were accumulated on the west coast of Nova Scotia, from which they were, by the fraudulent contrivance of persons in both countries, introduced into the United States. The *George* was ostensibly bound from Nova Scotia to Havana, but she was utterly deficient in equipment for such a voyage. The *Fly* was the sole property of her captain, and every man under him was engaged on wages. In the case of the *Bothnea* (2 Wheat. 169) the court had attached great weight to the fact that nine out of fifteen of the privateer's crew in that case were joint owners, and it was thought improbable that such a transaction, if there was fraud in it, would have been confided to so many witnesses. But in the case of the *Fly* the captain was to have all the prize money. It also appeared that sometime before the capture the *Fly* lay at Machias, in Maine, and that the lieutenant, a brother-in-law of the captain, was absent at Moose Island, holding communication with certain notorious

smugglers. The pilot of the *Fly* swore that he considered the capture amicable. Another witness swore to the same effect as well as to other circumstances of fraud. On the whole the capture was pronounced collusive, and the decree below affirmed.

The George (1817), 2 Wheat. 278.

"Whether the commander of a squadron be liable to individuals for the trespasses of those under his command is a question on which it would be equally incorrect to lay down a general proposition either negatively or affirmatively. In case of positive or permissive orders, or in case of actual presence and co-operation, there could not be a doubt of his liability. But on the other hand, when we consider the partial independence of each commander of a vessel, and that the association is not a subject of contract, but founded on the orders of their government, which leave them no election, it would be dangerous indeed, and dampening to the ardour of enterprise, to trammel a commander with fears of liability, where it is not possible, from the nature of the service, and the delicate rules of etiquette, for him always to direct or control the actions of those under his command. We feel no inclination to extend the principle of constructive trespass, and will leave each case to be decided on its own merits as it shall arise. Where a capture has actually taken place with the assent of the commodore, express or implied, the question of liability assumes a different aspect; and the prize-master may be considered as bailee to the use of the whole squadron who are to share in the prize money. To this case there is much reason for applying the principle, that *qui sentit commodum sentire debet et onus;* but not so as to mere trespasses unattended with a conversion to the use of a squadron.

"The case of the commander of a single ship varies materially from that of the commander of a squadron, and the rigid rules of liability for the acts of those under our command may, with more propriety, be applied to him. The liability of the owners of a privateer for the acts of their commanders has never been disputed. And it is because they are left at large in the selection of a commander, and are not permitted to disavow his actions as being unauthorized by them. So, in the case of a commander of a ship, the absolute subordination of every officer to his command attaches to him the imputation of the marine trespasses of his subalterns on the property of individuals, when acting within the scope of his commands. Orders even giving a discretion to a subordinate in such cases is no more than adopting his actions as the actions of the commander; and placing him in a command which requires skill, integrity, or prudence, makes the commander the pledge to the individual for his competence to discharge the duties of the undertaking.

"With these views on the subject we should have found no difficulty in deciding on the liability of Captain Smith, of the *Congress*, had he been a party to this libel, and the facts of the case had made out a marine trespass in himself, or in Lieutenant Nicholson, or a want of competence or due care in the latter to discharge the command assigned him. But we are of opinion that no one act is proven in the case which did not comport with the fair, honorable, and reasonable exercise of the rights of war."

The Eleanor (1817), 2 Wheat. 345, 356, Johnson, J., delivering the opinion of the court.

It was claimed in a certain case that the captors had, by their misconduct, forfeited the rights given by their commission, so that the condemnation ought to be to the United States. Just what the misconduct consisted in does not appear. The court thought that the capture was made in neutral waters, but it also thought that the captured vessel had forfeited the neutral protection by beginning the hostilities. It is evident, therefore, that there were other irregularities in the case. Mr. Justice Story, delivering the opinion of the court, said:

"There can be no doubt, that if captors are guilty of gross misconduct, or laches, in violation of their duty, courts of prize will visit upon them the penalty of a forfeiture of the rights of prize, especially where the Government chooses to interpose a claim to assert such forfeiture. Cases of gross irregularity, or fraud, may readily be imagined in which it would become the duty of this court to enforce this principle in its utmost rigour. But it has never been supposed that irregularities, which have arisen from mere mistake, or negligence, when they work no irreparable mischief, and are consistent with good faith, have ordinarily induced such penal consequences. There were some irregularities in this case; but there is no evidence upon the record from which we can infer that there was any fraudulent suppression, or any gross misconduct inconsistent with good faith; and, therefore, we are of opinion, that condemnation ought to be to the captors."

The Anne (1818), 3 Wheat. 435, 448.

Search and seizure being lawful processes, the burden is on the neutral to show that they were improperly employed; but a seizure presumptively lawful may be rendered illegal by subsequent wrongful acts of the captor, such as breaking open hatches and removing merchandise and depriving the master of the ship's papers. Proceedings to condemn must be in all essentials legal, and the omission of any important factor vitiates the judgment.

The Nancy (1902), 37 Ct. Cl. 401.
See The Sally (1902), id. 542; The Snow Thetis (1902), id. 470.

6. Capture in Neutral Territory.

§ 1211.

See Neutrality, infra, §§ 1334–1335.

"In the case of the *Anna*, captured by a British cruiser in 1805, near the mouth of the Mississippi, and within the jurisdiction of the United States, the British court of admiralty not only restored the captured property, but fully asserted and vindicated the sanctity of neutral territory by a decree of costs and damages against the captor. If a neutral state neglects to make such restitution, and to enforce the sanctity of its territory, but tamely submits to the outrages of one of the belligerents, it forfeits the immunities of its neutral character with respect to the other, and may be treated by it as an enemy. Phillimore on Int. Law, vol. iii, §§ 155–157; the Vrow Anna Catharina, 5 Rob. 15; the Anna, 5 Rob. 348; Heffter, Droit International, §§ 146–150; Bello, Derecho Internacional, pt. ii, cap. vii, § 6; Riquelme, Derecho Púb. Int., lib. i, tit. ii, cap. xvii."

Halleck's Int. Law (3d ed., by Baker), II. 171.

During a war between the United States and another power a capture as prize of war may be made within the territorial waters of the United States at any place beyond low-water mark.

The Joseph (1814), 8 Cranch, 451, 455.

The seizure of a vessel by the naval force of the United States in waters belonging to a friendly power, though an offense against that power, is a matter to be adjusted between the two Governments and not within the cognizance of the court, and does not render unlawful judicial proceedings against the vessel, instituted after her arrival within the jurisdiction of the United States.

Ship Richmond *v.* United States (1815), 9 Cranch, 102; The Merino (1824), 9 Wheat. 391.

It was alleged that certain property, libeled as British and enemy property, was captured in Spanish and neutral waters. The court said that as there was not sufficient evidence of the truth of this allegation, it was unnecessary to say what influence the fact, if established, might have had on the decision of the court.

Cargo of the ship Hazard *v.* Campbell (1815), 9 Cranch, 205.

A British vessel and cargo were captured by the American privateer *Ultor*, near the shore of the Spanish part of the island of San Domingo, and were brought in for adjudication. A claim of neutral

territory was set up by the Spanish consul at New York, merely by virtue of his office, without the special authority of his Government. Held, that his official character gave him no authority to make such a claim.

The Anne (Mar. 7, 1818), 3 Wheat. 435.

"There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self defence. The privateer had an equal title with herself to the neutral protection, and was in no default in approaching the coast without showing her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities for any purpose in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign."

The Anne (Mar. 7, 1818), 3 Wheat. 435, 447.

Where it is claimed by a foreign minister that a seizure made by an American vessel was a violation of the sovereignty of his Government, and he satisfies the President of the fact, the latter may, where there is a suit depending for the seizure, cause the Attorney-General to file a suggestion of the fact in the cause, in order that it may be disclosed to the court.

Wirt, At. Gen., 1821, 1 Op. 504.

"A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void."

The Anne (1818), 3 Wheat. 435, 447; The Lilla, 2 Sprague, 177; The Sir William Peel, 5 Wall. 517; The Adela, 6 Wall. 263; Wheaton, Dana's note, 209; Judge Holmes's note to 1 Kent, 118.

If a ship or cargo is enemy property, or if either be otherwise liable to condemnation, the circumstance that the vessel at the time of the capture was in neutral waters would not, by itself, avail the claimants in a prize court. It might constitute a ground of claim by the neutral

power whose territory had suffered trespass for apology or indemnity. But neither a hostile belligerent, nor a neutral acting the part of such belligerent, can demand restitution of captured property on the sole ground of capture in neutral waters.

The Sir William Peel, 5 Wall. 517; The Adela, 6 Wall. 266.

As the United States, in the case of American vessels seized by French privateers and carried into Spanish ports and held there, pending prize proceedings in French territory, expressly relinquished any claim against Spain and looked to France alone for indemnity, it must be assumed that the United States, in the exercise of impartial justice, tacitly relinquished similar claims against Sweden and the Netherlands; but where a neutral nation permitted American vessels to be condemned by French consuls in its territory, or permitted such vessels to be seized there, it alone would be responsible, and France would be released.

The Happy Return (1902), 37 Ct. Cl. 262.

In 1881 Mr. Evarts complained to the Chilean minister that the American schooner *Mary E. Hall* had been fired at, brought to, and searched by the Chilean man-of-war *Amazonas* in Colombian waters. Mr. Evarts expressed the conviction that the forcible search of a vessel of a friendly state within the waters of another friendly state, under circumstances imperiling the lives of those on board and after conclusive ascertainment of her nationality and of her destination to a neutral port under regular papers, would be the subject of such frank and positive action on the part of Chile as would remove the case from the sphere of diplomatic action. Mr. Evarts added that the failure of the authorities of the State of Panama to find in the occurrence any ground of grievance, because it took place in the jurisdictional waters of that State, was not conceived to preclude action on the part of the United States, inasmuch as the forcible search of the vessel under the circumstances narrated would have been equally contested by the United States if it had been committed on the high seas.

Mr. Evarts, Sec. of State, to Mr. Asta Buruaga, Chilean min., Mar. 3, 1881, MS. Notes to Chilean Leg. VI. 259.

"All American goods in American bottoms will be subject to capture by Spanish cruisers on the high seas and in all but neutral waters."

Mr. Moore, Act. Sec. of State, to Mr. Huntley, May 3, 1898, 228 MS. Dom. Let. 229.

7. Sending in of Prize.

§ 1212.

Duty to Send in.

It is the duty of the captors, as soon as practicable, to bring the ship's papers into the registry of the district court, and to have the examinations of the principal officers and seamen of the captured ship taken upon the standing interrogatories.

The Dos Hermanos, 2 Wheat. 76; The Pizarro, 2 Wheat. 227.

"20. Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port in which a prize court may be sitting.

"21. The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure; and to this end her papers should be sealed at the time of seizure, and kept in the custody of the prize master. Attention is called to articles Nos. 16 and 17 for the Government of the U. S. Navy. (Exhibit A.)

"22. All witnesses whose testimony is necessary to the adjudication of the prize should be detained and sent in with her, and if circumstances permit it is preferable that the officer making the search should act as prize master.

"23. As to the delivery of the prize to the judicial authority, consult sections 4615, 4616, and 4617, Revised Statutes of 1878. (Exhibit B.) The papers, including the log book of the prize, are delivered to the prize commissioners; the witnesses, to the custody of the United States marshal; and the prize itself remains in the custody of the prize master until the court issues process directing one of its own officers to take charge."

United States Instructions to Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780, 782.

"EXHIBIT A.

"Art. 16. No person in the Navy shall take out of a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof, or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States, before the same are adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in, in order that judgment may be passed thereon; and every person who offends against this article shall be punished as a court-martial may direct.

"Art. 17. If any person in the Navy strips off the clothes of, or pillages, or in any manner maltreats, any person taken on board a prize, he shall suffer such punishment as a court-martial may adjudge.

"EXHIBIT B.

"SEC. 4615. The commanding officer of any vessel making a capture shall secure the documents of the ship and cargo, including the log book, with all other documents, letters, and other papers found on board, and make an inventory of the same, and seal them up, and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found, and are in the condition in which they were found; or explaining the absence of any documents or papers, or any change in their condition. He shall also send to such court, as witnesses, the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He shall send the prize, with the documents, papers, and witnesses, under charge of a competent prize master and prize crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient, in view of the interests of probable claimants, as well as of the captors. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisement made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had; and such property, unless appropriated for the use of the Government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the assistant treasurer of the United States most accessible to such court, and subject to its order in the cause. (See Sec. 1624, Art. 15.)

"SEC. 4616. If any vessel of the United States shall claim to share in a prize, either as having made the capture, or as having been within signal distance of the vessel or vessels making the capture, the commanding officer of such vessel shall make out a written statement of his claim, with the grounds on which it is founded, the principal facts tending to show what vessels made the capture, and what vessels were within signal distance of those making the capture, with reasonable particularity as to times, distances, localities, and signals made, seen, or answered; and such statement of claim shall be signed by him and sent to the court in which proceedings shall be had, and shall be filed in the cause.

"SEC. 4617. The prize master shall make his way diligently to the selected port, and there immediately deliver to a prize commissioner the documents and papers, and the inventory thereof, and make affidavit that they are the same, and are in the same condition as delivered to him, or explaining any absence or change of condition therein, and that the prize property is in the same condition as delivered to him, or explaining any loss or damage thereto; and he shall further report to the district attorney and give to him all the information in his possession respecting the prize and her capture; and he shall deliver over the persons sent as witnesses to the custody of the marshal, and shall retain the prize in his custody until it shall be taken therefrom by process from the prize court. (See Sec. 5411.)"

Question of destruction.

In an article by Mr. John A. Bolles, in 1872, under the title "Why Semmes of the *Alabama* was not tried," extracts are given from instructions of the Secretary of the Navy to various commanders, during the war of 1812, enjoining the destruction of enemy ships taken as prize. Mr. Bolles' article was quoted by Sir Alexander Cockburn, in his dissenting opinion at Geneva, and has since been cited by Hall and other writers. The instructions in question were published with a petition presented to Congress in behalf of various naval officers for an allowance in lieu of prize money, in the cases of the vessels which they had destroyed. Claims were made on account of 74 such captures, 6 of which were made by the *Essex;* 5 by the *Constitution;* 8 by the *President;* 8 by the corvette *Adams;* 1 each by the *Chesapeake*, the *Hornet*, and the *Rattlesnake* and *Enterprise* combined; 2 each by the *Siren*, the *Frolic*, and the *Rattlesnake;* 11 by the *Wasp;* 13 by the *Argus*, and 14 by the *Peacock*. The instructions do not appear to have been general, but to have been given from time to time, as occasion arose. Thus, Lieutenant Allen, of the *Argus*, was, on June 5, 1813, directed to "proceed upon a cruise against the commerce and light cruisers of the enemy," which he was to "capture and destroy in all cases," unless the "value and qualities" should "render it morally certain that they may reach a safe and not distant port. Indeed, in the present state of the enemy's force, there are," continued the paper, "very few cases that would justify the manning of a prize, because the chances of reaching a safe port are infinitely against the attempt, and the weakening the crew of the *Argus* might expose you to an unequal contest with the enemy. It is exceedingly desirable that the enemy should be made to feel the effects of our hostility and of his barbarous system of warfare; and in no way can we so effectually accomplish this object as by annoying and destroying his commerce, fisheries, and coasting trade. The latter is of the utmost importance, and is much more exposed to the attack of such a vessel as the *Argus* than is generally understood. This would carry the war home directly to their feelings and interests and produce an astonishing sensation."

In a letter of September 19, 1813, Captain Charles Stewart, of the *Constitution*, was instructed:

"The commerce of the enemy is the most vulnerable point we can attack, and its destruction the main object; and to this end all your efforts should be directed. Therefore, unless your prizes shall be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send them in. The chances of recapture are excessively great, the crew and the safety of the ship under your command would be diminished and endangered, as well as your own fame and the national honor by hazarding a battle after the reduction

of your officers and crew by manning prizes. In every point of view, then, it will be proper to destroy what you capture, except valuable and compact articles that may be transshipped.

"This system gives to one ship the force of many, and by granting to prisoners a cartel, as sufficient numbers accumulate, our account on that head will be increased to our credit, and not only facilitate the exchange, but insure better treatment to our unfortunate countrymen who are, or may be, captured by the enemy."

In a subsequent instruction to Captain Stewart, November 29, 1814, the Secretary of the Navy said that, as he had on former occasions "urged the superior advantage of destroying" captures, unless in the vicinity of a friendly port and only in the case of very valuable and fleet-sailing prizes, he need not dwell on that subject, and added: "Daily experience and the grievous complaints of the merchants of Great Britain sufficiently attest the efficacy of the system."

In a letter of December 8, 1813, Master Commandant George Parker, of the *Siren*, was admonished that as the most effectual way of harassing and distressing the enemy was the destruction of his trade and commerce, it "ought to be the ruling principle of action with every commander. A single cruiser, if ever so successful, can," declared the Secretary of the Navy, "man but a few prizes, and every prize is a serious diminution of her force; but a single cruiser, destroying every captured vessel, has the capacity of continuing in full vigor her destructive power so long as her provisions and stores can be replenished, either from friendly ports or from vessels captured. Thus has a single cruiser, upon the destructive plan, the power, perhaps, of twenty, acting upon pecuniary views alone; and thus must the employment of our small forces in some degree compensate for the great inequality compared with that of the enemy."

Similar instructions were given to other commanders on December 22, 1813, January 6, 1814, February 26, 1814, March 3, 1814, and November 30, 1814.

American State Papers, Naval Affairs, I. 373–376.

Mr. Bolles's article, in which the foregoing instructions are cited, may be found in the *Atlantic Monthly* (1872), XXX. 88, 95–97.

"Perhaps the only occasions on which enemy's vessels have been systematically destroyed, apart from any serious difficulty in otherwise disposing of them, were during the American Revolutionary war and that between Great Britain and the United States in 1812. * * * The destruction of prizes by the ships commissioned by the Confederate States of America was not parallel because there were no ports into which they could take them with reasonable safety; and the practice of the English and French navies has always been to bring in captured vessels in the absence of strong reasons to the contrary. It is at the same time impossible to ignore the force of the consideration suggested by the Government of the United States in the latter

of the foregoing extracts. It would be unwise to assume that a practice will be invariably maintained which has been dictated by motives not necessarily of a permanent character. Self-interest has hitherto generally combined with tenderness towards neutrals to make belligerents unwilling to destroy valuable property; but the growing indisposition of neutrals to admit prizes within the shelter of their waters, together with the wide range of modern commerce, may alter the balance of self-interest and may induce belligerents to exercise their rights to the full." (Hall, Int. Law, 5th ed., 457–459.)

Hall quotes Bluntschli, § 672, as declaring that the destruction of a captured ship is justifiable only in case of absolute necessity, and Woolsey, § 148, as pronouncing "the practice a barbarous one, which ought to disappear from the history of nations." Hall observes upon this that it is somewhat difficult to see in what the harshness consists of destroying property which would not return to the original owner, but adds that destruction of neutral vessels or of neutral property on an enemy's vessel "would be a wholly different matter." What assurance, however, can there be without the intervention of prize courts that questions of ownership and of culpability will be adequately investigated, and that neutral trade will not be exposed to destructive depredations?

For the citation of Mr. Bolles's article by Sir Alexander Cockburn, see Parliamentary Papers, North America, No. 2 (1873), 92.

"28. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this can not be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court in order that a decree may be duly entered."

Instructions to United States Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898.

"Necessity will excuse the captor from the duty of sending in his prize." (Dana's Wheaton, § 388, note 186, p. 485.)

Order 492, while it authorizes four modes of dealing with a captured vessel, including destruction in certain contingencies, does not purport to authorize its destruction as a means of converting it to public use; and, where a vessel is destroyed to prevent recapture, the captors are entitled to bounty under sec. 4635, Revised Statutes, and not to prize money.

The Santo Domingo (1903), 119 Fed. Rep. 386.

"In extraordinary cases, when the preservation of a detained vessel proves impossible in consequence of its bad condition or extremely small value (sic), the danger of its recapture by the enemy, or the considerable distance or blockade of the ports, as well as of danger

threatening the detaining vessel or the success of its operations, the naval commander is permitted, on his personal responsibility, to burn or sink the detained vessel after having first taken all the people off it, and, as far as possible, the cargo on board, and also after having taken measures for preserving the documents and other objects found on board, and which might prove essential in elucidating matters when the case is examined according to the method prescribed for prize cases.

"Concerning the circumstances which led to the destruction of the detained vessel, the naval commander prepares a memorandum according to article 353 of the Naval Regulations."

Russian Prize Regulations, March 27, 1895, § 21, For. Rel. 1904, 735, 738.

"In the following and other similar extraordinary cases the commander of the imperial cruiser has the right to burn or sink a detained vessel after having previously taken therefrom the crew, and, as far as possible, all or part of the cargo thereon, as well as all documents and objects that may be essential in elucidating the matter in the prize court:

"(1) When it is impossible to preserve the detained vessel on account of its bad condition.

"(2) When the danger is imminent that the vessel will be recaptured by the enemy.

"(3) When the detained vessel is of extremely little value, and its conduct into port requires too much waste of time and coal.

"(4) When the conducting of the vessel into port appears difficult owing to the remoteness of the port or a blockade thereof.

"(5) When the conducting of the detained vessel might interfere with the success of the naval war operations of the imperial cruiser or threaten it with danger.

"The officer prepares a memorandum under his signature and that of all the officers concerning the circumstances which have led him to destroy the detained vessel, which memorandum he transmits to the authorities at the earliest possible moment.

"NOTE.—Although article 21 of the Regulations on Maritime Prizes of 1895 permits a detained vessel to be burned or sunk 'on the personal responsibility of the commander,' nevertheless the latter by no means assumes such responsibility when the detained vessel is actually subject to confiscation as a prize, and the extraordinary circumstances in which the imperial vessel finds itself absolutely demand the destruction of the detained vessel."

Russian Special Instructions, Sept. 20, 1900, § 40, For. Rel. 1904, 735, 747, 752.

In a telegram to Mr. Choate, at London, July 29, 1904, the Department of State said that the American minister at Tokio had reported

that the crew of the *Knight Commander* testified that the vessel was sunk for want of coal to proceed to Vladivostok, and that the United States Government considered that the sinking of the vessel was not justified by the bare fact that there was contraband of war aboard. The Department cited as authorities the note to Dana's Wheaton, p. 485, Hall, Twiss, and Lawrence. In a subsequent telegram to Mr. Choate, on August 6th, Mr. Hay, Secretary of State, said that the Department was not sufficiently advised of all the circumstances of the sinking of the *Knight Commander* to express an opinion in the case; nor could it say that, "in case of imperative necessity," a prize might not be lawfully destroyed by a belligerent captor.

For. Rel. 1904, 333, 337. See, also, id. 734.

With reference to the assertion by the Russian Government of the right of the captor of a neutral ship to sink it, if it was difficult or impossible to carry it into port for adjudication, because, for instance, the distance of the port rendered such conveyance inconvenient, or the voyage would take too much time or coal, or the captor lacked men to provide a prize crew, the British Government declared that such measures would "occasion a complete paralysis of all neutral trade," and characterized them as "contrary to acknowledged principles of international law" and "intolerable to all neutrals." The British Government added that it objected to and could not acquiesce in the introduction of a new doctrine under which, on the discovery of articles alleged to be contraband, the ship carrying them was, without trial and in spite of her neutrality, subjected to penalties which were "reluctantly enforced even against an enemy's ship," and that "should the Russian Government act upon their extreme contentions with regard to contraband of war, and the treatment of vessels accused of carrying it, His Majesty's Government will be constrained to take such precautions as may seem to them desirable and sufficient for the protection of their commerce."

Lord Lansdowne to Sir C. Hardinge, British ambass. to Russia, Aug. 10, 1904, Parl. Papers, Russia, No. 1 (1905), 11, 12.

"For the protection of what may prove to be innocent neutral property, the captor is bound, in ordinary cases, to place a prize crew on board the captured vessel, and to send her in for adjudication by a prize court. He may, however, find difficulties in the way of doing this. He may, for instance, be in immediate danger of attack by a superior force of the enemy, may be unable to spare the men needed to navigate the prize (especially now that the work on a warship is so much more highly specialized than was formerly the case), or may be unable to spare coal for a prize which has possibly exhausted her own supplies of fuel. Under these circumstances what steps may be taken by him?

"If ship and cargo belong, beyond question, to the enemy, he may, after taking off the crew, sink the ship, the property in which is now vested in his own government.

"If, however, the ship or cargo be neutral, the matter in not so simple. The neutral government is not bound to acquiesce in the destruction of the possibly innocent property of its subjects, at any rate unless some overwhelming necessity can be shown for the course which has been adopted; if, indeed, even overwhelming necessity would be sufficient to justify it.

"This is, of course, the question raised by the sinking of the British ship *Knight Commander*, which was effected on July 23, 1904, in accordance with the Russian instructions, and was approved of by the Vladivostok prize court. The attitude of the British Government has been all along adverse to the legitimacy of such a step. Before the occurrence, our ambassador had intimated our disapproval of the Russian instructions on the point, and he presented a strong protest against the sinking five days after it had happened. The incident was discussed in both Houses of Parliament (July 28, August 11) and was spoken of by ministers as an 'outrage,' 'a serious breach of international law.' I am not sure that this language could be fully supported by a reference to the opinion and practice of nations. While it is, on principle, most undesirable that neutral property should be exposed to destruction without enquiry, cases may occasionally occur in which a belligerent could hardly be expected to permit the escape of such property, though he is unable to send it in for adjudication. The contrary opinion is, I venture to think, largely derived from a reliance upon detached paragraphs in one of Lord Stowell's judgments on the subject, judgments which, taken together, show little more than that, in his view, no plea of national interest will bar the claim of a neutral owner to be fully compensated for the value of his property, when it has been destroyed without judicial proof of its noxious character. 'Where doubtful whether enemy's property, and impossible to bring in, the safe and proper course,' says Lord Stowell, 'is to dismiss.' *The Admiralty Manual* of 1888 accordingly directs commanders, who are unable to send in their prize, to 'release the vessel and cargo without ransom, unless there is clear proof that she belongs to the enemy.' This indulgence can hardly, however, be proclaimed as an established rule of international law, in the face of the fact that the sinking of neutral prizes is, under certain circumstances, permitted by the prize codes not only of Russia, but also of such powers as France, the United States, and Japan (1904)."

Neutral Duties in a Maritime War, by Thomas Erskine Holland, Proceedings of the British Academy, II, 12–13.

The foregoing extract from Holland seems very fairly to exhibit the present state of opinion with regard to the sinking of neutral prizes. As he adverts to the reliance sometimes placed upon certain paragraphs in one of Lord Stowell's judgments, it may be pointed out that Hall, in laying down the rule that the captor must bring in neutral property for adjudication, says it follows as of course "that a neutral vessel must not be destroyed," and adds: "The principle that destruction involves compensation was laid down in the broadest manner by Lord Stowell: Where a ship is neutral, he said, 'the act of destruction can not be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified under any such circumstances by a full restitution in value.' It is the English practice to give costs and damages as well; to destroy a neutral ship is a punishable wrong; if it can not be brought in for adjudication, it can and ought to be released."[a] For this passage Hall cites as authority the cases of the *Zee Star*,[b] the *Felicity*,[c] and the *Leucade*.[d] The passage which he cites from Lord Stowell may be found in the case of the *Felicity*. This was a case of an American merchantman burned at sea in January, 1814, by a British cruiser under circumstances which would have justified the destruction of an enemy's ship. The owners afterwards claimed damages on the ground that, although when the burning took place, the United States and Great Britain were at war, the vessel was sailing under a British license. Lord Stowell rejected the claim, finding upon the evidence before him that, when the destruction was committed, the possession of a British license was not disclosed or alleged. The statement of principle quoted by Hall was therefore not involved in the conclusion actually reached. It will also be observed that Lord Stowell, while declaring that the destruction can not be justified "to the neutral owner" even by the gravest importance of the act to the captor's Government, remarks that "it can only be justified . . . by a full restitution in value." The case of the *Zee Star* was that of a ship and cargo restored by consent, and because of an unexplained delay in giving the consent Lord Stowell allowed the claimants two months' demurrage. There was no question of destruction, nor any discussion of it. The case of the *Leucade* was decided in 1855, by Doctor Lushington. The vessel was brought in for adjudication, but the learned judge, in the course of his opinion, endeavored to elucidate various questions of practice which the published reports had left obscure. In connection with the question of costs and damages, he observed that there was a wide difference between the detention of vessels under enemy colors and

[a] Hall, Int. Law (4th ed.), 763; (5th ed.), 735.
[b] 4 C. Rob. 71.
[c] 2 Dodson, 383.
[d] Spinxs, 221.

vessels under neutral flags; that a neutral vessel had "the right to be brought to adjudication, according to the regular course of proceeding in the prize court," and that it was "the very first duty of the captor to bring it in if it be practicable." Continuing, he said:

"From the performance of this duty the captor can be exonerated only by showing that he was a bona fide possessor, and that it was impossible for him to discharge it. No excuse for him as to inconvenience or difficulty can be admitted as between captors and claimants. If the ship be lost, that fact alone is no answer; the captor must show a valid cause for the detention as well as the loss. If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore, is that if a ship under neutral colors be not brought to a competent court for adjudication, the claimants are, as against the captor, entitled to costs and damages. Indeed, if the captor doubt his power to bring a neutral vessel to adjudication, it is his duty, under ordinary circumstances, to release her."

These authorities hardly sustain Hall's statement that the neutral ship, if it can not be brought in, "can and ought to be released," if he intended to lay this down as a rule of unqualified and universal obligation. Let us take, for example, the case of a neutral vessel, laden with a cargo of arms and munitions of war, which is captured by a cruiser of one belligerent while approaching a port of the other. Soon afterwards a superior force of the latter belligerent appears, so that the only way to prevent the arms and munitions of war from being conducted to their hostile destination is to burn or sink the vessel in which they are borne. Is the captor bound under such circumstances practically to hand over the vessel and cargo to his enemy?

Taylor, in his work on international law, says: "It is generally agreed that a neutral prize should never be burned."[a] He gives no authority for this statement. He adds that it is the American rule "that whenever captured vessels, arms, munitions of war, or other material are destroyed or taken for the use of the belligerent before coming into the custody of a prize court," they are to be surveyed, inventoried, and appraised, and the record sent to a prize court for further proceedings. This statement is undoubtedly sustained by the provisions of the Revised Statutes.[b] The Revised Statutes also provide that "if by reason of the condition of the captured property, or if because the whole has been appropriated to the use of the United States, no part of it has been or can be sent in for adjudication, or if the property has been entirely lost or destroyed" proceedings for adjudication may be begun in any district which the Secretary of the Navy may designate; and if no such proceedings are taken within a rea-

[a] International Public Law, 573.

[b] Sec. 4615, quoted supra in this section.

sonable time, either by the Secretary of the Navy or by the captors, the parties claiming the captured property may take steps to compel proceedings on the part of the captors, or may themselves institute proceedings for restitution.[a]

T. J. Lawrence, adverting to the fact that a captor sometimes sells a prize before condemnation, remarks that neutrals may perhaps claim more than the thing brought at forced sale, and adds that "their complaints would have still greater justification if a belligerent destroyed at sea any prizes taken from neutrals." He observes that "this question has given rise to much discussion in recent years," and, after summarizing what Hall says on the subject, reaches the somewhat indefinite conclusion that it is far better for a naval officer to release a ship or goods "as to which he is doubtful than to risk personal punishment and international complications by destroying innocent neutral property."[b] This phrase seems to convey an implication that if the neutral property be clearly guilty it need not invariably be released.

Oppenheim, in his very recent work, clearly recognizes the fact that the question whether the destruction of the neutral prize may ever be justified or excused and the question whether compensation must be made for such destruction are by no means necessarily identical. Attentively observing the language of Lord Stowell, he states that the British practice does not hold the captor in any case justified "as regards the neutral owner of the vessel," with the result that indemnities must be paid. Upon the question whether destruction is ever permissible, he cites, in the negative, Taylor and Kleen, and, in the affirmative, Geffcken, Calvo, Fiore, Martens, Dupuis, and Perels. He says that the practice of other states does not recognize the absolute English rule, and in this relation refers to the United States and France, as well as to Russia. He also remarks: "Japan, which according to article 20 of her prize law of 1894 ordered her captors to release neutral prizes after confiscation of their contraband goods, in case the vessels cannot be brought into port, altered her attitude in 1904, and allowed in certain cases the destruction of neutral prizes."[c] A close scrutiny of article 20 of the Japanese prize law of 1894 seems scarcely to bear out this statement. The article does not in terms embrace vessels not brought in, but refers to cases in which the prize was, in conformity with article 18, brought in, if

[a] Revised Statutes, sec. 4625. For an illustration of the appropriation of captured neutral property by the United States, see The Neuestra Señora de Regla, 108 U. S. 92. The history of the case is given in Moore, Int. Arbitrations, II. 1016–1018, note.

[b] Principles of Int. Law, 405 et seq.

[c] International Law, § 431, II. 469 et seq.

not to the port where the prize court sits, then to the port nearest thereto, or, if that was impracticable, then, in conformity with article 19, to the port nearest the place of capture; and in this relation it provides: "In the above mentioned cases, if the vessel is not an enemy's vessel, the commander should release the vessel after confiscation of the contraband goods."[a]

A stronger implication, to the effect stated by Oppenheim, might have been drawn from article 22 of the prize law of 1894, which reads: "If the enemy's vessels are unfit to be sent to a port as stated in article 18, the commander should break up the vessels, after taking the crew, the ship's papers and the cargo if possible into his ship. The crew, the ship's papers and the cargo should be sent to a port as stated in article 18." (Takahashi, 183.)

Oppenheim, in discussing the cases in which the destruction of captured enemy vessels is exceptionally lawful, adverts to the question whether indemnities must be paid to neutral owners of goods on board. He cites the case of two German merchantmen seized and destroyed by the French cruiser *Dessaix*, in 1870, in which the French Conseil d'État refused to grant indemnities to the owners of the cargo, on the ground that the act of the captor was lawful, it being impracticable to spare a prize crew.

We have quoted above the provisions of paragraph 28 of United States General Orders, No. 492, which were issued during the war with Spain. This paragraph was evidently founded upon a note of Dana, in his edition of Wheaton, as follows:

"Necessity will excuse the captor from the duty of sending in his prize. If the prize is unseaworthy for a voyage to the proper port, or there is impending danger of immediate recapture from an enemy's vessel in sight, or if an infectious disease is on board, or other cause of a controlling character, the law of nations authorizes a destruction or abandonment of the prize, but requires all possible preservation of evidence in the way of papers and persons on board. And, even if nothing of pecuniary value is saved, it is the right and duty of the captor to proceed for adjudication in such a case, for his own protection and that of his government, and for the satisfaction of neutrals."[b]

Paragraph 28 of General Orders, No. 192, was afterwards incorporated, with some unessential verbal changes, in Stockton's Naval

[a] Takahashi, 182–183.

[b] Dana's Wheaton, note 186, p. 485. Dana adds: "In the case of the *Trent*, the reason assigned by Commodore Wilkes for not sending his prize in for adjudication was the great inconvenience that would result to the numerous passengers on board and to the commercial world, as there were mails on board for all parts of Europe which would have to be subjected to delay. This motive, though creditable to the commander in that case, is not recognized by the law of nations as an excuse."

War Code, as article 50.[a] This code was promulgated by the Secretary of the Navy on June 27, 1900, but was revoked by the same authority on February 4, 1904. So long as it was in force this code superseded General Orders, No. 492, but it did not materially alter paragraph 28 of the latter.

In the instructions for the French navy of July 25, 1870, it is provided that if an overmastering circumstance compels a cruiser to destroy a prize for the reason that its preservation endangers its own safety or the success of its operations, it must carefully preserve all papers on board and other things necessary to the rendering of a judgment by the prize court and the ascertainment of the indemnities due to neutrals on account of any nonconfiscable property which may have been destroyed, and that it must use this right of destruction with the greatest reserve.[b]

According to the Règlement of the Institute of International Law, adopted at Turin in 1882, a prize may be burned or sunk in five cases: (1) When, because of the bad condition of the vessel and the state of the weather, she can not be kept afloat; (2) when she can not keep up with the man-of-war and may easily be retaken by the enemy; (3) when the approach of a superior enemy force creates fear of recapture; (4) when the captor can not put aboard a prize crew without dangerously depleting his own; (5) when the nearest port to which the vessel may possibly be taken is very remote. In any case the captor must remove the persons on board and as much as possible of the cargo, and must secure the ship's papers and things important to a judicial inquiry and to the determination of the claims of the owners of the cargo for damages.[c] Nothing is expressly stated in the Règlement with regard to neutral prizes, and it appears that no distinction was intended to be made. The original draft of the Règlement was made by M. de Bulmerincq in 1879–80. In this project the paragraph regarding destruction was numbered 55.[d] In some observations upon it Sir Travers Twiss suggested the insertion of an express authorization of ransom, as well as of a distinction

[a] "Art. 50. If there are controlling reasons why vessels that are properly captured may not be sent in for adjudication, such as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold, and if this can not be done, they may be destroyed. The imminent danger of recapture would justify destruction, if there should be no doubt that the vessel was a proper prize. But in all such cases all of the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered."

[b] Instructions Complementaires, art. 20, Snow, Cases on Int. Law, 577.

[c] Règlement International des Prises Maritimes, adopted at Turin, Sept. 13–15, 1882, § 50, Annuaire de l'Institut de Droit Int. (1882–83), VI. 213, 221.

[d] Annuaire, VI. 105, 114.

between neutral and enemy vessels.[a] In a discussion at Wiesbaden, September 6, 1881, M. de Bulmerincq declared that he had deliberately excluded any such distinction. Sir Travers Twiss continued to maintain that it was exorbitant to permit a neutral ship to be sunk without condemnation. MM. Bluntschli and Den Beer Poortugael thought that in some of the contingencies mentioned in the article the right given appeared to be excessive. Various members, notably MM. de Martens and Perels, observed that if the seized ship carried contraband of war the captor could not be required to release it in any of the cases mentioned. On the motion of various members, and particularly of M. Den Beer Poortugael, the article was amended by confining its general application to "enemy" ships, but by adding at the end that "the same right shall exceptionally belong to the captor in case of the seizure of a neutral ship which is subject to condemnation."[b] Subsequently these amendments were dropped and the article was adopted in the form in which it now stands.[c]

The discussion between Great Britain and Russia, during the Russo-Japanese war, serves to emphasize the potentially important relation of the question of contraband to the question of destruction. When publicists have spoken of the presence of "contraband" as justifying or excusing the destruction of a neutral ship that could not be brought in, they have no doubt had in mind cargoes composed of things specially adapted to use in war and confessedly contraband, such as arms and ammunition, and can not be assumed to have contemplated the subjection of neutral commerce to general depredation under an extension of the categories of contraband.

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[a] Annuaire, VI. 134.

[b] Annuaire, VI. 154–155, 168–169.

[c] The full text of the article is as follows: "§ 50. Il sera permis au capteur de brûler ou de couler bas le navire saisi, après avoir passer sur le navire de guerre les personnes qui se trouvaient à bord, et déchargé autant que possible la cargaison, et après que le commandant du navire capteur aura pris à sa charge les papiers de bord et les objets important pour l'enquête judiciare et pour les réclamations des propriétaires de la cargaison en dommages et intérêts, dans les cas suivants:

1. Lorsqu'il n'est pas possible de tenir le navire à flot, à cause de son mauvais état, la mer étant houleuse;

2. Lorsque le navire marche si mal qu'il ne peut pas suivre le navire de guerre et pourrait facilement être repris par l'ennemi;

3. Lorsque l'approche d'une force ennemie supérieure fait craindre la reprise du navire saisi;

4. Lorsque le navire de guerre ne peut mettre sur le navire saisi un équipage suffisant sans trop diminuer celui qui est nécessaire à sa propre sûreté;

5. Lorsque le port où il serait possible de conduire le navire saisi est trop éloigné." (Annuaire, VI. 221.)

8. Recapture—Salvage.

§ 1213.

A neutral vessel and cargo, having been unlawfully captured by a belligerent, were captured by another belligerent more than twenty-four hours after the first capture. The second captors claimed that the property had then passed to the first captors, both under the law of nations and the ordinance of Congress, and was therefore to be considered as good prize. Held, that the first capture being illegal, the twenty-four hours' occupation did not operate to transfer the property, and that the vessel and cargo were not good prize.

Case of The Resolution, Federal Court of Appeals, 1781, 2 Dallas, 1.

With reference to the ordinance of Congress, providing that after a capture and occupation of twenty-four hours the property captured should be prize, the court said: "The ordinance of Congress is in truth a new regulation of the *jus post liminii*, and limits it to a recapture within twenty-four hours, and therefore can only relate to the subjects of the United States. It adopts the ordinance of France, and that ordinance relates only to the subjects of France. In both cases, with regard to the owner, *a subject*, the property captured is not passed away before the expiration of twenty-four hours. But put the case of a capture and the sale of it before twenty-four hours to a neutral subject; the sale is certainly good and conclusive upon the owner; for the question must be decided by the law of nations, and by the law of nations, the property captured is transferred to the captor as soon as it is taken. Both the ordinances therefore of Congress and of France, in our opinion, relate only to property captured from a subject and recaptured; and not to property captured from a neutral and recaptured."

Case of The Resolution, Federal Court of Appeals, 1781, 2 Dallas, 1, 4.

In September, 1799, the U. S. ship of war *Constitution*, Captain Talbot, recaptured the *Amelia*, an armed Hamburg vessel, which was then on its way to San Domingo in charge of a French prize crew, for adjudication. Captain Talbot libeled the vessel at New York as prize, under the act of Congress authorizing the seizure of French armed vessels. The owners put in a claim, insisting that as Hamburg was at peace with France the *Amelia* was not lawful prize and the property had not changed, and that nothing was due to the recaptors. The district court of the United States decreed one-half of the gross amount of the sale of the vessel and cargo to the recaptors and the other half to the owners. Washington, Justice, in the circuit court, reversed the decree, holding that, as the vessel could not have been

lawfully condemned by the French, nothing was due to the recaptors. From this judgment an appeal was taken to the Supreme Court.

Marshall, C. J., delivering the opinion of the court, said that, in order that salvage might be demanded, two circumstances must concur, (1) the taking must be lawful, and (2) there must be a meritorious service rendered to the captured. As to the first point, the lawfulness of the taking must depend on the state of the relations between the United States and France, since a recapture by a neutral power would be unjustifiable and an act of hostility. The laws of the United States at the time, however, authorized the capture of French armed vessels, and regulated the salvage in case of recapture; and it was a universal principle, which applied to those engaged in partial as well as to those engaged in a general war, that where the vessel met with at sea was in the condition of one liable to capture it was lawful to take her and subject her to the examination and adjudication of the courts. The *Amelia* was an armed vessel commanded and manned by Frenchmen, and apparently there was no evidence on board from which to ascertain her character. It was therefore unquestionable that there was probable cause to bring her in for adjudication, and that the recapture was lawful.

But it was contended that the recapture was lawful only in consequence of the doubtful character of the *Amelia*, and that a right to salvage could not accrue from an act which was founded in mistake. But, said Marshall, it was the opinion of the court that, had the character of the *Amelia* been completely ascertained by Captain Talbot, yet, as she was an armed vessel under French authority, and in a condition to annoy American commerce, it was his duty to capture her and bring her in.

This being so, was there a meritorious service rendered? It was stated, said Marshall, that no service was rendered in recapturing a neutral from a belligerent, because it was in no danger, and consequently that no salvage was due in such a case. But suppose a nation should so change its laws as to subject to condemnation all neutrals captured by its cruisers? The neutral would then be in as much danger as if he had been captured by his own enemy. By the French decree of January 18, 1798, it was made a ground of condemnation for a neutral to have on board merchandise the production of England or her possessions. It appeared that the *Amelia*, when captured, was on a voyage from Calcutta, in Bengal, laden with the products and manufactures of that country. A French court doubtless would have condemned her, unless it had been plainly shown that the cargo was from a part of Bengal not within the British power. The *Amelia*, therefore, was in danger, nor was the danger less real because the decree in question was violative of the law of nations.

Under all the circumstances it was held that one-sixth was a "reasonable allowance" for salvage.

Talbot *v.* Seeman (1801), 1 Cranch, 1.

The word "captured," as used in the fourth article of the treaty with France of 1800 (expired by limitation), as a technical and descriptive term, does not include the meaning, and ought not to be construed to have the effect, of the term "*re*captured" in the sense of the treaty.

Lincoln, At. Gen., 1802, 1 Op. 111.

A vessel, the property of a resident of St. Thomas, then neutral, was, while on her way to the French island of Guadaloupe with a cargo of American produce, captured by a French privateer. She was subsequently recaptured by the commander of a United States frigate, who claimed salvage. The court, referring to the case of the *Amelia*, said that it was a precedent to be followed in similar circumstances, one of which was that the vessel recaptured should be armed and in a condition to annoy American commerce. In the present case there was on board of the vessel only one musket, a few ounces of powder, and a few balls. Her capacity for defense did not warrant her capture as an armed vessel; nor was it proved that she was in such "imminent hazard of being condemned as to entitle the recaptors to salvage." The claim for salvage was dismissed.

Murray *v.* Schooner Charming Betsy (1804), 2 Cranch, 64, 121.

A donation on the high seas by a captor to a neutral does not exempt the property from recapture, and the donee who brings it into a port of his own country must be treated as a salvor.

The Adventure, 8 Cranch, 221.

In cases of recapture the rule of reciprocity is applied. If France would restore in a like case, then we are bound to restore; if otherwise, then the whole property must be condemned to the recaptors. It appears that by the law of France in cases of recapture, after the property has been twenty-four hours in possession of the enemy, the whole property is adjudged good prize to the recaptors, whether it belonged to her subjects, to her allies, or to neutrals. We are bound, therefore, in this case to apply the same rule; and as the property in this case was recaptured after it had been in possession of the enemy more than twenty-four hours, it must, so far as it belonged to persons domiciled in France, be condemned to the captors.

Schooner Adeline, 9 Cranch, 244.

"Recaptures are emphatically cases of prize; for the definition of prize goods is, that they are goods taken on the high seas, *jure belli*,

out of the hands of the enemy. When so taken, the captors have an undoubted right to proceed against them as belligerent property in a court of prize: for in no other way, and in no other court can the questions presented on a capture *jure belli* be properly or effectually examined. The very circumstance that it is found in the possession of the enemy, affords *prima facie* evidence that it is his property. It may have previously possessed a neutral or friendly character; but if the property has been changed by a sentence of condemnation, or by such possession as nations recognize as firm and effectual, the neutral or friendly owner is forever ousted of his right."

The Adeline (1815), 9 Cranch, 244, 284.

The American letter of marque, *Adeline*, from Bordeaux to the United States with a cargo owned partly by citizens of the United States and partly by French subjects, was captured on March 14, 1814, by a British squadron. Six days afterwards she was recaptured by an American privateer, brought into the United States, and libeled, The question arose as to the rate of salvage to be allowed to the recaptors upon the cargo. By the act of Congress of March 3, 1800, it was provided that, upon the recapture of any vessel other than a vessel of war or privateer, or of any goods belonging to persons resident within or under the protection of the United States, such vessel and goods, if recaptured by a private vessel of the United States, should be restored on payment of one-sixth of the value; and if the vessel so recaptured should appear to have been armed as a vessel of war, before such capture or afterwards, she should be restored on payment of one-half of her value. It was argued, in behalf of the recaptors, that, as the *Adeline* was an armed vessel, they were entitled to a half of the value of the cargo as well as of the vessel. The court held that the statute was clear, and that it gave in any case only one-sixth of the value of the cargo, whether a vessel was armed or unarmed.

The Adeline (1815), 9 Cranch, 244, 287.

Where a British vessel was captured by an American privateer, then recaptured by another British vessel, and then captured again by another American privateer, it was held that prize vested in the last captor; Marshall, C. J., for the court, saying: "An interest acquired by possession, is devested by the loss of possession from the very nature of a title acquired in war. The law of our own country, as to salvage, settles the question, and the case of the *Adventure* is directly in point and conclusive."

The Astrea (1816), 1 Wheat. 125.

The *Adventure* was a vessel (British) captured by two French frigates, and, after a part of the cargo was taken out, presented to certain citizens of the United States, then neutral, whose vessel the frigates

had before taken and burnt. It was held to be a case of salvage, one-half being allowed to the salvors, and the other half reserved for proper disposition after the close of the war between the United States and Great Britain.

The American privateer *Cadet*, having captured a British vessel, was standing in for the shore with her when another American privateer, the *Paul Jones*, flying American colors but having sails of English canvas, began a pursuit. The *Cadet*, supposing the pursuer to be British, parted company with the prize, and the *Paul Jones* then pursued the latter, firing at her. When near the shore the prize crew abandoned the vessel and the *Paul Jones* took possession of her, and, raising British colors, carried her away, though aware that she was a prize of the *Cadet*. Held, that the vessel should be restored to the first captor, with damages.

The Mary (1817), 2 Wheat. 123.

The general salvage act of March 3, 1800, expressly excepted from its operation recaptured property which had been condemned by competent authority. Section 5 of the prize act of June 26, 1812, provided for the restoration of recaptured property to the "original owners," on payment of salvage "agreeably to the provisions heretofore established by law." Held, that the latter provision did not repeal the former, but was merely affirmative of it, and that, where the captured property had been condemned, the "lawful owners" were not the original owners, but those who held title under the condemnation.

The Star (1818), 3 Wheat. 78.
See a long note by Wheaton to this case, on the subject of salvage, 3 Wheat. 93–101.

By the British statute of 13 George II., chapter 4, the jus postliminii was reserved to "British subjects" upon all recaptures of their vessels and goods by British ships, even though they had been previously condemned, except where such vessels had, after capture, set forth as ships of war. This rule was not altered by the statute of 43 George III., chapter 160, section 39, which established uniform rates of salvage. Neither of these statutes extended to neutral property.

The Star (1818), 3 Wheat. 78.

"It is admitted, on all sides, by public jurists, that in cases of capture a firm possession changes the title of the property; and although there has been in former times much vexed discussion as to the time at which this change of property takes place, whether on the capture or on the *pernoctation*, or on the carrying *infra præsidia*, of the prize; it is universally allowed, that at all events, a sentence of con-

demnation completely extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign."

Story, J., delivering the opinion of the court, The Star (1818), 3 Wheat. 78, 86.

As the conduct of the French prize courts during the period of spoliations rendered a recapture of an American vessel a rescue from actual danger, the recaptors were entitled to salvage.

Hooper *v.* United States, 22 Ct. Cl. 408.

The act of March 3, 1800, providing for salvage in cases of recapture, was substantially embodied in the act of June 30, 1864, and Revised Statutes, sec. 4652. In order to come within its terms the property in question must "have been taken by an enemy of the United States," and "retaken" by a public or private vessel of the United States. Where there had been no capture there could be no recapture.

Oakes *v.* United States (1899), 174 U. S. 778, 792–793.

9. Safe-conducts; Ransoms.

§ 1214.

Sometimes, instead of submitting to be sent in, the original owner of the property repurchases his right by a ransom, and the crew is released instead of becoming prisoners of war. The master gives a ransom bill, by which he contracts, for himself and the owner of the vessel and cargo, that a stipulated sum shall be paid to the captor. A copy of the ransom bill is retained by himself and serves as a safe-conduct, protecting the vessel from seizure by ships of the enemy country or its allies so long as a prescribed course is kept for a port of destination agreed on. Any divergence or delay, except from stress of weather, renders the vessel subject to a new capture, and any excess realized from her sale over the amount stipulated in the bill goes to the second captors. Usually the captor, besides holding the ransom bill, keeps an officer of the vessel as a hostage for the payment of the stipulated sum; and if, on his way to port with the bill and hostage, or either of them, on board, the captor is himself captured, the owner is exonerated from his debt. But, as the bill and hostage are the equivalent of the prize, this consequence does not follow if both have previously arrived in a place of safety.

Hall, Int. Law (5th ed.), 460–461; Twiss, War, II, § 181; Woolsey, § 150; Cornu *v.* Blackburne, 2 Douglas, 640.

The English courts do not permit the captor to sue on the ransom bill, because of his being an alien enemy, but require the action to be brought indirectly by the imprisoned hostage for the recovery of his freedom. (Anthon *v.* Fisher, 2 Douglas, 649, note.)

See, also, the cases of the Charming Nancy and the Patrixent, Marsden's Admiralty Cases, 398; the Hoop, 1 C. Rob. 200.

Wheaton takes the ground that a ransom contract is to be regarded as suspending the enemy character, so that the captor may sue directly on the bill; and this view generally prevails in the courts of the Continent. (Lawrence's Wheaton (1863), 695.) Ransom bills were often taken by the Confederate cruisers.

Below are copies of two marine passports issued by the United States to vessels in order to protect them from molestation:

"I, Timothy Pickering, Secretary for the Department of State, of the United States of America, hereby certify and make known, that the ship *Benjamin Franklin*, whereof Lloyd Jones, a citizen of the said States, is master, and Francis Breuil, also a citizen thereof, is owner, is employed as a flag of truce by the consul-general of the French Republic to the said United States, to transport a number of the citizens of his nation to France: Wherefore I request all armed vessels, sailing under the flag of the said States, and whomsoever else it may concern, to permit the said ship *Benjamin Franklin*, freely to pursue her intended voyage without giving or suffering to be given to her any let or molestation, but on the contrary to afford her every aid and protection of which she may stand in need. In faith whereof I have signed these presents and caused my official seal to be hereto affixed, at Philadelphia, the first day of June, A. D. 1798, and in the twenty-second year of the Independence of the said States.

[L. S.] "Timothy Pickering."

10 MS. Dom. Let. 422.

"Department of State,
"*December 21, 1814.*

"*To all to whom these presents shall come, greeting:*

"Whereas Andrew de Daschkoff, esq., envoy extraordinary and minister plenipotentiary of His Imperial Majesty the Emperor of the Russias, is desirous of obtaining a passport for the steamboat to come from New York or Philadelphia to Alexandria in the District of Columbia, loaded with wines, furniture, &c. for his use: and it has been determined on the part of the Government of the United States to afford him this accommodation: In pursuance, therefore of a provision in the second section of a law of Congress entitled 'An act to prohibit the use of licenses or passes granted by the authority of Great Britain and Ireland,' authority is hereby given to the steamboat ——, whereof —— is commander or master, to proceed on the voyage aforesaid notwithstanding the passport, or license which the said vessel may have from any British admiral or other officer: *Provided, however*, That the said vessel does not in other respects violate the laws of the United States.

"In faith whereof, I have caused the seal of the Department of State to be hereunto affixed. Done at Washington, this 21st day of December, anno Domini eighteen hundred and fourteen, and of the Independence of the United States the thirty-ninth.

"JAS. MONROE."

16 MS. Dom. Let. 181.

July 22, 1898, the United States consul at Martinique was instructed by telegraph to issue to the Spanish transatlantic steamer *Alicante* a safe conduct as follows: "By direction of the President of the United States I hereby issue this safe conduct to the Spanish steamer *Alicante*, while proceeding under contract with the Government of the United States to Santiago de Cuba and sailing therefrom to Spain with Spanish prisoners surrendered to the Army of the United States in Cuba. All persons under the jurisdiction of the United States are commanded to respect this guarantee."

Mr. Moore, Act. Sec. of State, to Sec. of War, July 25, 1898, 230 MS. Dom. Let. 374.

The United States consul at Vera Cruz was instructed to issue safe conduct in a similar form to the Spanish steamers *Montevideo* and *Villa Verde*, if they had on board only sufficient coal and provisions each to transport 1,600 prisoners from Santiago de Cuba to Cadiz. (Mr. Moore, Act. Sec. of State, to Sec. of War, Aug. 1, 1898, 230 MS. Dom. Let. 478.)

See, also, Mr. Moore, Act. Sec. of State, to Mr. Canada, consul at Vera Cruz, Aug. 1, 1898, 163 MS. Inst. Consuls, 147.

XII. *PRIVATEERS.*

1. WHAT ARE, AND WHAT ARE NOT.

§ 1215.

Definitions.

"A private armed vessel or privateer is a vessel owned and officered by private persons, but acting under a commission from the State, usually called letters of marque. It answers to a company on land raised and commanded by private persons, but acting under rules from the supreme authority, rather than to one raised and acting without license, which would resemble a privateer without commission. (It is equipped not so much to fight an enemy's war ships, to which it would be unequal, as to plunder his commerce; its value to the state commissioning it is thus mainly incidental.) The commission, on both elements, alone gives a right to the thing captured, and insures good treatment from the enemy. A private vessel levying war without such license, although not engaged in a piratical act, would fare hardly in the enemy's hands."

Wooley's Int. Law, § 127.

"By Swift a privateer is defined to be an armed vessel, belonging to one or more private individuals, licensed by Government to take prizes from an enemy.

"In Wilhelm's Military Dictionary (Phil. 1881), the name 'partisan' is stated to be given to 'small corps *detached from the main body of an army, and acting independently against the enemy. In partisan warfare much liberty is allowed to partisans.*' But if so in military, why not in naval warfare? The objection is to the plunder of private property on the high seas, against which the United States have always remonstrated, not to the particular agency employed.

"In McCulloch's Commercial Dictionary, London, 1882, privateers are defined to be 'ships of war fitted out by private individuals to annoy and plunder the enemy. *But before commencing their operations, it is indispensable that they obtain letters of marque and reprisal from the government whose subjects they are, authorizing them to commit hostilities, and that they conform strictly to the rules laid down for the regulation of their conduct.* All private individuals attacking others at sea, unless empowered by letters of marque, are to be considered pirates.'"

Wharton, Com. Am. Law, § 201, note; citing Butler-Johnstone, Handbook of Maritime Rights (London, 1876), 12.

"Though she [a merchant vessel] has arms to defend herself in time of war, in the course of her regular commerce, this no more makes her a privateer, than a husbandman following his plough, in time of war, with a knife or pistol in his pocket, is thereby made a soldier."

Mr. Jefferson, Sec. of State, to Mr. Morris, Aug. 16, 1793, 1 Wait's State Papers, 147; Am. State Papers, For. Rel. I. 167.

The term "letter of marque," though originally indicating the commission issued to a privateer, came in the course of time to be applied almost exclusively to a trading vessel that was authorized to make reprisals, whether in peace or in war. The term "privateer" was reserved for a vessel which, although privately fitted out, was employed solely as a cruiser. Hamilton, therefore, in his circular of August 4, 1793, said: "The term privateer is understood not to extend to vessels armed for merchandise and war, commonly called with us *letters of marque*, nor, of course, to vessels of war in the immediate service of the government of either of the powers at war."

Am. State Papers, For. Rel. I. 140.

"On the 1st March, 1803, the King of France lent the ship *Indien*, for the term of three years to the Prince of Luxembourg. The Prince then ceded his right to the State of South Carolina; and in order to

man the vessel, a legion was raised in France, called the Legion of Luxembourg.

"The State of South Carolina agreed to pay the Prince 100,000 francs cash, and, in case the vessel should be lost, 400,000 francs more; in addition to which the Prince was to receive one quarter of the value of the prizes. The legions were engaged upon the terms at which persons were then commonly enlisted to serve on board ships of war.

"The Prince, at the period of these engagements, owed the King 248,000 francs for sums advanced to him.

"The *Indien*, under the name of *South Carolina*, made many prizes while in the employment of the American State, but was finally taken by the enemy.

"Two orders of creditors then present themselves, claiming their shares of the prize money; to wit, the prince of Luxembourg and the members of the legion.

"After the peace, as the Prince was indebted to France, the royal treasury protested against the sum being paid to him. In consequence, an arrangement was effected, by which the Prince's debt was ultimately discharged by South Carolina in 1807. There now remain only the claimants of shares in the prizes in the name of the legion.

"The lapse of time, the character of the claimants, death and dispersion, have caused these claims to pass into an infinite number of hands. Syndics of doubtful creation, or whose powers are obsolete, lawyers in the same predicament, the smallness of the individual claims, and other circumstances, combine to lengthen out the proceedings, and increase the accumulation of papers, without advantage to any one except the agent, who has established himself for life, as he expects, at Charleston.

"All these difficulties can not but increase, on account of the deaths of the primitive claimants; and especially to the United States, will their heirs become troublesome.

"But one equitable mode of adjusting the affair presents itself. Let the State of South Carolina, which has no interest in the distribution, surrender to the French Government as the natural protector of the rights of its subjects, and, above all, as the guardian of the French seamen, all the shares of the prize money now deposited in its care; the French Government being charged with distributing it to those who make good their claims."

French minister of foreign affairs to Mr. Rives, minister of the United States, June 15, 1831, H. Ex. Doc. 147, 22 Cong. 2 sess. 191, 199.

"This is obviously a question between the legionnaires and the State of South Carolina, to which the Government of the Union is entirely a stranger."

Mr. Rives, min. to France, to Count Sebastiani, French minister of foreign affairs, June 19, 1831, H. Ex. Doc. 147, 22 Cong. 2 sess. 201, 207.

"In 1814, during the war between the United States and Great Britain, the legislature of New York passed an act to constitute every association of five or more persons, embarking in the trade of privateering, a body politic and corporate, with corporate powers, on their complying with certain formalities."

2 Halleck's Int. Law (Baker's ed.) 13.

The fact that the commander of a private armed vessel is an alien enemy does not invalidate a capture made by it.

The Mary and Susan, 1 Wheat. 46.

Writing to Lord Lyons, Mr. Seward said: "There are no private-armed or uncommissioned vessels. A portion of our public marine service are commissioned through the War Department as transports; a portion through the Treasury, as revenue. All are subjected to the regulations of the Navy as to foreign and maritime war."

Mr. Seward, Sec. of State, to Lord Lyons, British min., Jan. 4, 1864, MS. Notes to Great Britain, X. 453.

Auxiliary naval forces.

"The two points in the declaration [of Paris] upon which, as already remarked, considerable light has been thrown during the Franco-German war of 1870, are the interpretation that is to be given to the term 'la course,' which occurs in the first resolution, and likewise the interpretation to be given to the term 'contraband of war,' which occurs in the second and third resolutions. The phrase 'la course' dates from a period, when it was the practice of states, whenever there was occasion to have recourse to an armed expedition on the high seas against another state, to grant letters of marque to the commanders of private cruisers, authorising them to make reprisals against the vessels and cargoes of the subjects of the other state. By and by commissions of war come to be issued by sovereign princes to private ships fitted out either by their own subjects, or by the subjects of other powers, so that it was competent for a power which had no public ships of war of its own to harass the commerce of its enemy by issuing letters of marque and reprisals not merely to vessels of its own subjects, but to the vessels of the subjects of other powers, and when commissions of war came to be granted to both classes of such vessels in the sixteenth century, they had lawful authority to exercise belligerent rights against neutrals as well as against the enemy. It can well be imagined, as the crews of such ships were brought together by the prospect of plunder,

and were under no naval discipline, that, when a single corsair or privateer hove in sight on the high seas, it caused a greater terror to a neutral merchant ship than a fleet of public ships of war.

"In the present century, however, as the practice of states in intrusting their defence on land to regiments of foreign origin serving them for pay has generally been discarded, so the practice of granting commissions of war to the subjects of foreign states, serving for plunder, has fallen into disrepute, to say nothing of the license of maritime warfare so conducted being intolerable to the civilisation of the present age. That a main object, which the two allied powers in the war of 1854 against Russia had in view, was to put an end to the practice of belligerents issuing letters of marque and reprisals to the subjects of neutral states, is confirmed by the memoir of M. Drouyn de Lhuys, already mentioned.

"'What influenced especially the English Government was the fear of America inclining against us, and lending to our enemies the co-operation of her hardy volunteers. The maritime population of the United States, their enterprising marine, might furnish to Russia the elements of a fleet of privateers, which, attached to its service by letters of marque and covering the seas with a net work would harass and pursue our commerce even in the most remote waters. To prevent such a danger the cabinet of London held it of importance to conciliate the favourable disposition of the Federal Government. It had conceived the idea of proposing to it at the same time as to the French Government and to all the maritime states, the conclusion of an arrangement, having for its object the suppression of privateering, and permitting to be treated as a pirate everyone, who in time of war should be found furnished with letters of marque. This project, which was in the end abandoned, is evidence of the disquiet felt by England. We thought, as they did, respecting privateering, a barbarous practice which marked too often, under an appearance of patriotic devotion, violence excited by the allurement of lucre. At former epochs, justified by the fury of war, it was able in the midst of numerous iniquities, to give rise to some heroic action, to transmit even to history some glorious names. But we considered it to be incompatible henceforth with the usages of civilized nations, which can not allow private persons to be armed with the rights of war, and which reserve their terrible application to the public power of established states.'

"Such was the object in view of the allied powers in the war against Russia, according to the highest authority. We find also a statement from the same authority, namely, the French minister for foreign affairs, in his report to the Emperor of the French, of 29th March, 1854, that the motive of the allied powers was to miti-

gate the disastrous effects of war upon the commerce of neutral nations and to relieve it from all unnecessary shackles, and accordingly the Emperor of the French published a declaration at the conclusion of which he announced that he had no intention to deliver 'lettres de marque pour autoriser les armements en course.' On the other hand the British Government issued a corresponding declaration on 28th March, 1854, announcing that is was not the intention of the Queen of the United Kingdom to issue letters of marque for the commissioning of privateers.

"No occasion for the interpretation of the first article of the declaration of Paris of 1856 arose in its application to a war, in which both the belligerent parties were signatories of that declaration, before the Franco-German war of 1870, when the Prussian Government issued a decree (24th July, 1870), relating to the constitution of a volunteer naval force. Under that decree the King of Prussia invited all German seamen and shipowners to place themselves and their forces and ships suitable thereto at the service of the fatherland. The officers and crews were to be enrolled by the owners of the ships and were to enter into the Federal navy for the continuance of the war, and to wear its uniform and badge of rank, to acknowledge its competence and to take an oath to the articles of war. The ships were to sail under the Federal flag and to be armed and fitted out for the service allotted to them by the Federal royal navy. The ships destroyed in the service of their country were to be paid for to their owners at a price taxed by a naval commission, and a sum was to be paid by the state as a deposit, when the ships were placed at the service of the state, which, at the end of the war, when the ships were restored to their owners, was to be reckoned as hire. The French Government, regarding the institution by Prussia of a volunteer naval force as the revival of privateering under a disguised form, lost no time in calling the attention of the British Government to the Royal Prussian decree, as instituting an auxiliary marine contrary to Prussia's engagements under the declaration of 1856. Earl Granville, on behalf of the British Government, referred the matter to the law officers of the Crown, and in accordance with their opinion returned for answer, 'that there was a substantial difference between the proposed naval volunteer force sanctioned by the Prussian Government and the system of privateering which, under the designation of "la course," the declaration of Paris was intended to suppress, inasmuch as the vessels referred to in the Royal Prussian decree would be for all intent and purposes in the service of the Prussian Government, and the crews would be under the same discipline as the crews on board vessels belonging permanently to the Federal navy.' Upon these considerations the British Government could not object to the decree of the German Government as

infringing the declaration of Paris. (Brit. and For. St. Pap., LXI. p. 692.. Perels, Manuel de Droit Maritime International, p. 195. Paris, 1884.)

"There is not an unanimity of opinion amongst text writers on international law on the subject of this Prussian auxiliary marine, as to whether its institution was in conflict with the declaration of Paris or not. M. Charles Calvo, ancien ministre, considers that vessels equipped in accordance with the Prussian decree may be regarded as privateers of an aggravated character, seeing that the owners are not required to give security for their good conduct (Le Droit International. Troisième edition. Tome Troisième, p. 303. Paris, 1880); and Mr. W. E. Hall, in his recent work on International Law, p. 455 (International Law. Oxford, at Clarendon Press. 1880.) observes 'that unless a volunteer navy could be brought into closer connection with the state than seems to have been the case in the Prussian project, it would be difficult to show that its establishment did not constitute an evasion of the declaration of Paris.' But neither of these eminent publicists seem to have given sufficient weight to the provisions of the Prussian decree, under which the officers and crew were required to enter into the Federal navy for the continuance of the war, were to wear its uniform and to take an oath to the articles of war. Further, the vessels were to be fitted out by the state, and were to sail under the public flag of the state.

"On the other hand, Professor Geffcken, in his recent edition of Heffter's Droit International de l'Europe (Paris, 1883), p. 278, and Dr. Charles D. Boeck in his masterly treatise on enemy's property under an enemy's flag, have recognised a broad distinction between such an auxiliary force, which under the Royal decree was intended to be employed solely against the enemy, and priv teers, which may be of no matter what nationality, and whose main object it has always been to prey upon neutral commerce, keeping up the worst traditions of private warfare under cover of letters of marque. It should be observed that the Prussian Government never gave practical effect to the Royal decree on this subject, and that no vessel of the 'seewehr,' as instituted in 1870, ever put to sea. (Staats Archiv., 4345, 4346.)"

Twiss, Belligerent Rights, etc., London, 1884.

See, also, W. B. Lawrence in 127 N. Am. Review for July, 1878, 32, citing 22 Solicitor's Journal, 523; 9 Rev. de Droit Int. 552.

April 22, 1898, the Department of State, in a telegraphic instruction to the diplomatic representatives of the United States, declared among other things that, in the event of hostilities with Spain, the "policy" of the United States "will be not to resort to privateering." This announcement was reaffirmed in a proclamation issued by the

President on the 26th of April. The Spanish Government, by a royal decree of April 23, 1898, embodying the rules which it proposed to observe during the war, reserved the right to issue letters of marque. Of this reservation Spain afterwards took no advantage. The decree also declared that the Government would, for the purposes of cruising, organize a service of "auxiliary cruisers of the navy," composed of "ships of the Spanish mercantile navy" and "subject to the statutes and jurisdiction of the navy."

The United States organized an auxiliary force, under the command of officers of the Navy. The conditions under which this service was established are set forth in the case of *The Rita*, relating to the distribution of prize money among the officers and crew of the auxiliary cruiser *Yale*, formerly the steamer *City of Paris* of the International Navigation Company, commonly called the American Line.

The *City of Paris* was one of a class of steamers which were, under the provisions of the mail-subsidy act of March 3, 1891, subject to be taken by the United States as cruisers or transports upon the payment of their actual value. By a charter party and supplementary agreement entered into April 30, 1898, between the company and the Secretary of the Navy, possession of the ship was transferred to the Government, by which she was heavily armed and converted into an auxiliary cruiser. The charter party provided that the ship should be "manned, victualled, and supplied at the expense of the charterer." The charterer was also to pay all other expenses and at the termination of the charter, which was to be at the charterer's will, was to return the ship in good repair, less ordinary wear and tear. The supplementary agreement provided that the ship was "to be manned by her regular officers and crew, and in addition thereto was to take on board two naval officers, a marine officer, and a guard of thirty marines, and was to be victualled and supplied with two months' provisions, and about four thousand tons of coal; the actual cost to the owner of such additional equipment and services to be reimbursed by the charterer upon bills to be certified by the senior naval officer on board." There were also stipulations protecting the owner against all expenses and liability, and a provision that during the continuation of the supplementary agreement the steamship was to be "under the entire control of the senior naval officer on board." Under these agreements the Government of the United States placed on board the ship a captain and a lieutenant of the Navy and a marine guard of 25 enlisted men. There were also on board 269 other persons, not commissioned by or regularly enlisted in the service of the United States, but comprising the ship's company, both officers and men, who were doing duty on board and were borne on the books of the ship. On a question that arose as to the distribution of prize

money it was held that the *Yale* was neither a "vessel of the Navy" nor a privateer, but came within the statutory class of vessels "not of the Navy, but controlled by either executive department," and was, as an "armed vessel in the service of the United States," "entitled," in the words of the statute, "to an award of prize money in the same manner as if such vessel belonged to the Navy."

The Rita, 89 Fed. Rep. 763.

By the act of March 3, 1899, for the reorganization of the United States Navy and Marine Corps, all provisions of law authorizing the distribution among captors of prize money or providing for the payment of bounty are repealed. (30 U. S. Stat. 1004, 1007.)

See, as to the "volunteer navy" organized by Prussia during the Franco-German war, Hall, Int. Law (4th ed.), 547–550; and supra, p. 538.

2. Bonding and Responsibility.

§ 1216.

By the act of July 9, 1798, privateers were required to give security in $14,000, if the vessel carried more than one hundred and fifty men, and in half that sum if she carries less.

1 Stat. 578.

As to the administration of this provision, see Mr. Pickering, Sec. of State, to American ministers, Dec. 3, 1798, MS. Inst. U. States Ministers, V. 1; Mr. Pickering, Sec. of State, to Mr. Simons, collector at Charleston, S. C., March 30, 1799, 11 MS. Dom. Let. 275

"By the laws of most of the nations of Europe, the owners of privateers are required to give bond and security, in amount from $8,000 to $12,000, to comply with the regulations concerning their cruising, and to prevent them from committing illegal acts."

1 De Bow's Rev. 517, as quoted in Wharton's Int. Law Digest, III. 476.

The owners of a privateer are responsible for the conduct of their agents, the officers and crew, to all the world, to the full value of the property injured or destroyed.

Del Col *v.* Arnold (1796), 3 Dallas, 333.

A privateer's commission fraudulently obtained is, as to vesting the interests of prize, utterly void. But a commission may be lawfully obtained, although the parties intended to use it as a cover for illegal purposes. If a commission is fairly obtained, without imposition or fraud upon the officers of government, it is not void merely because the parties privately intend to violate, under its protection, the laws of their country. A collusive capture conveys no title to the captors, not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property.

The Experiment, 8 Wheat. 261.

As to the right to impugn the capture, where the capturing vessel is equipped in violation of the neutrality laws, see The Fanny, 9 Wheat. 658.

When there is an invasion of neutral rights by privateers commissioned by the United States, their commissions will be withdrawn.

Mr. Monroe, Sec. of State, to Mr. Rademaker, May 1, 1814, MS. Notes to For. Legs. II. 8.

In March, 1828, a sum of money was paid by the Russian Government to the United States as indemnity to the Weymouth (Mass.) Importing Company on account of the ship *Commerce*, which was captured at sea in 1807 by a Russian privateer, in the Mediterranean, and carried into Corfu and there condemned by a Russian prize court.

Mr. Brent, chief clerk, to Messrs. Loud et al., July 3, 1829, 23 MS. Dom. Let. 7

3. Instructions, 1812.

§ 1217.

"1. The tenor of your commission under the act of Congress, entitled, 'An act concerning letters of marque, prizes and prize goods,' a copy of which is hereto annexed, will be kept constantly in your view. The high seas, referred to in your commission, you will understand generally, to refer to a low-water mark; but with the exception of the space within one league, or three miles, from the shore of countries at peace both with Great Britain and the United States. You may nevertheless execute your commission within that distance of the shore of a nation at war with Great Britain, and even on the waters within the jurisdiction of such nation, if permitted so to do.

"2. You are to pay the strictest regard to the rights of neutral powers, and the usages of civilized nations; and in all your proceedings towards neutral vessels, you are to give them as little molestation or interruption as will consist with the right of ascertaining their neutral character, and of detaining and bringing them in for regular adjudication, in the proper cases. You are particularly to avoid even the appearance of using force or seduction, with a view to deprive such vessesls of their crews or of their passengers, other than persons in the military service of the enemy.

"3. Towards enemy vessels and their crews, you are to proceed, in exercising the rights of war, with all the justice and humanity which characterize the nation of which you are members.

"4. The master and one or more of the principal persons belonging to the captured vessels, are to be sent, as soon after the capture as

may be, to the judge or judges of the proper court in the United States, to be examined upon oath, touching the interest or property of the captured vessel and her lading; and at the same time, are to be delivered to the judge or judges all passes, charter-parties, bills of lading, invoices, letters and other documents, and writings found on board; the said papers to be proved by the affidavit of the commander of the capturing vessel, or some other person present at the capture, to be produced as they were received, without fraud, addition, subduction or embezzlement."

General Instructions of President Madison to Private Armed Vessels, 1812, 2 Wheat., App. 80–81.

By section 8 of the prize act of 1812 the President was authorized "to establish and order suitable instructions for the better governing and directing the conduct" of privateers commissioned thereunder. The President, by instructions of August 28, 1812, directed privateers not to interrupt vessels "belonging to citizens of the United States, coming from British ports to the United States laden with British merchandise, in consequence of the alleged repeal of the British orders in council." Held, that these instructions came within the President's powers under the prize act. No opinion was expressed as to whether the President might have issued such instructions under his general powers as Commander in Chief of the Army.

The Thomas Gibbons (1814), 8 Cranch, 421.

Held, that the instructions of the President of August 28, 1812, forbidding the interruption of vessels coming from Great Britain in consequence of the repeal of the British orders in council, must have been known to the commanders of men-of-war or privateers, at or before the seizure, in order to invalidate captures made contrary to the letter and spirit of the instructions. The court, Johnson, J., based this decision on the ground that the instructions, unlike statutes, which have, immediately on their enactment, "a legal ubiquity," were applicable, as the word "instruction" itself denoted, only to individuals. The same operation as that of a statute might indeed be given by law to the President's instructions; but, in reality, the clause which vested the power in the President held out the idea of the necessity of notice. By capture the individual acquired an inchoate statutory right which could be defeated only by the act of the supreme legislative power of the Union, such as the suspension of the prize act by a treaty, between the time of capture and of judicial decision. But there was nothing in the objects of the law authorizing the President to issue his instructions, or in the instructions themselves, to support the idea that that which was lawfully

prize of war at the time of capture should cease to be so upon subsequent notice of the instructions.

The Mary and Susan (1816), 1 Wheat. 46, 57.

4. Asylum.

§ 1218.

Under the construction adopted by General Washington's administration of the nineteenth article of the French-American treaty "*privateers*, only, of the enemies of France, were absolutely excluded from our ports, except as before, when compelled to enter through stress of weather, pursuant to the twenty-second article of the treaty; while the *national* ships of war of *any other nation*, were entitled to an asylum in our ports, excepting those which should have made prize of the people or property of France *coming in with their prizes*."

Mr. Pickering, Sec. of State, to Mr. Pinckney, Jan. 16, 1797, 1 Am. State Papers, For. Rel. 559, 565.

It is not uncommon for neutral nations, while granting asylum in their ports to belligerent men-of-war, wholly to exclude privateers.

Cushing, At. Gen., 1855, 7 Op. 122.

The neutrality proclamation issued by the Netherlands during the civil war in the United States excluded privateers, with or without prizes, from Dutch ports, save in case of distress.

Baron van Zuylen, Dutch min. of for. aff., to Mr. Pike, American min., Sept. 17, 1861, Dip. Cor. 1861, 352; same to same, Oct. 29, 1861, id. 369.

The note of Baron van Zuylen of Sept. 17, 1861, controverts the statement of Mr. Seward that the Confederate cruiser *Sumter* was a "privateer," and points out that she was a ship-of-war commissioned by the government of the Confederate States.

5. Legality and Policy.

§ 1219.

"The right to employ this kind of extraordinary naval force is unquestioned, nor is it at all against the usage of nations in times past to grant commissions even to privateers owned by aliens. The advantages of employing privateers are (1) that seamen thrown out of work by war can thus gain a livelihood and be of use to their country. (2) A nation which maintains no great navy is thus enabled to call into activity a temporary force, on brief notice, and at small cost,

Thus an inferior state, with a large commercial marine, can approach on the sea nearer to an equality with a larger rival, having a powerful fleet at its disposal. And as aggressions are likely to come from large powers, privateering may be a means, and perhaps the only effectual means, of obtaining justice to which a small commercial state can resort.

"On the other hand, the system of privateering is attended with very great evils. (1) The motive is plunder. It is nearly impossible that the feeling of honor and regard for professional reputation should act upon the privateersman's mind. And when his occupation on the sea is ended, he returns with something of the spirit of a robber to infest society. Add to this that it is by no means certain that the motive of plunder or booty can be long endured in the international law of Christian nations. (2) The control over such crews is slight, while they need great control. They are made up of bold, lawless men, and are where no superior authority can watch or direct them. The responsibility at the best can only be remote. The officers will not be apt to be men of the same training with the commanders of public ships, and can not govern their crews as easily as the masters of commercial vessels can govern theirs. (3) The evils are heightened when privateers are employed in the execution of belligerent rights against neutrals, where a high degree of character and forbearance in the commanding officer is of especial importance.

"Hence many have felt it to be desirable that privateering should be placed under the ban of international law, and the feeling is on the increase, in our age of humanity, that the system ought to come to an end."

Woolsey, Int. Law, §§ 127, 128.

As to privateers in the American Revolution, see 2 John Adams's Works, 504; 3 id. 37, 207; 7 id. 21, 23, 159, 176, 189, 273, 299, 312, 356; 10 id. 27, 31.

As to policy and lawfulness, see 9 John Adams's Works, 607; 13 Hunt's Merchants' Magazine, 450, 456; 8 Edinburgh Review, 13; 2 N. Am. Review (N. S.) 166.

For Mr. Sumner's views against privateering, see 7 Sumner's Works, 278.

In acknowledging the receipt of a note of the French minister of Oct. 9, 1792, "proposing a stipulation for the abolition of the practice of privateering in times of war," Jefferson said: "The benevolence of this proposition is worthy of the nation from which it comes, and our sentiments on it have been declared in the treaty to which you are pleased to refer, as well as in some others which have been proposed." Writing, however, to Monroe, before the signing of the treaty of Ghent was known, he said: "Privateers will find their own men

and money. Let nothing be spared to encourage them. They are the dagger which strikes at the heart of the enemy, their commerce."

Mr. Jefferson, Sec. of State, to M. Ternant, French min., Oct. 16, 1792, 4 MS. Am. Let. 417; Mr. Jefferson to Mr. Monroe, Jan. 1, 1815, 6 Jefferson's Works, 409.

For Mr. Jefferson's message of Jan. 31, 1805, see 2 Am. State Papers, For. Rel. 606.

Gallatin, in a speech Feb. 10, 1797, advocated privateering as "our only mode of warfare against European nations at sea." (Annals of Congress, 4 Cong. 2 sess. 2128–2130; Adams's Gallatin, 170.)

Mr. Jefferson, in a paper dated July 4, 1812, vindicating privateering, says: "What is war? It is simply a contest between nations, of trying which can do the other the most harm. Who carries on the war? Armies are formed and navies manned by individuals. How is a battle gained? By the death of individuals. What produces peace? The distress of individuals. What difference to the sufferer is it that his property is taken by a national or private-armed vessel? Did our merchants, who have lost nine hundred and seventeen vessels by British captures, feel any gratification that the most of them were taken by His Majesty's men-of-war? Were the spoils less rigidly exacted by a seventy-four-gun ship than by a privateer of four guns; and were not all equally condemned? War, whether on land or sea, is constituted of acts of violence on the persons and property of individuals; and excess of violence is the grand cause that brings about a peace. One man fights for wages paid him by the government, or a patriotic zeal for the defense of his country; another, duly authorized, and giving the proper pledges for his good conduct, undertakes to pay himself at the expense of the foe, and serves his country as effectually as the former, and government drawing all its supplies from the people, is, in reality, as much affected by the losses of the one as the other, the efficacy of its measures depending upon the energies and resources of the whole. In the United States, every possible encouragement should be given to privateering in time of war with a commercial nation. We have tens of thousands of seamen that without it would be destitute of the means of support, and useless to their country. Our national ships are too few in number to give employment to a twentieth part of them, or retaliate the acts of the enemy. But by licensing private armed vessels, the whole naval force of the nation is truly brought to bear on the foe, and while the contest lasts, that it may have the speedier termination, let every individual contribute his mite, in the best way he can, to distress and harass the enemy and compel him to peace."

Coggeshall's Hist. Am. Privateers, introduction, xliii.

"We have been worsted in most of our naval encounters, and baffled in most of our enterprises by land. With a naval force on their coast

> exceeding that of the enemy in the proportion of ten to one, we have lost two out of three of all the sea fights in which we have been engaged, and at least three times as many men as our opponents; while their privateers swarm unchecked round all our settlements, and even on the coasts of Europe, and have already made prize of more than seventeen hundred of our merchant vessels." (24 Edinburgh Review, 249, Nov. 1814.)

"He [Captain Perry] will observe that by the practice of European nations generally, and by the approved principles of the most eminent writers, it is held that no privateer can legally hold commissions from two states, or sail under two different flags at the same time. That it has been found essentially necessary from the experience of all maritime nations to place all privateers navigating by their authority under rigorous instructions, to prevent them from degenerating into pirates. That it is generally required that the masters and at least two-thirds of the crews belonging to them should be subjects or citizens of the country issuing the commission. That bonds of a large amount and unquestionable security are required from those to whom the commissions are delivered, as pledges of the good conduct of the masters and crews, and to guard the property of neutral and pacific navigators from their depredations. That rules and regulations for the government of privateers, and tribunals for the trials of captures made by them conformably to the laws of nations, are held to be indispensable, and are the only safeguard by which foreign nations can trace the line of discrimination between freebooters and lawful belligerents. That from the omission of these precautions, or the neglect of these principles, many of the privateers commissioned by the South American governments have become common nuisances to the peaceful commerce of all nations. That we have seen proclamations from Pueyrredon, at Buenos Ayres, and from General Arismendi, at Margarita, themselves declaring some of such vessels pirates. That of others the crews have revolted and murdered or turned on shore their captains; attacked, plundered and ravaged defenseless islands; robbed indiscriminately every vessel that came within their power; seduced the crews of some to join them in their depredations; suborned others to make false declarations of property, to alter and disguise the marks upon bales or cases of merchandise; transshipped whole cargoes, and stranded captured vessels, to escape the detection of their guilt, or evade the redeeming process of the law. That the ministers of the nations in amity with the United States have made frequent and urgent representations and reclamations to them; that the merchants of almost all the sea ports of the Union have implored the protection of the Government to their property thus exposed upon the ocean, and that it was impossible to look upon this state of things without making an effort for effectual interposition."

Mr. Adams, Sec. of State, to Mr. Thompson, Sec. of Navy, May 20, 1819, 17 MS. Dom. Let. 304.

See 6 J. Q. Adams's Memoirs, 168. See, also, as to the exemption of private property at sea from capture, supra, § 1198.

July 14, 1824, Mr. Adams, as Secretary of State, instructed Mr. Anderson, at Bogota, to remonstrate against the provisional privateering ordinance of Colombia. (MS. Inst. U. States Ministers, X. 189.)

"In answer [to Lord Clarendon] I admitted that the practice of privateering was subject to great abuses; but it did not seem to me possible, under existing circumstances, for the United States to agree to its suppression, unless the naval powers would go one step further, and consent that war against private property should be abolished altogether upon the ocean, as it had already been upon the land. There was nothing really different in principle or morality between the act of a regular cruiser and that of a privateer in robbing a merchant vessel upon the ocean, and confiscating the property of private individuals on board for the benefit of the captor. But how would the suppression of privateering, without going further, operate upon the United States? Suppose, for example, we should again unfortunately be engaged in a war with Great Britain, which I earnestly hoped might never be the case; to what a situation must we be reduced if we should consent to abolish privateering. The navy of Great Britain was vastly superior to that of the United States in the number of vessels-of-war. . . . The only means which we would possess to counterbalance in some degree their far greater numerical strength, would be to convert our merchant vessels, cast out of employment by the war, into privateers, and endeavor, by their assistance, to inflict as much injury on British as they would be able to inflict on American commerce."

Mr. Buchanan, minister at London, to Mr. Marcy, Mar. 24, 1854, H. Ex. Doc. 103, 33 Cong. 1 sess. 10–11.

In April, 1854, the British and French ministers at Washington stated that their Governments had determined in the war with Russia not to authorize privateering by letters of marque, and asked that no Russian privateers be fitted out, or victualled, or admitted with their prizes into United States ports, and that American citizens be restrained from aiding in the equipment of such vessels. The Secretary of State replied "that the laws of the United States imposed severe restrictions, not only upon its own citizens, but upon all persons who might be residents in this country, against equipping privateers, receiving commissions, or enlisting men therein, for the purpose of taking a part in any foreign war; that it was not apprehended that there would be any attempt to violate these laws; but should the just expectations of the President be disappointed, he would not fail in

his duty to use the power with which he was invested to enforce obedience to them."

Memorandum accompanying Mr. Seward, Sec. of State, to Dayton, min. to France, No. 421, Oct. 24, 1863, Dip. Cor. 1863, II. 728–729.

The United States in 1854, on the outbreak of the Crimean war, opened negotiations with maritime nations for the general adoption of the rule that free ships make free goods, and to that end submitted a project of a treaty. The King of Prussia, while approving the project, proposed an "article providing for the renunciation of privateering. Such an article, for most obvious reasons, is much desired by nations having naval establishments large in proportion to their foreign commerce. If it were adopted as an international rule, the commerce of a nation having comparatively a small naval force would be very much at the mercy of its enemy in case of war with a power of decided naval superiority. The bare statement of the condition in which the United States would be placed, after having surrendered the right to resort to privateers, in the event of war with a belligerent of naval supremacy will show that this Government could never listen to such a proposition. The navy of the first maritime power in Europe is at least ten times as large as that of the United States. The foreign commerce of the two countries is nearly equal, and about equally exposed to hostile depredations. In war between that power and the United States, without resort on our part to our mercantile marine, the means of our enemy to inflict injury upon our commerce would be tenfold greater than ours to retaliate. We could not extricate our country from this unequal condition, with such an enemy, unless we at once departed from our present peaceful policy and became a great naval power. Nor would this country be better situated in war with one of the secondary naval powers. Though the naval disparity would be less, the greater extent and more exposed condition of our widespread commerce would give any of them a like advantage over us.

"The proposition to enter into engagements to forego a resort to privateers in case this country should be forced into war with a great naval power is not entitled to more favorable consideration than would be a proposition to agree not to accept the services of volunteers for operations on land. When the honor or the rights of our country require it to assume a hostile attitude, it confidently relies upon the patriotism of its citizens, not ordinarily devoted to the military profession, to augment the Army and the Navy so as to make them fully adequate to the emergency which calls them into action. The proposal to surrender the right to employ privateers is professedly founded upon the principle that private property of unoffending

noncombatants, though enemies, should be exempt from the ravages of war; but the proposed surrender goes but little way in carrying out that principle, which equally requires that such private property should not be seized or molested by national ships of war. Should the leading powers of Europe concur in proposing, as a rule of international law, to exempt private property upon the ocean from seizure by public armed cruisers, as well as by privateers, the United States will readily meet them upon that broad ground."

President Pierce, annual message, Dec. 4, 1854, Richardson's Messages, V. 276.

See, to the same effect, Mr. Marcy, Sec. of State, to Baron Gerolt, Prussian min., Dec. 9, 1854, MS. Notes to Prussian Leg. VII. 28, inclosing a copy of the message.

"This Government is not prepared to listen to any proposition for a total suppression of privateering. It would not enter into any convention whereby it would preclude itself from resorting to the merchant marine of the country in case it should become a belligerent party." (Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, Apr. 13, 1854, H. Ex. Doc. 103, 33 Cong. 1 sess. 12–13.)

"The policy of the law which allows a resort to privateers has been questioned for reasons which do not command the assent of this Government. Without entering into a full discussion on this point, the undersigned will confront the ordinary and chief objection to that policy, by an authority which will be regarded with profound respect, particularly in France. In a commentary on the French ordonnance of 1681, Valin says:

"'However lawful and time-honored this mode of warfare may be, it is, nevertheless, disapproved of by some pretended philosophers. According to their notions, such is not the way in which the state and the sovereign are to be served, whilst the profits which individuals may derive from the pursuit are illicit, or at least disgraceful. But this is the language of bad citizens, who, under the stately mask of a spurious wisdom, and of a crafty, sensitive conscience, seek to mislead the judgment by a concealment of the secret motive which gives birth to their indifference for the welfare and advantage of the state. Such are as worthy of blame as are those entitled to praise who generously expose their property and their lives to the dangers of privateering.'

"In a work of much repute published in France almost simultaneously with the proceedings of the congress at Paris, it is declared that—'the issuing of letters of marque, therefore, is a constantly customary belligerent act. Privateers are *bonâ fide* war-vessels, manned by volunteers, to whom, by way of reward, the sovereign resigns such prizes as they make, in the same manner as he sometimes assigns to the land forces a portion of the war contributions levied

on the conquered enemy.'—(Pistoye et Duverdy, 'Des Prises Maritimes.')

"No nation which has a due sense of self-respect will allow any other, belligerent or neutral, to determine the character of the force which it may deem proper to use in prosecuting hostilities; nor will it act wisely if it voluntarily surrenders the right to resort to any means, sanctioned by international law, which under any circumstances, may be advantageously used for defence or aggression.

"The United States consider powerful navies and large standing armies, as permanent establishments, to be detrimental to national prosperity and dangerous to civil liberty. The expense of keeping them up is burdensome to the people; they are, in the opinion of this Government, in some degree a menace to peace among nations. A large force, ever ready to be devoted to the purposes of war, is a temptation to rush into it. The policy of the United States has ever been, and never more than now, adverse to such establishments, and they can never be brought to acquiesce in any change in international law which may render it necessary for them to maintain a powerful navy or large regular army in time of peace. If forced to vindicate their rights by arms, they are content, in the present aspect of international relations, to rely, in military operations on land, mainly upon volunteer troops, and for the protection of their commerce in no inconsiderable degree upon their mercantile marine. If the country were deprived of these resources, it would be obliged to change its policy, and assume a military attitude before the world. In resisting an attempt to change the existing maritime law that may produce such a result, it looks beyond its own interest and embraces in its view the interest of all such nations as are not likely to be dominant naval powers. Their situation in this respect is similar to that of the United States, and to them the protection of commerce, and the maintenance of international relations of peace, appeal as strongly as to this country, to withstand the proposed change in the settled law of nations. . . . It is, in the opinion of this Government, to be seriously apprehended that if the use of privateers be abandoned, the dominion over the seas will be surrendered to those powers which adopt the policy and have the means of keeping up large navies. The one which has a decided naval superiority would be potentially the mistress of the ocean, and by the abolition of privateering that domination would be more firmly secured. Such a power engaged in war with a nation inferior in naval strength would have nothing to do for the security and protection of its commerce but to look after the ships of the regular navy of its enemy. These might be held in check by one-half, or less, of its naval force, and the other might sweep the commerce of its enemy from the ocean. Nor would the injurious effect of a vast naval superiority to weaker states be

much diminished if that superiority was shared among three or four great powers. It is unquestionably the interest of such weaker states to discountenance and resist a measure which fosters the growth of regular naval establishments."

Mr. Marcy, Sec. of State, to Count Sartiges, French min., July 28, 1856, 55 Br. & For. State Papers, 589, 591, replying to the invitation to adhere to the Declaration of Paris.

In the same note Mr. Marcy says: "The right to resort to privateers is as clear as the right to use public armed ships, and as incontestable as any other right appertaining to belligerents." Id. 590.

"The right of a commercial state, when unhappily involved in war, to employ its mercantile marine for defense and aggression, has heretofore proved to be an essential aid in checking the domination of a belligerent possessed of a powerful navy. By the surrender of that uncontested right one legitimate mode of defense is parted with for a like surrender only in form by a strong naval power, but in effect the mutual surrender places the weaker nation more completely at the mercy of the stronger." (Mr. Marcy, Sec. of State, to Mr. Gadsden, min. to Mexico, No. 66, July 14, 1856, MS. Inst. Mexico, XVII. 73; and, to the same effect, Mr. Marcy, Sec. of State, to Mr. Seibels, No. 19, July 14, 1856, MS. Inst. Belgium, I. 94.)

"Though the President does not seriously apprehend that the rights of the United States in regard to the employment of privateers will be affected directly or indirectly by the new state of things which may arise out of the proceedings of the congress at Paris, yet it would be gratifying to him to be assured by the Government of Sardinia that no new complications in our relations with it are likely to spring from those proceedings. He trusts that, so long as Sardinia is, and he anxiously desires she should ever be, a friendly power, her ports will be, as they heretofore have been, a refuge from the dangers of the sea and from attack as well for our privateers as for our merchant vessels and national ships of war in the event of hostilities between any other European power and this country."

Mr. Marcy, Sec. of State, to Mr. Daniel, min. to Sardinia, No. 18, July 29, 1856. MS. Inst. Italy, I. 93.

"You will see by the enclosed slip just cut from the *Globe* newspaper that Mr. Cobden anticipates for your conditional surrender of privateering, an almost unanimous decision in the House of Commons in its favor. This is a sincere, and I believe a sound opinion, viewing the question as *an English one*. They will gain everything, first, for the security of their commerce, and, second, in the concentrative efficacy of their prodigious naval armament. War will not endanger their merchant ships or their manufactures, and thus, relieved from all care about these vital interests, they may send their fleets to bully and thunder where they please. Opposite results may be drawn from

an American view. Losing the right of privateering, in other words, of assailing the vital interests of our adversary, our means of aggression are nil. Our Navy must be docked; and we must be content with whatever terms the adversary in this national duel may prescribe for a peace, if indeed a peace would ever be desirable or attainable. You see, I have my misgivings on your great measure of change in the rights of nations at war. If our Navy approached anywhere near to the power of the one displayed off Portsmouth last spring, I should be quite willing to let it take its chance in defending our coast: but as it now is, and as I am afraid, by an unwise economy, it may be long kept, it is impossible to say how many points of landing along our coast, a war would rapidly become one of invasion."

Mr. Dallas to Mr. Marcy, Sec. of State, Dec. 12, 1856, 1 Letters from London (1869), 117, 119.

On the subject of Maritime Law, see Mr. Marcy, Sec. of State, to Mr. Dallas, No. 48, Jan. 31, 1857, MS. Inst. Great Britain, XVII. 58.

"In relation to the communication of R. B. Forbes, esq., a copy of which was sent by you to this Department on the 16th ultimo, inquiring whether letters of marque cannot be furnished for the propeller *Pembroke*, which is about to be despatched to China, I have the honor to state that it appears to me there are objections to, and no authority for, granting letters of marque in the present contest. I am not aware that Congress, which has the exclusive power of granting letters of marque and reprisal, has authorized such letters to be issued against the insurgents, and were there such authorization I am not prepared to advise its exercise, because it would, in my view, be a recognition of the assumption of the insurgents that they are a distinct and independent nationality.

"Under the act of August 5, 1861, 'supplementary to an act entitled an act to protect the commerce of the United States, and to punish the crime of piracy,' the President is authorized to instruct the commanders of 'armed vessels sailing under the authority of any letters of marque and reprisal granted by the Congress of the United States, or the commanders of any other suitable vessels, to subdue, seize, take, and, if on the high seas, to send into any port of the United States any vessel or boat built, purchased, fitted out, or held,' etc.

"This allusion to letters of marque does not authorize such letters to be issued, nor do I find any other act containing such authorization. But the same act, in the 2d section, as above quoted, gives the President power to authorize the 'commanders of any suitable vessels to subdue, seize,' etc. Under this clause, letters permissive, under proper restrictions and guards against abuse, might be granted to the propellor *Pembroke*, so as to meet the views expressed by Mr. Forbes. This would seem to be lawful and perhaps not liable to the objections

of granting letters of marque against our own citizens, and that, too, without law or authority from the only constituted power that can grant it."

Mr. Welles, Sec. of the Navy, to Mr. Seward, Sec. of State, Oct. 1, 1861, MS. Misc. Let.

"A bill to authorize the President, during the continuance of the civil war, to grant letters of marque and reprisal, was introduced at the session of 1861–62, but failed in consequence of the position taken in opposition, that letters of marque could only be granted against an independent state, and that their issue might be regarded as a recognition of the Confederate States. It was also objected that the bill if passed would be regarded as an admission of weakness on the part of the Federal Navy, and as conflicting with the position that privateering, as conducted by the Confederate States, was piracy."

Lawrences' Wheaton (1863), 643, citing Cong. Globe (1861–1862), 3325, 3335.

With reference to the act of Congress of March 3, 1863, entitled "An act concerning letters of marque, prizes, and prize goods," Mr. Seward wrote to Mr. Adams: "Congress has conferred upon the President ample power for the execution of the latter measure [issue of letters of marque and reprisal] and the necessary arrangements for it are now engaging the attention of the proper departments."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, March 9, 1863, Dip. Cor. 1863, I. 141.

Under the act of March 3, 1863, the Department of State formulated and printed "Instructions for the Private Armed Vessels of the United States," and a set of "Regulations," the latter being dated "Department of State, Washington, March 20, 1863." These documents were embodied in a printed circular of seven pages. The Secretary of the Navy, Mr. Welles, continued to oppose the policy, setting forth his objections in a letter to Mr. Seward of March 31, 1863. Mr. Welles says that no responsible person applied for letters of marque. It appears that in April, 1863, a citizen of New York applied for letters, and was invited by Mr. Seward to a conference, which resulted in the submission by the former of certain propositions. These were communicated by Mr. Seward to Mr. Welles, with the statement that, "in view of a slight improvement of the disposition of the British Government in regard to assisting the fitting out of piratical vessels," it seemed "inexpedient to proceed at this moment to the issue of letters of marque."

MS. Circulars, I. 218–221; Welles's Lincoln and Seward, 145–164; Mr. Seward to Mr. Welles, April 20, 1863, 60 MS. Dom. Let. 270.

"You have rightly interpreted to Mr. Drouyn de l'Huys our views concerning the issue of letters of marque. The unrestrained issue of piratical vessels from Europe to destroy our commerce, break our blockade of insurrectionary ports, and invade our loyal coast, would practically be an European war against the United States, none the less real or dangerous for wanting the sanction of a formal declaration. Congress has committed to the President, as a weapon of national defense, the authority to issue letters of marque. We know that it is a weapon that cannot be handled without great danger of annoyance to the neutral and friendly commercial powers. But even that hazard must be incurred rather than quietly submit to the apprehended greater evil. There are now, as you must have observed, indications that that apprehended greater evil may be averted through the exercise of a restraining power over the enemies of the United States in Great Britain. Hopeful of such a result, we forbear from the issue of letters of marque, and are content to have the weapon ready for use if it shall become absolutely necessary."

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, April 24, 1863, Dip. Cor. 1863, I. 662.

"Thoughtful and hopeful minds generally favor the proposition to exempt private persons and property on the high seas from the inflictions of war. So far as I have learned, this opinion has, however, been by no means universally accepted. There is a large class of persons who habitually regard foreign war as always a probable contingency, besides many who are continually expecting a conflict with some particular state or states. These persons regard privateering not only as the strongest arm of naval defense, but as one which the United States could use with greater advantage than any foreign enemy. These persons are so jealous on the subject of privateering that they are always unwilling to consent to waive the right in any one treaty for fear that the treaty may become a precedent for the entire abandonment of that form of public war. Certainly this latter class very strongly prevailed throughout the entire period of our civil war. I have not recently made any careful inquiry to ascertain how far that popular sentiment has been modified by the return of peace."

Mr. Seward, Sec. of State, to Mr. Bancroft, Feb. 19, 1868, Dip. Corr. 1868, II. 46, 47.

In view of the fact that Spain had not adhered to the first article of the declaration of Paris of 1856, the United States, April 15, 1898, in view of the strained situation between the two countries instructed its diplomatic and consular officers to be on the watch to prevent the possible fitting out or departure of privateers against the United States.

For. Rel. 1898, 1169.

With his despatch No. 356 of April 16, 1898, Mr. Hay, United States ambassador in London, inclosed a letter addressed to *The Times* by Sir George Baden-Powell, proposing that in the event of hostilities between the United States and Spain the powers should treat privateers, if any, as pirates. With his number 358 of April 18, 1898, Mr. Hay enclosed two letters from *The Times* of that day, one by Professor T. E. Holland and the other by Sir Sherston Baker. By the former the proposal was characterized as "an inadmissible atrocity," and by the latter as "an uncivilized act, subversive of one of the clearest and best defined rules of international law."

April 23, 1898, Mr. Sherman, Secretary of State, telegraphed to Mr. Hay: "In the event of hostilities between United States and Spain, the policy of this Government will be not to resort to privateering, but to adhere to the following recognized rules of international law: First, the neutral flag covers enemy's goods, with the exception of contraband of war; second, neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag; and, third, blockades in order to be binding must be effective."

July 6, 1898, the Department of State cabled to Mr. Hay a rumor communicated by the United States consul at Vancouver, British Columbia, that a Spanish privateer was lying in the Gulf of Georgia. The rumor was also communicated to the British ambassador at Washington. Investigation proved it to be erroneous.

For. Rel. 1898, 970, 971, 984–987.

"The Spanish Government, while maintaining their right to issue letters of marque, which they expressly reserved in their note of the 16th May, 1857, in reply to the request of France for the adhesion of Spain to the declaration of Paris relative to maritime law, will organize for the present a service of 'auxiliary cruisers of the navy,' composed of ships of the Spanish mercantile navy, which will cooperate with the latter for the purposes of cruising, and which will be subject to the statutes and jurisdiction of the navy."

War decree of Spain, April 23, 1898, London *Gazette*, May 3, 1898, For. Rel. 1898, 774.

XIII. *DECLARATIONS OF MARITIME LAW.*

1. The Armed Neutrality.

§ 1220.

See Fauchille, Le Ligue des Neutres de 1780.

"Previous to the war which grew out of the American Revolution, the respective rights of neutrals and belligerents had been settled and clearly defined by the conventional law of Europe, to which all the

maritime powers had given their sanction in the treaties concluded among themselves. The few practical infractions, in time of war, of the principles thus recognized by them, have been disavowed, upon the return of peace, by new stipulations again acknowledging the existence of the rights of neutrals as set down in the maritime code.

"In addition to the recognition of these rights by the European powers, one of the first acts of the United States, as a nation, was their unequivocal sanction of the principles upon which they are founded, as declared in their treaty of commerce of 1778 with the King of France. These principles were that free ships gave freedom to the merchandise, except contraband goods, which were clearly defined, and that neutrals might freely sail to and between enemies' ports, except such as were blockaded in the manner therein set forth. These principles having thus been established by universal consent, became the rule by which it was expected that the belligerents would be governed in the war which broke out about that time between France and Spain on the one hand, and Great Britain on the other. The latter power, however, having soon betrayed a disposition to deviate from them in some of the most material points, the governments which had preserved a neutral course in the contest became alarmed at the danger with which their maritime rights were threatened by the encroachments and naval supremacy of England, and the Empress of Russia, at their head, undertook to unite them in the defense of those rights. On the 28th February, 1780, she issued her celebrated declaration, containing the principles according to which the commanders of her naval armaments would be instructed to protect the neutral rights of her subjects. Those principles were as follows:

"1st. Neutral vessels may freely sail from port to port, and on the coasts of the nations parties to the war.

"2d. The goods belonging to the subjects of the said nations at war are, with the exception of contraband articles, free on board neutral vessels.

"3d. With respect to the definition of contraband articles, the Empress adheres to the provisions of the 10th and 11th articles of her treaty of commerce with Great Britain, and extends the obligations therein contained to all the nations at war.

"4th. To determine what constitutes a blockaded port, this denomination is confined to those the entrance into which is manifestly rendered dangerous in consequence of the dispositions made by the attacking power with ships stationed and sufficiently near.

"5th. These principles are to serve as a rule in proceedings and judgments with respect to the legality of prizes.

"This declaration was communicated to the belligerent Governments with a request that the principles it contained should be observed by

them in the prosecution of the war. From France and Spain it received the most cordial and unequivocal approbation, as being founded upon the maxims of public law which had been their rule of conduct. Great Britain, without directly approving or condemning those maxims, promised that the rights of Russia would be respected agreeably to existing treaties. The declaration was likewise communicated to the other European powers, and the accession by treaties or solemn declarations of Denmark, Sweden, Russia, Holland, Austria, Portugal, and the Two Sicilies to the principles asserted by the Empress of Russia, formed the league, which, under the name of 'armed neutrality,' undertook to preserve inviolate the maritime rights of neutrals.

"Whatever may have been the conduct of the belligerents in that war with respect to the rights of neutrals as declared by the armed neutrality, the principles asserted by the declaration of the Empress Catherine were again solemnly recognized by the treaty of peace concluded by Great Britain and France at Versailles on the 3d September, 1783. Among the several treaties thereby renewed and confirmed was that of Utrecht, in 1713, by which the same contracting parties had, nearly a century before, given the most solemn sanction to the principles of the armed neutrality, which were thus again proclaimed by the most deliberate acts both of belligerents and neutrals as forming the basis of the universal code of maritime legislation among the naval powers of the world.

"Such may be said to have been the established law of nations at the period of the peace of 1783, when the United States, recognized as independent by all the powers of the earth, took their station amongst them. These principles, to which they had given their sanction in their treaties with France of 1778, were again confirmed in those of 1873 with Sweden, and 1785 with Prussia, and continued, uncontroverted by other nations, until the wars of the French Revolution broke out and became almost general in Europe in 1793. The maxims then advanced by Great Britain in her instructions to her naval commanders and in her orders in council regulating their conduct and that of her privateers with regard to neutrals, being in direct contravention of the principles set forth in the declaration of the armed neutrality and in her own treaty stipulations, compelled the European powers which had remained neutral in the contest to unite again for the protection of their just rights. It was with this view that the Emperor Paul, of Russia, appealed to these powers, and that, at his instance, making common cause in behalf of the general interest of nations, Russia, Sweden, Denmark, and Prussia united in a new league of armed neutrality, bound themselves by new treaties, reasserted the principles laid down in the declaration of 1780, and

added thereto some new clauses extending still further the privileges of neutral commerce."

Mr. Van Buren, Sec. of State, to Mr. Randolph, June 18, 1830, MS. Inst. U. States Ministers, XIII. 127.

The tenth and eleventh articles of the treaty of commerce and navigation between Great Britain and Russia of June 20, 1766, referred to in the third article of the declaration of the Empress Catherine of Feb. 28, 1780, supra, are as follows:

"X. Permission shall be granted to the subjects of the two contracting parties to go, come, and trade freely with those states, with which one or other of the parties shall at that time, or at any future period, be engaged in war, provided they do not carry military stores to the enemy. From this permission, however, are excepted places actually blocked up, or besieged, as well by sea as by land; but, at all other times, and with the single exception of military stores, the above-said subjects may transport to these places all sorts of commodities, as well as passengers without the least impediment. With regard to the searching of merchant ships, men of war and privateers shall behave as favourably as the reason of the war, at that time existing, can possibly permit towards the most friendly powers that shall remain neuter; observing, as far as may be, the principles and maxims of the law of nations, that are generally acknowledged.

"XI. All cannon, mortars, muskets, pistols, bombs, grenades, bullets, balls, fusees, flint-stones, matches, powder, saltpetre, sulphur, breast-plates, pikes, swords, belts, cartouch-bags, saddles, and bridles, beyond the quantity that may be necessary for the use of the ship, or beyond what every man serving on board the ship, and every passenger, ought to have, shall be accounted ammunition or military stores; and, if found, shall be confiscated, according to law, as contraband goods or prohibited commodities; but neither the ships nor passengers, nor the other commodities found at the same time, shall be detained or hindered to prosecute their voyage." (Chalmers, I. 7.)

See, as to the question of naval supplies, Fauchille, 67.

See, also, as to the Armed Neutrality, 47 West. Rev. 349; 8 J. Q. Adams's Memoirs, 67.

2. Declaration of Paris.

§ 1221.

"Considering that maritime law, in time of war, has long been the subject of deplorable disputes:

"That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts:

"That it is consequently advantageous to establish a uniform doctrine on so important a point:

"That the plenipotentiaries assembled in congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles in this respect;

"The above-mentioned plenipotentiaries, being duly authorised, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn declaration:

"1. Privateering is, and remains abolished.

"2. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;

"4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

"The Governments of the undersigned plenipotentiaries engage to bring the present declaration to the knowledge of the states which have not taken part in the congress of Paris, and to invite them to accede to it.

"Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned plenipotentiaries doubt not that the efforts of their Governments to obtain the general adoption thereof, will be crowned with full success.

"The present declaration is not and shall not be binding, except between those powers who have acceded, or shall accede, to it.

"Done at Paris, the 16th of April, 1856."

Herlstet's Map of Europe by Treaty, II, 1282.

The foregoing declaration respecting maritime law was signed by the representatives of all the seven powers in the Congress of Paris, namely, Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey.

It was afterwards acceded to as follows: Anhalt-Dessau-Coethen (June 17, 1856); Argentine Confederation (Oct. 1, 1856); Baden (July 30, 1856); Bavaria (July 4, 1856); Belgium (June 6, 1856); Brazil (March 18, 1858); Bremen (June 11, 1856); Brunswick (Dec. 7, 1857); Chile (Aug. 13, 1856); Denmark (June 25, 1856); Ecuador (Dec. 6, 1856); Frankfort (June 17, 1856); Germanic Confederation (July 10, 1856); Greece (June 20, 1856); Guatemala (Aug. 30, 1856); Hamburg (July 27, 1856); Hanover (May 31, 1856); Hayti (Sept. 17, 1856); Hesse-Cassel (June 4, 1856); Hesse-Darmstadt (June 15, 1856); Lübeck (June 20, 1856); Mecklenburg-Schwerin (July 22, 1856); Mecklenburg-Strelitz (Aug. 25, 1856); Modena (July 29, 1856); Nassau (June 18, 1856); Netherlands (June 7, 1856); New Granada (July 31, 1856), subject to the ratification of the legislature); Oldenburg (June 9, 1856); Parma (Aug. 20, 1856); Peru (Oct. 5, 1857); Portugal (July 28, 1856); Roman States (June 3, 1856); Saxe-Altenburg (June 9, 1856); Saxe-Coburg-Gotha (June 22, 1856); Saxe-Meiningen (June 30, 1856); Saxe-Weimar (June 22, 1856); Saxony (June 16, 1856); Two Sicilies (May 31, 1856); Sweden and Norway (June 13, 1856); Switzerland (July 28, 1856); Tuscany (June 5, 1856); Würtemberg (June 24, 1856). (Herlstet's Map of Europe by Treaty, II. 1284.)

"The Government of Uruguay has likewise given its entire assent to the four principles, subject to the ratification of the legislative power. Spain, without acceding to the declaration of April 16, on account of the first point, which relates to the abolition of privateering, has replied that she approves the other three. Mexico has made the same response." (Report of M. Walewski, min. of for. aff., to the Emperor of the French, June 12, 1858, 48 Br. & For. State Papers, 132, 133.)

The reply of the United States is given below.

"On the proposition of Count Walewski, and recognizing that it is to the common interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which have signed it, or which shall accede thereto, shall not in future enter into any arrangement, concerning the application of the law of neutrals in time of war, which does not rest altogether upon the four principles embodied in the said declaration.

"Upon an observation made by the plenipotentiaries of Russia, the congress concurred in the view that the present resolution could not have a retroactive effect nor invalidate previous conventions."

Protocol No. 24, Congress of Paris, session of April 16, 1856, 46 Br. & For. State Papers, 137.

See, generally, Stark's Abolition of Privateering and the Declaration of Paris; New York, 1897. This monograph presents, in an attractive style, an excellent exposition of the subject to which it relates.

See, also, as to the declaration of Paris, 144 Edinburgh Review, 353.

"Soon after the commencement of the late war in Europe this Government submitted to the consideration of all maritime nations two principles for the security of neutral commerce—one that the neutral flag should cover enemies' goods, except articles contraband of war, and the other that neutral property on board merchant vessels of belligerents should be exempt from condemnation, with the exception of contraband articles. These were not presented as new rules of international law, having been generally claimed by neutrals, though not always admitted by belligerents. One of the parties to the war (Russia) as well as several neutral powers, promptly acceded to these propositions, and the two other principal belligerents (Great Britain and France) having consented to observe them for the present occasion, a favorable opportunity seemed to be presented for obtaining a general recognition of them, both in Europe and America.

"But Great Britain and France, in common with most of the states of Europe, while forbearing to reject, did not affirmatively act upon the overtures of the United States.

"While the question was in this position, the representatives of Russia, France, Great Britain, Austria, Prussia, Sardinia, and Tur-

key, assembled at Paris, took into consideration the subject of maritime rights, and put forth a declaration containing the two principles which this Government had submitted nearly two years before to the consideration of maritime powers, and adding thereto the following propositions: 'Privateering is and remains abolished,' and 'blockades in order to be binding must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy;' and to the declaration thus composed of four points, two of which had already been proposed by the United States, this Government has been invited to accede by all the powers represented at Paris except Great Britain and Turkey. To the last of the two additional propositions—that in relation to blockades—there can certainly be no objection. It is merely the definition of what shall constitute the effectual investment of a blockaded place, a definition for which this Government has always contended, claiming indemnity for losses where a practical violation of the rule thus defined has been injurious to our commerce. As to the remaining article of the declaration of the conference at Paris, that 'privateering is and remains abolished,' I certainly can not ascribe to the powers represented in the conference of Paris any but liberal and philanthropic views in the attempt to change the unquestionable rule of maritime law in regard to privateering. Their proposition was doubtless intended to imply approval of the principle that private property upon the ocean, although it might belong to the citizens of a belligerent state, should be exempted from capture; and had that proposition been so framed as to give full effect to the principle, it would have received my ready assent on behalf of the United States. But the measure proposed is inadequate to that purpose. It is true that if adopted private property upon the ocean would be withdrawn from one method of plunder, but left exposed meanwhile to another mode, which could be used with increased effectiveness. The aggressive capacity of great naval powers would be thereby augmented, while the defensive ability of others would be reduced. Though the surrender of the means of prosecuting hostilities by employing privateers, as proposed by the conference of Paris, is mutual in terms, yet in practical effect it would be the relinquishment of a right of little value to one class of states, but of essential importance to another and a far larger class. It ought not to have been anticipated that a measure so inadequate to the accomplishment of the proposed object and so unequal in its operation would receive the assent of all maritime powers. Private property would be still left to the depredations of the public armed cruisers.

"I have expressed a readiness on the part of this Government to accede to all the principles contained in the declaration of the conference of Paris provided that the one relating to the abandonment of priva-

teering can be so amended as to effect the object for which, as is presumed, it was intended—the immunity of private property on the ocean from hostile capture. To effect this object, it is proposed to add to the declaration that 'privateering is and remains abolished' the following amendment:

"'And that the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by the public armed vessels of the other belligerent, except it be contraband.' This amendment has been presented not only to the powers which have asked our assent to the declaration to abolish privateering, but to all other maritime states. Thus far it has not been rejected by any, and is favorably entertained by all which have made any communication in reply.

"Several of the governments regarding with favor the proposition of the United States have delayed definitive action upon it only for the purpose of consulting with others, parties to the conference of Paris. I have the satisfaction of stating, however, that the Emperor of Russia has entirely and explicitly approved of that modification and will cooperate in endeavoring to obtain the assent of other powers, and that assurances of a similar purport have been received in relation to the disposition of the Emperor of the French."

President Pierce, annual message, Dec. 2, 1856, Richardson's Messages, V. 412.

See Lawrence's Wheaton (1863), 640, 641, 778; Dana's Wheaton, § 475, note 223; Twiss, Belligerent Right on the High Seas since the Declaration of Paris (London, 1884); Woolsey, Int. Law (6th ed.), 205, 313, 344.

The representatives of the European powers represented in the congress of Paris having solicited the adhesion of the United States to the declaration concerning maritime rights, Mr. Marcy, who was then Secretary of State, entered into correspondence with various Governments not represented in that congress with the object of acquainting them with the views of the United States and of securing, if possible, concurrence of action. On July 14, 1856, he instructed Mr. Gadsden to approach the Mexican Government, in the hope that it might be induced to take the same course as the United States. Mr. Gadsden was informed that the United States would readily adhere to all the rules of the declaration, except the first. It had, in fact, on the outbreak of the Crimean war opened negotiations with maritime nations for the general adoption of the propositions embraced in the second and third rules; and the fourth rule, requiring blockades to be effectively maintained, had always been observed and supported by the United States as a principle of international law. The United States, however, was unwilling to accept the first rule,

forbidding privateering, unless it should be so amended as to exempt private property at sea from capture. An apprehension was felt by the United States that, unless private property on the ocean was protected from seizure by public armed vessels as well as by privateers, the rule would be exceedingly injurious to the commerce of all nations not occupying the first rank among naval powers. A similar instruction was sent to the American minister at Brussels.

The argument made in these instructions was powerfully elaborated in the note addressed by Mr. Marcy to the Count de Sartiges on July 28, 1856, in formal reply to the invitation to adhere to the declaration. The reasons against the unconditional abolition of privateering, as they were outlined in President Pierce's annual message of 1854, were repeated and amplified; and an offer was made on the part of the United States to adhere to the declaration as a whole if it should be so amended as to exempt private property at sea from belligerent capture, except in the cases of contraband and blockade.

On the next day Mr. Marcy addressed an instruction to Mr. Daniel, American minister at Turin, in which he expressed a wish to learn what would be the treatment of American privateers on the high seas and in Sardinian ports in case the United States should be at war with a power which had acceded to the declaration. The United States, he said, did not seriously apprehend that its rights in regard to the employment of privateers would be affected, directly or indirectly, by the state of things which had arisen out of the congress of Paris; but it would be gratified to be assured that no complications were likely to arise.

October 3, 1856, Mr. Marcy informed Mr. Vroom, at Berlin, that Russia had informed the United States that if the proposed amendment should become "the object of a collective deliberation," the Imperial Government would favor its adoption.

Mr. Marcy, Sec. of State, to Mr. Gadsden, min. to Mexico, No. 66, July 14, 1856, MS. Inst. Mexico, XVII. 73; Mr. Marcy, Sec. of State, to Mr. Siebels, min. to Belgium, No. 19, July 14, 1856, MS. Inst. Belgium, I. 94; Mr. Marcy, Sec. of State, to Count Sartiges, July 28, 1856, 55 Br. & For. State Papers, 589; Mr. Marcy, Sec. of State, to Mr. Daniel, min. to Sardinia, No. 18, July 29, 1856, MS. Inst. Italy, I. 93; Mr. Marcy, Sec. of State, to Mr. Vroom, min. to Prussia, No. 33, Oct. 3, 1856, MS. Inst. Prussia, XIV. 239.

The President "finds himself unable to agree to the first principle in the 'declaration' contained in Protocol No. 23, which proposes to abolish privateering, or to the proposition in the Protocol No. 24, which declares the indivisibility of the four principles of the declaration, and surrenders the liberty to negotiate in regard to neutral rights except on inadmissible conditions. It can not have been the object of the governments represented in the congress at Paris to obstruct the adoption of principles which all approve and are willing to observe, unless they are encumbered by an unrelated principle to which some governments can not accede without a more extended application of

it than that which is proposed by the Paris Congress." (Mr. Marcy, Sec. of State, to Mr. Mason, min. to France, No. 87, July 29, 1856, MS. Inst. France, XVI. 336.)

"You are instructed by the President to propose to the Government of Mexico to enter into an arrangement for its adherence with the United States to the four principles of the declaration of the congress, provided the first of them is amended, as specified in my note to the Count de Sartiges. Without such amendment, the President is constrained for many weighty reasons, some of which are stated in that note, to decline acceding to the first principle of the 'declaration.' The President, however, will readily give his consent to the remaining three principles." (Mr. Marcy, Sec. of State, to Mr. Forsyth, Aug. 29, 1856, MS. Inst. Mexico, XVII. 89.)

See, on the subject of maritime law, Mr. Marcy, Sec. of State, to Mr. Dallas, No. 48, Jan. 31, 1857, MS. Inst. Great Britain, XVII. 58.

"Count Walewski has communicated to Mr. Mason confidentially, in very decisive terms, the determination of France to concur in our amendment and given assurances that he would soon agree to formalize a proper instrument for that purpose. Russia has informed this Government of her willingness to do the same thing. In a less direct manner we are informed that Holland is prepared to act favorably on our proposition. Prussia has, I believe, always been favorable to it; but her situation with regard to other powers, particularly Great Britain, has disinclined her to take the lead in the case. Public opinion in Great Britain, I believe, is with us, but the Government will resist it as long as it will be safe to do so. She will probably delay the immediate consummation of the measure, but it will ultimately be adopted. Portugal will lose the credit which she would have gained by acting promptly on your earliest suggestion."

Mr. Marcy, Sec. of State, to Mr. O'Sullivan, min. to Portugal, No. 21, Nov. 24, 1856, MS. Inst. Portugal, XIV. 185.

See, also, same to same, No. 20, Oct. 25, 1856, id. 183.

"With reference to the instructions which have heretofore been given to you with a view to a modification of the rules of maritime law which were proposed by the conference at Paris, I am directed by the President to instruct you to suspend negotiations upon the subject until you shall have received further instructions. He has not yet had time to examine the questions involved, and he deems it necessary to do so before any further steps in the matter are taken."

Mr. Cass, Sec. of State, to Mr. Dallas, min. to England, No. 60, April 3, 1857, 17 MS. Inst. Great Britain, 71.

A similar passage may be found in Mr. Cass, Sec. of State, to Mr. Vroom, min. to Prussia, No. 41, April 7, 1857, MS. Inst. Prussia, XIV. 245.

"Circumstances have delayed an answer to your letter, enquiring the views of the United States respecting the changes in the maritime

law proposed by the conference at Paris. But I have now the honor to inform your lordship, that, since the issuing of the instructions to which you refer, and which were given to the ministers of the United States at London and Paris, to suspend all negotiations upon that subject till the farther views of the Government were communicated to them, the President has not thought it expedient to authorize them to renew the discussion. I do not understand from your lordship that any variation has been made in the propositions of the Paris conference which this Government found itself unable to accept, and the President does not feel at liberty to determine in advance what might be the views of the United States upon this subject, if it should be presented in a new form. He can only promise to give it that respectful consideration which its importance deserves."

Mr. Cass, Sec. of State, to Lord Napier, British min., Dec. 11, 1858, MS. Notes to Great Britain, VIII. 190.

Mr. Marcy having proposed, in his note of July 28, 1856, to amend article 1 of the declaration, and having also stated that the President approved articles 2, 3, and 4, independently of the first, Mr. Dallas, American minister in London, on February 24, 1857, "renewed the proposal in regard to the first article, and submitted a draft of convention, in which the article so amended would be embodied with the other three articles. But, before any decision was taken on this proposal, a change took place in the American Government by the election of a new President of the United States, and Mr. Dallas announced, on the 25th of April, 1857, that he was directed to suspend negotiations on the subject; up to the present time those negotiations have not been renewed.

"The consequence is, that the United States remaining outside the provisions of the Declaration of Paris, the uncertainty of the law and of international duties with regard to such matters may give rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties and even conflicts.

"It is with a view to remove beforehand such 'difficulties,' and to prevent such 'conflicts,' that I now address you.

"For this purpose I proceed to remark on the four articles, beginning, not with the first, but with the last.

"In a letter to the Earl of Clarendon of the 24th of February, 1857, Mr. Dallas, the minister of the United States, while submitting the draft of a new convention, explains the views of the Government of the United States on the four articles.

"In reference to the last article, he says: 'The fourth of those principles, respecting blockades, had, it is believed, long since become a fixed rule of the law of war.'

"There can be no difference of opinion, therefore, with regard to the fourth article.

"With respect to the third article, the principle laid down in it has long been recognized as law, both in Great Britain and in the United States. Indeed this part of the law is stated by Chancellor Kent to be uniform in the two countries.

"With respect to the second article, Mr. Dallas says, in the letter before quoted: 'About two years prior to the meeting of [the] congress at Paris, negotiations had been originated and were in train with the maritime nations for the adoption of the second and third propositions substantially as enumerated in the declaration.'

"The United States have therefore no objection in principle to the second proposition.

"Indeed Her Majesty's Government have to remark that this principle is adopted in the treaties between the United States and Russia of the 22d of July, 1854, and was sanctioned by the United States in the earliest period of the history of their independence by their accession to the armed neutrality.

"With Great Britain the case has been different. She formerly contended for the opposite principle as the established rule of the law of nations.

"But having, in 1856, upon full consideration, determined to depart from that rule, she means to adhere to the principle she then adopted. The United States, who have always desired this change, can, it may be presumed, have no difficulty in assenting to the principle set forth in the second article of the Declaration of Paris.

"There remains only to be considered the first article, namely, that relating to privateering, from which the Government of the United States withhold their assent. Under these circumstances it is expedient to consider what is required on this subject by the general law of nations. Now, it must be borne in mind that privateers bearing the flag of one or other of the belligerents may be manned by lawless and abandoned men, who may commit, for the sake of plunder, the most destructive and sanguinary outrages.

"There can be no question but that the commander and crew of the ship bearing a letter of marque must, by law of nations, carry on their hostilities according to the established laws of war. Her Majesty's Government must, therefore, hold any government issuing such letters of marque responsible for, and liable to make good, any losses sustained by Her Majesty's subjects in consequence of wrongful proceeding of vessels sailing under such letters of marque.

"In this way the object of the Declaration of Paris may, to a certain extent, be attained without the adoption of any new principle.

"You will urge these views upon Mr. Seward.

"The proposals of Her Majesty's Government are made with a view to limit and restrain that destruction of property and that inter-

ruption of trade which must, in a greater or less degree, be the inevitable consequence of the present hostilities. Her Majesty's Government expect that these proposals will be received by the United States Government in a friendly spirit. If such shall be the case, you will endeavor (in concert with M. Mercier) to come to an agreement on the subject binding France, Great Britain, and the United States.

"If these proposals should, however, be rejected, Her Majesty's Government will consider what other steps should be taken with a view to protect from wrong and injury the trade and the property and persons of British subjects."

Earl Russell, British foreign secretary, to Lord Lyons, British min. at Washington, May 18, 1861, Dip. Cor. 1861, 131, 132–133.

See Mr. Marcy, Sec. of State, to Mr. Dallas, No. 48, Jan. 31, 1857, MS. Inst. Great Britain XVII. 58.

"The advocates of benevolence and the believers in human progress, encouraged by the slow though marked meliorations of the barbarities of war which have obtained in modern times, have been, as you are well aware, recently engaged with much assiduity in endeavoring to effect some modifications of the law of nations in regard to the rights of neutrals in maritime war. In the spirit of these movements the President of the United States, in the year 1854, submitted to the several maritime nations two propositions, to which he solicited their assent as permanent principles of international law, which were as follows:

"1. Free ships make free goods; that is to say, that the effects or goods belonging to subjects or citizens of a power or state at war are free from capture or confiscation when found on board of neutral vessels, with the exception of articles contraband of war.

"2. That the property of neutrals on board an enemy's vessel is not subject to confiscation unless the same be contraband of war.

"Several of the governments to which these propositions were submitted expressed their willingness to accept them, while some others, which were in a state of war, intimated a desire to defer acting thereon until the return of peace should present what they thought would be a more auspicious season for such interesting negotiations.

"On the 16th of April, 1856, a congress was in session at Paris. It consisted of several maritime powers, represented by their plenipotentiaries, namely, Great Britain, Austria, France, Russia, Prussia, Sardinia, and Turkey. That congress having taken up the general subject to which allusion has already been made in this letter, on the day before mentioned, came to an agreement, which they adopted in the form of a declaration, to the effect following, namely:

"1. Privateering is and remains abolished.

"2. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

"4. Blockades, in order to be binding, must be effective; that is to say, maintained by forces sufficient really to prevent access to the coast of the enemy.

"The agreement pledged the parties constituting the congress to bring the declaration thus made to the knowledge of the states which had not been represented in that body, and to invite them to accede to it. The congress, however, at the same time insisted, in the first place, that the declaration should be binding only on the powers who were or should become parties to it as one whole and indivisible compact; and, secondly, that the parties who had agreed, and those who should afterwards accede to it, should, after the adoption of the same, enter into no arrangement on the application of maritime law in time of war without stipulating for a strict observance of the four points resolved by the declaration.

"The declaration, which I have thus substantially recited of course prevented all the powers which became parties to it from accepting the two propositions which had been before submitted to the maritime nations by the President of the United States.

"The declaration was, in due time, submitted by the Governments represented in the congress at Paris to the Government of the United States.

"The President, about the 14th of July, 1856, made known to the states concerned his unwillingness to accede to the declaration. In making that announcement on behalf of this Government, my predecessor, Mr. Marcy, called the attention of those states to the following points, namely:

"1st. That the second and third propositions contained in the Paris declaration are substantially the same with the two propositions which had before been submitted to the maritime states by the President.

"2d. That the Paris declaration, with the conditions annexed, was inadmissible by the United States in three respects, namely: 1st. That the Government of the United States could not give its assent to the first proposition contained in the declaration, namely, that 'Privateering is and remains abolished,' although it was willing to accept it with an amendment which should exempt the private property of individuals, though belonging to belligerent states, from seizure or confiscation by national vessels in maritime war. 2d. That for this reason the stipulation annexed to the declaration, viz: that the propositions must be taken altogether or rejected altogether, without modification, could not be allowed. 3d. That the fourth

condition annexed to the declaration, which provided that the parties acceding to it should enter into no negotiation for any modifications of the law of maritime war with nations which should not contain the four points contained in the Paris declaration, seemed inconsistent with a proper regard to the national sovereignty of the United States.

"On the 29th of July, 1856, Mr. Mason, then minister of the United States at Paris, was instructed by the President to propose to the Government of France to enter into an arrangement for its adherence, with the United States, to the four principles of the Declaration of the Congress of Paris, provided the first of them should be amended as specified in Mr. Marcy's note to the Count de Sartiges on the 28th of July, 1856. Mr. Mason accordingly brought the subject to the notice of the Imperial Government of France, which was disposed to entertain the matter favorably, but which failed to communicate its decision on the subject to him. Similar instructions regarding the matter were addressed by this Department to Mr. Dallas, our minister at London, on the 31st day of January, 1857; but the proposition above referred to had not been directly presented to the British Government by him when the administration of this Government by Franklin Pierce, during whose term these proceedings occurred, came to an end, on the 3d of March, 1857, and was succeeded by that of James Buchanan, who directed the negotiations to be arrested for the purpose of enabling him to examine the questions involved, and they have ever since remained in that state of suspension.

"The President of the United States has now taken the subject into consideration, and he is prepared to communicate his views upon it, with a disposition to bring the negotiation to a speedy and satisfactory conclusion.

"For that purpose you are hereby instructed to seek an early opportunity to call the attention of Her Majesty's Government to the subject, and to ascertain whether it is disposed to enter into negotiations for the accession of the Government of the United States to the Declaration of the Paris Congress, with the conditions annexed by that body to the same; and if you shall find that Government so disposed, you will then enter into a convention to that effect, substantially in the form of a project for that purpose herewith transmitted to you; the convention to take effect from the time when the due ratifications of the same shall have been exchanged. It is presumed that you will need no special explanation of the sentiments of the President on this subject for the purpose of conducting the necessary conferences with the Government to which you are accredited. Its assent is expected on the ground that the proposition is accepted at its suggestion, and in the form it has preferred. For

your own information it will be sufficient to say that the President adheres to the opinion expressed by my predecessor, Mr. Marcy, that it would be eminently desirable for the good of all nations that the property and effects of private individuals, not contraband, should be exempt from seizure and confiscation by national vessels in maritime war. If the time and circumstances were propitious to a prosecution of the negotiation with that object in view, he would direct that it should be assiduously pursued. But the right season seems to have passed, at least for the present. Europe seems once more on the verge of quite general wars. On the other hand, a portion of the American people have raised the standard of insurrection, and proclaimed a provisional government, and, through their organs, have taken the bad resolution to invite privateers to prey upon the peaceful commerce of the United States.

"Prudence and humanity combine in persuading the President, under the circumstances, that it is wise to secure the lesser good offered by the Paris Congress, without waiting indefinitely in hope to obtain the greater one offered to the maritime nations by the President of the United States."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England. Circular, April 24, 1861, Dip. Cor. 1861, 18.

The same circular, mutatis mutandis, was sent to the American ministers in France, Russia, Prussia, Austria, Belgium, Italy, and Denmark. Also to the Netherlands. (Mr. Seward, Sec. of State, to Mr. Pike, No. 2, May 10, 1861, MS. Inst. Netherlands, XIV. 194.)

The draft of a convention, sent to Mr. Adams, was as follows:

"The United States of America and Her Majesty the Queen of Great Britain and Ireland, being equally animated by a desire to define with more precision the rights of belligerents and neutrals in time of war, have, for that purpose, conferred full powers, the President of the United States upon Charles F. Adams, accredited as their envoy extraordinary and minister plenipotentiary to her said Majesty, and Her Majesty the Queen of Great Britain and Ireland, upon ———.

"And the said plenipotentiaries, after having exchanged their full powers, have concluded the following articles:

"Article I.

"1. Privateering is and remains abolished. 2. The neutral flag covers enemy's goods, with the exception of contraband of war. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag. 4. Blockades in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

"Article II.

"The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate, and by Her Majesty the Queen of Great Britain and Ireland, and the ratifications shall be exchanged at Washington, within the space

of six months from the signature, or sooner if possible. In faith whereof, the respective plenipotentiaries have signed the present convention in duplicate, and have thereto affixed their seals.

"Done at London, the —— day of ———, in the year of our Lord, one thousand eight hundred and sixty-one (1861)."

"We should now . . . vastly prefer to have that [Marcy] amendment accepted. Nevertheless, if this can not be done, let the convention be made for adherence to the declaration, pure and simple." (Mr. Seward, Sec. of State, to Mr. Sanford, min. to Belgium, No. 9, June 21, 1861, Dip. Cor. 1861, 43.)

"There is no reservation or difficulty about their application [i. e., the application of the rules of the Declaration of Paris] in the present case. We hold all the citizens of the United States, loyal or disloyal, alike included by the law of nations and treaties; and we hold ourselves bound by the same obligations to see, so far as may be in our power, that all our citizens, whether maintaining this Government or engaged in overthrowing it, respect those rights in favor of France and of every other friendly nation. In any case, not only shall we allow no privateer or national vessel to violate the rights of friendly nations as I have thus described them, but we shall also employ all our naval force to prevent the insurgents from violating them just as much as we do to prevent them from violating the laws of our own country."

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 19, June 17, 1861, Dip. Cor. 1861, 208, 211–212.

"You seem to us to have adopted the idea that the insurgents are necessarily a belligerent power because the British and French Governments have chosen in some of their public papers to say they are so. . . . Our view is on the contrary. . . . We do not admit, and we shall never admit, even the fundamental statement you assume, namely, that Great Britain and France have recognized the insurgents as a belligerent party. True, you say that they have so declared. We reply: Yes, but they have not declared so to us. You may rejoin: Their public declaration concludes the fact. We nevertheless reply: It must be not their declarations, but their action that shall conclude the fact. That action does not yet appear, and we trust, for the sake of harmony with them and peace throughout the world, that it will not happen." (Mr. Seward, Sec. of State, to Mr. Dayton, No. 24, "strictly confidential," July 1, 1861, MS. Inst. France, XVI. 16.)

Mr. Dayton, American minister at Paris, acting upon the circular instruction of April 24, 1861, brought the views therein expressed to the attention of Mr. Thouvenel, minister of foreign affairs of France, in a personal interview. Some correspondence then took place, and on the 31st of May Mr. Dayton, in view of the fact that, since the circular was written, the belligerency of the Confederate States had been acknowledged by England and France, proposed the accession

of the United States to the Declaration of Paris, not pure and simple, but with the Marcy amendment.

Writing to Mr. Dayton on July 6, 1861, Mr. Seward observed that what was directed to be proposed to France in the circular of April 24 was "equally and simultaneously proposed to every other maritime power." Understanding, said Mr. Seward, that an attempt to obtain the acceptance of the Marcy amendment "would require a negotiation not merely with France alone, but with all the other original parties of the Congress of Paris, and every government that has since acceded to the declaration," as well as the unanimous consent of all those powers, the United States had decided to offer to adhere to the declaration, pure and simple. "In this way," declared Mr. Seward, "we expected to remove every cause that any foreign power could have for the recognition of the insurgents as a belligerent power." Continuing, Mr. Seward said:

"We shall not acquiesce in any declaration of the Government of France that assumes that this Government it not now, as it always has been, exclusive sovereign, for war as well as for peace, within the States and Territories of the Federal Union, and over all citizens, the disloyal and loyal all alike. We treat in that character, which is our legal character, or we do not treat at all, and we in no way consent to compromise that character in the least degree; we do not even suffer this character to become the subject of discussion. Good faith and honor, as well as the same expediency which prompted the proffer of our accession to the Declaration of Paris, pure and simple, in the first instance, now require us to adhere to that proposition and abide by it; and we do adhere to it, not, however, as a divided, but as an undivided nation. The proposition is tendered to France not as a neutral but as a friend, and the agreement is to be obligatory upon the United States and France and all their legal dependencies just alike.

"The case was peculiar, and in the aspect in which it presented itself to you portentous. We were content that you might risk the experiment, so, however, that you should not bring any responsibility for delay upon this Government. But you now see that by incorporating the Marcy amendment in your proposition, you have encountered the very difficulty which was at first foreseen by us. The following nations are parties to the Declaration of Paris, namely: Baden Bavaria, Belgium, Bremen, Brazils, Duchy of Brunswick, Chili, the Argentine Confederation, the Germanic Confederation, Denmark, the Two Sicilies, the Republic of the Equator, the Roman States, Greece, Guatemala, Hayti, Hamburg, Hanover, the two Hesses, Lübeck, Mecklenburgh Strelitz, Mecklenburgh Schwerin, Nassau, Oldenburgh, Parma, Holland,[a] Peru, Portugal, Saxony, Saxe Altenburgh, Saxe

[a] I. e., the Netherlands.

Coburg Gotha, Saxe Meiningen, Saxe Weimar, Sweden,[a] Switzerland, Tuscany, Wurtemberg, Anhault Dessau,[b] Modena, New Granada, and Uruguay.[c]

"The great exigency in our affairs will have passed away—for preservation or destruction of the American Union—before we could bring all these nations to unanimity on the subject, as you have submitted it to Mr. Thouvenel. It is a time not for propagandism, but for energetic acting to arrest the worst of all national calamities. We therefore expect you now to renew the proposition in the form originally prescribed. But in doing this you will neither unnecessarily raise a question about the character in which this Government acts (being exclusive sovereign), nor, on the other hand, in any way compromise that character in any degree. Whenever such a question occurs to hinder you, let it come up from the other party in the negotiation. It will be time then to stop and wait for such further instructions as the new exigency may require.

"One word more. You will, in any case, avow our preference for the proposition with the Marcy amendment incorporated, and will assure the Government of France that whenever there shall be any hope for the adoption of that beneficent feature by the necessary parties, as a principle of the law of nations, we shall be ready not only to agree to it, but even to propose it, and to lead in the necessary negotiations.

"This paper is, in one view, a conversation merely between yourself and us. It is not to be made public. On the other hand, we confide in your discretion to make such explanations as will relieve yourself of embarrassments, and this Government of any suspicion of inconsistency or indirection in its intercourse with the enlightened and friendly Government of France."

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 27, July 6, 1861, Dip. Cor. 1861, 215.

See Mr. Dayton to Mr. Seward, No. 12, June 22, 1861, Dip. Cor. 1861, 213. It may be observed, however, that in the place here cited only brief extracts from Mr. Dayton's dispatch are printed, insufficient to disclose the action he had taken. It appears by a note of Mr. Dayton to the minister of foreign affairs of Aug. 2, 1861, that he had on the 31st of May proposed the accession of the United States with the Marcy amendment. (Dip. Cor. 1861, 223.)

See, also, Mr. Dayton to Mr. Seward, No. 15, July 5, 1861, Dip Cor. 1861, 218.

On August 2, 1861, Mr. Dayton, who had then received Mr. Seward's No. 27, of July 6, 1861, wrote to the French minister of

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[a] I. e., Sweden and Norawy.

[b] I. e., Anhalt-Dessau-Coethen.

[c] Frankfort should be added to the list. See supra, p. 562.

foreign affairs, offering the unconditional adhesion of the United States to the Declaration of Paris.

On the 20th of August, M. Thouvenel, who was acting in concert with Lord John Russell, inclosed to Mr. Dayton the text of a written declaration which he proposed to make, on signing the convention concerning the declaration of Paris. The proposed declaration read as follows: "In affixing his signature to the convention . . . the undersigned declares, in execution of the orders of the Emperor, that the Government of His Majesty does not intend to undertake, by the said convention, any engagement of a nature to implicate it, directly or indirectly, in the internal conflict now existing in the United States."

In a personal interview with Mr. Dayton, M. Thouvenel explained that his reason for intending to make this declaration was that the provisions of the convention might be construed by the United States as binding the English and French Governments to pursue and punish Confederate privateers as pirates, and it was deemed necessary to repel this inference. Mr. Dayton objected to the proposed declaration, and intimated that he might be under the necessity of referring the matter to his Government.

Mr. Dayton, min. to France, to Mr. Seward, Sec. of State, No. 24, Aug. 2, 1861, Dip. Cor. 1861, 222–224.

See, also, same to same, No. 35, Aug. 22, 1861, and No. 37, Aug. 29, 1861, Dip. Cor. 1861, 226–228, 228–231.

On August 17, 1861, Mr. Dayton was instructed to suspend negotiations till the result should be known of the request which Mr. Adams had been instructed to make for "explanations" from Lord John Russell.

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 41, Aug. 17, 1861, Dip. Cor. 1861, 224.

See, also, same to same, No. 53, Sept. 5, 1861, id. 231.

"The obscurity of the text of the declaration which Mr. Thouvenel submits to us is sufficiently relieved by his verbal explanations. . . . He said . . . that we could deal with these people as we choose, and they (England and France) could only express their regrets on the score of humanity if we should deal with them as pirates, but that they could not participate in such a course. . . . France declines to receive that adhesion [of the United States to the Declaration of Paris], unless she be allowed to make a special declaration, which would constitute an additional and qualifying article, limiting the obligations of France to the United States to a narrower range than the obligations which the United States must assume towards France and towards every other one of the forty-six sovereigns who

are parties to it, and narrower than the mutual obligations of all those parties, including France herself. . . .

"I know that France is a friend, and means to be just and equal towards the United States. I must assume, therefore, that she means not to make an exceptional arrangement with us, but to carry out the same arrangement in her interpretation of the obligations of the Declaration of the Congress of Paris in regard to other powers. Thus carried out, the Declaration of Paris would be expounded so as to exclude all internal conflicts in states from the application of the articles of that celebrated declaration. Most of the wars of modern times—perhaps of all times—have been insurrectionary wars, or "internal conflicts." If the position now assumed by France should thus be taken by all the other parties to the declaration, then it would follow that the first article of that instrument, instead of being, in fact, an universal and effectual inhibition of the practice of privateering, would abrogate it only in wars between foreign nations, while it would enjoy universal toleration in civil and social wars. . . .

"I can not, indeed, admit that the engagement which France is required to make without the qualifying declaration in question would, directly or indirectly, implicate her in our internal conflicts. But if such should be its effect, I must, in the first place, disclaim any desire for such an intervention on the part of the United States. The whole of this long correspondence has had for one of its objects the purpose of averting any such intervention. If, however, such an intervention would be the result of the unqualified execution of the convention by France, then the fault clearly must be inherent in the Declaration of the Congress of Paris itself, and it is not a result of anything that the United States have done or proposed. . . .

"You will inform Mr. Thouvenel that the proposed declaration on the part of the Emperor is deemed inadmissible by the President of the United States; and if it shall be still insisted upon, you will then inform him that you are instructed for the present to desist from further negotiation on the subject involved."

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 56, Sept. 10, 1861, Dip. Cor. 1861, 233.

See M. Thouvenel to Mr. Dayton, Sept. 9, 1861, formally stating the specific grounds of exception to the unconditional adhesion by the United States to the Declaration of Paris, under the conditions then existing. He maintained that such a reservation as he proposed was essential, since the Cabinet of Washington might "be led, by the particular point of view in which it is placed, to draw from the act which we are ready to conclude such consequences as we should now absolutely reject." (Dip. Cor. 1861, 236, 237.)

Mr. Dayton communicated to M. Thouvenel a copy of Mr. Seward's No. 56, of Sept. 10, 1861. M. Thouvenel merely acknowledged its receipt, thus tacitly treating the negotiation as closed. (Dip. Cor. 1861, 238, 239.)

In a similar sense, see Mr. Seward, Sec. of State, to Mr. Dayton, No. 137, April 8, 1862, MS. Inst. France, XVI. 137.

On July 11, 1861, Mr. Adams, American minister in London, formally proposed to Lord John Russell the conclusion of a convention for the adhesion of the United States to the Declaration of Paris. On the 18th of July, Lord John Russell, in reply, stated that the mode of adhering to the declaration by those who were not originally parties to it was by simple notification, and that as the object of the declaration was to obtain a general concurrence upon questions of maritime law, it embraced various powers and did not contemplate an insulated engagement between only two of them; but he added that, if Her Majesty's Government should be assured that the United States were ready to enter into a similar engagement with France and the other maritime powers, they would, in order to save time, advise the Queen to enter into a convention on the subject so soon as they should be informed that a similar convention was ready for signature between the United States and France, so that they might be signed simultaneously.

Mr. Adams, min. to England, to Mr. Seward, Sec. of State, No. 17, July 19, 1861, and accompanying correspondence, Dip. Cor. 1861, 97–100.

See, also, Mr. Adams to Mr. Seward, No. 2, May 21, 1861, Dip. Cor. 1861, 74, 78; Mr. Seward to Mr. Adams, No. 32, July 1, 1861, id. 95; Mr. Adams to Mr. Seward, No. 20, July 26, 1861, id. 105.

On July 29, 1861, Mr. Adams informed Lord John Russell that he had been in correspondence with Mr. Dayton, at Paris, and that Mr. Dayton had desired to ascertain whether perseverance in the attempt to secure the Marcy amendment would be fruitless in England. Mr. Adams said that he had expressed to Mr. Dayton the belief that it would be so, and he wished to learn whether this view was correct.

Lord John Russell replied, July 31, that Mr. Adams's statement was "perfectly correct;" that he considered the Marcy amendment inadmissible. But he added that, if a convention should be signed, the engagement on the part of Great Britain would be "prospective" and would "not invalidate anything already done."

Mr. Adams, in transmitting this correspondence to his Government, said that he did not understand the meaning of this phrase.

Mr. Adams, min. to England, to Mr. Seward, Sec. of State, No. 22, Aug. 2, 1861, and accompanying correspondence, Dip. Cor. 1861, 108–110.

On receiving the correspondence, Mr. Seward sent to Mr. Adams, on August 17, 1861, an extended instruction. Mr. Seward considered unimportant the proposed declaration that the operation of the convention should be "prospective" only, but he saw difficulties in the way of accepting the declaration that the signature of the convention should not invalidate "anything already done." He desired Great Britain to specify what the thing was already done that was not to be invalidated.

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 61, Aug. 17, 1861, Dip. Cor. 1861, 112.

Two days after the foregoing instruction was signed, Mr. Adams received from Earl Russell, under date of the 19th of August, a draft of a proposed written declaration to be made, on the signing of the convention. Like the declaration proposed by M. Thouvenel in Paris, it declared, mutatis mutandis, that the British Government, in signing the convention, did "not intend thereby to undertake any engagement which shall have any bearing, direct *or indirect*, on the internal differences now prevailing in the United States." On receiving this communication, Mr. Adams deemed it advisable to suspend action till he should receive further instructions; and, with this end in view, he addressed to Earl Russell, on the 23rd of August, a long note setting forth his reasons for declining to fix a day for the signing of the convention. In this note Mr. Adams fully reviewed the course of the negotiations, and argued that it would be better that the convention should not be signed, than that it should be accepted with "a particular exception, susceptible of so wide a construction," as the proposed declaration.

To this note Earl Russell replied on August 28, 1861. After recapitulating the various steps in the negotiations, he explained the meaning and purpose of his proposed declaration as follows:

"On some recent occasions, as on the fulfillment of the treaty of 1846, respecting the boundary, and with respect to the treaty called by the name of the 'Clayton-Bulwer treaty,' serious differences have arisen with regard to the precise meaning of words, and the intention of those who framed them.

"It was most desirable in framing a new agreement not to give rise to a fresh dispute.

"But the different attitude of Great Britain and of the United States in regard to the internal dissensions now unhappily prevailing in the United States gave warning that such a dispute might arise out of the proposed convention.

"Her Majesty's Government, upon receiving intelligence that the President had declared by proclamation his intention to blockade the

ports of nine of the States of the Union, and that Mr. Davis, speaking in the name of those nine States, had declared his intention to issue letters of marque and reprisals, and having also received certain information of the design of both sides to arm, had come to the conclusion that civil war existed in America, and Her Majesty had thereupon proclaimed her neutrality in the approaching contest.

"The Government of the United States on the other hand, spoke only of unlawful combinations, and designated those concerned in them as rebels and pirates. It would follow logically and consistently, from the attitude taken by Her Majesty's Government, that the so-called Confederate States, being acknowledged as a belligerent, might, by the law of nations, arm privateers, and that their privateers must be regarded as the armed vessels of a belligerent.

"With equal logic and consistency it would follow, from the position taken by the United States, that the privateers of the Southern States might be decreed to be pirates, and it might be further argued by the Government of the United States that a European power signing a convention with the United States, declaring that privateering was and remains abolished, would be bound to treat the privateers of the so-called Confederate States as pirates.

"Hence, instead of an agreement, charges of bad faith and violation of a convention might be brought in the United States against the power signing such a convention, and treating the privateers of the so-called Confederate States as those of a belligerent power.

"The undersigned had at first intended to make verbally the declaration proposed. But he considered it would be more clear, more open, more fair to Mr. Adams to put the declaration in writing, and give notice of it to Mr. Adams before signing the convention."

Mr. Adams to Earl Russell, Aug. 23, 1861, Dip. Cor. 1861, 120; Earl Russell to Mr. Adams, Aug. 28, 1861, id. 128,129.

Writing to Mr. Adams on September 7, 1861, before the receipt of Earl Russell's note to the latter of the 28th of August, Mr. Seward, perceiving the object of the proposed declaration, declared it to be "inadmissible," on the following grounds:

1. That it "would be virtually a new and distinct article incorporated into the projected convention."

2. That to admit such an article would be "to permit a foreign power to take cognizance of and adjust its relations upon assumed internal and purely domestic differences existing within our own country."

3. That the proposed declaration was not mutual.

4. That it "would be a substantial and even a radical departure from the declaration of the Congress of Paris."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 83, Sept. 7, 1861, Dip. Cor. 1861, 125.

In the course of this instruction, Mr. Seward said: "It is my desire that we may withdraw from the subject carrying away no feelings of passion, prejudice, or jealousy, so that in some happier time it may be resumed, and the important objects of the proposed convention may be fully secured. I believe that that propitious time is even now not distant; and I will hope that when it comes Great Britain will not only willingly and unconditionally accept the adhesion of the United States to all the benignant articles of the declaration of the congress of Paris, but will even go further, and, relinquishing her present objections, consent, as the United States have so constantly invited, that the private property, not contraband, of citizens and subjects of nations in collision shall be exempted from confiscation equally in warfare waged on the land and in warfare waged upon the seas, which are the common highways of all nations.

"Regarding this negotiation as at an end, the question arises, what, then, are to be the views and policy of the United States in regard to the rights of neutrals in maritime war in the present case. My previous despatches leave no uncertainty upon this point. We regard Great Britain as a friend. Her Majesty's flag, according to our traditional principles, covers enemy's goods not contraband of war. Goods of Her Majesty's subjects, not contraband of war, are exempt from confiscation, though found under a neutral or disloyal flag. No depredation shall be committed by our naval forces or by those of any of our citizens, so far as we can prevent it, upon the vessels or property of British subjects. Our blockade, being effective, must be respected.

"The unfortunate failure of our negotiations to amend the law of nations in regard to maritime war does not make us enemies, although, if they had been successful, we should have perhaps been more assured friends.

"Civil war is a calamity from which certainly no people or nation that has ever existed has been always exempt. It is one which probably no nation ever will escape. Perhaps its most injurious trait is its tendency to subvert the good understanding and break up the relations existing between the distracted state and friendly nations, and to involve them, sooner or later, in war. It is the desire of the United States that the internal differences existing in this country may be confined within our own borders. I do not suffer myself for a moment to doubt that Great Britain has a desire that we may be successful in attaining that object, and that she looks with dread upon the possibility of being herself drawn into this unhappy internal controversy of our own. I do not think it can be regarded as disrespectful if you should remind Lord Russell that when, in 1838, a civil war broke out in Canada, a part of the British dominions adjacent to the United States, the Congress of the United States passed and the President executed a law which effectually prevented any intervention against the Government of Great Britain in those internal differences by American citizens, whatever might be their motives, real or pretended, whether of interest or sympathy. I send you a copy of that enactment. The British Government will judge

for itself whether it is suggestive of any measures on the part of Great Britain that might tend to preserve the peace of the two countries, and, through that way, the peace of all nations." (Id. 127.)

As to the signature by Mr. Cassius M. Clay and Prince Gortschakoff, in the autumn of 1861, of a treaty for the amelioration of the rigors of maritime war, and its subsequent postponement and abandonment, by mutual consent of the two Governments, see Mr. Seward, Sec. of State, to Mr. Clay, min. to Russia, No. 19, Oct. 23, 1861, MS. Inst. Russia, XIV. 238; same to same, Nos. 20 and 26, Nov. 9, 1861, and Jan. 8, 1862, id. 239, 244; Mr. Seward, Sec. of State, to Mr. Stoeckl, Rusian min., Jan. 8, 1862, MS. Notes to Russian Leg. VI. 114; Mr. Seward, Sec. of State, to Mr. Clay, min. to Russia, No. 32, March 6, 1862, MS. Inst. Russia, XIV. 249.

CHAPTER XXV.

PRIZE COURTS AND PROCEDURE.

I. *COURTS.*

§ 1222.

The court of appeals in prize causes erected by the Continental Congress had power to revise and correct the sentences of the State courts of admiralty.

United States *v.* Judge Peters (1809), 5 Cranch, 115.

"The papers of the Continental Congress preserved in this Department have been thoroughly examined, and the only records of the board of admiralty which have been found relate solely to the proceedings of Congress. . . . The adjudication of prize cases does not appear to have been made the duty of the said board; and as it was left to the courts, the establishment of which was 'recommended to the several legislatures in the United Colonies' by article 4 of the resolution of Congress forming the United States Navy (November 25, 1775), it was not subject to the interference of Congress except in cases of appeal (see article 6th, same resolution)."

Mr. Brown, chief clerk, Department of State, to Mr. Wing, chief clerk, Department of Justice, July 24, 1879, 129 MS. Dom. Let. 208.

District courts of the United States possess all the powers of a court of admiralty, both instance and prize, and may award restitution of property claimed as prize of war by a foreign captor.

Glass *v.* The Sloop Betsey (1794), 3 Dall. 6.

Proceedings against the ship and cargo are to be had before the district court of the United States according to the laws of Congress and the usage and practice of courts of admiralty in prize causes.

Lee, At. Gen., 1798, 1 Op. 85.

The jurisdiction of the Supreme Court of the United States in prize cases is appellate only, and a claim can not for the first time be interposed there; but, where a case was disposed of in the district court without proper opportunity to claimants to appear, and the decree was affirmed by the circuit court, the case was remanded to the circuit court, with directions to allow a claim to be filed.

The Harrison (1816), 1 Wheat. 298.

The validity of the seizure and the question of prize or no prize can only be determined in the courts upon which jurisdiction has been conferred by the sovereign under whose authority the capture was made. Neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide prize cases and administer the laws of nations.

Jecker *v.* Montgomery, 13 How. 498.
See Snell *v.* Faussatt, 1 Wash. C. C. 271.

It was within the authority of the President, as commander-in-chief, to establish courts during the rebellion in portions of the insurgent territory which were occupied by the national forces.

The Grapeshot, 9 Wall. 129.

Neither by the law of nations nor by the French-American treaty then in force had a French consul in Charleston in 1793 jurisdiction to condemn as legal prize a British vessel captured and brought into that port by a French frigate; and such act is not only a nullity, but justifies an appeal to the French minister to "interpose efficaciously to prevent a repetition of the error."

Mr. Jefferson, Sec. of State, to Mr. Ternant, French min., May 15, 1793. Am. State Papers, For. Rel. I. 147; 3 Jefferson's Works, 560.

See, to the same effect, Mr. Jefferson, Sec. of State, to Mr. Morris, min. to France, Aug. 16, 1793, Am. State Papers, For. Rel. I. 167, 4 Jefferson's Works, 39.

This view was taken by the Supreme Court in Glass *v.* Sloop Betsey, 3 Dall. 6.

By article 28 of the treaty between the United States and Hayti of November 3, 1863, it is provided "that in matters of prize 'in all cases the established courts for prize causes, in the country to which the prizes may be conducted, shall *alone* take cognizance of them.'

"The tribunal before which the *Haytian Republic* and her officers were brought was hastily improvised for the occasion and consisted of two commissioners specially appointed on the 21st of October, 1888, to examine the case of the *Haytian Republic*. It was in no sense 'an established court for prize causes,' as stipulated in the treaty, but had for its special and only authority the order of the provisional president, Légitime. Its proceedings had scarcely a feature of formality and regularity. The witnesses before it, whose statements were generally founded on hearsay and often palpably inconsistent with established facts, were not even sworn, and no opportunity was given for defense, although the reasonable delay of four days, two of which were holidays, was requested for that purpose and refused.

"Such proceedings appear only the more indefensible when it is considered that the provisional president, Légitime, and his minister for foreign affairs now set up a violation of the municipal law of Hayti as the ground of the condemnation of the vessel and the imprisonment of her officers. The professed character of the commission was that of a 'prize court,' and it is so styled in your notes, to which I have the honor now to reply. The trial of an alleged violation of Haytian municipal law was thus wholly outside its competence. As the tribunal for the examination of such a charge its proceedings were thus not only confessedly without jurisdiction, but destitute of regularity, and also palpably violative of the provisions of the sixth article of the treaty of 1864, which guaranties to citizens of the United States access to the ordinary courts of justice, and full opportunity to defend their rights and interests before them.

"A prize court is not a court of criminal jurisdiction. 'The condemnation of the vessel and cargo' (Bates, Attorney-General, 10

Opin. Atty. Gen'l, 453) 'in a prize court is not a criminal sentence. No person is charged with an offense; and so no person is in condition to be relieved and reinstated by a pardon.'

"To such proceedings as those of the special Haytian commission above described, it is the opinion of the Department that the doctrines set forth in your note of the 19th instant, in relation to appeals from the decisions of prize tribunals, have no application. Such rules can be held to apply only to the procedure of regularly established courts acting within the limits of their competency, and from whose decisions appeals are provided for. It can not be admitted that the decrees of an extraordinary commission, which assumes to act in disregard of treaties and the law of nations, must stand unquestioned as a subject for judicial review, or that the persons who have been deprived of their property or of their personal freedom by such decrees are bound to seek judicial relief. Those doctrines apply only to the regular and formal proceedings of the established judicial courts of a country, acting according to recognized principles of justice. In other cases relief and redress may be obtained by direct appeal to the government of the individuals whose rights of person and property have been invaded."

Mr. Bayard, Sec. of State, to Mr. Preston, Haytian min. Nov. 28, 1888, For. Rel. 1888, I. 1001, 1003.

The Haytian Government was required to release the ship and pay an indemnity.

The United States not having acknowledged the existence of a Mexican Republic or State at war with Spain, the Supreme Court does not recognize the existence of any lawful court of prize at Galveston.

The Nueva Anna and Liebre, 6 Wheat. 193.

The proceedings of a prize court of the Confederate States are of no validity in the United States, and a condemnation and sale by such a court do not convey any title to the purchaser, or confer upon him any right to give a title to others.

The Lilla, 2 Sprague, 177.

II. *JURISDICTION.*

1. Courts of Captor's Country.

§ 1223.

Process was issued by the United States district court at Philadelphia for the seizure of the French privateer *Cassius* and the arrest of her commander, Samuel Davis, in a suit for damages by the owner of

an American vessel and cargo which the *Cassius* had captured on the high seas and carried into Port de Paix, where they were condemned. Though it was alleged that the *Cassius* was fitted out in the United States in violation of their laws, and that Davis, her commander, was a citizen of the United States, the Supreme Court issued a writ of prohibition to the district court, on the ground that the trial of prizes made by French cruisers on the high seas and brought within the French jurisdiction belonged of right and exclusively to the French tribunals, and that French cruisers and their officers ought not to be held to answer in the United States for such transactions. The writ observed that the libel did not allege that the *Cassius* was fitted out either by the French Republic or by Davis, or that she was at the time the property of that Republic, or that Davis was concerned in the fitting out, or that he was retained in the French service in the United States.

United States *v.* Richard Peters (1795), 3 Dall. 121.

The reporter, in a note to this case (p. 132), says that the libel for damages was accordingly superseded; "but an information, Ketland qui tam, etc., was immediately afterwards filed in the circuit court against the corvette, for the illegal outfit in violation of the act of Congress, and the vessel being thereupon attached, an application was made to Judge Peters, to discharge her on giving security, but the judge was of opinion, that he had no power as the district judge, to make such an order in a cause depending in the circuit court. The French minister, then deeming (as I have been informed) this prosecution to be a violation of the rights and property of the Republic, delivered a remonstrance to our Government; and, converting the judicial inquiry into a matter of state, abandoned the corvette, and discharged the officers and crew. See 2 vol., p. 365. Ketland qui tam versus The Cassius."

The exclusive cognizance of prize questions belongs in general to the capturing power, and the courts of other countries will not undertake to redress alleged marine torts committed by public armed vessels in assertion of belligerent rights. This applies to privateers, duly commissioned.

L'Invincible, 1 Wheat. 238.

The court of admiralty of the State of Delaware had, in accordance with common-law doctrine, jurisdiction of a prize made at Whitehall landing, in Little Duck Creek, in the body of Kent County.

W. B. *v.* Latimer, Delaware Court of Errors, 1788, 4 Dall. App. I.

The power of the courts in the United States to adjudge prize cases is dependent upon legislation by Congress.

The Mary and Susan, 1 Wheat. 46.

The legislation of the United States in reference to prizes is to be found in the following statutes: (1) Act in respect to right of salvage in

case of reprisals, Mar. 3, 1800, 2 Stat. 16. (2) Supplementary act of Jan. 27, 1813, id. 792. (3) Act simplifying process of seizure, Mar. 25, 1862, 12 Stat. 374. (4) Sections 2, 6, and 12 of the act of July 17, 1862, in reference to the U. S. Navy, id. 600. (5) Act regulating prize procedure, Mar. 3, 1863, id. 759. (6) Act regulating prize procedure and distribution, June 30, 1864, 13 Stat. 306, 314; act for the reorganization of the Navy and Marine Corps, Mar. 3, 1899, 30 Stat. 1004.

"The prize court of an ally can not condemn. Prize or no prize, is a question belonging exclusively to the courts of the country of the captor."

1 Kent, Comm. 103; Glass *v.* Sloop Betsey, 3 Dall. 6.

The United States have the right to order an uncondemned ship, captured by the subjects of a foreign power, out of their territory.

Lee, At. Gen., 1797, 1 Op. 78. See 8 Hamilton's Works, by Lodge, 304.

The owner, master, supercargo, and crew of a Haytien schooner filed a libel for a marine trespass in the United States district court for the southern district of New York against the owners of an American privateer. The evidence showed that the privateer seized, robbed, and plundered the schooner, and maltreated some of her crew, and then permitted her to proceed on her course. The name of the privateer was the *Scourge*, commanded by Samuel Eames. Objection was made to the jurisdiction of the court. Held, that the court had, independently of the provisions of the prize act of June 26, 1812, chapter 107, and by virtue of its general maritime jurisdiction, authority to entertain the suit. The court said that this point had been so repeatedly decided that it could not be permitted again to be judicially brought into doubt.

The Amiable Nancy (1818), 3 Wheat. 546.

Wheaton refers, in a footnote, to the appendix to volume 2 of his reports, Note 1, p. 5.

See, also, Jecker *v.* Montgomery, 13 How. 498.

When the courts have acquired jurisdiction of cases of maritime capture, the political department of the Government should postpone the consideration of questions concerning reclamations and indemnities until the judiciary has finally performed its functions in these cases.

Bates, At. Gen. 1864, 11 Op. 117.

"Your letter of the 2d instant has been received. You state your purpose to visit Europe this summer, and make enquiries respecting the treatment you would receive should war break out between England and Russia, and the British steamer on which you take passage be captured by a Russian cruiser.

"Neutral passengers in such a case, like neutral goods not contraband of war, found on board a belligerent vessel, are exempt from the jurisdiction of any prize court before which the vessel when captured might be taken. The captor would be under no obligation to transport either passengers or goods, being neutral, to any other port of debarkation than that where a competent prize court may sit.

"The Department usually abstains from answering hypothetical questions on points of international law which are usually treated of in the standard text-books, but the answer herein conveyed seems due to your courteous enquiry."

Mr. Bayard, Sec. of State, to Mr. Boya, May 5, 1885, 155 MS. Dom. Let. 286.

2. Possession of the Captured Property.

§ 1224.

See supra, § 1212.

A captor may, under imperative circumstances, sell the captured property and subject the proceeds to the adjudication.

Although it is the duty of the captor promptly to take the captured property before a prize court, yet he may, under imperative circumstances, sell it and subject the proceeds to adjudication.

Jecker *v.* Montgomery, 13 How. 498; Fay *v.* Montgomery, 1 Curtis, 266. See Lee, At. Gen. 1797, 1 Op. 78.

The American schooner *Fortitude*, having been captured by a French privateer under the Milan decree, was taken into the Dutch island of St. Martins and left there, while the prize master proceeded to the French island of Guadaloupe, with a copy of the schooner's papers, for the purpose of instituting proceedings for condemnation. Sentence of condemnation was pronounced, but in the meantime the Dutch governor of St. Martins, acting under the laws and constitution of the island and without authority from the tribunal at Guadaloupe, had sold the schooner and cargo; and a part of the cargo was brought to the United States, where a libel was filed for its recovery. In support of this claim it was urged that the jurisdiction of the prize court depended on the possession of the thing; that the sentence was a formal decision by which a forcible possession was converted into a civil right; and that, the possession being gone, there was nothing on which the sentence could operate. Held that, however just this reasoning might be where the possession of the captor had been divested by an adversary force, as in cases of recapture, rescue, or escape, it did not apply to the present case, in which the possession was not an adversary possession, but the possession of a person claim-

ing under the captor. "The sale," said the court, "was made on the application of the captor, and the possession of the vendee is a continuance of his possession. The capture is made by and for the government; and the condemnation relates back to the capture, and affirms its legality."

Williams *v.* Armroyd (1813), 7 Cranch, 423.

A prize court may take jurisdiction of property captured on a vessel, although the vessel was not brought under its cognizance.

The Advocate, Blatchf. Pr. Cas. 142.

Permission to a foreign public ship to land goods in our ports does not involve a pledge that, if illegally captured, they shall be exempted from the ordinary operation of our laws. Though property may be condemned in the courts of the captor while lying in a neutral port, it must be in the possession of the captor there at the time of the condemnation, for if the captor's possession has previously been divested the condemnation is invalid.

The Santissima Trinidad, 7 What. 283, affirming S. C., 1 Brock. 478.

"The Supreme Court of the United States has followed the English rule, and has held valid the condemnation, by a belligerent court, of prizes carried into a neutral port and remaining there, the practice being justifiable on the ground of convenience to belligerents, as well as neutrals; and though the prize was, in fact, within neutral territory, it was still to be deemed under the control or *sub potestate* of the captor, whose possession is considered as that of his sovereign. It may, also, be remarked, that the rule thus established by the highest courts of England and the United States, is sanctioned by the practice of France, Spain, and Holland. But several French publicists deny its legality. For the same reason that a prize court of the captor may condemn captured property while in a neutral port, it may condemn such property situate in any foreign port which is in the military possession of the captor. 'As a general rule,' says Chief Justice Taney, delivering the opinion of the Supreme Court, 'it is the duty of the captor to bring it within the jurisdiction of the prize court of the nation to which it belongs, and to institute proceedings to have it condemned. This is required by the act of Congress in cases of capture by ships-of-war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which, in all civilised countries, secures to the captured a trial in a court of competent jurisdiction, before he can be finally deprived of his property. But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell, or otherwise dispose of, the property,

before condemnation. And where the commander of a national ship can not, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel, or where the orders of his Government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States.' Wheaton, Hist. Law of Nations, 321; Jecker et al. *v.* Montgomery, 13 Howard R. 516; The Peacock, 4 Rob. 185; Hudson *v.* Guestier, 4 Cranch R. 293; Williams et al. *v.* Armoyd, 7 Cranch R. 523; The Arabella and Madeira, 2 Gallis. 368; The Henric and Maria, 6 Rob. 138, note; the Falcon, 6 Rob. 198; La Dame Cécile, 6 Rob. 257."

2 Halleck's Int. Law (3d ed., by Baker), 405.

3. Cases of Violated Neutrality.

§ 1225.

Property captured in violation of the neutrality of the United States (i. e., within territorial waters) or captured on the high seas by a cruiser fitted out or armed in violation of the neutrality of the United States, will, if retained or brought within the jurisdiction of the United States be judicially restored.

The Estrella, 4 Wheat. 298; the Santissima Trinidad, 7 Wheat. 283; the Gran Para, 7 Wheat. 471.
See, also, L'Invincible, 1 Wheat. 238, 244, note.

"There are two apparent exceptions to this exclusive jurisdiction of the prize courts of the captor's country over questions of prize: 1st, where the capture is made within the territory of a neutral state, and, 2nd, where it is made by a vessel fitted out within the territory of the neutral state. In either of these cases the judicial tribunals of the neutral state have jurisdiction to determine the validity of captures so made, and to vindicate its own neutrality by restoring the property of its own subjects, or of other states in amity with it. 'A neutral nation,' says the Supreme Court of the United States, 'which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own courts, of the validity of every capture made under their respective commissions, and to decide on every question of prize law which may arise in the progress of such discussion. But it is no departure from this obligation if, in a case in which a captured vessel be brought, or voluntarily comes *infra præsidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture. So long as a

nation does not interfere in the war, but professes an exact impartiality towards both parties, it is its duty, as well as right, and its safety, good faith, and honour demand of it, to be vigilant in preventing its neutrality from being abused, for the purpose of hostility against either of them. . . . In the performance of this duty, all the belligerents must be supposed to have an equal interest; and a disregard, or neglect of it, would inevitably expose a neutral nation to the charge of insincerity, and to the just dissatisfaction and complaints of the belligerent, the property of whose subjects should not, under such circumstances, be restored.' These are not, properly considered, exceptions to the general rule of prize jurisdiction, but are cases where the courts of a neutral state are called upon to interfere for the purpose of maintaining and vindicating its neutrality."

Halleck, Int. Law (3d ed., by Baker), II. 395–396.

4. Damages.

(1) right to.

§ 1226.

The court of admiralty of Pennsylvania was held to have jurisdiction of an action of damages brought by the captain of an American privateer against three other American privateers, their owners and commanders, for wrongfully taking from on the high seas a prize which he had there captured.

Talbot *v.* The Commanders and Owners of Three Brigs, High Court of Errors and Appeals of Pennsylvania, 1784, 1 Dall. 95. This was during the existence of the Articles of Confederation.

It was held that the trespassers were liable at least to the value of the captured vessel. (Ibid.)

"The sovereign is therefore held responsible to the state whose citizen the claimant is, that no injustice is done by the capture."

Dana's Wheaton, § 388, note 186, p. 483.

A court of admiralty (prize as well as instance) of one nation may carry into effect the decree of an admiralty court of another nation. And where the decree was for restitution, which could not be specifically enforced, it was held that damages might be decreed.

Penhallow *v.* Doane (1795), 3 Dall. 54.

The right to seize a vessel and send her in for further examination is not the right to spoliate and injure the property captured; and for any damage or spoliation the captors are answerable to the owners if the property be not condemned as prize.

Del Col *v.* Arnold (1796), 3 Dall. 333.

The facts in this case (Del. Col *v.* Arnold) were as follows: A French privateer had captured as prize, on the high seas, an American brig, called the *Grand Sachem* and owned by the defendant in error. At the time of taking possession of the brig, a sum of money was removed from her into the privateer; a prize master and several mariners were put on board of her, and were directed to steer for Charleston. On their way to Charleston a British frigate captured the privateer and gave chase to the prize; whereupon the prize master run her into shoal water, and there she was abandoned by all on board, except a sailor originally belonging to her crew, and a passenger. In a short time she drove on shore, was scuttled, and plundered. The money taken from her by the French privateer, and taken in the latter by the British frigate, had been condemned in Jamaica. A libel was filed in the district court of South Carolina by the defendant in error against Del Col and others, the owners of the French privateer. When the marshal came with process against the brig, she was in the joint possession of the custom-house officers and the privateer's men, the latter of whom prevented the execution of the process. Thereupon a ship and cargo, a prize to the privateer, lying in the harbor of Charleston, were attached by the libelant, and sold by agreement between the parties, and the proceeds paid into court, to abide the issue of the suit. The district court pronounced a decree in favor of libelant for the full value of the *Grand Sachem* and her cargo, with interest at 10 per cent from the day of capture; declared "that the proceeds of the ship *Industry* and her cargo, attached in this cause, be held answerable to that amount;" and directed that the defendant in error should enter into a stipulation to account to the plaintiffs in error for the money condemned as prize to the British frigate, or any part of it, that he might recover as neutral property. This decree was affirmed by the circuit court and in turn by the Supreme Court. So far as this case may be interpreted to lend support to the idea that the courts of a neutral can take cognizance of the legality of belligerent seizure, it has been severely criticized by the Supreme Court (L'Invincible, 1 Wheat. 238), and pronounced to be "glaringly inconsistent" with the acknowledged doctrine of that court.

The right to abandon and recover for a total loss depends upon the actual state of facts at the time of the offer to abandon, and not upon the state of the information then received. Hence where, on information of capture, an offer to abandon was made on July 19, 1806, but it was afterwards learned that a final sentence of restitution had been made on the 9th of the same month, it was held that the plaintiff could not recover for a total loss, though the actual restitution was not made till several hours after the offer to abandon.

Marshall *v.* Delaware Ins. Co. (1808), 4 Cranch, 202.

The commander of a United States ship of war is answerable in damages to persons injured in the execution by him of his instructions of the President of the United States which are not warranted

by law. Hence, it was held, in a case of capture under the act of February 9, 1799, that the captor was answerable in damages for seizing on the high seas a vessel *from* a French port, an act not warranting such seizure, though the instructions of the President authorized it to be made.

Little *v.* Barreme (1804), 2 Cranch, 170.

Whenever an officer seizes a vessel as prize he is bound to commit her to the care of a competent officer and crew, not because the original crew, when left on board, in case of seizure of the vessel of a citizen or neutral, are released from their duty without the assent of the master, but because of a want of the right to subject the crew of the captured vessel to the authority of the captor's officer. If a vessel were seized as prize and no one put on board but the prize-master, without any undertaking of the original ship's company to navigate her under his orders, the captor might be liable for any loss that followed from insubordination of the crew.

The Eleanor, 2 Wheat. 345.

The Isabella having been condemned by the Supreme Court of the United States as a British vessel falsely and fraudulently covered by Spanish documents, and consequently held to be good prize of war (6 Wheat. 1–100), and a claim having been made by Alonzo Benigno Munoz for reimbursement by Congress, and the Attorney-General having been requested by the Judiciary Committee to communicate information upon the subject, an answer was filed approving the reasons of the action of the executive and the judiciary.

Wirt, At. Gen., 1822, 1 Op. 536.
See Dana's Wheaton, § 388, note 186.

A captor may, under imperative circumstances, sell the captured property and subject the proceeds to the adjudication of a court of prize. The orders of the commander-in-chief not to weaken his force by detaching an officer and crew for the prize, or his own deliberate and honest judgment, exercised with reference to all the circumstances, that the public service does not permit him to make such detachment, will excuse the captor from sending in his prize for adjudication. But if no sufficient cause is shown to justify the sale, or if the captor has unreasonably neglected to bring the question of prize or no prize to an adjudication, the court may refuse to proceed to an adjudication and may award restitution, with or without damages, upon the ground of forfeiture of rights by the captor, although his seizure was originally lawful.

If the captor should neglect to proceed at all, the court may, upon a libel filed by the owner for a marine trespass, grant a motion to

proceed to adjudication in a court of prize, or refuse it and at once award damages. It is the duty of the captor, under the law of nations (affirmed by act of Congress), to send captured property in for adjudication by a court of his own country having competent jurisdiction.

Jecker *v.* Montgomery, 13 How. 498.

Wanton capture without probable cause subjects the captor to damages.

The Thompson, 3 Wall. 155; the Dashing Wave, 5 Wall. 170.

The British ship *Restormel*, laden with coal for the Spanish fleet, and which had followed the fleet from Porto Rico to Curaçao, was captured by a United States cruiser while endeavoring to enter the port of Santiago de Cuba, where the Spanish fleet then lay. Judge Locke, of the United States district court for the southern district of Florida, although he considered the ship liable to capture and her cargo, at least, to condemnation, being desirous to give the owners the benefit of every doubt, released the ship, but allowed nothing for freight or for costs or expenses. With reference to a claim which the master of the *Restormel* afterwards sought to make for the value of provisions supplied by him to the American prize crew, the Navy Department expressed the opinion "that the item of claim for provisions consumed by the prize crew should be considered, together with the claims for damages presented to the court, as a loss which resulted from the employment of the ship at the time of her capture and for which the captors were not liable."

Mr. Day, Sec. of State, to Sir Julian Pauncefote, British ambass., Aug. 6, 1898, MS. Notes to British Leg. XXIV. 276.

A claim was made by the master of the British vessel *E. R. Nickerson* for damages and losses consequent upon her alleged wrongful capture and detention by an American man-of-war. It appeared that the prize court, in discharging the vessel, decided that there was reasonable cause for capture. The Attorney-General held that, with the rendition of its decision, the jurisdiction of the prize court ended, but suggested that there appeared "to be ample jurisdiction in the Court of Claims to determine the case, either upon petition of the claimant or by reference and transmission from the Department of State." In this relation the Attorney-General called attention to section 1068 of the Revised Statutes of the United States, and to the authorities there cited in the margin, especially to the case of the United States *v.* O'Keefe, 11 Wall. 178.

Mr. Hay, Sec. of State, to Sir Julian Pauncefote, British ambass., Dec. 6, 1898, No. 1279, MS. Notes to British Leg. XXIV. 397.

See, also, same to same, No. 1409, April 17, 1899, id. 498.

The court having ordered in The Paquete Habana, 175 U. S. 677, that the proceeds of the vessels and cargoes should be restored to the claimants with compensatory and not punitive damages and costs, and it appearing that the damages allowed were excessive, the cases were remanded to the district court for further proceedings. It was also ordered that, under the circumstances of the case, the decree should be entered against the United States and not against the captors individually.

The Paquete Habana (1903), 189 U. S. 453.

(2) MEASURE.

§ 1227.

In a suit by the owners of captured property, lost through the fault and negligence of the captors, the value of the captured vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, were allowed in ascertaining the damages.

The Anna Maria, 2 Wheat. 327.

A vessel and cargo having been condemned under the nonimportation laws, and a question having arisen as to whether damages should be computed from the date of the bond given for the appraised value of the cargo, or from the decree of condemnation of the district court, it was held "that the damages should be computed at the rate of six per centum on the amount of the appraised value of the cargo, including interest from the date of the decree of condemnation in the district court."

The Diana (1818), 3 Wheat. 58.

On an illegal capture the original wrongdoers may be made responsible beyond the loss actually sustained in case of gross and wanton outrage; but the owners of the offending privateer, who are only constructively liable, are not liable for punitive damages.

The Amiable Nancy, 3 Wheat. 546.
See Talbot *v.* Three Brigs, 1 Dall. 95.

If property has been wrongfully brought into the United States, and the duty paid by a wrongful captor, and a decree of restitution is made after a sale, the captor is liable on such a decree only for the balance, without interest, after deducting the amount paid as duties.

The Santa Maria, 10 Wheat. 431.

(3) PROBABLE CAUSE.

§ 1228.

See supra, § 1209.

Prize courts properly deny damages or costs where there has been probable cause for seizure. Probable cause exists where there are circumstances sufficient to warrant suspicion, though not sufficient to warrant condemnation.

The Thompson, 3 Wall. 155.
See, also, The Dashing Wave, 5 Wall. 170; Lushington, Prize Law, §§ 25, 94.

A Spanish vessel seized as a prize on April 22, 1898, when there was probable cause for the seizure, but which was exempted from seizure and condemnation by the subsequent proclamation of April 26, is not entitled to damages or costs on restitution. Decree (D. C. 1898) 87 Fed. Rep. 927, reversed.

The Buena Ventura *v.* United States, 175 U. S. 384.

"In all prize cases where claims for indemnity were presented to the Department of State by foreign governments on behalf of their subjects for seizures made by our war vessels [during the war with Spain], the rule adopted was to reject claims for indemnity in cases where the prize court had found probable cause, and to refer to the Court of Claims all claims for indemnity in cases where probable cause may not be found."

Mr. Hay, Sec. of State, to Attorney-General, Jan. 5, 1900, 242 MS. Dom. Let. 133.

III. *JURISPRUDENCE.*

1. PRINCIPLES OBSERVED.

§ 1229.

On questions of belligerent and neutral rights the Supreme Court will recognize the decisions of the courts of every country, so far as they are founded on a law common to every country, not as authorities, but with respect. The decisions of the courts of every foreign civilized land show in a given case how the law of nations is understood in such lands, and will be considered in adopting the rule which is to prevail in the United States.

Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191.

"Without taking a comparative view of the justice or fairness of the rules established in the British courts, and of those established in the courts of other nations, there are circumstances not to be excluded

from consideration, which give to those rules a claim to our attention that we can not entirely disregard. The United States having, at one time, formed a component part of the British Empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it.

"It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts, will be considered as forming a rule for the American courts, or that any recent rule of the British courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations."

Marshall, C. J., Thirty Hogsheads of Sugar *v.* Boyle (1815), 9 Cranch, 191, 198.

"I remember with pleasure that I once heard you assert this principle [free ships free goods], but in Congress and in the Supreme Court I am sorry to say that it was almost friendless. Such is the influence of England. We read none but English books, adopt none but English ideas of law and politics."

Mr. Ingersoll to Mr. Madison, July, 1814, Meigs's Life of Charles Jared Ingersoll, 325.

The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country. By this law the definition of prize goods is that they are goods taken on the high seas, jure belli, out of the hands of the enemy.

Schooner Adeline, 9 Cranch, 244.

In 5 Wheat., App. p. 52, Wheaton gives a note on prize law, which embraces:

1. Extract from the Consolato del Mare. Chap. CCLXXIII., CCLXXXVII. P. 54.
2. Extracts from the Code des Prises. Articles relatifs aux prises. Extraits de l'Ordonnance de Charles VI. sur le faict de l'Admiraulté, of Dec. 7, 1400. P. 62. Articles Extraits de l'Edit, concernant la Jurisdiction de Admiranté de France, March, 1584. P. 65.
3. Sur la Navigation, Ordonnance du Roi de Suede. Feb. 10, 1715. P. 72.
4. Ordinance of the King of Denmark, Norway, the Vandals, the Goths, etc., Sept. 23, 1659. P. 75.
5. Extracts from the French Ordinance of 1681. Liv. III., Tit. IX., § 2. Des Prises. P. 80.
6. Réglement du 17 Février 1694, concernant les passeports accordés aux vaisseaux ennemis par les Puissances neutres. P. 85.
7. Ordonnance du 12 Mai 1696, touchant la manière de juger les vaisseaux qui échouent, ou qui sont portés aux côtes de France par tempête ou autrement. P. 86.

8. Extrait du Règlement du 21 Octobre 1744, concernant les prises faites sur mer, et la navigation des vaisseaux neutres pendant la guerre. P. 87.
9. Règlement du 26 Juillet 1778, concernant la navgation des bâtimens neutres en temps de guerre. P. 88.
10. Danish Prize Instructions of 1810. P. 91.
11. Ordinances of Congress, Nov. 25, 1775, p. 103; Dec. 5, 1775, p. 104; Jan. 6, 1776, p. 105; March 23, 1776, p. 106; April 2, 1776, p. 106; April 3, 1776, p. 107; Nov. 15, 1776, p. 108; May 2, 1780, p. 109, and other ordinances to p. 128.
12. British Statutes and Prize Instructions. P. 129.

Prize courts are subject to the instructions of their own sovereign. In the absence of such instructions their jurisdiction and rules of decision are to be ascertained by reference to the known powers of such tribunals and the principles by which they are governed under the public law and the practice of nations.

The Amy Warwick, 2 Sprague, 123.

Prize courts are tribunals of the law of nations, and the jurisprudence they administer is a part of that law. They deal with cases of capture as distinguished from seizures; their decrees are decrees of condemnation, not of forfeiture; they judge the character and relations of the vessel and cargo, and not the acts of persons.

Speed, At. Gen., 1866, 11 Op. 445.

The equitable principle of prescription is applied by prize courts.

Sir W. Scott, The Mentor, 1 C. Rob. 179.

"All law is resolvable into general principles: The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not *new*, nor is it justly chargeable with being *an innovation* on the ancient law; when, in fact, the court does nothing more than apply old principles to new circumstances."

Lord Stowell, The Atalanta (1808), 6 C. Rob. 440, 458.

2. Liens.

§ 1230.

Prize—Lien on goods.

A claim was made by an American merchant to certain goods which were libeled as enemy's property, and which were shipped by British merchants on their own account and risk. The claimant set up a lien (1) on some of the

goods on the ground of an advance made to the shippers by his agent in Great Britain in consideration of the consignment; and (2) on other goods on the ground that they were shipped to him in virtue of a general balance of account due to him as the shippers' factor. The court, Washington, J., said that the doctrine of a factor's lien for a balance of account, or of a consignee's lien for advances, was unknown in the prize courts, unless in special cases where the lien was imposed by a general law of the mercantile world, independently of any contract between the parties, as, for example, in the case of freight allowed on an enemy's goods seized in the vessel of a friend. The court therefore refused to allow further proof of the claimant's allegations.

Marshall, C. J., was absent. Livingston, J., dissented, saying that he could concur in the condemnation of the property only as subject to the claimant's lien.

The Frances (1814), 8 Cranch, 418.

That capture, *jure belli*, overrides previous liens; see, also, The Hampton, 5 Wall. 372; The Battle, 6 Wall. 498.

Under the principles of international law, mortgages on vessels captured jure belli are to be treated only as liens subject to be overridden by the capture. The act of March 3, 1863, "to protect the liens upon vessels in certain cases," does not refer to captures jure belli, or modify the law of prize in any respect.

The Hampton, 5 Wall. 372.

The right of capture acts on the proprietary interest of the thing captured at the time of capture, and is not affected by the secret liens or private engagements of the parties.

The Carlos F. Roses, 177 U. S. 655.

3. Freight.

§ 1231.

A vessel sailed from London to Amelia Island under a charter party by which she was to carry the outward cargo free, but was to receive freight for the return cargo at a rate greater than would have been paid if the return voyage had had no connection with the outward. On her outward voyage she was captured by a United States armed vessel, and her cargo was condemned as enemy property; but an allowance was made for freight to Amelia Island, as on a quantum meruit. The claimant of the cargo and the master of the ship having appealed, the latter contended that the outward and return voyage should be treated as one, and freight allowed as stipulated in the charter party. Marshall, C. J., delivering the opinion of the court,

held that the outward and return voyages were to be considered as distinct, and said: "The court can perceive no principle on which a cargo to be delivered freight free can be burthened with the freight agreed to be paid on a cargo to be afterwards taken on board. In this case, too, no sum in gross is to be paid for freight, but a sum depending on the quantity and quality of the return cargo. . . . If the claim to freight on the return voyage, not commenced at the time of capture, can not be sustained, the court perceives no other rule which could have been adopted than that which the district court did adopt. Freight has been allowed on the whole voyage to Amelia Island, as on a quantum meruit. The captors not having appealed, no question can arise on the propriety of having allowed the ship any freight whatever. The court, however, will say that it is satisfied with the allowance which is made, and which is certainly an equitable one."

The Société (1815), 9 Cranch, 209, 212.

A neutral vessel, chartered for a voyage from London to St. Michaels, thence to Fayal, thence to St. Petersburg or any other port on the Baltic, and back to London, at a freight of 1,000 guineas, was captured on her way from London to St. Michaels and brought into the United States, where part of the cargo was condemned and part restored. Held, that freight was chargeable upon the whole cargo, the restored as well as the condemned.

The Antonia Johanna (1816), 1 Wheat. 159.

No question was raised below as to whether the whole freight for the whole voyage should be allowed, or only a pro rata freight, though the whole freight was decreed. Had the question been raised, it would, said the court, "have deserved grave consideration."

"It has been held, that the charter party is not the measure by which the captor is, in all cases, bound, even where no fraud is imputed to the contract itself. When, by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not, necessarily, bound to that inflamed rate of freight. When no such circumstances exist, when a ship is carrying on an ordinary trade, the charter party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. But a very different rule is to be applied, when the trade is subjected to very extraordinary risk and hazard, from its connexion with the events of war, and the redoubled activity and success of the belligerent cruisers. 5 Rob. 82. The Twilling Riget."

The Antonia Johanna (1816), 1 Wheat. 159, note by the reporter, p. 170.

The law of nations does not prohibit the carrying of enemies' goods in neutral vessels; so far from so doing, upon the condemnation of the

goods, the vessel is entitled to freight. But if a neutral endeavors, by false appearances, to cover the property of a belligerent from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerent whom he thus endeavors to protect, and is a fraud on the neutrality of his own government and upon the rights of the belligerent.

Schwartz *v.* Insurance Company of North America, 3 Wash. C. C. 117.

IV. *PROCEDURE.*

1. General Rules.

§ 1232.

"We have the honor 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 jurisdiction.

"The general principles of proceeding can not, 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 Ryder, 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 can not 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 and 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 further proof thereof.

"'A claim of ship 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 colorable 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 can not 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 misbehavior 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 behavior, 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 show 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 in 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 a 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 show 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 intrusted; 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 instruction 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 registry to transmit a copy of all the proceedings of the inferior courts; 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 showing the instrument under seal, and delivering a note or copy of the contents. If the party can not be found, and the proctor will not accept the service, the instrument is to be served '*viis and 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 proceedings can not 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 further 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 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* pur-

pose 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."

Letter of Sir W. Scott and Sir J. Nicholl to Mr. Jay, min. to England, Sept. 10, 1794, Am. State Papers, I. 494. Imperfectly given in Halleck's Int. Law (3d ed., by Baker), II. 421.

Wheaton, in an appendix to the first volume of his reports, p. 494, gives a note on the practice in prize cases.

In an appendix to the second volume of his reports, he gives an "Additional Note on the Principles and Practice in Prize Causes;" and, at p. 81 of this appendix, he gives, as note iii, the Standing Interrogatories.

See, also, Dana's Wheaton, § 388, note.

As to the compensation of prize commissioners and United States marshals in prize cases, see The Adula (1901), 127 Fed. Rep. 849.

"No proceedings can be more unlike than those in the courts of common law and in the admiralty. In prize causes, in an especial manner, the allegations, the proofs and the proceedings are, in general, modelled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidable impose. The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country."

The Adeline (1815), 9 Cranch, 244, 284.

An account of proceedings in American prize courts is given in Kaltenborn's Seerecht, II. 389.

See, also, as to the practice of prize courts, articles by Prof. Bulmerincq, of Heidelberg, in Rev. de Droit Int. X. 185, 384, 595; XI. 152, 320, 561; XIV. 114.

In admiralty a party is not restricted, as at common law, to a recovery strictly secundum allegata et probata. Hence a court of admiralty, having jurisdiction of the case, on a libel asking simply for the condemnation of the property as prize, "will exert its authority over all the incidents. It will decree a restoration of the whole or of a part; it will decree it absolutely, or burthened with salvage, as the circumstances of the case may require: and whether the salvage be held a portion of the thing itself, or a mere lien upon it, or a condition annexed to its restitution, it is an incident to the principal

question of prize, and within the scope of the regular prize allegation."

The Adeline (1815), 9 Cranch, 244, 285.

In every case of a proceeding for condemnation upon captures made by the public ships of war of the United States, whether the same be cases of prize strictly jure belli, or upon public acts in the nature of captures jure belli, the proceedings are in the name and authority of the United States.

The Palmyra, 12 Wheat. 1.

Prize proceedings should be in the name of the United States; but if conducted in the name of the captors until the Supreme Court is reached, they will not be reversed on that ground.

Jecker *v.* Montgomery, 18 How. 110.

"Where merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel, but to allow the party to assert his rights in a new allegation." For that purpose a cause may be remanded to the circuit court with directions to allow an amendment of the libel.

The Adeline (1815), 9 Cranch, 244, 284.

A test affidavit ought to state that the property at the time of shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant, but an irregularity in this respect is not fatal.

A test affidavit by an agent is not sufficient if the principal be within the country and within a reasonable distance from the court. But if test affidavits liable to such objections have been acquiesced in by the parties in the courts below, the objections will not prevail in this court.

The Adeline (1815), 9 Cranch, 244.

In admiralty proceedings by libel for an offense under the non-importation act of March 1, 1809, it suffices to describe the offense in the words of the law and to set forth the facts in such manner that if they be true the case is within the statute. Technical nicety is not required in such proceedings.

The Samuel (1816), 1 Wheat. 9.

Where an inspection and comparison of original documents is material to the decision of a prize case, the Supreme Court of the United States will order the original papers to be sent up from the court below.

The Elsineur (1816), 1 Wheat. 439.

An agreement by the parties to a prize cause will, like an agreement made in a court of common law or of chancery, be set aside, if made clear under a clear mistake.

The Hiram (1816), 1 Wheat. 440.

The commander of a French privateer, whose crew had been unlawfully enlisted in the United States, captured on the high seas a Spanish brig with a cargo of slaves, and, after taking out and selling fourteen slaves, conducted the brig and the rest of the slaves towards Belize. On the way a gale was encountered, and the captor then proceeded to New Orleans, arriving there in safety. The Spanish owner having libeled the brig and the remaining slaves for restitution, and restitution having been ordered, the captor claimed salvage. His claim was denied. Washington, J., delivering the opinion of the court, said that nothing could be more remote from the intentions of the captor than to render a service to the brig and her cargo; that he committed a spoliation of the cargo by selling some of the slaves, and intended to smuggle the rest on some part of the coast; that it would ill become an American court to reward a person who had thus violated the laws of the United States in one instance and meditated a violation of them in another; and that it would be still worse to reward him at the expense of the injured Spaniard.

The Alerta *v.* Moran (1815), 9 Cranch, 359.

With reference to a complaint of the British consul at Key West, Florida, that the prize master in charge of the British ship *Twickenham* had refused to permit him to come on board of that vessel, the Department of State explained that the refusal in the first instance was due to a misunderstanding, and that the consul feeling aggrieved afterwards declined to come on board when allowed to do so. The Department of State added that reasonable facilities would be afforded for the visits of consular officers to prize ships when such ships were brought into court.

Mr. Day, Sec. of State, to Sir Julian Pauncefote, British ambass., personal, June 18, 1898, MS. Notes to British Leg. XXIV. 225.
See, also, same to same, No. 1038, May 31, 1898, id. 208.

2. Examination in Preparatorio

§ 1233.

If, upon the hearing on the ship's papers and the evidence taken in preparatory, the property appears to belong to enemies, it is immediately condemned; but, if its national character appears doubtful, or even neutral, and no claim is interposed, the court will postpone

the cause for a year and a day after the proceedings were begun, in order that an opportunity may be afforded to claimants to appear.

The Harrison (1816), 1 Wheat. 298.

"It is the established rule in courts of prize, that the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured ship. On this account it is the duty of the captors, as soon as practicable, to bring the ship's papers into the registry of the district court, and to have the examinations of the principal officers and seamen of the captured ship taken before the district judge, or commissioners appointed by him, upon the standing interrogatories. It is exclusively upon these papers and the examinations, taken *in preparatorio*, that the cause is to be heard before the district court. If, from the whole evidence, the property clearly appear to be hostile, or neutral, condemnation or acquittal immediately follows. If, on the other hand, the property appear doubtful, or the case be clouded with suspicions or inconsistencies, it then becomes a case of farther proof, which the court will direct or deny, according to the rules which govern its legal discretion on this subject. Farther proof is not a matter of course. It is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith. But if the parties have been guilty of gross fraud or misconduct, or illegality, farther proof is not allowed; and under such circumstances, the parties are visited with all the fatal consequences of an original hostile character. It is essential, therefore, to the correct administration of prize law, that the regular modes of proceeding should be observed with the utmost strictness; and it is a great mistake to allow common law notions in respect to evidence or practice, to prevail in proceedings which have very little analogy to those at common law.

"These remarks have been drawn forth by an examination of the present record. The court could not but observe with regret that great irregularities had attended the cause in the court below. Neither were the ship's papers produced by the captors, nor the captured crew examined upon the standing interrogatories. Witnesses were produced by the libellants and the claimant indiscriminately at the trial, and their testimony was taken in open court upon any and all points to which the parties chose to interrogate them, and upon this testimony and the documentary proofs offered by the witnesses, the cause was heard and finally adjudged. In fact there was nothing to distinguish the cause from an ordinary proceeding in a mere revenue cause *in rem*.

"This court can not but watch with considerable solicitude irregularities, which so materially impair the simplicity of prize proceedings, and the rights and duties of the parties. Some apology for

them may be found in the fact, that from our having been long at peace, no opportunity was afforded to learn the correct practice in prize causes. But that apology no longer exists; and if such irregularities should hereafter occur it may be proper to adopt a more rigorous course, and to withhold condemnation in the clearest cases, unless such irregularities are avoided or explained. In the present case the first fault was that of the captors; and if the claimant had suffered any prejudice from it, this court would certainly restore to him every practicable benefit. But in fact no such prejudice has arisen. The claimant has had, in the court below, the indulgence and benefit of farther proof and of collateral aids to verify the truth of his claim; and he stands at least upon as favourable a ground to sustain it as if the cause had been conducted with the most scrupulous form."

The Dos Hermanos (1817), 2 Wheat. 76, 79, Mr. Justice Story, delivering the opinion of the court.

"It is a general rule of the prize law, not to admit claims which stand in entire opposition to the ship's papers, and to the preparatory examinations, where the voyages have originated after the war. The rule is founded upon this simple reason, that it would open a door to fraud in an incalculable extent, if persons were not required to describe their property with perfect fairness. The rule, however, is not inflexible; it yields to cases of necessity, or where, by the course of the trade, simulated papers become indispensable, as in a trade licensed by the state with the public enemy."

Mr. Justice Story, delivering opinion of the court, in The Dos Hermanos (1817), 2 Wheat. 76,90.

It is exclusively upon the proofs taken in preparatorio that the cause is to be heard before the district court. If, from the whole evidence, the property clearly appear to be hostile or neutral, condemnation or acquittal immediately follows. If the property appear doubtful, or the case be clouded with suspicions or inconsistencies, further proof may, in the discretion of the court, be taken. If the parties have been guilty of gross fraud or misconduct, or illegality, further proof is not allowed, and the parties are visited with all the fatal consequences of an original hostile character.

The Pizarro, 2 Wheat. 227.

Frankness and truth are especially required of the officers of captured vessels when examined in preparation for the first hearing in prize.

The Springbok, 5 Wall. 1.

3. Order for Further Proof.

§ 1234.

Further proof was refused where it contradicted, in a "suspicious" manner, the original evidence, and the manner in which it was obtained or produced was "mysterious" and unexplained.

The Frances (1814), 8 Cranch, 335.

The original evidence having left the transaction in doubt, and an order for further proof having been made, the affidavits thereupon produced referred to certain letters which were not exhibited. On a promise by counsel for the claimant to produce the correspondence, and such other proof as would be entirely satisfactory to the court, the case was ordered to stand for further proof.

The Frances (1814) 8 Cranch, 348.

The question having arisen as to whether certain goods should be condemned in which funds had been invested for the alleged purpose of withdrawing them from Great Britain, the claimant was allowed to make further proof on certain points. No question was decided except that of making further proof.

The Mary (1814), 8 Cranch, 388.

The omission of papers, by inadvertence or mistake, does not preclude an order for further proof.

The St. Lawrence (1814), 8 Cranch, 434.

The intentional suppression of papers is a ground for refusing further proof.

The St. Lawrence (1814), 8 Cranch, 434.

The master of an American ship, which was alleged to have been captured by an American privateer, swore that he had never considered his ship as having been taken as prize, the facts being that he was overhauled by an armed schooner under English colors, whose commander represented her to be a British privateer and requested him to take a man on board and treat him as a gentleman until the ship arrived in the United States. To this he consented. The master's testimony was confirmed by the mate, who added, that the man who was put on board conducted himself not as a prize master, but simply as a passenger. A seaman testified that he never knew that the ship was seized as prize till after her arrival within the Boston light-house. Another seaman testified that the ship was met by an armed schooner under English colors, which obliged the mate to come on board, and then sent him back with a man who next day

declared himself to have been put on board as a prize master, saying that if the ship should fall in with a French vessel he should be obliged to show his commission. This seaman further testified, however, that he did not know that the vessel had been made a prize of till her arrival at Boston. The alleged prize master swore that he was present at the capture, and that the master of the ship was ordered aboard the schooner with his papers; and that he (the prize master) was then directed by his commander, in the presence of the master, to go on board of the ship, but that the master was to keep possession of the ship's papers and navigate her into port. He further testified that the suggestion that he should be represented to be a passenger proceeded from the master of the ship, with a view to a possible meeting with a British cruiser. Washington, J., delivering the opinion of the court, said that the facts necessary for deciding upon the validity of the capture were not sufficiently clear, and that it would be proper to order further proof, to be furnished by the captors and the claimants, with respect to all the circumstances of the capture.

The Grotius (1814), 8 Cranch, 456.

Where the court is satisfied from the evidence in the case that property ought to be restored, it will not require further proof of the claimant's right.

The Mary and Susan (1816), 1 Wheat. 5.

A cargo, condemned as British property, was claimed to be Swedish and neutral, the appearance of British ownership being, as was alleged, simulated for the purpose of avoiding capture. The court, however, refused a motion for further proof to show that the property was really neutral, saying that the evidence, as it stood, was not susceptible of any satisfactory explanation, and that the captors had made out "a clear title" to the cargo.

Cargo of the ship Hazard *v.* Campbell (1815), 9 Cranch. 205.

Further proof will be allowed where the nationality and ownership of recaptured goods do not distinctly appear.

The Adeline (1815), 9 Cranch, 244.

The court will order further proof in a revenue or instance cause, where the evidence is so contradictory and ambiguous as to render a decision difficult.

The Samuel (1816), 1 Wheat. 9.
See, also, The Venus (1816), 1 Wheat. 112.

It is a general rule in prize causes that the decision should be prompt, and should be made, unless some good reason for departing from the rule exist, on the papers and testimony afforded by the cap-

tured vessel, or which can be invoked from the papers of other vessels in possession of the court. But in cases of joint and collusive capture, the usual simplicity of the prize proceedings is necessarily departed from; and where, in these cases, there is the least doubt, other evidence may be resorted to.

The George, 1 Wheat. 408.

In a certain case in which the claimant had the benefit of further proof in the court below, and upon the evidence as it then stood there seemed to be "no fair and reasonable explanation" of the doubts cast upon his claim of an exclusive proprietary interest in the property, the Supreme Court declined to make an order for further proof, Mr. Justice Story, who delivered the opinion of the court, saying:

"We are not satisfied that it would be a safe or convenient rule, unless, under very special circumstances, to allow parties who have had the benefit of plenary proof in the court below, to have an order for farther proof in this court upon the same points. Much less should we incline to allow it in a case of pregnant suspicion, where the evidence must come from sources tainted with so many unwholesome personal interests, and so many infusions of doubtful credit."

The Dos Hermanos (1817), 2 Wheat. 76, 98.

"The proceedings in the district court were certainly very irregular; and this court can not but regret that so many deviations from the correct prize practice should have occurred at so late a period of the war. The ship's papers ought to have been brought into court, and verified, on oath, by the captors, and the examinations of the captured crew ought to have been taken upon the standing interrogatories, and not *viva voce* in open court. Nor should the captured crew have been permitted to be re-examined in court. They are bound to declare the whole truth upon their first examination; and if they then fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give colour to their former statements after counsel has been taken, and they know the pressure of the cause. Public policy and justice equally point out the necessity of an inflexible adherence to this rule.

"It is upon the ship's papers, and the examinations thus taken in preparatory, that the cause ought, in the first instance, to be heard in the district court; and upon such hearing it is to judge whether the cause be of such doubt as to require farther proof; and if so, whether the claimant has entitled himself to the benefit of introducing it. If the court should deny such order when it ought to be granted, or allow it when it ought to be denied, and the objection be taken by the party and appear upon the record, the appellate court can administer the proper relief. If, however, evidence in the nature of farther proof be introduced, and no formal order or objec-

tion appear on the record, it must be presumed to have been done by consent of parties, and the irregularity is completely waived. In the present case, no exception was taken to the proceedings or evidence in the district court; and we should not, therefore, incline to reject the farther proof, even if we were of opinion that it ought not, in strictness, to have been admitted."

The Pizarro (1817), 2 Wheat. 227, 240.

Affidavits to be used as farther proof in causes of admiralty and maritime jurisdiction in this court must be taken by a commission.

The London Packet (1817), 2 Wheat. 371.

A bill of lading, consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence to entitle a claimant to restitution; but is sufficient to lay a foundation for the introduction of further proof. A bill of lading gives the person to whom it is addressed a right to receive the goods, and lays the foundation for further proof that the property is in him. To admit such proof, in the absence of an invoice or letter of advice, does not endanger the fair rights of the belligerent. These papers themselves are so easily prepared that no fraudulent case would be without them.

The Friendschaft (1818), 3 Wheat. 14, 48.

"The farther proof in the claims 108, 109, 141, and 122, consists of affidavits to the proprietary interest of the claimants; of copies of letters, in some instances ordering the goods, and in others advising of their shipment; and of copies of invoices—all properly authenticated. This proof was satisfactory, and the order for restitution made upon it was the necessary consequence of its admission."

The Friendschaft (1818), 3 Wheat. 14, 49.

"The French prize practice not allowing farther proof, but acquitting or condemning upon the original evidence consisting of the papers found on board and the depositions of the captors and captured. The only exception to this rule is, where the papers have been spoliated by the captors, or lost by shipwreck, or other inevitable accidents. Valin, Traité des Prises, ch. 15, n. 7. But the Spanish law admits of farther proof in case of doubts arising upon the original evidence. De Habreu, part 2, ch. 15."

Note by Wheaton, The Friendschaft, 3 Wheat. 14, 50.

It is a relaxation of the rules of the prize court to allow time for further proof in a case where there has been a concealment of material papers.

The Fortuna (1818), 3 Wheat. 236.

The carpenter and cook of a captured vessel asserted that she was taken while at anchor about a mile from a neutral shore. The captors testified that she lay from four to five miles from shore. Counsel for the claimant contended that the captors, whose testimony had been taken on an order for further proof, were not competent witnesses, by reason of their interest. Mr. Justice Story, delivering the opinion of the court, said that, upon the original hearing, no evidence was admissible but that of the ship's papers and the preparatory examinations of the captured crew; but, upon an order for further proof, where the benefit of the order was allowed to both parties, other testimony was clearly admissible. Such was the ordinary course of the prize courts, especially where it became material to ascertain the circumstances of the capture, in which case the facts lay within the knowledge of both parties, and the objection of interest applies equally to both. Unlike the courts of common law, prize courts consider no one incompetent on the ground of interest. They admit the testimony, subject to all exceptions as to its credibility.

The Anne (1818), 3 Wheat. 435.

An order for further proof in prize cases is always made with extreme caution, and only when the ends of justice clearly require it. A claimant forfeits the right to ask it, by any guilty concealments in the case.

The Gray Jacket (1866), 5 Wall. 342.

Regularly, in cases of prize, no evidence is admissible on the first hearing, except that which comes from the ship's papers or the testimony of persons found on board. If, upon this evidence, the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or on motion and proper grounds shown, to introduce additional evidence under an order for further proof. If, preparatory to the first hearing, testimony was taken of persons not in any way connected with the ship, such evidence is properly excluded, and the hearing takes place on the proper proofs.

The Sir William Peel (1866), 5 Wall. 517.

In the case of a vessel captured by a United States cruiser during the war with Spain, the master, after the preparatory proofs were taken, appeared on behalf of the owners and made a claim to the vessel and moved for leave to take further proof on the ground that, although a majority of the stock of the Spanish corporation, to which the vessel ostensibly belonged, was registered in the names of Spanish subjects and only a minority in the names of British subjects, one of the latter had possession of all the certificates of stock, in consequence

of which he was, under the charter of the company, the sole beneficial owner of the steamer; that the transfer from British to Spanish registry was made solely with a view to facilitate her engaging in commerce with the Spanish colonies; that it was the intention of the British stockholders to restore her to the British registry and flag whenever the trade might be disturbed; and that the steamer was insured by British underwriters, by whom, if she should be condemned, the loss would be borne. The court below refused to allow further proof to be taken, and this ruling was affirmed by the Supreme Court. The vessel, said the Supreme Court, belonged to a Spanish corporation, had a Spanish registry, was sailing under the Spanish flag and a Spanish license, and was officered and manned by Spaniards. Nothing was better settled than that she must, under such circumstances, be deemed a Spanish ship and treated accordingly. When the stockholders elected to take the benefit of the Spanish navigation laws, they must be held also to have elected to rely on the protection of the Spanish flag. The alleged intention to restore the vessel to British registry, if war should render the change desirable, could not be regarded, since it had not been carried into effect when she was captured. The Spanish ownership having been made out, the facts that the stock of the corporation belonged legally or equitably to British subjects, and that the loss would eventually be borne by British underwriters were, said the court in conclusion, immaterial.

The Pedro (1899), 175 U. S. 354.

Citing Story, Prize Courts (Pratt's ed.), 60, 66; The Friendschaft, 4 Wheat. 105; The Ariadne, 2 Wheat. 143; The Cheshire, 3 Wall. 231; Hall, Int. Law, § 169.

An order for further proof, in case of the libel of a vessel as a prize for trying to violate a blockade, is not an abuse of discretion, where the circumstances created a suspicion of an intention to enter the blockaded port. Decree (D. C. 1898) 89 Fed. Rep. 510, reversed.

The Newfoundland (1900), 176 U. S. 97.

If an examination of the ship's papers and the testimony of the crew, taken in preparatorio, make a case for condemnation, an order for further proof is only made where the interests of justice clearly require it. Held, in this case that there was no error in denying the motion of the claimant for further proofs.

The Adula (1900), 176 U. S. 361.

4. Appeals.

§ 1235.

In admiralty an appeal suspends a sentence of condemnation altogether, and if, pending the appeal, the law under which the sentence was pronounced be repealed, no sentence of condemnation can be pronounced except under special provision of statute.

Yeaton *v.* United States (1809), 5 Cranch, 281.

The Supreme Court of the United States will not entertain a new claim of persons to share as captors in property condemned as prize, but will remand the cause to the circuit court, where the claim must be made.

The Societe (1815), 9 Cranch, 209.

As to appeals in prize cases, see Revised Statutes, secs. 695, 1006, and 1009. (Mr. Day, Sec. of State, to Mr. Cambon, French amb., Aug. 23, 1898, For. Rel. 1898, 806.)

By the fourth article of the treaty with France, of 1800, it was provided that "property captured, and not yet definitely condemned . . . shall be mutually restored." It was held that a decree of condemnation by a circuit court, from which an appeal had been taken to the Supreme Court, was not a definitive condemnation within the meaning of the treaty.

United States *v.* Schooner Peggy, 1 Cranch, 103.

Where a vessel has been lawfully condemned and sold as prize of war, the reversal of the decree of condemnation by a higher court does not disturb the title and rights of the purchasers, but only operates upon the fund produced by the sale of the vessel.

Griggs, At. Gen., Feb. 17, 1900, 23 Op. 29.

5. Sale of Captured Property.

§ 1236.

It is reasonable, as applicable to all nations, to permit a portion of a prize cargo to be sold under the superintendence of our public officers, for the necessary reparation of the prize ship. As to France, it is within the nineteenth article of the treaty of 1778.

The prize ship should be permitted to sail whenever the captors wish, and a deception practiced on the revenue officers, as to the goods, affords no ground for detaining it.

Lee, At. Gen., 1796, 1 Op. 67.

Certain goods, captured by an American privateer, were, with the consent of a neutral claimant, sold under an order of court. Subsequently the neutral's title having been proved, the proceeds were ordered to be paid to him without payment of duties. On appeal, Story, J., delivering the opinion of the court, said: "Where goods are brought by superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law, as necessarily to attach the right to duties. If, however, such goods are afterwards sold or consumed in the country, or incorporated into the general mass of its property, they become retroactively liable to the payment of duties. In the present case, if the goods had been specifically restored, and afterwards withdrawn from the United States by the claimants, they would have been exempt from duties. But having been sold, by order of the court, for the general benefit, the duties indissolubly attached, and ought to have been deducted from the proceeds by the courts below. The decree in this respect must be reversed."

The Concord (1815), 9 Cranch, 387.
See, also, The Nereide, 1 Wheat. 171.

Certain goods captured as prize were sold, before condemnation, under an order of court to which the claimant assented, with a reservation of all his rights. Under the prize act of June 26, 1812, and that of August 2, 1813, a deduction of 33⅓ per cent was allowed on "all goods captured from the enemy, and made good and lawful prize of war, etc., and brought into the United States." Held, that this did not apply to goods like those in question, which, though sold, were ultimately ordered to be restored; but that the goods so sold were chargeable with the same rate of duties as goods imported in foreign bottoms.

The Nereide (1816), 1 Wheat. 171. Marshall, Ch. J., delivering the opinion, referred to the case of the *Concord*.

Section 2 of the prize act of 1863 (12 Stat. 759) authorizing the taking by the Government of any captured property and the deposit of its value in the Treasury, subject to the jurisdiction of the prize court in which proceedings may be instituted for the condemnation of the property, is a valid exercise of the power of Congress to make rules concerning captures. This provision is not in conflict with the public law of war, and does not impair the just rights of neutrals.

Bates, At. Gen., 1863, 10 Op. 519. See the case of The Nuestra Señora de Regla (1882), 108 U. S. 92, 103.

"24. The title to property seized as prize changes only by the decision rendered by the prize court. But if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to

such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court."

Instructions to United States Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 782.

V. *EVIDENCE.*

1. Competency and Weight.

§ 1237.

The ship's papers are prima facie evidence of property; and "bills of lading, letters of correspondence, and all other papers on board which relate to the ship or cargo are also considered as prima facie evidence of the facts they speak, because such papers naturally accompany such a mercantile transaction."

Case of The Resolution, Federal Court of Appeals (1781), 2 Dallas, 19, 23.

The master of a captured vessel, by the usage of admiralty, is a competent witness.

Bradford, At. Gen., 1794, 1 Op. 40.

The record of a court of admiralty, though always evidence to prove a condemnation, is, in cases between the insurer and insured, evidence, according to the general rule, only to prove the cause of condemnation. But where the record was read to the jury without opposition, and the party producing it therefore did not resort to other modes of proof which, if opposition had been made, he might have adopted, it was held to be admissible as proof of facts so far as it exhibited documents which, if produced to the court, would be evidence in the cause.

Russel *v.* Union Insurance Co., U. S. Circuit Court, Pennsylvania District (1806), 4 Dallas, 421.

A certificate of the proceedings of a court under the private seal of a person who styles himself secretary of state for foreign affairs is not evidence.

Church *v.* Hubbart (1804), 2 Cranch, 187, 238.

Copies of the proceedings in the vice-admiralty court in Jamaica are admissible as evidence when certified under the seal of the court by the deputy registrar, who is certified by the judge of the court, who is certified by a notary public.

Yeaton *v.* Fry (1809), 5 Cranch, 335.

In a case under the nonimportation act of March 1, 1809, it was held that the fact that a person was a seaman on a gunboat in a certain harbor, and liable to be ordered to some other place, so as to be unable to attend the court at the time of its sitting, was not a sufficient reason for taking his deposition de bene esse under the judiciary act of 1789.

The Samuel (1816), 1 Wheat. 9.

The legality of captures is to be decided upon competent evidence, and no rules are more proper for determining the competency of evidence than those which prevail in courts of admiralty.

Bradford, At. Gen. 1794, 1 Op. 40.

The sentence of condemnation of a foreign prize court is evidence merely of "its own correctness," and does not establish "any particular fact, without which the sentence would have been rightly pronounced." Hence it does not negative the averment of the neutral ownership of the property condemned, since a neutral vessel may so act as to forfeit her neutral character.

Maley *v.* Shattuck (1806), 3 Cranch, 458.

In order to prove a foreign condemnation, it is necessary to produce only the libel and sentence. It is a frequent but useless practice to read the proceedings at length; the depositions in such proceedings are not evidence in an action upon a policy of insurance.

Marine Ins. Co. *v.* Hodgson (1810), 6 Cranch, 206.

A bill of lading is not conclusive evidence of property.

Maryland Ins. Co. *v.* Ruden's Admr. (1810), 6 Cranch, 338.

The forfeiture of a vessel as a prize for attempting to run a blockade should not be made on evidence which consists of suspicious circumstances merely, although they make probable cause for capture of the ship and justification of her captors. Decree (D. C. 1898) 89 Fed. Rep. 510, reversed.

The Newfoundland (1900), 176 U. S. 97.

2. Burden of Proof.

§ 1238.

The burden of proof in prize cases rests upon the captors.

Case of The Resolution, Federal Court of Appeals (1781), 2 Dall., 19.

"Peace and friendship must always be presumed to subsist among nations; and therefore he who founds a claim upon the rights of

war, must prove that the peace was broken by some national hostility, and war commenced."

Case of The Resolution, Federal Court of Appeals (1781), 2 Dall., 1, 3.

In general the circumstances of goods being found on board an enemy's ship raises a presumption that they are enemy's property.

The London Packet, 5 Wheat. 132.

The onus probandi of a neutral interest rests on the claimant; but the evidence to acquit or condemn shall, in the first instance, come from the ship's papers and persons on board. If the neutrality of the property is not established finally beyond a reasonable doubt, condemnation ensues. The assertion of a false claim, in whole or in part, by an agent of, or in connivance with, the real owners, leads to condemnation.

The Amiable Isabella, 6 Wheat. 1, 78.

When a vessel is liable to condemnation the first presumption is that the cargo is in the same situation.

The Sally Magee, 3 Wall. 451.

Presumptions of ownership in a neutral, arising from registry or other documents, may be rebutted by circumstances.

The Bermuda, 3 Wall. 514.

In proceedings against a ship and cargo as prize of war, the burden of proving neutral ownership is on the claimants: and when there is no proof of such ownership, and still more when the weight of evidence is on the side of enemy ownership, condemnation will be pronounced.

The Jenny, 5 Wall. 183.

The burden of proving neutral ownership of a vessel in a prize case is on the claimants.

The Benito Estenger, 176 U. S. 568.

VI. *CONDEMNATION.*

1. Necessity of.

§ 1239.

"As between the belligerents, the capture undoubtedly produces a complete dives[ti]ture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations has subjected all such

captures to the scrutiny of judicial tribunals, as the only practical means of furnishing documentary evidence to accompany ships that have been captured, for the purpose of proving that the seizure was the act of sovereign authority, and not mere individual outrage. In the case of a purchase made by a neutral, Great Britain demands the production of such documentary evidence, issuing from a court of competent authority, or will dispossess the purchaser of a ship originally British. (The Fladoyen, 1 Rob. 114, 135.)"

Johnson, J., delivering the opinion of the court, The Adventure (1814), 8 Cranch, 221.

In 1775 Congress resolved that all prizes should be the right of the captors. Congress had the right to adopt this resolution under its prerogative of making war and peace; and the resolution vested a legal right in the captors, the legality of the capture being determinable by the courts of admiralty.

Henderson *v.* Clarkson, Supreme Court of Pa., 1792, 2 Dall., 174.

Property libeled as prize and unclaimed will be condemned accordingly.

The Adeline (1815), 9 Cranch, 244.

The *Lone* entered the port of Matamoras while it was blockaded by a French squadron, and sailed thence, bound to New Orleans as her port of final destination. On her homeward voyage she was captured by a vessel belonging to the blockading squadron. Some days after the capture her captain rescued her and brought her to New Orleans. A demand was made on the President by the French Government for her return to the captors. It was advised that he had no power to grant the demand, the case involving questions to be settled by the courts and not by the Executive, and that the claimants must go into the courts. It was also advised that if a vessel, after escaping from her captors, terminates her voyage in safety, her liability to condemnation for the escape entirely ceases.

Grundy, At. Gen. (1838), 3 Op. 377.

No title to a captured vessel and cargo passes to the captors till a sentence of condemnation has been passed by a court having jurisdiction.

Grundy, At. Gen. (1838), 3 Op. 377.

"By the well-settled principles of national law it is made the duty of the captor to place an adequate force on board of the captured vessel, and if from mistaken reliance upon the sufficiency of that force, or from misplaced confidence, he fails in that object, the omission is considered to be at his own peril. . . .

"It appears to be equally well settled that capture alone does not transfer any right of property in the vessel or cargo to the captors, the title remaining unchanged until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction.

"The points involved, when considered with reference to the powers and functions of the different branches of this Government, are, besides, within the cognizance of the judicial department; and tribunals are instituted in which they may be fairly investigated. To these tribunals exclusively belongs the right of deciding between different claimants who may choose to litigate their rights before them. The Executive may, it is true, order property to be restored to the rightful *undisputed* owner, in cases where the *United States alone* have, under their revenue laws, put in a claim for forfeiture; but it is not held to be within his constitutional power to take from the possession of an individual, property of which he once was admitted to be the rightful owner, to which he still lays claim, and his title to which has not been divested by the judgment of a court."

Mr. Vail, Act. Sec. of State, to Mr. Pontois, Oct. 19, 1838. MS. Notes to French Leg. VI. 32.

A Mexican vessel captured as a blockade runner in May, 1846, and brought into New Orleans, as to which no prize proceedings had been instituted, was, with her cargo, to be "considered as Mexican property found in the port of New Orleans after the existence of war between the two countries."

Mr. Buchanan, Sec. of State, to Mr. Wagner, June 12, 1846, 36 MS. Dom. Let. 29.

"After a Mexican privateer has captured an American vessel, the property can not be transferred until after it shall have been condemned by a court of admiralty; and the question of prize or no prize belongs exclusively to the courts of the captor. These principles of public law are incontestable. At the time the Mexican Government issued these commissions they knew perfectly well that the prizes of their privateers could not be brought within Mexican ports for condemnation. Aware of this impossibility, they have attempted to overcome it in their prize regulations, by conferring on their consuls in foreign ports the power in effect of condemning prizes made by their privateers. But no principle of public law is settled on surer foundations than that 'neutral ports are not intended to be auxiliary to the operations of the parties at war; and the law of nations has very wisely ordained that a prize court of a belligerent captor can not exercise jurisdiction in a neutral country. All such assumed authorities are unlawful, and their acts are void.' I quote from the language of Chancellor (then Chief Justice) Kent, in delivering the opinion of the court in the case

of Wheelwright *v.* Depeyster, 1 Johnston's Rep. 481; and the authorities cited by him fully justify the decision. One of these is the case of Glass et al. *v.* The Sloop Betsey (3 Dallas, 6); in which the Supreme Court of the United States sanctioned this principle so early as the year 1794."

Mr. Buchanan, Sec. of State, to Mr. Saunders, min. to Spain, June 13, 1847, MS. Inst. Spain, XIV. 224.

"Only the fifth question remains, namely, Did Captain Wilkes exercise the right of capturing the contraband in conformity with the law of nations?

"It is just here that the difficulties of the case begin. What is the manner which the law of nations prescribes for disposing of the contraband, when you have found and seized it on board of the neutral vessel? The answer would be easily found, if the question were what you shall do with the contraband vessel. You must take or send her into a convenient port, and subject her to a judicial prosecution there in admiralty, which will try and decide the questions of belligerency, neutrality, contraband, and capture. So again you would promptly find the same answer, if the question were, What is the manner of proceeding prescribed by the law of nations in regard to the contraband, if it be property or things of material or pecuniary value?

"But the question here concerns the mode of procedure in regard, not to the vessel that was carrying the contraband, nor yet to contraband things which worked the forfeiture of the vessel, but to contraband persons.

"The books of law are dumb. Yet the question is as important as it is difficult. First, the belligerent captor has a right to prevent the contraband officer, soldier, sailor, minister, messenger or courier, from proceeding in his unlawful voyage, and reaching the destined scene of his injurious service. But, on the other hand, the person captured may be innocent, that is, he may not be contraband; he, therefore, has a right to a fair trial of the accusation against him. The neutral state that has taken him under its flag is bound to protect him, if he is not contraband, and is, therefore, entitled to be satisfied upon that important question. The faith of that state is pledged to his safety, if innocent, as its justice is pledged to his surrender, if he is really contraband. Here are conflicting claims, involving personal liberty, life, honor, and duty. Here are conflicting national claims, involving welfare, safety, honor, and empire. They require a tribunal and a trial. The captors and the captured are equals; the neutral and the belligerent state are equals.

"While the law authorities were found silent, it was suggested at an early day by this Government, that you should take the captured persons into a convenient port, and institute judicial proceedings

there to try the controversy. But only courts of admiralty have jurisdiction in maritime cases, and these courts have formulas to try only claims to contraband chattels, but none to try claims concerning contraband persons. The courts can entertain no proceedings and render no judgment in favor of or against the alleged contraband men.

"It was replied, all this was true; but you can reach in those courts a decision which will have the moral weight of a judicial one, by a circuitous proceeding. Convey the suspected men together with the suspected vessel into port, and try there the question whether the vessel is contraband. You can prove it to be so by proving the suspected men to be contraband, and the court must then determine the vessel to be contraband. If the men are not contraband the vessel will escape condemnation. Still there is no judgment for or against the captured persons. But it was assumed that there would result from the determination of the court concerning the vessel a legal certainty concerning the character of the men.

"This course of proceeding seemed open to many objections. It elevates the incidental, inferior, private interest into the proper place of the main, paramount, public one, and possibly it may make the fortunes, the safety, or the existence of a nation, depend upon the accidents of a merely personal and pecuniary litigation. Moreover, when the judgment of the prize court upon the lawfulness of the capture of the vessel is rendered, it really concludes nothing, and binds neither the belligenent state nor the neutral, upon the great questions of the disposition to be made of the captured contraband persons. That question is still to be really determined, if at all, by diplomatic arrangement or by war.

"One may reasonably express his surprise when told that the law of nations has furnished no more reasonable, practical, and perfect mode than this of determining questions of such grave import between sovereign powers. The regret we may feel on the occasion is, nevertheless, modified by the reflection that the difficulty is not altogether anomalous. Similar and equal deficiencies are found in every system of municipal law, especially in the system which exists in the greater portion of Great Britain and the United States. The title to personal property can hardly ever be resolved by a court without resorting to the fiction that the claimant has lost, and the possessor has found it, and the title to real estate is disputed by real litigants under the names of imaginary persons. It must be confessed, however, that while all aggrieved nations demand, and all impartial ones concede, the need of some form of judicial process in determining the character of contraband persons, no other form than the illogical and circuitous one thus described exists, nor has

any other yet been suggested. Practically, therefore, the choice is between that judicial remedy or no judicial remedy whatever.

"If there be no judicial remedy, the result is that the question must be determined by the captor himself on the deck of the prize vessel. Very grave objections arise against such a course. The captor is armed, the neutral is unarmed. The captor is interested, prejudiced, and perhaps violent; the neutral, if truly neutral, is disinterested, subdued, and helpless. The tribunal is irresponsible, while its judgment is carried into instant execution. The captured party is compelled to submit, though bound by no legal, moral, or treaty obligation to acquiesce. Reparation is distant and problematical, and depends at last on the justice, magnanimity, or weakness of the state in whose behalf and by whose authority the capture was made. Out of these disputes reprisals and wars necessarily arise, and these are so frequent and destructive that it may well be doubted whether this form of remedy is not a greater social evil than all that could follow, if the belligerent right of search were universally renounced and abolished forever. But carry the case one step further. What if the state that has made the capture unreasonably refuse to hear the complaint of the neutral or to redress it? In that case the very act of capture would be an act of war—of war begun without notice, and, possibly, without provocation.

"I think all unprejudiced minds will agree that imperfect as the existing judicial remedy may be supposed to be, it would be, as a general practice, better to follow it than to adopt the summary one of leaving the decision with the captor and relying upon diplomatic debates to review his decision. Practically, it is a question of choice between law, with its imperfections and delays, and war, with its evils and desolations. Nor is it ever to be forgotten that neutrality, honestly and justly preserved, is always the harbinger of peace, and, therefore, is the common interest of nations, which is only saying that it is the interest of humanity itself.

"At the same time it is not to be denied that it may sometimes happen that the judicial remedy will become impossible, as by the shipwreck of the prize vessel, or other circumstances which excuse the captor from sending or taking her into port for confiscation. In such a case the right of the captor to the custody of the captured persons, and to dispose of them, if they are really contraband, so as to defeat their unlawful purposes, can not reasonably be denied. What rule shall be applied in such a case? Clearly the captor ought to be required to show that the failure of the judicial remedy results from circumstances beyond his control and without his fault. Otherwise he would be allowed to derive advantages from a wrongful act of his own. . . .

"I have not been unaware that in examining this question I have fallen into an argument for what seems to be the British side of it against my own country, but I am relieved from all embarrassment on that subject. I had hardly fallen into that line of argument when I discovered that I was really defending and maintaining, not an exclusively British interest, but an old, honored, and cherished American cause, not upon British authorities, but upon principles that constitute a large portion of the distinctive policy by which the United States have developed the resources of a continent, and thus becoming a considerable maritime power, have won the respect and confidence of many nations. These principles were laid down for us in 1804 by James Madison, when Secretary of State in the administration of Thomas Jefferson, in instructions given to James Monroe, our minister to England. Although the case before him concerned a description of persons different from those who are incidentally the subjects of the present discussion, the ground he assumed then was the same I now occupy, and the arguments by which he sustained himself upon it have been an inspiration to me in preparing this reply.

"'Whenever,' he says, 'property found in a neutral vessel is supposed to be liable on any ground to capture and condemnation, the rule in all cases is, that the question shall not be decided by the captor, but be carried before a legal tribunal, where a regular trial may be had, and where the captor himself is liable to damages for an abuse of his power. Can it be reasonable, then, or just, that a belligerent commander who is thus restricted, and thus responsible in a case of mere property, of trivial amount, should be permitted without recurring to any tribunal whatever, to examine the crew of a neutral vessel, to decide the important question of their respective allegiance, and to carry that decision into execution by forcing every individual he may choose into a service abhorrent to his feelings, cutting him off from his most tender connections, exposing his mind and his person to the most humiliating discipline, and his life itself to the greatest danger. Reason, justice, and humanity unite in protesting against so extravagant a proceeding.'

"If I decide this case in favor of my own Government, I must disallow its most cherished principles, and reverse and forever abandon its essential policy. The country can not afford the sacrifice. If I maintain those principles, and adhere to that policy, I must surrender the case itself. It will be seen, therefore, that this Government could not deny the justice of the claim presented to us in this respect upon its merits. We are asked to do to the British nation just what we have always insisted all nations ought to do to us."

Mr. Seward, Sec. of State, to Lord Lyons, Dec. 26, 1861, 55 Br. & For. State Papers, 627, 632, 638.

When a vessel is captured, the rule is to bring her into some convenient port of the government of the captor for adjudication. The mere fact of capture does not work a transfer of title, and until there is a sentence of condemnation or restitution, the captured vessel is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it.

Demands against property captured as prize of war must be adjusted in a prize court. The property arrested as prize is not attachable at the suit of private parties; and if such parties have claims which in their opinion override the rights of the captors, they must present them to the prize court for settlement. The jurisdiction of a prize court over a captured vessel is determined by the capture and not by the filing of a libel.

The Nassau, 4 Wall. 634.

"The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages. This rule is well settled. Slocum *v.* Mayberry, 2 Wheat. 1; The Apollon, 9 Wheat. 362; The Lively, 1 Gall. 314; The Corier Maritimo, 1 Rob. 287."

The Nuestra Señora de Regla (1882), 108 U. S. 92, 103.

A Chilean cruiser having seized on the high seas certain paper currency destined for the Peruvian Government, and the Chilean forces in Peru having afterwards, without judicial condemnation of the property, which was claimed to belong to citizens of the United States, put such currency into enforced circulation in Peru in payment for supplies taken by the Chilean army, the Government of the United States said: "The capture of the property having been made on the high seas and no prize court having inquired into the authority of the captor or the liability of the property under the public law to be seized, that act might in strictness be regarded as piratical in its character. 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 had thereon as prize in a court of admiralty, judging by the law of nations and treaties. Wildman's International Law, vol. 2, p. 352."

Mr. Bayard, Sec. of State, to Mr. Godoy, Chilean min., April 11, 1885, MS. Notes to Chilean Leg. VI. 337.

"By the law of nations, as recognized and administered in this country, when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of the captors. 1 Kent. Com. 102, 110; Halleck's International Law, c. 19, § 7; c. 30, § 4; Kirk *v.* Lynd, 106 U. S. 315, 317."

Oakes *v.* United States (1899), 174 U. S. 778, 786.

The title of a vessel which was fitted out by the Confederate government as a gunboat, immediately on capture in inland waters by the Federal armies passes without the necessity of condemnation proceedings.

Oakes *v.* United States, 30 Ct. Cl. 378.

Act March 3, 1800 (2 Stat. 17, sec. 1), providing that when any vessel other than a vessel of war shall hereafter be captured by any vessel acting under authority of the Government of the United States, not having been condemned by competent authority before the recapture, shall be restored to the former owner, does not apply to a vessel which, when recaptured, was in process of reconstruction for a gunboat, the capture being on inland waters, by a force attached to the army, and acting under the orders of the military authorities. (Ibid.)

Spanish vessels wrecked in battle by the naval vessels of the United States during the war with Spain, and afterwards lying along the coast of Cuba, were the property of the United States.

Griggs, At. Gen., March 29, 1900, 23 Op. 76.

2. Effect of Fraudulent Conduct.

§ 1240.

"There is certainly nothing illegal in resorting to devices to elude hostile capture; and where it can be clearly shewn that property is really neutral or friendly, its being covered under hostile habiliments for the purpose of evasion, will not necessarily subject it to condemnation." But the evidence must not be equivocal.

The Frances (1815), 9 Cranch. 183, 189.

The owner of captured property should be careful to avoid the use of language calculated to mislead the court, and to extricate property to which the captors are entitled, even though he may think otherwise. He should never swear to inferences without stating the train of reasoning by which his mind has been conducted to them. Yet

prize courts must distinguish between misrepresentations due to error of judgment, and corrected as soon as possible by the party who made them, and willful falsehoods detected by the testimony of others, or confessed by the party when detection becomes inevitable. In the first case there may be cause for a critical and perhaps suspicious examination of the claim and the testimony in support of it; but it would be harsh to condemn property clearly proved to be neutral for one false step, in some degree equivocal, which was soon corrected by the party making it.

The Nereide (1815), 9 Cranch, 388, 417.

The use by a belligerent of colorable papers for the purpose of making it appear that a cargo, actually belonging to himself, is the property of a neutral, in order that he may thereby be enabled to trade with the enemy, merely enhances his criminality.

The Rugen (1816), 1 Wheat. 62.

Where enemy's property is fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former, and must be condemned.

The St. Nicholas, 1 Wheat. 417.
See note by Wheaton, id. 431.

A cargo, bound from Jamaica to New Orleans, was claimed by G., an alleged neutral, as his exclusive property. The adventure was conducted by M., of New Orleans, who, while admitting that he had expected to have an interest in the cargo, alleged that he was finally disappointed, and that the whole belonged to G. The whole cargo, with a small exception, was documented as the property of L., of Pensacola. G. alleged, however, that the documents were merely colorable, for the purpose of avoiding British capture. There was a total absence of documentary proof to establish the claim of G.; and it was not pretended that any genuine papers were put on board or were in existence. There was no testimony, except that of M., from the ship's crew that the property belonged to G., and the testimony of M., including the test affidavit, was seriously discredited. Under the circumstances the whole cargo was condemned, without regard to the partial interest which G. might have had, on the ground that, where a party fraudulently claims as his own property belonging to others, he is not entitled to restitution even of that which he may ultimately establish as his own.

The Dos Hermanos (1817), 2 Wheat. 76.

It is the duty of neutrals to put on board of their ships sufficient papers to show the real character of the property; and, if false or

colorable documents are used, the necessity or reasonableness of the excuse ought to be very clear and unequivocal to induce a court of prize to rest satisfied with it.

The Dos Hermanos, 2 Wheat. 76.

A ship and cargo, libeled as prize of war, were claimed by Spanish merchants. It appeared that during the voyage a parcel of papers respecting the cargo was thrown overboard, by the advice of the master and supercargo, on the ground that the ship was at the time chased by a schooner supposed to be a Carthaginian privateer. In the ship's papers, however, which were retained, her Spanish character was distinctly asserted. Mr. Justice Story, delivering the opinion of the court, said that under these circumstances the excuse given for throwing the papers overboard was not easily credited. Nor was it easy to assign a motive for the act. If the ship was Spanish, it was, as to American cruisers, immaterial to whom the property belonged, unless it belonged to an American who had been trading with the enemy, since, by the treaty with Spain of 1795, article 15, free ships made free goods; and there was nothing in the evidence before the court to raise a presumption that any American interest was concerned in the shipment. The utmost, therefore, which the extraordinary conduct in question could justify on the part of the court was "to institute a more rigid scrutiny into the character of the ship itself." But "very different," said Mr. Justice Story, "would be the conclusion, if the case stood upon the ground of the law of nations, unaffected by the stipulations of a treaty."

The Pizarro (1817), 2 Wheat. 227, 242.

"Concealment, or even spoliation of papers, is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile, if the cause labour under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of farther proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply."

Mr. Justice Story, in The Pizarro (1817), 2 Wheat. 227, 241.

See note by Wheaton, id. 242.

See 1 Kent, Comm. 158, Holmes's note, citing the Ella Warley, Blatch. Pr. Cas. 288, 648, and other cases in the same volume, and the Johanna Emilie, Spinks's Pr. Cas. 12.

A bill of lading, consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not a sufficient evidence to entitle the claimant to restitution, but affords a ground for the introduction of further proof. The fact of invoices and letters of advice not being found on board may induce a suspicion that papers have been spoliated.

The Friendschaft (1818), 3 Wheat. 14.

Even admitting that a belligerent master, carrying a cargo chiefly belligerent, had thrown papers overboard, this fact ought not to preclude a neutral claimant, to whom no fraud is imputable, from exhibiting proof of property. In the case in question, no attempt was made to disguise any part of the cargo, the greater part of which was confessedly belligerent and was condemned without claim. The whole transaction with respect to the cargo was "plain and open." There was not, however, any direct evidence of throwing papers overboard. It was merely suggested that such was the case, because the various shipments composing the cargo, while accompanied with bills of lading, were not accompanied with invoices and letters of advice; and it was suggested that these papers were thrown overboard.

The Friendschaft (1818), 3 Wheat. 14, 48.

Where a neutral shipowner lends his name to cover a fraud with regard to the cargo, his conduct will subject the ship to condemnation.

The Fortuna (1818), 3 Wheat. 236.

A vessel was boarded by a crew from a privateer, plundered of her papers and various other things, and then allowed to proceed on her voyage. She was afterwards captured by another belligerent, as was alleged, for lack of the papers of which the first captors had deprived her, and was compelled to pay a ransom. A claim against the first captors for the money so paid was disallowed, the expenditure being considered unnecessary, as the mere absence of papers is not a just ground of condemnation.

The Amiable Nancy (1818), 3 Wheat. 546.

Covering belligerent property by neutral papers is not contrary to the law of nations, and, in neutral courts, does not invalidate contracts made in relation to such property.

De Valengin *v.* Duffy (1840), 14 Pet. 282.

A vessel was captured by the United States naval squadron, acting in cooperation with the land forces in the taking of Newbern, N. C., in March, 1862. The vessel was at the time totally abandoned, but had lately been occupied by enemy troops and still had on board at the time of her capture an enemy's flag and a heavy arma-

ment of artillery; and there was evidence that she had been used in running the blockade and had also been fitted out as a privateer. "Although all these acts were without the sanction of and violently in opposition to the wishes of the claimant [owner], who is personally a loyal citizen, of high character and integrity and a resident merchant of this city, opposed strenuously to the rebellion, and has been deeply injured pecuniarily by the misuse of his property on this occasion and otherwise, yet the acts of his agent, with whom the vessel was left by him, determine the character of the vessel; and the integrity of her real owner can not secure her from the consequences of her illicit employment. The claimant must appeal to his government for relief from the forfeiture."

Betts, J., The Schooner Napoleon (1862), Blatchf. Prize Cas. 296, 298.

An appeal from this decree was taken; but the Secretary of the Treasury afterwards released seven-eighths of the vessel to the claimant and the appeal was abandoned.

An enemy's commerce under neutral disguises has no claim to neutral immunity.

The Bermuda, 3 Wall. 514.

Spoliation of papers at the time of capture warrants unfavorable inferences as to the employment, destination, and ownership of the captured vessel.

The Bermuda, 3 Wall. 514.

Neutrals who place their vessels under belligerent control and engage them in belligerent trade, or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, while the real destination is to belligerent ports, impress upon them the character of the belligerent in whose service they are employed, and can not complain if they are seized and condemned as enemy property.

The Hart, 3 Wall. 559.

3. Power to Remit Forfeitures.

§ 1241.

The statute of July 13, 1861, giving the Secretary of the Treasury power to remit penalties, etc., in certain cases did not extend to captures jure belli.

The Gray Jacket, 5 Wall. 342; The Hampton, 5 Wall. 372.

The condemnation of a vessel and cargo in a prize court is not a criminal sentence, and the President can not remit the forfeiture and restore the property, or its proceeds, to the claimant.

Bates, At. Gen., 1863, 10 Op. 452.

The President may lawfully direct the release of prize property in which the captors took no interest, it being in their possession and subject to their control.

Ashton, Act. At. Gen., 1866, 11 Op. 484.

The President has authority to remit forfeitures in cases of prize of war after the vessels have been condemned, but before the prize money has been deposited in the United States Treasury.

Griggs, At. Gen., Jan. 22, 1901, 23 Op. 360, with comments on the opinion of Bates, At. Gen., 10 Op. 452.

VII. *EFFECT OF JUDICIAL SENTENCES.*

1. Conclusiveness as to Property.

§ 1242.

The American schooner *Sarah* was arrested by a French privateer on the high seas in February, 1804, and carried into a port in Cuba, where with her cargo she was sold. The purchaser of the cargo brought it into Charleston, South Carolina, where, in May, 1804, it was libeled in the United States district court for restoration on the ground that it was unlawfully seized. In September, 1806, no sentence of condemnation having been produced, the district court made a decree of restitution. From this decree an appeal was taken to the circuit court, where the appellant produced a sentence of condemnation by the tribunal of first instance of San Domingo, pronounced in July, 1804. This sentence purported to be made conformably to a decree of Captain-General Ferrand of March 1, 1804, relating to vessels contravening the laws and regulations concerning San Domingo. By this decree it was stated that under the laws and regulations then existing the port of San Domingo was the only one in the island open to commerce, and that, in consequence, "all vessels anchored in the bays, harbors, and landing places, on the coast occupied by the rebels; those cleared for the ports in their possession, and coming out with or without a cargo, and, generally, all vessels sailing in the territorial extent of the island (except that from Cape Raphael to Ocoa Bay), found at a distance less than two leagues from the coast," should be "detained by the state vessels and privateers," who should conduct them, if possible, into the port of San Domingo for condemnation. On the production of the sentence of condemnation the circuit court reversed the decree of restitution and dismissed the libel. It was apparently held, Marshall, C. J., delivering the opinion, that as the decree of Captain-General Ferrand authorized the seizure of vessels only when sailing within the territorial extent of the island, less than two leagues from the coast, the seizure and confiscation were made in

virtue of a "municipal regulation," and not of a right of war; and that, as it appeared that the seizure was made ten leagues from the coast, it was a marine trespass which gave to the courts of the captor no jurisdiction to pronounce a sentence of condemnation. The judgment of the circuit court was therefore ordered to be reversed.

Rose *v.* Himely (1808), 4 Cranch, 241. The opinion of Mr. Justice Johnson, who delivered the opinion in the circuit court, is printed in 4 Cranch, 509, Appendix.

In connection with the foregoing case, another case was argued in which it appeared that the vessel and cargo, which were condemned under General Ferrand's decree, were seized within the territorial jurisdiction of San Domingo, though they were carried into a Spanish port and held there by French agents, when the decree of condemnation, which was pronounced in the French island of Guadaloupe, was passed. On the ground that the seizure was made within the territorial jurisdiction, the sentence of condemnation was sustained, Marshall, C. J., again delivering the opinion. The judgment of the circuit court was reversed.

Hudson *v.* Guestier (1808), 4 Cranch, 293.

When the foregoing case came up on its second trial, it appeared that it was submitted on the first trial upon an agreed state of facts, one of which, supposed by the parties to be immaterial, was the statement that the vessel was seized within a league of the coast. On the second trial it was shown that she was seized six leagues from land, but the judge instructed the jury that the seizure was legal and the condemnation valid, if it appeared that the vessel had violated the French municipal regulations by trading with the Dominican insurgents. A second appeal was taken, and, upon the facts newly established, the seizure and condemnation appeared to be invalid, if the decision in Rose *v.* Himely was to be adhered to. But Livingston, J., observing that it had been settled, against his opinion, that the condemnation at Guadaloupe was valid, though the vessel and cargo were lying in the port of another nation, declared that, if the res could be proceeded against when not in the possession or under the control of the court, he could not perceive how it could be "material whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right." "By a seizure on the high seas," continued Mr. Justice Livingston, "she interfered with the jurisdiction of no other nation, the authority of each being there concurrent. It would seem also that, if jurisdiction be at all permitted where the thing is elsewhere, the court exercising it must necessarily decide, and that ultimately, or subject only to the review of a superior tribunal of its own state, whether, in the par-

ticular case, she had jurisdiction, if any objection be made to it. And, although it be now stated, as a reason why we should examine whether a jurisdiction was rightfully exercised over the *Sea Flower*, that she was captured more than two leagues at sea, who can say that this very allegation, if it had been essential, may not have been urged before the French court, and the fact decided in the negative? And, if so, why should not its decision be as conclusive on this as on any other point? The judge must have had a right to dispose of every question which was made on behalf of the owner of the property, whether it related to his own jurisdiction, or arose out of the law of nations, or out of the French decrees, or in any other way: and, even if the reasons of his judgment should not appear satisfactory, it would be no reason for a foreign court to review his proceedings, or not to consider his sentence as conclusive on the property.

"Believing, therefore, that this property was changed by its condemnation at Guadaloupe, the original owner can have no right to pursue it in the hands of any vendee under that sentence, and the judgment below must, therefore, be affirmed."

The other judges concurred, except Marshall, Ch. J., who observed that he had supposed that the former opinion delivered in these cases upon the point in question had been concurred in by four judges. In this he was mistaken; it was concurred in by one judge. He himself still adhered to it. Continuing, he said: "He understood the expression *en sortant*, in the arrete, as confining the case of vessels coming out, to vessels taken in the act of coming out. If it included vessels captured on the return voyage, he should concur in the opinion now delivered. However, the principle of that case (Rose *v.* Himely) is now overruled."

Hudson *v.* Guestier (1810), 6 Cranch, 281, 284, 285.

The sentence of a foreign court of admiralty, condemning a vessel for a breach of blockade, is conclusive evidence of the offense in an action on a policy of insurance.

Croudson *v.* Leonard (1808), 4 Cranch, 434.

The sentence of a foreign court of admiralty, though avowedly made under a decree subversive of the law of nations, binds the property on which it acts. This principle was applied to sentences under the Milan decree, which both the Executive and the Congress of the United States had declared to constitute a flagrant violation of the law of nations, the court observing that Congress, while making this declaration in regard to the decree, had not declared that the sentences pronounced under it should be considered as void.

Williams *v.* Armroyd (1813), 7 Cranch, 423.

"The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law, can never arise, for no co-ordinate tribunal is capable of making the inquiry. The decision, in the case of Hudson & Smith *v.* Guestier, reported in 6th Cranch, is considered as fully establishing this principle."

Williams v. Armroyd (1813), 7 Cranch, 423, 432.

"A judgment against one defendant for the want of a plea, or a decree against one defendant for want of an answer, does not prevent any other defendant from contesting, so far as respects himself, the very fact which is admitted by the absent party.

"No reason is perceived why a different rule should prevail in a court of admiralty, nor is the court informed of any case in which a different rule has been established.

"If the district court was not precluded by the non-claim of the owner of the vessel from examining the fact of ownership, so far as that fact could affect the cargo, it will not be contended that an appellate court may not likewise examine it.

"This case is to be distinguished from those which have been decided on policies of insurance, not only by the circumstance that the cause respecting the vessel and the cargo came on at the same time before the same court, but by other differences in reason and in law, which appear to be essential.

"The decisions of a court of exclusive jurisdiction are necessarily conclusive on all other courts, because the subject matter is not examinable in them. With respect to itself no reason is perceived for yielding to them a further conclusiveness than is allowed to the judgments and decrees of courts of common law and equity. They bind the subject matter as between parties and privies.

"The whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision. The reason on which this *dictum* stands will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any in-

terest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the *Mary*, has constructive notice of her seizure, and may fairly be considered as a party to the libel. But those who have no interest in the vessel which could be asserted in the court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties in the cause so far as respects the vessel. When such person is brought before a court in which the fact is examinable, no sufficient reason is perceived for precluding him from reexamining it. The judgment of a court of common law, or the decree of a court of equity, would, under such circumstances, be re-examinable in a court of common law, or a court of equity; and no reason is discerned why the sentence of a court of admiralty, under the same circumstances, should not be re-examinable in a court of admiralty.

"This reasoning is not at variance with the decision that the sentence of a foreign court of admiralty, condemning a vessel or cargo as enemy property, is conclusive in an action against the underwriters on a policy in which the property is warranted to be neutral.

"It is not at variance with that decision, because the question of prize is one of which courts of law have no direct cognizance, and because the owners of the vessel and cargo were parties to the libel against them.

"In the case of Croudson and al. *v.* Leonard, two judges expressed their opinions. Those who were silent, but who concurred in the opinion of the court, undoubtedly acquiesced in the reasons assigned by those judges. On the conclusiveness of a foreign sentence, *Judge Johnson* said, 'The doctrine appears to me to rest on three very obvious considerations: The propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law; and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world.'

"These reasons undoubtedly support the opinion founded on them, but it will be readily perceived that they would not apply to the case before the court.

"After stating the conclusiveness of the sentence of courts of exclusive jurisdiction, Judge Washington said, 'This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering, upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem;* but any person having an interest in the property may interpose a claim, or may prosecute an appeal from the

sentence. The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned; so that in this respect he also represents the insurer.'

"The very foundation of this opinion that the insured is bound by the sentence of condemnation is, that he was in law a party to the suit, and had a full opportunity to assert his rights. This decision can not be applicable to one in which the person to be affected by the sentence of condemnation was not, and could not be a party to it."

The Mary (1815), 9 Cranch, 126, 143.

Of the shipments constituting a cargo, captured on a voyage from London to Lisbon, some were accompanied with bills of lading, directing a delivery to shipper or order; a few of these bills were specially indorsed, but most of them had no indorsements, or blank indorsements only. Other shipments were accompanied with bills of lading deliverable to persons specifically named in them. Very few of either kind of bills were accompanied with letters of advice or invoices. The district court condemned "all that part of the cargo which was shipped, as evidenced by bills of lading, either without endorsement or with blank endorsements, and not accompanied by letter or invoice, viz. . . . and that part," etc. An appeal having been taken to the circuit court, the decree was, for the most part, affirmed; but, when the decree was returned, the district court admitted further proof as to parts of the cargo comprehended in the bills which, though not indorsed, were expressly deliverable to Lisbon merchants therein named, and, deeming the proof sufficient, ordered restitution. On an appeal by the captors, the circuit court, holding that the former sentence of the district court, as affirmed by the circuit court, was left imperfect by omitting to recite the particular parts of the cargo intended to be condemned, and that the words above quoted could have been intended only for the bills addressed to shipper or order, and not to those addressed to consignees named in the bills themselves, affirmed the sentence of restitution. On a further appeal by the captors, Marshall, Ch. J., delivering the opinion of the court, said "that justice ought not to be diverted from its plain course, by circumstances so susceptible of explanation, that error is possible; and that when the decree was returned to the district court . . . . with the blank unfilled, that court did right in considering the specification intended to have been inserted, and for which the blank was left, as a substantiative and essential part of the decree, still capable of being supplied, and in acting upon and explaining the decree, as if that specification had been originally inserted."

The Friendschaft (1818), 3 Wheaton, 14.

Soon after the beginning of the war of 1812 the American ship *Star* was captured by the British and condemned as prize by the vice-admiralty court at Halifax, Nova Scotia, British subjects becoming her owners. More than two years afterwards she was captured by an American privateer and brought into New York, where a claim was put in by her original owner. This claim was based on the prize act of June 26, 1812. In the general salvage act of March 3, 1800, there was a special provision excepting from the operation of the act recaptured vessels which had been condemned by competent authorities. It was argued, however, that this rule was changed by section 5 of the prize act of June 26, 1812, which provided for the restoration of recaptured property to "the lawful owners," "agreeably to the provisions heretofore established by law." Held, Story J., delivering the opinion of the court, that the "lawful owner" of recaptured property which had been lawfully condemned was not the original proprietor, but the person who had acquired title under the decree of condemnation.

The Star (1818), 3 Wheat. 78.

"The sentence of a foreign court of competent jurisdiction, condemning a neutral vessel taken in war, as prize, is binding and conclusive on all the world."

Dobree *v.* Napier (1836), 2 Bingham's New Cases, 781, 795, citing Hughes *v.* Cornelius, Sir T. Raymond, 473.

This was an action against a person for seizing a steam vessel of the plaintiff and converting it to his own use. It appeared that the defendant, a British subject, made the seizure as an officer in the service of the Queen of Portugal, and that the vessel was condemned by a Portuguese tribunal as lawful prize. It was contended, however, that he might be held answerable for the seizure on the ground that his entrance into the service of the Queen of Portugal constituted a violation of the British foreign enlistment act, so that his Portuguese commission would not justify him. The court rejected this contention, saying that no one could dispute "the right of the Queen of Portugal, to appoint in her own dominions, the defendant or any other person she may think proper to select, as her officer or servant, to seize a vessel which is afterwards condemned as a prize."

See, in connection with this case, Underhill *v.* Hernandez, 168 U. S. 250.

2. Jurisdictional Limitations or Defects.

§ 1243.

A sentence of condemnation as prize does not establish any particular fact without which the sentence may have been rightfully pronounced.

Maley v. Shattuck (1806), 3 Cranch, 458.

Where a policy of insurance contained a warranty that the vessel was "American property," followed by the words "proof of which to be required in the United States only," it was held that, although a foreign sentence of prize generally was conclusive, it was not so in this case, and that, in an action upon the policy, evidence was properly admitted to show, in opposition to a foreign sentence of condemnation for breach of blockade, that the vessel was not guilty of that offense.

Maryland Ins. Co. *v.* Woods (1810), 6 Cranch, 29.

A vessel and cargo having been captured and libeled as enemy property, no claim was put in for the vessel, and she was condemned; but a claim was made for the cargo. The vessel and the cargo belonged to different persons, but it was contended by the captor that the condemnation of the vessel conclusively established her enemy character, so that the goods must be treated as having been imported in a hostile bottom. Held, that the owners of the cargo were not precluded from showing the true character of the vessel, so far as this circumstance could affect their claim.

The Mary (1815), 9 Cranch, 126.

Whoever sets up a title under a condemnation is bound to show that the court had jurisdiction of the cause, and that the sentence has been rightly pronounced upon the application of parties competent to ask it. For this purpose it is necessary to show who are the captors, and how the court has acquired authority to decide the cause.

In the ordinary cases no difficulty arises on this subject, for the courts of the captors have general jurisdiction of prize, and their adjudication is conclusive upon the proprietary interest. But where the capture is made by captors acting under the commission of a foreign country, such capture gives them a right which no other nation, neutral to them, has authority to impugn, unless for the purpose of vindicating its own violated neutrality. The courts of another nation, whether an ally or a co-belligerent only, can acquire no general right to entertain cognizance of the cause, unless by the consent or upon the voluntary submission of the captors.

La Nereyda, 8 Wheat. 108.

A final decree of acquittal and restitution to the only claimant in a prize court determines nothing as to the title in the property, save whether it is prize or not.

Cushing *v.* Laird, 107 U. S. 69.

Proceedings in the vice-admiralty court at San Domingo are nullities, for the reason that the court is not legally constituted.

Lee, At. Gen., 1798, 5 Op. 689, App.

Quære, Whether the French prize court established at San Domingo in 1796 was a court of competent jurisdiction under the law of nations, the evidence not satisfactorily showing that France had then taken possession of San Domingo under the treaty of cession with Spain.

Duncanson *v.* McLure (1804), Supreme Court of Pennsylvania, 4 Dallas, 308.

3. Inconclusiveness as to International Rights.

§ 1244.

"The legality of a capture is open for question and examination, till a competent jurisdiction has decided the question, and a decree passes for condemnation as prize; . . . and if the decree be erroneous or iniquitous, the party injured must apply for redress to that nation, whose courts have committed the error or iniquity."

Case of The Resolution, Federal Court of Appeals, 1781, 2 Dallas 1, 5.

In the opinion of Judge John Davis on French spoliations, May 17, 1886, is the following:

"The defendants say, further, the condemnation can not be illegal because made by a prize court having jurisdiction, and the decisions of such courts are final and binding. This proposition is of course admitted so far as the *res* is concerned; the decision of the court, as to that, is undoubtedly final, and vests good title in the purchaser at the sale; not so as to the diplomatic claim, for that claim has its very foundation in the judicial decision, and its validity depends upon the justice of the court's proceedings and conclusion. It is an elementary doctrine of diplomacy that the citizen must exhaust his remedy in the local courts before he can fall back upon his Government for diplomatic redress; he must then present such a case as will authorize that Government to urge that there has been a failure of justice. The diplomatic claim, therefore, is based not more upon the original wrong upon which the court decided than upon the action and conclusion of the court itself, and, diplomatically speaking, there is no claim until the courts have decided. That decision, then, is not only not final, but on the contrary is the beginning, the very corner-stone, of the international controversy. This leads us naturally to another point made by the defense in that the claimant did not 'exhaust his remedy,' because he did not prosecute an appeal. We of course admit that usually there is no foundation for diplomatic action until a case cognizable by the local courts is prosecuted to that of last resort; but this doctrine involves the admission that there are courts freely open to the claimant, and that he is unhampered in the protection of his rights therein, including his right of appeal. It is within the

knowledge of every casual reader of the history of the time that no such condition of affairs in fact then existed.

"The very valuable report of Mr. Broadhead shows (pp. 6 and 7) that prior to March 27, 1800, there was practically no appeal in these cases except to the department of the Loire-Inférieure; in the then existing state of bad feeling and modified hostilities, and under the surrounding circumstances, this was to the captains of the seized vessels, in most if not in all cases, a physical impossibility. Nor prior to the agreement of 1800 was there any practical reason for appealing to a court when the result, as our seamen believed, whether rightly or not, but still honestly, was a foregone conclusion, and while negotiations were progressing for a settlement; nor is there anything in these negotiations showing that a technical exhaustion of legal remedy would be required. We are of opinion that the claimant was not, under these purely exceptional circumstances, obliged to prosecute his case through the highest court, even if he could have done so, which we doubt."

Gray, Admr., *v.* United States, 21 Ct. Cl. 340, 402.

Condemnation of prize courts are final in actions between individuals, and as to vessels condemned, giving purchasers a good title, but do not bind foreign nations, nor bind claims valid by international law.

Cushing *v.* United States, 22 Ct. Cl. 1.

"The merchant vessels of a nation at peace with another can only, if captured on the high seas, be justly adjudged to be prize by that other when such vessels shall have violated either the law of nations or some existing treaty. When either of these causes can be with truth alleged, the adjudication is not complained of. It is only in cases where no law, whether established by the common consent of the civilized world or by particular compact between the two Governments, has been infracted—no rule which governs the conduct of belligerent and neutral powers towards each other has been broken by the vessel condemned—that the United States complain of, and expect compensation for the injury.

"It is perfectly understood that many of these decisions, alike unjust and injurious, have been made by the French consular tribunals established in Spain. This circumstance in no degree weakens the claim of the United States on the Spanish Government. That complete and exclusive jurisdiction within its own territory is of the very essence of sovereignty is a principle which all nations assert. Courts, therefore, of whatever description, can only be established in any nation by the consent of the sovereign power of that nation. All

the powers they possess must be granted by, proceed from, and be a portion of, the supreme authority of that country in which such powers are exercised. Of consequence, foreign nations consider the decisions of such tribunals in like manner as if made by the ordinary tribunals of the country. A Government may certainly, at its discretion, permit any portion of its sovereignty to be exercised by foreigners within its territory; but for the acts of those to whom such portions of sovereignty may be delegated, the Government remains, to those with whom it has relations, as completely responsible as if such powers had been exercised by its own subjects named by itself. The interior arrangements which a Government makes according to its will can not be noticed by foreign nations or affect its obligations to them. Of consequence the United States can consider the condemnation of their vessels by the French tribunals in Spain no otherwise than if such condemnations had been made in the ordinary tribunals of the nation.

"Where vessels so condemned have been captured by privateers equipped in the ports of His Catholic Majesty, or manned in whole or in part by his subjects, the hostility of the act is rendered still more complete.

"In the one case or in the other, the aggressions complained of are totally incompatible with those rules which the law of nations (Vat., b. 3, s. 15, 5, 17, 102, 104) prescribes for a conduct of a neutral power. They are also considered as violating the 6th article of our treaty with Spain. By that article each nation binds itself to protect by all means in their power, the vessels and other effects belonging to the citizens or subjects of the other which shall be within the extent of their jurisdiction by sea or land, and to use all their efforts to recover and cause to be restored to the right owners their vessels and effects which may have been taken from them within the extent of their said jurisdiction."

Mr. Marshall, Sec. of State, to Mr. Humphreys, min. to Spain, Sept. 8, 1800, MS. Inst. U. States Ministers, V. 358.

"In a dissenting opinion by Judge Thomas Cooper, in Dempsie, assignee of Brown *v.* Insurance Company, in the Pennsylvania court of errors and appeals, 1808, the following reasons are given for declining to assign international conclusive authority to the decisions of foreign prize courts:

"'They are emanations of the executive authority, the judges sitting, not during good behavior, but during pleasure.

"'They are bound by executive instructions which are always dictated by the interest of the belligerent. (To this a note is appended calling attention to the fact that Napoleon's Milan decrees were directed to the Tribunal des Prizes; and that the British orders

of council of 1807 were directed *inter alios* to the British courts of admiralty and vice-admiralty.)

"'They are the courts of the belligerent; the plaintiffs, libelants, are the subjects of the belligerent, cruising under the authority and protection of the belligerent.

"'The property, if condemned, enriches the belligerent nation. . . .

"'The proceedings are written, by interrogatories and answers; by the civil law, and not by the common law of our own country or of England.

"'There is no intervention of a jury trial, nor any *viva voce* examination of testimony.

"'The salary of a British judge depends on a great degree upon the number of condemnations. I believe it is £15 sterling a vessel.' On the last point it may be mentioned that the practice which exists in some countries of vesting in the judge the appointment of clerks and other officials who receive large emoluments from condemnations, coupled with the fact that the offices in question are often occupied by members of the judge's family, or by personal friends whose interests he has at heart, must, from the nature of things, influence the judge in the shape which he gives the case, unconscious as he may be of such influence. 'A power over a man's sustenance,' so substantially said Chief Justice Gibson, of Pennsylvania, in declaring unconstitutional an act of the legislature of that State reducing the salaries of the judges, 'is a power over himself,' and a power of this kind over the judiciary, it was held, it was not constitutional for the legislature to assume. Yet what power of this character could be more subtle than that exercised over an admiralty judge by a prize case coming before him with an offer of large emoluments to himself, or to some one of his family or friends, if a condemnation be decreed? That such a temptation would not be consciously yielded to by British or American judges may be unhesitatingly affirmed. But the atmosphere of influence which such a condition of things generates is no less pervasive and powerful than would be that of temptations directly and avowedly applied; and it is impossible not to admit that in this atmosphere judges of prize courts have been from time to time immersed, and that it is from some, at least, of these judges that the precedents which make up our prize law have been in part drawn. Judge Cooper's opinion, from which the above points are taken, was published in Philadelphia, in 1810, with a preface by Mr. A. J. Dallas, United States district attorney in Philadelphia, and afterwards Secretary of the Treasury. In this preface, which adopts and defends the views of Judge Cooper, is cited Lord Ellenborough's contemptuous censure (in Fisher *v.* Ogle, 1 Camp. 418, and Donaldson *v.* Thompson, id. 429) of foreign courts of admiralty, and Mr.

Dallas proceeds to declare that 'whatever the animosity of the belligerents can generate against each other, whatever their power can impose on the rest of the world, is now the law of war, the only measure of justice, while the neutral flag, instead of producing respect and safety, is the certain signal for insult and agression.'"

Note of Dr. Wharton, Wharton's Int. Law Dig. III. 197, § 329*a*.

"The instant that a court sitting to administer international law recognizes either governmental orders or proclamations setting forth governmental policy as constituting rules of that code, at once that court ceases in fact to administer in its purity that law which it pretends to administer. . . . The function of the tribunal has undergone a change which is justly and inevitably fatal to its weight and influence with foreign powers. It is not only a degradation of the court itself, but it is a mischievous injury to the government which has destroyed the efficiency of an able ally."

5 Am. Law Rev. 255.

In an article in the Edinburgh Review for February, 1812, under the title of "Disputes with America" (vol. 19, p. 290), the contrast between Sir William Scott's opinions in 1798 and 1799 and those made by him in 1811, is thus stated. In The Maria, (1 Rob. 350, June 11, 1799), he spoke as follows: "In my opinion, if it could be shown that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient, that would not be enough; more must be proved: *It must be shown that it is conformable to the usage and practice of nations.*" "A great part," he continues, "of the law of nations," stands on no other foundation. It is introduced, indeed, by general principles, but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go further, and to say that mere general speculation would bear you out in a further progress." "It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance, independent of all practice, from the earliest history of mankind. The *institution must conform to the text law, and likewise to the constant usage upon the matter.*" (1 Rob. 139.) "Such," says the Edinburgh Review, "were the sound, enlightened, and consistent doctrines promulgated by the learned judge, in the years 1798 and 1799—doctrines wholly unconnected with any '*present purpose of particular national interest;*' uninfluenced by any preference or '*distinction to independent states;*' delivered from a *seat* '*of judicial authority locally here,*' indeed, but according to a law which '*has no locality,*' and by one whose '*duty it is to determine the question exactly as he would determine the same question, if sitting at Stockholm,*'—'*asserting no pretentions, on the part of Great Britain, which he would not allow to Sweden.*'" . . . "Twelve years," so continues the Review, "have passed away since the period of those

beautiful doctrines—an interval not maked by any general change of character among neutrals, or any new atrocities on the part of the belligerents—distinguished by no pretentions which had not frequently before been set up by the different parties in the war, except that on both sides the right of unlimited blockade had been asserted. France, complaining that England, in 1806, and previously, exercised this power, had declared England and her colonies in a state of blockade, and England, in her turn, proclaimed all France, and her allies, blockaded. There were orders and decrees on both sides; and both parties acted upon them. The neutrals protested; and, recollecting the sound and impartial principles of our prize courts in 1798 and 1799, they appealed to that 'judicial authority which has its seat locally here,' but is bound to enforce 'a law that has no locality,' and 'to determine in London exactly as it would in Stockholm.' The question arose, whether those orders and decrees of one belligerent justified the capture of a neutral trader; and on this point we find Sir W. Scott delivering himself with his accustomed eloquence—with a power of language, indeed, which never forsakes him—and which might have convinced any person, except the suffering parties to whom it was addressed. (Case of the Fox, 30th May, 1811.)

"'It is strictly true, that by the constitution of this country, the King in council possesses legislative rights over this court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this court. These two propositions, that the court is bound to administer the law of nations, and that it is bound to enforce the King's orders in council, are not at all inconsisent with each other; because these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the court itself; or they are positive regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

"'The constitution of this court, relatively to the legislative power of the King in council, is analogous to that of the courts of common law relatively to that of the Parliament of this Kingdom. Those courts have their unwritten law, the approved principles of natural reason and justice—they have likewise the written or statute law in acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large, if they were left to the imperfect information which the courts could extract from mere general speculations. What would be the duty of the individuals who preside in those courts, if required to enforce an act of Parliament which contradicted those principles, is a question which I presume they would not entertain *a priori*; because they will not entertain *a priori* the supposition that any such will arise. In like manner, this court will not let itself loose into speculations as to what would be its duty under such an emergency; because it can not, without extreme indecency, presume that any such emergency will happen; and it is the less disposed to entertain them, because

its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law.' (Pp. 2, 3.)

"Here there are two propositions mentioned, asserting two several duties which the court has to perform. One of these is very clearly described—the duty of listening to orders in council, and proclamations issued by one of the parties before the court—the other, the duty of administering the law of nations, seems so little consistent with the former, that we naturally go back to the preceding passage of the judgment where a more particular mention is made of it. 'This court,' says the learned judge, 'is bound to administer the law of nations to the subjects of other countries, in the different relations in which they may be placed towards this country and its Government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law evidenced in the course of its decisions, and collected from the common usage of civilized states.'

"The faultless language of this statement all will readily confess and admire. The more judicial virtues of clearness and consistency may be more doubtful in the eyes of those who have been studying the law of nations under the same judge, when ruling the cases of the *Flad Oyen* and *Swedish Convoy*. It is with great reluctance that we enter upon any observations which may appear to question anything stated by such accurate reporters as Dr. Edwards and Sir C. Robinson, to have been delivered in the high court of admiralty. But we have no choice—we must be content to make our election between the doctrines of 1799 and 1811, and to abandon one or the other. The reluctance which we feel is therefore materially diminished; for, if we venture to dispute the law recently laid down by the learned judge, it is upon his own authority in times but a little removed from the present in point of date, and nowise differing from them in any other respect.

"How then can the court be said to administer the unwritten law of nations between contending states, if it allows that one government, within whose territories it 'locally has its seat,' to make alterations on that law at any moment of time? And by what stretch of ingenuity can we reconcile the position, that the court treats the English Government and foreign claimants alike, determining the cause exactly as it would if sitting in the claimant's country, with the new position, that the English Government possesses legislative powers over the court, and that its orders are in the law of nations what statutes are in the body of municipal law? These are questions which, we believe, the combined skill and address of the whole doctors of either law may safely be defied to answer.

"Again:—What analogy is there between the proclamations of one belligerent, as relating to points in the law of nations, and the enactments of statute, as regarding the common law of the land? Were there indeed any general council of civilized states—any congress such as that fancied in Henry IV.'s famous project for a perpetual peace—any amphyctyonic council for modern Europe; its decisions and edicts might bear to the established public law the same relation that statutes have to the municipal code; because they would be the enactments of a common head, binding on and acknowledged by the

whole body. But the edicts of one state, in questions between that state and foreign powers—or between that state and the subjects of foreign powers—or between those who stand in the place of that state and foreign governments or individuals, much more nearly resemble the acts of a party to the cause, than the enactments of the law by which both parties are bound to abide."

In 115 Edinburgh Review, (January, 1862.) 261, we have the following: "Lord Stowell conceived this country to be engaged in a revolutionary contest, because we had the misfortune to be at war with a revolutionary government. The landmarks of former times and the stipulations of more recent treaties were swept away by the torrent; but we are bold enough to assert that it is not for the interest or the honour of this country to attempt at this day to apply the extreme, and often unjustifiable rules, which may boast Lord Stowell's authority."

"His Majesty's Government desire to point out that the decision of the prize court of the captor in such matters, in order to be binding on neutral states, must be in accordance with recognized rules and principles of international law.

"His Majesty's Government feel themselves bound to reserve their rights by protesting against the doctrine that it is for the belligerent to decide that certain articles, or classes of articles, are as a matter of course, and without reference to the considerations referred to in the earlier portion of this despatch, to be dealt with as contraband of war regardless of the well-established rights of neutrals; and His Majesty's Government could not consider themselves bound to recognize as valid the decision of any prize court which violated those rights, or was otherwise not in conformity with the recognized principles of international law."

Lord Lansdowne, Sec. for For. Aff., to Sir C. Hardinge, Brit. ambass. at St. Petersburg, June 1, 1904, Parl. Papers, Russia, No. 1 (1905), 9–10.

The principle that the decisions of prize courts are not internationally conclusive as to the doctrines applied, and that a claimant injured by a wrongful decision may seek indemnity through the action of his government, is no longer open to question. The right to indemnity in such cases was demonstrated in the remarkable opinion delivered by William Pinkney, as one of the commissioners under Article VII. of the Jay treaty, under which large amounts were paid by the British Government to citizens of the United States as indemnity for captures and condemnations under orders in council violative of the rights of neutral trade. Similar indemnities were obtained from France for wrongful captures and condemnations during the Napoleonic wars, as well as from Spain, Naples, and Denmark. In the case of Denmark, the question of the international finality of prize sentences gave rise to a long discussion, which was conducted on the part of the United States by Henry Wheaton, as

minister to Denmark. Indemnities were also obtained by British subjects from the United States in certain prize cases under Article XII. of the treaty of Washington of May 8, 1871.

Moore, Int. Arbitrations, I. 336; III. 3209, 3210; V. 4555.
For the opinion of Mr. Pinkney in the case of the Betsey, see Moore, Int. Arbitrations, III. 3180.

VIII. *PRIZE MONEY AND BOUNTY.*

1. Claimants of Prize Money.

§ 1245.

The crew of a privateer may proceed by libel in admiralty for their respective portions of a prize.

Keane *v.* The Brig Gloucester, Federal Court of Appeals (1782), 2 Dall. 36.

Members of a crew of a privateer wrongfully dismissed and left on shore, after the beginning of the voyage, are entitled to their share of the prize money as joint tenants of the right to capture and make prizes conceded by the privateer's commission. It was said that this right attached when they were shipped and received on board by the captain as part of the crew.

Keane *v.* Gloucester, Federal Court of Appeals (1782), 2 Dall. 36.

In a case of capture from an enemy by a privateer, persons in other privateers acquire no right merely by witnessing the making of the capture.

Talbot *v.* The Commanders and Owners of Three Brigs, High Court of Errors and Appeals of Pennsylvania, 1784, 1 Dall. 95.

Where a capture has actually taken place with the assent of the commander of a squadron, express or implied, the question of liability assumes a different aspect, and the prize-master may be considered as bailee to the use of the whole squadron who are to share in the prize money; but not so as to mere trespasses unattended with a conversion to the use of the squadron.

The Eleanor, 2 Wheat. 345.

The profits of a capture made by individuals acting without a commission inure to the Government, but it has not been the practice to exact them. On the contrary, it has been the practice to recompense gratuitous enterprise, courage, and patriotism, by assigning the captors a part and sometimes the whole prize.

Wirt, At. Gen., 1821, 1 Op. 463.
This related to the case of the Dos Hermanes, 2 Wheat. 77.

In a case of joint capture by the Army and Navy, it was held that the capture inured exclusively to the benefit of the United States, there being no statutory provision in such a case as to prize money.

The Siren, 13 Wall. 389.

"As the capture was made by the Army, or by the Army and Navy operating together, it inured exclusively to the benefit of the United States. There is no distribution of prize money in such a case. Porter *v.* United States, 106 U. S. 607; The Siren, 13 Wall. 389."

The Nuestra Señora de Regla (1882), 108 U. S. 92, 101.

The proceeds of the sale of a vessel seized as a prize, deposited by a marshal in a national bank which is a special or designated depositary of public moneys, do not constitute public moneys of the United States, within the meaning of statutes applicable to public money and authorizing its deposit in a public depositary; and such deposit does not, therefore, constitute a payment of such moneys to the United States, which will make the Government liable therefor in case of the failure of the bank pending appeal. Judgment, United States *v.* Coudert (1896), 73 Fed. Rep. 505, 19 C. C. A. 543, affirmed.

Coudert *v.* United States (1899), 175 U. S. 178, 20 S. Ct. 56.

2. Proportions Awarded.

§ 1246.

The 4th section of the act of 3d March, 1800, adopts the rules which have been or might be provided by law for the distribution of prize money. These rules were taken from the 5th and 6th sections of the act of the 23d of April, 1800, by which the whole of the prize is given to the captors when the vessel captured is of equal or superior force to the vessel making the capture; and when of inferior force, the prize is directed to be divided equally between the United States and the captors.

Wirt, At. Gen., 1823, 1 Op. 594.

An armed torpedo steam launch without books is a "single ship," within the meaning of the term in United States prize act of June 30, 1864, which gives to the commander of a single ship one-tenth of the prize money awarded to the ship.

United States *v.* Steever, 113 U. S. 747.

Under the prize act of 1864 the commander of a single ship making a capture is entitled to one-tenth of the prize money, and can not take,

like the other officers, in proportion to his rate of pay in the service, even though his tenth be less than the shares of his subordinate officers. (Nott, J. dissenting.)

Swan *v.* United States, 19 Ct. Cl. 51.

Under said act the terms "vessel" and "ship" are synonymous; an armed torpedo launch is a "ship" and her commander "the commander of a single ship." (Ibid.)

Capture of enemy's property does not increase naval pay proper, but enlarges the right to compensation, prize money being given as an inducement to enter the service and perform its duties with bravery and fidelity.

Cole *v.* United States (1899), 34 Ct. Cl. 446.

3. Bounty.

§ 1247.

Section 4625, Revised Statutes, relating to prizes, refers only to property actually captured, and not to property which has been destroyed without ever having been actually seized or in the possession of the forces of the United States. It was therefore held that the officers and men of the U. S. S. *Hawk* were not entitled to prize money under that section for the destruction of the Spanish steamer *Alphonso XII.* But it was suggested that if the steamer, which was publicly reported to have been "in use as an auxiliary vessel of the Spanish navy," was, at the time of her destruction, "a ship or vessel of war belonging to Spain, or in her service," a claim for bounty might, perhaps, be made under section 4635, Revised Statutes.

Griggs, At. Gen., Aug. 2, 1898, 22 Op. 171.

Questions as to bounty under section 4635, Revised Statutes, should be submitted to a judicial tribunal, and the Court of Claims has authority to hear and determine such questions.

Boyd, Act. At. Gen., Sept. 2, 1898, 22 Op. 205.

In determining whether the Spanish vessels sunk or destroyed at Manila were of inferior or superior force to the American vessels engaged in the battle, for the purpose of fixing the amount of bounty to be awarded under Revised Statutes, section 4635, the land batteries, mines, and torpedoes not controlled by those in charge of the enemy's vessels, but which supported those vessels, are to be excluded altogether from consideration, and the size and armaments of the vessels sunk or destroyed, together with the number of men upon them, are alone to be regarded.

Dewey *v.* United States (1900), 178 U. S. 510, 20 S. Ct. 981.

4. Abolition of Prize Money and Bounty.

§ 1248.

"And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed."

Act of March 3, 1899, c. 413, entitled "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," 30 Stats. 1004, 1007.

CHAPTER XXVI.

CONTRABAND.

I. *RESTRICTION ON NEUTRAL TRADE.*

§ 1249.

See Kleen, De la Contrebande de Guerre; Manceaux, De la Contrebande de Guerre.

The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade.

The Peterhoff, 5 Wall. 28.

Contracts for the transportation of contraband articles are enforceable.

Northern Pac. Ry. Co. *v.* American Trading Co. (1904), 195 U. S. 439, 465.

The question of contraband "is a source and a pretext for much vexation to the commerce of neutrals, whilst it is of little real importance to the belligerent parties. The reason is obvious. In the

present state of the arts throughout Europe every nation possesses, or may easily possess, within itself the faculty of supplying all the ordinary munitions of war. Originally the case was different, and for that reason only it would seem that the articles in question [i. e., the lists embraced in the treaties] were placed on the contraband list. The articles which alone fall within the original reason are naval stores; and if these are expunged from the list of contraband, it is manifest that an abolition of the list altogether would be a change in the law of nations to which little objection ought to be made."

Mr. Madison, Sec. of State, to Mr. Armstrong, min. to France, March 14, 1806, MS. Inst. U. States Ministers, VI. 322.

The doctrine of contraband "should be rigidly confined within the narrowest limits compatible with an honest belligerent policy; and in the opinion of this Government those limits ought to be made to include only arms and munitions of war. . . . It found its way into the code of nations, when the means of supply were much more restricted than at present, and before the progress of improvement had placed it in the power of almost every nation to provide itself with whatever it may want either for offensive or defensive operations. . . . The dictum upon which this whole doctrine rests is, that a neutral nation ought not to supply a belligerent power with articles which may serve him in the direct prosecution of hostilities. . . . The discussion which at this time is going on respecting the military character of coal, and whether it is now excluded from general commerce as contraband of war, is a striking illustration of the tendency to enlarge this power of prohibition and seizure, and of the necessity of watching its exercise with unabated vigilance. . . . It adds to the complications arising out of the uncertainty in which this subject is involved, that there is no common tribunal empowered to decide between the independent parties, when a belligerent nation, interested in the measure, undertakes to add a new article to the catalogue of contraband, upon the assumption that it has changed its character from a peaceable to a warlike one, in consequence of a change in the objects to which it may be applied, either by a revolution in the mode of conducting war, or by improvements in the implements used in its prosecution. The pretension of a prerogative on the part of sovereigns, whether in peace or war, if indeed any such exist, to decide these questions, except so far as relates to their own subjects, is utterly repudiated by the United States."

Mr. Cass, Sec. of State, to Mr. Mason, min. to France, No. 190, June 27, 1859, MS. Inst. France, XV. 426.

See note under an extract from this instruction, supra, § 1195.

"I have the honor to acknowledge the receipt of your note of the 25th ultimo, wherein you present certain reasons which lead your Government to ask that this Government, in common with other powers, consent to a general prohibition of the passage of the Dardanelles or the Black Sea by vessels carrying dynamite.

"In the form in which the request is presented, this Government would not feel justified in giving this measure its unqualified sanction, inasmuch as it is founded not so much on the inherent danger to life and property of the explosives named while in transit as on the possible ulterior wish to which they may be put. I need scarcely adduce argument to show that such a course is tantamount to enlarging the international definition of contraband of war, and making the substances in question contraband also in time of peace. To this proposition the United States could not assent, either as a general principle or in its practical application to a class of explosives whose employment is widely extending in all operations of mining and tunneling, and which, rightly used, plays an important part in the internal development of the natural resources of nearly all countries.

"If, however, the question presented were one of regulating the conveyance of a dangerous detonating or inflammable substance, so that its transit might be unaccompanied by peril to life, this Government could find no objection to such a course. Our own laws (sections 4472, 5353, and 5354 of the Revised Statutes) prohibit the carriage of such explosives upon any vessel or vehicle whatever used for the conveyance of passengers to the United States or between the States and Territories; and section 5354 especially considers the death of any person when caused by the transit or attempted transit of such explosives as entailing upon the offenders the penalty for manslaughter. Our statutes, however, do not absolutely prohibit, but simply regulate, the conveyance of explosives.

"This Government will be happy to consider any scheme for the regulation of the conveyance of explosives through the straits of the Porte, and if it shall not appear that the rights of peaceful and legitimate commerce or of transit through waters by which the world's commerce must necessarily pass are interfered with or prohibited, your Government may rest assured that no objection will be made to the enforcement of such legislation."

Mr. Frelinghuysen, Sec. of State, to Aristarchi Bey, Turkish min., Dec. 4, 1882, For. Rel. 1883, 892.

Mr. King's correspondence in 1799 as to contraband is given in 2 Am. State Papers, For. Rel. 494 et seq.

Mr. Seward's report of Jan. 26, 1863, giving correspondence in relation to the capture of British vessels sailing from one British port to another with contraband articles for the Confederate States, is given in Senate Ex. Doc. 27, 37 Cong. 3 sess.

July 17, 1890, the Pacific Mail Steamship Company's steamer *Colima* arrived at San José, Guatemala, having on board a quantity of arms and ammunition in transit from San Francisco to a port in Salvador. At that time, the relations between Guatemala and Salvador were strained, armies of "observation" of the two countries confronting each other on the frontier. When the *Colima* arrived at San José, the Guatemalan authorities sought the consent of Mr. Mizner, the American minister, to the taking of the arms from the steamer as contraband of war, and proposed, if necessary, formally to declare war in order to seize the arms as contraband, the steamer meanwhile being detained till Mr. Mizner should hear from Washington. On July 20 Mr. Blaine instructed Mr. Mizner to demand the surrender of the *Colima* and her cargo, as she had been guilty of no offense against any existing treaty or against the law of nations. Before this message was received, however, the attention of the Guatemalan minister of foreign affairs was drawn to a stipulation in the contract between that Government and the steamship company, by which the latter agreed not to permit troops or munitions of war to be carried on its steamers from any of its ports of call to the ports of or adjacent to Guatemala, if there should be reason to believe that the materials might be used against Guatemala, or that war or pillage was intended. On the strength of this stipulation, it was agreed between the Guatemalan authorities and the officers of the steamship company, with Mr. Mizner's concurrence, that the arms and ammunition should be transshipped from the *Colima* to a steamer going north for the purpose of being provisionally detained at the company's storehouse at Acapulco, in Mexico. But, while the transshipment was in progress, the Guatemalan official who had charge of it compelled, by means of threats against the *Colima*, the conveyance of the arms to the shore, where they were seized by the Guatemalan authorities and some of them distributed among the troops. Mr. Mizner demanded that the arms should be returned to the company, with certain apologetic formalities. This was agreed to, and the arms were placed on board a steamer bound north on the 31st of August, but without any of the promised formalities. The United States declined to accept this as terminating the incident, and insisted that further reparation should be made for the irregular seizure of the arms and ammunition and for the indignity offered to the *Colima*.

For. Rel. 1890, 32–35, 39, 40, 47, 54, 97, 142; For. Rel. 1891, 53–55, 59, 61, 66, 74, 82.

II. *WHAT ARTICLES ARE CONTRABAND.*

§ 1250.

According to Chief Justice Chase, contraband goods are divided into three classes: "Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes.

"Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

The Peterhoff, 5 Wall. 28, 58.

The foregoing classification is that which was made by Grotius, and which has been repeated by writers ever since his time. See Grotius, De Jure Belli ac Pacis, bk. 3, c. 1, sec. 5.

See, also, note by Wheaton, 1 Wheat. 389.

In the draft convention, suggested on January 5, 1804, by Mr. Madison, Secretary of State, to Mr. Monroe, minister to England, occurs the following:

"ART. IV. Contraband of war shall consist of the following articles only: Saltpeter, sulphur, cuirasses, pikes, swords, sword belts, knapsacks, saddles and bridles, cannon, mortars, firearms, pistols, bombs, grenades, bullets, firelocks, flints, matches, and gunpowder; excepting, however, the quantity of the said articles which may be necessary for the defense or use of the ship and those who compose the crew, and no other articles whatever, not here enumerated, shall be reputed contraband or liable to confiscation, but shall pass freely without being subjected to the smallest difficulty, unless they be enemy's property."

Mr. Madison stated that this enumeration was "copied from the treaty of 1781 between Great Britain and Russia. It is sufficiently limited, and that treaty is an authority more likely than any other to be respected by the British Government."

MS. Inst. U. States Ministers, VI. 161.

"There is no accepted enumeration of the articles coming within the prohibition. And to add to the dangers of collision, the principle by which they are to be tested is so loosely defined that it is practically of little use, but to furnish a pretext when one is wanting,

to enable parties at war to enlarge the contraband list at their pleasure. Some of the later and approved writers upon the law of nations, as Hautefeuille and Ortolan, object to this power of extension *ad libitum*, and the former particularly confines the list to objects of first necessity for war, and which are exclusively useful in its prosecution, and which can be directly employed for that purpose without undergoing any change—that is to say, to arms and munitions of war."

Mr. Cass, Sec. of State, to Mr. Mason, min to France, No. 190, June 27, 1859, MS. Inst. France, XV. 426.

By the "armed neutrality" entered into during the American Revolutionary War by Russia, Denmark, and Sweden in 1780, "being the three northern powers from whose dominions chiefly the other maritime nations of Europe received supplies of timber and other naval stores," the effort was made "to strike these from the list of contraband, or by some means to exempt them from capture." It was understood, however, at the time, that this was an exception from the law of nations. By this law "timber and other articles for the equipment of ships are contraband of war." Hence the recital of this principle in Jay's treaty ought to give no just cause of offense to France.

Mr. Pickering, Sec. of State, to Mr. Pinckney, min. to England, Jan. 16, 1797, Am. State Papers, For. Rel. I. 559.

For the list of contraband under the armed neutrality, see the section on that subject, supra, § 1220.

Marshall, referring, as Secretary of State, to the provision in the Jay treaty which embraced as contraband "whatever may serve directly to the equipment of vessels," complained that the British vice-admiralty courts, in construing the clause, appeared to consider it "as including whatever might by any possibility be applied to the equipment of vessels."

Mr. Marshall, Sec. of State, to Mr. King, min. to England, Sept. 20, 1800, Am. State Papers, For. Rel. II. 486, 488.

See, also, 5 American Law Review, 256.

See note by Wheaton, 1 Wheat. 389.

Tar was, as an article used in the building and equipment of ships, contraband in 1779.

The Bird (1903), 38 Ct. Cl. 228.

"Of the continental writers, Hautefeuille contends for the absolute rule limiting contraband to such articles as are in their nature of first necessity for war, substantially exclusively military in their use, and so made up as to be capable of direct and immediate use in war.

(Tit. 8, § 2, tom. ii. 84, 191, 154, 412; tom. iii. 222.) Ortolan is of the same opinion, on principle, and contends that all modern treaties limit the application of contraband to articles directly and solely applicable to war; yet he admits that certain articles not actually munitions of war, but whose usefulness is chiefly in war, may, under circumstances, be contraband; as, sulphur, saltpetre, marine steam-machinery, &c.; but coal, he contends, from its general necessity, is always free. (Tom. ii. ch. vi. 179–206.) Massé (Droit Comm., i. 209–211) admits that the circumstances may determine whether articles doubtful in their nature are contraband in the particular case; as the character of the port of destination, the quantity of goods, and the necessities and character of the war. The same view is taken by Tetens, a Swedish writer (Sur les Droits Récïproques, 111–113). Hubner (lib. ii. ch. i. §§ 8, 9), seems to be of the same opinion with Tetens and Massé. Klüber (§ 288) says that naval stores are not contraband; but adds, that, in case of doubt as to the quality of particular articles, the presumption should be in favor of the freedom of trade.

"The subject is not affected by the declaration of Paris, of 1856."

Dana's Wheaton, § 501, note 226, p. 631.

Referring to a circular of the Department of State, No. 12, May 12, 1862, transmitting a proclamation of the President relaxing the blockade of certain ports, together with regulations as to trade with such ports; and also to circular No. 13, May 30, 1862, transmitting additional regulations, "together with a list of certain articles contraband of war, of which the importation was prohibited into ports the blockade of which had been relaxed by the President," Mr. Seward, April 26, 1864, instructed the diplomatic and consular officers of the United States that, in the opinion of the Secretary of the Treasury, considerations of a public nature required that the importation of coin or bullion from foreign countries into such ports should be entirely prohibited; and they were accordingly directed to add to the prohibited articles enumerated in circular No. 13 the words "coin" and "bullion."

Mr. Seward, Sec. of State, to the diplomatic and consular officers of the United States, circular No. 50, April 26, 1864, MS. Circulars, I. 267.

During the war with Chile, the Peruvian authorities seized, while in transitu, at Callao, certain packages of blank paper currency, the property of American citizens, but destined for the Chilean Government. The property thus seized was at the time in charge of Messrs. Wells, Fargo & Company, of New York, as public carriers. Subsequently, apparently in retaliation for this seizure, the Chilean corvette *Chacabuco*, while off the port of Chimbote, took from the vessel

on which they were being transported, in charge of Messrs. Wells, Fargo & Company, certain cases of blank paper currency destined for the Peruvian Government. Against the seizure by the Peruvian authorities, the United States protested, both on the ground that the goods in question were not embraced in the definition of contraband in the treaty between the two countries, and that the seizure was besides a violation of the stipulation in the treaty of 1856 between the United States and Peru forbidding the seizure of enemy's property in neutral ships. A similar protest was addressed to the Chilean Government against the seizure by the *Chacabuco*. It appears that the Peruvian Government, in response to the protest of the United States, restored the property, which was afterwards duly delivered by the carriers to the Chilean Government. The Chilean Government, however, put into enforced circulation in Peru the notes seized by the *Chacabuco*, requiring all persons to accept it at its full face value in exchange for property taken and used by the Chilean forces. A claim against Chile in behalf of Messrs. Wells, Fargo & Company was subsequently presented to the United States and Chilean Claims Commission under the convention of August 7, 1892, and by consent of the agents of the two Governments, and at the request of the claimants, a compromise award was entered in their favor for upwards of $29,000, United States gold.

Mr. Evarts, Sec. of State, to Mr. Osborn, min. to Chile, No. 110, Oct. 29, 1880, MS. Inst. Chile, XVI. 295; Moore, Int. Arbitrations, IV. 3744.

Writing to the Chilean minister at Washington, May 18, 1881, and referring to his contention that money or its representative might under certain circumstances be regarded as contraband of war, Mr. Blaine, as Secretary of State, said that the minister did not specify the circumstances under which money might be so regarded, nor refer to the statements of writers or the decisions of prize courts where the doctrine had been maintained. "Diligent but fruitless search," said Mr. Blaine, "has here been made for them." He also adverted to the stipulation in the treaty between England and France of 1786 that "gold, silver, coined or uncoined," should not be deemed contraband of war. The treaty between the United States and Chile of 1832, said Mr. Blaine, restricted contraband to implements and munitions of war, and did not include in that category paper money and postage stamps. He expressed the opinion that an acknowledgment of the Chilean claim would establish an inconvenient precedent. (Mr. Blaine, Sec. of State, to Mr. Martinez, MS. Notes to Chilean Leg. VI. 269.)

See, also, Mr. Blaine, Sec. of State, to Mr. Martinez, June 3, 1881, MS. Notes to Chilean Leg. VI. 274.

The Chilean minister at Washington submitted, on March 19, 1883, a detailed statement of the case, with many quotations from international texts. To this statement no reply appears to have been made till April 11, 1885, when Mr. Bayard addressed a note on the subject to the Chilean minister. The most of this note was devoted to the question of title to the property at the time of seizure. In

briefly referring to the contraband question, Mr. Bayard adverted to the fact that at the time of the seizure the port of Chimbote, to which the vessel was apparently bound, was in the possession of the Chilean forces, so that the property, if it could originally have been considered contraband, was to be regarded as having ceased to be so for want of a hostile destination. In this relation, he cited the cases of The Abby and The Lisette (6 Robinson's Admiralty Reports, 392), and added: "The Chilean statement embodies an urgent effort to show that, by analogy at least, the Peruvian Government notes seized were liable to condemnation as contraband of war. No authority, however, is cited in support of that pretension, which can not be acquiesced in. Still, it may be acknowledged that with the lapse of time the just rights of belligerents may require an addition to the articles heretofore regarded as contraband of war." (Mr. Bayard, Sec. of State, to Mr. Godoy, Chilean min., April 11, 1885, MS. Notes to Chilean Leg. VI. 337.)

Money, silver plate, and bullion, when destined for hostile use or for the purchase of hostile supplies, being contraband of war, where a foreign vessel entered New Orleans under the license of the President's proclamation of May 12, 1862, the determination of the question as to whether articles of this class, part of her outward-bound cargo, were contraband, devolved upon the Federal general commanding in that city. Believing them to be so, he was authorized to order them to be removed from her, and her clearance to be withheld until his order should be complied with.

United States *v.* Diekelman, 92 U. S. 520.

Printing presses, materials, and paper, and postage stamps, belonging to the enemy, and intended for his immediate use, are contraband.

The Bermuda, 3 Wall. 514, 552.

Artillery harness, men's army bluchers, artillery boots, government regulation gray blankets, are, when they have a hostile destination, contraband.

The Peterhoff, 5 Wall. 28, 58; cited in 5 Am. Law Rev. 259.

In numerous treaty provisions, as in that between the United States and France of 1778 (art. 24), "horses," or "horses with their furniture," are classed as contraband.

See Lee, At. Gen., 1796, 1 Op. 61.

"Horses, saltpetre and sulphur may be placed first as subjects of the widest usage. It has always been the practice of England and France to regard horses as contraband; in a very large number of treaties they are expressly included; in none are they excluded except a few contracted by Russia, and in those between the United

States and other American countries, the latter however confining the prohibition to cavalry mounts."

Hall, Int. Law (5th ed.), 657.

The preponderance of authority at the end of the eighteenth century was that horses were presumptively contraband, and that a shipment of horses to a port of a belligerent was presumptively for military uses.

The Atlantic (1901), 37 Ct. Cl. 17.

In this case there were 38 horses on a vessel of 85 tons burden. But, in another case, where there were only 5 horses on a vessel of 98 tons burden, the rest of the cargo, consisting of cattle and fowls, and the port of destination was neither besieged, blockaded, nor, so far as was known, garrisoned, it was held that the horses would not be presumed to have been intended for military use. (The Juno, 38 Ct. Cl. 465.)

April 29, 1898, the Italian ambassador at Madrid was orally advised that instructions had been issued to Spanish naval officers temporarily to suspend, in regard to sulphur, the application of the royal decree of April 23, concerning contraband of war. This resolution was confirmed by a note of May 31, 1898, the Spanish Government reserving the right to restore sulphur to the contraband list, should its interests require it, but promising not to do so without sufficient notice, so that pending contracts might be performed. The Italian ambassador replied June 3, 1898, accepting the notification of Spain's resolution, but expressly reserving the question of principle. It was understood to be the opinion of the Italian Government that sulphur could not properly be considered as contraband of war, since it was used in many innocent arts and had ceased to be an ingredient of the higher class of gunpowders.

June 8, 1898, there appeared in the official Imperial Gazette, at Berlin, an announcement that the Spanish ambassador had informed the German Government that sulphur, which had been included in the royal decree of April 23 as contraband of war, was no longer to be so considered.

Mr. Draper, ambass. at Rome, to Mr. Day, Sec. of State, No. 227, June 9, 1898; Mr. Iddings, chargé at Rome, to Mr. Day, Sec. of State, No. 251, July 16, 1898, MS. Desp. from Italy.

Mr. White, ambass. at Berlin, to Mr. Day, Sec. of State, June 11, 1898, MS. Desp. from Germany.

See, also, Mr. Moore, Act. Sec. of State, to Sir J. Pauncefote, British ambass., July 2, 1898, MS. Notes to Brit. Leg. XXIV, 241.

The master of a ship, who, just prior to the war between the United States and Spain, had taken on board at Port Empedocle, Sicily, a quantity of sulphur for New York, was justified, on hearing that war had begun, in unloading the sulphur and storing it in a warehouse,

and was not obliged to delay his voyage and reship the sulphur because of reports in the press that Spain, as afterwards proved to be the case, would revoke her declaration that sulphur was contraband of war.

The Styria *v.* Morgan (1902), 186 U. S. 1.

With reference to the proposal in the negotiations at Peking in 1901 to prohibit China from importing articles used in the manufacture of arms and munitions of war, the American diplomatic representative was instructed: "The materials principally employed in the manufacture of arms and ammunition are reported by the War Department to be as follows: Brass, copper, tin, niter, lead, charcoal, guncotton, sulphur, alcohol, nitroglycerine, sulphuric acid, nitric acid, picric acid, mercuric fulminate, raw cotton; steel tubes and hoops, forged and oil tempered. . . . The prohibition of several of the materials mentioned, would, unless destined for arms and ammunition factory, be impossible. The object would seem to be the prevention of the setting up of plants. The exclusion of gun and cartridge machinery would be necessary, but this inhibition is not regarded by the United States as important."

Mr. Hay, Sec. of State, to Mr. Rockhill, special commissioner, tel., March 19, 1901, For. Rel. 1901, App. 365.

"It has been held by this country, and our officers have been so instructed, that the term 'contraband of war' includes only articles having belligerent destination and purpose. Such articles have been classed under these two heads:—

"1. Those that are primarily and ordinarily used for military purposes in time of war, *e. g.*, arms and munitions of war, military material, &c.—articles of this kind being usually described as absolutely contraband.

"2. Those that may be, and are, used for peaceful or warlike purposes according to circumstances, such articles being usually described as conditionally contraband.

"Articles of the first class destined for ports of the enemy or places occupied by his forces are always contraband of war. Articles of the second class are contraband of war only when actually and especially destined for the military or naval forces of the enemy. Coal and provisions are among the articles which are only conditionally contraband."

Lord Lansdowne, British Sec. for For. Aff., to Sir C. Hardinge, British ambass. at St. Petersburg, Aug. 10, 1904, Parl. Papers, Russia, No. 1 (1905), 13.

III. *GOVERNMENTAL LISTS.*

§ 1251.

"6. The following things are considered contraband of war:

"Portable arms and artillery, mounted or in detached pieces; ammunition for firearms, such as projectiles, fuses, balls, priming, cartridges, cartridge tubes, powder, saltpeter, sulphur; the material and ammunition of explosive instruments, such as mines, torpedoes, dynamite, pyroxylin, and other fulminating substances; the material of artillery, either for fortifications or for the field, such as carriages, caissons, cartridge chests, campaign forges, canteens, pontoons, etc.; objects of military equipment and dress, such as cartridge-boxes, knapsacks, armor, sappers implements, drums, saddles and harness, articles of military dress, tents, etc., and in general all objects destined to land or sea forces.

"Such objects, when found on board neutral vessels and destined to an enemy port, may be seized and confiscated, save the quantity which is necessary for the ship on which the seizure is made.

"7. The following acts are assimilated to contraband of war, and are forbidden to neutrals: The transportation of enemy troops, and that of dispatches and correspondence of the enemy, and the furniture of enemy ships of war.

"Neutral ships taken in the commission of the offense of such contraband may, according to the circumstances, be seized and even confiscated."

Translation of Russian Decree, relating to Privateering, Neutral Trade, and Blockades, May 13/25, 1877, 68 Br. & For. State Papers, 924, 925.

The original text is as follows:

6. Sont réputés contrebande de guerre les objets suivants:

Les armes portatives et d'artillerie, montées ou en pièces détachées; les munitions d'armes à feu, telles que projectiles, fusées d'obus, balles, amorces, cartouches, tubes de cartouches, poudre, salpêtre, soufre; le matériel et les munitions de pièces explosibles, telles que mines, torpilles, dynamite, pyroxiline et autres substances fulminantes; le matériel de l'artillerie, du génie et du train, tels que affûts, caissons, caisses de cartouches, forges de campagne, cantines, pontons, etc.; les objets d'équipement et d'habillement militaire, tels que gibernes, cartouchières, sacs, cuirasses, outils de sape, tambours, selles et harnais, pièces d'habillement militaire, tentes, etc., et en général tous les objets destinés aux troupes de terre ou de mer.

Ces objets, lorsqu'ils sont trouvés à bord de navires neutres et destinés à un port ennemi, peuvent être saisis et confisqués, sauf la quantité qui est nécessaire au navire sur lequel est opérée la saisie.

7. Sont assimilés à la contrebande de guerre les actes suivants, interdits aux neutres: le transport de troupes ennemies, celui de dépêches et de la correspondance de l'ennemi, la fourniture de navires de guerre à l'ennemi.

Les navires neutres pris en flagrant délit de semblable contrebande peuvent être, selon les circonstances, saisis et même confisqués.

"62. The list of Goods Absolutely Contraband comprises:—

"Arms of all kinds and machinery for manufacturing Arms. Ammunition and materials for Ammunition, including Lead, Sulphate of Potash, Muriate of Potash (Chloride of Potassium), Chlorate of Potash, and Nitrate of Soda. Gunpowder and its materials, Saltpetre and Brimstone; also Gun-Cotton. Military Equipments and Clothing. Military Stores. Naval Stores, such as Masts (Staadt Embden, 1 C. Rob. 27. Charlotte, 5 C. Rob. 305), Rudders, and ship Timber, Hemp (Gute Gesellschaft Michael, 4 C. Rob. 94. Apollo, 4 C. Rob. 161. Evert, 4 C. Rob. 354) and Cordage, Sail-cloth (Neptunus, 3 C. Rob. 108), Pitch and Tar (Jonge Tobias, 1 C. Rob. 329. Twee Juffrowen, 4 C. Rob. 242. Neptunus, 6 C. Rob. 408); Copper fit for sheathing Vessels (Charlotte, 5 C. Rob. 275); Marine Engines, and the component parts thereof, including Screw-Propellers, Saddle-Wheels, Cylinders, Cranks, Shafts, Boilers, Tubes for Boilers, Boiler-Plates, and Fire-Bars; Marine Cement, and the materials used in the manufacture thereof, as Blue Lias and Portland Cement; Iron in any of the following forms—Anchors, Rivet-Iron, Angle-Iron, Round Bars of from $\frac{3}{4}$ to $\frac{5}{8}$ of an inch diameter, Rivets, Strips of Iron, Sheet Plate-Iron exceeding $\frac{1}{4}$ of an inch, and Low Moor and Bowling Plates.

"63. All Goods fit for purposes of war and peace alike, (not hereinbefore specified as Absolutely Contraband), on board a vessel which has a hostile destination, are Conditionally Contraband, that is, they are contraband only in case it may be presumed that they are intended to be used for purposes of war. This presumption arises when such hostile destination of the Vessel is either the Enemy's Fleet at Sea or a hostile Port used exclusively or mainly for Naval or Military Equipment (Jonge Margaretha, 1 C. Rob. 188. Peterhof, 5 Wallace, 58).

"64. The list of Goods Conditionally Contraband comprises:—Provisions and Liquors fit for consumption of Army or Navy (Jonge Margaretha, 1 C. Rob. 191. Haabet, 2 C. Rob. 174. Edwards, 4 C. Rob. 68. Ranger, 6 C. Rob. 125). Money. Telegraphic Materials, such as Wire, Porous Cups, Platina, Sulphuric Acid, and Zinc (see Parliamentary Papers, North America, No. 14, 1863, p. 5). Materials for the construction of a Railway, as Iron Bars, Sleepers, &c. Coals (see Lord Kingsdown's Speech in the House of Lords, May 26, 1861). Hay. Horses. Rosin (Nostra Signora de Begona, 5 C. Rob. 98). Tallow (Neptunus, 3 C. Rob. 108). Timber (Twende Brodre, 4 C. Rob. 33).

"65. It is part of the prerogative of the Crown during the war to extend or reduce the lists of Articles to be held Absolutely or Conditionally Contraband, subject, however, to any Treaty Engagements binding upon Great Britain.

"66. If the Commander is satisfied that the Goods on board the Vessel are fit for purposes of peace exclusively, he should allow the Vessel to proceed on her course."

Holland's Manual of Naval Prize Law (issued by authority of the Lord's Commissioners of the Admiralty, 1888), 19–21.

The question of contraband did not become the subject of judicial controversy during the war with Spain, but it was dealt with in General Orders No. 492. Premising its definition with the explanation that "contraband of war comprehends only articles having a belligerent destination as to an enemy's port or fleet," the order specified certain articles as "absolutely contraband" and others as "conditionally contraband." The former were:

"Ordnance; machine guns and their appliances, and the parts thereof; armor plate, and whatever pertains to the offensive and defensive armament of naval vessels; arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being especially adapted for use in war by land or sea; torpedoes and their appurtenances; cases for mines, of whatever material; engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges, canteens, pontoons; ordnance stores; portable range finders; signal flags destined for naval use; ammunition and explosives of all kinds; machinery for the manufacture of arms and munitions of war; saltpeter; military accouterments and equipments of all sorts; horses."

The "conditionally contraband" were:

"Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions, when destined for an enemy's ship or ships, or for a place that is besieged."

By the Spanish royal decree of April 23, 1898, contraband was defined as follows:

"Cannon, machine guns, mortars, guns, all kinds of arms and firearms, bullets, bombs, grenades, fuses, cartridges, matches, powder, sulphur, saltpeter, dynamite and every kind of explosive; articles of equipment like uniforms, straps, saddles and artillery and cavalry harness; engines, for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair and arming of war-ships; and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband."

But for the last clause, which seemed to be capable of rendering the preceding specific enumeration nugatory, this paragraph would be open to little objection. Soon after its promulgation the operation

of the decree was restricted, on the request of the Italian Government, by a special dispensation in favor of sulphur, which is obtained chiefly from Sicily.

Proclamations and Decrees during the War with Spain, 85, 88, 93.

"According to article 13 of the 'Regulations on Maritime Prizes,' articles considered as contraband of war are announced for general information in a special declaration. The following have been declared such in declarations: (*a*) All kinds of arms, both hand (portable) and artillery (ordnance), whether assembled or in parts; (*b*) ammunition, such as projectiles for cannon, fuses, bullets, capsules, cartridges, cartridge cases, powder, saltpeter, sulphur; (*c*) objects or accessories for making explosions, such as mines, dynamite, pyroxylene, and other explosive compositions; (*d*) artillery appliances, engineer and army vehicles, such as gun carriages and mounts, cartridge boxes or packs (small arms and ordnance), field forges, field kitchens, tool wagons, pontoons, bridge trestles, draft harness, etc.; (*e*) articles of troop equipment and dress, such as cartridge boxes and bags, knapsacks, bandoleers, breastplates, intrenching tools, drums, kettles, saddles, horse trappings, ready-made uniforms, tents, etc.; (*f*) naval vessels sailing to an enemy's port, even though under a neutral commercial flag, if by the construction of their hull, their interior arrangement, and other signs they are evidently built for war purposes and are going to the enemy's port for the purpose of being sold or turned over to the enemy; (*g*) generally speaking, all other objects directly intended for war, whether land or naval, if they are being transported at the cost of or with destination to the enemy. By the designation 'to the enemy' is meant transportation to his fleet, to one of his ports, or even to a neutral port if the latter, according to obvious and indisputable proofs, merely serves as an intermediate station to the enemy and as the final goal of all transportation.

"The following acts are considered on a par with military contraband and involve the same consequences for a neutral vessel and cargo: (1) Conveyance of hostile troops, military detachments, and individual military persons, and (2) conveyance of enemy's dispatches—that is, business correspondence between hostile commanders and their agents stationed on a vessel or on territory belonging to or occupied by the enemy."

Russian Special Instructions, Sept. 20, 1900, Appendix II., supplementing the Prize Regulations of March 27, 1895, For. Rel. 1904, 735, 747, 754.

The enumeration here used as a basis for a list of contraband articles is that given in the enumeration of the ukase of the governing senate of May 12, 1877, on the occasion of the war between Russia and Turkey, printed on p. 477, Foreign Relations, 1877. (For. Rel. 1904, 754).

"VI. The following articles are considered as contraband of war:

"(1) Small arms of all kind, both portable and of artillery, whether mounted or in parts, as well as armor plate.

"(2) Ammunition for firearms, such as shells, bomb fuses, bullets, caps, cartridges, cartridge tubes, powder, sulphur, saltpeter.

"(3) Material and all kind of substances for making explosions, such as torpedoes, dynamite, pyroxilin, various fulminary substances, conductors, and all articles used for exploding mines and torpedoes.

"(4) All material for the artillery, the engineer corps, and troop trains, such as gun carriages, limbers, cartridge and ammunition boxes, campaign forges, field kitchens, instrument wagons, pontoons, bridge trestles, barbed wire, harness for transport service, etc.

"(5) Material for the equipment and clothing of troops, such as bandoliers, knapsacks, sword hilts, cuirasses, intrenching tools, harness, uniforms, tents, etc.

"(6) Ships which are bound to an enemy's port, even if sailing under a neutral commercial flag, if their construction or internal arrangements or any other indication would show that they are built for warlike purposes or for sale or destined to be handed to the enemy upon arriving at their destination.

"(7) All kinds of ships' machinery or boilers, whether mounted or in parts.

"(8) All kinds of fuel, such as coal, naphtha, alcohol, and such like.

"(9) Telegraph, telephone, and railway material.

"(10) In general, everything intended for warfare on land or sea, also rice, food stuffs, horses, beasts of burden, and others available for warlike purposes if they are transported for account of or intended for the enemy.

"VII. The following actions, prohibited to neutrals, are considered as violating neutrality: The transport of the enemy's troops, its telegrams or correspondence, the supplying it of transport boats or war vessels. Vessels of neutrals found to be breaking any of these rules may be, according to circumstances, captured and confiscated.

"VIII. The Imperial Government reserves the right to depart from the above decisions with regard to a neutral or hostile power which on its part does not observe them, as well as to take measures necessary to fit the circumstances of each individual case.

"IX. The detailed rules which the military authorities are bound to observe during the war at sea are prescribed in the prize regulations sanctioned by His Majesty the Emperor on March 27, 1895, as as well as in special instructions approved by the council of the admiralty on September 20, 1900, relative to the detention, visitation, capture, the conveyance, and the delivery of ships and captured goods."

Imperial Russian Order, February 14, 1904, For. Rel. 1904, 728; Monthly Consular Reports, May, 1904, LXXV, 397.

By an imperial order of April 8–21, 1904, cotton was added to the contraband list. This was stated to apply to raw cotton and cotton waste, and not to manufactured cotton.

For. Rel. 1904, 729, 730.

"It is hereby decided that the undermentioned goods shall be regarded as contraband during the present war between Japan and Russia:

"1. The following goods shall be treated as contraband of war in case they are going to pass through the enemy's territory or in case they are destined for the enemy's territory or his army or navy:

"Arms, ammunition, explosives, and the raw materials thereof (including lead, saltpeter, sulphur, etc.) and apparatus for manufacturing them, cement, uniforms, and equipment of military and naval men, armor plates, materials for the construction and equipment of men-of-war and other ships, and all other goods to be used solely for purposes of war.

"2. The following goods shall be treated as contraband of war in case they are destined for the enemy's army or navy, or in case, from the nature of the locality in the enemy's territory to which they are bound, they may be considered to be intended for the use of the enemy's army or navy:

"Provisions, drinks, horses, harness, fodder, vehicles, coal, timber, money, gold and silver bullion, and materials for the construction of telegraphs, telephones, and railways.

"3. Of the goods mentioned in the foregoing two clauses, those which on account of their quality or quantity may be judged to be evidently intended for the use of the ship that carries them shall not be treated as contraband."

Japanese contraband regulations, Feb. 10, 1904, For. Rel. 1904, 416; Monthly Consular Reports, May, LXXV, 394.

A somewhat different, but apparently not very accurate, version is given in the British Parl. Papers, Russia, No. 1 (1905), 7–8.

In neutrality regulations issued by the Chinese Government on the outbreak of the Russo-Japanese war, there were enumerated as contraband—

"(*a*). Cannon shot, lead balls, powder, and all sorts of weapons.

"(*b*). Saltpeter, sulphur, and all materials used in the manufacture of powder.

"(*c*). All vessels that may be used in fighting or materials used in their construction.

"(*d*). Official dispatches relating to the war."

For. Rel. 1904, 19.

By the same regulations it was forbidden "to buy up contraband of war for the belligerents" or "to manufacture contraband of war." The observance of this rule was enjoined on foreigners within the Empire. (Ibid.)

IV. *CONTROVERSIES AS TO CERTAIN ARTICLES.*

1. Coal.

§ 1252.

"The discussion which at this time is going on respecting the military character of coal, and whether it is now excluded from general commerce as contraband of war is a striking illustration of the tendency to enlarge this power of prohibition and seizure, and of the necessity of watching its exercise with unabated vigilance. Here is an article, not exclusively nor even principally used in war, but which enters into general consumption in the arts of peace, to which, indeed, it is now vitally necessary. It has become also important in commercial navigation. It is a product of nature with which some regions are bountifully supplied while others are destitute of it, and its transportation, instead of meeting with impediments, should be aided and encouraged. The attempt to enable belligerent nations to prevent all trade in this most valuable accessory to mechanical power has no just claim for support in the law of nations; and the United States avow their determination to oppose it as far as their vessels are concerned."

Mr. Cass, Sec. of State, to Mr. Mason, min. to France, No. 190, June 27, 1859, MS. Inst. France, XV. 426.

"Considering, that the vessels of war, both Chilean and Peruvian, are supplied with coal from the mines of Chile for their hostile operations on this coast;

"Considering, that the law of war permits the belligerents to seize anything employed by the enemy to carry on hostilities against them, which is the case with the said combustible, and that it is also the production of the enemy's country;

"Considering, that a belligerent has a right to declare new articles to be contraband of war, when from the circumstances of the war they become, on the part of the enemy, elements for undertaking and carrying on hostilities;

"Considering, lastly, that the Government of Chile has declared coal destined for the use of the Spanish vessels of war or their privateers to be contraband of war;

"I have resolved:

"1st. Coal from the various Chilean mines is declared contraband of war. . . .

"3rd. This declaration, confined as it is to a special case and peculiar to the present war, is not intended to establish any precedent with respect to the general principle, that coal should not be considered contraband of war."

Provisional Declaration, issued Jan. 29, 1866, by Admiral Nuñez, commanding the Spanish naval forces in the Pacific, in the war with the allied republics on the west coast of South America. (56 Br. & For. State Papers, 710.)

"That in the actual state of war in which the Republic finds itself with the Government of Spain, it is necessary to determine the conditions of certain articles which, being of lawful commerce, may be considered according to circumstances as contraband of war; I decree:

"Sole article. Coal and provisions will be considered contraband of war when one or the other are destined for the use of Spanish ships of war."

Decree of President Prado, of Peru, Feb. 9, 1866, 56 Br. & For. State Papers, 917–918.

In instructions issued next day to the commanders of Peruvian men-of-war and privateers, after the enumeration, as contraband, of certain "instruments manufactured for war," there is the following passage: "Equally so [i. e., contraband] are coal destined for the vessels of war of the enemy or his privateers, coined gold and silver, and all provisions destined for the enemy, as is also the correspondence destined for the same. This catalogue will be increased in case the war extends on shore. Likewise are contraband of war, if destined for the enemy, land and sea troops, and, in general, all those individuals having a military character." (56 Br. & For. State Papers, 914.)

"Had coal been declared unconditionally contraband of war, the precedent would have been awkward in the event of war between foreign nations where the United States as a neutral would desire the largest opportunities for the exportation of coal."

Report of Mr. Chamberlain, Commissioner of Navigation, 1898, p. 66.

See, at the same place, a statement as to the liberal regulations adopted by the Treasury Department for the execution of the act of April 22, 1898, concerning the export of coal or other material used in war from any seaport of the United States during the war with Spain.

By section 8, article 6, of the Russian regulations of Feb. 14, 1904, there is included unconditional as contraband "every kind of fuel, such as coal, naphtha, alcohol, and other similar materials."

In an instruction to the British ambassador at St. Petersburg, Aug. 10, 1904, Lord Lansdowne said: "This treatment of coal as unconditionally contraband is diametrically opposed to the declaration made at the West African Conference, held at Berlin in 1884,

by the Russian plenipotentiary, who stated that his instructions were peremptory, and that his Government refused categorically to consent to any treaty, convention, or declaration of any kind which would imply the recognition of coal as contraband of war."

In an interview on Sept. 21, 1904, Count Lamsdorff, as reported by the British ambassador, stated that "it was permissible for the Russian Government to change their views since 1884, during which time many developments and circumstances had occurred which had induced them to modify their opinion."

On Oct. 9 the Russian Government issued a memorandum, by which rice and food stuffs were placed in the category of conditional contraband, but coal was left in the category of absolute contraband. The British Government expressed regret that coal was not transferred to the conditional category, as well as the hope that a more favorable view might yet be taken by Russia.

Parl. Papers, Russia, No. 1 (1905), 13–14, 21, 22, 26.

2. PROVISIONS.

§ 1253.

"In one of your letters of March 13 you express your apprehensions that some of the belligerent powers may stop our vessels going with grain to the ports of their enemies, and ask instructions which may meet the question in various points of view, intending, however, in the meantime to contend for the amplest freedom of neutral nations. Your intention in this is perfectly proper, and coincides with the ideas of our own Government in the particular case you put, as in general cases. Such a stoppage to an unblockaded port would be so unequivocal an infringement of the neutral rights that we can not conceive it will be attempted. With respect to our conduct as a neutral nation, it is marked out in our treaties with France and Holland, two of the belligerent powers; and as the duties of neutrality require an equal conduct to both parties, we should, on that ground, act on the same principles towards Great Britain. We presume that this would be satisfactory to her, because of its *equality*, and because she, too, has sanctioned the same principles in her treaty with France. Even our 17th article with France, which must be disagreeable, as from its nature it is unequal, is adopted, exactly, by Great Britain in her 40th article with the same power; and would have laid her, in a like case, under the same unequal obligations against us. We wish, then, that it could be arranged with Great Britain that our treaties with France and Holland, and that of France and Great Britain (which agree in what respects neutral nations) should form the line of conduct for us all, in the present war, in the cases for which they

provide. Where they are silent, the general principles of the law of nations must give the rule. I mean the principles of that law as they have been liberalized in latter times by the refinement of manners and morals, and evidenced by the declarations, stipulations, and practice of every civilized nation. In our treaty with Prussia, indeed, we have gone ahead of other nations in doing away restraints on the commerce of peaceful nations, by declaring that nothing shall be contraband, for, in truth, in the present improved state of the arts, when every country has such ample means of procuring arms within and without itself, the regulations of contraband answer no other end than to draw other nations into the war. However, as nations have not given sanction to this improvement, we claim it, at present, with Prussia alone."

Mr. Jefferson, Sec. of State, to Mr. Pinckney, min. to England, May 7, 1793, MS. Inst. U. States, Ministers, I. 278.

The apprehension expressed by Pinckney, to which Jefferson referred in the foregoing instruction, soon proved to be well grounded. By a decree of the national convention of France, of May 9, 1793, the commanders of French ships of war and privateers were authorized to seize and bring in merchant vessels laden wholly or in part with provisions, being neutral property bound to an enemy's port.

This decree was soon followed by a British order in council, issued June 8, 1793, by which the commanders of British ships of war and privateers were ordered to detain all vessels laden wholly or in part with grain, flour, or meal, bound to any port in France or any port occupied by the armies of France, in order that such grain, flour, or meal might be purchased on behalf of the British Government, or in order that the cargo might be disposed of in the ports of a country in amity with Great Britain. The British Government assumed to justify this order on the ground that "by the law of nations, as laid down by the most modern writers," and particularly by Vattel, all provisions were to be considered as contraband, and as such liable to confiscation, in the cases where "the depriving an enemy of these supplies, is one of the means intended to be employed for reducing him to reasonable terms of peace." "The actual situation of France," said Mr. Hammond, British minister at Philadelphia, "is notoriously such, as to lead to the employing this mode of distressing her by the joint operations of the different powers engaged in the war; and the reasoning which in these authors applies to *all* cases of this sort, is certainly much more applicable to the *present* case, in which the distress results from the unusual mode of war employed by the enemy himself, in having armed almost the whole laboring class of the French nation, for the purpose of *commencing* and supporting hostilities against all the governments of Europe; but this reasoning is

most of all applicable to the circumstances of a trade, which is now in a great measure entirely carried on by the actually ruling party of France itself, and which is therefore no longer to be regarded as a mercantile speculation of individuals, but as an immediate operation of the very persons who have declared war, and are now carrying it on against Great Britain. On these considerations, therefore, the powers at war would have been perfectly justifiable if they had considered all provisions as contraband, and had directed them, as such, to be brought in for confiscation. But the present measure pursued by His Majesty's Government, so far from going to the extent which the law of nations and the circumstances of the case would have warranted, only has prevented the French from being supplied with *corn*, omitting all mention of *other* provisions; and even with respect to corn, the regulation adopted is one which, instead of confiscating the cargoes, secures to the proprietors, supposing them neutral, a full indemnification for any loss they may possibly sustain."

Mr. Hammond, British min., to Mr. Jefferson, Sec. of State, Sept. 12, 1793, Am. State Papers, For. Rel. I. 240; Moore, Int. Arbitrations, I. 299–302.

The United States, on the other hand, speaking through Mr. Jefferson, Secretary of State, declared that the position that provisions were contraband "in the case where the depriving an enemy of these supplies, is one of the means *intended to be employed* for reducing him to reasonable terms of peace," or in any case but that of a place *actually blockaded*, was "entirely new;" that reason and usage had established "that, when two nations go to war, those who choose to live in peace retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual; to go and come freely, without injury or molestation; and, in short, that the war among others shall be, for them, as if it did not exist." To these mutual rights nations had allowed one exception—that of furnishing implements of war to the belligerents, or anything whatever to a blockaded place. Implements of war destined to a belligerent were treated as contraband, and were subject to seizure and confiscation. Corn, flour, and meal were not of the class of contraband, and consequently remained articles of free commerce. The state of war between Great Britain and France furnished neither belligerent with the right to interrupt the agriculture of the United States, or the peaceable exchange of its produce with all nations. Such an act of interference tended directly to draw the United States from the state of peace in which they wished to remain. If the United States permitted corn to be sent to Great Britain and her friends, and refused it to France, such an act of partiality might

lead to war with the latter power. If they withheld supplies of provisions from France, they should in like manner be bound to withhold them from her enemies also, and thus to close to themselves all the ports of Europe where corn was in demand, or else make themselves a party to the war. This was a dilemma into which no pretext for forcing the United States could be found. Great Britain might, indeed, "feel the desire of starving an enemy nation; but she can have no right of doing it at our loss, nor of making us the instrument of it."

Mr. Jefferson, Sec. of State, to Mr. Pinckney, min. to England, Sept. 7, 1793, Am. State Papers, For. Rel. I. 239.

See, also, Mr. Jefferson, Sec. of State, to Mr. Hammond, British min., Sept. 22, 1793, Am. State Papers, For. Rel. I. 240; Mr. Pinckney to Lord Grenville, undated, id. 449; Mr. Hammond, British min., to Mr. Randolph, Sec. of State, April 11, 1794, id. 449; Mr. Randolph, to Mr. Hammond, May 1, 1794, id. 450.

In his note to Mr. Hammond of May 1, 1794, last above cited, Mr. Randolph said: "If, by a circuit of construction, food can be *universally* ranked among military engines, what article, to which human comfort of any kind can be traced, is not to be registered as contraband? In some peculiar circumstances, it must be confessed, corn, meal, and flour, are so; as in a blockade, siege, or investment. There the exclusion of them directly and obviously goes to the reduction of the place; but neutral commerce is, in this instance, infringed only, where the exclusion, if continued without interruption, would be decisive in its effect."

See, also, Mr. Jefferson, Sec. of State, to the French min., Nov. 30, 1793, Jefferson's Works, IV. 86.

See Lodge's Hamilton, IV. 304; V. 253.

"Certainly *provisions* are not allowed, by the consent of nations, to be contraband but where everything is so, as in the case of a blockaded town, with which all intercourse is forbidden." (Mr. Jefferson to Mr. Everett, Feb. 24, 1823, Jefferson's Works, VII, 270.)

The order in council of June 8, 1793, was followed by other orders against which the United States likewise protested. In the instructions given by Edmund Randolph, as Secretary of State, to Mr. Jay on May 6, 1794, with reference to the latter's special mission to England, the first topic discussed was that of "the vexations and spoliations committed on our commerce by the authority of instructions from the British Government." For injuries committed under the order of June 8, 1793, Mr. Jay was instructed that one of the principles on which he was to demand compensation was "that provisions, except in the instance of a siege, blockade, or investment are not to be ranked among contraband." By Article VII. of the treaty concluded by Mr. Jay with Lord Grenville on November 19, 1794, a mixed commission was constituted for the purpose of awarding indemnity for damages by reason of irregular or illegal captures or condemnations. Among the questions determined by the commis-

sioners none was more elaborately argued than that of the legality of the orders in council relating to the seizure of provisions. By a majority of the board the orders were held to have been illegal and damages to a large amount were awarded.

Moore, Int. Arbitrations, I. 306–310, 340–341, 344. An excellent summary of the contentions of the agents of the two Governments concerning the provision orders, of the grounds on which the legality of the orders was maintained on the one hand, and their illegality pronounced by the board on the other, is given in Wheaton's Elements of International Law, Lawrence's edition, 1855, 555–561.

"Before the treaty with Great Britain her cruisers captured neutral vessels bound to France with provisions. She asserted that in certain cases provisions were contraband of war, consequently that she might lawfully capture and confiscate such provisions. We opposed the principle and the practice. Britain insisted on her right. In this dilemma it was agreed by the treaty that whenever provisions becoming contraband by the law of nations should be captured, they should be paid for with a reasonable mercantile profit. This stipulation, without admitting the principle, by securing the American merchants from loss in case of capture, would certainly tend to promote rather than to discourage adventures in provisions to France." (Mr. Pickering, Sec. of State, to Mr. Pinckney, min. to England, Jan. 16, 1797, MS. Inst. U. States Ministers, III. 326.)

As to relations with France, and the decree of May 9, 1793, see Moore, Int. Arbitrations, V. 4412 et seq.

Provisions may become contraband of war when destined to a port of naval equipment of an enemy, and *a fortiori*, when destined for the supply of his army.

Maisonnaire *v.* Keating, 2 Gallison, 325.

"By the modern law of nations, provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband. Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott has observed, in such case the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities."

The Commercen (1816), 1 Wheat. 382.

"The doctrine of the English courts at the commencement of the last century with respect to provisions was that 'generally they were not contraband, but might become so in circumstances arising out of the particular situation of the war, or the conditions of the parties engaged in it.'[a] Grain, biscuit, cheese, and even wine, when on their way to a port of naval equipment or to a naval armament, were condemned, and, as has already been seen, the same practice was followed by the courts of the United States.[b] In 1793 and 1795, the English Government indefensibly extended the application of the doctrine to the point of seizing all vessels laden with provisions which were bound to a French port, alleging as their justification that there was a prospect of reducing the enemy by famine. A serious disagreement occurred in consequence with the United States, which maintained that provisions could only be treated as contraband when destined for a place actually invested or blockaded; and the point remained wholly unsettled by the treaty of 1794, which, while recognizing that provisions under the existing law of nations, were capable of acquiring the taint of contraband, did not define the circumstances under which the case would arise.[c] The excesses of the English government cast discredit on the doctrine under the shelter of which they screened themselves. Manning adopts it, but not without evident hesitation. Wheaton seems to think that provisions can only be contraband when sent to ports actually besieged or blockaded; and MM. Ortolan, Bluntschli, and Calvo declare this to be undoubtedly the case.[d] Until lately no nation except England had pushed its practice even to the point admitted in the American courts, and England itself had long regarded its own doctrine of 1793 as wholly untenable; but in 1885 the doctrine was revived to its fullest extent by a country which has been in the habit of including a very narrow range of articles in its list of contraband. France, during her hostilities of that year with China, declared shipments of rice destined for any port north of Canton to be contraband of war. The pretension was resisted by Great Britain on the ground that though, in particular circumstances, provisions may acquire a contraband character, they can not in general be so treated. In answer the French government alleged that a special circumstance of such kind as to justify its action was supplied by the fact of 'the importance of rice in the feeding of the Chinese population' as well as of the

[a] The Jonge Margaretha, 1 Rob. 193.

[b] The Ranger, 6 Rob. 125; The Edward, 4 Rob. 69.

[c] De Martens, Rec. v. 674.

[d] Manning, 361–72; Wheaton, Elem. pt. iv. chap. iii. § 24; Ortolan, Dip. de la Mer, ii. 191 and 216; Bluntschli, § 807; Calvo, § 2452. Phillimore (iii. § ccxlvi.–lviii.) seems to look upon the practice of the English and American courts as being the most authoritative part of a confused usage.

Chinese armies. Thus they implicitly claimed that articles become contraband, not by their importance in military or naval operations, but by the degree in which interference with their supply will put stress upon the noncombatant population. Lord Granville notified that Great Britain would not consider itself bound by the decision of any prize court which should give effect to the doctrine put forward by France; but no opportunity was afforded for learning whether the French courts would have upheld the views of their government, as no seizure was made during the short remainder of the war; shipments of rice, it would seem, were entirely stopped by fear of capture.[a]

"The topic of the admissibility of provisions in general to the list of contraband of war may be put aside as one which is not open to serious argument. Further than this, it can not be doubted for a moment, not only that the detention of provisions bound even to a port of naval equipment is unauthorized by usage, but that it is unjustifiable in theory. To divert food from a large population, when no immediate military end is to be served, because it may possibly be intended to form a portion of supplies which in almost every case an army or a squadron could complete from elsewhere with little inconvenience, would be to put a stop to all neutral trade in innocent articles. But writers have been satisfied with a broad statement of principle, and they have overlooked an exceptional and no doubt rare case, in which, it would seem, provisions may fairly be detained or confiscated. If supplies are consigned directly to an enemy's fleet, or if they are sent to a port where the fleet is lying, they being in the latter case such as would be required by ships, and not ordinary articles of import into the port of consignment, their capture produces an analogous effect to that of commissariat trains in the rear of an army. Detention of provisions is almost always unjustifiable, simply because no certainty can be arrived at as to the use which will be made of them; so soon as certainty is in fact established, they, and everything else which directly and to an important degree contributes to make an armed force mobile, become rightly liable to seizure. They are not less noxious than arms; but except in a particular juncture of circumstances their noxiousness can not be proved."[b]

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[a] Parl. Papers, France, No. 1, 1885. Dr. Geffcken says (Holtzendorff's Handbuch (1889), iv. 723), "man kann Lord Granville nur dankbar sein, dass er das gute Recht der Neutralen so entschieden gegen französische Willkür vertheidigt hat." M. Calvo, in the last edition of his work (Droit Int. iv. 23), says, "nous nous croyons fondés à poser en principe que le commerce des denrées alimentaires reste essentiellement libre en temps de guerre."

[b] "The general doctrine in the text as to the capture of provisions bound to any ports of naval equipment, and the exceptions from it, were both upheld by the British Government in the course of the above-mentioned correspondence with France. See Lord Granville's note of the 27th Feb., 1885. Parl. Papers, France, No. 1, 1885."

Hall, Int. Law 4th ed. 1895), § 245, pp. 687–690; (5th ed.) 661–664.

February 20, 1885, the French Government notified foreign powers that, "in view of the conditions under which the war with China is being actually conducted," it had determined to exercise the right of considering and treating rice as contraband of war. On the 24th of February this notice was modified by the statement that shipments of rice intended for Canton or the southern Chinese ports might freely pursue their course, but that shipments bound to ports north of Canton would "be declared interdicted and treated as contraband of war." Mr. Frelinghuysen, who was then Secretary of State of the United States, merely acknowledged receipt of these notifications, but instructed the American minister at Peking that the United States reserved the question as to foreign rice going to China in American ships.

Lord Granville, British foreign secretary, however, in a note to M. Waddington, of February 27, 1885, declared that the British Government could not admit that provisions could be treated as contraband of war merely because they were consigned to a belligerant port. The British Government, said his lordship, did not deny that provisions might acquire a contraband character under particular circumstances, as if they should be consigned directly to the fleet of a belligerant or to a port where such fleet was lying, but that there must, in any event, be "circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of this kind are intended for the ordinary use of life, and to show *prima facie*, at all events, that they are destined for military use," before they could be treated as contraband.

M. Ferry, French minister of foreign affairs, writing to M. Waddington, on March 7, 1885, suggested that, as the Chinese troops received a part of their pay in rice and as taxes and tributes were paid in the same article, the cargoes of rice forwarded from southern to northern ports might be considered as destined for military use and that they might also be treated as state property of the enemy subject to capture.

M. Roustan, French min., to Mr. Frelinghuysen, Sec. of State, Feb. 20 and Feb. 24, 1885, For. Rel. 1885, 384; Mr. Frelinghuysen, Sec. of State, to Mr. Young, min. to China, tel., Feb. 26, 1885, MS. Inst. China, III. 698; Mr. Frelinghuysen to M. Roustan, March 2, 1885, MS. Notes to France, X. 45; Lord Granville to M. Waddington, Feb. 27, 1885, For. Rel. 1885, 365; M. Ferry to M. Waddington, March 7, 1885, ibid.; Mr. Bayard, Sec. of State, to Baron Fava, Italian min. (personal), March 30, 1885, MS. Notes to Italy, VIII. 131.

For notices issued by the French diplomatic and consular representatives in China, see For. Rel. 1885, 161, 162.

"I have followed with peculiar interest the European discussion relating to the French declaration making *rice* contraband of war.

"The greater number of the European powers, so far as I have observed, have failed to avow their position on this question. England, however, found her navigation and commercial interests so much involved that her Government appears to have protested against the doctrine. At the risk of duplicating the information already on the files of the Department, I inclose herewith a printed summary of the Anglo-French views of the question, deeming it worthy of preservation in the files of important international questions.

"But more especially I beg your attention to the importance of the principle involved in this declaration, as it concerns our American interests. We are neutrals in European wars. Food constitutes an immense portion of our exports. Every European war produces an increased demand for these supplies from neutral countries. The French doctrine declares them contraband, not only when destined directly for military consumption, but when going in the ordinary course of trade as food for the civil population of the belligerent government. If food can be thus excluded and captured, still more can clothing, the instruments of industry, and all less vital supplies be cut off on the ground that they tend to support the efforts of the belligerent nation. Indeed, the real principle involved goes to this extent, that everything the want of which will increase the distress of the civil population of the belligerent country may be declared contraband of war. The entire trade of neutrals with belligerents may thus be destroyed, irrespective of an effective blockade of ports. War itself would become more fatal to neutral states than to belligerent interests.

"The rule of feudal times, the starvation of beleaguered and fortified towns, might be extended to an entire population of an open country. It is a return to barbaric habits of war. It might equally be claimed that all the peaceful men of arms-bearing age could be deported, because otherwise they might be added to the military forces of the country.

"The United States and other countries have hitherto refused to recognize *coal* as contraband of war, indispensable as it is to the equipment of war steam cruisers, because its chief use is for peaceful objects. But this French doctrine goes far beyond that.

"Although the Franco-Chinese war is ended, there is always danger that this precedent will be again adopted in the heat of another war, unless resisted by energetic protests in the interests of neutral trade and of humanity itself. Its adoption indeed would practically nullify the advantages of neutrals intended to be secured by the Paris declarations of 1856."

Mr. Kasson, min. at Berlin, to Mr. Bayard, Sec. of State, Apr. 23, 1885, For. Rel. 1885, 411.

"I concur in the reasoning and conclusion of Mr. Kasson." (Report of Dr. Francis Wharton, Solicitor of the Department of State, May 18, 1885, MSS. Dept. of State.)

"I beg to report that in my judgment the Government of the United States should concur in the position taken by Earl Granville, in the accompanying correspondence, that rice can not as a general rule be regarded as a contraband of war. Rice in all parts of the civilized world is a common article of food, and to many classes of persons almost indispensable for the purposes of diet; while in oriental states it is so essential to the sustenance of the community that to seriously and arbitrarily diminish the supply would be to inflict incalculable distress. It is true that we can conceive of cases in which rice destined for the specific use of an army in the field or a cruiser on the high seas may become contraband. But to pronounce it contraband, in a general sense, would destroy the limitations of contraband altogether. If rice is contraband, everything is contraband, and neutral commerce in time of war, already sufficiently oppressed, would be subjected to an additional burden, which would be intolerable."

Report of Dr. Francis Wharton, Solicitor of the Department of State, to Mr. Bayard, Sec. of State, May 5, 1885, MSS. Dept. of State.

The provision in the instructions issued by the United State to its naval forces in 1898, during the war with Spain, which classed provisions among things that were only "conditionally" contraband, and stated that they were liable to seizure only "when actually destined for the enemy's military or naval forces," was incorporated in Stockton's Naval War Code, issued by the Navy Department in 1900. This code has since been withdrawn, but, as it is understood, not for any reason connected with this subject.

See, also, Hall, Int. Law (4th ed.) § 245, pp. 687–690; (5th ed.), 661–664.

In the early stages of the Boer war a question arose between the United States and Great Britain as to the seizure of various articles shipped at New York, some of them on regular monthly orders, by American merchants and manufacturers on the vessels *Beatrice*, *Maria*, and *Mashona*, which were seized by British cruisers while on the way to Delagoa Bay. These articles consisted chiefly of flour, canned meats, and other food stuffs, but also embraced lumber, hardware, and various miscellaneous articles, as well as quantities of lubricating oil, which were consigned partly to the Netherlands South African Railway, in the Transvaal, and partly to the Lourenço Marques Railway, a Portuguese concern. It was at first supposed that the

seizures were made on the ground of contraband, and with reference to this possibility the Government of the United States, on January 2, 1900, declared that it could not recognize their validity "under any belligerent right of capture of provisions and other goods shipped by American citizens in ordinary course of trade to a neutral port."

It soon transpired, however, that the *Beatrice* and *Mashona*, which were British ships, and the *Maria*, which, though a Dutch ship, was at first supposed to be British (S. Doc. 173, 56 Cong. 1 sess. 16), were arrested for violating a municipal regulation forbidding British subjects to trade with the enemy, the alleged offense consisting in the transportation of goods destined to the enemy's territory. The seizure of the cargoes was declared to be only incidental to the seizure of the ships. As to certain articles, however (particularly the oil consigned to the Netherlands South African Railway in the Transvaal), an allegation of enemy's property was made; but no question of contraband was raised, and it was eventually agreed that the United States consul-general at Cape Town should arrange with Sir Alfred Milner, the British high commissioner, for the release or purchase by the British Government of any American-owned goods, which, if purchased, were to be paid for at the price they would have brought at the port of destination at the time they would have arrived there in case the voyage had not been interrupted.

In the course of the correspondence, Lord Salisbury thus defined the position of Her Majesty's Government on the question of contraband:

"Food stuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure."

Mr. Hay, Sec. of State, to Mr. Choate, ambass. at London, tel., Jan. 2, 1900, For. Rel. 1900, 539–540, S. Doc. 173, 56 Cong. 1 sess. 13–14; Lord Salisbury to Mr. Choate, Jan. 10, 1900, For. Rel. 1900, 555, S. Doc. 173, 56 Cong. 1 sess. 29; Mr. Hay, Sec. of State, to Mr. Toomey, March 2, 1900, 243 MS. Dom. Let. 317; Mr. Hay, Sec. of State, to the Ballard & Ballard Co., March 9, 1900, id. 412; Mr. Hay, Sec. of State, to Mr. Newman, March 13, 1900, id. 488; Mr. Hay, Sec. of State, to Mr. Choate, ambass. at London, No. 378, May 24, 1900, For. Rel. 1900, 612, MS. Inst. Great Brit. XXXIII. 408.

See, also, Mr. Hay, Sec. of State, to Mr. White, chargé at London, No. 334, March 20, 1900, deprecating the raising of any issue as to the suggestion made by Lord Salisbury, that "an ultimate destination to citizens of the Transvaal, even of goods consigned to British ports on the way thither," might, if the "transportation were viewed as one 'continuous voyage,' be held to constitute in a British vessel such a 'trading with the enemy' as to bring the vessel within the provisions of the municipal law. (For. Rel. 1900, 609, MS. Inst. Great Brit. XXXIII. 371.)

"Referring to your letter of the 8th ultimo, and to subsequent correspondence, on the subject of the restrictions on British ships carrying freight to Delagoa Bay, I have now to inform you that in a telegram dated the 3rd instant the United States ambassador at London reports that British ships are at liberty to carry to Delagoa Bay any goods not destined for the enemy, but that at present the railroad inland from Komatipoort is largely required for military purposes and that therefore it is doubtful whether private goods destined for places in the Transvaal can for the moment be forwarded." (Mr. Hill, Assist. Sec. of State, to Messrs. Arkell and Douglas, Nov. 5, 1900, 248 MS. Dom. Let. 681.)

March 7, 1904, the Russian Government officially declared that all the articles embraced in the 6th article of the regulations, including coal, were regarded as unconditionally contraband, and that, as to the articles embraced in section 10 of that article, the Imperial Government reserved the right to supplement the list by the addition of other things, if, in the circumstances of the war, it should judge it indispensable to forbid their conveyance "to Japan or to Japanese armed forces."

March 19, 1904, the *Journal de Saint-Pétersburg* published a French translation of the instructions to commanders of Russian men-of-war, extending the contraband list. By these instructions there was included, under the name of "food stuffs," in section 10, all kinds of grain, fish, fish products of various kinds, beans, bean oil, and oil cakes; and, under the head of articles intended for warlike purposes, on land or sea, machinery and parts of machinery intended for the manufacture of cannon, small arms, and projectiles.

June 1, 1904, Lord Lansdowne instructed Sir C. Hardinge, British ambassador at St. Petersburg, that his Majesty's Government observed "with great concern that rice and provisions will be treated as unconditionally contraband, a step which they regard as inconsistent with the law and practice of nations." His Majesty's Government, said Lord Lansdowne, did not contest "that, in particular circumstances, provisions may acquire a contraband character, as for instance, if they should be consigned direct to the army or fleet of a belligerent, or to a port where such fleet may be lying;" but that his Majesty's Government could not admit "that if such provisions were consigned to the port of a belligerent (even though it should be a port of naval equipment) they should therefore be necessarily regarded as contraband of war." The true test appeared to be "whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use."

The protest of the British Government was renewed by Lord Lansdowne on the 10th of August.

Parl. Papers, Russia, No. 1 (1905), 9, 11.

Count Lamsdorff was reported by Sir C. Hardinge, British ambassador at St. Petersburg, as having in an interview with him disclaimed responsibility for the text of the rules of Feb. 14, 1904. (Id. 21.)

"It appears from public documents that coal, naphtha, alcohol, and other fuel have been declared contraband of war by the Russian Government.

"These articles enter into general consumption in the arts of peace, to which they are vitally necessary. They are usually treated not as 'absolutely contraband of war,' like articles that are intended primarily for military purposes in time of war, such as ordnance, arms, ammunition, etc., but rather as 'conditionally contraband'—that is to say, articles that may be used for or converted to the purposes of war or peace, according to circumstances. They may rather be classed with provisions and food stuffs of ordinarily innocent use, but which may become absolutely contraband of war when actually and especially destined for the military or naval forces of the enemy.

"In the war between the United States and Spain the Navy Department, General Orders, No. 492, issued June 20, 1898, declared, in article 19, as follows: 'The term "contraband of war" comprehends only articles having a belligerent destination.' Among articles absolutely contraband it declared ordnance, machine guns, and other articles of military or naval warfare. It declared as conditionally contraband 'coal, when destined for a naval station, a port of call, or a ship or ships of the enemy.' It likewise declared provisions to be conditionally contraband 'when destined for the enemy's ship or ships, or for a place that is besieged.'

"The above rules as to articles absolutely or conditionally contraband of war were adopted in the Naval War Code, promulgated by the Navy Department, June 27, 1900.

"While it appears from the documents mentioned that rice, food stuffs, horses, beasts of burden, and other animals which may be used in time of war are declared to be contraband of war only when they are transported for account of or in destination to the enemy, yet all kinds of fuel, such as coal, naphtha, alcohol, are classified along with arms, ammunition, and other articles intended for warfare on land or sea.

"The test in determining whether articles ancipitis usus are contraband of war is their destination for the military uses of a belligerent. Mr. Dana, in his Notes to Wheaton's International Law, says: 'The chief circumstance of inquiry would naturally be the port of destination. If that is a naval arsenal, or a port in which vessels of war are usually fitted out, or in which a fleet is lying, or a garrison town, or a place from which a military expedition is fitting out, the presumption of military use would be raised, more or less strongly according to the circumstances.'

"In the wars of 1859 and 1870 coal was declared by France not to be contraband. During the latter war Great Britain held that the character of coal depended upon its destination, and refused to permit vessels to sail with it to the French fleet in the North Sea. Where coal or other fuel is shipped to a port of a belligerent, with no presumption against its pacific use, to condemn it as absolutely contraband would seem to be an extreme measure.

"Mr. Hall, International Law, says: 'During the West African Conference, in 1884, Russia took occasion to dissent vigorously from the inclusion of coal amongst articles contraband of war, and declared that she would categorically refuse her consent to any articles in any treaty, convention, or instrument whatever which would imply its recognition as such.'

"We are also informed that it is intended to treat raw cotton as contraband of war. While it is true that raw cotton could be made up into clothing for the military uses of a belligerent, a military use for the supply of an army or garrison might possibly be made of food stuffs of every description which might be shipped from neutral ports to the nonblockaded ports of a belligerent. The principle under consideration might, therefore, be extended so as to apply to every article of human use which might be declared contraband of war simply because it might ultimately become in any degree useful to a belligerent for military purposes.

"Coal and other fuel and cotton are employed for a great many innocent purposes. Many nations are dependent on them for the conduct of inoffensive industries, and no sufficient presumption of an intended warlike use seems to be afforded by the mere fact of their destination to a belligerent port. The recognition, in principle, of the treatment of coal and other fuel and raw cotton as absolutely contraband of war might ultimately lead to a total inhibition of the sale, by neutrals to the people of belligerent States, of all articles which could be finally converted to military uses. Such an extension of the principle by treating coal and all other fuel and raw cotton as absolutely contraband of war, simply because they are shipped by a neutral to a nonblockaded port of a belligerent, would not appear to be in accord with the reasonable and lawful rights of a neutral commerce.

Mr. Hay, Sec. of State, to the ambassadors of the United States in Europe, circular, June 10, 1904, For. Rel. 1904, 3.

"I have the honor to acknowledge the receipt of your despatch No. 176, of the 10th instant.

"The Department has carefully considered the note of the Russian minister of foreign affairs dated July 27, last, a copy of which is inclosed with your despatch, with reference to the decision of the prize court in the case of the steamship *Arabia*, containing American

cargo, seized by the Russian naval forces and sent to Vladivostok for adjudication.

"As communicated to you by the minister, the decision of the court was 'that the steamer *Arabia* was lawfully seized; that the cargo, composed of railway material and flour, weighing about 2,360,000 livres, destined to Japanese ports and addressed to different commercial houses in said ports, constitutes contraband of war; . . . that the cargo bound for Japanese ports should be confiscated as being lawful prize.'

"In communicating the said decision the minister observed, in response to the request of this Government for the release of the non-contraband portion of the cargo, that the question could only be decided through judicial channels on the basis of a decision of the prize court.

"This is the first authentic information which the Department has received of the precise grounds on which the prize court decided to confiscate the railway material and flour in question. The judgment of confiscation appears to be founded on the mere fact that the goods in question were bound for Japanese ports and addressed to various commercial houses in said ports. In view of its well-known attitude, it should hardly seem necessary to say that the Government of the United States is unable to admit the validity of the judgment, which appears to have been rendered in disregard of the settled law of nations in respect to what constitutes contraband of war. If the judgment and the communication accompanying its transmission are to be taken as an expression of the attitude of His Imperial Majesty's Government and as an interpretation of the Russian imperial order of February 29, last, it raises a question of momentous import in its bearing on the rights of neutral commerce.

"The Russian imperial order denounces as absolutely contraband of war telegraph, telephone, and railway materials, and fuel of all kinds, without regard to the question whether destined for military or for purely pacific and industrial uses.

"Clause 5, article 10, of the imperial order, denounces as contraband of war 'all articles destined for war on land or sea, as well as rice, food stuffs, and horses, beasts of burden, and others (autres) capable of serving a warlike purpose, and if they are transported on account of or to the destination of the enemy.'

"The ambiguity of meaning which characterizes the language of this clause, lending itself to a double interpretation, left its real intendment doubtful. The vagueness of the language, used in so important a matter, where a just regard for the rights of neutral commerce required that it should be clear and explicit, could not fail to excite inquiry among American shippers, who, left in doubt

as to the significance attributed by His Imperial Majesty's Government to the word 'enemy'—uncertain as to whether it meant 'enemy government or forces,' or 'enemy ports or territory'—have been compelled to refuse the shipment of goods of any character to Japanese ports. The very obscurity of the terms used seemed to contain a destructive menace, even to legitimate American commerce.

"In the interpretation of clause 10 of article 6, and having regard to the traditional attitude of His Imperial Majesty's Government, as well as to the established rule of international law, with respect to goods which a belligerent may or may not treat as contraband of war, it seemed to the Government of the United States incredible that the word 'autres' or the word 'l'ennemi' could be intended to include as contraband of war food stuffs, fuel, cotton, and all 'other' articles destined to Japanese ports, irrespective of the question whether they were intended for the support of a noncombatant population or for the use of the military or naval forces. In its circular of June 10 last, communicated by you to the Russian Government, the Department interpreted the word 'enemy' in a mitigated sense, as well as in accordance with the enlightened and humane principles of international law, and therefore it treated the word 'enemy,' as used in the context, as meaning 'enemy government or forces,' and not the 'enemy ports or territory.'

"But if a benign interpretation was placed on the language used, it is because such an interpretation was due to the Russian Government, between whom and the United States a most valued and unbroken friendship has always existed, and it was no less due to the commerce of the latter, inasmuch as the broad interpretation of the language used would imply a total inhibition of legitimate commerce between Japan and the United States, which it would be impossible for the latter to acquiesce in.

"What doubt could exist as to the meaning of the imperial order has been apparently removed by the inclosure in your dispatch of the note from Count Lamsdorff, stating tersely and simply the sentence of the prize court. The communication of the decision was made in unqualified terms, and the Department is therefore constrained to take notice of the principle on which the condemnation is based, and which it is impossible for the United States to accept, as indicating either a principle of law, or a policy which a belligerent State may lawfully enforce or pursue toward the United States as a neutral.

"With respect to articles and material for telegraphic and telephonic installations, unnecessary hardship is imposed by treating them all as contraband of war—even those articles which are evidently and unquestionably intended for merely domestic or industrial uses. With respect to railway materials, the judgment of the court

appears to proceed in plain violation of the terms of the imperial order, according to which they are to be deemed to be contraband of war only if intended for the construction of railways. The United States Government regrets that it could not concede that telegraphic, telephonic, and railway materials are confiscable simply because destined to the open commercial ports of a belligerent.

"When war exists between powerful states it is vital to the legitimate maritime commerce of neutral states that there be no relaxation of the rule—no deviation from the criterion for determining what constitutes contraband of war, lawfully subject to belligerent capture, namely, warlike nature, use, and destination. Articles which, like arms and ammunition, are by their nature of self-evident warlike use, are contraband of war if destined to enemy territory; but articles which, like coal, cotton, and provisions, though of ordinarily innocent are capable of warlike use, are not subject to capture and confiscation unless shown by evidence to be actually destined for the military or naval forces of a belligerent.

"This substantive principle of the law of nations can not be overridden by technical rule of the prize court that the owners of the captured cargo must prove that no part of it may eventually come to the hands of the enemy forces. The proof is of an impossible nature; and it can not be admitted that the absence of proof in its nature impossible to make can justify the seizure and condemnation. If it were otherwise, all neutral commerce with the people of a belligerent state would be impossible; the innocent would suffer inevitable condemnation with the guilty.

"The established principle of discrimination between contraband and noncontraband goods admits of no relaxation or refinement. It must be either inflexibly adhered to or abandoned by all nations. There is and can be no middle ground. The criterion of warlike usefulness and destination has been adopted by the common consent of civilized nations, after centuries of struggle in which each belligerent made indiscriminate warfare upon all commerce of all neutral states with the people of the other belligerent, and which led to reprisals as the mildest available remedy.

"If the principle which appears to have been declared by the Vladivostok prize court and which has not so far been disavowed or explained by His Imperial Majesty's Government is acquiesced in, it means, if carried unto full execution, the complete destruction of all neutral commerce with the noncombatant population of Japan; it obviates the necessity of blockades; it renders meaningless the principle of the Declaration of Paris set forth in the imperial order of February 29 last that a blockade in order to be obligatory must be effective; it obliterates all distinction between commerce in contraband and noncontraband goods; and is in effect a declaration of war

against commerce of every description between the people of a neutral and those of a belligerent state.

"You will express to Count Lamsdorff the deep regret and grave concern with which the Government of the United States has received his unqualified communication of the decision of the prize court; you will make earnest protest against it and say that the Government of the United States regrets its complete inability to recognize the principle of that decision and still less to acquiesce in it as a policy."

Mr. Hay, Sec. of State, to Mr. McCormick, ambass. to Russia, No. 143, August 30, 1904, For. Rel. 1904, 760.

Sent as a circular to all American diplomatic representatives, Sept. 23, 1904, For. Rel. 1904, 4.

See, further, as to the case of the *Arabia*, For. Rel. 1904, 755–757, 758–765, 766, 770, 774, 776, 777.

As to the case of the *Calchas*, see id. 758, 763, 765–766, 775, 776.

As to the case of the *Knight Commander*, see id. 733, 776.

In consequence of the protests of Great Britain and the United States, the Russian Government appointed a commission, of which Professor Martens was a member, to consider the question of contraband.

On Oct. 22, 1904, the Russian Government announced its conclusion in a memorandum which, as amended on the following day, reads:

"In consequence of doubts which have arisen as to the interpretation of article 6, section 10, of the Regulations respecting Contraband of War, it has been resolved by the Imperial Government that articles capable of serving for a warlike object, and not specified in sections 1–9 of article 6, as well as rice and food-stuffs, shall be considered as contraband of war, if they are destined for—the Government of the belligerent power; for its administration; for its army; for its navy; for its fortresses; for its naval ports; or for its purveyors. In cases where they are addressed to private individuals, these articles shall not be considered as contraband of war. In all cases horses and beasts of burden shall be considered as contraband of war."

Parl. Papers, Russia, No. 1 (1905), 27–28.

3. Cotton.

§ 1254.

April 21, 1905, the Russian Government added to the list of contraband, previously announced by it, raw cotton (not yarn or tissues). The reason given for this extension of the list was that raw cotton was used in the manufacture of explosives, and that, as it was

impossible to distinguish between cotton imported for the one purpose and that imported for the other, it was necessary to prohibit its importation altogether.

Parl. Papers, Russia, No. 1 (1905), 8, 9.

"British India is by far the largest importer of raw cotton into Japan," the value of such importation in each of the years 1901 and 1902 being nearly 40,000,000 roubles. "The quantity of raw cotton that might be utilized for explosives would be infinitesimal in comparison with the bulk of the cotton exported from India to Japan for peaceful purposes, and to treat harmless cargoes of this latter description as unconditionally contraband would be to subject a branch of innocent commerce, which is specially important in the Far East, to a most unwarrantable interference."

Sir C. Hardinge, British ambass., to Count Lamsdorff, Russian min. of for. aff., Oct. 9, 1904, Parl. Papers, Russia, No. 1 (1905), 24, 25.

The Russian Government in placing, by a memorandum of Oct. 9 (22), 1904, rice and food stuffs in the list of conditional contraband, left raw cotton in the absolute category. The British Government expressed regret at this conclusion, as well as the hope that a more favorable view of the subject might yet be taken. (Id. 26.)

Hall, in his work on International Law (see 5th edition, 664), says that "the United States have gone so far as to regard cotton as contraband of war when, in their view, it took the place of money." As authority for this statement he cites Wharton's International Law Digest, III, 438, where an extract is given from a note of Mr. Bayard, as Secretary of State, to Mr. Muruaga, Spanish minister, of June 28, 1886. The extract, as thus printed, separated from its context, unfortunately conveys, as an examination of the correspondence will show, an erroneous impression, which has been widely disseminated and which may not be unconnected with Russia's action during the war with Japan in declaring cotton to be contraband of war. The question under discussion between Mr. Bayard and the Spanish minister was not one of contraband in the sense of maritime law. The question at issue was the rightfulness of the alleged seizure on land, by military forces of the United States, of a quantity of cotton to which the claimants asserted title under a contract with the Confederate government, which then controlled the supply of cotton and used it as its chief resource for the purchase of arms and ammunition and the payment of current expenses. Under these circumstances, it was held by the American courts, as well as by the military authorities, that cotton within the Confederate territory and control was a legitimate subject of capture. In referring to this fact, Mr. Bayard, in his note to Mr. Muruaga, of June 28, 1886, said that there was no doubt that cotton might, under the circumstances described, be

seized as "contraband of war," using the term perhaps unadvisedly and at any rate in an untechnical sense, just as it was applied by General Butler to captured slaves. Mr. Bayard's use of the term, however, gave to Mr. Muruaga an opportunity to point out, as he did in a note of August 13, 1886, that the United States did not during the civil war treat cotton as contraband of war, and that the acceptance of such a proposition would imply an extension of the recognized lists of contraband articles. Mr. Bayard, replying on December 3, 1886, said: "You mistake the position of the United States . . . when you suppose that it is proposed by us formally to insert cotton on the list of articles contraband of war. . . . The seizure by the Government of the United States in 1865 is not to be narrowed to a question of contraband. The distinctions as to contraband have grown up from seizures of neutral vessels at sea, when the presumption arising from the ordinary inviolability of a neutral vessel has to be overcome before the seizure can be sustained. Here the seizure was not on board a neutral vessel, or on neutral territory invaded on ground of necessity, but on soil over which the United States had rights of sovereignty, not merely by constitutional title, but by the law of nations and by the law of war. . . . It is not needful, nor do I, therefore, say whether cotton purchased in the Confederacy during the war would be liable to seizure as contraband if found on a neutral ship. I propose to stricly construe belligerent rights on the high seas; but the cotton, which is the subject of the present claim, placed as it was by its owners, the present claimants, under what you properly state to be the 'strict surveillance' of the Confederate authorities, was, to the eye of the United States Government when it sought to reclaim the region where such cotton was stored, as much the proper subject of belligerent seizure as would have been a park of artillery."

Mr. Bayard to Mr. Muruaga, June 28, 1886, For. Rel. 1887, 1006; Mr. Muruaga to Mr. Bayard, Aug. 13, 1886, id. 1108; Mr. Bayard to Mr. Muruaga, Dec. 3, 1886, 1015.

In 1861, on the day after Virginia voted on the ordinance of secession, there came to Fortress Monroe, where Gen. B. F. Butler was then in command, three negroes, who said that they belonged to Colonel Mallory, commander of the Virginia troops in an adjacent place, and who, as it was ascertained, had been employed in constructing a battery. Mallory sent an agent to Butler with a view to recover possession of the negroes. Butler, according to his own statement, replied: "I shall hold these negroes as contraband of war, since they are engaged in the construction of your battery and are claimed as your property. The question is simply whether they shall be used for or against the Government of the United States."

Butler, in his autobiography, published in 1892, referring to the phrase "contraband of war," as applied to slaves, says: "The truth is, as a lawyer I was never very proud of it, but as an executive officer I was very much comforted with it as a means of doing my duty."

See "Butler's Book," 256–259.

V. *DESTINATION.*

1. Must be Hostile.

§ 1255.

See supra, § 1250.

"In order to constitute contraband of war, it is absolutely essential that two elements should concur—viz. a hostile quality and a hostile destination. If either of these elements is wanting, there can be no such thing as contraband. Innocent goods going to a belligerent port are not contraband. Here there is a hostile destination, but no hostile quality. Hostile goods, such as munitions of war, going to a neutral port are not contraband. Here there is a hostile quality, but no hostile destination."

Historicus on International Law, 191.

A vessel sailed July, 1798, from Dantzig for Amsterdam; but the master having learned, on calling at Elsineur, that Amsterdam was blockaded, he changed his course for Embden, entered his protest to that effect, and was sailing thither when captured. The cargo consisted of small pieces of timber. Sir W. Scott said:

"This is a claim for a ship taken, as it is admitted, at the time of capture sailing for Embden, a neutral port: a destination on which, if it is considered as the real destination, no question of contraband could arise; inasmuch as goods going to a neutral port, can not come under the description of contraband, all goods going there being equally lawful. It is contended, however, that they are of such a nature, as to become contraband, if taken on a destination to a hostile port. On this point, some difference of opinion seems to have been entertained; and the papers which are brought in, may be said to leave this important fact in some doubt. Taking it however, that *they are* of such a nature as to be liable to be considered as contraband on a hostile destination, I can not fix that character on them in the present voyage. The rule respecting contraband, as I have always understood it, is, that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you can not generally take

the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait, till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach. . . . The master receives information of this fact [the blockade of Amsterdam] at Elsineur, and on consultation with the consul of the nation to which the cargo belonged, changed his purpose, and actually shaped his course for Embden, to which place he was sailing at the time of capture. I must ask then, was this property taken under such circumstances as make it subject to the penalty of contraband? Was it taken *in delicto*, in the prosecution of an intention of landing it at a hostile port? Clearly not— But it is said, that in the understanding and intention of the owner it *was* going to a hostile port; and that the intention on his part was complete, from the moment when the ship sailed on that destination: had it been taken at any period previous to the actual variation, there could be no question, but that this intention would have been sufficient to subject the property to confiscation; but when the variation had actually taken place, however arising, the fact no longer existed. There is no *corpus delicti* existing at the time of capture. In this point of view, I think, the case is very distinguishable from some other cases, in which, on the subject of deviation by the master, *into* a blockaded port, the court did not hold the cargo, to be necessarily involved in the consequences of that act. It is argued, that as the criminal deviation of the master did not there immediately implicate the cargo; so here, the favourable alteration can not protect it; and that the offence must in both instances, be judged by the act and designs of the owner. But in those cases there *was* the guilty act, really existing at the time of capture; both the ship and cargo were taken *in delicto;* and the only question was, to whom the *delictum* was to be imputed. . . . In the present instance, there is *no* existing *delictum*. . . . The cargo is taken on a voyage to a neutral port. . . . If the capture had been made a day before, that is, before the alteration of the course, it might have been different; but however the variation has happened, I am disposed to hold, that the parties are entitled to the benefit of it; and that under that variation the question of contraband does not at all arise. I shall decree restitution; but as it was absolutely incumbent on the captors to bring the cause to adjudication, from the circumstance of the apparent original destination, I think they are fairly entitled to their expences."

The Imina (Aug. 1, 1800), 3 C. Rob. 167.

A Swedish ship, while on a voyage from Ireland to Spain, with a cargo of corn, shipped under the permission of the British Government for the use of the British forces in Spain, was captured, in April, 1814, by an American privateer. It was contended that the doctrine of contraband could not apply to the case because the cargo was destined to a country which was neutral in the war between Great Britain and the United States. It was held, however, that the cargo was contraband because it was avowedly destined to British military forces. The opinion of the court, which was delivered by Mr. Justice Story, was concurred in by Justices Washington, Todd, and Duvall. Marshall, Chief Justice, with whom concurred Justices Livingston and Johnson, dissented, on the ground that the war in Europe was separable from that in which the United States and Great Britain were engaged, and that, although British troops in every part of the world were legally enemies of the United States, yet the furnishing of supplies to British armies in Spain was not in reality an unneutral act to the prejudice of the United States.

The Commercen (1816), 1 Wheat., 382.

To the inquiry of an importer as to whether the United States would object to the importation of pyrites and phosphate of soda as contraband articles, the following reply was made: "The Department is not informed of the views of the Spanish Government on this subject, but the articles in question are not generally mentioned in the lists of contraband found in treaties. It is also proper to observe that, where articles classed as contraband are destined for this country, it is not our policy to obstruct their importation."

Mr. Moore, Asst. Sec. of State, to Secretary of Treasury, May 7, 1898, 228 MS. Dom. Letters, 341.

2. Doctrine of "Continuous Voyages."

The doctrine of "Continuous voyages" has already (supra, § 1180) been to some extent discussed in connection with the Rule of the War of 1756. It will now be considered under the head of "Contraband," in connection with which it has had its latest development. In some of the cases in the American civil war it is uncertain whether the doctrine was applied by the court in connection with contraband or with blockade, but, as this question can best be judged by studying the cases as a whole, they are here fully presented under the preponderant topic—that of contraband.

(1.) QUESTION RAISED IN AMERICAN CIVIL WAR.

§ 1256.

Early in the war the Confederate Government, whose ports were blockaded by the United States, sent abroad agents for the purpose, among others, of obtaining arms and munitions of war and other needful supplies, as well as vessels to transport them, the means of payment to be derived chiefly from the proceeds of the Southern cotton crop. To carry out this plan a firm under the name of Frazer, Trenholm & Co., composed of merchants of Charleston, South Carolina, and constituting a branch of a house in that city, was established in Liverpool. Consignments of cotton were made to this firm, to be drawn against for purchases for the Confederacy. In this way a vast system of blockade running was soon built up, under cover of the neutral flag, but under actual Confederate supervision and control. Commander Bulloch, C. S. N., writing at Liverpool, May 3, 1862, to Mr. Mason, Confederate commissioner in London, stated that he had read to Messrs. Frazer, Trenholm & Co. a part of one of Mr. Mason's letters, and added: "These gentlemen say that their ships are necessarily sailed under the British flag, and the presence on board of any persons known to have been in the Confederate service would compromise their character, and in this view of the case they feel reluctantly compelled to decline giving a pasage to any of the *Sumter's* men."

As the system of blockade running grew in notoriety it became more difficult of execution, and Confederate agents were established in the various West India islands to facilitate its operations; and, instead of direct voyages to blockaded ports, goods were shipped in British bottoms to neutral ports and there transshipped into steamers of light draft and great speed, which could carry coal enough for the short passage to Charleston, Savannah, or Wilmington. Of the neutral ports thus used, Nassau, in the island of New Providence, acquired the greatest celebrity.

Moore, Int. Arbitrations, I. 580–581; Official Records of the Union and Confederate Navies, Ser. I., vol. 1, p. 770.

July 5, 1862, Mr. A. H. Layard, by direction of Earl Russell, addressed a letter to certain British merchants and shipowners of Liverpool in reply to a memorial in which they invoked the protection of the British Government against "the hostile attitude assumed by Federal cruisers in the Bahama waters," so as to put a check on the seizures frequently made therein. Earl Russell, in his reply, stated that complaint had, on the other hand, been made on the part of the United States that ships had been sent out from Great Britain to America "with a fixed purpose to run the blockade; that high premiums of insurance have been paid with this view, and that arms and ammunition have been thus conveyed to the Southern States to

enable them to carry on the war. Lord Russell," so the letter continues, " was unable either to deny the truth of those allegations or to prosecute to conviction the parties engaged in those transactions. But he can not be surprised that the cruisers of the United States should watch with vigilance a port which is said to be the great entrêpot of this commerce.

" Her Majesty's Government have no reason to doubt the equity and adherence to legal requirements of the United States prize courts. But he is aware that many vessels are subject to harsh treatment, and that, if captured, the loss to the merchant is far from being compensated even by a favorable decision in a prize court.

" The true remedy would be that the merchants and shipowners of Liverpool should refrain from this species of trade. It exposes innocent commerce to vexatious detention and search by American cruisers; it produces irritation and ill will on the part of the population of the Northern States of America; it is contrary to the spirit of Her Majesty's proclamation; and it exposes the British name to suspicions of bad faith, to which neither Her Majesty's Government nor the great body of the nation are justly obnoxious.

" It is true, indeed, that supplies of arms and ammunition have been sent to the Federals equally in contravention of that neutrality which Her Majesty has proclaimed. It is true, also, that the Federals obtain more freely and more easily that of which they stand in need. But if the Confederates had the command of the sea they would no doubt watch as vigilantly and capture as readily British vessels going to New York as the Federals now watch Charleston and capture vessels seeking to break the blockade.

" There can be no doubt that the watchfulness exercised by Federal cruisers to prevent supplies reaching the Confederates by sea will occasionally lead to vexatious visits of merchant ships not engaged in any pursuit to which the Federals can properly object. This, however, is an evil to which war on the ocean is liable to expose neutral commerce, and Her Majesty's Government have done all they can fairly do, that is to say, they have urged the Federal Government to enjoin upon their naval officers greater caution in the exercise of their belligerent rights.

" Her Majesty's Government having represented to the United States Government every case in which they were justified in interfering, have only further to observe that it is the duty of Her Majesty's subjects to conform to Her Majesty's proclamation, and to abstain from furnishing to either of the belligerent parties any of the means of war, which are prohibited to be furnished by that proclamation."

Dip. Cor. 1862, 171.

When a vessel is visited she "is not then to be seized without a search carefully made, so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents, and to their ports directly or indirectly by transshipment, or otherwise violating the blockade; and that if, after visitation and search, it shall appear to your satisfaction that she is in good faith and without contraband, actually bound and passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents, then she can not be lawfully seized."

Instructions of Mr. Welles, Sec. of Navy, to United States cruisers, Aug. 18, 1862, Official Records of the Union and Confederate Navies, Ser. I., vol. 1, p. 417, 418.

For correspondence preceding the issuance of these instructions, see Blue Book, North America, No. 5 (1863).

Diligent watch was kept by the United States consuls in English ports for vessels believed to be engaged in contraband and blockade-running ventures. December 30, 1862, Mr. Adams, United States minister at London, communicated to Earl Russell two lists, respectively furnished by the consuls at Liverpool and London, of vessels which, as Mr. Adams said, were believed to have "left with supplies, principally contraband of war, with the intention of either running the blockade directly, or of going to a neighbouring Atlantic or Gulf port, and there discharging their cargoes into another class of vessels, the more easily to get such cargoes to their places of destination." In these lists, which contained the names of 82 vessels, were the steamers *Bermuda*, *Circassian*, *Gertrude*, *Labuan*, *Pearl*, and *Peterhoff*, and the sailing vessels *Springbok* and *Stephen Hart*.

Parl. Paper, North America, No. 3 (1863), 29, 34, 35.

(2) CASES OF "DOLPHIN" AND "PEARL."

§ 1257.

The first judicial application during the civil war of the doctrine of continuous voyages was made by Judge Marvin, of the district court of the United States for the southern district of Florida, in the case of the *Dolphin*, a steamer of 129 tons net, of apparent British ownership. She was captured March 25, 1863, at 5.15 o'clock a. m., by Lieut. Commander Fleming, of the U. S. S. *Wachusett*, between the islands of Culebra and Porto Rico, while ostensibly on a voyage from Liverpool to Nassau. The *Dolphin* left St. Thomas just after midnight on March 25. The *Wachusett* followed her but lost her in the night; descried her again at daylight, and captured her after an hour and a half's chase and the firing of a number of shots. In his

first brief report, March 25, Commander Fleming said: "Suspicion being strong against her I seized her." In a further report, of March 28, he said that the report of the boarding officer, "together with an examination I had of her papers, and the strong suspicion attached to her of intending to run the blockade, induced me to capture her and to send her to Key West."

When sent before the prize court, the vessel and cargo were claimed by one Grazebrook, of Liverpool, to whose order the bills of lading consigned the cargo, while the freight bill consigned it to Messrs. Chambers & Raw, of Nassau. It corresponded to the freight list found on board, except as to certain cases containing in all 920 rifles and 2,240 cavalry swords, which were described as "hardware."

Judge Marvin said that if the vessel and cargo were owned as claimed and "there was no intention on the part of the owner that the vessel should proceed with the cargo to a port of the enemy," there would be no justification for the capture or condemnation of either; but that "if, on the other hand, it was the intention of the owner that the vessel should simply touch at Nassau and should proceed thence to Charleston or some other port of the enemy, then the voyage was not a voyage prosecuted by a neutral from one neutral port to another, but was a voyage to a port of the enemy, begun and carried on in violation of the belligerent rights of the United States to blockade the enemy's ports and prevent the introduction of munitions of war. . . . The cutting up of a continuous voyage into several parts by the intervention or proposed intervention of several intermediate ports may render it the more difficult for cruisers and prize courts to determine where the ultimate terminus is intended to be, but it can not make a voyage which in its nature is one to become two or more voyages, nor make any of the parts of one entire voyage to become legal which would be illegal if not so divided."

The master and some of the crew swore that Nassau was the terminus of the voyage. Three letters, however, were found on board, all signed by Grazebrook. One of them, addressed to Chambers & Raw, suggested that if the market at Nassau was "overdone from New York and the States," or if the "French charter" for "army stores, rum, etc.," had fallen through, a "fine trade" might be done "between Nassau and Boston and New York," and a "return cargo" of coal might be brought from Prince Edward Island for blockade runners; or perhaps the steamer might be sold, but not for any of "your Federal or Confederate paper," but only for "hard cash." Another letter, addressed to the master, was of similar purport. The third, which evidently was not intended to be shown to visiting cruisers, and the contents of which were unknown to the master, was addressed to Chambers & Raw. It canceled the prior instructions, which were said to have been given "for a certain reason;" declared

that the vessel "of course" was "not to be sold to anyone;" stated that "a power of attorney, for certain purposes," would be sent to the firm by the next mail, and expressed the hope that they would "be able to get some more goods on, instead of taking any off, and at good rates."

Commenting upon the evidence, Judge Marvin observed—

1. That Nassau furnished no market for such a cargo as that of the *Dolphin*. "It is," he said, "a small town. The adjacent islands possess but a small population, dependent on it for supplies. Probably not three merchant steamers ever arrived at that port from any part of the world until after the present blockade was established, except the regular Government mail steamers. Was her cargo to be sold in Nassau, including the 920 rifles and the 2,240 swords? These are questions which it is not unreasonable that a prize court should ask and expect some reasonable explanation of in a case like this."

2. That it appeared that Mr. Grazebrook did not intend that the vessel should be sold at Nassau or that her voyage should end there. "She was," said Judge Marvin, "to go from Nassau somewhere. More goods were to be put on, instead of taking any off. The studied effort to conceal the ulterior destination; the swords and rifles found on board, and denominated 'hardware;' the almost certain impossibility of employing a steamer of this class and size in any trade in this part of the world by which she could earn even her expenses, other than in the trade and business of violating the blockade; all point with unerring certainty to Charleston or Wilmington as the ulterior destination of the vessel and cargo."

Both were accordingly condemned, and no appeal was taken.

The Dolphin (May, 1863), 7 Fed. Cases, 868.

For the reports of Commander Fleming, see Official Records of the Union and Confederate Navies, Ser. I., vol. 2, pp. 135, 136. The *Dolphin* was "on the list," supra, and had been under observation for several days. (Id. 131.)

Judge Marvin in the course of his opinion cited The Columbia, 1 C. Rob. 154; The Neptunus, 2 C. Rob. 110; The Imina, 3 C. Rob. 167; The Maria, 5 C. Rob. 365; The William, 5 C. Rob. 385; The Richmond, 5 C. Rob. 325; The Thomyris, Edwards's Adm. 17; The Odin, 1 C. Rob. 252.

May 6, 1863, Judge Marvin decided the case of the *Pearl*. This vessel, a small steamer of 72.17 tons net, was captured by the U. S. S. *Tioga* January 20, 1863, about 60 or 70 miles from Nassau, while ostensibly on a voyage from Liverpool to that port. A claim to the vessel was made by the master on behalf of one Wigg, a merchant of Liverpool, and to the cargo on behalf of H. Adderly & Co., of Nassau.

In deciding the case Judge Marvin observed that he had already held, in the case of the *Dolphin*, "that a vessel bound on a voyage from Liverpool to Nassau, with an intention of touching only at the latter port, and of proceeding thence to a blockaded port of the enemy, is engaged in an attempt to violate the blockade, which subjects her to capture, in the antecedent as well as in the ultimate stage of the voyage—before arriving at Nassau, as well as after having left that port. I think the law also is that if an owner sends his vessel to a neutral port, with a settled intention to commence from such a port a series of voyages to a blockaded port, he thereby commences to violate the blockade, and subjects his vessel to capture, notwithstanding he may also intend to unlade the vessel at the neutral port, discharge the crew, and give all other external manifestations of an intention to end the voyage at such port. Where a deliberate purpose exists to violate a blockade, and measures are actually taken to accomplish that object, the law couples the act and the intent together and declares the offense to be complete. The resorting, therefore, to a neutral port for the purpose of the better disguising the intention, or of procuring a pilot for the blockaded port, or of perfecting the arangements, so as to increase the chances of a successful violation of the blockaded port, will not, in the least, extenuate the offense or avoid the penalty. These measures may increase the difficulty of discovering the true intention, but whenever it is discovered it will give to the transaction its true legal character."

The bill of lading stated that the cargo was shipped by Wigg to be delivered to Adderly & Co. No letter of advice, nor any invoice was found among the papers; and seven members of the crew concurred in the understanding that they were engaged in a blockade-running venture. Nevertheless, as the vessel when captured was really going from one neutral port to another, Judge Marvin stated that he was unwilling to pronounce a condemnation without affording the claimants all the facilities they might desire for rebutting the presumption that they were engaged in an unlawful enterprise. He therefore ordered that the claimant of the vessel "be allowed to produce further evidence, by his own oath and otherwise, touching his interest therein, and the use he intended at the time of capture to make of the vessel after her arrival at Nassau, the trade or business he intended she should be engaged in, and for what purpose she was going to that port; and that the claimant of the goods have time to procure an affidavit of his right and title thereto, and to produce such other proof of neutral ownership as he may be advised."

No new evidence was taken under this order; but the court, on a further hearing, probably influenced by the fact that the cargo consisted of 10 bales of cloth and ready-made clothing, and contained

nothing distinctively pointing to a belligerent destination, decreed restitution of the vessel and cargo, on payment by the claimants of expenses and costs.

The Supreme Court reversed this decree, and condemned both ship and cargo. In pronouncing sentence as to the vessel, the following grounds were mentioned:

The fact that the firm of H. Adderly & Co. had become well known in the court as largely engaged in the business of blockade running; the testimony of the crew as to the Confederate destination of the vessel; the failure to take new evidence on the order for further proof; the absence from Wigg's affidavit, produced on the motion for further proof, of any statement as to the use intended to be made of the vessel after her arrival at Nassau, or as to the purpose for which she was going thither; and the defective and suspicious character of other testimony for the claimant. The court declared itself satisfied that the vessel "was destined, either immediately after touching at that port [Nassau], or as soon as practicable after needed repairs, for one of the ports of the blockaded coast."

As to the cargo, it was observed that the evidence showed ownership in Wigg rather than in any other person, but that no claim was put in by him. The master put in a claim for Adderly & Co., but in his deposition disclaimed all knowledge of ownership, except from the consignment; and the neglect of the firm to put in an affidavit of title or neutral ownership, under the order for further proof, could not, said the court, be construed otherwise than as an admission that they were not entitled to restitution. The cargo was therefore condemned with the ship.

The Pearl (1863), 19 Fed. Cases, 54; (Supreme Court, 1866), 5 Wall. 574. Judge Marvin cited The Columbia, 1 C. Rob. 154; The Neptunus, 2 C. Rob. 110; Yeaton *v.* Fry, 5 Cranch, 335; The Richmond, 5 C. Rob. 325; The Maria, id. 365; The William, id. 385.

(3) CASE OF THE "STEPHEN HART."

§ 1258.

The doctrine of continuous voyages was next judicially discussed by Judge Betts, of the United States district court for the southern district of New York, in a series of cases of which we may take, as the leading example, that of the *Stephen Hart*, condemned July 30, 1863. On the same day Judge Betts rendered similar sentences in the cases of the *Springbok* and the *Peterhoff*, the case of the *Gertrude*, which will be mentioned in association with them, having been disposed of by a sentence of condemnation previously in the same month.

The *Stephen Hart* was captured January 29, 1862, by the U. S. S. *Supply*, off the southern coast of Florida, about 25 miles from Key

West and 82 miles from Point de Yeacos, in Cuba. The vessel was claimed by one Harris, a British subject, and the cargo by the firm of Isaac, Campbell & Co., of London. The cargo consisted of arms, ammunition, and military clothing. The vessel was bound ostensibly to Cardenas, in Cuba. There were found on board, at the time of her capture, her register and sundry bills, certificates, telegrams, and letters, a clearance, two log books, a copy of the United States Coast Survey for 1856, and various other papers, but no invoices, no bills of lading, and no manifest. The vessel was originally built and owned in the United States, and there was strong evidence to show that she was enemy's property. The shipping articles specified a voyage from London to Cuba and Sierra Leone and any ports on the coast of Africa, of North or South America, or of the West Indies, and back to the United Kingdom. The letter of instructions from the owners of the cargo directed the master to proceed to Cardenas, Cuba, and on arrival there to report to "Charles J. Helm, esq.," who was to direct his "future actions with reference to the schooner and cargo." Charles J. Helm was the agent of the Confederate States in Cuba.

The first mate testified that "the destination of the cargo was certainly to one of the Confederate States, and the vessel was in like manner so destined, if Charles J. Helm, the Confederate agent at Cuba, should so direct." He narrated at length how he had met Mr. Yancey and other well-known agents of the Confederacy at the house of Isaac, Campbell & Co., and how he was at first employed to undertake a blockade-running adventure on the steamer *Gladiator*, and was afterwards transferred to the *Stephen Hart*, nominally as mate but really in charge of the cargo. Before the *Stephen Hart* sailed he was directed by one of the Confederate agents to proceed to Cardenas and there work under the instructions of Charles J. Helm, and he was informed that the cargo was to be transshipped into a steamer which could with greater facility run the blockade, unless, indeed, the *Stephen Hart* should be ordered to proceed herself.

Upon this and much other evidence of similar purport, Judge Betts declared that no doubt was left upon his mind that the case was "one of a manifest attempt to introduce contraband goods into the enemy's territory by a breach of blockade." There was an absence of all papers and circumstances to warrant the conclusion "that there was any intent to dispose of the cargo at Cardenas in the usual way of lawful commerce." The consignee of the entire cargo was the agent of the enemy, and it was laden on board by the enemy's agent in London.

The broad issue upon the merits of the cause was, said Judge Betts, "whether the adventure of the *Stephen Hart* was the honest voyage of a neutral vessel from one neutral port to another neutral port,

carrying neutral goods between those two ports only, or was a simulated voyage, the cargo being contraband of war, and being really destined for the use of the enemy, and to be introduced into the enemy's country by a breach of blockade by the *Stephen Hart*, or by transhipment from her to another vessel at Cardenas." This question, declared Judge Betts, was not to be decided by merely ascertaining whether the vessel was documented for, and sailing upon a voyage from London to Cardenas. If the inquiry were thus limited "a very wide door would be opened for fraud and evasion." The commerce consisted in the destination and intended use of the property laden on board the vessel, and the proper test to be applied was whether the contraband goods "are intended for sale or consumption in the neutral market, or whether the direct and intended object of their transportation is to supply the enemy with them." If such was the object they were not exempt from forfeiture merely on the ground that they were neutral property, and that the port of delivery was also neutral. In this relation Judge Betts said:

"If the guilty intention, that the contraband goods should reach a port of the enemy, existed when such goods left their English port, that guilty intention can not be obliterated by the innocent intention of stopping at a neutral port on the way. If there be, in stopping at such port, no intention of transshipping the cargo, and if it is to proceed to the enemy's country in the same vessel in which it came from England, of course there can be no purpose of lawful neutral commerce at the neutral port by the sale or use of the cargo in the market there; and the sole purpose of stopping at the neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage. If, on the other hand, the object of stopping at the neutral port be to tranship the cargo to another vessel to be transported to a port of the enemy, while the vessel in which it was brought from England does not proceed to the port of the enemy, there is equally an absence of all lawful neutral commerce at the neutral port; and the only commerce carried on in the case is that of the transportation of the contraband cargo from the English port to the port of the enemy, as was intended when it left the English port. This court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout: and that the vessel and her cargo are subject to capture, as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy."

Judge Betts was careful to distinguish between such a voyage as that in which the *Stephen Hart* was engaged and a voyage having an actual neutral terminus. With regard to the latter and to the vessel before the court, he said:

"If she was, in fact, a neutral vessel, and if her cargo, although contraband of war, was being carried from an English port to Cardenas, for the general purpose of trade and commerce at Cardenas, and for use or sale at Cardenas, without any actual destination of the cargo, prior to the time of the capture, to the use and aid of the enemy, then most certainly both the vessel and her cargo were free from liability of capture."

The sentence of condemnation pronounced by Judge Betts in this case was affirmed by the Supreme Court. Chief Justice Chase, who delivered the opinion, observed that the principal features of the case resembled that of the *Bermuda* and her cargo, but was perhaps even more irreconcilable with neutral good faith. "It is enough to say," declared Chief Justice Chase, "that neutrals who place their vessels under belligerent control, and engage them in belligerent trade, or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, while the real destination is to belligerent ports, impress upon them the character of the belligerent in whose service they are employed, and can not complain if they are seized and condemned as enemy property."

The Stephen Hart (1863) Blatch. Prize Cases, 387; The Hart, 3 Wall. 559.

Judge Betts cited the cases of the Dolphin and the Pearl, supra; Halleck on International Law, chap. 21, sec. 11, p. 504; 1 Kent's Comm., eighth edition, p. 85, note *a*; 1 Duer on Insurance, 568, section 13; Jecker *v.* Montgomery, 18 How. 110, 115; 2 Wildman's International Law, 20; The Jonge Pieter, 4 C. Rob. 79; The Richmond, 5 C. Rob. 356; The William, 5 C. Rob. 385; The Nancy, 3 C. Rob. 122; The United States, Stewart's Adm. Rep. 116; The Imina, 3 C. Rob. 167; The Trende Sostre, 6 C. Rob. 390; The Columbia, 1 C. Rob. 154; The Neptunus, 2 C. Rob. 110.

The *Gertrude*, an English iron screw steamer, 450 tons, was captured off the island of Eleuthera, April 16, 1863, by the U. S. S. *Vanderbilt*, Baldwin, commanding. In his report to Admiral Wilkes, Commander Baldwin said: "The *Gertrude* has on board an assorted cargo, including 250 barrels of powder, which stamps her as a contraband trader. . . . No log book can be found as yet." She was "caught after a hard chase of 28 miles, during which time a part of her cargo was thrown overboard. She was endeavoring to reach Harbor Island," and showed no colors till three shots had been fired, the last one at her, when she hoisted English colors. She "left Nassau on or about the 8th of April," and had since been off the southern coast, but having failed to run the blockade, and having only 36 hours' coal aboard, was on her way back to Nassau when fallen in with. A person was on board, a citizen of Charleston, who was taken to be a

pilot. (Official Records of the Union and Confederate Navies, Ser. I. vol. 2, p. 159.) No claim was put in for the vessel and no appeal taken from the sentence of condemnation.

(4) CASE OF THE "BERMUDA."

§ 1259.

The question discussed in the foregoing cases was first dealt with by the Supreme Court in the case of the steamship *Bermuda*, which came up on an appeal from a decree of the United States district court for the eastern district of Pennsylvania condemning the vessel and part of her cargo, which were captured by the U. S. S. *Mercedita*, April 26, 1862, near the British West India island of Abaco.

It was claimed by the captors that the vessel was enemy's property; that it was her intention with her cargo, which was largely composed of munitions of war, to break, either directly or by transshipment, the blockade of the southern coast of the United States, and that both ship and cargo were on these and other grounds liable to capture and condemnation.

The ostensible owner of the ship was one Haigh, a British subject; her original master was one Tessier, a South Carolinian. On the day after her registration, Haigh, as appeared by a document from the Liverpool customs, executed a power of attorney to two persons named Hencle and Trenholm, both of Charleston, South Carolina, to sell the ship at any place out of the Kingdom for any sum they might deem sufficient. Trenholm was a member of the firm of Frazer, Trenholm & Co., of Liverpool, a branch of the house of John Frazer & Co., of Charleston, and the fiscal agents of the Confederacy in Great Britain, in which capacity they were largely engaged in fitting out cruisers and blockade runners.

With the registry and power of attorney above mentioned the *Bermuda* sailed for Charleston, S. C. Subsequently she changed her course and ran the blockade of Savannah, returning to Liverpool in the autumn of the same year. Her master, Tessier, was then transferred to the *Bahama*, which afterwards became known for carrying the armament of the Confederate cruiser *Alabama*. In his place, as master of the *Bermuda*, was installed one Westendorff, who was licensed by the British authorities, on the recommendation of Frazer, Trenholm & Co., as an experienced shipmaster, sailing out of Charleston, who had commanded one of their ships. The name of the firm of Frazer, Trenholm & Co., Liverpool, was indorsed on the back of Westendorff's license as his address.

The *Bermuda* was now prepared at West Hartlepool for another voyage, ostensibly to Bermuda. The cargo consisted of various things, including tea, coffee, drugs, surgical instruments, shoes, boots,

leather, saddlery, lawns with figures of a youth bearing onward the Confederate flag, military decorations, epaulettes, stars for the shoulder straps of officers of rank, many military articles with designs appropriate for use in the Confederate States, cases of cutlery stamped with the names of merchants in Confederate cities, several cases of double-barreled guns stamped as manufactured for a dealer at Charleston, a large amount of munitions of war, five finished Blakely cannon in cases, with carriages, six cannon without cases, a thousand shells, several hundred barrels of gunpowder, 72,000 cartridges, 2,500,000 percussion caps, 21 cases of swords, and in addition a large quantity of army blankets and other materials. Numerous letters of friendship and business were found on board the vessel, as well as books and newspapers addressed to different persons in the Confederate States, and also a few memoranda, apparently in the nature of requests from persons in Charleston to Capt. Westendorff to buy things for them in England and bring them through the blockade. There were also on board several persons denominated in various letters as "Government passengers," and in one letter as "printers and engravers," who had been sent from Scotland by an agent of the Confederate government, and who were entered on the crew list of the *Bermuda* as common sailors. They had with them a large number of boxes containing Confederate postage stamps, copper plates, envelopes, printing ink, and many reams of white bank-note paper watermarked C. S. A. There were also on board certain well-known gentlemen, residents of Charleston, who were also entered on the shipping list as common sailors, under disguised names. Of the ship's real company, the master, the first mate, the clerk, and three seamen, were citizens of South Carolina, and the second mate, carpenter, and cook belonged to other Confederate States.

There were 45 bills of lading, of which 41 were for goods shipped by Frazer, Trenholm & Co. The whole cargo was shipped under their direction, and according to the bills of lading was to be delivered at the island of Bermuda "unto order or assigns." No consignees were named. Several persons connected with the ship, who were examined in preparatorio, thought that she belonged to Frazer, Trenholm & Co. A letter of one of the mates, found on board, seemed to indicate the same thing, as also a letter of the former captain, Tessier, to Westendorff.

Much stress was laid by the captors upon the correspondence found on board. It appeared that on January 16, 1862, Frazer, Trenholm & Co., at Liverpool, wrote to John Frazer & Co., at Charleston, that they had dispatched the ship *Ella* with a cargo to N. T. Butterfield, their agent at Hamilton, Bermuda, and that she would be followed by the steamer *Bermuda* with goods. On January 23 they wrote again,

inclosing bills of lading of the cargo of the *Ella* and copies of invoices. The goods, they said, were "all shipped by our friends here; *but the disposition of them there is left entirely to you, and in any market to which you may please to direct them.* The bills of lading are indorsed to your order, or that of your authorized agent. . . . Captain Carter [of the *Ella*] is instructed to proceed to Bermuda, and there await your instructions," which were to be sent under cover to Butterfield. By a later letter, of February 28, 1862, addressed to "Messrs. Jno. Frazer & Co. (or their authorized agent), Hamilton, Bermuda," Messrs. Frazer, Trenholm & Co., referring to the invoices and bills of lading of the *Bermuda*, said they were "very full in every particular, and we think will greatly facilitate the delivery *and also the transshipment*, should this be determined upon." On April 1, 1862, the Charleston house, having by a previous letter informed Buterfield that they had been advised that the *Ella* had been dispatched and that she would be followed by the *Bermuda*, wrote another letter requesting him to direct Captain Westendorff to take certain articles from the *Ella* and proceed to Nassau, reporting himself on arrival there to H. Adderly & Co., and to request Captain Carter to "keep in his cargo and wait further orders from us." This letter was received by Butterfield on the 19th of April and was forwarded the same day to Westendorff, at St. George's. Westendorff immediately acted upon it and sailed on the 23d of April toward Nassau. He had arrived at Bermuda on the 19th of March and had remained there about five weeks, during which the cargo was not touched. The gentlemen from Charleston were aboard.

Among the papers taken on board there was also an unfinished letter without signature, but apparently written by the engineer of the *Bermuda* to a friend. This letter was dated at Liverpool, February 16, 1862, and stated that "our tender," a light-draft boat called the *Herald*, had left the day before with a crew shipped for twelve months "for some port or ports south of Mason and Dixon's line;" that "three captains" were on the tender—"one an Englishman, nominal; another, an experienced coast pilot from the Potomac to Charleston; another, ditto, ditto, from Charleston to the San Juan River in Texas. If the Yankees reach her, they are smarter than I give them credit for. *She awaits our arrival in Bermuda;* goes *first into Charleston*, . . ."

The record disclosed that the captain of the *Herald*, after his arrival at Bermuda, drew a bill on Frazer, Trenholm & Co., at Liverpool, in favor of Westendorff, showing that the latter had advanced a certain amount of money to the *Herald*. It was also testified by a person on the *Bermuda* that the *Herald* was connected with the former ship.

At the time of the capture, and after the vessel was boarded, the captain's brother, by his order, threw overboard two small boxes and a package, which he swore he understood contained postage stamps, and a bag, which he understood contained letters, and which he was instructed to destroy in case of capture. One of the gentlemen from Charleston also destroyed a number of letters, which he swore were private letters, intrusted to him by Americans in Europe.

On the part of the claimants it was contended—

1. That the vessel was captured within British territorial waters.

2. That both the vessel and the cargo were owned by neutrals, and that their destination was either Bermuda or Nassau, a neutral port.

3. That there was no intent to run the blockade; that the ship, after arriving at Bermuda, was instructed to proceed to Nassau in order that her cargo might be landed and another cargo be taken on board for some port in Europe; that it was the intention of the consignees at Nassau, who were correspondents of Frazer, Trenholm & Co., to carry out these instructions strictly; that a part of the munitions of war were intended for the Government of Hayti, and the rest "for sale at Bermuda or Nassau, in the usual course of business, to any person willing to purchase the same."

4. That the fact that the ship was not intended to run the blockade was shown by the circumstance that the "government passengers," though they all undoubtedly wished to enter the Confederate States, all disembarked at Bermuda and did not rejoin the vessel when she sailed to Nassau.

5. That there was no concealment as to anything on board; that everything was fairly entered on the bills of lading and manifest; and that the crew were shipped for a term not exceeding twelve months from Liverpool to Bermuda, and thence, if required, to any ports or places in the West Indies, British North America, the United States, and back to the United Kingdom; and that their wages did not exceed that of ordinary voyages in peaceful times.

The opinion of the court was delivered by Chief Justice Chase, and was unanimous.

The court held that all the circumstances, including that of the spoliation of papers, which was one of unusual aggravation, warranted the most unfavorable inference as to ownership, employment, and destination; that all the transactions repelled the conclusion that Haigh was the true owner; that not a document taken on the ship showed ownership in him except the shipping articles, which were false in putting upon the crew list employees of the Confederate Government and enemy passengers; that there was no indication that, after Haigh gave the power of attorney, he performed a single act of ownership; that no letter alluded to him as owner, and no

direction as to vessel or cargo recognized him as such; but that, on the contrary, all the papers and all the circumstances indicated that a sale was made in Charleston under the power, by which the beneficial control and real ownership were transferred to John Frazer & Co., while the apparent title, by the British papers, was suffered to remain in Haigh as a cover. It was therefore held that the ownership of Haigh was a pretense, and that the vessel was rightly condemned as enemy property.

Assuming for the moment, however, that Haigh was the owner of the ship, the court next considered the question as to the employment of the vessel and cargo at the time of the capture. The theory of counsel for Haigh was, said the court, that the ship was neutral and carried a neutral cargo, in good faith, from one neutral port to another; and they insisted that the description[a] of cargo, if neutral, and in a neutral ship and on a neutral voyage, could not be inquired into in the courts of a belligerent.

"We agree to this," said the court. Neutrals might "convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port."

It was asserted by counsel, said the court, that British merchants had "a perfect right to trade, even in military stores, between their own ports, and to sell at one of them goods of all sorts, even to an enemy of the United States, with knowledge of his intent to employ them in rebel war against the American Government. If," continued the court, "by trade between neutral ports is meant real trade, in the course of which goods conveyed from one port to another become incorporated into the mass of goods for sale in the port of destination; and if by sale to the enemies of the United States is meant sale to either belligerent, without partiality to either, we accept the proposition of counsel as correct. But if it is intended to affirm that a neutral ship may take on a contraband cargo ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it."

Applying these principles to the case under consideration, the court observed that a large part of the cargo was contraband in the narrowest sense of the word, and a part of it expressly destined to the Confederate States, so that the character of the cargo made "its ulterior, if not direct, destination to a rebel port quite certain." There was, besides, evidence of destination found in the letters of

[a] Possibly the phrase "description of cargo," which appears in the published report, is a misprint. The character of the cargo is what seems to be meant.

Frazer, Trenholm & Co., which made distinct references to the contingency of transshipment; and the evidence showed that the *Herald* was sent over with a view to this. Moreover, the consignment of the whole cargo to order or assigns, which meant in fact to the order of John Frazer & Co., of Charleston, was "conclusive, in the absence of proof to the contrary, that its destination was the port in which the consignee resided and transacted business. . . . It makes no difference," said the court, "whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo. The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene."[a] There seemed to be no reason, said the court, "why this reasonable and settled doctrine should not be applied to each ship where several are engaged successively in one transaction, namely, the conveyance of a contraband cargo to a belligerent. The question of liability must depend on the good or bad faith of the owners of the ships. If a part of the voyage is lawful, and the owners of the ship conveying the cargo in that part are ignorant of the ulterior destination, and do not hire their ship with a view to it, the ship can not be liable; but if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole."

Should the *Bermuda*, on these principles, be condemned for the conveyance of contraband? "By the ancient rule," said the court, "the vessel which carried contraband was condemned as well as the cargo." Of this rule there had been a great but very proper relaxation to the effect that the neutral might convey contraband to a belligerent, subject to no liability except seizure with a view to the confiscation of the offending goods. This relaxation, however, required good faith on the part of the neutral, and did not protect the ship where good faith was wanting. Thus, the carrying of contraband with a false des-

[a] The court cited Jecker *v.* Montgomery, 18 Howard, 114; The Polly, 2 C. Rob. 369; The William, 5 C. Rob. 395; 1 Kent's Comm., 84, note.

tination was a ground of condemnation.[a] Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith; but the belligerent is entitled to require of neutrals a frank and bona fide conduct.[b] So, too, vessels had been condemned for being engaged actually or practically in enemy service.[c]

What, then, inquired the court, "were the marks by which the conveyance of contraband on the *Bermuda* was accompanied? First, we have the character of the contraband articles, fitted for immediate military use in battle, or for the immediate civil service of the rebel government; then the deceptive bills of lading requiring delivery at Bermuda, when there was either no intention to deliver at Bermuda at all, or none not subject to be changed by enemies of the United States; then the appointment of one of these enemies as master, necessarily made with the knowledge and consent of Haigh, if he was owner; then the complete surrender of the vessel to the use and control of such enemies, without even the pretence of want of knowledge, by the alleged owner, of her destined and actual employment." The circumstances rendered it highly probable that the ship at the time of capture was actually in the service of the Confederate government, and known to be so by all parties interested in her ownership. But, however this might be, it could not be doubted "that the *Bermuda* was justly liable to condemnation for the conveyance of contraband goods destined to a belligerent port, under circumstances of fraud and bad faith, which make the owner, if Haigh was owner, responsible for unneutral participation in the war. The cargo, having all been consigned to enemies, and most of it contraband, must share the fate of the ship."

Having thus disposed of the questions connected with the ownership, control, and employment of the *Bermuda* and the character of her cargo, the court added that little need be said on the subject of liability for the violation of the blockade. "What has been already adduced of the evidence," said the court, "satisfies us completely that the original destination of the *Bermuda* was to a blockaded port; or, if otherwise, to an intermediate port, with intent to send forward the cargo by transshipment into a vessel provided for the completion of the voyage. It may be that the instructions to Westendorff were not settled when the steamship left St. George's for Nassau; but it is quite clear to us that the ship was then at the disposition of John Frazer & Co., and that the voyage, begun at Liverpool with intent to violate the blockade, delayed at St. George's for instructions

[a] The Franklin, 3 C. Rob. 224.

[b] The Neutralitet, 3 C. Rob. 296; Carrington *v.* Merchants' Insurance Co., 8 Pet. 518; The Ranger, 6 C. Rob. 126.

[c] The Jonge Emilia, 3 C. Rob. 52; The Carolina, 4 C. Rob. 256.

from that firm, continued toward Nassau for the purpose of completion from that port to a rebel port, either by the *Bermuda* herself or by transshipment, was one voyage from Liverpool to a blockaded port; and that the liability to condemnation for attempted breach of blockade was, by sailing with such purpose, fastened on the ship as firmly as it would have been by proof of intent that the cargo should be transported by the *Bermuda* herself to a blockaded port, or as near as possible, without encountering the blockading squadron, and then sent in by a steamer, like the *Herald*, of lighter draft or greater speed."

As to the question of capture within neutral waters, the court observed that there was nothing in the evidence which proved to its satisfaction that such was the fact.

It was therefore held that "both vessels and cargo, even if both were neutral, were rightly condemned."

By this judgment the decree of the court below condemning the vessel and the munitions of war was affirmed. Subsequently the district court passed a decree condemning the residue of the cargo.

The Bermuda (1865), 3 Wall. 514.

(5) MATAMORAS CASES.

§ 1260.

The Mexican town of Matamoras, situated on the Rio Grande, nearly opposite Brownsville, in Texas, which formed one of the Confederate States, offered obvious advantages as a base of contraband trade.

The steamer *Peterhoff* was captured Feb. 25, 1863, near the island of St. Thomas, D. W. I., by the U. S. S. *Vanderbilt*, and was condemned by the United States district court for the southern district of New York, together with her cargo, for attempt to break the blockade. From this sentence an appeal was taken to the Supreme Court.

The *Peterhoff* was fully documented as a British merchant steamer upon a voyage, as shown by her manifest, shipping list, clearances, and other papers, from London, England, to Matamoras, in Mexico. The bills of lading all stipulated for the delivery of the goods "off the Rio Grande, Gulf of Mexico, for Matamoras," adding that they were to be taken from alongside the ship, provided that lighters could cross the bar at the mouth of the river. The cargo was miscellaneous, and shipped by different persons, all but one of whom were British subjects, and a part of it belonged to the owner of the vessel. Of the numerous packages a certain number contained articles useful for military purposes during war. Among them were 36 cases of artillery harness, 14,450 pair of "Blucher" boots, 5,580 pair of "govern-

ment regulation grey blankets," 95 casks of horseshoes of large size, suitable for cavalry service, and 52,000 horseshoe nails. There were also considerable amounts of iron, steel, shovels, spades, blacksmiths' bellows and anvils, nails, and leather, and an assorted lot of drugs—1,000 pounds of calomel, large quantities of morphine, 265 pounds of chloroform, and 2,640 ounces of quinine. Owing to the blockade of the coast, drugs, and especially quinine, were greatly needed in the Southern States.

With the exception of a portion consigned to the order of the master, which belonged to the owners of the vessel, the cargo was represented in agency or consigneeship chiefly by three different persons on board the vessel as passengers—Redgate, Bowden, and Almond—all natives of Great Britain, and at the time of the capture all British subjects, except Redgate, who had become a citizen of the United States, and who, before the outbreak of the war, resided in Texas. He stated that at the time of the capture he intended to establish a mercantile house at Matamoras, and that, had his "goods arrived there, they were to take the chances of the market." Bowden and Almond testified to substantially the same effect as to their respective ventures. During the war Matamoras, which lies on the Mexican side of the Rio Grande, nearly opposite the town of Brownsville, in Texas, had, by reason of the facilities which as a neutral port it offered for trade with the Confederacy, whose seaports were all blockaded, suddenly risen from the position of a place of no importance "into a great centre of commercial activity, rivalling the trade of New York or Liverpool."

The opinion of the Supreme Court in the case of the *Peterhoff* was delivered by Chief Justice Chase. He stated that the record satisfied the court that the voyage of the ship "was not simulated." She was "in the proper course of a voyage from London to Matamoras;" nor was there any evidence which fairly warranted the belief "that the cargo had any other direct destination." The proposed delivery of the cargo off the mouth of the Rio Grande into lighters for Matamoras was "in the usual course of trade," since it was impossible for a vessel of heavy draught to enter the river. "It is true," said the court, "that, by these lighters, some of the cargo might be conveyed directly to the blockaded coast; but there is no evidence which warrants us in saying that such conveyance was intended by the master or the shippers. We dismiss, therefore, from consideration, the claim, suggested rather than urged in behalf of the Government, that the ship and cargo, both or either, were destined for the blockaded coast."

But it was maintained in argument by counsel for the captors (1) that trade with Matamoras was, at the time of the capture, made unlawful by the blockade of the mouth of the Rio Grande; and, if this was not the case, (2) that the ulterior destination of the cargo

was Texas and the other States in rebellion, and that this ulterior destination constituted a breach of the blockade.

On these points the court held—

1. That "the mouth of the Rio Grande was not included in the blockade of the ports of the rebel States, and that neutral commerce with Matamoras, except in contraband, was entirely free."

2. That "neutral trade to or from a blockaded country by inland navigation or transportation," is lawful; and, "therefore, that trade, between London and Matamoras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and can not be declared unlawful." "Such trade," said the court, "with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country."

The question of breach of blockade being thus excluded, the court proceeded to consider the question of the destination of the cargo in connection with the question of contraband. Taking up the usual classification of articles with reference to this question— (1) those used primarily for purposes of war, (2) those used for purposes of war or of peace according to circumstances, and (3) those used exclusively for peaceful purposes—the court observed that a considerable part of the cargo was of the third class and need not be further considered. A large part, perhaps, was of the second class, but as it was "not proved . . . to have been actually destined to belligerent use," it therefore could not, said the court, "be treated as contraband." "Another portion was, in our judgment," continued the court, "destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the invoices as 'men's army bluchers,' 'artillery boots,' and 'government regulation gray blankets.' These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army."

With regard to these articles, which were adjudged to be condemned as contraband, the language of the court is to be specially noted. "It is true that even these goods," said the court, "if really intended for sale in the market of Matamoras, would be free of liability: for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that

these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

"And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. . . . Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras. We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned."

Restitution of the ship was decreed on payment of costs and expenses. This condition was imposed, notwithstanding the finding that her destination was neutral, (1) because the master, when brought to by the *Vanderbilt*, refused to send his papers on board; (2) because papers were destroyed on board the ship at the time of the capture; and (3) because it was the duty of the captors, since contraband was found on board "destined to the enemy," to bring the ship in for adjudication.

The Peterhoff (1866), 5 Wall. 28.

In two other Matamoras cases, decided at the same term. the Supreme Court decreed restitution, in the absence of proof of actual enemy destination. The first of these was that of the *Science*. Chief Justice Chase, delivering the opinion of the court, stated that the evidence was "clear that the vessel and her outward cargo were neutral property, destined to neutral consignees at Matamoras, and that the cargo had been actually delivered as consigned." "Some of the proof," the court added, "tended to show that a portion of this cargo consisted of Confederate uniform cloth; but there was none showing destination to enemy territory or immediate enemy use. There was, therefore, nothing in the character of the vessel or of the outward cargo which warrants condemnation."

The Science, 5 Wall. 178.

At the same time the court decided the case of the *Volant*, another Matamoras case. The Chief Justice, delivering the opinion, stated that the proof showed that the vessel was the property of a neutral merchant of the island of Jersey, documented as a British merchantman, and regularly cleared from London to Matamoras. The cargo was shipped by the charterers of the vessel for neutral owners, and

consigned to neutrals at Matamoras, but had not been discharged at the time of capture. "It consisted," said the court, "in part of bales of Confederate uniform cloth, of the same mark and of corresponding numbers with like goods found on the *Science;* but there is no proof of unlawful destination." The decree of the court below, condemning the ship and cargo, was accordingly reversed.

The Volant, 5 Wall. 179.

(6) CASE OF THE "SPRINGBOK."

§ 1261.

Of all the decisions rendered by the Supreme Court in cases involving the question of continuous voyage, that which was pronounced in the case of the British bark *Springbok* has been most discussed and most criticised. The case came up on appeal from a decree of the United States district court for the southern district of New York, condemning the bark and her cargo, which had been captured at sea by the United States gunboat *Sonoma*.

It appeared the vessel was owned by British subjects and was commanded by the son of one of the owners. She was chartered November 12, 1862, to T. S. Begbie, of London, to take a cargo of merchandise and therewith "proceed to Nassau, or so near thereunto as she may safely get, and deliver same," and thirty days were allowed "for loading at port of loading and discharging at Nassau." This document was indorsed by Speyer & Haywood, who, on December 8, 1862, instructed the master: "You will proceed at once to the port of Nassau, N. P., and on arrival report yourself to Mr. B. W. Hart there, who will give you orders as to the delivery of your cargo." In a letter directed to Hart, Speyer & Haywood spoke of themselves as acting "under instructions from Messrs. Isaac, Campbell & Co." By the bills of lading the cargo was to be delivered to order or assigns.

The ship set sail from London December 8, 1862, and was captured February 3, 1863, about 150 miles east of Nassau, when making for that port. When captured she made no resistance, and her papers were given up without any attempt at concealment or spoliation.

On the hearing before the district court, counsel for the captors invoked the proofs taken in two other cases then on trial, namely, United States *v.* The Steamer *Gertrude*, and United States *v.* The Schooner *Stephen Hart*. As has been seen, the *Stephen Hart* was captured January 29, 1862, and the claimants of her cargo were Isaac, Campbell & Co., who claimed jointly with Begbie the cargo of the *Springbok*. The brokers who had charge of the lading of the *Stephen Hart* were also Speyer & Haywood. The *Gertrude* was captured

April 16, 1863, off one of the Bahama Islands while on a voyage ostensibly from Nassau to St. John's, N. B. She was condemned, and no claim was put in either to the vessel or her cargo. The testimony showed that she belonged to Begbie; that her cargo consisted, among other things, of hops, dry goods, drugs, leather, cotton cards, paper, 3,960 pair of gray army blankets, 335 pair of white blankets, linen, woolen shirts, flannel, 750 pair of army brogans, congress gaiters, and 24,900 pounds of powder; that she was captured after a chase of three hours, and when making for the harbor of Charleston, her master knowing of its blockade, and having on board a Charleston pilot under an assumed name.

The opinion of the Supreme Court in the case of the *Springbok* was delivered by Chief Justice Chase. He admitted that the invocation of the documents in the cases of the *Gertrude* and the *Stephen Hart*, at the original hearing, was not "strictly regular;" but he also held that the irregularity was not such as would justify a reversal of the decree of the court below, or a refusal to examine the documents invoked and forming part of the record.

It had already been held, said the court, in the case of the *Bermuda* that where goods destined ultimately for a belligerent port were "being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods," the ship, though liable to seizure in order that the goods might be confiscated, was not liable to condemnation as prize. The *Springbok* was thought fairly to come within this rule. Her papers were regular and genuine and showed a neutral destination of the ship. Her owners were neutral and did not appear to have any interest in the cargo, nor was there any proof that they knew of its alleged unlawful destination. It was therefore adjudged that the ship should be restored; but in view of a misrepresentation made by the master when examined and of the circumstance that he signed bills of lading which did not truly and fully state the nature of the goods contained in certain bales and cases, no costs or damages were allowed to the claimant.

The case of the cargo was, said the court, quite different. In addition to the facts heretofore noted as to the lading and consignment of the cargo, the court stated that the bills of lading, while they disclosed the contents of 619 packages, "concealed" the contents of 1,388. On this point the court laid great stress, especially in view of the fact that the owners of the cargo knew that it was going "to a port in the trade with which the utmost candor of statement might be reasonably required." The true reason of the concealment must be found in the desire of the owners to hide from the scrutiny of the American cruisers the contraband character of a considerable part

of the contents of the packages. Moreover, the bills of lading and the manifest "concealed" the names of the owners. The true motive of this concealment must have been, said the court, the apprehension of the claimants that the disclosure of their names as owners would lead to the seizure of the ship in order that the cargo might be condemned. It was admitted, however, that "these concealments" did not of themselves warrant condemnation, and the court then proceeded "to ascertain the real destination of the cargo." "If," said the court, "the real intention of the owners was that the cargo should be landed at Nassau and incorporated by real sale into the common stock of the island, it must be restored, notwithstanding this misconduct. What, then, was this real intention?"

That some other destination than Nassau was intended was inferred, first, from the fact that by the bills of lading and the manifest the cargo was consigned to order or assigns. This was treated as a "negation" that a sale was intended to anyone at Nassau, since, if such a sale had been intended the goods would most likely have been consigned for that purpose to some established house named in the bills of lading. This inference was strengthened by the fact that the agent of the owners at Nassau was to receive the property and execute the instructions of his principals.

These instructions were not in evidence; but they might, said the court, be collected in part from the character of the cargo. A part of it, small in comparison with the whole, consisted of arms and munitions of war. A somewhat larger part consisted of articles useful and necessary in war. These portions being contraband, the residue belonging to the same owners must share their fate. "But," declared the court, "we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned, if really destined for Nassau and not beyond, and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade.

"Looking at the cargo with this view, we find that a part of it was specially fitted for use in the rebel military service, and a large part, though not so specially fitted, was yet well adapted to such use. Under the first head we include the sixteen dozen swords, and the ten dozen rifle bayonets, and the forty-five thousand navy buttons, and the one hundred and fifty thousand army buttons; and, under the latter, the seven bales of army cloth and the twenty bales of army blankets and other similar goods. We can not look at such a cargo as this, and doubt that a considerable portion of it was going to the rebel States, where alone it could be used; nor can we doubt that the whole cargo had one destination.

"Now, if this cargo was not to be carried to its ultimate destination by the *Springbok* (and the proof does not warrant us in saying that it was), the plan must have been to send it forward by transshipment. And we think it evident that such was the purpose. We have already referred to the bills of lading, the manifest, and the letter of Speyer & Haywood as indicating this intention; and the same inference must be drawn from the disclosures by the invocation, that Isaac, Campbell & Co., had before supplied military goods to the rebel authorities by indirect shipments, and that Begbie was the owner of the *Gertrude* and engaged in the business of running the blockade.

"If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the *Gertrude* in the harbor of Nassau with undenied intent to run the blockade, about the time when the arrival of the *Springbok* was expected there. It seems to us extremely probable that she had been sent to Nassau to await the arrival of the *Springbok* and to convey her cargo to a belligerent and blockaded port, and that she did not so convey it, only because the voyage was intercepted by the capture.

"All these condemnatory circumstances must be taken in connection with the fraudulent concealment attempted in the bills of lading and the manifest, and with the very remarkable fact that not only has no application been made by the claimants for leave to take further proof in order to furnish some explanation of these circumstances, but that no claim, sworn to personally, by either of the claimants, has ever been filed.

"Upon the whole case we can not doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok;* that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing."

In conformity with this opinion the decree of condemnation of the district court was reversed as to the ship, but without costs or damages to the claimants, and was affirmed as to the cargo.

The Springbok (1866), 5 Wall. 1.

For the sentence below, May, 1863, see Blatchf. Prize Cases, 349.

Commander T. H. Stevens, U. S. S. *Sonoma*, in a report to Admiral Wilkes, Feb. 9, 1863, said: "On the morning of the 3d of February, while looking for the *Oreto*, I captured the English bark *Springbok*, loaded with contraband, bound to Nassau, but having nothing in the way of a manifest of a legal character, and being upon the list furnished by you, I sent her to New York for adjudication in charge of Acting Master Foster Willis, with a prize crew from this vessel. The vessel was from

London. The capture was made in latitude 25° 41′ N., long. 74° 46′ W." (Official Records of the Union and Confederate Navies, Ser. I., vol. 2, pp. 69, 70.)

February 20, 1864, Earl Russell instructed Lord Lyons, then British minister at Washington, that Her Majesty's Government had considered the judgment of Judge Betts in the case of the *Springbok*, in communication with the law officers of the Crown, and saw no reason to change the opinion that they "could not officially interfere in the matter, but that the owners must be left to the usual and proper remedy of an appeal. On the contrary," declared Earl Russell, "a careful perusal of this elaborate and able judgment, containing the reasons of the judge, the authorities cited by him in support of it, and the important evidence properly invoked from the cases of the *Stephen Hart* and the *Gertrude* (which Her Majesty's Government have now seen for the first time), in which the same parties were concerned, goes so far to establish that the cargo of the *Springbok*, containing a considerable portion of contraband, was never really and *bonâ fide* destined for Nassau, but was either destined merely to call there or to be immediately transshipped after its arrival there without breaking bulk and without any previous incorporation into the common stock of that colony, and then to proceed to its real destination, being a blockaded port. The complicity of the owners of the ship, with the design of the owners of the cargo, is, to say the least, so probable on the evidence that there would be great difficulty in contending that this ship and cargo had not been rightly condemned."

February 5, 1868, the attorney of the owners of the cargo transmitted to Lord Stanley, then foreign secretary, the sentence of the Supreme Court, by which the condemnation of the cargo was affirmed and a decree of restitution entered as to the vessel. He also inclosed a copy of the joint opinion of Messrs. George Mellish, Q. C., and W. Vernon Harcourt, Q. C., holding the sentence to be erroneous and unjust, and stated that in that opinion he had no doubt the law officers of the Crown would concur. He asked that compensation be demanded for the owners of the cargo from the United States for the condemnation of their property.

This petition was referred to the law officers of the Crown, and on July 24, 1868, the foreign office, after an extended review of the papers in the case, including the opinion of counsel, announced the conclusion that Her Majesty's Government would not be "justified, on the materials before them, in making any claim" for compensation. With reference to the opinion of counsel, the foreign office observed that it found fault with the judgment because one ground taken by the court as justifying the conclusion that Nassau was not the real destination of the cargo, was derived from the forms of the

bills of lading, which, although they did not disclose the contents of the packages or name any consignee, the cargo being deliverable to "order or assigns," were, it was maintained, on the testimony of some of the principal brokers of London, "in the usual and regular form of consignment to an agent for sale at such a port as Nassau." No doubt, said the foreign office, the form was usual in time of peace; but a practice which might be "perfectly regular in time of peace under the municipal regulations of a particular state, will not always satisfy the laws of nations in time of war, more particularly when the voyage may expose the ship to the visit of belligerent cruisers." Thus it was laid down by Dr. Lushington, in the case of the *Abo*,[a] that where cargo is shipped *flagrante bello*, the bills of lading on their face ought to express for whose account and risk the property was shipped. The ship's manifest in the present case was, said the foreign office, equally silent on the subject; and, "having regard to the very doubtful character of all trade ostensibly carried on at Nassau during the late war in the United States, and to many other circumstances of suspicion before the court, Her Majesty's Government are not disposed to consider the argument of the court on this point as otherwise than tenable."

As to the argument of counsel that the character of the cargo, being fitted for blockade running, was a proof that it was destined for Nassau, which was the great entrepôt for contraband of war, the foreign office declared that it was one "to which much weight can not be attached." Under "all the circumstances of time and place," and in the absence of evidence from the claimants as to what was to become of the goods on their arrival at Nassau, Her Majesty's Government thought "the court was entitled to draw the inference that the consignors of the goods intended to be parties to the immediate transshipment and importation of these goods into a blockaded port, on their being taken out of the *Springbok*."

In connection with the contention of counsel that the court erred in its statement that the *Gertrude* was at Nassau with undenied intent to run the blockade about the time when the *Springbok* was expected to arrive there, the foreign office observed that the decision of the court did not appear to be based on that ground, but found "that the owners of the cargo intended that it should be transshipped at Nassau in some vessel more likely to succeed in reaching a blockaded port than the *Springbok*." As a fact, said the foreign office, the voyage of the *Gertrude* appeared to have been delayed, but "when she did reach Nassau, after the capture of the *Springbok*, she took on board a contraband cargo, upon which the marks and numbers corresponded to some extent with certain marks and numbers on

[a] 1 Spinks's Adm. Rep., 350.

many packages in the *Springbok*, and she was captured and condemned without any attempt being made to resist such condemnation."

In the case of the *Peterhoff*, it appears that the British consul at New York, on August 3, 1863, transmitted to his Government a copy of Judge Betts's decree condemning the vessel and her cargo, and stated that the judge would later deliver in extenso his reasons for the condemnation. With reference to the decree, Earl Russell instructed Lord Lyons, Oct. 31, 1863, that Her Majesty's Government, having considered the judicial proceedings, in communication with the law officers of the Crown, adhered to the opinion that any official intervention in the present stage of the case was inexpedient. "The evidence," said Earl Russell, "is certainly not 'clearly and unequivocally inadequate to sustain the sentence,' but, on the contrary, in various particulars tends to sustain it; such as the false swearing of the master, or, at least, the palpable equivocation and disingenuousness of his evidence; the throwing overboard of papers, the contents of which are said to be unknown at the moment of capture; the incredible and conflicting suggestions (in the absence of a true explanation which the claimants might have obtained) as to their contents, and the character of certain portions of the cargo."

April 22, 1864, the full opinion of Judge Betts in the case of the *Peterhoff* having been received, as well as that of Judge Marvin in the cases of the *Dolphin* and the *Pearl*, Earl Russell instructed Lord Lyons, after consulting the law officers of the Crown, that Her Majesty's Government did not consider that the decisions in the cases of the *Peterhoff* and the *Dolphin* called "for any intervention on their part. Her Majesty's Government," continued Earl Russell, "without adopting all the reasons assigned in these judgments (in some of them, indeed, they do not concur), are not prepared to say that the decisions themselves, under all the circumstances of the cases, are not in harmony with the principles of the judgments in the English prize courts. With respect to the case of the *Pearl*, Her Majesty's Government consider that the course pursued by the judge is fair and equitable."

In the cases of the *Springbok*, *Peterhoff*, *Dolphin*, and *Pearl*, claims for compensation were made before the international commission under Art. XIII. of the treaty of Washington of May 8, 1871. None was presented in the case of the *Bermuda*.

In the case of the *Springbok* the commission unanimously disallowed all claims on account of the cargo. An award of $5,065 was made as damages for the detention of the vessel from the date of the decree of the district court till her discharge under the decree of the Supreme Court.

The *Peterhoff* claims were all unanimously disallowed.

The cases of the *Dolphin* and the *Pearl* were similarly disposed of.

The commission consisted of the Hon. J. S. Frazer, sometime a a justice of the supreme court of the State of Indiana; the Rt. Hon. Russell Gurney, a member of Her Majesty's privy council, and recorder of London, and Count Corti, Italian minister at Washington.

Blue Book, Miscellaneous, No. 1 (1900); Int. Arbitrations, IV. 3928–3935; id. 3838–3843; Hale's Report, 92, 115; Int. Arbitrations, I. 690.

"The doctrine of 'continuous voyage,' as it has been interpreted and applied by the Supreme Court in cases previous to that of the *Springbok*, may be stated thus: A voyage which, at its start from the neutral port of lading for the carriage of contraband to the belligerent's country (or innocent cargo to a blockaded port of the enemy's country), includes in its project and design this destined deposit of its lading in the enemy's ports, is open to belligerent interception, *from the start*, although it should appear that the ship and cargo were actually seeking a neutral port when intercepted, *provided*, it should, also, appear that from the neutral port the cargo was intended to be, *as a part of the original and planned adventure*, carried to the enemy's port. And, this latter element of the completion of the transit from the first neutral port of departure to the enemy's port being embraced in the original guilty scheme, the fact that the carriage from the intermediate neutral port was to be by transshipment, and taken up by a new bottom, does not purge the adventure of its guilt, or protect the first stage of the voyage from interception, and the ship and cargo from condemnation. The doctrine is as extremely stated in the head note of The Bermuda, 3 Wallace, 515, as anywhere:

"'*A voyage from a neutral to a belligerent port is one and the same voyage*, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports; and whether to be performed by one vessel or several *employed in the same transaction and in the accomplishment of the same purpose.*'

"The recognized doctrine, of which we make no complaint, that vessels carrying cargo 'to belligerent ports under blockade, are liable to seizure and condemnation from the commencement to the end of the voyage' (the *Bermuda*, *ut supra*), is thus thought to be made applicable to a project of violation of blockade, at any stage of its execution, although such project included intermediate ports and transshipment and carriage by new bottoms.

"The condition of proof, and the interpretation of it, which, in this extreme case of the *Bermuda*, was thought by the court to justify condemnation, must not be overlooked and should be carefully weighed. It really gives the *measure* of the doctrine of the court, laid down in that extreme case, on the subject of 'continuous voyage.'

"The court concludes: 'What has already been adduced of the evidence, *satisfies us completely that the original destination of the Bermuda was to a blockaded port;* or, if otherwise, *to an intermediate port, with intent to send forward the cargo by transshipment into a vessel provided for the completion of the voyage.*'

"The court found sufficient evidence that either the *Bermuda* herself or her tender, the *Herald*, was to *complete the voyage and penetrate the blockade*, and condemned both ship and cargo.

"With the doctrine of continuous voyage, as thus limited and defined (and made to depend for its application on a *proved* voyage reaching from a neutral to a belligerent's port, by ascertained vessels completing the project in a scheme which is intercepted only by the capture), there is nothing in the case of the *Springbok* that involves us in any necessary controversy. The important question, for neutrals, is, whether trade between neutral ports to which the actual voyage intercepted is really confined, is to be made guilty, by surmise, conjecture, or moral evidence, and that, even, not of the further carriage and further carrier, but only of a probability that such supplementary further carriage, and *some* supplementary carrier may or must have been included in the original scheme of the commercial adventure.

"If a belligerent prize court can thus be the master of neutral commerce by this *fiction* of continuous voyage for the case of all trade between neutral ports, which has its stimulus from the state of war, why, then, we have a paper blockade of the neutral ports in question, and their commerce is at the mercy of the belligerent."

Argument of Mr. Evarts in the case of the Springbok, before the British Claims Commission, 45–47.

Hall, referring to the cases in which the English prize courts have applied the doctrine of continuous voyages, states that those courts "were careful not to condemn until what they conceived to be the hostile act was irrevocably entered upon" by departure "from the port of colorable importation to the enemy country;" and he declares that "the American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country." He does not cite, however, any case in which it was held by an English court that the performance of the process of "colorable importation" was a prerequisite to condemnation, nor does he exhibit his usual accuracy in his unqualified censure of the American decisions, which found, as will be shown, a defender in his own Government.

In the cases of the *Susan* and the *Hope*, neutral American vessels were condemned by Sir William Scott for carrying, on voyages from Bordeaux to the neutral port of New York, official dispatches

destined to French authorities in the West Indies. In neither case does it appear to have been alleged that the apparent destination of the vessel was not her true and final destination, or that she was specially employed by the French Government. Nevertheless, it was held that the transportation of the dispatches toward their belligerent destination was an unneutral and prohibited service.

Hall, Int. Law (4th ed.), 695, note; The Caroline, 6 C. Rob. 461, 463, note.

"The ruling of the Supreme Court in the *Springbok* case, together with the opinions on it by foreign jurists, are given above at large, in consequence not merely of the extraordinary attention the decision of the court has attracted abroad, but of the vast importance of the issue to neutral rights. The decision in this case, so it was said by Bluntschli, at once one of the most liberal and most accurate of modern publicists, has inflicted a more serious blow on neutral rights than did all the orders in council put together. As is shown by the prior note, the disapproval of this famous decision, so strongly expressed by Bluntschli, is shared with more or less intensity by all the eminent publicists of the continent of Europe whose attention has been called to it, while even in England, from whose precedents the decision was in part drawn, it is treated by high authorities as aiming an unjustifiable blow at neutral rights. As to the opinion of the court, the following remarks may be made:

"(1) The opinion of the court has not that logical precision which enables us to discover how far the question determined involves a question of blockade. It can not be clearly ascertained from the opinion whether the goods confiscated were held good prize because it was intended that they should run the blockade of some particular blockaded Confederate port, or because they were contraband destined for belligerent use in the Confederacy.

"(2) The decision was approved by a bare majority of the court, and among the dissenting judges was Mr. Justice Nelson, whose knowledge of international law was not equaled by that of any of his associates, and Mr. Justice Clifford, distinguished as much for strong sense as for his practice in maritime cases. That the case, in any view, was not, in the hurry of business, considered with that care which its great importance, as it now appears to us, demanded, is evident not merely from the looseness and vagueness of its terms, but from the fact that no dissenting opinion is recorded, nor the arguments of counsel even noted. It is a matter of great regret, also, that the masterly argument of Mr. Evarts, before the mixed commission afterwards instructed to act on this class of claims, and printed in the proceedings of that commission (vol. xxi, Lib. Dept. of State), an argument which is one of the ablest expositions of international law in this relation which has ever appeared, and is recognized as such by

the highest foreign authority, had not been delivered before the Supreme Court so as to have enabled that tribunal to become aware of the great gravity of the question involved.

"(3) While the great body of foreign jurists, British as well as Continental, protested against the decision, it is not a little significant that at the hearing before the commission the British commissioner united in affirming the condemnation. Down to this hearing it was understood that the British Government, acting under the advice of its law officers, had disapproved of the condemnation. Mr. Evarts's argument, however, went to show that the condemnation, while perhaps sustainable under the British system as defined by Sir W. Scott, was in antagonism, not merely to the doctrines set forth in Sir W. Scott's time by the United States, but to those modern restrictions of blockade, by which alone the rights of neutral commerce can be sustained against a belligerent having the mastery of the seas. It is not strange that the British commissioner should have declined to set aside a ruling so consistent with the older British precedents and so favorable to belligerent maritime ascendancy.

"(4) The decision can not be accepted without discarding those rules as to neutral rights for which the United States made war in 1812, and which, except in the *Springbok* and cognate cases, the executive department of the United States Government, when stating the law, has since then consistently vindicated. The first of these is that blockades must be of specific ports. The second is that there can be no confiscation of non-contraband goods owned by neutrals and in neutral ships, on the ground that it is probable that such goods may be, at one or more intermediate ports, transshipped or retransshipped, and then find their way to a port blockaded by the party seizing.

"(5) The ruling is in conflict with the views generally expressed by the executive department of the Government of the United States, a department which has not merely coordinate authority in this respect with the judiciary, but is especially charged with the determination of the law of blockade, so far as concerns our relations to foreign states."

Wharton, editorial note, Int. Law Digest, III. 404.

"Since I took up my pen to review the progress made during the past thirty years in rendering war less onerous to neutrals, a debate has taken place in the Upper Chambers of the States General of the Netherlands on the subject of the condemnation of the cargo of the *Springbok*, with a view to prevent the doctrine upon which the Supreme Court of the United States justified its decision from being generally accepted in European prize courts. Count van Lynden van Sandenburg, minister of state, in the sitting of the Upper Chamber of the States General, on Friday, 25th January, 1881, in the course of his speech, in which he set forth the history of the capture and release

of the vessel and the condemnation of her cargo, stated that he knew that the attention of several powers is now directed to the question, which has at length assumed an *international* character, seeing that it vitally affects neutral rights. 'It matters not,' he said, 'who the owners of her cargo may be, to what nationality they may belong, whether they are English, French, Dutch, or even American. A great principle is at stake, and the only satisfactory and conclusive proof that the United States Government can give, that it at length abandons and renounces a doctrine destructive of neutral trade, and a judgment pronounced in error, will be the awarding full compensation to the despoiled owners of the cargo, the long-suffering victims of a flagrant miscarriage of justice. Now, is it not,' he continued, 'the clear course, is it not the duty of the Netherlands Government, of the government of the country, which gave birth to Hugo Grotius, to approach the United States of North America in conjunction with other maritime powers, for the purpose of prevailing on their government to retrace its steps. In my opinion it is clearly our duty.'

"Herr Van der Does de Willebois, the Netherlands minister of foreign affairs, in his reply, stated that the Netherlands minister at Washington had already been instructed to take every opportunity to press earnestly the subject on the American Government."

Sir T. Twiss, Belligerent Right on the High Seas (1884), 29.

Phillimore, referring to Twiss' pamphlet, says: "It seems to me, after much consideration, and with all respect for the high character of the tribunal, difficult to support the decision of the majority of the Supreme Court of the United States in the case of the *Springbok*, that a cargo shipped for a neutral port can be condemned on the ground that it was intended to transship it at that port, and forward it by another vessel to a blockaded port." (3 Int. Law, 3rd ed., 490.)

See W. B. Lawrence, to the same effect, in 3 Law Mag. and Rev. (4th series), quoting a letter of Mr. Justice Clifford.

"Suppose a state of war between France and the United States: A French cruiser would, under the old system, have the power of preventing a British neutral ship from carrying an American cargo of corn to Liverpool, and an American cruiser would equally have the right of taking a French consignment of silk or fancy goods out of a Cunard steamer on her way to America, because enemy's property was liable to seizure under the neutral flag. It is not too much to say that war itself would be regarded by the British nation as far preferable to such a state of neutrality. . . . In these six wars (Franco-Austrian war of 1859, the Mexican war, the American civil war, the Danish war of 1864, the German war of 1866, and the Franco-German war of 1870) no attempt was made to interfere with neutral ships of commerce, except by blockade, and the stoppage at sea of contraband of war, and upon the whole, the world, but more especially this country, gained immensely by it." (144 Edinb. Rev. 359.)

"Opinion delivered by Messrs. Arntz, professor of international law in the University of Brussels and advocate; Asser, professor of international law in the University of Amsterdam and legal councilor of the department of foreign affairs at The Hague, advocate, etc.; Bulmerincq, privy councilor, professor of international law in the University of Heidelberg, etc.; Gessner, doctor of law, acting imperial councilor of legation at Berlin; W. E. Hall, doctor of law of the University of Oxford; De Martens, professor of international law in the University of St. Petersburg and councilor at the minister of foreign affairs there, etc.; Pierantoni, professor of international law in the University of Rome, and member of the council of diplomatic controversy, etc.; Renault, professor of international law in the Faculty of Law and in the Free School of Political Science in Paris; Alberic Rolin, professor of law in the University of Ghent and advocate; and Sir Travers Twiss, Q. C., formerly professor of international law in London and of civil law in Oxford, late Queen's advocate-general, etc.

"We, the undersigned members of the maritime prize commission, nominated by the Institute of International Law from amongst its members to frame a scheme of international maritime prize law, having been consulted as to the juridical soundness of the doctrine laid down and applied by the Supreme Court of the United States of America in the case of the *Springbok*, have *unanimously* given the following opinion:

"That the theory of continuous voyages, as we find it enunciated and applied in the judgment of the Supreme Court of the United States of America, which condemned as good prize of war the entire cargo of the British bark *Springbok* (1867), a neutral vessel on its way to a neutral port, is subversive of an established rule of the law of maritime warfare, according to which neutral property on board a vessel under a neutral flag, whilst on its way to another neutral port, is not liable to capture or confiscation by a belligerent as lawful prize of war; that such trade when carried on between neutral ports has, according to the law of nations, ever been held to be absolutely free, and that the novel theory, as above propounded, whereby it is presumed that the cargo, after having been unladen in a neutral port, will have an ulterior destination to some enemy port, would aggravate the hindrances to which the trade of neutrals is already exposed, and would, to use the words of Bluntschli, '*annihilate*' such trade, by subjecting their property to confiscation, not upon *proof* of an actual voyage of the vessel and cargo to an enemy port, but upon *suspicion* that the cargo, after having been unladen at the neutral port to which the vessel is bound, may be transshipped into some other vessel and carried to some effectively blockaded enemy port.

"That the theory above propounded tends to contravene the efforts

of the European powers to establish a uniform doctrine respecting the immunity from capture of all property under a neutral flag, contraband of war alone excepted.

"That the theory in question must be regarded as a serious inroad upon the rights of neutral nations, inasmuch as the fact of the destination of a neutral vessel to a neutral port would no longer suffice of itself to prevent the capture of goods noncontraband on board.

"That, furthermore, the result would be that, as regards blockade, every neutral port to which a neutral vessel might be carrying a neutral cargo would become *constructively* a blockaded port if there were the slightest ground for *suspecting* that the cargo, after being unladen in such neutral port was *intended* to be forwarded in some other vessel to some port actually blockaded.

"We, the undersigned, are accordingly of opinion that it is extremely desirable that the Government of the United States of America, which has been on several occasions the zealous promoter of important amendments of the rules of maritime warfare, in the interest of neutrals, should take an early opportunity of declaring, in such form as it may see fit, that it does not intend to incorporate the above-propounded theory into its system of maritime prize law, and that the condemnation of the cargo of the *Springbok* shall not be adopted as a precedent by its prize courts."

14 Revue de Droit Int. 329–331. The *Springbok* case is criticised by Gessner, 7 id., 236; by Westlake, 7 id., 258; by Gessner in his Reform des Kriegs-Secrechts; by Sir Travers Twiss in a pamphlet on this special topic; by "D. C. L." in a pamphlet to the same effect. It is supported by Mr. Bancroft Davis in a pamphlet entitled Les Tribunaux de Prises des États Unis, 1878.

The pamphlet of Sir Travers is answered in the pamphlet Les Tribunaux de Prises des États Unis, Paris, 1878, by Mr. J. C. Bancroft Davis, who maintains that the historic position of the United States as the defender of neutral rights does not oblige the Government to accept and justify a fictitious neutrality.

See a paper on the rights and duties of belligerents and neutrals from the American point of view, by Alexander Porter Morse, in the American Law Register, November, 1898.

"In later times Great Britain has practically abandoned her theory of paper blockades. In an official proclamation, published at the commencement of the Crimean war (see London *Gazette* of the 20th March, 1854), we read, 'And she (Her Majesty the Queen) must maintain the right of a belligerent to prevent neutrals from breaking any *effective* blockade which may be established with an adequate force against the enemy's forts, harbors, or coasts.' The declaration of the congress of Paris of 1856 confirms the principle in the following words: 'Les blocus pour être obligatoires doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi.' (Blockades, in order to be binding must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.)

"Accordingly Bluntschli observes (in his work on Modern International Law, § 829): 'A port is understood to be actually blockaded when ingress to and egress from it are prevented by vessels of war stationed off it, or by the land batteries of the blockading power. No specific number of vessels is required, nor a specific number of cannon in the land batteries; but the warlike force must be sufficiently close and strong to prevent merchant vessels from entering or leaving it, not on *individual* occasions, nor yet necessarily on *every* occasion, *but as a general rule*.'

"In section 833, Bluntschli propounds this other axiom of international law, '*A blockade lasts only as long as it is effective*.' If the blockading squadron is forced to withdraw before a superior force of the enemy, the blockade must be considered as raised. It follows, then, that a neutral vessel on the high seas, bound to a blockaded port, can not be seized for breach of blockade, even though the master has knowledge of the blockade. To the eye of international law, a real breach of blockade is committed only when a neutral vessel attempts by force or stratagem to enter or leave the blockaded port. Bluntschli further contends (§ 835) that, in every case, the vessel can be *lawfully* captured *only while in the act of attempting to violate the blockade*.

"It must be conceded—it is, in fact, admitted—that the blockade of the ports of the rebel States during the war of secession was, on the whole, effective. The doctrine, however, upon which the Supreme Court of the United States has condemned the entire cargo of the *Springbok*, a neutral vessel, on her way to a neutral port, is quite monstrous, more especially as the court acquits that *vessel* of any intention to violate the blockade. If such a doctrine were carried to its logical conclusions, and were enforced by a belligerent great maritime power as rigorously as it has been by the United States, all neutral property on the high seas might be treated as lawful prize of war.

"The official report of Mr. Robert S. Hale, the agent and counsel of the United States Government, before the mixed commission, contains, at page 367 of the appendix, a copy of a 'Confidential *memorandum* for the use of the commissioners on the part of the United States in the American-British Joint High Commission, Washington, 1871, which was inclosed in a communicaton addressed to each of the American commissioners by the honorable Mr. Fish, the American Secretary of State, on February 22, 1871.' In these secret instructions Mr. Fish informed the American commissioners that 'one hundred and sixty-seven cases have been condemned by the prize courts of the United States. With the exception of one case, that of the *Springbok*, the Department of State is not aware of a disposition on the part of the British Government to dissent from any final adjudication of the Supreme Court of the United States in a prize case." (Gessner's Review of *Springbok* case. To same effect, see Gessner's Int. Law, 231.)

"This decree [in the case of the *Springbok*], unprecise as it was, not even designating the port whose blockade the vessel was assumed to purpose to break, was nevertheless affirmed by the mixed commission, instituted by the two Governments, by virtue of the twelfth article of the treaty of Washington. By these decisions the theory of blockade violation received a new extension, which may be formulated as fol

lows: A belligerent can seize and condemn for blockade breaking the cargo of a vessel immediately after its departure from one neutral port for another neutral port, no matter how distant may be the blockaded port, if there be a suspicion that the cargo, after having been disembarked in the friendly port, should afterwards be transported to a blockaded port and placed at the disposition of the enemy; it being held that the voyage from one neutral port to another neutral port, and the subsequent voyage from the second neutral port to a blockaded port constitute one and the same voyage which is tainted on principle.

"This theory of continuity of voyage is not a new invention, but only recently has it been applied to the violation of blockades. It is a revival of the famous rule of the war of 1756, by which it was held to be incompatible with neutrality for the subject of a neutral state to engage in time of war in a commerce between a belligerent and his colonies when such commerce was interdicted by the latter belligerent in time of peace. With the view of escaping the harshness of this rule, neutrals took an intermediate neutral port as the medium by which they carried on trade between the colony and the mother country. In order to stop this trade Sir W. Scott invented what he called the doctrine of continuous voyages, by which the voyage from the intermediate port to the mother country was held to be continuous with that between the colony and the intermediate port, though no seizures were permitted except on voyages between the intermediate port and the belligerent port. This doctrine was pushed by the Supreme Court of the United States so as to make it sustain the seizure of a vessel between the port of original departure and the intermediate neutral port, and this on the conjecture of an ulterior adventure being projected for the goods in question from such intermediate neutral port to a blockaded port. . . . The effect of this decision is to impose on a voyage between two neutral ports the penalties which may be imposed on a voyage between a neutral and a belligerent port. The decision rests on the fiction that though the vessel in which the goods are to be carried is changed at the intermediate port, yet the voyage is the same; and the reason would apply no matter how many changes the goods might be subjected to, or how many successive neutral ports they might pass through. But international law repudiates such fictions, international law being eminently a law based on common sense. The fiction in the present case imposes on neutral commerce restrictions irrationally onerous. It gives to belligerent cruisers a power over neutral ports greater and more arbitrary than they possess in respect to belligerent ports, since, while neutrals can carry to nonblockaded belligerent ports objects which are not contraband of war, they can not, without risk of seizure, carry the same objects to another neutral port. It can not be said that this traffic between friendly ports can be prohibited on account of the suspicion that the cargo disembarked in a neutral port will ultimately be consigned to a blockaded port, for this restriction does not serve to protect neutral rights. All will be left to the judgment of the opposing belligerent. He will be sole judge of a question in which his interests are greatly involved. The preliminary examination, which would extend to all vessels whatever issuing from neutral ports, would be undertaken on the high seas, involving an entire overhauling of papers and cargo, while the decision would be left to a prize court

of the captor, after an examination, more or less protracted, and hence prejudicial to the neutral rights. Hence, the theory of continuity of voyage destroys the freedom of the seas, and the commercial freedom of neutrals. It makes the blockading belligerent the despot of the ocean, putting neutral commerce at his feet. It will be sufficient for him to blockade a single port to enable him, if his navy be sufficient, to paralyze all neutral commerce. . . . All the saltpeter of commerce, to borrow an illustration from Sir Travers Twiss, is sent from Bengal, through Calcutta, to London, which is the great *entrepôt* from which European nations receive this staple. Now, what would be the effect of war in such a relation? A neutral ship freighted with saltpeter *en route* for London would be liable to seizure by the belligerent, though London was a neutral port, on the ground that London was not the final port of destination, but that the saltpeter was ultimately to be forwarded from London to a belligerent. Or, there might be a war between France and Russia, in which France undertakes to blockade the Russian Baltic ports. A cargo of a character absolutely innocent, such as sugar or coffee, is embarked at an American port on an English ship destined for London. This vessel, if the 'continuous voyage' theory be good, could be arrested when half over the Atlantic by a French cruiser on the suspicion that the cargo, after its arrival at London, might be bought by a Russian agent and forwarded to some blockaded Baltic port. In The Peterhoff (5 Wall. 28; Blatch. Pr. Ca. 403, 521), the rule was pushed still further, so as to apply the doctrine of continuous voyages to cases where the goods were to be transported from one neutral port to another, and to be thence taken by land to the belligerent. The Peterhoff was an English merchant ship which was freighted in London for Matamoras, a neutral Mexican port. She was captured *en route* by the United States cruiser Vanderbilt, on the suspicion that her destination was a blockaded Texan port. On August 1, 1863, she was held good prize by the New York prize court. The seizure of the ship was not followed by protests from the British Government, Lord Russell's answer to the proprietors of the Peterhoff showing that that Government was by no means prepared to disavow the theory of continuous voyages as laid down by the Federal courts. (Archiv. Dipl. 1863, iv. 105–109.) This 'approbation' by the British Government of the doctrine thus laid down, shows how little respect that Government has for the Declaration of Paris, of which it was one of the principal signers, for this theory assigns the same validity to fictitious as to effective blockades, the declaration only authorizing the blockade of waters adjoining the place blockaded. Not only, also, would the *enemy's* coast be subject to this supervision, since blockading squadrons could be placed around neutral ports to arrest all vessels issuing therefrom which carry goods which might find their way into an enemy's territory. This doctrine, also, implicitly nullifies the rule, admitted by Great Britain in 1856, that an enemy's property on a neutral ship is free. But, anomalous as is this position of Great Britain in accepting this extension of the doctrine of continuity of voyages, still more anomalous is the position of the United States, which heretofore had vindicated the freedom of enemy's goods when under neutral flag. It is true that the United States did not, as did Great Britain, accede to the Declaration of Paris, but, on the other hand, the United States had uniformly maintained the position that

only effective blockades were obligatory, and President Lincoln had notified all the powers of his intention to maintain during the war these particular principles of the congress of Paris. (Archiv. Dipl. 1861, iv. 115.) In conclusion, we must hold that this ruling in the Springbok case is not only dangerous, but is a retrogressive step in international maritime war." (Fauchille, Du Blocus Maritime (Paris, 1882), 335.)

"The prize courts of the United States of America have slidden much further down the above slippery and dangerous path. Their decisions in the case of the British bark *Springbok* and its cargo are so manifestly in subversion of the universally accepted doctrines of international law, that Monsieur Charles de Boeck, in his recent able work (De la proprieté privée ennemi sous pavillon ennemi) denounces them as '*highly dangerous innovations*,' and devotes an entire chapter to their examination and refutation. Dr. Gessner, an eminent jurist and councilor of the Berlin foreign office, has pronounced these judgments 'monstrous.' Bluntschli declared that they are more pregnant with danger to neutral commerce than the exploded '*paper blockades*.' Even in England the law officers of the Crown, Sir Robert Phillimore, Sir William Atherton, and Sir Roundell Palmer (now lord chancellor of England), pronounced the seizure of the *Springbok* illegal.

"The question which now awaits the decision of the maritime powers is whether they are to take a step, not *in advance*, but a decided *retrograde* step in respect of neutral rights; whether the progress made in 1856 is to be lost, whether all the jurists and statesmen who believed that they had pretty well defined the rights of neutrals, have for years past been only benighted dreamers of dreams.

"The *Springbok*, a British sailing vessel, chartered and loaded by British merchants, sailed from London, on the 2d December, 1862, bound for Nassau, in the British colony, the Bahamas, carrying a general cargo consisting chiefly of Manchester goods, haberdashery, groceries, drugs, stationery, &c. An insignificant portion of the cargo, worth about £700 sterling, consisted of articles which the American prize courts thought fit to regard as *contraband of war*, while the appraised value of the entire cargo was upwards of £66,000 sterling. The proportion of *alleged* contraband was little more than one per cent. Upon the 3d of February, 1863, the *Springbok*, while sailing direct to Nassau and about 150 miles distant from that port, was seized, *without any search*, by the United States cruiser *Sonoma*. The vessel and the entire cargo were summarily condemned as good prize of war by the New York district prize court. Upon appeal, the Supreme Court of the United States, restored the vessel on the ground that a neutral port was its *bona fide* destination, but that court condemned the entire cargo by a judgment which ran as follows:

"'Upon the whole case we cannot doubt that the cargo was originally shipped with *intent* to violate the blockade; that the owners of the cargo *intended* that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok;* that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, *one voyage;* and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing.'

"All the above-quoted legal display rests on a judicial sophism. In respect of the cargo between the port of loading and the *suspected* port of delivery (*a port which the prize court was unable to specify*), there is, forsooth, but '*one voyage*.' Now, a *voyage* in the widest application of the word, has never been held in maritime legal phraseology to compromise more than the space traversed by a vessel between its ports of loading and unloading. But to pretend that the '*voyage*' still continues after the cargo has been discharged and the commercial operation has been completed is, indeed, the very acme of the judicial temerity. The proposition is rendered more glaringly preposterous by the court's admission that the voyage '*as to the ship*' ended at Nassau. The voyage is at an end '*as to the ship*,' yet it is continuous '*as to the cargo*.' This is startling law. The proposition seems more monstrous and absurd when we bear in mind that no transshipment having taken place, it was utterly impossible to say whether or not the cargo would be sent forward, or, if so sent forward, to what port it might go. To tack such a hypothetical, indefinite, imaginary voyage without date of departure or fixed destination on to the completed voyage, and thus to convert the real port of destination (Nassau) into an *intermediate* port, is to misconstrue the facts of the case to establish the right of confiscation by a wretched play upon words.

"To hold a vessel and cargo liable to capture simply because it is *on its way* to a blockaded port is, in our opinion, a departure from the true principles of international law. What, we ask, was the use of the congress of Paris in 1856 abrogating paper and other fictitious blockades, if England and the United States persist in maintaining that the bare *intent* constitutes a breach of blockade, and that the setting sail for a blockaded port establishes that intent. The paradox is altogether indefensible in the case of a vessel sailing from one neutral port to another neutral port. According to the English and American doctrine it would, under the circumstances, be necessary to prove that the vessel's destination was simulated; the intent would be inferred from the care taken to conceal it and to mislead the belligerent as to the real destination. But even in an English prize court the captor would be required to produce the clearest *proof* of the alleged concealed destination. There would be no guessing, no surmising, no inferring, no jumping at illogical conclusions, as in the case of the *Springbok*. In the case of that vessel the Supreme Court's judgment is in the highest degree arbitrary and unjust. Firstly, the blockade is held to have been broken because there was an *intention* to break it; secondly, the neutral vessel is held to have had the intention to break the blockade, not because it was proceeding to a *certain* blockaded port, but because though bound to a *neutral* port it *might* subsequently proceed thence to 'some blockaded port,' or the cargo *might* be sent forward by transshipment to 'some blockaded port.' No! Such doctrines are repugnant to every principle of international justice. No more in the United States than in Europe are such subtleties compatible with the law of nations. The case of the *Springbok* is one of those upon which public opinion, even in the United States, has already decisively condemned the judges. . . .

"The American people are too enlightened, they possess too much practical sound sense, not to perceive that if the doctrine of their Supreme

Court were generally adopted, if the *Springbok* precedent were followed by future belligerents, neutral commerce would be completely crippled, paralyzed, or destroyed on the advent of a maritime war. For instance, American coasting vessels carrying cotton from New Orleans to New York would be liable to capture while on that honest voyage, because the cotton might subsequently be forwarded to some blockaded port and some belligerent cruiser suspected such ulterior destination. In time of war, courage—*robur et æs triplex*—would be necessary to risk a voyage from one neutral port to another. If the merchants in countries engaged in war were to abstain from risking their goods at sea because private enemy property does not yet enjoy immunity from capture, and if neutral vessels were laid up, and their owners renounced a lucrative neutral carrying trade out of fear of being seized, as the *Springbok* was, on suspicion of being engaged on 'a continuous voyage' to some undefined blockaded port, what would become of maritime international trade? What, we ask, will be the position of those nations which, in consequence of their need of foreign supplies, can not possibly dispense with that trade? The subject is a very serious one. It deserves, it commands, the meditation and action of statesmen, and especially of American statesmen." (Mr. Arthur Desjardins, avocat-général of the court of cassation of France, member of the Institute of France, in 59 Revue des Deux Mondes, Sept. 1, 1883, 218, 223–225.)

Fiore, in the second edition of his work on International Law, translated into French by Antoine (1886), vol. 3, § 1649, takes, when commenting on the *Springbok* case, the following distinctions: "Contraband goods destined for one belligerent may be seized by the other belligerent when found on a neutral ship sailing between neutral ports if it be plain that the intention was to supply the goods to the former belligerent. In this sense voyages of such goods are continuous, as they constitute an indivisible unity as links in the same chain. But this by itself would not justify the seizure of the vessel, but only the seizure of such goods as are actually contraband, and of no other."

"The principle of continuous voyages will apply when cases of contraband, attempt to break blockade, etc., come up before courts which accept this English doctrine. In the war of secession many British vessels went to Nassau, and either landed their cargoes destined for Confederate ports there, to be carried forward in some other vessel, or stopped at that port as a convenient place for a new start towards Charleston or some other harbor. If an intention to enter a blockaded port can be shown, the vessel and the cargo, as is said in the text, are subject to capture according to English and American doctrine from the time of setting sail. Now the doctrine of continuous voyages has been so applied by our Supreme Court, that it matters not if the vessel stops at a neutral port, or unlades its cargo and another vessel conveys it onward, or if formalities of consignment to a person at the neutral port, or the payment even of duties are used to cover the transaction: provided destination to the blockaded port, or, in the case of contraband, to the hostile country, can

be established, the ship on any part of its voyage, and the cargo before and after being landed, are held to be liable to confiscation. Or, if again the master of the vessel was ordered to stop at the neutral port to ascertain what the danger was of continuing the voyage to the blockaded harbor, still guilt rested on the parties to the transaction as before. All this seems a natural extension of the English principle of continued voyages, as at first given out; but there is danger that courts will infer intention on insufficient grounds. A still bolder extension was given to it by our courts in the case of vessels and goods bound to the Rio Grande, the goods being then carried up by lighters to Matamoras. We could not prohibit neutrals from sending goods to the Mexican side of that river; but if it could be made to appear that the goods were destined for the side belonging to the United States, that was held to be sufficient ground for condemnation of them; although, in order to reach their destination, they would need overland carriage over neutral territory. (See Prof. Bernard's British Neutrality, 307–317, and comp. Dana's note 231 on Wheaton, § 508.)"

Woolsey, Int. Law, 356.

(6) DELAGOA BAY CASES.

§ 1262.

German Cases.

An interesting and important discussion of questions of contraband and continuous voyage may be found in the correspondence between Germany and Great Britain growing out of the seizure and detention by British cruisers of the three German East African Mail steamers *Bundesrath*, *General*, and *Herzog*.

The first case was that of the *Bundesrath*. As early as Dec. 5, 1899, Rear Admiral Sir R. Harris reported that that vessel had sailed from Aden for Delagoa Bay; that "ammunition" was "suspected, but none ascertained;" and that she carried "twenty Dutch and Germans and two supposed Boers, three Germans and two Austrians, believed to be officers, all believed to be intending combatants, although shown as civilians; also twenty-four Portuguese soldiers."[a] On the 29th of December she arrived at Durban in charge of the British cruiser *Magicienne*. The German Government requested her release on the ground, among others, of "positive assurances" given by the Hamburg Company that she carried no contraband. Lord Salisbury replied that she "was suspected to be carrying ammunition in her cargo, and that she had on board a number of passengers

[a] Blue Book, Africa, No. 1 (1900), 1.

believed to be volunteers for service with the Boers," but that no details as to the grounds of the seizure had been received. Subsequently the British Government was advised by Admiral Harris that the ship changed the position of her cargo on being chased; that a partial search had revealed some sugar consigned to a person at Delagoa Bay, and some railway sleepers and small trucks consigned to a firm at the same place, but labelled "Johannesburg;" and that a further search was expected to disclose "arms among baggage of Germans on board, who state openly they are going to the Transvaal." The German Government declared that it had no knowledge of more than two officers having proceeded to the Transvaal, where they were unable to obtain commands. On Jan. 3, 1900, the British Government directed that an application be made to the prize court for the release of the mails; that, if the application should be granted, they be handed over to the German consul, to be hastened to their destination by a British cruiser if available, or by mail steamer, or otherwise; and that every facility for proceeding to his destination should be afforded "to any passenger whom the court considers innocent." The search of the steamer was continued for nine days, but no contraband was found. Jan. 5 the mails and passengers were released by order of the prize court and were taken on board the German war ship *Condor* for Delagoa Bay. The steamer and her cargo was discharged on the 18th of January.

Dec. 16, 1899, the Admiralty communicated to the foreign office two telegrams, one from the commander in chief of the Mediterranean Station, and the other from the commander in chief of the Cape of Good Hope, in relation to the *Herzog*. One of the telegrams conveyed a report that this steamer, though she had declared that there were no troops on board, had left the Suez Canal for South Africa with "a considerable number of male passengers, many in khaki, apparently soldiers;" the other spoke of "a number of passengers dressed in khaki," and asked whether they could be legally removed. Dec. 21 the senior naval officer at Aden reported her as having sailed on the 18th for Delagoa Bay "conveying, probably for service in [the] Transvaal, about forty Dutch and German medical and other officers and nurses." Jan. 1, 1900, the Admiralty telegraphed to Admiral Harris: "Neither the *Herzog* nor other German mail steamer should be arrested on suspicion only until it becomes obvious that the *Bundesrath* is carrying contraband." The *Herzog* was brought into Durban on the 6th of January. It seems that she had among her passengers three Red Cross expeditions, one of which, however, had no official character nor any connection with the regular Red Cross societies. Jan. 7 the Admiralty directed her immediate release unless guns or ammunition were revealed by the summary search. To this there was added next day the further proviso, "un-

less provisions on board are destined for the enemy's government or agents, and are also for the supply of troops or are specially adapted for use as rations for troops." The steamer was released on the 9th of January.

Jan. 4, 1900, the senior naval officer at Aden reported that the steamer *General* was detained "on strong suspicion" and was undergoing search. The German Government protested, and asked that explicit instructions be given to British officers "to respect the rules of international law, and to place no further impediments in the way of the trade between neutrals"—a request to the form and imputations of which the British Government strongly excepted. The Admiralty had previously telegraphed to Aden that it was undesirable to detain the steamer if she carried the mails. It appears that she was detained on "information" that various suspicious articles were on board for Delagoa Bay, including boxes of ammunition stowed in the main hold, buried under reserve coal. The manifest contained several large cases of rifle ammunition for Mauser, Mannlicher, and sporting rifles, consigned to Mombasa, but this consignment was believed to be bona fide. After a search, which included the removal of 1,200 tons of cargo and the digging out of a large quantity of coal—a task which occupied the *Marathon's* ship's company, assisted by 100 coolies, several days—no contraband was found. The British Government ordered the vessel's release on the 7th of January, but as time was requisite for the replacement of the 1,200 tons of cargo which had then been removed, she was unable to sail till the 10th. She had on board a considerable number of Dutch and German passengers for the Transvaal, in plain clothes, but "of military appearance," some of whom were believed to be trained artillerymen, though it was stated by the British officials that proof of this suspicion could be obtained only by searching their baggage. Lord Salisbury afterwards stated that "there was no sufficient evidence as to their destination to justify further action on the part of the officers conducting the search."

With the release of the ships and their passengers and cargoes, and an expression of regret by Great Britain for what had occurred, the subject in controversy was arranged as follows:

1. The British Government admitted in principle the obligation to make compensation, and expressed its readiness to arbitrate the claims should an agreement by other means be impracticable.

2. Instructions were issued to prevent the stopping and searching of vessels at Aden or at any point equally or more distant from the seat of war.

3. It was agreed provisionally, till another arrangement should be made, that German mail steamers should not in future be searched on "suspicion only." By a mail steamer, however, was understood

not every steamer that had a bag of letters on board, but a steamer flying the German mail flag.

On the other hand, the German Government substantially modified its original position with regard to the questions of international law involved. In a note to Lord Salisbury, of January 4, 1900, Count Hatzfeldt, German ambassador at London, declared it to be the opinion of his Government that prize proceedings in the case of the *Bundesrath* were not justified, for the reason that, no matter what may have been on board, "there could have been no contraband of war, since, according to recognized principles of international law, there can not be contraband of war in trade between neutral ports." He also declared this to be the view taken by the British Government in 1863 as against the judgment of the American prize court in the case of the *Springbok;* and by the British Admiralty in the Manual of Naval Prize Law, in 1866.

Lord Salisbury, in his reply of the 10th of January, pointed out the error of the German Government as to the case of the *Springbok*. As to the Manual of Naval Prize Law, he declared that, while its directions were for practical purposes sufficient for wars such as Great Britain had waged in the past, they were "quite inapplicable to the case which has now arisen of war with an inland state, whose only communication with the sea is over a few miles of railway to a neutral port." He also adverted to the fact that the author of the Manual, in another part of the work than that cited, had discussed "the question of destination of the cargo, as distinguished from destination of the vessel, in a manner by no means favorable to the contention advanced in Count Hatzfeldt's note," and that Professor Holland, who edited a revised edition of the Manual in 1888, had, in a recent letter in *The Times*, expressed an opinion altogether inconsistent with that which the German Government had endeavored to found on its words. Lord Salisbury stated that, in the opinion of Her Majesty's Government, the passage cited from the Manual "that the destination of the vessel is conclusive as to the destination of the goods on board," could not apply to "contraband of war on board of a neutral vessel if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country," and that the true view in regard to such goods, as Her Majesty's Government believed, was correctly stated by Bluntschli, as follows: "If the ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war and confiscation will be justified."[a]

[a] Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi il y aura contrebande de guerre et la confiscation sera justifiée. (Droit Int. Codifié, ed. 1874, § 813.)

In his speech in the Reichstag, January 19, 1900, announcing the arrangement with Great Britain, Count von Bülow laid down certain propositions as constituting a system of law which should be operative in practice, and a disregard of which would constitute a breach of international treaties and customs. One of these propositions was that by the term *contraband of war* "only such articles or persons are to be understood as are suited for war, and at the same time are destined for one of the belligerents." Count von Bülow added that the Imperial Government had striven from the outset to induce the English Government, in dealing with neutral vessels consigned to Delagoa Bay, "to adhere to that theory of international law which guarantees the greatest security to commerce and industry, and which finds expression in the principle that, for ships consigned from neutral states to a neutral port, the notion of contraband of war simply does not exist. To this the English Government demurred. We have reserved to ourselves the right of raising this question in the future, in the first place, because it was essential to us to arrive at an expeditious solution of the pending difficulty, and, secondly, because, in point of fact, the principle here set up by us has not yet met with universal recognition in theory and practice."[a]

American cases.

Contemporaneously with the British-German controversy a question arose between the United States and Great Britain as to the seizure of various articles shipped at New York, some of them on regular monthly orders, by American merchants and manufacturers on the vessels *Beatrice*, *Maria*, and *Mashona*, which were seized by British cruisers while on the way to Delagoa Bay. These articles consisted chiefly of flour, canned meats, and other food stuffs, but also embraced lumber, hardware, and various miscellaneous articles, as well as quantities of lubricating oil, which were consigned partly to the Netherlands South African Railway, in the Transvaal, and partly to the Lourenço Marques Railway, a Portuguese concern. It was at first supposed that the seizures were made on the ground of contraband, and with reference to this possibility the Government of the United States declared that it could not recognize their validity "under any belligerent right of capture of provisions and other goods shipped by American citizens in ordinary course of trade to a neutral port."[b]

It soon transpired, however, that the *Beatrice* and *Mashona*, which were British ships, and the *Maria*, which, though a Dutch ship, was at first supposed to be British,[c] were arrested for violating a munici-

[a] Blue Book, Africa, No. 1 (1900).

[b] Mr. Hay, Sec. of State, to Mr. Choate, ambassador at London, tel., Jan. 2, 1900, S. Doc. 173, 56 Cong. 1 sess. 13-14.

[c] S. Doc. 173, 56 Cong. 1 sess. 16.

pal regulation forbidding British subjects to trade with the enemy, the alleged offense consisting in the transportation of goods destined to the enemy's territory. The seizure of the cargoes was declared to be only incidental to the seizure of the ships. As to certain articles, however (particularly the oil consigned to the Netherlands South African Railway, in the Transvaal), an allegation of enemy's property was made; but no question of contraband was raised, and it was eventually agreed that the United States consul-general at Cape Town should arrange with Sir Alfred Milner, the British high commissioner, for the release or purchase by the British Government of any American-owned goods, which, if purchased, were to be paid for at the price they would have brought at the port of destination at the time they would have arrived there in case the voyage had not been interrupted.[a]

In the course of the correspondence Lord Salisbury thus defined the position of Her Majesty's Government on the question of contraband:

"Foodstuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure."[b]

Mr. Thomas Gibson Bowles, in a letter in the London *Times*, January 4, 1900, says: "In July, 1896, the Dutch steamer *Doelwijk* took a cargo of arms and ammunition, destined to Abyssinia, then at war with Italy, from the neutral port of Rotterdam to the neutral (French) port of Jibutil, in the Gulf of Tajura. The steamer being captured by the Italian cruiser *Etna* and brought in for adjudication, was condemned as lawful prize by the prize court at Rome on December 8, 1896."[c]

VI. *PENALTY.*

§ 1263.

By the law of nations at the close of the eighteenth century the act of carrying materials of war to a belligerent was regarded as a wrong for which vessel and cargo were liable to condemnation.

> The Atlantic (1901), 37 Ct. Cl. 17.
>
> The court further observed, in this relation, that the mere presence of a contraband article on board without proof or indication that the owners knew the vessel was carrying contraband would justify only

[a] Mr. Hay, Sec. of State, to Mr. Toomey, March 2, 1900; to the Ballard & Ballard Co., March 9, 1900; to Mr. Newman, March 13, 1900; 243 MS. Dom. Let. 317, 412, 488.

[b] S. Doc. 173, 56 Cong. 1 sess. 29.

[c] S. Doc. 173, 56 Cong. 1 sess. 20–22.

the seizure of the article, but that if a substantial part of the cargo (e. g., 38 horses on a vessel of 85 tons burden) was contraband, the presumption was that the cargo was to aid a belligerent.

Where, however, there were only 5 horses on a 98-ton vessel, the rest of the cargo consisting of cattle and fowls, an intended military use was not presumed. (The Juno, 38 Ct. Cl. 465.)

April 16, 1814, the Swedish ship *Commercen*, while on a voyage from Limerick, Ireland, to Bilbao, Spain, was captured by an American privateer. Her cargo consisted of corn, shipped under the special permission of the British Government for the use of British forces in Spain. The cargo was condemned, but the ship was restored with an allowance of freight. Against this allowance the captor appealed, and the decree as to freight was reversed by the circuit court. From this sentence an appeal was taken to the Supreme Court, which held that, as the voyage of the vessel was illicit and inconsistent with the duties of neutrality, the penalty of loss of freight was properly imposed.

The Commercen (1816), 1 Wheat. 382.

The court said: "The general rule that the neutral carrier of enemy's property is entitled to his freight, is now too firmly established to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying despatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted."

See a note by Wheaton to this case, on the question of penalty for carrying contraband, 1 Wheat. 394.

The carriage of contraband goods does not subject the vessel and remaining cargo to confiscation, unless they all belong to the same owner, or unless there has been some actual cooperation in an attempted fraud upon the belligerent, by covering up the voyage under false papers, and with a false destination. When the contraband goods have been deposited at the port of destination, neither the vessel nor the cargo is liable to seizure on the return voyage, though the latter may have been purchased with the proceeds of the contraband.

The same rule would seem to apply, by analogy, to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it terminated. But if the voyage be

disguised, and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband in the course of the voyage does not exempt the vessel from seizure.

Carrington *v.* Ins. Co., 8 Pet. 495.

In the case of The Lucy (1901), 37 Ct. Cl. 97 (a French spoliation case), the court, referring to the state of the law at the close of the eighteenth century, said: "Where the owners of a vessel were the owners of the [contraband] cargo, the vessel as well as the cargo was subject to confiscation." See, also, The Bird (1903), 38 Ct. Cl. 228.

Mere consent to transportation of contraband will not always or usually be taken as a violation of good faith by the neutral owner of a ship. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and general features of the transaction must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war.

Contraband of war is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners or of the master with the sanction of the owners.

The Bermuda, 3 Wall. 514; The Springbok, 5 id. 1.

Conveyance of contraband attaches in ordinary cases only to the freight of the contraband merchandise. It does not subject the vessel to forfeiture.

The Peterhoff, 5 Wall. 28.

Contraband articles contaminate the noncontraband parts of a cargo, if belonging to the same owner, and the noncontraband must share the fate of the contraband.

The Peterhoff, 5 Wall. 28.
This is known as the doctrine of "infection."

A false destination will not justify a vessel's condemnation as for carrying contraband, where her real destination is an unblockaded port and her cargo is innocent.

The Betsey and Polly (1902), 38 Ct. Cl. 30.

Where a vessel sailed in March, 1798, with a cargo of horses for a belligerent port, but under a false destination, and the owners of the cargo were the owners of the vessel, the vessel was liable to seizure

and condemnation on her return voyage, together with her cargo, though the cargo was innocent.

The Lucy (1901), 37 Ct. Cl. 97. The court said: "The liability to confiscation attended the entire voyage; that is to say, from the home port back to the home port, and to the cargo on the return voyage, though it might be innocent. There can be no doubt but that such was the recognized law of nations at the close of the eighteenth century. (The Joseph, 8 Cranch, 451–454; Carrington *v.* Merchants' Insurance Co., 8 Pet. 494–520.)"

"Regarding the trade in arms and ammunition and other contraband objects, the Government of the King, looking to the strict observance of the duties prescribed by neutrality, does not intervene either to protect or prohibit it. No law prohibiting the exportation of these products of national industry, the trade in question is carried on freely in the country, but outside the territory at the risks and perils of those who carry it on. If Belgian merchandise of this kind, or vessels transporting it flying the national flag, were stopped and seized on the high seas by the cruisers of one of the belligerents, the intervention of the Government would be confined to seeing that the laws of war and the regulations of the procedure before the prize courts were strictly applied to all parties interested."

M. de Favereau, Belgian min. of for. aff., to Mr. Storer, min. to Belgium, Sept. 6, 1898, enclosed by Mr. Storer with dispatch No. 140, Sept. 14, 1898, MSS. Dept. of State.

In February, 1865, a British subject shipped from Liverpool to his agent in Buenos Ayres a quantity of rifles, with a view to their sale in Paraguay. After the arrival of the goods at Buenos Ayres such a sale was negotiated, and the rifles were shipped from Buenos Ayres on April 8, 1865, for Corrientes, Argentine Republic, where they were to be transshipped for Paraguay. On April 14 war broke out between the Argentine Republic and Paraguay, and the steamer on which the rifles were transported was stopped by the governor of Corrientes, who took out the rifles and placed them at the disposal of the Argentine Government. The owner subsequently presented a claim for the value of the rifles, as well as for an indemnity of about a fourth of their value for their detention for eighteen months. Their value he estimated by the price which they would have fetched in Paraguay. A suit was brought in the federal court at Buenos Ayres, which held that the rifles could not be lawfully confiscated, and that they should be returned to the owner or that a just equivalent should be paid to him or his representative. From this decision the Argentine Government appealed to the supreme court, which decided that, as the arms were shipped by the owner before the declaration of war, they were not subject to confiscation; that their taking

by the Argentine Republic was to be considered as an act of expropriation for public use, and not as an act of preemption under the law of nations; that, according to the law of expropriation the price to be paid was what the goods were worth in place where they were taken; and that, as the Government had in detaining the arms exercised a legitimate right, from which no obligation to pay indemnity could arise, the Government should pay only the current rate of interest on the value of the arms from the date of their expropriation.

Mr. Buchanan, min. to the Argentine Republic, to Mr. Hay, Sec. of State, No. 584, Dec. 1, 1898, enclosing a report of Mr. François S. Jones, sec. of legation, citing Fallos de la Suprema Corte, 1869, IV. 245–246.

A citizen of a neutral state who, for hire, serves on a neutral ship employed in contraband commerce with a belligerent power, is not punishable personally, according to the law of nations, though taken in the act by that belligerent nation to whose detriment the trade would operate.

Lee, At. Gen., 1796, 1 Op. 61.

The rule "that a vessel on a return voyage is liable to capture by the circumstances of her having on the outward voyage conveyed contraband articles to an enemy's port" is an intrepolation in the law of nations.

Mr. Madison, Sec. of State, report of Jan. 25, 1806, 15 MS. Dom. Let. 70.

The transportation of contraband, though an unneutral service, is not a "criminal" act.

1 Kent's Comm. 142, approved by Lord Westbury, in Ex parte Chavasse, 11 Jur. N. S., pt. 1, 400. See, also, 11 Op. At. Gen. 408, 451; The Helen, L. R. 1 Adm. & Eccles. 1.

Much misapprehension as to the quality of the act of supplying contraband articles, such as arms and munitions of war, to the parties to an armed conflict, has arisen from the statement so often made that the trade in contraband is lawful and not prohibited. This statement, when used with reference to the preventive duties of neutral governments, is quite correct, but if applied to the duties of individuals it is quite incorrect. The acts which individuals are forbidden to commit and the acts which neutral governments are obliged to prevent are by no means the same; precisely as the acts which the neutral government is obliged to prevent and the acts which it is forbidden to commit are by no means the same. The supply of materials of war, such as arms and ammunition, to either party to an armed conflict, although neutral governments are not obliged to

prevent it, constitutes on the part of the individuals who engage in it a participation in hostilities, and as such is confessedly an unneutral act. Should the government of the individual itself supply such articles it would clearly depart from its position of neutrality. The private citizen undertakes the business at his own risk, and against this risk his government can not assure him protection without making itself a party to his unneutral act.

These propositions are abundantly established by authority.

Maritime states, says Heffter, have adopted, "in a common and reciprocal interest, the rule that belligerents have the right to restrict the freedom of neutral commerce so far as concerns contraband of war, and to punish violations of the law in that regard. . . . This right has never been seriously denied to belligerents."[a]

Says Kent: "The principal restriction which the law of nations imposes on the trade of neutrals, is the prohibition to furnish the belligerent parties with warlike stores, and other articles which are directly auxiliary to warlike purposes."[b]

"If the neutral [government]," says Woolsey, "should send powder or balls, cannon or rifles, this would be a direct encouragement of the war, and so a departure from the neutral position. . . . Now the same wrong is committed when a private trader, without the privity of his government, furnishes the means of war to either of the warring parties. It may be made a question whether such conduct on the part of the private citizen ought not to be prevented by his government, even as enlistments for foreign armies on neutral soil are made penal. But it is claimed to be difficult for a government to watch narrowly the operations of trade, and it is annoying for the innocent trader. Moreover, the neutral ought not to be subjected by the quarrels of others to additional care and expense. Hence, by the practice of nations, he is passive in regard to violations of the rules concerning contraband, blockade, and the like, and leaves the policy of the sea and the punishing or reprisal power in the hands of those who are most interested, the limits being fixed for the punishment by common usage or law. . . . It is admitted that the act of carrying to the enemy articles directly useful in war is a wrong, for which the injured party may punish the neutral taken in the act."[c]

Says Manning: "The right of belligerents to prevent neutrals from carrying to an enemy articles that may serve him in the direct prosecution of his hostile purposes has been acknowledged by all authorities, and is obvious to plain reason. . . . The nonrecognition of this right . . . would place it in the power of neutrals to

[a] Heffter, Droit Int., Bergson's ed., by Geffcken, 1883, 384.

[b] Kent, Int. Law, 2d ed., by Abdy, 330.

[c] Woolsey, Int. Law, §§ 193, 194.

interfere directly in the issue of wars—those who, by definition, are not parties in the contest thus receiving a power to injure a belligerent, which even if direct enemies they would not possess." [a]

"A belligerent," says Creasy, "has by international law a right to seize at sea, and to appropriate or destroy, articles, to whomsoever they may belong, which are calculated to aid the belligerent's enemy in the war, and which are being conveyed by sea to that enemy's territory." [b]

"The neutral power," says Holland, "is under no obligation to prevent its subjects from engaging in the running of blockades, in shipping or carrying contraband, or in carrying troops or despatches for one of the belligerents; but, on the other hand, neutral subjects, so engaged, can expect no protection from their own government against such customary penalties as may be imposed upon their conduct by the belligerent who is aggrieved by it." [c]

"By this term [contraband] we now understand," says Baker, "a class of articles of commerce which neutrals are prohibited from furnishing to either one of the belligerents, for the reason that by so doing, injury is done to the other belligerent. To carry on this class of commerce is deemed a violation of neutral duty, inasmuch as it necessarily interferes with the operations of the war by furnishing assistance to the belligerent to whom such prohibited articles are supplied." [d]

It may be observed that in some of the foregoing quotations the question is discussed as one affecting the rights of "belligerents." But the question of belligerency is important only as affecting the question of the right of seizure on the high seas. The circumstance that the parties, in consequence of the nonrecognition of their belligerency, are not permitted to exercise visitation and search on the high seas does not alter the nature or detract from the unneutral character of the act of supplying arms and munitions of war to the parties to an armed conflict.

The fact that the supplying of such articles is considered as a participation in the hostilities is shown not only by the authority of writers, but also by numerous state papers.

President Washington, in his famous neutrality proclamation of April 22, 1793, countersigned by Mr. Jefferson, as Secretary of State, announced "that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles which are deemed contraband by the *modern* usage of nations, will not

[a] Manning's Law of Nations, Amos's edition, 352.
[b] Creasy, First Platform of Int. Law, 604.
[c] Holland, Studies in Int. Law, 124–125.
[d] Baker's First Steps in Int. Law, 281.

receive the protection of the United States, against such punishment or forfeiture."[a]

Mr. Jefferson, in the subsequent note to the British minister, quoted in Wharton's Digest (I. 510), observes that in the case of contraband the law of nations is satisfied with the "external penalty" pronounced in the President's proclamation.

President Grant, in the proclamation issued by him August 22, 1870, during the Franco-German war, declares, in the most precise terms:

"While all persons may lawfully, and without restriction, by reason of the aforesaid state of war, manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as 'contraband of war,' yet they can not carry such articles upon the high seas for the use or service of either belligerent, . . . without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf. And I do hereby give notice that all citizens of the United States, and others who may claim the protection of this Government, who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the Government of the United States against the consequences of their misconduct."[b]

In the neutrality proclamations issued during the war between the United States and Spain the following provisions are found in which the furnishing of arms and munitions of war to either party to the conflict is expressly treated as an act of unneutrality.

The Brazilian Government, by a circular of April 29, 1898, declared to be "absolutely prohibited" the "exportation of material of war from the ports of Brazil to those of either of the belligerent powers, under the Brazilian flag, or that of any other nation."[c]

The King of Denmark issued, April 29, 1898, a proclamation prohibiting Danish subjects "to transport contraband of war for any of the belligerent powers."[d]

Great Britain's proclamation of April 23, 1898, warned British subjects against doing any act "in derogation of their duty as subjects of a neutral power," or "in violation or contravention of the law of nations," among which was enumerated the carrying of "arms, ammunition, military stores or materials;" and declared that "all persons so offending, together with their ships and goods, will rightfully incur and be justly liable to hostile capture, and to the penalties denounced by the law of nations."[d]

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[a] Am. State Papers, For. Rel. I. 140.

[b] Wharton's Int. Law Dig., III. 907–908.

[c] Proclamations and Decrees during the War with Spain, 13.

[d] Proclamations, 31, 35.

The governor of Curaçao, acting under instructions of the minister of the colonies of the Netherlands, issued a decree prohibiting "the exportation of arms, ammunition, or other war materials to the belligerents." [a]

Portugal, while stating, in Article IV. of her neutrality decree of April 29, 1898, that "all articles of lawful commerce" belonging to subjects of the belligerent powers might be carried under the Portuguese flag, and that such articles belonging to Portuguese subjects might be carried under the flag of either belligerent, yet declared: "Articles that may be considered as contraband of war are expressly excluded from the provisions of this article." [b]

Were further proof needed of the unneutral and noxious character of contraband trade, it might be found in the doctrine of infection, under which innocent cargo is condemned when associated with contraband merchandise of the same proprietor, and the transportation penalized by loss of freight and expenses, and, under various circumstances, by confiscation of the ship.[c]

From what has been shown it may be argued that, without regard to the recognition or nonrecognition of belligerency, a party to a civil conflict who seeks to prevent, within the national jurisdiction and at the scene of hostilities, the supply of arms and munitions of war to his adversary commits not an act of injury, but an act of self-defense, authorized by the state of hostilities; that, the right to carry on hostilities being admitted, it seems to follow that each party possesses, incidentally, the right to prevent the other from being supplied with the weapons of war; and that any aid or protection given by a foreign government to an individual to enable him with impunity to supply either party with such articles is to that extent an act of intervention in the contest.

VII. *ANALOGUES OF CONTRABAND.*

1. Military Persons.

§ 1264.

On September 14, 1847, Mr. Buchanan, Secretary of State, instructed Mr. Bancroft, American minister at London, to bring to the notice of the British Government the action of Captain May, of the British mail steamer *Teviot*, who had brought from Havana to Vera Cruz General Paredes, the late President of Mexico, who was, said Mr. Buchanan, "the chief author of the existing war between

[a] Proclamations and Decrees during the War with Spain, 27.

[b] Proclamations, 61. (See also, the proclamation of the toatai of Shanghai, id., 20, and the instructions of the Haitian Government, id., 39.)

[c] Walker's Science of Int. Law, 511–512.

that Republic and the United States," and "the avowed and embittered enemy" of the latter. Knowing, as Captain May must have known, that General Paredes would exert all his influence to prolong and exasperate the war, it was, declared Mr. Buchanan, truly astonishing that he "should have brought this hostile Mexican general, under an assumed name, on board of a British mail steamer, to Vera Cruz, and aided or permitted him to land clandestinely, for the purpose of rushing into the war against the United States." Mr. Buchanan said that the President had not yet determined on the course he would pursue in regard to British mail steamers, but he would be justified in withdrawing from them the privilege which had been granted of entering the port of Vera Cruz. He would not, however, immediately resort to that extreme measure, since he was convinced that the British Government would at once adopt efficient measures to prevent such a violation of their neutrality in the future. "British mail steamers," said Mr. Buchanan, "can not be suffered to bring to Vera Cruz either Mexican citizens or the subjects of any other nation, for the purpose of engaging in the existing war on the part of Mexico against the United States. A neutral vessel which carries a Mexican officer of high military rank to Mexico, for the purpose of taking part in hostilities against our country, is liable to confiscation, according to the opinion of Sir William Scott, in the case of the *Orozembo* (6 Robinson's Reports, 430), and this even although her captain and officers were ignorant that they had such a person on board." In conclusion, Mr. Buchanan instructed Mr. Bancroft to acquaint Lord Palmerston with the circumstances of the case, and if it should turn out that Captain May or any of his officers were officers in the British service, to ask for their dismissal or for such other punishment as would clearly manifest their Government's disapproval of their conduct.

Mr. Bancroft brought the case to the attention of Lord Palmerston in the sense of his instructions on October 8, 1847.

On November 16, 1847, Lord Palmerston answered that, the lords commissioners of the admiralty having investigated the affair, her Majesty's Government had informed the directors of the Royal Mail Steam Packet Company, to which the *Teviot* belonged, "that the directors are bound to testify, in a marked manner, their disapproval of Captain May's conduct, in having thus abused the indulgence afforded to the company's vessels by the Government of the United States:" and Lord Palmerston added that the directors of the company had accordingly stated that they would immediately suspend Captain May from his command and that they publicly and distinctly condemned any act on the part of their officers which might be regarded as a breach of faith towards the Government of

the United States, or as an infringement or invasion of the regulations established by the United States officers in those parts of Mexico which were occupied by the forces of the United States.

Mr. Buchanan, Sec. of State, to Mr. Bancroft, min. to England, Sept. 14, 1847; Mr. Bancroft, min. to England, to Lord Palmerston, British for. sec., Oct. 8, 1847; Lord Palmerston to Mr. Bancroft, Nov. 16, 1847; H. Ex. Doc. 60, 30 Cong. 1 sess. 796–798.

This case is discussed by Lawrence, in his edition of Wheaton (1863), appendix, pp. 958–960.

It is also referred to by Mr. Horatio King, in an article on the "Trent Affair," in the Magazine of American History (March, 1886), XV. 278.

In reply to an inquiry whether an American steamer might properly afford passage from France to Mexico to "some forty gentlemen who were taken prisoners by the French forces," at the capture of Pueblo, Mr. Seward said: "The right of your steamers as neutral vessels to carry them will not, it is presumed, be questioned by the French under the public law as it is understood to be received by them, and the Mexican Government would, it is presumed, be governed by the stipulation in the 16th article of our treaty of 1831, which says, 'It is also agreed that the same liberty be extended to persons who are on board a free vessel, so that, although they be enemies to either party, they shall not be made prisoners, or taken out of that free vessel, unless they are soldiers, and in the actual service of the enemy.' Discharged prisoners on their way home could scarcely be embraced by the exception here referred to. But, supposing that your steamer reach a Mexican port without molestation, the authorities there might refuse to allow the passengers to land, and such refusal might be justifiable under the circumstances. This part of the case, however, may be regarded as of an exclusively business character which the company is most competent to decide for itself."

Mr. Seward, Sec. of State, to Mr. McLane, March 14, 1865, 68 MS. Dom. Let. 399.

"It is important not to confound, as has sometimes been artfully attempted, the right of search with the pretended right of impressment. In opposing this we do not contend against the right of search for purposes in which we have, like other nations, acquiesced; that is to say, so far as relates to objects which we have admitted to be liable to capture and condemnation, such as enemies' property and contraband articles. But we deny the right of capturing or taking out of neutral ships (and therefore searching for) persons of any description whatever, with one single exception, [that of soldiers in service of the enemy provided for in several treaties] . . . Yet, as all those treaties were with nations that acknowledged the princi-

ple of 'free ships, free goods,' I am not ready to assert that, with respect to Great Britain, since we admit that enemy's property is liable to capture and condemnation, the exception ought not to be to the same extent as respects persons, so as to admit that all enemies may be taken out, although they be not soldiers and in actual service of the enemies."

Mr. Gallatin to Mr. Everett, Aug. 9, 1828, 2 Gallatin's Writings, 403, 404.

The "Instructions to blockading vessels and cruisers," issued by the Navy Department during the war with Spain,[a] contained the following clause:

"16. A neutral vessel in the service of the enemy, in the transportation of troops or military persons, is liable to seizure."

Stockton's Naval War Code, which is, however, no longer in force, contains a similar but amplified provision as follows:

"ART. 16. Neutral vessels in the military or naval service of the enemy, or under the control of the enemy for military or naval purposes, are subject to capture or destruction."

It is to be observed, however, that in this clause nothing is expressed as to the transportation of troops or military persons, the design appearing to be to class as a punishable act the performance by a neutral vessel of military or naval services for the enemy, perhaps under the latter's immediate employment or control.

Another provision of the code which may be cited here reads as follows:

"ART. 35. Vessels, whether neutral or otherwise, carrying contraband of war destined for the enemy, are liable to seizure and detention, unless treaty stipulations otherwise provide."

This clause would cover the carriage of military persons, should such persons be admitted to fall within the category of contraband.

It is admitted that a neutral vessel engaged in the carriage of persons in the service of a belligerent becomes liable to condemnation either when the belligerent "has so hired it that it has become a transport in his service and that he has entire control over it; or when the persons on board are such in number, importance, or distinction, and at the same time the circumstances of their reception are such, as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war."[b] This rule leaves open the question as to the carriage of persons in the service of a belligerent by a neutral vessel in the ordinary course of trade. The view has been expressed that if such persons may be classed as contraband the vessel may be seized and brought in for adjudication; but that if they may not be so classed the vessel in which they are traveling remains a ship under neutral jurisdiction which has not been brought

[a] General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781.

[b] Hall, Int. Law (4th ed.), 701.

by the conduct of the persons having control over it within the scope of those exceptional rights in restraint of trade which belligerents have been allowed to assume.[a] On the other hand, the view has been expressed that "it is incorrect to speak of the conveyance of persons in the military or civil employment of a belligerent as if it were the same thing as the conveyance of contraband of war, or as if the same rules were applicable to it. It is a different thing, and the rules applicable to it are different."[b] Apparently the great majority of writers treat the transportation of persons in the military service of the enemy either as a carriage of contraband or as an act analogous thereto. It is probable, however, that too much importance has been given to this somewhat technical aspect of the matter, since it seems to be generally agreed that the carriage of such persons to a military destination is an enemy service far more important than the carriage of contraband. From the belligerent's point of view the importance of the act consists not in the manner or in the motive with which it may be done, but in the aid rendered to the enemy. Whether the circumstances of the transportation may or may not be such as to render the vessel liable to confiscation, it is reasonable to hold that it is a right of the belligerent to take proper measures to prevent the enemy from receiving military aid under the protection of a neutral flag. As to the number of military persons necessary to subject the vessel to confiscation no rule can be laid down. "To carry a veteran general, under some circumstances, might be a much more noxious act than the conveyance of a whole regiment."[c]

Although the case of the *Trent* related to persons in the diplomatic and not in the military service of the enemy, a considerable majority of the authorities seem to concur in the opinion that the discussion which then took place resulted in a general understanding that in the absence of a treaty it is no longer allowable to take persons out of a neutral ship, but that the ship herself, with the noxious persons on board, must be brought in for judicial examination.

In numerous treaties running back to the seventeenth century, a provision may be found in connection with the subject of contraband to the effect that the persons of enemies shall not be taken out of free ships unless they are military persons in the actual service of the enemy. Such a clause may be found in various treaties entered into by the United States with foreign powers. Article XXIII. of the treaty of amity and commerce with France of February 6, 1778—the first treaty concluded by the United States—stipulated that free ships should make free goods, and in connection therewith that the same liberty should be extended to persons on board such ships, so that, "although they be enemies to both or either party, they are not to be taken out of that free ship unless they are soldiers and in actual service of the enemies." A similar clause may be found in Article XIV. of the treaty with France of September 30, 1800; in Article XI. of the treaty with the Netherlands of October 8, 1782; in Article VII. of the treaty with Sweden of April 3, 1783, and in various other early treaties, most of which have ceased to be in force. A similar

[a] Hall, Int. Law (4th ed.), 705.

[b] Mountague Bernard, quoted by Hall, Int. Law (4th ed.), 708.

[c] Lawrence's Wheaton, edition of 1863, 802.

provision has, however, been included by the United States in various recent or comparatively recent conventions. It may be found in Article XV. of the treaty with New Granada (Colombia) of December 12, 1846; in Article XVI. of the treaty with Bolivia of May 13, 1858; in Article XIX. of the treaty with Hayti of November 3, 1864; in Article XVI. of the treaty with Italy of 1871; in Article XVII. of the treaty with Peru of August 31, 1887. The usual form of the clause in these later treaties is that the freedom of the ship shall extend to persons on board, even if they be enemies, "unless they are officers or soldiers in the actual service of the enemy."

These clauses obviously imply that officers and soldiers in the actual service of the enemy may be taken out of a neutral ship without judicial proceedings. In this respect they bear the trace of their origin in a time when the authority and necessity of prize adjudication were not so well settled and understood as now; and when the claims of belligerents to interdict neutral intercourse with their enemies, and neutral carrying trade of persons and goods, were almost unlimited, and their practices loose and irregular.[a] Although they must be conceded to possess, in existing treaties, the force of law as between the contracting parties, their perpetuation is perhaps to be ascribed rather to the habit of employing ancient forms than to intelligent design, and it would therefore be unsafe to assume that the act which they authorize would be admitted to-day in the absence of an express treaty stipulation. Nevertheless, they clearly exemplify the opinion that the transportation on the high seas of military persons in actual service is an act the consummation of which the adverse belligerent has a right to prevent.

Frequent reference is made to certain decisions of Sir William Scott in cases involving the carriage of military persons or of official dispatches. These cases are reviewed by Dana in a note to his edition of Wheaton.[b] His summaries are generally accurate, but in a few particulars they do not appear to be borne out by the printed record, while in some instances they fail to disclose important points.

The first case is that of the *Carolina*,[c] a Swedish vessel which was captured by the British naval forces at the taking of Alexandria. She was subsequently lost, while in possession of those forces, before being sent in; and the owners sought, by petition to the court, to hold the captors liable for her value on the ground (1) that she was impressed into the French service by duress and violence; (2) that, when she was captured, the troops had been landed and her offense had been discharged, and (3) that there was a culpable failure to bring her to adjudication. Sir William Scott, while intimating but not deciding that the alleged duress was feigned by the master, held that the vessel at the time of capture was still in the control of the French, and that there was, considering the circumstances of the fleet, no culpable delay on the part of the captors. On the question of unneutral employment he said: "A man can not be permitted to aver, that he was an involuntary agent in such a transaction. If an act of force, exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for any act done by him, con

[a] Bernard, Case of The Trent, 14 20, cited by Dana, note to Wheaton, 657.

[b] Pp. 640-643.

[c] 4 C. Rob. 256, April 30, 1802.

trary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands, must seek redress against the government that has imposed the restraint upon him. He has no right to expect that the British Government should pay for the injustice of its public enemy. If this vessel had been taken *in delicto*, I should have felt no hesitation in saying, that she must have been subject to condemnation. Whether the troops were received on board voluntarily, or involuntarily, could make no difference."

The second case is that of the *Friendship*,[a] an American ship which was captured by the British while on a voyage from Baltimore and Annapolis to Bordeaux, with a small quantity of cargo, such as was often taken as ballast, and ninety passengers, of whom eighty-four were French officers and seamen, relics of the crews of two wrecked French vessels, who were, on their arrival in France, to report to the Bureau of Marine for orders. The contract under which the transportation was conducted was destroyed or concealed, but from the evidence in the case it was gathered that it was made by the French minister in the United States, that it required that no cargo should be taken on board, and that the service was to be paid for by the French Government. The precise form of the contract, said Sir William Scott, was a matter of no importance. The "substance of the thing" was whether the vessel was hired "by the agents of the Government, for the purpose of conveying soldiers or stores in the service of the state." It signified nothing whether the men so conveyed were "to be put into action on an immediate expedition or not." The general importance of having troops or stores conveyed to places where it was convenient that they should be collected, either for present or future use, constituted "the object and employment of transport vessels." In conclusion, Sir William Scott said: "I am of opinion that this vessel is to be considered as a French transport. It would be a very different case if a vessel appeared to be carrying only a few individual *invalided* soldiers, or discharged sailors, taken on board by chance, and at their own charge. Looking at the description given of the men on board, I am satisfied that they are still as effective members of the French marine as any can be. Shall it be said then that this is an innoxious trade, or that it is an innocent occupation of the vessel? What are arms and ammunition in comparison with men, who may be going to be conveyed, perhaps to renew their activity on our own shores? They are persons in a military capacity, who could not have made their escape in a vessel of their own country. Can it be allowed that neutral vessels shall be at liberty to step in and make themselves a vehicle for the liberation of such persons, whom the chance of war has made, in some measure, prisoners in a distant port of their own colonies in the West Indies? It is asked, Will you lay down a principle that may be carried to the length of preventing a military officer, in the service of the enemy, from finding his way home in a neutral vessel from America to Europe? If he was going merely as an ordinary passenger, as other passengers do, and at his own expense, the question would present

[a] 6 C. Rob. 420, Aug. 20, 1807.

itself in a very different form. Neither this court, nor any other British tribunal has ever laid down the principle to that extent. This is a case differently composed. It is a case of a vessel letting herself out in a distinct manner, under a contract with the enemy's government, to convey a number of persons, described as being in the service of the enemy, with their military character traveling with them, and to restore them to their own country in that character. I do with perfect satisfaction of mind, pronounce this to be a case of a ship engaged in a course of trade, which cannot be considered to be permitted to neutral vessels, and without hesitation pronounce this vessel subject to condemnation."

The third case is that of the *Orozembo*,[a] an American vessel which went from Rotterdam to Lisbon, where she was ostensibly chartered by a merchant of the place "to proceed in ballast to Macao, and there to take a cargo to America," but was afterwards, by his direction, fitted up for the reception of three military officers of distinction, and two persons in civil departments, who had come from Holland to take their passage to Batavia. She was to take no cargo and was to receive a thousand dollars a month for her employment, without reference to the number of persons put on board. She was condemned "as a transport, let out in the service of the Government of Holland," and in pronouncing sentence Sir William Scott said he would state "*distinctly*" that the principle on which he proceeded was "that the carrying military persons to the colony of an enemy, who are there to take on them the exercise of their military functions, will lead to condemnation, and that the court is not to scan with minute arithmetic the number of persons that are so carried. If it has appeared to be of sufficient importance to the government of the enemy to send them, it must be enough to put the adverse government on the exercise of their right of prevention; and the ignorance of the master can afford no ground of exculpation in favor of the owner, who must seek his remedy in cases of deception, as well as of force, against those who have imposed upon him."

In a previous passage, Sir William Scott, referring to the question of what number of persons would constitute a case of forbidden transportation, said: "Number alone is an insignificant circumstance in the considerations, on which the principle of law on this subject is built; since fewer persons of high quality and character may be of more importance, than a much greater number of persons of lower condition. To send out one veteran general of France to take the command of the forces at Batavia, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the belligerent has a stronger right to prevent and punish. In this instance the military persons are three, and there are, besides, two other persons, who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which the question has been agitated; but it appears to me, *on principle*, to be but reasonable that, whenever it is of sufficient importance to the enemy that such persons should be sent out on the public service, at the public expense, it should afford equal ground

[a] 6 C. Rob. 430, Sept. 24, 1807.

of forfeiture against the vessel, that may be let out for a purpose so intimately connected with the hostile operations."

In each of the three foregoing cases the vessel was condemned as a transport of the enemy engaged in the carriage of military persons in his service.

In another series of cases the question involved was that of the carriage of dispatches. The first of these cases is that of the *Atalanta*,[a] a Bremen ship, which received on board at the Isle of France, from the French governor, a packet of dispatches addressed to the minister of marine at Paris. The packet was delivered to one of the supercargoes, of whom there were two, in the presence of the master; and in the event of the appearance of a strange cruiser, or of the arrival of the ship at Bremen, was to be delivered to a person on board, a Colonel Richmond, who shipped as a planter, but who was in reality an officer of artillery and second in command in the Isle of France. Subsequently to the capture of the ship, the packet was found in the bottom of a small tea chest in the trunk of the second supercargo.

On all the circumstances, Sir William Scott found that there was a fraudulent carriage and concealment of the dispatches on the part of the master and the supercargoes, constituting "an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud, and marked with every species of malignant conduct," for which both ship and cargo must be condemned. In the course of his opinion he said: "What might be the consequences of *simple* transmission of despatches I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a *fraudulent* case. That the simple carrying of despatches between the colonies and the mother country of the enemy, is a service highly injurious to the other belligerent, is most obvious. In the present state of the world, in the hostilities of European powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other belligerent, is one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance also and support, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these despatches might relate only to the civil wants of the colony, and that it is necessary to shew a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered, in the contemplation of law, as an object of hostility, although not produced by operations strictly military. . . . The consequence of such a service [maintaining intercourse with the mother country] 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 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. It is true, as it has been said, that *one*

[a] 6 C. Rob. 440, March 4, 1808.

ball might take off a Charles XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has been *accordingly*, that it is in considerable quantities only that the offence of contraband is contemplated. The case of despatches is very different; it is impossible to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy: It is a service therefore which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature."

Sir William Scott afterwards mentioned, as "a circumstance of no great consequence," that the dispatches in question were "of a noxious nature, stating the strength of the different regiments, etc., and other particulars entirely military."

It may also be observed that the learned judge, referring, in the course of his opinion, to the allegation that Colonel Richmond was shipped as a planter for the purpose of avoiding imprisonment in case of capture, said:

"This might, *perhaps*, be the real and the only inducement for consenting to take him under that disguise, but even *that* is an accommodation which neutral *ship masters*, and supercargoes, have no right to afford. If an individual is, from his military character, exposed to the operations of war, it is not for them to throw over him, from motives of compassion, or from any other inducement, a colourable protection by artifices of this kind."

Several cases of condemnation for carrying dispatches are given by the reporter in a note to the case of the *Caroline*, which will be noticed hereafter. These cases are merely summarized, and the language of the court does not purport to be given.

The first is the case of the *Constantia*, a Danish ship, on a voyage from the Isle of France to Copenhagen, having on board a packet for the French ambassador at that place, to be by him transmitted to the departments of government in France. There did not appear to have been any fraudulent concealment, but it seemed that the master took charge of the packet knowingly, and that he was in the custody of the captors fifteen days without disclosing it. He was part owner of the vessel and the cargo, and he was entrusted with the management of the expedition, as agent, by his copartner. The court declared that the case must follow the course of the *Atalanta*.

The second case was that of the *Susan*, an American vessel, captured on a voyage from Bordeaux to New York, having on board a packet addressed to the prefect of the Isle of France. It did not appear that the packet contained more than a letter, providing for the payment of the prefect's salary; and the master averred ignorance of the contents, stating that it was delivered to him by a private merchant as containing old newspapers and some shawls to be delivered to a merchant at New York. The court stated that as a general rule the master was not at liberty to aver his ignorance, and that in the present instance the master did not appear to have used any caution to inform himself of the nature of the papers; besides, although fraudulent concealment was not shown, they were

not produced to the captors as they ought to have been; and the court announced that, in view of the multiplication of such cases, it would be considered a proof of fraud if papers such as those in question were not produced voluntarily in the first instance. The ship was condemned, but the cargo was restored, including what belonged to the owner of the ship, since it did not appear that the master had been appointed agent for the cargo.

The third case was that of the *Hope*, an American vessel, captured on a voyage from Bordeaux to New York, having on board various dispatches to officers of the Government in the French West Indies, and also a military officer of rank who had been shipped as a merchant's clerk going to settle some accounts in New York. The master swore that the papers in question were brought on board in the officer's baggage, and had been stowed in the hold for want of room in the cabin assigned to him, and that he had refused at Bordeaux to take any public papers. The court thought that the master was a party to the concealment both of the character of the military officer and of the papers, and condemned the ship, but restored the cargo, the master not appearing to have been the agent for it.

Coming to cases of the carriage of dispatches in which the vessel and cargo have been restored, the first to be noticed is that of the *Caroline*.[a] This case is summarized in Mr. Dana's note, but with far less than his usual skill, since, in common with most other writers who have discussed it, he fails to notice the terms on which restitution was decreed and thus misses the precise position of the court. The case was that of an American vessel, captured with a cargo of cotton and other articles on a voyage from New York to Bordeaux. There were found on board dispatches from the French minister and consul in the United States to the Government of France. Sir William Scott distinguished the case of carrying the dispatches of the enemy's ambassador, residing in a neutral country, from that of carrying dispatches of the enemy from the colonies to the mother country. In the latter case he said the criminality of the act could hardly be doubted, and by dispatches he included "all official communications of official persons, on public affairs of the government," without regard to the "comparative importance of the particular papers." But the neutral country, he declared, has a right to preserve its relations with the enemy, and it is not to be concluded the communications between them possess the nature of hostility; and if there should be private reason to suspect the good faith of the neutral, while it might afford ground for measures of preventive policy on the part of the government, it would not justify the court in pronouncing that the neutral character had violated his duty by bearing dispatches which, as far as he could know, might be presumed to be of an innocent nature. But, although Sir William Scott thus held that the carriage of the dispatches was not presumptively unlawful, he declared that a private merchant was "under no obligation to be the carrier of the enemy's dispatches to his own government," and that he might be held "fairly subject" to the "inconvenience" of having his vessel brought in for examination, and of the necessary detention and expense. "He gives," concluded Sir William Scott, "the captors an undeniable right to

[a] 6 C. Rob. 461, April 1, 1808.

intercept and examine the nature, and contents of the papers, which he is carrying; for they *may* be papers of an injurious tendency, although not such, on any *a priori* presumption, as to subject the party who carries them to the penalty of confiscation, and by giving the captors the right of that inquiry, he must submit to all the inconvenience that may attend it." On this ground Sir William Scott, while directing the ship and cargo to be restored, did so only on condition of payment of the captor's expenses.

Another case is that of the *Madison*. (Edward's Adm. (1810), 224.) This was the case of an American vessel, captured on a voyage from Dieppe to Baltimore, having on board dispatches from the Danish Government to the Danish consul-general in the United States. The case was held to come within the privilege of transporting official correspondence with an agent in a neutral state; but the court also emphasized the point that the innocent character of such correspondence was not a conclusive presumption.

In the case of the *Rapid* (Edward's Adm. (1810), 228) an American vessel was captured by the British on a voyage from New York to Tonningen, a free port. There was found on board a packet of papers addressed to a private citizen in Tonningen. This packet was given to the master by a person who was represented as a Dutch gentleman residing in New York, but who was in fact sent by the governor of Batavia to New York to engage merchants in commercial enterprises with Java. He possessed, however, neither a diplomatic nor a military character. On being opened it was found to contain letters conveying important information to the Dutch Government. The master alleged ignorance of the official character of the packet and of its hostile destination. Sir William Scott refused to consider, as conclusive of the case, either the fact that the vessel was going from one neutral port to another or that she had on board noxious dispatches. He held that the consequences of the carriage would be determined by the nature of the act itself. While the dispatches were noxious, he did not desire to lay down a rule which should deter a neutral master from taking private letters. The caution of the master must be proportioned to the circumstances under which the papers were received. If he was sailing from a hostile country, and, still more, if the letters were addressed to persons resident in a hostile country, the master was called upon to exercise the utmost jealousy; on the other hand, when the voyage began, and was to terminate in a neutral country, there was less to excite his vigilance. Under the circumstances the vessel was restored.

With regard to Sir William Scott's decisions as to the carriage of official dispatches, it is to be observed (1) that, in cases in which the vessel or the vessel and cargo were condemned, he proceeded not upon the ground of governmental employment, but simply upon that of the aid rendered, knowingly or fraudulently, to the enemy; and (2) that, in cases in which, knowledge or fraud not being proved, the vessel was restored, the claimants were required to pay the captors' expenses. Thus, in the case of the *Rapid*, Sir William Scott, in pronouncing sentence of restitution, declared that "in this, as in every other instance in which the enemy's dispatches are found on board a vessel," the master had, by failing to exercise the utmost jealousy, and in spite of the fact that his voyage was to terminate in a neutral country, "justly subjected himself to all the inconven-

iencies of seizure and detention, and to all the expenses of those judicial inquiries which they have occasioned."

The practical futility of attempting to base a final solution of the question under consideration upon the mere form of the agreement under which military persons in the service of the enemy are transported—whether they are carried under a contract with the government or merely as "passengers"—may be vividly illustrated by a correspondence which took place during the revolution in Chile in 1891.

In a dispatch to Lord Salisbury of Aug. 12, 1891, Mr. Kennedy, British minister at Santiago, reported that on the 26th ultimo he had learned from the agent of the Pacific Steam Navigation Company, a British concern, at Valparaiso, that the company's steamer *Iberia* had been detained by the authorities two days at Coronel, in order to embark soldiers for the Government, and that the company's agent at Coronel, in explanation of his action, which was contrary to his instructions stated that his objections were overruled by the governor of Coronel, who satisfied him that the soldiers were embarked under Mr. Kennedy's authority and by his orders. On August 3rd Mr. Kennedy wrote to Señor Zañartu, the minister for foreign affairs, and requested an explanation of this statement of the governor, at the same time denying that he had given any orders or authority in the matter.

Accompanying the dispatch there was a note of Mr. Kennedy to Señor Zañartu, of July 15, 1891, acknowledging the receipt of a note of the latter stating that the Government desired immediately to ship, by the *Iberia*, 400,000 silver dollars to Montevideo, and also a certain number of individuals, not possessed of any special character, to Punta Arenas, and inquiring whether the money and the passengers could count, in case of seizure by the revolutionary squadron, on the protection of the British flag, in the sense of exacting the release of the individuals and the restitution of the specie. Mr. Kennedy, in reply, referred to similar assurances given by him in regard to British vessels carrying wheat to Europe, and to the concurrence of Her Majesty's senior naval officer on the station in them.

There was also a letter of Mr. Prain, the company's agent at Valparaiso, to Mr. Kennedy of July 25, 1891, expressing surprise at the reports from Coronel, especially as Mr. Kennedy had warned him in a private letter not to receive "fighting men" on board as passengers, since by so doing the steamers would run the risk of getting into trouble in which Her Majesty's representatives would not be able to help them.

In a letter to Mr. Prain of August 3, 1891, Mr. Kennedy said:

"I privately conveyed to you, in the interests of your company, the opinion expressed to me by Admiral Hotham on the general question of conveyance of troops, stores, &c., but I abstain from concurring officially in that opinion as regards the Pacific Steam Navigation Company."

In his dispatch of August 12, Mr. Kennedy, referring to this correspondence, said:

"As regards the alleged illegality of the above shipments as asserted by the Oppositionists and their sympathizers, I beg to state that the Pacific Steam Navigation Company are bound under their contract to carry soldiers, military stores, &c., excepting in the case of war between two republics on this coast; but, as the Chilean Government are now engaged in the suppression of a rebellion, the above exemp-

tion, I venture to think, does not apply. It is true that, in reply to Mr. Prain's private and confidential inquiry I privately reminded him that Admiral Hotham had given a general opinion against the transport of soldiers and stores by British ships; but I did this to help Mr. Prain in his efforts to induce the authorities to send their soldiers on board his ship as private passengers, so as not to compromise his position with the Opposition, for whom he has strong sympathies, and in the success of whose cause he is an enthusiastic believer. But, as your lordship will perceive, I decline to commit myself officially to the opinion that the Pacific Steam Navigation Company would, under present circumstances, commit a breach of neutrality in transporting troops for the Chilean Government." [a]

The purport of Mr. Kennedy's suggestion appears to be that, if the persons in question were transported as "troops for the Chilean Government," the act might be considered culpable; but that if the same persons, who were in fact soldiers in the service of that Government, were taken on board as "private passengers," the ship would not be "compromised" by their transportation. Perhaps a touch of irony may be detected in Mr. Kennedy's suggestion, since it was not entirely harmonious with the private advice which he gave on the strength of Admiral Hotham's opinion.

In the neutrality proclamation issued by the British Government April 23, 1898, in respect of the war between the United States and Spain, the acts against which British subjects were warned as being in derogation of their duty as neutrals, or in contravention of the law of nations, comprised the "carrying" of "officers, soldiers, dispatches, arms, ammunition, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usages of nations, for the use or service of either of the said powers." [b]

In the late controversy between Germany and Great Britain growing out of the seizure and detention by British cruisers of the German East African mail steamers *Bundesrath*, *General*, and *Herzog* it appears that one of the grounds on which the steamer first mentioned was seized was that she carried "twenty Dutch and Germans and two supposed Boers, three Germans and two Australians, believed to be officers, all believed to be intending combatants, although shown as civilians." In reply to the request of the German Government for the vessel's release Lord Salisbury stated, among other things, that she "had on board a number of passengers believed to be volunteers for service with the Boers." It was subsequently stated that the search of the ship was expected to disclose "arms among baggage of Germans on board, who state openly they are going to the Transvaal." The German Government declared that it had no knowledge of more than two of its officers having proceeded to the Transvaal, where they were unable to obtain commands. The British Government subsequently directed that every facility for proceeding to his destination should be afforded "to any passenger whom the court considers innocent." The steamer and her cargo were afterwards discharged. In the case of the *Herzog* it was alleged, among other things, that she had on board "a considerable number of male pas-

[a] Blue Book, Chile, No. 1 (1892), 236–242.

[b] Proclamations and Decrees During the War with Spain, 35.

sengers, many in khaki, apparently soldiers." It turned out that she had among her passengers three Red Cross expeditions. The *General* was said to have on board a considerable number of Dutch and German passengers for the Transvaal in plain clothes, but "of military appearance," some of whom were believed to be trained artillerymen. Lord Salisbury afterwards stated that "there was no sufficient evidence as to their destination to justify further action on the part of the officers conducting the search."

In none of these cases was it alleged that the suspected persons were soldiers in the actual service of the enemy. They seem rather to have been looked upon as contraband, as material immediately useful in war. In this relation it is to be observed that Count von Bülow, in a speech in the Reichstag, January 19, 1901, laid down certain propositions of international law, one of which was that by the term contraband of war "only such articles or persons are to be understood as are suited for war, and at the same time are destined for one of the belligerents." By this definition Count von Bülow seems to have concurred in the opinion apparently entertained by Lord Salisbury, that the transportation of persons suited for war and destined for a belligerent may be dealt with as a case of contraband, without regard to the question whether such persons are in the actual service of the enemy.[a]

This opinion accords with that of Bluntschli, who says:

"§ 815. The transportation of troops or of general officers forming part of belligerent armies, on neutral ships, is assimilated to the transportation of materials of war and is regarded as contraband. The troops or officers may be made prisoners."

By troops he means not only a large force, but a small number of soldiers with an underofficer, for example; and he considers the same principle applicable to a military general officer without his command.[b]

Perels considers as prohibited the transportation of subjects of a belligerent power who are in the actual military service or who are liable to such service.[c]

Marquardsen thinks it an essential condition of seizure that the persons are in the actual military service of the enemy; and he holds that if Mason and Slidell had been military persons the question of the legality of their capture would have been one for the determination of the prize courts, although the *Trent* was not under contract with any government.[d]

Rivier, in his late work, says:

"Another application of the principles laid down concerns the transportation at sea, by neutral ships, of soldiers and sailors destined to a belligerent. According to a just opinion this transportation is forbidden to the neutral state, but not to its private citizens. The latter undertake it at their peril and risk. If, as we assume, the owner or the master of the ship is cognizant of the nature of the transportation, and that it is of sufficient importance, which is a question of fact, the injured belligerent may seize and confiscate the ship." [e]

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[a] Blue Book, Africa, No. 1 (1900).

[b] Le Droit Int. Codifié (Lardy's ed.), Paris, 1881.

[c] Das internationale öffentliche Seerecht, Berlin, 1882.

[d] Der Trent-Fall (1862), chap. 10.

[e] Principes du Droit des Gens, II. 388.

See, also, Fiore, Droit Int. Public, III. 514, § 1602; Field, Int. Code, § 853; Creasy, First Platform of Int. Law, §§ 595, 596.

The question of the transportation of military persons has been discussed and has formed the subject of resolutions by the Institute of International Law, not as a question of contraband, but as a question of prohibited transportation. In accordance with this view, the institute, at its session in Venice in 1896, adopted the following resolutions:

"§ 6. It is forbidden to attack or oppose the transportation of diplomats or diplomatic couriers: 1st, neutrals; 2nd, those accredited to neutrals; 3rd, navigating under the neutral flag between neutral ports, or between a neutral port and the port of a belligerent.

"On the contrary, the transportation of the diplomats of an enemy accredited to his ally is, except it be in the course of regular and ordinary traffic, prohibited: 1st, on the territories and waters of the belligerents; 2nd, between their possessions; 3rd, between the allied belligerents.

"§ 7. The transportation of troops, military men, or military agents of an enemy is forbidden: 1st, in the waters of the belligerents; 2nd, between their authorities, ports, possessions, armies, or fleets; 3rd—when the transportation is made on account of or by the order or mandate of the enemy, or to conduct to him (pour lui amener) either his agents with a commission for the operations of the war, or military persons already in his service, or auxiliaries or troops enrolled in violation of neutrality—between neutral ports, between those of a neutral and those of a belligerent, from a neutral point to the army or the fleet of a belligerent.

"The prohibition does not extend to the transportation of individuals who are not yet in the military service of a belligerent, even though their intention is to enter it, or who make the voyage as simple passengers without manifest connection with the military service.

"§ 8. The transportation of despatches (official communications between official authorities), between two authorities of an enemy, who are on land or ships belonging to or occupied by him, is prohibited, save in regular or ordinary traffic.

"The prohibition does not extend to transportation either between neutral ports or from or to some neutral territory or authority."[a]

In connection with the resolutions of the Institute, reference should be made to the work of M. Kleen, entitled "De la Contrebande de Guerre et des Transports Interdits aux Neutres," Paris, 1898, which he prepared especially for the elucidation of the questions before the Institute.

While the controversy between Germany and Great Britain, as to the seizure of the German mail steamers, was in its early stages, Prof. T. E. Holland, editor of the British "Admiralty Manual of the Law of Prize," in a letter dated Jan. 2, 1900, and published in the London *Times* of the next day, said:

"The carriage by a neutral ship of enemy troops, or of even a few military officers, as also of enemy dispatches, is an 'enemy service' of so important a kind as to involve the confiscation of the vessel concerned, a penalty which, under ordinary circumstances, is not imposed upon carriage of 'contraband' properly so called. See Lord

[a] Annuaire, XV. 231-232.

Stowell's luminous judgments in Orozembo (6 Rob. 430) and Atalanta (id. 440). The alleged offense of the ship *Bundesrath* would seem to be of this description."

When this letter was written, the facts in the case of the *Bundesrath* had not been definitely ascertained; but, without regard to any particular case, it is obvious from the passage quoted that, where the transportation of military persons is in question, Professor Holland considers the carriage of the persons, and not the special letting out of the ship to a belligerent government for that purpose, as the gravamen of the charge of "enemy service," and that he interprets the decisions of Sir William Scott as authority for this view.

(2) TRENT CASE.

§ 1265.

On November 8, 1861, the British mail steamer *Trent*, while on a voyage from Havana to St. Thomas, was overhauled by the American man-of-war *San Jacinto*, Captain Wilkes, and was compelled to surrender the Confederate commissioners, Messrs. Mason and Slidell, and their secretaries, Messrs. McFarland and Eustis, all of whom were on their way to England. The British Government demanded their release. The reason of this demand, as stated by Earl Russell, in his instructions to Lord Lyons, British minister at Washington, of November 30, 1861, was that "certain individuals" had "been forcibly taken from on board a British vessel, the ship of a neutral power, while such vessel was pursuing a lawful and innocent voyage—an act of violence which was an affront to the British flag and a violation of international law."

Writing confidentally to Mr. Adams, American minister at London, November 27, 1861, Mr. Seward said: "The act was done by Commander Wilkes without instructions, and even without the knowledge of the Government. Lord Lyons has judiciously refrained from all communication with me on the subject, and I thought it equally wise to reserve ourselves until we hear what the British Government may have to say on the subject."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England (confidential), Nov. 27, 1861, MS. Int. Great Britain, XVIII. 76.

For facts and discussions, see, generally, Harris, The Trent Affair.

Captain Wilkes, in his report on the capture, said: "I . . . carefully examined all the authorities on international law to which I had access, viz, Kent, Wheaton, and Vattel, besides various decisions of Sir William Scott, and other judges of the admiralty court of Great Britain, . . . There was no doubt I had the right to capture vessels with *written* despatches; they are expressly referred to in all authorities, subjecting the vessel to seizure and condemnation if the captain of the vessel had the knowledge of their being on board; but these gentlemen were not despatches in the literal sense, and did not seem to come under that designation, and nowhere could I find a case in

point. . . . I then considered them as the embodiment of despatches." (S. Ex. Doc. 1, 37 Cong., 2 sess., vol. 3, p. 123.)

"In connection with the case of Messrs. Mason and Slidell, the Department has recently been engaged in examining that of M. Fauchet, a minister from France during Washington's administration, who, while on his way to embark at Newport, R. I., on his return home, probably escaped seizure by the commander of the British ship *Africa*, near that port, in consequence of the packet *Peggy*, in which he was proceeding from New York to Newport, being compelled by stress of weather to put into Stonington, Conn. Here M. Fauchet received intimations of the intention of the commander of the *Africa*, which induced him to proceed to Newport by land and across the ferries. When the weather moderated the *Peggy* continued on her course, and when she approached the *Africa* she was boarded from that vessel, the trunks of the passengers were searched, and disappointment shown at the absence of M. Fauchet. This act having been committed within the maritime jurisdiction of the United States, and the British vice-consul at Newport having been implicated in it, his exequatur was formally revoked by President Washington and explanations demanded of the British Government; first through their minister here, and then through Mr. John Quincy Adams, acting chargé d'affaires at London."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 146, Dec. 16, 1861, MS. Inst. Gr. Brit. XVIII. 87.

The report of Mr. Seward, Sec. of State, Dec. 9, 1862, giving the documents in respect to the attempted seizure of M. Fauchet, French minister to the United States, by the commander of the British ship-of-war *Africa*, in 1795, is printed in S. Ex. Doc. 4, 37 Cong. 3 sess.

For an account of the attempt of the captain of the British ship-of-war *Africa* to seize M. Fauchet, the French minister to the United States, while in our territorial waters, see 3 Life of Pickering, 231, et seq.

Neither the records of the Department of State nor those of the Navy Department show any foundation for a report as to the detention of the U. S. S. *Congress*, having on board Mr. Eustis, American minister to The Hague, in the summer of 1815. (Mr. Seward, Sec. of State, to Mr. Winthrop, Jan. 10, 1862, 56 MS. Dom. Let. 186.)

A copy of the British Government's demand was presented by Lord Lyons to Mr. Seward on December 20, 1861. Mr. Seward's reply was made on December 26. In this reply Mr. Seward argued that Messrs. Mason and Slidell and their secretaries might properly be considered as contraband, or as analogues of contraband. In this relation he said:

"All writers and judges pronounce naval or military persons in the service of the enemy contraband. Vattel says war allows us to cut off from an enemy all his resources, and to hinder him from sending

ministers to solicit assistance. And Sir William Scott says you may stop the ambassador of your enemy on his passage. Despatches are not less clearly contraband, and the bearers or couriers who undertake to carry them fall under the same condemnation.

"A subtlety might be raised whether pretended ministers of a usurping power, not recognized as legal by either the belligerent or the neutral, could be held to be contraband. But it would disappear on being subjected to what is the true test in all cases—namely, the spirit of the law. Sir William Scott, speaking of civil magistrates who are arrested and detained as contraband, says:

"'It appears to me on principle to be but reasonable that when it is of sufficient importance to the enemy that such persons shall be sent out on the public service at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations.'"

But Mr. Seward, after thus contending that the capture might have been validly made, declared that Captain Wilkes did not exercise the right of capture in conformity with the law of nations. The books of law, as to the proper course to be pursued in such a case, were, as he said, dumb. While the belligerent captor had "a right to prevent the contraband officer, soldier, sailor, minister, messenger, or courier from proceeding in his unlawful voyage, and reaching the destined scene of his injurious service," the person captured might, on the other hand, be innocent—that is, he might not be contraband—and he therefore had a right to a fair trial of the accusation against him. It was true, said Mr. Seward, that the courts of admiralty had no formulas for conducting proceedings against contraband persons, but, if there was no judicial remedy, the result was that the question must be determined by the captor himself on the deck of the prize vessel, and to this course there existed very grave objections. No matter, therefore, how imperfect the existing judicial remedy might be supposed to be, it would be better to follow it than to adopt the summary one of leaving it to the captor and relying upon diplomatic debates to review it. Under these circumstances, he reached the conclusion that the captives should be given up, and in taking this course he was, he said, really defending and maintaining not an exclusive British interest, but an old, honored, and cherished American cause, upon principles laid down by Jefferson and Madison, when they protested against the British claim of impressment. "If," said Mr. Seward, "I decide this case in favor of my own Government, I must disavow its most cherished principles, and reverse and forever abandon its essential policy. The country can not afford the sacrifice. If I maintain those principles and adhere to that policy I must surrender the case itself. It will be seen, therefore, that this Government could

not deny the justice of the claim presented to us in this respect upon its merits."

Mr. Seward, Sec. of State, to Lord Lyons, British min., Dec. 26, 1861, MS. Notes to British Leg. IX. 72; 55 Br. & For. State Papers, 627.

As to the presentation of the demand by Lord Lyons to Mr. Seward, see Harris, The Trent Affair, 172–173.

"The President has adopted his decision with the unanimous assent of his Cabinet." (Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 150, Dec. 27, 1861, MS. Inst. Great Britain, XVIII. 89.)

"The American people could not have been united in a war which, being waged to maintain Captain Wilkes's act of force, would have practically been a voluntary war against Great Britain. At the same time it would have been a war in 1861 against Great Britain for a cause directly the opposite of the cause for which we waged war against the same power in 1812." (Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 171, Jan. 31, 1862, Dip. Cor. 1862, 17, 18.)

As to the state of public feeling in the United States in favor of the detention of Messrs. Mason and Slidell, see the Hon. Horatio King, in the Magazine of American History for March, 1886; also, Harris, The Trent Affair.

"The Trent affair, all the world sees, was an accident for which not the least responsibility rests upon this Government. For a time our national pride and passion appealed to us to abandon an ancient and liberal policy; but, even though unadvised, we did not listen to it, and we are to-day, after that occurrence, as ready and as willing to join other maritime powers in meliorations of the law, to the extent that France desires, as we were before it happened, and before the civil war commenced." (Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 114, Feb. 19, 1862, Dip. Cor. 1862, 315, 316.)

For correspondence in the Trent case, see 55 Br. & For. State Papers, 602.

In a letter to Mr. Evarts, June 8, 1879, the Hon. Benjamin F. Butler asked to be furnished with a copy of an opinion of Caleb Cushing, which, he said, he filed in the Department of State in 1861 in regard to the capture of Mason and Slidell. Mr. Evarts stated, in reply, that a search had been made, but that the papers had not been found. He suggested that the opinion might not have been placed on the official files or might afterwards have been withdrawn by Mr. Cushing. (Mr. Evarts, Sec. of State, to Mr. Butler, June 13, 1879, 128 MS. Dom. Let. 431.)

As to the claim of impressment, see supra, §§ 317–320.

Mr. Seward, in concluding his note to Lord Lyons of December 26, 1861, stated that the prisoners would be cheerfully liberated, and requested Lord Lyons to indicate a time and place for receiving them. In view of the fact that no condition of any kind was coupled with this offer, and of the statement that Captain Wilkes's act was not authorized, Earl Russell accepted Mr. Seward's response as constituting the reparation which the British Government had demanded, although it was not accompanied with any express apology. In an

instruction to Lord Lyons of January 23, 1862, however, his lordship reviewed Mr. Seward's argument with regard to the question of contraband, and took the ground that the conveyance of Messrs. Mason and Slidell and of their credentials or dispatches, if they had any, from Havana to St. Thomas, could not have been a violation of neutrality, because their destination was bona fide neutral. In order that things might be considered as contraband, they must, said his lordship, have a hostile and not a neutral destination, and in this relation he cited Bynkershoek, Quæst. Jur. Pub., lib. i., cap. 9, and The Imina, 3 C. Rob. 167. Mr. Seward, said Earl Russell, sought to support his conclusion by the well-known dictum of Sir William Scott, in the case of The Caroline, 6 C. Rob. 468, to the effect that "you may stop the ambassador of your enemy on his passage," and another dictum of the same judge in the case of The Orozembo, 6 C. Rob. 434, to the effect that civil functionaries, "if sent for a purpose intimately connected with the hostile operations," might fall under the same rule as military persons. But Sir William Scott, said Earl Russell, did not express the opinion, nor had any writer of authority ever suggested, that an ambassador proceeding to a neutral state on board one of its merchant ships might be treated as contraband of war. The rule to be collected from the authorities was, said his lordship, that you might stop an enemy's ambassador in any place of which you were yourself the master, or in any place where you might have the right to exercise acts of hostility. But an ambassador sent to a neutral power must be considered as inviolable on the high seas, as well as in neutral waters, while under the protection of the neutral flag. "It is," said Earl Russell, "undoubtedly the law as laid down by British authorities, that if the real destination of the vessel be hostile (that is, to the enemy, or the enemy's country), it can not be covered and rendered innocent by a fictitious destination to a neutral port. But if the real terminus of the voyage be *bona fide* in a neutral territory, no English, nor, indeed, as Her Majesty's Government believe, any American, authority can be found which has ever given countenance to the doctrine that either men or despatches can be subject, during such a voyage, and on board such a neutral vessel, to belligerent capture as contraband of war. . . . According to Mr. Seward's doctrine, any packet ship carrying a Confederate agent from Dover to Calais, or from Calais to Dover, might be captured and carried to New York. . . . So also a Confederate vessel of war might capture a Cunard steamer on its way from Halifax to Liverpool, on the ground of its carrying despatches from Mr. Seward to Mr. Adams. . . . Mr. Seward asserts that 'if the safety of this Union required the detention of the captured persons it would be the right and duty of this Government to detain them.' . . . His frankness compels me to be equally open, and to inform

him that Great Britain could not have submitted to the perpetration of that wrong, however flourishing might have been the insurrection in the South, and however important the persons captured might have been."

Earl Russell to Lord Lyons, Jan. 10, 1862, Dip. Cor. 1862, 245; same to same, Jan. 23, 1862, id. 248.

See Mr. Seward, Sec. of State, to Mr. Stoeckl, Russian min., Feb. 18, 1862, MS. Notes to Russian Leg. VI. 116.

For correspondence between Mr. Seward and the diplomatic representatives of Austria, Prussia, Russia, and Italy, concerning the capture of Messrs. Mason and Slidell, see S. Ex. Docs. 14, 18, 22, 30, 37 Cong. 2 sess. The communications from the Governments mentioned all indicated strong disapproval of the capture, and assumed, without going into the legal aspects of the subject, that it was incompatible with the principles of neutral rights and the freedom of the seas which the United States had always defended.

"Lord Russell's reply takes ground which was substantially adopted by the leading European powers, and, therefore, placing it side by side with Mr. Seward's instructions, gives us a basis from which we can gather certain general rules in respect to the important subject of which it treats. These rules are as follows:

"(1) Diplomatic agents sent by one belligerent to a neutral are not, in themselves, contraband of war, subject to seizure by the other belligerent if found on a neutral ship on the high seas. It is true that a belligerent diplomatic agent may carry with him dispatches which are promotive of the belligerent designs of the power he represents; and if so, such dispatches will be contraband of war, and, if the agent carrying them be proved to be cognizant of their character and employed in carrying out the belligerent purpose they disclose, he may be subjected to the same taint and exposed to the same contingencies. But it does not follow that a diplomatic agent from a belligerent, when on a neutral vessel, bound to a neutral port, is necessarily employed in the furtherance of belligerent designs. He may be engaged on an errand of peace. This may be in two ways. He may be seeking to consummate some such general plan for the mitigation of the sufferings of war, as was set forth by the declaration of Paris of 1856, or by the Geneva Conference which met during the Franco-German war. It is well known that both Great Britain and France sought to obtain the accession of other powers to the principles with regard to freedom of neutral ships adopted by the treaty of Paris; and it is noticed in other sections of this work that the United States Government, when a neutral during the Napoleonic wars, sought to have agreements of the same character made between itself and the then great belligerent powers. Such a condition of things would be likely again to occur in any future maritime war. China, for instance, is rapidly becoming an important power, with a

great population capable of being efficiently employed in naval enterprises, and with a government which is able to appreciate and employ remarkably capable diplomatists. (See London *Spectator*, Sept. 11, 1886, 1203.) The relations of China to France are such as that war between these powers may at any time be renewed, and this on a large scale; and if such a war should arise, the United States would be not unlikely to intervene to mitigate its horrors, and the United States Government would be prompted, should such an intervention take place, to say to China: 'Send to us, if you choose, an envoy specially charged with the mission of coming to some such arrangement as may make the war in which you are engaged conform to modern civilized usage. You have held,' so the United States might say, 'that in an extreme case you might permanently obstruct your ports of entry. This is a matter as to which your envoy might treat at Washington with the French legation.' Or the United States might, as it has done in other cases, consent to mediate and say: 'Send your envoy to Washington for the purpose of canvassing with the French envoy the terms of peace, just as we sent our envoys to St. Petersburg in 1813 for the same purpose.' Now the United States Government, as in a peculiar degree the vindicator of neutral rights, and as eminently bound to promote peace, and to prevent any undue supremacy on the high seas of any great maritime power, would not tamely acquiesce in the seizure, on one of her own merchant ships on the high seas, of envoys sent to her from China for such pacific purposes as this. The question then comes up, suppose, under such circumstances, a Chinese envoy should be arrested on the high seas in a United States ship, and suppose that no papers were found in his custody showing that his design was to add to the strength of Chinese belligerency, could the arresting belligerent impute from the nature of things a contraband character to such envoy? Now, the reasoning of Lord Russell, sustained by the other great European powers and acquiesced in by Mr. Seward, is that no such contraband character is to be so imputed. And the reasons are obvious. First, when an agent is engaged in a mission which is only on a particular contingency illegal, such arrest can not be sustained unless such illegal contingency can be shown to exist. Secondly, even were we to reject this position, diplomacy, it must be recollected, is the police of peace; and until the contrary is shown, a diplomatic agent on the high seas is to be presumed to be on a pacific errand.

"(2) The case is not altered when the diplomatic agent, whose status is under discussion, represents an insurgent power whose belligerency (but not whose sovereignty) has been recognized by the power in one of whose ships such envoy is arrested. During the latter part of the long contest between Spain and her South Amer-

ican colonies, those colonies had informal agents at Washington, who were received so far as such reception enabled the United States to intercede with both belligerents for the adoption of humane modes of warfare, and ultimately for the settlement of judicious terms of peace. The United States would certainly have witnessed with grave displeasure the seizure and confiscation by Spain on a United States ship of one of those envoys bound to the United States; and if Spain had insisted on such a measure she would have hastened the acknowledgment of South American independence. It is not impossible that the United States may be placed in a similar condition of neutral interposition between Great Britain and a revolted province, either in the Old or the New World. If so, the United States would not be likely to silently acquiesce in the seizure on board of one of her merchant ships of envoys to herself from such insurgents (they being recognized as belligerents), unless it should be proved that the object of those envoys was to obtain, in violation of the law of nations, troops or contraband of war.

" (3) Where there is ground to suspect an envoy from a belligerent to a neutral to be on a mission distinctively belligerent, then, if he be arrested by the other belligerent on board a neutral ship, he and the ship on which he is found must be taken to a prize court for adjudication. Undoubtedly the proceedings against him in such a prize court would be novel, as such a case, if it should ever occur, would be the first instance in which an admiralty proceeding *in rem* would be instituted against a person. But be this as it may, Mr. Seward's position, that such a case would be for a prize court, is not, supposing that there be criminative evidence against the envoy, showing him to be on a distinctively belligerent service, directly controverted by Lord Russell, and may be held to be now generally accepted. At the same time it should be remembered that the action of a prize court in condemning such envoy as contraband would not bar the neutral nation on whose ship the arrest was made from proceeding against the arresting nation for a violation of neutral rights."

Note of Dr. Francis Wharton, Wharton's Int. Law Dig. § 374, III. 451–453.

The fullest and most satisfactory discussion of the *Trent* case is that given in the monograph of Dr. Heinrich Marquardsen, the preface to which is dated at Erlangen, February, 1862. In this monograph the learned author keeps clearly in view the distinction between the question of contraband and that of enemy service. He considers actual hostile destination, either immediate or eventual, to be essential to the idea of contraband, but he conceives that men as such can not be considered as contraband of war. A neutral vessel engaged as a transport of the enemy may, as he points out, be pun-

ished with confiscation, but in this case the destination need not be hostile. For example, a neutral American ship, chartered to carry British troops to Alexandria on their way to India, in a war between Great Britain and France, would, as a transport in the enemy's service, be subject to capture. Provisions of treaties permitting military persons to be taken out of a neutral ship point, says Dr. Marquardsen, to the conclusion that a ship would be confiscated for carrying a single military person only were she used for that particular purpose; but in any case it would be an absolute condition of seizure that the persons were in the active military service of the enemy. He inclines to the opinion that the treaty clause allowing military persons to be taken out of a neutral ship is but an expression of the law of nations, and he maintains that if Messrs. Mason and Slidell had been military persons the question of the lawfulness of their capture would have been one to be determined by the prize courts. In any case he insists that the ship must be taken in for adjudication, the judicial process being essential to the security of the rights of all persons on board. Considering, in conclusion, the question of what the law should be, he holds that, if the main purpose of the ship be neutral, it should protect individual soldiers who may be on board; that the clause in the treaties as to taking out miltary persons never had a practical application or a judicial interpretation; and that, if the carriage is not such as to make the vessel an enemy transport, the conclusion of Hautefeuille is unavoidable that the neutrality of the ship should protect its military passengers.

Marquardsen, Der Trent-Fall, 1862.

Dr. Marquardsen cites, in his preface, Gazette des Tribunaux, Dec. 5, 1861; Hautefeuille, Quelques Questions de Droit International Maritime à propos de la Guerre d'Amérique (cited in January *Edinburgh Review*); Bernard, Two Lectures on the Present American War (cited in *Edinburgh Review*, January, 1862); *The Jurist*, Jan. 18 and 27, 1862; Belligerents and Neutrals, *Edinburgh Review*, January, 1862; *Westminster Review*, January, 1862; M. Cassimir-Perier, Revue des Deux Mondes, Jan. 15, 1862, 421; Preussischen Jahrbücher, December 1861; C. Clark, on the case of the *Trent*, Juridical Society Papers, II. 505–532.

See, also, *The Jurist*, Feb. 8 and 15, 1862.

Dana, in his edition of Wheaton, takes the view that, if the *Trent* had been brought before an American prize court, Messrs. Mason and Slidell could not have been condemned or released by the court, but would "doubtless have been held as prisoners of war," but that there was "no decided case in England or America that required the condemnation of the vessel, even if Messrs. Mason and Slidell had not the immunity of diplomatic persons."

Perels, adopting the view of Heffter, takes the ground that the "transport of the diplomatic agent of a belligerent to a neutral port

can not be by itself regarded as a violation of neutrality; the object of the agent must be an alliance for the continuance of the war, in which case the arrest and carrying off would be not unjustifiable." Perels dissents from Gessner's distinction that such arrest would not be justifiable, even in the latter case, if made when the agent was passing between two neutral ports.

Bernard maintains that, in order to condemn a neutral ship for carrying enemy individuals, it is necessary to prove that she was virtually acting as a transport of the enemy, and that in this view the number of the persons conveyed, the nature of their employment, their importance, and their immediate or ultimate destination may then become material elements of proof, and that there should be evidence of intention, or of knowledge from which intention may be reasonably inferred, on the part of the owner or his agent or the master. He further says: "It is not lawful, on the high seas, to take persons, whatever their character, as prisoners out of a neutral ship which has not been judicially proved to have forfeited the benefit of her neutral character."

Dana's Wheaton, 650, 651, note; Perels, Das internationale öffentliche Seerecht (Berlin, 1882), § 47, citing Heffter, § 161a; Bernard, Neutrality of Great Britain, chap. 9.

The position of Mr. Seward that the *Trent* should have been sent before a prize court is criticised in 95 North American Review (July, 1862), 1.

"One thing . . . the *Trent* case did settle conclusively, and that is, that where the passage of contraband persons is to be interrupted, it is unjustifiable to remove them bodily from the vessel and to allow her to proceed. She must herself be seized and carried into the belligerent port for trial in the prize courts." (5 American Law Review, 269.)

See, also, Letters of Historicus, 192.

"Though dispatches are classed as contraband articles, and their carriage is illegal because of their peculiar character, ambassadors are neither contraband articles nor denounced by international law." (Abdy's Kent, 359.)

For further notices of the *Trent* case, see Goldwin Smith, 13 Macmillan's Magazine, 169; 46 Hunt's Merchants' Magazine, 1; 8 Southern Law Review, N. S. 33; 1 Life of Thurlow Weed, Autobiography, 639; 111 London Quarterly Review (Jan. 1862), 239; 2 Revue de Droit International, 126.

Woolsey, referring to the seizure of Messrs. Mason and Slidell, says: "The vessel itself was allowed to pursue its way, by waiver of right as the officer who made the detention thought, but no dispatches were found. On this transaction we may remark: (1) That there is no process known to international law by which a nation may extract from a neutral ship on the high sea a hostile ambassador, a traitor, or any criminal whatsoever. Nor can any neutral ship be brought

in for adjudication on account of having such passengers on board. (2) If there had been hostile despatches found on board, the ship might have been captured and taken into port; and when it had entered our waters, these four men, being citizens charged with treason, were amenable to our laws. But there appears to have been no valid pretext for seizing the vessel. It is simply absurd to say that these men were living despatches. (3) The character of the vessel as a packet ship, conveying mails and passengers from one neutral port to another, almost precluded the possibility of guilt. Even if hostile military persons had been found on board, it might be a question whether their presence would involve the ship in guilt, as they were going from a neutral country and to a neutral country. (4) It ill became the United States—a nation which had ever insisted strenuously upon neutral rights—to take a step more like the former British practice of extracting seamen out of neutral vessels upon the high seas, than like any modern precedent in the conduct of civilized nations, and that, too, when she had protested against this procedure on the part of Great Britain and made it a ground of war. As for the rest, this affair of the *Trent* has been of use to the world, by committing Great Britain to the side of neutral rights upon the seas."

Woolsey, Int. Law § 199.

"88. A commander should detain any neutral vessel which is being actually used as a transport for the carriage of soldiers or sailors by the enemy.

"89. The vessel should be detained, although she may have on board only a small number of enemy officers; or even of civil officials sent out on the public service of the enemy, and at the public expense.

"90. The carriage of ambassadors from the enemy to a neutral state, or from a neutral state to the enemy, is not forbidden to a neutral vessel, for the detention of which such carriage is therefore no cause.

"91. It will be no excuse for carrying enemy military persons that the master is ignorant of their character.

"92. It will be no excuse that he was compelled to carry such persons by duress of the enemy.

"93. A vessel which carries enemy military persons becomes liable to detention from the moment of quitting port with the persons on board, and continues to be so liable until she has deposited them. After depositing them the vessel ceases to be liable.

"94. The commander will not be justified in taking out of a vessel any enemy persons he may have found on board, and then allowing the vessel to proceed; his duty is to detain the vessel and send her in for adjudication, together with the persons on board.

"95. The penalty for carrying enemy military persons is the confiscation of the vessel and of such part of the cargo as belongs to her owner.

Holland's Manual of Naval Prize Law, 25–26.

Under paragraph 88, the learned editor cites Carolina, 4 C. Rob. 256; Friendship, 6 C. Rob. 420; Rebecca, 2 Acton, 119; Commercen, 1 Wheat. 382; under paragraph 89, Orozembo, 6 C. Rob. 430; under paragraph 91, ibid.; under paragraph 92, Carolina, 4 C. Rob. 256; under paragraph 95, Friendship, 6 C. Rob. 420, and Atalanta, 6 C. Rob. 440.

Paragraphs 96–105 of the Manual contain analagous provisions on the carrying of enemy's despatches, which comprise "any official communications, important or unimportant, between officers, whether military or civil, in the service of the enemy on the public affairs of the government" (par. 97), the only exception being "official communications between the enemy's home government and the enemy's ambassador or consul resident in a neutral state," it being presumed that "they concern the affairs of the neutral state, and therefore are of a pacific character" (par. 98). "Official communications between the enemy and neutral foreign governments are under no circumstances ground for detention" (par. 99).

CHAPTER XXVII.

BLOCKADE.

I. *A BELLIGERENT RIGHT.*

§ 1266.

"A *siege* is a military investment of a place, so as to intercept, or render dangerous, all communications between the occupants and persons outside of the besieging army; and the place is said to be *blockaded*, when such communication, *by water*, is either entirely cut off or rendered dangerous by the presence of the blockading squadron. A place may be both besieged and blockaded at the same time, or its communications by water may be intercepted, while those by land may be left open, and *vice versâ*."

Halleck, Int. Law (3rd ed., by Baker), II. 184, § 3. See, also, id. 193, § 15.

"On principle, it might well be questioned whether this rule [the right to confiscate vessels bound to a blockaded port] can be applied to a place not completely invested by land as well as by sea. If we examine the reasoning on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction that its extension to towns invested by sea, only, is an unjustifiable encroachment on the rights of neutrals. But it is not of this departure from principle, a departure which has received some sanction from practice, that we mean to complain. It is, that ports not effectually blockaded by a force capable of completely investing them, have yet been declared in a state of blockade, and vessels attempting to enter therein have been seized, and on that account confiscated."

Mr. Marshall, Sec. of State, to Mr. King, min. to England, Sept. 20, 1800, 2 Am. State Papers, For. Rel. 486, 488.

See 3 Wheaton, appendix, note 1, for an extract from this instruction, and also for a note of Mr. Merry, British minister, to Mr. Madison, April 12, 1804, and an instruction of Mr Smith, Sec. of Navy, to Commodore Preble, Feb. 4, 1804.

The blockade of an enemy's coast in order to prevent all intercourse with neutral powers "is a claim which gains no additional strength by an investigation into the foundation on which it rests; and the evils which have accompanied its exercise call for an efficient remedy." The investment of a place by sea and land with a view to its reduction is a mode of warfare which can not reasonably be objected to, so long as war is recognized as an arbiter of national disputes. The original theory of blockades was that of reducing places by means of investment. Marshall, when Secretary of State, in an instruction of September 30, 1800, to Mr. King, American minister in London, declared that it might well be questioned whether the rule of blockade could be applied to a place "not completely invested by land as well as by sea," and that, if the foundations of the subject were examined, it would be difficult to resist the conviction that the extension of the doctrine to towns invested by sea only was "an unjustifiable encroachment on the rights of neutrals." Elementary writers abound in expressions indicating a close connection between blockades and sieges, and similar expressions had been used by Lord Stowell. "The blockade of a coast or of commercial positions along it, without any regard to ulterior military operations and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceable and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times. . . . Unfortunately, however, the right to do this has been long recognized by

the law of nations, accompanied indeed with precautionary conditions, intended to prevent abuse, but which experience has shown to be lamentably inoperative. It is very desirable, therefore, that this constant source of irritation in time of war should be guarded against and the power to interrupt all intercourse with extensive regions be limited and precisely defined, before by a necessary reaction its exercise is met by an armed resistance."

Mr. Cass, Sec. of State, to Mr. Mason, min. to France, No. 190, June 27, 1859, MS. Inst. France, XV. 426.

See the note under an extract from this instruction, supra, § 1195.

The right to blockade an enemy's port with a competent force is a right secured to every belligerent by the law of nations.

McCall *v.* Marine Ins. Co., 8 Cranch, 59.

Neutrals may question the existence of a blockade, and challenge the legal authority of the party which has undertaken to establish it. One belligerent, engaged in actual war, has a right to blockade the ports of the other, and neutrals are bound to respect that right. The blockade of the ports of the Confederacy under the proclamation of the President of the 19th of April, 1861, was valid.

The Prize Cases, 2 Black, 635; The Circassian, 2 Wall. 135; The Admiral, 3 id. 603.

"There has in all probability been an extensive importation of merchandise, especially contraband of war, into Matamoras, destined for the insurgent States, and an exportation of cotton from those States through the same channel. Our right to blockade the mouth of the Rio Grande, for the purpose of preventing this commerce, may be considered as at least questionable. A British steamer with a cargo of cotton has recently been captured near the mouth of that river and has been sent to New York for adjudication. In all probability this Government will ultimately have to pay heavy damages for this capture."

Mr. Seward, Sec. of State, to Mr. Stanton, Sec. of War, March 13, 1862, 56 MS. Dom. Let. 488.

Mr. Seward suggested the occupation of a part of the left bank of the Rio Grande for the purpose of preventing the trade between the Mexican bank, particularly near Matamoras, and the adjacent region of Texas. (Ibid.)

Mr. Seward's letter referred to the case of the British steamer *Labuan*, as to which see, also, Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, March 13, 1862, 56 MS. Dom. Let. 487.

Article 7 of the treaty of 1848 between the United States and Mexico stipulated that the navigation of the river Bravo (otherwise called the Rio Grande) should be free and common to the citizens of

both countries, without interruption by either without the consent of the other, even for the purpose of improving the navigation. Nothing short of an express declaration by the Executive would warrant a court in ascribing to the Government an intention to blockade such a river in time of peace between the two Republics.

The Peterhoff, 5 Wall. 28, 51.

II. *GOVERNMENTAL AND DE FACTO BLOCKADES.*

§ 1267.

"Blockades are divided, by English and American publicists, into two kinds: (1) A simple or *de facto* blockade, and (2) a public or governmental blockade. This is by no means a mere nominal distinction, but one that leads to practical consequences of much importance. In cases of capture, the rules of evidence which are applicable to one kind of blockade, are entirely inapplicable to the other; and what a neutral vessel might lawfully do in case of a simple blockade, would be sufficient cause for condemnation in case of a governmental blockade. A simple or *de facto* blockade is constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts, it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence. The burthen of proof is thrown upon the captors, and they are bound to show that there was an actual blockade at the time of the capture. If the blockading ships were absent from their stations at the time the alleged breach occurred, the captors must prove that it was accidental, and not such an absence as would dissolve the blockade. A *public*, or governmental blockade, is one where the investment is not only actually established, but where also a public notification of the fact is made to neutral powers by the government, or officers of state, declaring the blockade. Such notice to a neutral state is presumed to extend to all its subjects; and a blockade established by public edict is presumed to continue till a public notification of its expiration. Hence the burthen of proof is changed, and the captured party is now bound to repel the legal presumptions against him by unequivocal evidence. It would, probably, not be sufficient for the neutral claimant to prove that the blockading squadron was absent, and there was no actual investment at the time the alleged breach took place; he must also prove that it was not an accidental and temporary absence, occasioned by storms, but that it arose from causes which, by their necessary and legal operation, raised the blockade."

Halleck, Int. Law (3d ed., by Baker), II. 189; Wheat. Elem. Int. Law, pt. iv. ch. III. § 28; The Neptunus, 1 Rob. 170; The Betsey, 1 Rob. 332;

The Christina Margaretha, 6 Rob. 62; The Vrow Johanna, 2 Rob. 109; Duer on Insurance, vol. i, pp. 649, 659; Phillimore on Int. Law, vol. iii. § 290; The Mercurius, 1 Rob. 80; The Neptunus, 2 Rob. 110; The Welvaart Van Pillaw, 2 Rob. 128; Ortolan, Diplomatic de la Mer, tome ii, ch. ix; Hautefeuille, Des Nations Neutres, tit. ix. ch. v, § 2.

The British steamer *Adula* having been captured on June 29, 1898, by a United States cruiser, on a charge of attempt to break the blockade of Guantanamo, Cuba, it appeared that no blockade was ever proclaimed of that place by the Government of the United States, Guantanamo being east of the line established by the President's proclamation of the 27th of June. But it also appeared that blockades of Santiago and Guantanamo were in fact established by Admiral Sampson early in June, and were maintained till some days after the capture of the *Adula;* and, in view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, the court thought these blockades must be held to have been lawfully instituted, as an adjunct to such operations.

The Adula, 176 U. S. 351, affirming 89 Fed. Rep. 351.

Near the close of hostilities between the United States and Spain, in 1898, an attempt was made to establish a de facto blockade of the port of Sagua le Grande, on the north side of Cuba, beyond the limits of the blockade proclaimed by the Government of the United States, but the attempt was abandoned under orders from Washington, and certain vessels which had been seized, ostensibly in connection with it, were released. The French steamer *Manoubia* was supposed to fall within this category, but in reality she appears to have been seized, not for any breach of blockade, but on suspicion of "acting in the interest of the enemy." August 10, 1898, the Navy Department telegraphed that it was considered best for a few days not to extend the blockade beyond what had been proclaimed, and added: "Beyond these limits be very careful not to seize vessels, unless Spanish or carrying contraband of war, as neutrals have a right to trade with ports not proclaimed blockaded."

Naval Operations of the War with Spain, 259, 280, 298.

See, as to the case of the *Manoubia*, note of French ambassador to the Secretary of State, Aug. 3, 1898, MS. Notes from French Leg.; Mr. Day, Sec. of State, to the Attorney-General, Aug. 3, 1898, 230 MS. Dom. Let. 501; Mr. Hay, Sec. of State, to Sec. of the Navy, May 22, 1900, 245 MS. Dom. Let. 211.

As to the British vessels *E. R. Nickerson* and *Pilgrim*, see Mr. Hay, Sec. of State, to the Attorney-General, Jan. 5, 1900, 242 MS. Dom. Let. 133, enclosing copy of a note of the British ambassador of Dec. 30, 1899; Mr. Hay, Sec. of State, to the Attorney-General, March 2, 1899, 235 MS. Dom. Let. 237.

As to the Mexican steamer *Tabasqueno*, see Mr. Day, Sec. of State, to the Attorney-General, Aug. 8, 1898, 230 MS. Dom. Let. 573; Mr. Day, Sec. of State, to Sec. of Navy, Aug. 8, 1898, id. 581; Mr. Day, Sec. of State, to the Attorney-General, Aug. 11, 1898, id. 633.

A proclaimed blockade is not to be territorially extended by construction.

The Peterhoff, 5 Wall. 28.

A blockade which was intended to "blockade the whole coast, from the Chesapeake Bay to the Rio Grande," did not include the mouth of the Rio Grande, the middle of that stream forming the boundary line between the United States and Mexico, and the free navigation of the river being guaranteed by treaty. The presumption from these facts could be overcome only by an express declaration to that end. Hence trade, during the rebellion, between London and Matamoras, two neutral places, the latter an inland port of Mexico and close to the Mexican boundary line, even with intent to supply, from Matamoras, goods to Texas, then an enemy of the United States, was not unlawful on the ground of such violation.

The Peterhoff, 5 Wall. 28.

III. *CONDITIONS OF VALIDITY.*

1. Authority to Institute.

§ 1268.

Blockade being a belligerent right, any recognized belligerent has the authority to exercise it; and the refusal to respect a blockade duly instituted would in effect be a denial to the party establishing it of the possession of belligerent rights. In two recent instances—in Chile and Brazil, respectively—it was intimated that if a blockade should be instituted by revolutionists who had not then been recognized as belligerents it would be respected if it was effective, the inference being that if they could in fact establish the blockade they would show themselves to be entitled to exercise belligerent rights, at any rate to that extent.

To justify the exercise of the right of blockade, and legalize the capture of a neutral vessel for violating it, a state of actual war must exist, and the neutral must have knowledge or notice that it is the intention of one belligerent to blockade the ports of the other.

To create the right of blockade and other belligerent rights, as of capture, as against neutrals, it is not necessary that the party claiming them should be at war with a separate and independent power. The parties to a civil war are in the same predicament as two nations

who engage in a contest and have recourse to arms. A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war.

The Prize Cases, 2 Black., 635.

"The rule adopted by the French Government in 1861, in respect to the civil war then existing in the United States, was as follows: 'The Southern States having revolted against the Northern States, so said this Government on May 11, exhibit to the eyes of foreign powers every appearance of a government *de facto;* under these conditions, they have a right to be treated as belligerents, and can consequently employ against their adversary such measures of coercion as are usual in war.' France thus recognized in these States the right to establish a blockade, without at the same time recognizing them as a new state, never having entered into an official communication with the Confederate States. The United States followed the same course in reference to French interposition in Mexico, never having recognized Maximilian as Emperor, but never having contested his right to establish a blockade. If on August 17, 1866, President Johnson declared null and void the imperial decree of July 9 declaring the blockade of Matamoras, it was indeed only because 'the said decree, in declaring a belligerent blockade not maintained by effective military or naval forces violated the neutral right of the United States.' (Archiv. Dip., 1866, IV. 276.)"

Fauchille, Blocus Maritime (Paris, 1882), 69–70.

November 1, 1899, the United States minister in Venezuela reported that Puerto Cabello was "formally and probably effectively blockaded by Castro government," a de facto organization which assumed power at Caracas October 23, 1899. He inquired whether recognition of the blockade would not imply recognition of the de facto government, which was "fairly well established." The Department of State replied: "If closure by the de facto government is supported by effective blockade, it must be respected by all United States merchant vessels."

Mr. Hay, Sec. of State, to Mr. Loomis, min. to Venezuela, tel., Nov. 2, 1899, For. Rel. 1899, 803.

In June, 1858, Mr. Forsyth, United States minister in Mexico, suspended diplomatic relations with the Miramon government until he should ascertain the decision of the President. His action was approved; and he was directed to demand his passports, to deposit the archives of the legation with the United States consul at the City of Mexico, and to proceed to Vera Cruz, where an armed steamer would be in readiness to convey him to the United States. All diplo-

matic intercourse with the Miramon government was thus finally terminated. In March, 1859, Mr. Robert M. McLane was sent out as a new minister to the Mexican Republic, with discretionary authority to recognize the government of President Juarez, if he should find it to be entitled to such recognition, according to the established practice of the United States. Mr. McLane proceeded to Vera Cruz, where the Juarez government was then established, and finding it to be, as he declared, "the only existing government of the Republic," presented his credentials. The administration at Washington having subsequently been led to believe that arrangements were making by the Miramon government to blockade Vera Cruz and other ports on the Gulf of Mexico, the commanders of the United States vessels of war in those waters were instructed that the President had decided "that no such blockade will be recognized by the United States;" and they were therefore directed to employ the forces under their command to afford American vessels free ingress and egress at all Mexican ports and fully to protect them.

Mr. Toucey, Sec. of Navy, to Capt. Jarvis, U. S. S. *Savannah*, Mar. 13, 1860, S. Ex. Doc. 29, 36 Cong. 1 sess. Similar instructions were sent to Captain Farragut of the *Brooklyn*, and to Commanders Thomas Turner of the *Saratoga*, Thornton A. Jenkins of the *Preble*, and Hazard of the *Pocahontas*.

See, supra, § 63.

"I acknowledge the receipt of your despatch (No. 30) of December 13, 1869, with enclosures, narrating your proceedings in relation to a threatened blockade of Port-au-Prince by armed vessels in the service of insurrectionists. Your conduct in protesting against the enforcement of the proposed blockade against the vessels of the United States, and in requesting the good offices of the consul-general of France to convey notice of your protest by a French man-of-war to the blockading fleet, is approved. It is to be regretted, however, that you did not somewhat more distinctly disavow a desire for the employment of force, and that when the consul-general informed you that the French man-of-war would guaranty to our commercial vessels a free passage both on coming in and going out of the port, without permitting them to be stopped by the vessels destined to establish the blockade, you did not inform him that any action involving violence would exceed your request or desire. It is unfortunate that the commander of a foreign man-of-war should be invested, or allowed to suppose himself invested, with any discretionary power to be exercised on behalf of this Government. Your situation, however, was an embarrassing one, and in expressing the regret forced upon me by the peculiar circumstances attending that blockade it is not intended to convey any reproof of your conduct."

Mr. Fish, Sec. of State, to Mr. Bassett, min. to Hayti, No. 30, Jan. 22, 1870, MS. Inst. Hayti, I. 177.

Early in the civil war in Chile, in 1891, the Congressional deputation on the insurgent fleet notified the Government authorities and the foreign representatives that Iquique and Valparaiso would be blockaded on February 1, 1891. Protests against the institution of blockades by the insurgents were made by the consular bodies at both those ports. The British Government, however, stated, January 24, 1891, that, if an "effective blockade" should exist, "escort through it can not be given." In reality neither port was ever blockaded.

Blue Book, Chile, No. 1 (1892), 2, 8, 25–41; Naval War College, International Law Situations, 1901, 113.

In the case of the naval insurrection in Brazil of 1893–1894, the American minister at Rio de Janeiro was instructed, January 11, 1894: "The insurgents have not been recognized as belligerents, and should they announce a blockade of the port of Rio the sole test of its validity will be their ability to make it effective."

Mr. Gresham, Sec. of State, to Mr. Thompson, min. to Brazil, Jan. 11, 1894, For. Rel. 1893, 98, 99.

2. Effectiveness.

§ 1269.

"To a country whose principal exports are, and for a long period will be, the various articles of provisions, it is essential to obtain an entire exemption from restraint in their exportation, except to a blockaded place. And to guard against the abusive extension of the term blockade, it will be necessary explicitly to describe its meaning, and to confine it, as in the declaration of the armed neutrality, 'to a port where, by the disposition of the power which attacks it, with vessels stationed sufficiently near, there would be evident danger to enter it.'"

Mr. Pickering, Sec. of State, to Mr. Rufus King, min. to England, June 8, 1796, MS. Inst. U. States Ministers, III. 146.

For an extract from a dispatch of Mr. King to Mr. Pickering, July 15, 1799, see 3 Wheaton, Appendix, note 1. An extract from a note of Mr. King to Lord Grenville, May 23, 1799, will be found at the same place.

"Ports not effectually blockaded by a force capable of completely investing them, have yet been declared in a state of blockade. . . . If the effectiveness of the blockade be dispensed with, then every port of the belligerent powers may at all times be declared in that state, and the commerce of neutrals be thereby subjected to universal cap-

ture. But, if this principle be strictly adhered to, the capacity to blockade will be limited by the naval force of the beligerent, and, of consequence, the mischief to neutral commerce can not be very extensive. It is, therefore, of the last importance to neutrals that this principle be maintained unimpaired. I observe that you have pressed this reasoning on the British minister, who replies that an occasional absence of a fleet from a blockaded port ought not to change the state of the place. Whatever force this observation may be entitled to, where that occasional absence has been produced by an accident, as a storm, which for a moment blows off the fleet and forces it from its station, which station it immediately resumes, I am persuaded, that where a part of the fleet is applied, though only for a time, to other objects, or comes into port, the very principle requiring an effective blockade, which is, that the mischief can only be co-extensive with the naval force of the belligerent, requires that, during such temporary absence, the commerce to the neutrals to the place should be free."

Mr. Marshall, Sec. of State, to Mr. King, min. to England, Sept. 20, 1800, 2 Am. State Papers, For. Rel. 486, 488.

See 3 Wheaton, Appendix, note 1; Marshall on Insurance (Condy's ed.), 81, note (3), and cases there cited; Williams *v.* Smith, 2 Caines's Rept. 1; Radcliffe *v.* United States Ins. Co., 7 Johns. Rept. 38.

Mere liability by neutral vessels to capture, by belligerent cruisers hovering around a coast, can not constitute a blockade of a port on such coast.

Mr. Madison, Sec. of State, to Mr. C. Pinckney, min. to Spain, Oct. 25, 1801, Am. State Papers, For. Rel. II. 476.

An extract from this instruction is given in 3 Wheaton, Appendix, note 1.

The law of nations requires, to constitute a blockade, that there should be the "presence and position of a force rendering access to the prohibited place manifestly difficult and dangerous. Every jurist of reputation, who treats with precision on this branch of the laws of nations, refers to an actual and particular blockade."

Mr. Madison, Sec. of State, to Mr. Thornton, Oct. 27, 1803, 14 MS. Dom. Let. 215. See also letter of Mr. Madison to Mr. Merry, Dec. 24, 1803, id. 245.

"No maxim of the law of nations is better established than that a blockade shall be confined to particular ports, and that an adequate force shall be stationed at each to support it. The force should be stationary, and not a cruising squadron, and placed so near the entrance of the harbor or mouth of the river as to make it evidently dangerous for a vessel to enter I have to add, that a vessel entering

the port ought not to be seized, except in returning to it after being warned off by the blockading squadron stationed near it."

Mr. Monroe, Sec. of State, to Mr. de Onis, Spanish min., Mar. 20, 1816, Am. State Papers, For. Rel. IV. 156.

In 1826 and 1827 a discussion took place between representatives of the United States and Great Britain on the one hand, and of Brazil on the other, as to the validity of certain blockades declared by the Brazilian forces. Great Britain as well as the United States maintained the principle that blockades, in order to be binding, must be effective.

See Mr. Forbes, chargé d'affaires to Buenos Ayres, to Admiral Lobo, commanding the Brazilian squadron blockading Buenos Ayres, Feb. 13, 1826, 13 Br. & For. State Papers, 822.

The message of President J. Q. Adams, of May 23, 1828, containing a mass of correspondence in relation to the Brazilian blockades, as well as to claims against the Brazilian Government, is given in H. Ex. Doc. 281, 20 Cong. 1 sess. Am. State Papers, For. Rel. VI. 1021, 22. See, also, 14 Br. & For. State Papers, 1165.

As to the blockade of Buenos Ayres by Brazil and Mr. Raguet's demand for his passports, see H. Ex. Doc. 281, 20 Cong. 1 sess.; Am. State Papers, For. Rel. VI. 1021.

As to the Brazilian blockades of Pernambuco and the river Plate, see 16 Br. & For. State Papers, 1099.

For comments on the position of the British Government concerning the Brazilian blockades, see Memoirs of J. Q. Adams, VII. 385.

It is not inconsistent with the principles of international law for a neutral sovereign to send an armed cruiser to watch a blockaded coast, so as to see no injustice is done to his own merchant vessels, and that they may be prevented from any irregular proceedings.

Mr. Van Buren, Sec. of State, to Mr. Azambujo, Mar. 8, 1831, MS. Notes to For. Legs. IV. 373.

Referring to the blockade by the United States naval forces of the west coast of Mexico in 1846, Mr. Buchanan, as Secretary of State, in a note to Mr. Pakenham, British minister, of December 29, 1846, said: "It is as yet sufficiently apparent from the whole proclamation [of Commodore Stockton] that he did not intend to establish a paper blockade. This would have been equally unwarranted by his instructions and by the principles which the United States have maintained in regard to blockades ever since we became an independent nation." In a circular from Mr. Mason, Secretary of the Navy, of December 24, to the commanding officers of the United States Navy in the Pacific, it is said that "a lawful maritime blockade requires the actual presence of a sufficient force stationed at the entrance of the ports sufficiently near to prevent communication. The only exception to this

rule, which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the circumstance of the occasional temporary absence of the blockading squadron, produced by accident, as in the case of a storm, which does not suspend the legal operation of a blockade. The law considers an attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade. The United States have at all times maintained these principles on the subject of blockade; and you will take care not to attempt the application of penalties for a breach of blockade, except in cases where your right is justified by these rules. You should give public notice, that under Commodore Stockton's general notification no port on the west coast of Mexico is regarded as blockaded unless there is a sufficient American force to maintain it, actually present, or temporarily driven from such actual presence by stress of weather, intending to return."

37 Br. & For. State Papers, 565 et seq.

It appears by a dispatch from General Taylor, of April 23, 1846, that when General Ampudia summoned him to fall back from his position, he ordered a blockade of the mouth of the Rio Grande, deeming this, as he said, a measure "perfectly proper under the circumstances, and, at the same time, the most efficient means of letting the Mexican commander understand that this state of *quasi* war was not to be interpreted to his advantage only, while we reaped the inconveniences attending it." On April 17 Lieutenant Renshaw of the Navy, pursuant to General Taylor's instructions, warned off two American schooners, which were about to enter the river with provisions. General Ampudia protested against this action, stating that one of the vessels was wholly and the other partly laden with provisions which the contractors had engaged to supply to the Mexican forces, that one of the proprietors was the Spanish vice-consul, and the other the British vice-consul, and that the commerce of nations was not to be interrupted, except in consequence of a solemn declaration of blockade communicated and established in the form prescribed by international law. He demanded that the vessels be allowed to return to the mouth of the river, and that the provisions belonging to private contractors be restored. It seems that both vessels had been taken with their cargoes to Brazos Santiago.

General Taylor, on April 22, 1846, replied, and contested General Ampudia's position. (See correspondence accompanying the message of President Polk to Congress, May 12, 1846, H. Ex. Doc. 197, 29 Cong. 1 sess.)

"It will be your duty, however, to bear in mind the true principles of blockade contended for and insisted upon by the United States. They are well known to the world. We deny that general and diplomatic notifications of blockade are of binding force; though they may be regarded as friendly notices. Blockade must be confined to particular and specified places, with a sufficient force near to intercept

the entry of vessels, and no vessel is subject to capture without previous notice or due warning."

Mr. Clayton, Sec. of State, to Mr. Flenniken, May 12, 1849, MS. Inst. Denmark, XIV. 72.

"A blockade, to be valid under the law of nations, must be efficient; that is to say, carried on by a force competent to prevent the entrance of neutrals into the blockaded ports." (Mr. Clayton, Sec. of State, to Mr. Bowlin, Jan. 24, 1850, 37 MS. Dom. Let. 419.)

Texas having in 1842 given notice of a blockade of Mexican ports, and it appearing that the blockade was not "real," the British foreign office on Sept. 21, 1842, declared it to be of no effect. (34 Br. & For. State Papers (1845–1846), 1261, 1262.)

"If the blockade [of Mexican ports by France] is effectually maintained against vessels of other nations, this Government would withhold its protection from an American vessel taken in the attempt to evade it." (Mr. Seward, Sec. of State, to Mr. Bond, Aug. 9, 1862, 58 MS. Dom. Let. 47.)

As to the duration of the French blockades in Mexico, see Mr. Seward, Sec. of State, to Mr. Chase, Ch. Justice, Feb. 9, 1867, 75 MS. Dom. Let. 231.

"Only such blockades as shall be duly proclaimed and maintained by adequate force, in conformity to the law of nations, will be observed and respected by the United States." (Mr. Seward, Sec. of State, to Mr. Sullivan, min. to Colombia, No. 4, June 13, 1867, Dip. Cor. 1868, II. 1011, 1012.)

See, to the same effect, Mr. Evarts, Sec. of State, to Mr. Shishkin, Russian min., June 12, 1877, For. Rel. 1877, 476; Mr. Evarts, Sec. of State, to Mr. Christiancy, min. to Peru, No. 29, Aug. 8, 1879, For. Rel. 1879, 893.

But the person who assumes to enter a port proclaimed to be blockaded takes the responsibility of his act, if the blockade is in fact effective. Mr. Frelinghuysen, Sec. of State, to Mr. Langston, min. to Hayti, No. 246, Dec. 15, 1883, MS. Inst. Hayti, II. 367.)

A blockade, once regularly proclaimed and established, will not be held to be ineffective by continual entries in the log-book, supported by testimony of officers of the vessel seized, that, the weather being clear, no blockading vessels were to be seen off the port from which the vessel sailed.

The Andromeda, 2 Wall. 481.

October 15, 1888, the authorities at Port au Prince decided upon a blockade of the ports of Cape Haytian, Gonaives, and St. Marc. Next day they notified the American minister, and from that time on refused to clear vessels for those ports. It appeared that an attempt was made to establish a blockade at Cape Haytian, and that during the next twenty days a man-of-war was kept cruising between that port and Fort Liberté, about twenty-four miles to the eastward. During this time the cruiser never remained off Cape Haytian at night, and eight sailing vessels entered the port. From November 23

to December 3 no blockading vessel whatever appeared off Cape Haytian, while from November 2 to December 1, inclusive, twenty-six sailing vessels and two steamships entered the port. On December 3 two Haytian men-of-war appeared and proceeded to fire upon the city, but, after remaining in the offing till December 6, they departed. From that time on hardly a semblance of a blockade existed, and as late as December 25 all the public armed vessels of Hayti were at Port au Prince. Soon after the declaration of blockade, an American schooner was seized off Gonaives, but as she had had no notice of its existence she was subsequently released and an indemnity paid. Other ports, in addition to those above mentioned, were also declared to be blockaded, but the circumstances as to enforcement were similar. It appeared, in fact, that for some time there were only two vessels available for blockade duty, and that both of these were on one or more occasions lying in the harbor of Port au Prince. The evidence appeared to be conclusive that the blockade had always been intermittent, and that it was at no time effective or valid in the sense of being maintained by a force sufficient to restrain access to the coast or to make it difficult to obtain ingress or egress or to preclude a reasonable chance of entrance. Under the circumstances, the Haytian Government was notified that no blockade was considered as existing, and that, if a blockade should be again proposed, "due notice of the commencement thereof must be given, and a reasonable period during which neutral vessels will be permitted to depart with their cargoes must be allowed and will be reckoned from the date of such actual commencement."

Mr. Bayard, Sec. of State, to Mr. Thompson, min. to Hayti, No. 156, Feb. 27, 1889, For. Rel. 1889, 494.

See, also, S. Ex. Doc. 69, 50 Cong. 2 sess.

"The question of the legitimacy and effectiveness of a blockade is one of fact to be determined in each case upon the evidence presented; and this Department can not undertake to express opinions thereon in anticipation." (Mr. Bayard, Sec. of State, to Messrs. Kamer & Co., Feb. 19, 1889, 171 MS. Dom. Let. 685.)

During a revolution in Venezuela, the minister of the United States reported, on Oct. 4, 1892, that the "blockade" of Puerto Cabello was "effected by two inefficient Venezuelan steamers" which were "present there at intervals," and which "now threaten to fire upon New York American steamers;" and he asked "whether the naval forces of the United States should respect such a blockade, should the steamers make an attempt to enter." Reply was made, on October 5, that the blockade was rendered "effective by the presence of blockading vessels competent to warn and prevent entrance;" that "if blockade be intermitted, commercial vessels should not be prevented from entering," nor should they on the other hand be

" protected in breaking actual blockade;" that instructions in this sense would be sent to the United States naval forces, and that the steamers should be advised " that they should not attempt to break the blockade when it is visible." The aspects of the situation were, however, essentially changed by an investigation of the complaint made by the minister of foreign affairs at Caracas, of the action of the U. S. S. *Kearsarge*, Sept. 30, 1892, in convoying the steamer *Philadelphia* into Puerto Cabello. Although the blockade of the port was proclaimed August 26, to take effect on Sept. 10 for vessels from the Antilles, and on Sept. 25 for vessels from the United States, it was positively ascertained that no blockading force was visible on Sept. 16, 21, 23, 25, 26, or 27, while no information was obtained of the presence of any Venezuelan Government vessel either before or after Sept. 30, when a force was sent there perhaps for the purpose of intercepting the *Philadelphia*, but more probably for that of intercepting another vessel, which was supposed to be laden with arms and munitions of war. (For. Rel. 1892, 624.) Under the circumstances, and in view of the fact that not long previously, six passengers with permits to leave the country were forcibly taken from the American steamer *Caracas* by de facto authorities at Puerto Cabello, Admiral Walker ordered the *Kearsarge* to convoy the *Philadelphia* into port, in order, as he said, " to protect the American mail steamer from unlawful and irregular interference from either faction." It seems that one of the Venezuelan gunboats steamed toward the *Philadelphia*, but did not speak her, or make any recognized signal to attract her attention. With reference to this situation the Department of State, on Oct. 18, 1892, said: " If, as appears from the facts stated, no serious and continuous visible blockade of that port [Puerto Cabello] was maintained and a mere pretense of blockade kept up by sending a vessel there only on the periodical occasions when the . . . steamers were scheduled to touch at that port, it could not be respected as effective under international law. Blockade to be effective must be maintained against all commerce, and aim to visibly close the port [and] not be directed to interference with particular ships at intervals."

Mr. Scruggs, min. to Venezuela, to Mr. Foster, Sec. of State, tel., Oct. 4, 1892, For. Rel. 1892, 628; Mr. Foster to Mr. Scruggs, tel., Oct. 5, 1892, id. 629, MS. Inst. Venezuela, IV. 190; Mr. Scruggs to Mr. Foster, Oct. 7, 1892, For. Rel. 1892, 629–634; Mr. Wharton, Act. Sec. of State, to Mr. Scruggs, Oct. 18, 1892, id. 635.

For a Venezuelan decree of blockade of the mouth of the Orinoco, Oct. 2, 1871, and a decree of May 4, 1872, abrogating the previous decree, see S. Mis. Doc. 168, 50 Cong. 1 sess. 71, 81.

"A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous."

Instructions to Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780.

The French steamer *Olinde Rodriguez*, belonging to the Compagnie Générale Transatlantique, sailed from Havre June 16, 1898, on her regular voyage, under her mail contract with the French Government, for the West Indian ports of St. Thomas, San Juan (Porto Rico), Puerto Plata, Cape Haytian, St. Marc, Port au Prince, Gonaives, and return, calling at the same ports.

A proclamation declaring San Juan to be blockaded was issued by the Government of the United States on June 27, 1898. The *Olinde Rodriguez* arrived at St. Thomas on July 3, and on July 4 entered the port of San Juan. The U. S. S. *Yosemite*, which was lying three miles southwestward of the port, on blockade duty, gave chase, but was unable to reach the steamer before she had turned in and come under the protection of the shore batteries. When on the following morning she came out, the commander of the *Yosemite*, accepting the master's statement that he did not know that the port was blockaded, endorsed on her log an official warning and permitted her to proceed. She duly completed her outward itinerary and had left Puerto Plata on her return voyage when, on July 17, she was captured by the United States steamship *New Orleans* off San Juan, on the charge of attempting to enter that port. Questions were raised (1) as to the existence of the intent to enter, and (2) as to the existence of a lawful blockade. The court below doubted the validity of the blockade, because it was maintained by only one cruiser. The Supreme Court observed that the test was whether the blockade was "practically effective;" that this, though a mixed question, was one "more of fact than of law;" that, by General Orders, No. 492, "a blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous;" that, while it was not practicable to define the degree of danger that should constitute a test, it was enough that the danger was "real and apparent;" and that the question of effectiveness was not controlled by the number of the blockading force. The position could not, said the court, be maintained, that one modern cruiser, though sufficient in fact, was not sufficient in law; nor could a vessel, actually captured in attempting to enter a blockaded port, after a warning entered on her log by a cruiser off that port only a few days before, dispute the efficiency of the force to which she was subjected. The blockade was therefore held to be effective and binding. On the other hand, the court decided that the intent to break the blockade was not sufficiently established; but, in view of circumstances of suspicion, ordered that restitution should be awarded without damages, and that the costs

and expenses of her custody and preservation, and all costs in the cause except the fees of counsel, should be imposed on the ship.

The Olinde Rodriguez, 174 U. S. 510; cited in The Newfoundland, 176 U. S. 97.

For the case of the Olinde Rodriguez in the court below, see 89 Fed. Rep. 105; 91 id. 274.

The President, in his proclamation of April 26, 1898, in relation to the rules of maritime law to be observed by the United States in the conflict with Spain, adhering to the uniform position of the United States, declared: "3. Blockades in order to be binding must be effective." (Proclamations and Decrees during the War with Spain, 77.)

"In some cases, where a blockading squadron, from the nature of the channels leading to a port, can be eluded with ease, a large number of successful evasions may be insufficient to destroy the legal efficiency of the blockade. Thus during the American civil war, the blockade of Charleston was usually maintained by several ships, of which one lay off the bar between the two principal channels of entrance, while two or three others cruised outside within signaling distance. This amount and disposition of force seem to have been thought by the British Government amply sufficient to create the degree of risk necessary under the English view of international law, although from the peculiar nature of the coast a large number of vessels succeeded in getting out and in during the whole continuance of the blockade."

Hall, Int. Law (5th ed.), 701, citing Bernard, Neut. of Great Britain, chaps. x. and xi.

"To agree to perform a duty effectively is a very different thing from agreeing to perform it absolutely; the latter engagement is a guarantee, the former is an engagement to perform the duty unless *casus* intervene. A carrier, for instance, does not insure against a sudden frost which a prudent person could not foresee, nor against peculiar and extraordinary storms; nor even against defective performance by employés, when this defectiveness arises from extraordinary interferences not to be prognosticated. And so it is with blockades. A blockade to be effective need not be perfect. It is not necessary that the beleaguered port should be hermetically sealed. It is not enough to make the blockade ineffective that on some particularly stormy night a blockade-runner slid through the blockading squadron. Nor is it enough that through some exceptional and rare negligence of the officers of one of the blockading vessels a blockade-runner was allowed to pass when perfect vigilance could have arrested him. But if the blockade is not in the main effective—if it can be easily eluded—if escaping its toils is due not to *casus* or some rare and exceptional neg-

ligence, but to a general laxity or want of efficiency—then such blockade is not valid."

Wharton, Com. Am. Law, § 233, p. 332.

Baker, referring to the fourth clause of the Declaration of Paris of 1856, which declares that "blockades, in order to be binding, must be effective," makes the singular statement: "This proposition has been adopted by most civilized nations with the exception of the United States, Spain, Mexico, and Venezuela." No other principle was ever maintained by the United States, and it was chiefly against its violation that the United States went to war in 1812.

See First Steps in Int. Law, by Sir Sherston Baker, Bart. (London 1899) 271.

A blockade may be made effectual by batteries ashore as well as by ships afloat. In the case of an inland fort, the most effective blockade would be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter.

The Circassian, 2 Wall. 135.

3. Paper Blockades.

§ 1270.

"The fictitious blockades proclaimed by Great Britain and made the pretext for violating the commerce of neutral nations have been one of the greatest abuses ever committed on the high seas. During the late war they were carried to an extravagance which would have been ridiculous, if in their effects they had not inflicted such serious and extensive injuries on neutral nations. Ports were proclaimed in a state of blockade previous to the arrival of any force at them, were considered in that state without regard to intermissions in the presence of the blockading force, and the proclamations left in operation after its final departure; the British cruisers during the whole time seizing every vessel bound to such ports, at whatever distance from them, and the British prize courts pronouncing condemnations wherever a knowledge of the proclamation at the time of sailing could be presumed, although it might afterwards be known that no real blockade existed. The whole scene was a perfect mockery in which fact was sacrificed to form and right to power and plunder. The United States were among the greatest sufferers; and would have been still more so, if redress for some of the spoliations proceeding from this source had not fallen within the provisions of an article in the treaty of 1794."

Mr. Madison, Sec. of State, to Mr. Monroe, min. to England, Jan. 5, 1804, MS. Inst. U. States Ministers, VI. 161.

See, as to the conditions existing prior to the peace of Amiens, Moore, Int. Arbitrations, I. 299 et seq.; V. 4419–4422.

For documents relating to paper blockades, see app. to United States *v.* Palmer, 3 Wheat. 610, app.

October 26, 1803, the commander of the British ship of war *Bellerophon*, off Cape François, announced that "every port in the island of St. Domingo" was in a state of blockade and warned vessels that if they were seen or found within three leagues of the land, after that date, they would be seized as prize. The only intimation which the United States appears to have received concerning this blockade was by the endorsement made on the register of an American ship which was afterwards communicated to the Department of State by a collector of customs in the United States, late in December, 1803.

Mr. Adams, Sec. of State, to Mr. Cowper, March 17, 1821, 18 MS. Dom. Let. 282.

On April 8, 1806, the British Government, in retaliation for a decree of Prussia, issued on the occupation of Hanover, excluding British trade, declared the mouths of the Ems, Weser, Elbe, and Trave to be in a state of blockade. On May 16, a similar declaration was made in respect of the whole coast of the continent from the river Elbe to the port of Brest, inclusive. In the following September, this blockade was declared to be discontinued as to the coast from the Elbe to the Ems. On November 21, 1806, Napoleon issued from the imperial camp at Berlin a decree which declared the British Islands to be in a state of blockade and all commerce and correspondence with them to be prohibited. Referring to this decree, Lord Howick, on January 7, 1807, issued an order in council by which neutral vessels were forbidden to trade from one port to another, both of which were in the possession or control of France or her allies. On the 11th of November, further orders in council were issued, which prohibited neutral vessels from trading with the ports of France and her allies and with all ports in Europe from which, though they were not at war with Great Britain, the British flag was excluded, unless such vessels should clear from a British port under regulations to be prescribed in the future. On December 17, 1807, Napoleon, in retaliation for these orders, issued his Milan decree which, besides declaring every ship that had submitted to search by the English to be good prize, repeated the declaration that the British Islands were in a state of blockade, and declared that every ship that should sail from or be destined to a port in Great Britain or the British possessions, or in any country occupied by the British troops, should be good prize. Against these various orders

and decrees, the United States protested, and as measures of retaliation resorted to embargoes and non-intercourse, and in the case of Great Britain, which was aggravated by the question of impressment, eventually to war.

Moore, Int. Arbitrations, V. 4447–4456.

For the text of the various orders and decrees of the belligerent powers in Europe, affecting the commerce of the United States, see Am. State Papers, For. Rel. III. 263.

Count Romanzoff's circular of May 14, 1809, as to the blockade of the Baltic, is given in Am. State Papers, For. Rel. III. 327.

The Secretary of State reported on January 11, 1810, that he had no information "relative to the blockade of the Baltic, and of the exclusion of neutral vessels by Russia, Sweden, and Denmark," but that it was presumed that the enclosed papers, the first of which was a translation of a "ukase" of the Russian Government of May 14, 1809, and the second a translation of instructions given to Danish privateers on September 14, 1807, might be of interest to neutrals. (15 MS. Dom. Let. 403.)

For President Madison's message of January 12, 1810, with accompanying papers, relative to the French blockade of ports in the Baltic, see 7 Wait's State Papers, 342.

The position of the United States with regard to paper blockades is expounded by Mr. Pinkney in his note of January 14, 1811, to Lord Wellesley, Am. State Papers, For. Rel. III. 409; the position of the British Government is exhibited in notes of Mr. Foster, British min. at Washington, to Mr. Monroe, in Am. State Papers, For. Rel. III. 438.

No actual blockade of any British port in the West Indies was maintained by the French during the period of French spoliation, and a ship laden with provisions, bound for one of such British ports, was not subject to condemnation by the French while the French treaty of 1778 remained in force.

Hooper *v.* United States, 22 Ct. Cl. 408.

"The British Government having repealed the orders in council and the blockade of May, 1806, and all other illegal blockades, and having declared that it would institute no blockade which should not be supported by an adequate force, it was thought better to leave that question on that ground, than to continue the war, to obtain a more precise definition of blockade, after the other essential cause of the war, that of impressment, should be removed."

Mr. Monroe, Sec. of State, to the envoys at Ghent, June 23, 1814, Am. State Papers, For. Rel. III. 700.

Although the commissioners of the United States, during the conference at Ghent, were unable to obtain from Great Britain any definition which would limit blockade, the British Government from that time ceased to claim that blockades were effective unless supported by a naval force adequate to substantially seal the port. (Am. State Papers, For. Rel. IV. 9.)

"This consideration ought to operate with still greater force in leading the British cabinet to an adjustment of the principal objects of collision between neutral and belligerent interests. The unexampled outrages upon all neutral rights which were sanctioned during the late wars both by Great Britain and France, were admitted by both to be unwarranted by the ordinary laws of nations. They were, on both sides, professed to be retaliations, and each party pleaded the excesses of the other as the justification of its own. Yet so irresistible is the tendency of precedent to become principle in that part of the law of nations which has its foundation in usage, that Great Britain, in her late war with the United States, applied against neutral maritime nations almost all the most exceptionable doctrines and practices which she had introduced during her war against France. The maritime nations were then too so subservient to her domination that in the Kingdom of the Netherlands a clearance was actually refused to vessels from thence to a port in the United States on the avowed ground that their whole coast had been declared by Great Britain to be in a state of blockade. The whole coast in a state of blockade, while the British commerce, upon every sea, was writhing under the torture inflicted by our armed vessels and privateers issuing from the ports thus pretended to be in blockade! The dereliction of the rights of maritime neutrality by *all* the allied powers at the congress of Vienna, and at the subsequent negotiations for settling the affairs of Europe at Paris, have so far given a tacit sanction to all the British practices in the late wars that none of them would have a right to complain if the United States, on the contingency of a maritime war in which they should be engaged, should apply to the neutral commerce of all those allies the doctrines which they thus suffered Great Britain, without remonstrance, to apply against it in her late contest with the United States."

Mr. Adams, Sec. of State, to Mr. Rush, min. to England, Nov. 6, 1817, MS. Inst. U. States Ministers, VIII. 152.

September 5, 1815, the Spanish minister at Washington announced that the captain-general of Caracas, General Morillo, was about to decree a blockade of the ports of the viceroyalty of Santa Fé, including Carthagena, and that every neutral vessel found on those coasts would be considered good prize. On March 2, 1816, he stated that, Carthagena having been compelled to surrender, General Morillo had, on the 19th of the preceding December, decided to continue the blockade from Santa Marta to the river Atrato, and had given orders that if any vessel should be met south of the mouths of the Magdalena or north of the parallel of Cape Tiburon on the Mosquito shore, and between the meridians of those points, she would be declared good prize, whatever her destination; but that the ports of Santa

Marta and Puerto Bello would be open to the commerce of neutrals. Against this measure Mr. Monroe, on March 20, 1816, protested, on the ground that, while it declared a coast of several hundred miles to be in a state of blockade, adequate means for enforcing it did not exist. The Spanish minister replied that there were only three ports of entry on the coast in question, and that a squadron had sailed from Cadiz to enforce the blockade, but he also argued that the measure amounted merely to an enforcement of the laws relating to the Indies, by which foreign vessels found near or evidently shaping their course toward the Spanish colonies were, unless specially licensed to trade with them, liable to confiscation. On July 20, 1816, instructions were sent to Mr. Erving, American minister at Madrid, in regard to vessels which had been seized at Carthagena and to citizens of the United States who had been imprisoned there. The citizens had been released, but not the vessels. It appeared that the vessels were seized under the decree of December 19, 1815. In 1816 Mr. Christopher Hughes, jr., was sent by the United States to Carthagena for the purpose of reclaiming the property that had been seized. He was compelled to return unsatisfied. The claims were embraced in the settlement of 1819.

Am. State Papers, For. Rel. IV. 156; Moore, Int. Arbitrations, V. 4494; Mr. Monroe, Sec. of State, to Mr. Hughes, March 25, 1816, MS. Inst. U. States Ministers, VIII. 40.

See, also, 11 Wait's State Papers, 473.

As to the blockade of certain ports in Spain, including Gibraltar, see Moore, Int. Arbitrations, V. 4488.

"The renewal of the war in Venezuela has been signalized on the part of the Spanish commanders by proclamations of blockade unwarranted by the laws of nations, and by decrees regardless of those of humanity. With no other naval force than a single frigate, a brig, and a schooner, employed in transporting supplies from Curaçao to Porto Cabello, they have presumed to declare a blockade of more than twelve hundred miles of coast. To this outrage upon all the rights of neutrality, they have added the absurd pretension of interdicting the peaceable commerce of other nations with *all* the ports of the Spanish Main, upon the pretense that it had heretofore been forbidden by the Spanish colonial laws; and on the strength of these two inadmissible principles, they have issued commissions at Porto Cabello and in the island of Porto Rico to a swarm of privateers, which have committed extensive and ruinous depredations upon the lawful commerce of the United States, as well as upon that of other nations, and particularly of Great Britain. It was impossible that neutral nations should submit to such a system; the execution of which has been as strongly marked with violence and cruelty as was its origin

with injustice. . . . The naval officers of the United States who have been instructed to protect our commerce in that quarter have been brought in conflict with two descriptions of *unlawful* captors of our merchant vessels; the acknowledged and disavowed pirates of Cuba, and the ostensibly commissioned privateers from Porto Rico and Porto Cabello, and that in both cases the actual depredators have been of the same class of Spanish subjects, and often probably the same persons."

Mr. Adams, Sec. of State, to Mr. Nelson, min. to Spain, April 28, 1823, MS. Inst. U. States Ministers, IX. 183.

This is quoted by Lawrence in his edition of Wheaton (1863), 846.

"It is in vain for Spain to pretend that during the existence of a civil war, in which by the universal law of nations both parties have equal rights with reference to foreign nations, she can enforce against all neutrals by the seizure and condemnation of their property the laws of colonial monopoly, and prohibitions by which they have been excluded from commercial intercourse with the colonies, before the existence of the war, and when her possession and authority were alike undisputed. And if at any stage of the war this pretension could have been advanced with any color of reason, it was preeminently nugatory on the renewal of the war, after the formal treaty between Morillo and Bolivar, and the express stipulation which it contained, that if the war should be renewed, it should be conducted on the principles applicable to wars between independent nations, and not the disgusting and sanguinary doctrine of suppressing rebellion."

Mr. Adams, Sec. of State, to Mr. Nelson, min. to Spain, April 28, 1823, MS. Inst. U. States Ministers, IX. 183.

Part of this extract is given by Lawrence in his edition of Wheaton (1863), 847.

See 9 Br. & For. State Papers, 784.

"It is seen with surprise that the Brazilian Government persists in the measure of exacting from neutrals clearing from the port of Montevideo bonds obliging them not to enter any Buenos Ayrean port. That measure can find no justification whatever in the usage or laws of nations. Its pretext is the violation of blockade instituted by the Government of the Brazils. A blockade must execute itself. . . . The belligerent has no right to resort to any subsidiary means. Such a resort is a tacit admission of the incompetency of the blockading force to sustain the blockade, and consequently confesses its illegality. The belligerent can have no right, especially, to exert any municipal authority, as the measure in question is, over neutral vessels to execute his belligerent designs. The belligerent has no more right to lay the neutral under bond to respect the rights

of war, than the neutral has to lay the belligerent under bond to respect the rights of neutrality. . . . The measure in question is attended with the greatest practical inconvenience. It must be often difficult, if not altogether impracticable, for our traders to obtain in distant and foreign ports the securities satisfactory to the local authorities. We can not submit to the measure. If it shall be in operation on the receipt of this dispatch, you will remonstrate against it with an urgency proportionate to its manifest want both of principle and precedent. And if necessary you will notify the Brazilian Government that the commanders of our public vessels will be instructed to disregard and resist it."

Mr. Clay, Sec. of State, to Mr. Tudor, chargé d'affaires to Brazil, No. 8, April 1, 1828, MS. Inst. U. States Ministers, XII. 88.

4. Closure of Insurgent Ports.

§ 1271.

The Spanish minister at Washington, in 1834, notified the Department of State that the Queen of Spain had declared the coast of that country from Cape Finisterre to the river Bidassoa to be in a state of blockade, and had directed the seizure and embargo of all vessels loaded with articles contraband of war, which should come within six miles of the coast, as being justly under suspicion of intending to aid the followers of Don Carlos. Mr. Forsyth, who was then Secretary of State, by direction of the President, replied that the United States "can not acknowledge the legality of any blockade which is not confined to particular designated ports, each having stationed before it a force competent to sustain the blockade; nor the justice of any seizure of an American vessel on suspicion of improper designs; nor the legality of any capture for breach of blockade, unless the vessel captured has attempted to enter a blockaded port after having been previously warned off."

Mr. Forsyth, Sec. of State, to Chevalier Tacon, Spanish min., Nov. 18, 1834, MS. Notes to Spanish Leg. VI. 5.

This position was reaffirmed by Mr. Forsyth in replying to an announcement made by the Spanish minister at Washington that, in consequence of the insubordinate conduct of the governor of Santiago de Cuba, the captain-general of the island had received orders from Madrid to cut off all communication with that district and to blockade its ports, in order to deprive it of the revenue which it would receive from customs duties. (Mr. Forsyth, Sec. of State, to Mr. Calderon de la Barca, Spanish min., Nov. 25, 1836, MS. Notes to Spanish Leg. VI. 22.)

March 20, 1837, Mr. Monastario, acting minister of foreign affairs of Mexico, complained of a public notice issued by the commander

of the U. S. S. *Constellation*, January 24, 1837, offering convoy to merchant vessels bound from New Orleans to Texas. Mr. Monastario represented that this offer was in derogation of the Mexican decree of February 9, 1836, closing the ports of Texas to foreign commerce, and asked that the commanders of American men-of-war might be instructed to respect that decree. Mr. Forsyth replied that, while it was the right of the Mexican Government to designate which of its ports should be open to foreign vessels, it was also its duty as an independent power to execute its laws pursuant to its treaty obligations and public law. The United States had, said Mr. Forsyth, in the contest between Mexico and Texas pursued a neutral course. As it was, he said, notorious that the authority of Mexico in Texas was annulled and that the inhabitants of the country had declared themselves independent and had organized a government of their own, "the mandate of the Mexican Government was obviously tantamount to a blockade by notification merely, the illegality of which has invariably been asserted by the United States and has been agreed to by Mexico in the treaty." The request of the Mexican Government, therefore, could not, said Mr. Forsyth, be complied with, and convoy would consequently be afforded to merchant vessels of the United States destined to ports of Texas or to those of Mexico. Mr. Forsyth also adverted to the fact that at the time when he wrote the independence of Texas had been acknowledged by the United States.

Mr. Forsyth, Sec. of State, to Mr. Monastario, May 18, 1837, MS. Notes to Mexican Leg. VI. 74.

As to blockades on the Mexican coast and the River Plate, see President Van Buren's message of Feb. 22, 1839, H. Ex. Doc. 211, 25 Cong. 3 sess.

The American brig *Toucan*, bound from Boston to St. Catherines, Brazil, and a market, was detained at San Joze do Norte from February 13 to March 2, 1836, by the imperial authorities, who refused her a clearance and prevented her from going to Porto Alegre, which was her next place of destination, because it was in the possession of insurgents. A claim for this detention was laid before Mr. George P. Fisher, commissioner appointed under the act of Congress of March 29, 1850, 9 Stat. 422, to distribute the indemnity under the convention between the United States and Brazil of January 27, 1849. Mr. Fisher rejected the claim, saying: "The preventing of the *Toucan* and other vessels by the Brazilian authorities from going up to an interior port which had been closed on account of a civil insurrection existing there at the time, was but the exercise of a right incident to a sovereign state, and amounting to no embargo upon that

ship or other vessels in San Joze, nor to a detention of her or them so long as they were free to go elsewhere than to said port of Alegre."

Moore, Int. Arbitrations, V. 4616.

With reference to this decision, it may be observed that Mr. Forsyth, writing with regard to the claim in 1839, said: "It appears from the first protest of Captain Hamlin that the *Toucan* was detained . . . by order of Ribeiro, the imperial president, for the alleged reason that Porto Alegre was in the possession of the insurgents. It is believed that Ribeiro was at this time on board the ship of war the *Seventh of September*, which, with perhaps other vessels, was engaged in blockading the entrance to the lake and river leading up to Porto Alegre." (Mr. Forsyth, Sec. of State, to Mr. Hunter, chargé d'affaires to Brazil, No. 45, March 13, 1839, MS. Inst. Brazil, XV. 57.)

"I have to acknowledge the receipt of your despatch No. 22, and to inform you that your course in the correspondence between you and the governor of Panama upon the subject of the decree closing certain ports not in possession of the authorities of New Granada, is approved. The ground assumed by the governor, that the 15th article of the treaty was intended to apply to a state of foreign and not civil war, is considered to be quite untenable. His point, that a government has a perfect right to close any of its ports which may have been opened to foreign commerce is correct, provided such ports be in the possession of its authorities. If, as in this case, the fact be otherwise, the decree referred to, so far as it relates to those facts, must be considered as tantamount to a blockade by proclamation, a proceeding which is not recognized by the treaty. You will consequently take note of any damages which our citizens may have sustained, in order that reparation may be demanded therefor."

Mr. Trescot, Assist. Sec. of State, to Mr. Corwine, consul at Panama, Oct. 26, 1860, 53 MS. Dom. Let. 207.

In the records of the Department of State there is a memorandum by Mr. Seward, dated April 18, 1861, recommending a blockade of the ports in the seceded States, both on grounds of expediency and of constitutional right. After the blockade was proclaimed, Mr. Seward advised the members of the diplomatic corps that it would be "strictly enforced upon the principles recognized by the law of nations."

Memorandum of Mr. Seward, Sec. of State, April 18, 1861, MS. Inst. Special Missions, III. 187; Mr. Seward, Sec. of State, to Baron Gerolt, Prussian min., May 2, 1861, MS. Notes to Prussian Leg. VII. 109.

See, also, Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 114, Feb. 19, 1862, Dip. Cor. 1862, 315.

For correspondence between the United States and Great Britain concerning the blockade, see Br. & For. State Papers, vols. 51 and 55.

In the case of the British brig *Herald*, which was taken possession of at sea on July 16, 1861, for an alleged violation of the blockade of Beaufort, North Carolina, Mr. Seward suggested that orders be given for the release of the vessel, as it appeared that the rules prescribed in the proclamation of the President and in the instructions of the Navy Department on the subject of the blockade were not observed. (Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, July 29, 1861, 54 MS. Dom. Let. 370.)

In a dispatch of June 28, 1861, Mr. Adams reported an interview with Lord John Russell in which the latter adverted to the report that the Congress of the United States would probably pass a law declaring the Confederate ports to be closed to commerce, and in this relation stated that the law officers had advised, in the case of New Granada, that the Government had no right to close ports in the possession of insurgents except by a regular blockade. The question of the action of the New Granadian authorities was also the subject of a debate in the House of Commons on June 27, when Lord John Russell stated that the law officers had advised that, while it was perfectly competent for the government of a country in a state of tranquillity to say what ports should be open to trade and what should be closed, yet the attempt so to close ports de facto in the hands of insurgents would be an invasion of international law with regard to blockade. Lord John Russell added that the British naval commanders had been ordered not to recognize the closing of the insurgents' ports in New Granada.

By the act of Congress of July 13, 1861, the President was authorized to proclaim the closure of Confederate ports. Mr. Seward enclosed a copy of the act to Mr. Adams, and said that, if the United States should undertake to close the insurrectionary ports under the statute and Great Britain should, in pursuance of the intimation previously made, disregard the act, no one could suppose that the United States would acquiesce, but that the President, as well as himself, had felt an earnest and profound solicitude to avert foreign war. For the same reason he did not wish to dogmatize, but to act practically, with a view to immediate peace and ultimate good understanding. It was not, he said, his purpose to anticipate or even indicate the decision which would be made with regard to the enforcement of the statute in question, but simply to suggest what Mr. Adams might properly and advantageously say while the subject was under consideration. Mr. Adams was accordingly instructed to say, first, that the law only authorized the President to close the ports in his discretion, accordingly as he should regard existing or future exigencies; secondly, that the passage of the law, taken in connection with attendant circumstances, did not necessarily indicate a legislative conviction that the ports ought to be closed, but only showed the purpose of

Congress that the closing of the ports, if it should become necessary, should not fail for want of power explicitly conferred by law; thirdly, that no change in the policy adopted with regard to the blockade would be made from motives of aggression against nations which practically respected the sovereignty of the United States, or without due consideration of all the circumstances, foreign as well as domestic, bearing upon the question. On the other hand, Mr. Adams was not to leave it doubtful that the President fully adhered to the position which the Government had early adopted that the sovereignty of the United States over all parts of the Union remained unimpaired, and that he fully agreed with Congress in the principle of the law which authorized him to close the ports which had been seized by the insurgents, and that he would "put into execution and maintain it with all the means at his command, at the hazard of whatever consequences, whenever it shall appear that the safety of the nation requires it."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 42, July 21, 1861, Dip. Cor. 1861, 101.

Mr. Welles says that on April 11, 1865, after the fall of Richmond, a proclamation was issued in pursuance of the act of July 13, 1861, to close the ports of the Southern States. "Until the war had virtually ceased, the law of Congress was not enforced." (Welles, Lincoln and Seward, 128.)

Feb. 3, 1873, the consul of Spain at Singapore published a notice that no foreign vessel would be allowed to enter, unless in distress, any port of the Sulu territory for commercial or other purposes, and that the exclusion would be rigidly enforced by the men-of-war of the Philippine marine department, as no port in the territory had as yet been opened to foreign trade.

Jan. 1, 1875, a Spanish naval officer notified an English naval officer as follows:

"In conformity with your desire, I have the honor to inform you that Sulu, an integral part of our territory, is in open rebellion, on which account the vessels under my command are blockading it, in accordance with the superior instructions of my admiral, for the purpose of preventing all communication of ships with its coasts, for which reason it is not possible for me to permit the entry of the vessel under your command in the port above mentioned."

This notice was given by Lieut. Commander Propolo to Commander Buckle, of H. B. M. ship *Frolic*.

Jan. 17, 1876, the Earl of Derby wrote to Lord Odo Russell, at Berlin:

"It will be seen from Commander Buckle's report that the prohibition of foreign trade is carried out by the Spanish naval authorities under the name of a blockade; but that the force employed is quite

inadequate to maintain an efficient blockade, even supposing that one could properly be proclaimed.

"In the opinion of Her Majesty's Government, however, the Spanish Government is not in a position to proclaim a blockade in Sulu so long as she claims sovereignty over that archipelago. Blockade is a belligerent right, and can only be exercised against a state with which the blockading power is at war. A power may prohibit foreign trade with its own ports; but such prohibition does not carry with it the same rights of interference with foreign vessels as are conferred by a regularly constituted blockade."

Dec. 6, 1876, Mr. Layard, British minister at Madrid, wrote to the Earl of Derby, giving an account of an interview with Señor Cánovas del Castillo, president of the council, in which Señor Cánovas is reported as saying:

"He did not see . . . why the questions which had been raised between them [the English and Spanish Governments] in consequence of the blockade, which, he admitted, had been wrongly instituted, as no state of belligerency existed between Spain and Sulu, should not be amicably settled."

73 Br. & For. State Papers, 932, 958, 965, 1004.

"By the first of these decrees, as you inform me, the Colombian Government, in the exercise of its authority, and expressly enforcing pertinent provisions of its commercial and revenue laws, declares the ports of Sabanilla and Santa Marta, on the Caribbean Sea, and the fluvial port of Barranquilla, closed to foreign commerce, and denounces against the goods which may be imported thither or exported thence, and against the vessels which may engage in trade with those ports, the forfeitures and penalties fixed by Colombian law for smuggling. . . .

"This Government, following the received tenets of international law, does not admit that a decree of a sovereign government closing certain national ports in the possession of foreign enemies or of insurgents has any international effect unless sustained by a blockading force sufficient to practically close such ports.

"Mr. Lawrence thus states the rule drawn from the positions taken by the Administrations of Presidents Jefferson and Madison during the struggles with France and England, which grew out of the attempt to claim the right of closure—as equivalent to blockade—without effective action to that end:

"'Nor does the law of blockade differ in civil war from what it is in foreign war. Trade between foreigners and a port in possession of one of the parties to the contest cannot be prevented by a municipal interdict of the other. For this, on principle, the most obvious reason exists. The waters adjacent to the coast of a country are deemed

within its jurisdictional limits only because they can be commanded from the shore. It thence follows that whenever the dominion over the land is lost, by its passing under the control of another power, whether in foreign war or civil war, the sovereignty over the waters capable of being controlled from the land likewise ceases. (Lawrence's note on Wheaton, Part II, ch. iv, § 5, 2d annotated ed., p. 846.)'

"The situation which the present decree assumes to create is analogous to that caused by the action of the Government of New Granada in 1861. The Granadian chargé d'affaires, Señor Rafael Pombo, on the 31st of March of that year, notified Mr. Seward that certain ports, among them Rio Hacha, Santa Marta, Cartagena, Sabanilla, and Zapote, all on the Caribbean coast, had been declared to be closed to commerce, whether of export or of import. There is this difference, however, that the Granadian Government then announced that war vessels of the confederation were to cruise about the ports closed to commerce for the purpose of seizing vessels which should be found violating the closure which had been decreed. It appears from Mr. Seward's note of acknowledgment to Señor Pombo, dated April 9, 1861, that the announcement then made was interpreted as a declaration that certain named ports were 'in a state of blockade which should *be rendered effective by national vessels*, and of which due public notice had been given.'

"While the Government of the United States, in 1861, thus confirmed the doctrine it had consistently maintained from the earliest days of the Republic, that nonpossessed ports might be effectually closed by a maritime blockade, the British Government then controverted the right of New Grenada to resort to such remedy. Answering an inquiry in the House of Commons, June 27, 1861, Lord John Russell, the secretary of state for foreign affairs, said:

"'The Government of New Granada has announced, not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty's Government, after taking legal advice, is that it is perfectly competent to the government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but in the event of insurrection or civil war in that country, it is not competent for its government to close the ports that are *de facto* in the hands of the insurgents, as that would be a violation of international law with regard to blockades.'

"His lordship added that orders had been given to the British naval commanders in the Caribbean Sea 'not to recognize the closing of these ports.' (See Parliamentary Debates, cited in Lawrence's Wheaton, 2d annotated ed., notes, pp. 46, 47, 48.)

"When in 1861 the civil war in the United States broke out, this Government maintained the position that the municipal closure of

domestic ports in the hands of the Confederate forces was a legitimate incident toward the maintenance of an effective blockade by sea. This was opposed by the British Government, and in the correspondence which then took place Lord John Russell repeatedly announced to Mr. Adams the same rule as he had previously announced with regard to the Granadian decree; and he finally appealed to his answer in the New Granada case for the purpose of showing that it was intended to make the rule universal. (United States Diplomatic Correspondence, 1861, pp. 90, 95, 117, 120, 177.) The British ministry ultimately went to the extreme of declaring that they would consider such a municipal enactment (that of the closure of non-possessed ports) as null and void, and that 'they would not submit to measures taken on the high seas in pursuance of such decree.' (Parliamentary Papers, 1862, North America, No. 1, p. 72; Lord Lyons to Lord J. Russell, August 12, 1861.)

"In a speech of Mr. Cobden, made on October 25, 1862 (cited in Lawrence's Wheaton, 2d annotated ed., p. 823, note), he said:

" 'It has been distinctly intimated to America that we do not recognize their *municipal* right in the matter; and if they were to proclaim, for example, that Charleston was not to be traded with, and did not keep a sufficient force of ships there, we should go on trading with the town just as if nothing had occurred. It is only upon condition that the blockade shall be effectively maintained as between belligerents that the European powers recognize it at all.'

"A recent authority, Professor Perels, judge of the imperial admiralty court in Berlin, in a treatise on international maritime law, published in 1882, writes thus:

" 'The embargo of domestic ports, no matter by what measures or for what purpose it takes place, as it has not the character of a real blockade, can not have the same consequences. It can indeed without question be maintained, in case of need, by means of the employment of force against such neutral ships as do not choose to acquiesce in it; likewise a seizure of such neutral ships as do not find themselves prepared to submit to the measures of embargo must be considered as allowable, and it must be held in the case of active resistance that even the destruction of such ships is allowable in accordance with the rules of war; but it is inadmissible, because not grounded on international law, to condemn as good prizes on account of their cargoes neutral ships resisting such embargo.' (*Op. cit.*, sec. 52.)

"And it is conceded by this eminent authority that there can be, without blockade, no closure of a port not in possession of the sovereign issuing the decree.

"The legislation by the Congress of the United States in 1861 relative to the closing of the ports of the South held by the Con-

federate armies was really conditioned on a blockade. As Mr. Seward wrote to Mr. Adams, July 21, 1861—

"'The law only authorizes the President to close the ports in his discretion, according as he shall regard exigencies now existing or hereafter to arise. . . . The passage of the law, taken in connection with attendant circumstances, does not necessarily indicate a legislative conviction that the ports ought to be closed, but only shows the purpose of Congress that the closing of the ports, if it is now or shall become necessary, shall not fail for want of power explicitly conferred by law. (United States Diplomatic Correspondence, 1861, p. 120.)'

"Under the authority so conferred certain ports were closed by formal proclamation of blockade which it thereupon became incumbent upon the Government of the United States to maintain effectively according to the prescriptions of international maritime law.

"After careful examination of the authorities and precedents bearing upon this important question, I am bound to conclude, as a general principle, that a decree by a sovereign power closing to neutral commerce ports held by its enemies, whether foreign or domestic, can have no international validity and no extraterritorial effect in the direction of imposing any obligation upon the governments of neutral powers to recognize it or to contribute toward its enforcement by any domestic action on their part. Such a decree may indeed be necessary as a municipal enactment of the state which proclaims it, in order to clothe the executive with authority to proceed to the institution of a formal and effective blockade, but when that purpose is attained its power is exhausted. If the sovereign decreeing such closure have a naval force sufficient to maintain a blockade, and if he duly proclaim such a blockade, then he may seize, and subject to the adjudication of a prize court, vessels which may attempt to run the blockade. If he lay an embargo, then vessels attempting to evade such embargo may be forcibly repelled by him if he be in possession of the port so closed. But his decree closing ports which are held adversely to him is, by itself, entitled to no international respect. Were it otherwise the *de facto* and titular sovereigns of any determinate country or region might between them exclude all merchant ships whatever from their ports, and in this way not only ruin those engaged in trade with such states, but cause much discomfort to the nations of the world by the exclusion of necessary products found in no other market.

"The decree of closure of certain named ports of Colombia contains no intimation of an ulterior purpose to resort to a proclaimed and effective blockade. It may, therefore, be premature to treat your announcement as importing such ulterior measures; but it gives me pleasure to declare that the Government of the United States will

recognize any effective blockade instituted by the United States of Colombia with respect to its domestic ports not actually subject to its authority. This Government will also submit to the forcible repulsion of vessels of the United States by any embargo which Colombia may lay upon ports of which it has possession, when it has power to effect such repulsion. But the Government of the United States must regard as utterly nugatory proclamations closing ports, which the United States of Colombia do not possess, under color of a naval force which is not even pretended to be competent to constitute a blockade. . . .

"It may not be improper to recapitulate in somewhat more of detail the historical attitude of the Government of the United States in regard to the question of closing non-possessed ports, in order that its consistency may be quite evident to you.

"As early as April 24, 1861, when Mr. Lincoln's administration had only been in office six weeks, but when it was already apparent that the secession movement then begun would speedily have possession of most of the ports of the Southern States, Mr. Seward addressed a circular to the ministers of the United States in Europe, in which he declared the adhesion of the United States Government to the rule that 'blockades, in order to be binding, must be effective; that is to say, maintained by forces sufficient really to prevent access to the coast of the enemy.' (United States Diplomatic Correspondence, 1861, p. 34.)

"When President Lincoln proclaimed, as he did on the inception of the civil war, a blockade of the Southern coast, the proclamation was followed by an announcement to France and to England that the blockade would be effective in the above sense; and it is important to observe that, enormous as were the profits to be gained by blockade running and doubtful as was at least the friendliness of certain European courts toward the United States, not one of the maritime powers of Europe complained that the blockade was not effective.

"Congress, it is true, adopted a few weeks later a municipal statute, as hereinbefore stated, authorizing the President, at his discretion, to close the Southern ports; but as to this measure the following observations are to be made: (*a*) The closure was to be a domestic act, incidental to the blockade, the permanency of which as a general measure during the civil war the President had already announced to foreign sovereigns. (*b*) It was to be effected in part by land forces. (*c*) Its institution was conditional upon the discretion of the President, which discretion was never exercised.

"It is as thus qualified and explained that Mr. Seward refers, in his correspondence with Mr. Adams and Lord Lyons, to the statutes

in question, but it is impossible not to see, in Mr. Seward's references, a latent appeal of great force against the action of those European powers which, at the beginning of this century, did not hesitate to convulse and devastate the world by decrees and orders in council closing ports they did not possess. They did this in the face of vehement and almost supplicatory remonstrances from the United States, and forced this Government, then young in the family of sovereignties, and naturally desirous of peace with all, most reluctantly and at great cost of blood and treasure to undertake, as at last the sole maritime contestant, wars against Great Britain and France to maintain the freedom of the seas and the invalidity of paper blockades.

"With this unimpeachable record behind us, no tangible objection could be made to the validity of a blockade which was effective enough to keep off multitudes of the most skillful navigators of those countries from the Southern ports of the United States, and the appeal had its immediate and inevitable effect. Great Britain and France, on the one hand, ceased to contest the validity and efficiency of the blockade of the Southern ports, and united, on the other hand, in the most solemn repudiation of the position formerly taken by them, that a belligerent can, by mere decree, give binding international effect to the asserted closure of a port he does not hold. And that ports not so possessed can not be closed, even by their legitimate sovereign, without the concomitant of a duly announced and effective blockade, may be accepted as now an established rule of international law."

Mr. Bayard, Sec. of State, to Mr. Becerra, Colombian min., April 24, 1885, For. Rel. 1885, 254.

The passage from Perels's work on international maritime law, translated at p. 256 of the Foreign Relations of the United States for 1885, seems to refer to the closure by a government of ports in its own possession, and not in the possession of insurgents. The language certainly is not specific on this point, but such evidently is the construction placed upon it in Mr. Bayard's note, in which it is declared to be conceded by Perels that there can be, without blockade, no closure of a port not in the possession of the sovereign issuing the decree. It is also to be observed that Perels, in referring to measures of force, admits their employment only as a means of preventing an actual entrance into the closed port, and disclaims the idea that the attempted entrance can be considered as being in itself an offensive or criminal act, since he declares that a vessel which has been seized in order to prevent her entrance can not be condemned as prize.

"Your despatch No. 9 of the 28th of March last, has been received. It refers to a decree of the Colombian Government closing those of the ports of that Republic which may be in possession of insurgents. Your course in protesting against that measure was prudent and is approved, it being in accordance with the views of the Department as to the public law and the treaty between the United States and

the Republic of Colombia." (Mr. Evarts, Sec. of State, to Mr. Koppel, consul at Bogota, No. 9, May 29, 1877, 86 MS. Desp. Consuls, 136.)

"Assuming that the Colombian Government is in possession of the ports which it has ordered, by the decree you comment on, to be closed to sailing vessels, and that there is in the closure no discrimination against the United States, there are no grounds on which the Government of the United States can at present interpose for the removal of such closure. A sovereign has a right, at least temporarily, to close his ports, or a portion of his ports to foreign trade, nor is such a closure invalidated by the fact that it extends to only certain classes of vessels.

"From information, however, received at this Department from the consul-general at Panama, it may be inferred that the closure is only for temporary purposes, and therefore that it may be hoped the grievances of which you complain may be soon removed." (Mr. Bayard, Sec. of State, to Mr. Mason, Dec. 20, 1886, 162 MS. Dom. Let. 393.)

"In your despatch No. 233, of December 14, you stated that you had received a copy of a decree, issued by the so-called National Assembly of Constituents, a copy of which you inclosed. By this decree it is stated that the National Assembly of Constituents, 'considering that all free and independent countries have the right to close to foreign commerce one or several of their ports, decree the ports of St. Marc, Gonaïves, Port de Paix, and Cape Haytien are provisionally closed to outside commerce, and the right of changing ports (échelle) granted to Grand Saline, Mole and Fort Liberté are suppressed.'

"It has not been deemed necessary heretofore to refer to this matter in detail, but, in connection with the question of the validity or effectiveness of the blockade, it may be well to point out that this Government, following the received tenets of international law, does not admit that the decree of a Government closing any national ports in the possession of foreign enemies or insurgents has any international effect unless sustained by a blockading force sufficient practically to close such ports. This question was fully considered by me in 1885, at a time when the Republic of Colombia attempted by proclamation to close certain of its ports to foreign commerce; and in my note of April 24, 1885, to Mr. Becerra, published in Foreign Relations of that year, page 254, the question was fully discussed, and the views therein expressed I now reiterate.

"You will also notify the authorities at Port au Prince that this Government will in due course present demands for indemnity for losses sustained or that may hereafter be sustained by reason of the refusal of those authorities to clear vessels for the ports declared to be blockaded while no actual blockade in fact existed. It is intended that a notice only should now be given, and the formal demand may await a more settled condition of affairs in Hayti."

Mr. Bayard, Sec. of State, to Mr. Thompson, min. to Hayti, No. 156, For. Rel. 1889, 494, 496.

"Minister for foreign affairs Nicaragua notifies closing Atlantic ports occupied by rebels. If any question affecting American vessels arises, consult note to Colombian minister, Foreign Relations, 1885, 254." (Mr. Hay, Sec. of State, to Mr. Merry, min. to Nicaragua, tel., Feb. 10, 1899, For. Rel. 1899, 548.)

See, to the same effect, Mr. Hay, Sec. of State, to Sec. of Navy, March 13, 1899, 235 MS. Dom. Let. 416.

President Balmaceda, by a decree of April 1, 1891, declared "the ports of Chañaral, Taltal, Antofagasta, Tocopilla, Iquique, Caleta Buena, Junin, Pisagua, and all intermediate landing places, are closed to commerce as long as . . . [they] may remain in possession of the revolutionary party." Lord Salisbury, on being advised by telegraph of this decree, cabled to Mr. Kennedy, British minister at Santiago, on April 10, "to inform the Chilean Government, without delay, that Her Majesty's Government can not admit their right to close by municipal decree ports in the effective posssesion of the Congressional party, or to impose fines or penalties on ships which, in the ordinary and regular course of trade, have visited such ports, or, generally, to inflict penalties under the decree." Mr. Kennedy was also to state that the Chilean Government would be held responsible for any loss or damage caused to British subjects under the decree, and that instructions had been sent to the British naval officers in Chilean waters "to protect British vessels from molestation on such grounds."

Parliamentary Paper, Chile, No. 1 (1892), 62, 68, 122.

The German minister at Santiago was also instructed to protest against the decree. (Id. 75, 81.)

In view of the fact that the American minister at Santiago reported that he had "obtained full and friendly assurances that American vessels will not be subjected to any inconveniences," the sending of any informal instructions to him on the subject was rendered unnecessary; but, on first hearing of the decree, the Government of the United States reserved the right to consider upon the facts and the law any case that might arise under it. (For. Rel. 1891, 109, 111.)

The British Government appears to have drawn a clear distinction between the right of the Chilean Government to enforce the decree by measures analogous to blockade and its right to refuse clearances to vessels for the ports declared to be closed. Sir T. H. Sanderson, under secretary of state, replying, on April 14, 1891, to an inquiry of the Liverpool Shipowners' Association whether the Chilean Government was justified in refusing clearances for ports north of the Chañaral to British vessels in the southern ports of Chile, stated that Lord Salisbury was "not aware of any rule of international law which would prevent the Chilean Government, under existing circumstances, from refusing clearance to any port lying in Chilean terri-

tory so long as the refusal applies to all foreign vessels alike;" that it was "entirely within the competence of the Chilean Government to decide whether such a step is, in their interest, necessary or not;" and that "the inconvenience which, unhappily, it must cause to neutrals, does not in itself furnish Her Majesty's Government with any ground for resistance or remonstrance."

May 1, 1891, Lord Salisbury telegraphed to Mr. Kennedy that much inconvenience and loss were being caused to British shipowners by the refusal of the Chilean authorities to grant clearances for the northern ports, and that strong complaints were made. "In addition to the loss arising from the interruption of voyages and consequent breaches of contract, it is represented," said his lordship, "that the vessels themselves are deteriorating, and the anchorage at Valparaiso is considered unsafe in winter. I have to request you to call the attention of the Chilean Government to this state of things, and ask whether something can not be done to remedy it. You should warn them that claims, which threaten to be very large, are already being prepared, based upon the provisions of Article XVII. of the treaty of 1854 between Great Britain and Chile."

May 9, 1891, Lord Salisbury wrote to the Liverpool Shipowners' Association that, while the British Government was willing to do what was in its power to protect British vessels from illegal interference, it could not "undertake to shield them from any legal action to which they may be liable while within Chilean jurisdiction, or upon their return to it, for having sailed with a false clearance, or without a clearance at all."

June 2 Mr. Kennedy reported that British mail steamers received a subsidy from the Chilean Government, and, unlike other steamers belonging to foreign companies, were obliged to make Valparaiso their port of departure and arrival for the transshipment of passengers and cargo, and that, under the circumstances, he had advised the Pacific Steam Navigation Company to comply with the wishes of the Chilean Government for a short period. Lord Salisbury, writing to him on the 23d of July, approved his action. It seems that little by little the Government, without withdrawing the decree, suffered its provisions to be disregarded, and that as early as the 4th of May Mr. Kennedy obtained permission for the clearance of vessels for foreign ports without any written pledge or bond binding them not to call at revolutionary ports. On the 27th of July Mr. Kennedy reported that the Chilean Government finally became convinced that the prohibition was ruining the wheat trade of the country, since the revolutionary ports were obtaining supplies from California, and even from Australia, and that he had been able to arrange with the minister of finance that cargoes of food supplies might be shipped subject to

a bond for twice the value of the cargo and upon a written assurance on his part that the cargo should be protected from molestation on the part of the revolutionary squadron. His action was approved.

Parliamentary Paper, Chile, No. 1 (1892), 77, 99, 103, 134, 143, 145, 154, 157, 179, 199, 213, 230, 234–235.

With reference to a decree of President Balmaceda, declaring certain ports in the possession of the Congressional Party in Chile to be closed to commerce, the *North German Gazette*, in an article which was understood to reflect the opinion of Prince Bismarck, declared that it would be necessary to contest the right to use constraint against neutral vessels trading with ports which the Government had not the force effectually to blockade. It was understood that other foreign powers took the same view, and the decree of President Balmaceda, to which objection was taken, was revoked.

Calvo, Droit Int. VI. § 428.

August 26, 1892, there was issued at Caracas an executive decree declaring the custom-houses at Ciudad Bolivar and Puerto Cabello to be "suppressed." Most of the members of the diplomatic corps, wrote Mr. Scruggs, then United States minister to Venezuela, "attach so little importance to it as to refuse to even transmit it to their respective governments, while none of them regard it as being anything more than a mere *brutum fulmen* of an important faction against its rival, who is now, and has been for weeks past, in actual possession of the ports named."

The Department of State replied:

"Your comments indicate that you have formed a just opinion of the ineffectiveness of such a measure under existing circumstances.

"Quite recently, on the occasion of a similar measure being decreed by the Government of Honduras, purporting to close the custom-house at Trujillo and La Ceiba, which were at the time in full possession of insurgent forces, I instructed Mr. Pacheco as follows:

"'Should this measure apply to any ports of which insurgents may gain possession, it would of course involve the question of blockade of ports held by insurgents, as in Chile during the late revolution.

"'The closure of domestic ports actually occupied and administered by the titular government, is in itself an extreme measure, working in many cases hardship to foreign commerce; but is entitled to respect so long as it may be duly enforced by adequate means.'"

Mr. Scruggs, min. to Venezuela, to Mr. Foster, Sec. of State, Sept. 7, 1892, For. Rel. 1892, 621; Mr. Foster Sec. of State, to Mr. Scruggs, min. to Venezuela, Sept. 24, 1892, id. 615.

See, also, id. 629-631, 635, where a report is given of the action of the U. S. S. *Kearsarge* in convoying the American mail steamer *Philadelphia* into Puerto Cabello.

In 1893 the Government of Nicaragua notified the Pacific Mail Steamship Company that its steamers must not call at San Juan del Sur. In view of the fact that the company was obliged under its contract with the United States to deliver mails at that port and that no notice of its blockade had been given, the company asked to be instructed as to whether the order of the Nicaraguan authorities should be obeyed. As the port in question was understood to be in the hands of the insurgents, the Department of State declined to instruct the company that its steamers should call there, and advised the Postmaster-General of its action. Subsequently the Government of Nicaragua declared the port of Corinto to be closed to shipping and ordered the steamers of the Pacific Mail Steamship Company not to touch there for the time being.

Mr. Gresham, Sec. of State, to the Postmaster-General, May 22, 1893, 192 MS. Dom. Let. 85; Aug. 15, 1893, 193 id. 158.

During the revolution in Venezuela, in 1899, when the Castro Government sought by a decree to close Puerto Cabello, which was in the hands of the opposition forces, the American and British naval officers then in Venezuelan waters took possession of the papers of vessels of their respective nationalities and granted them clearances when needed. It was said not to have been uncommon in Venezuela, in time of revolution, for American and other naval officers to grant clearances to vessels of their respective nationalities under such circumstances.

For. Rel. 1899, 784, 788.

"I have the honor to acknowledge the receipt of a communication from the State Department, dated August 15, 1900, transmitting a copy of a note addressed to the Secretary of State by the imperial German ambassador at this capital, wherein complaint is made against the orders of the military government of the Philippine Archipelago, whereby commercial intercourse with the inhabitants of the Sulu Islands was at one time prohibited and subsequently restricted to the ports in the possession of the military forces of the United States, in which ports it is subject to certain regulations.

"I note your statement that you 'shall be glad to transmit to the embassy your reply to its expressed hope that the military orders of which complaint is made will be rescinded.'

"Replying to your communication, I have the honor to state as follows:

"The Sulu Islands are now subject to military occupation. The right of the commander of the occupying force to regulate or prohibit trade with territory so occupied is one of the recognized and well-received laws and usages of war and nations. (9 How. (U. S.),

615; Lieber's Instructions to American Armies in the Field, sec. 5, clause 1; Bluntschli, I., sec. 8; Manning, p. 167; Birkhimer, p. 204.)

"In addition to the maintenance of military occupation of the Sulu Islands the military forces of the United States are engaged in suppressing an insurrection in a portion of the Philippine Archipelago accessible from the Sulu Islands. The military authorities conducting the military operations against said insurrection were at one time of the opinion that a military necessity existed for prohibiting commercial intercourse between the Sulu Islands and the outside world. Thereupon Admiral Dewey, as commander of the military forces of the United States in the Philippines, in June, 1899, issued the following order:

"'All trade with the Philippines is prohibited, except with the ports of Manila, Iloilo, Cebú, and Bakalota. Ships are hereby warned to go nowhere else in the Philippines.'

"Subsequently this order was modified by General Orders, No. 73, series of 1899, dated December 26, 1899; General Orders, No. 30, series of 1900, dated March 10, 1900, and General Orders, No. 34, series of 1900, dated March 13, 1900. Copies of said orders are herewith inclosed.

"The military authorities in command of the United States military forces in the Philippines are of opinion that the restrictions and regulations upon trade with the Sulu Islands, now enforced pursuant to said orders, are essential to meet the military necessity occasioned by the insurrection.

"These restrictions and regulations are emergency measures, and should be so considered. They are not intended as an evidence or declaration of the permanent policy or practice of the United States when the condition of peace shall prevail in the Philippines."

Mr. Root, Sec. of War, to Mr. Hay, Sec. of State, Oct. 15, 1900. Magoon's Reports, 335. See, also, another letter of same to same, same date, and of similar purport, id. 336–338.

See Mr. Hay, Sec. of State, to Herr von Holleben, German ambass., No. 537, Jan. 18, 1900, MS. Notes to German Leg. XII. 536.

"To close ports which are in the hands of revolutionists by governmental decree or order is impossible under international law. It may in a proper way and under proper circumstances and conditions in time of peace declare what of its ports shall be open and what of them shall be closed. But when these ports or any of them are in the hands of foreign belligerents or of insurgents, it has no power to close or to open them, for the palpable reason that it is no longer in control of them. It has then the right of blockade alone, which can only be declared to the extent that it has the naval power to make it effective."

Plumley, umpire, case of Compagnie Générale des Asphaltes de France, British-Venezuelan Mixed Commission, protocol of Feb. 13, 1903, Ralston's Report, 331, 336–337; citing Wharton, Int. Law Dig., §§ 359, 361; Hall, Int. Law, 727; Glass, Marine Int. Law, 105–107.

The same principle was followed by Duffield, umpire, in the case of the Orinoco Asphalt Co., German-Venezuelan Mixed Commission, protocol of Feb. 13, 1903, Ralston's Report, 586.

When, in 1903, the Dominican Government declared certain ports, which had fallen into the hands of revolutionists, to be closed to maritime commerce, the American diplomatic representative at Santo Domingo City declined to recognize the closure of any of the ports in question except by an effective blockading force. (For. Rel. 1903, 396, 405.)

IV. *BREACH OF BLOCKADE.*

1. Notice.

§ 1272.

Article 18 of the treaty between the United States and Great Britain of 1794 provides that every vessel may be turned away from every blockaded or besieged port or place, which shall have sailed for the same without knowledge of the blockade or siege; but she shall not be detained, nor her cargo, if not contraband, be confiscated unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper. And this treaty is conceived to be a correct exposition of the present law of nations upon this point. The intention must be manifested in such manner as to be equivalent to an attempt.

Fitzsimmons *v.* Newport Ins. Co. (1808), 4 Cranch, 185.

In the absence of such a treaty, the courts do not require notice: Field's Code Int. Law, § 892, citing 1 Kent Com. 150; The Circassian, 2 Wall. 135; Wheaton on Capture, 193–207; The Hallie Jackson, Blatchf. Prize Cases, 2, 48; The Empress, id. 175; except where the vessel sails without a knowledge of the blockade; The Nayade, 1 Newb. Adm. 366.

A vessel sailing ignorantly for a blockaded port is not liable to condemnation under the law of nations.

Yeaton *v.* Fry (1809), 5 Cranch, 335.

January 5, 1804, the British Admiralty announced, with reference to the blockade of the islands of Martinique and Guadaloupe, that orders had been sent to the British forces "not to consider any blockade of those islands as existing unless in respect of particular ports which may be actually invested, and then not to capture vessels bound to such ports unless they shall have been previously warned not to enter them." The blockade having subsequently been extended to Curaçao, Mr. Merry, the British minister at Washington, informed

the United States Government that he could not doubt that the blockade of that island would be "conducted conformably to the instructions," or orders, given with reference to Martinique and Guadaloupe. Held, that the master of an American vessel was, under the circumstances, excusable for proceeding towards Curaçao for the purpose of inquiring whether the blockade still continued. The court expressly reserved any opinion as to what would have been the effect of the master's conduct if the communication by Mr. Merry had not been made.

Maryland Ins. Co. *v.* Wood (1813), 7 Cranch, 402.

Under the proclamation of the President of April 19, 1861, only those who are ignorant of the blockade are entitled to the warning and indorsement mentioned in the proclamation.

The Revere (1862), 2 Sprague, 107.

The provision in the President's proclamation of the 19th of April, 1861, for *warning* vessels which approached the blockaded ports with a view to entering, did not protect a vessel that sailed for a blockaded port with knowledge of the blockade.

The Hiawatha, 2 Black, 677; The Admiral, 3 Wall. 603.

It is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it commences.

The Prize Cases, 2 Black, 635.

Notice may be express, to a particular government, or to a ship, or it may be inferred from all the facts, among which notoriety is to be especially considered. To proceed to the mouth of the blockaded port on the plea of there seeking information, exposes the vessel to serious suspicion of knowledge of blockade, and the mere hovering around a blockaded port, as if to seize some unguarded point to enter, is ground for seizure.

See The Cornelius, 3 Wall. 214.

Knowledge of a recently established blockade may be inferred from facts.

The Herald, 3 Wall. 768.

The bark *Pilgrim*, owned two-thirds by citizens of New Orleans and the other third by citizens of New York and Connecticut, and with a cargo consigned to owners in New Orleans, left Bordeaux, France, about May 8, 1861, after news of the blockade of the southern ports had reached that place, so that the American consul would give

no papers to vessels bound for such ports. In passing the Bahamas the *Pilgrim* obtained full information of the blockade. The master, however, continued on his voyage, and on July, 1861, was captured by the blockading vessels of the United States, the bark having run aground in one of the passes of the Mississippi in an attempt to enter the port of New Orleans. *Held*, That the cargo and two-thirds of the vessel were liable to confiscation as enemy's property, and the remainder for illicit trading with the enemy.

United States *v.* Hallock (1864), 154 U. S. 537.

June 29, 1898, the steamer *Adula*, 372 tons, belonging to the Atlas Steamship Company, a British corporation, was captured by the United States steamship *Marblehead*, on the charge of an attempt to run the blockade established at Guantanamo Bay, in Cuba. She was proceeding at the time under a charter, entered into on the preceding day at Kingston, Jamaica, to one Solis, a Spanish subject, at whose disposal she was placed for the conveyance of passengers from the Cuban ports of Manzanillo, Santiago, and Guantanamo to Kingston. Accompanying the charter there was a letter of instructions to the master, signed by the agent of the company at Kingston, by which the master was advised that on his arrival at Guantanamo, whither he was to proceed direct, he would no doubt find American war ships on the port; and he was directed, when signaled, to stop immediately and acquaint the commanding officer with the voyage; in which case, said the instructions, it was not thought that the officer would object to his continuing into port. The steamer was condemned, and the sentence was affirmed by the Supreme Court, Mr. Justice Brown delivering the opinion, the court finding, upon the facts, that those in charge of the vessel had actual knowledge of the existence of the blockade, and that their sailing for the port was therefore unjustifiable, and properly subjected the vessel to condemnation.

The Adula, 176 U. S. 361; affirming The Adula, 89 Fed. Rep. 351.

The President did "not find himself justified in exercising clemency" in this case. (Mr. Hill, Act. Sec. of State, to the Attorney-General, Feb. 13, 1901, 250 MS. Dom. Let. 651.)

As to the case of the *Greenan Castle*, at Manzanillo, see Mr. Hay, Sec. of State, to Sir J. Pauncefote, Brit. ambass., No. 1312, Jan. 13, 1899, MS. Notes to Brit. Leg. XXIV. 419.

"The British principle which makes a notification to foreign governments of an intended blockade equivalent to the notice required by the law of nations, before the penalty can be incurred" can not be conceded.

Mr. Madison, Sec. of State, report Jan. 25, 1806, Am. State Papers, For. Rel. II. 728.

"In addition to what is proposed on the subject of blockades in VI. and VII. articles, the perseverence of Great Britain in considering a notification of a blockade, and even of an intended blockade, to a foreign government, or its ministers at London, as a notice to its citizens, and as rendering a vessel, wherever found in a destination to the notified port, liable to capture, calls for a special remedy. The palpable injustice of the practice is aggravated by the auxiliary rule prevailing in the British courts, that the blockade is to be held in legal force until the governmental notification be expressly rescinded, however certain the fact may be that the blockade was never formed, or had ceased. You will be at no loss for topics to enforce the inconsistency of these innovations with the law of nations, with the nature of blockades, with the safety of neutral commerce, and particularly with the communication made to this Government by order of the British Government in the year 1804, according to which, the British commanders and vice-admiralty courts were constructed not to consider any blockade of the islands of Martinique and Guadaloupe as existing, unless in respect of particular ports which may actually be invested, and then not to capture vessels bound to such ports, unless they shall previously have been warned not to enter them."

Mr. Madison, Sec. of State, to Messrs. Monroe and Pinkney, ministers to England, May 17, 1806, Am. State Papers, For. Rel. III. 119, 121.

"The words of the communication are, 'that vessels must be *warned* not to enter.' The term *warn* technically imports a distinction between an individual notice to vessels and a general notice by proclamation or diplomatic communication; and the terms *not to enter* equally distinguishes a notice at or very near the blockaded port, from a notice directed against the original destination or the apparent intention of a vessel nowise approaching such a port." (Same to same, Feb. 3, 1807; id. 153, 155.)

Notification of blockade must be made directly to the governments of neutral powers.

Mr. Rush, Sec. of State, to Mr. Correa, Portuguese min., May 28, 1817, MS. Notes to For. Legs. II. 229.

On April 10, 1825, the Mexican minister at Washington requested the Department of State to give notice of the blockade of the castle of San Juan d'Ulloa by the Mexican forces. "He was informed that such a notification from a neutral was not according to the usage of nations. It is not necessary to the legality of a blockade maintained by a competent force and otherwise conforming to the law of nations that its existence should be promulgated by a neutral."

Mr. Clay, Sec. of State, to Mr. Neale, Oct. 25, 1825, 21 MS. Dom. Let. 174.

In the case of a vessel which had run the blockade of Vera Cruz, in Mexico, by the United States, without interference by the blockading

squadron, and which was captured on coming out, it was claimed that the capture was unlawful because no previous warning of the blockade was given, by an entry on the papers of the vessel or other mode of actual notice. As it appeared, however, that the master was fully aware from the commencement of the voyage of the existence of the blockade, it was held that no further notice was necessary.

Mr. Webster, Sec. of State, to M. de Sartiges, June 3, 1852, MS. Notes to French Leg. VI. 180; Mr. Hunter, Act. Sec. of State, to M. de Sartiges, July 29, 1852, id. 188.

The case was that of the *Jeune Nelly*, as to which see United States *v.* Guillem, 11 Howard, 47.

See Mr. Buchanan, Sec. of State, to M. Poussin, Jan. 17, 1849, MS. Notes to French Leg. VI. 122.

A vessel duly notified of the blockade of St. Juan de Nicaragua, by a British naval force, had no right to claim damages for seizure for breach thereof. (Mr. F. Webster, Act. Sec. of State, to Messrs. H. & D. Cotheal & Co., Sept. 20, 1842, 32 MS. Dom. Let. 420.)

"Neutrals proceeding to such ports can not lawfully be captured for the mere intent, express or implied, of entering them, but must be warned off by the blockading force; but after having thus been duly warned, if they shall again attempt to enter, they are liable to capture and condemnation as lawful prize."

Mr. Clayton, Sec. of State, to Mr. Bowlin, Jan. 24, 1850, 37 MS. Dom. Let. 419.

"The safest rule, in regard to the rights of both belligerents and neutrals involved in blockade, is believed to be contained in the 18th article of the treaty between the United States and Great Britain of the 19th of November, 1794, in the following words:

"'And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after the notice, she shall again attempt to enter, *but she shall be permitted to go to any other port or place she may think proper.*'

"A similar article is contained in many other treaties between the United States and foreign powers."

Mr. Seward, Sec. of State, to Lord Lyons, British min., Mar. 24, 1862, MS. Notes to Gr. Brit. IX. 142.

"The treaty between the United States and Venezuela of the 27th of August, 1860, did not sanction constructive but required actual notice of a blockade. It is true that this instrument has been terminated pursuant to a notice to that effect from the Venezuelan Govern-

ment. The stipulation adverted to, however, is believed to be based on public law."

Mr. Fish, Sec. of State, to Mr. Pile, min. to Venezuela, No. 13, Nov. 23, 1871, United States and Venezuela Claims Commission (1895), 450.

The seizure and detention of American vessels with their crews and property for attempting to enter ports, due notice of the blockade of which has not been given, will be regarded "as an act of hostility and wrong for which the prompt release of the vessels and crews, restitution of the property, and other suitable redress will be insisted upon."

Mr. Bayard, Sec. of State, to Mr. Preston, Haitian min., Oct. 29, 1888, For. Rel. 1888, I. 990.

See, also, President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, I. xiv–xv.

For notice given by Portugal of the institution and termination of the blockade of the port of Quissembo, on the west coast of Africa, north of Ambriz, in 1888, see For. Rel. 1888, II. 1394, 1395.

See, also, the following notices of the blockade:

Of the coast of Abyssinia, from Amphylla to a point opposite the island of Dufnein, in 1887. (For. Rel. 1887, 650.)

Of the blockade imposed by Portugal, Dec. 22, 1888, of ports of Mozambique, lying between the mouth of the Rovuma and the southern point of the bay of Pemba. (MS. Notes to Portugal, VII. 148.)

Of coast of Dahomey, by France, April 4, 1890. (MS. Notes to France, X. 197.)

"The *Haytian Republic* sailed from New York October 4, 1888, with cargo and mails for Turk's Island, Cape Haytien, Port de Paix, Miragoane, Aux Cayes, and Jacmel, and with mails for Gonaïves, St. Marc, and Port au Prince. Arriving at Gonaïves on the 16th of October, she sailed on the same day for St. Marc, and after a brief stop at that port proceeded to Miragoane, where she arrived on the 17th, discharged cargo, and sailed for Aux Cayes, where she arrived on the following day, the 18th. Thence she proceeded to Jacmel, where she arrived on the 19th, discharged cargo, and sailed on the same day for St. Marc.

"The decree of blockade of the ports of Cape Haytien, Gonaïves, and St. Marc was resolved upon by the provisional government of Légitime on the 15th of October, and made known to the foreign representatives in Port au Prince on the following day, but was not published in the official paper, *Le Moniteur*, until the 18th of October.

"The means of communication between Port au Prince, Miragoane, Aux Cayes, and Jacmel exclude the supposition that news of the proposed blockade could have reached Miragoane by October 17, Aux Cayes by October 18, or Jacmel by the 19th, and consequently the master of the *Haytian Republic* could not have been aware of any proclamation of blockade when, on October 19, he sailed from Jacmel

to St. Marc. Indeed, it is known that no notice of blockade was sent to Jacmel at that time, as that city and district were not in sympathy with the provisional government of General Légitime at Port au Prince. Therefore even the usual and ordinary means of communication between Port au Prince and the ports proposed to be blockaded had been interrupted.

"When the *Haytian Republic* was entering the port of St. Marc from the southward, late in the afternoon of the 20th of October, a steamer was sighted to the northward of the Bay of St. Marc, and it was afterwards observed that she was firing guns, but for what purpose was unknown.

"Upon arriving in the port of St. Marc, the master of the *Haytian Republic* was informed by a pilot that the steamer which had been discerned outside was the Haytian man-of-war *Dessalines*, and that she was blockading the port. This was the first intimation from any source the captain or any officer of the *Haytian Republic* had of any blockade.

"The *Haytian Republic* left St. Marc on the next morning, the 21st of October, and was captured outside by the *Dessalines*. . . . It appears that after the *Haytian Republic* had entered the harbor of St. Marc, on October 20, and there received her first intimation of any blockade, she made no effort whatever to escape, although she could easily under cover of night or with her superior speed at any time have gotten away had her master seen fit to do so or had he had any ground for supposing such action desirable. . . .

"The treaty between the United States and Hayti of November 3, 1864, contains the following provisions:

"'Article XVIII. And whereas it frequently happens that vessels sail for a port or place belonging to an enemy without knowing that the same is either besieged, blockaded, or invested, it is hereby agreed by the high contracting parties that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor any part of her cargo, if not contraband, be confiscated, unless, after notice of such blockade or investment, she shall again attempt to enter; but she shall be permitted to go to any other port or place she shall think proper, provided the same be not blockaded, besieged, or invested. Nor shall any vessel of either of the parties that may have entered into such port or place before the same was actually besieged, blockaded, or invested by the other, be restrained from quitting such place with her cargo, nor, if found therein after the reduction and surrender of such place, shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof.' . . .

"From the above stipulations it is manifest that so far as the proceedings against the *Haytian Republic* rest upon a charge of attempt-

ing to run a blockade, they were in clear violation of the express terms of the treaty, and wholly improper and inadmissible."

Mr. Bayard, Sec. of State, to Mr. Preston, Haytian min., Nov. 28, 1888, For. Rel. 1888, I. 1001.

The Haytian Government was required to release the vessel and pay an indemnity.

"3. Neutral vessels are entitled to notification of a blockade before they can be made prize for its attempted violation. The character of this notification is not material. It may be actual, as by a vessel of the blockading force, or constructive, as by a proclamation of the government maintaining the blockade, or by common notoriety. If a neutral vessel can be shown to have had notice of the blockade in any way, she is good prize and should be sent in for adjudication; but, should formal notice not have been given, the rule of constructive knowledge arising from notoriety should be construed in a manner liberal to the neutral.

"4. Vessels appearing before a blockaded port, having sailed without notification, are entitled to actual notice by a blockading vessel. They should be boarded by an officer, who should enter in the ship's log the fact of such notice, such entry to include the name of the blockading vessel giving notice, the extent of the blockade, the date and place, verified by his official signature. The vessel is then to be set free; and should she again attempt to enter the same or any other blockaded port as to which she has had notice she is good prize.

"5. Should it appear from a vessel's clearance that she sailed after notice of blockade had been communicated to the country of her port of departure, or after the fact of blockade had, by a fair assumption, become commonly known at that port, she should be sent in as a prize. There are, however, treaty exceptions to this rule, and these exceptions should be strictly observed."

Instructions to U. S. Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780.

In numerous treaties negotiated by the United States it is provided that, notwithstanding a diplomatic general notice of blockade, a neutral vessel can not be condemned for blockade running unless she had notice en route that the place in question was blockaded. (Treaty with Sweden, September 4, 1816; July 14, 1827; with Prussia, May 1, 1828; with Greece, December 10, 1837; with Sardinia, November 26, 1837.) In other treaties special notification is made dependent on the question of the knowledge or ignorance of the party seized. (Treaty of the United States with Great Britain, November 28, 1795; with France, September 30, 1800; with Hayti, November 3, 1864; with Italy, February 27, 1871.) "But notwithstanding these treaties,

the Government of the United States seems to look upon the diplomatic notice as superfluous, and to exact in all cases a special notification. The instructions of May 14, 1846, relating to the blockade of Mexican ports prescribe that no neutral vessel entering into a blockaded port can be captured or detained unless it has received from one of the blockading squadron special notice of the existence." (Martens Nouv. rec. IX. 167.) The proclamation of President Lincoln of April 19, 1861, declares that if, with the intention to violate the blockade, a ship attempts to leave or to enter one of the blockaded ports, there must be an examination by the commander of one of the blockading vessels, who shall take due note of the fact and date of the notice. Lord Lyons to Lord Russell, May 2, 1861; Mr. Seward to the minister of Spain, Archiv. Dip., 1861, ii, 265; iii, 438, 443. But the American prize courts have not accepted this opinion of the Executive, and courts have declared that a vessel could be taken prize without special notice, if the officers of the vessel had knowledge of the blockade, and were consequently chargeable with bad faith. (The Circassian, 2 Wall. 135.)

Fauchille, Blocus Maritime (Paris, 1882), 202–204.

For the notification by the United States, in 1846, of the blockade of the Mexican ports in the Pacific, see Br. & For. State Papers (1845, 1846), 1139.

"According to the Anglo-American rule, a public notification given by the belligerent to a neutral government is ordinarily sufficient to convict all subjects of that government of the requisite guilty intent, provided that the statements of the notice are fully borne out by the facts of the actual blockade." (Walker, Science of International Law, 520, cited by Charles Noble Gregory, in an article on the law of blockade, 12 Yale Law Review, April, 1903, 339, 341.)

2. Sailing towards Blockaded Port.

§ 1273.

"The fact of clearing out for a blockaded port, is in itself innocent, unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offence: the persisting in the intention to enter that port, after warning by the blockading force, is the ground for the sentence. . . .

"Vattel, b. 3, s. 177, says, 'All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy whoever *attempts* to enter the place, or carry any thing to the besieged, without my leave.' The right to treat the vessel as an enemy is declared, by Vattel, to be founded on the *attempt* to enter, and certainly this attempt must be made by a person knowing the fact."

Marshall, Ch. J., Fitzsimmons *v.* Newport Ins. Co. (1808), 4 Cranch, 185, 198.

A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as prize from the time of sailing, though she intend to call at another neutral port, not reached at time of capture, before proceeding to her ulterior destination.

The Circassian, 2 Wall. 135.

That a blockade runner is *in delicto* from the moment she sails, see The Galen (1901), 37 Ct. Cl. 89.

But a mere abandoned purpose, there having been no overt act to execute it, is not ground for seizure.

1 Kent Com. 147; The John Gilpin, Blatchf. Pr. Ca. 291.

The approach of a vessel to the mouth of a blockaded port for inquiry—the blockade having been generally known—is itself a breach of the blockade, and subjects both vessel and cargo to condemnation.

The Cheshire, 3 Wall. 231.

"If approach for inquiry were permissible it will be readily seen that the greatest facilities would be afforded to elude the blockade."

Field, J., The Cheshire, 3 Wall. 231, 235; s. p., The Spes, 5 C. Rob. 80; The Charlotte Christine, 6 C. Rob. 101.

Mere sailing for a blockaded port is not an offense, but where the vessel has knowledge of the blockade, and sails with the intention of violating it, she is liable to capture. A vessel setting sail from England on the 9th of September, 1861, with actual knowledge of a proclamation which the President of the United States made on the 19th of the April preceding, blockading certain Southern ports, had no right, under an allegation of a purpose to see if the blockade existed, to sail to one of the ports actually blockaded.

The Admiral, 3 Wall. 603.

Where a clearance of a vessel expressed a neutral port to be her sole port of destination, but the facts showed that her primary purpose was to get cargoes into and out of a port under blockade, the outward cargo, if obtained, to go to the neutral port named as the one cleared for, the fact that the vessel's letter of instructions directed the master to call off the blockaded port and, if he should find the blockade still in force, to get the officer in command of the blockading ship to indorse on the vessel's register that she had been warned off (in accordance with what the owners of the vessel asserted to be their understanding of neutral rights under the President's proclamation of the 19th of April, 1861), and *then* to go to the port for which the

clearance called, will not save the vessel from condemnation as prize, she having been captured close by the blockaded port, standing in for it, and without ever having made an inquiry anywhere whether the port was blockaded or not.

The Admiral, 3 Wall. 603.

Where a neutral vessel, which had apparently set out on a lawful voyage, was captured, she was restored, the only evidence against her being that, when captured, she was out of the most direct and regular course, which was explained by the fact of there having been rough weather, which made it desirable for her to take the course she did.

The Sea Witch, 6 Wall. 242.

"6. A neutral vessel may sail in good faith for a blockaded port with an alternative destination to be decided upon by information as to the continuance of the blockade obtained at an intermediate port. But, in such case, she is not allowed to continue her voyage to the blockaded port in alleged quest of information as to the status of the blockade, but must obtain it and decide upon her course before she arrives in suspicious vicinity; and if the blockade has been formally established with due notification, any doubt as to the good faith of such a proceeding should go against the neutral and subject her to seizure."

Instructions to U. S. Blockading Vessels and Cruisers, General Orders, No. 420, June 20, 1898, For. Rel. 1898, 780.

3. Attempt to Enter.

§ 1274.

A British prize sentence, condemning an American vessel, recited that, the vessel having been cleared for Cadiz, a port actually blockaded by the British, the master of the brig "persisted in his intention of entering that port, after warning from the blockading force not to do so." The condemnation occurred in August, 1800. By article 18 of the treaty between the United States and Great Britain of 1794 it was provided that if a vessel sailed for a blockaded port without knowledge of the blockade, she might be turned away, but should not be detained, nor the cargo, if not contraband, be confiscated, "unless after notice she shall again attempt to enter." It was held that "persisting in an intention" was not an "attempt to enter," and that the decree did not show a valid ground of condemnation. This being so, it was held that the parties might look to other evidence in the case. The facts were recited in a special verdict, by which it appeared that the vessel, instead of being first turned away, was,

though she had no previous knowledge of the blockade, simply detained, and that her master was drawn into certain conversations in which he used expressions which might be construed as evidence of an intention to sail for Cadiz, should he be liberated. These facts were held not to amount to an attempt again to enter that port. As to what might constitute such an attempt, the court observed: "Lingering about the place, as if watching for an opportunity to sail into it, or the single circumstance of not making immediately for some other port, or possibly obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port."

Fitzsimmons *v.* Newport Ins. Co. (1808), 4 Cranch, 185, 200.

No neutral can, after knowledge of a blockade, lawfully enter or attempt to enter the blockaded port; and to do so would be a violation of neutral character, which, according to established usages, would subject the property engaged therein to the penalty of confiscation.

McCall *v.* Marine Ins. Co., 8 Cranch, 59.

Preparations towards entering a blockaded port, such as hovering around it, with other acts from which an intention to enter may be inferred, are grounds for seizure, unless the blockade is exclusively for ingress or egress.

The Coosa, 1 Newb. Adm. 393; The Hiawatha, Blatchf. Pr. Ca. 1; The Empress, Blatchf. Pr. Ca. 175; Halleck, Int. Law (1861), ch. 23, § 23.

If a vessel is found without a proper license near a blockading squadron, under circumstances indicating intent to run the blockade, and in such a position that if not prevented she might pass the blockading force, she cannot thus, flagrante facto, set up as an excuse that she was seeking the squadron with a view of getting an authority to proceed on her desired voyage.

The Josephine, 3 Wall. 83.

A neutral professing to be engaged in trade with a neutral port situated so near to a blockaded port as to warrant close observation by the blockading squadron must keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the blockading line as to repel, so far as position can repel, all imputation of intent to break the blockade; and neglect of that duty may well justify capture and sending in for adjudication, though it might not justify a condemnation in the absence of evidence that the neglect was willful.

The Dashing Wave, 5 Wall. 170.

A neutral vessel, completely laden with a neutral cargo and at anchor on the neutral side of a river which washed a blockaded coast, drifted into hostile waters and was captured while temporarily at anchor there on suspicion of intent to break the blockade. It was held that temporary anchorage in waters occupied by the blockading vessels did not justify capture in the absence of other grounds.

The Teresita, 5 Wall. 180.

To justify a neutral vessel in attempting to enter a blockaded port she must be in such distress as to render her entry a matter of uncontrollable necessity.

The Diana, 7 Wall. 354.

During the blockade of Port Royal in 1861 a Spanish steam vessel, with the permission of the commander of the blockading squadron, put into that port in distress, and was there seized as prize of war, and used by the Government till June, 1862, when she was brought to New York and condemned. In June of the following year, however, the Government in the meantime using the vessel, a decree of restitution was ordered; but the vessel never was restored. Subsquently the case was referred to a commissioner to ascertain the damages for the seizure and detention, and final judgment was rendered by the court on his award. This judgment was reversed on account of the impropriety of one of the items included in the decree of the district court. But it was held that clearly the vessel was not lawful prize of war or subject to capture, and that her owners were entitled to fair indemnity, though it might well be doubted whether the case was not more properly a subject of diplomatic adjustment than of determination by the courts.

The Nuestra Señora de Regla, 17 Wall. 29.

4. Evidence.

§ 1275.

Evidence of intent to violate blockade may be collected from bills of lading, from letters and papers found on board the captured vessel, from acts and words of the owners or hirers of the vessel and the shippers of the cargo and their agents, and from the spoliation of papers in apprehension of capture.

The Circassian, 2 Wall. 135.

Intent to run a blockade may be inferred in part from delay of the vessel to sail after being completely laden, and from changing the ship's course in order to escape a ship of war cruising for blockade runners. A vessel and cargo, though owned by neutrals, may be con-

demned as enemy property because of the vessel being engaged in enemy trade and because of an attempt to violate a blockade and to elude visitation and search.

The Baigorry, 2 Wall. 474.

Presumption of an intent to run a blockade by a vessel bound apparently to a lawful port may be inferred from a combination of circumstances.

The Cornelius, 3 Wall. 214.

A vessel sailing through blockaded waters was seized on suspicion of intent to break the blockade. Besides the fact that her manifest bore date as of a day when only a part of the cargo was laden, her bills of health and clearance pointed to one port as her port of destination, while the captain's letter of instructions required him to stop at another, not in a direct line, for instructions. The vessel's bills of health specified six men and no passengers, there being, in fact, one passenger; and the provisional certificate of registry represented as sole owner one person, and other papers another. It was held that these circumstances justified the seizure.

It further appeared that the vessel's name had been changed, and that her master had ten months before commanded a blockade runner. Not only was her ownership in doubt, the ostensible ownership being apparently but a mere cover, but no claim was put in for her, except by the captain, who put in a claim for the ostensible owners, though without instructions from them and only in his capacity of master. The evidence, too, was very strong that a portion of the cargo was enemy's property. Under these circumstances condemnation was decreed.

The Jenny, 5 Wall. 183.

The British steamship *Newfoundland* was seized off the coast of Cuba July 19, 1898, by a United States cruiser on a charge of attempt to violate the blockade of Havana. After the preparatory testimony was taken, an order was made for further proof, and on the subsequent hearing the vessel and cargo were condemned. This sentence the Supreme Court reversed. The case was one chiefly of fact. It was alleged that the vessel was loitering with intent to seize an opportunity to run into Havana: that her usual lights were not displayed, and that she was out of her proper course. These allegations were disputed, and the court was unwilling, upon the mere concurrence of a number of "suspicious circumstances," each one of which "standing alone" could be "explained," to hold that guilt was established. The court below, in discussing the proof of loitering,

observed that it fell "very far short" of the inculpatory evidence in the cases of certain sailing vessels, which the Government had cited as precedents for condemnation; but suggested that proof less full and precise might be accepted in the case of steam vessels, owing to their superior power of movement. "Undoubtedly there is a difference," said the Supreme Court, "but if steam has increased the power of blockade runners, it has increased in greater degree, when conjoined with the range of modern ordnance, the power of blockade defenders. We recently had occasion to consider their power, and decide that a single modern cruiser might make a blockade effective." It was ordered that the vessel and cargo be restored, but without costs or damages.

The Newfoundland (1900), 176 U. S. 97; citing the Olinde Rodriguez, supra.

The case of the *Newfoundland* in the court below is reported in 89 Fed. Rep. 99, 510.

5. Destination.

§ 1276.

See, as to "Continuous voyages," supra, § 1180.

Destination alone justifies seizure and condemnation of ship and cargo in voyage to ports under blockade; and such destination justifies equally seizure of contraband in voyage to ports not under blockade; but in the latter case the ship, and cargo, not contraband, are free from seizure, except in cases of fraud or bad faith.

The Bermuda, 3 Wall. 514.

For a criticism of this case, see 3 Phillimore Int. Law (3d ed.), 460.

A vessel destined for a neutral port with no ulterior destination for herself, and none by sea for her cargo, to a blockaded place, violates no blockade.

The Peterhoff, 5 Wall. 28.

As to the case, see 3 Phillimore Int. Law (3d ed.), 395, 479.

A cargo shipped from a neutral country by neutrals resident there, and destined ostensibly to a neutral port, was restored with costs after capture in a suspicious region, and where the vessel on its outward voyage had violated a blockade; there having been nothing to fix on the neutrals themselves any connection with the ownership or outward voyage of the vessel (which was itself condemned), nor anything to prove that their purposes were not lawful. But a certain portion of the cargo, which had been shipped like the rest, except that the shipper was a merchant residing and doing business in the enemy's country, was condemned.

The Flying Scud, 6 Wall. 263.

A vessel was condemned for intended breach of the blockade of the southern coast, having been found near Great Abaco Island, with no destination sufficiently proved, without sufficient documents, with a cargo of which much the largest part consisted of contraband of war, and with many letters addressed to one of the blockaded ports, for which her chief officer declared that she meant to run.

The Adela, 6 Wall. 266.

6. Egress.

§ 1277.

"As to violating a blockade by coming out with a cargo, the time of shipment is very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port. The Betsey, 1 Rob. 93; The Frederick Molke, id. 72; The Neptunus, id. 170. A neutral ship departing can only take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade; if she afterwards take on board a cargo, it is a violation of the blockade. The Vrouw Judith, id. 1 Rob. 150; The Rolla, 6 Rob. 364. Where a ship was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade. The Potsdam, 4 Rob. 89; The Juffrouw Maria Schroeder, id. note (a). But a ship which had been purchased by a neutral of the enemy in a blockaded port, and sailed from thence on a voyage to the neutral country, was held liable to condemnation. The General Hamilton, 6 Rob. 61. And where the vessel was captured on a voyage to the blockaded port, in ballast, she having sailed for the purpose of bringing away goods which had become the property of neutral merchants before the date of the blockade, she was held liable to condemnation. The rule of blockade permits an *egress* to ships innocently in the port before the restriction was imposed, and even with cargoes, if previously laden; but in the case of *ingress*, there is not the same reason for indulgence: there can be no surprise upon the parties, and, therefore, nothing short of a physical necessity is admitted as an adequate excuse for making the attempt of entry. The Comet, Edwards, 32. A marine blockade is not violated by sending goods to the blockaded port, or by bringing them from the same, through the interior canal navigation of the country. A mere maritime blockade, effected by a force operating only at sea,

can have no operation upon the interior communications of the port. The Ocean, 3 Rob. 297; The Stert, 4 Rob. 65. But goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, and under charter-party with the ship proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation. The Maria, 6 Rob. 201. The penalty for a breach of blockade is remitted by the raising of the blockade between the time of sailing from the port and the capture. When the blockade is raised, a veil is thrown over every thing that has been done, and the vessel is no longer taken *in delicto*. The *delictum* completed at one period is by subsequent events entirely done away. The Lisette, 6 Rob. 387. A neutral ship coming out of a blockaded port in consequence of a rumour that hostilities were likely to take place between the enemy and the country to which the ship belongs is not liable to condemnation, though laden with a cargo, where the regulations of the enemy would not permit a departure in ballast. The Drie Vrienden, Dodson, 269. But the danger of seizure and confiscation by the enemy, must be immediate and pressing. The mere apprehension of possible and remote danger will not justify bringing a cargo out of a blockaded port. The Wasser Hundt, id. 270, note."

Note of Wheaton to Olivera *v.* Union Ins. Co. (1818), 3 Wheaton, 183, 196, 198.

"Now, with respect to the matter of blockade, I must observe, that a blockade is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connexion and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation. 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 a neutral ship departing, can only take away a cargo *bonâ fide*, *purchased and delivered*, before the commencement of the blockade: if she afterward takes on board a cargo, it is a fraudulent act, and a violation of the blockade."

Sir William Scott, in the case of The Vrouw Judith, 1 C. Rob. 151.

Quoted in Mr. Buchanan, Sec. of State, to Mr. Poussin, French min., Jan. 17, 1849, in relation to the case of the *Jeune Nelly* (United States *v.* Guillem, 11 How. 47), the decision of which by the United States district court at New Orleans was reported in the *Picayune* of Dec. 14, 1847. (MS. Notes to French Leg. VI. 122.)

Cited, also, in Mr. Cass, Sec. of State, to Mr. Mason, min. to France, No. 190, June 27, 1859, MS. Inst. France, XV. 455.

The *Jeune Nelly*, a French vessel, ran the blockade of Vera Cruz, Mexico, by the United States forces without interference by the blockading squadron. On coming out, however, she was captured by the U. S. S. *Hunter*, but, being almost immediately afterwards wrecked, was not brought in for adjudication. The French Government presented a claim for damages on the ground that, as the vessel was permitted to enter the port, she was exempt from capture on going out unless previously warned by entry on her papers or other mode of actual notice. The United States declined to admit this contention, and maintained that nothing short of an intentional assent (of which there was no evidence) on the part of the blockading force to the entrance of the vessel would have sufficed to give her immunity from the operation of the blockade. "When the blockade," said the Department of State, "is actually maintained by a sufficient force, and when the captured vessel, with full knowledge of its existence, and without the consent of the blockading squadron, enters the port, the question how far the entry might have been prevented by greater activity or different measures on the part of the blockaders, is not material and is never examined. The vessel being thus in port, in breach of the blockade, was of course liable to capture in attempting to pass out."

Mr. Hunter, Act. Sec. of State, to M. de Sartiges, French min., July 29, 1852, MS. Notes to French Leg. VI. 188.

See, also, Mr. Buchanan, Sec. of State, to M. Poussin, Jan. 17, 1849, MS. Notes to French Leg. VI. 188; Mr. Webster, Sec. of State, to M. de Sartiges, June 3, 1852, MS. Notes to French Leg. VI. 180.

As to the case of the *Jeune Nelly*, see United States *v.* Guillem, 11 Howard, 47.

7. CAPTURE AND PENALTY.

§ 1278.

"11. Blockade running is a distinct offense, and subjects the vessel attempting, or sailing with the intent, to commit it, to seizure without regard to the nature of her cargo. The presence of contraband of war in the cargo becomes a distinct cause of seizure of the vessel, where she is bound to a port of the enemy not blockaded, and to which, contraband of war excepted, she is free to trade."

Instructions to United States Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781.

The capture of a vessel for violation of blockade may be lawful, if made by a national vessel, though the latter be not part of the blockading force.

The Memphis, Blatchf. Prize Cases, 260.

The penalty for breach of blockade is the confiscation of the ship, and, as a general rule, of the cargo. But if it be clearly established

by the proofs found on board at the time of the capture, that, at the inception of the voyage the owners of the cargo stood clear, even from a possible intention of fraud, their property will be excepted from the penal consequences of the breach of blockade.

Halleck, Int. Law (3d ed., by Baker), II. 208–209, citing Duer on Insurance, I. 683–685.

"In the absence of rules in relation to blockades in time of peace, those applicable to blockades in time of war are the only ones according to which the case of the *Lone* is to be considered. Whether seized in consequence of the one or the other description of blockade, the duties of the captors are the same, both with reference to the captured vessel, which they are bound so to secure as to insure their continued possession of it, and to her crew, who are to be treated with all the humanity and kindness which are consistent with the security of the prize, and which, it is gratifying to perceive from your note, have been extended to citizens of the United States detained by naval forces of France. It would be to the President a cause of sincere regret if anything connected with the case under consideration should lead to a change in the conduct of the officers commanding those forces towards American citizens falling into their hands of which the United States would have just cause to complain."

Mr. Vail, Act. Sec. of State, to M. Pontois, Oct. 23, 1838, MS. Notes to French Leg. VI. 38.

"The Department has been informally apprised that Commander Woodhull, of the United States steamer *Connecticut* recently exacted, as a condition of the release of members of the crew of the British schooner *Adeline*, captured for a breach of the blockade, that they should enter into an engagement not to be employed in a similar proceeding, in future. It occurs to this Department that, as the requirement referred to is not warranted by public law, the commanders of blockading vessels should be instructed not to exact any similar condition for the release of persons found on board of vessels charged with a breach of the blockade.

"It may be lawful to detain such persons as witnesses, when their testimony may be indispensable to the administration of justice, but, when captured in a neutral ship, they can not be considered and ought not to be treated as prisoners of war. Angus Smith, John Mooney and John H. McHenry, the alleged British subjects above referred to, are consequently to be considered as absolved from the obligation represented to have been required of them by Commander Woodhull."

Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, Dec. 31, 1861, 56 MS. Dom. Let. 133.

8. Deposit of Offense.

§ 1279.

Where an American vessel had entered and cleared from a port under blockade, and, while returning to New Orleans, was captured by a vessel belonging to the French blockading squadron, from which the captain of the former rescued her and brought her to her destination, the port of New Orleans; and demand subsequently being made of the Executive to deliver up the vessel and cargo, both on account of the said breach of blockade and rescue, it was advised that the captors had no right of property in said vessel and cargo, and that the liability of the vessel to condemnation, if it ever existed, had ceased by the termination of her voyage at the port of her destination.

It was also advised that the case called for a judicial decision settling certain questions of fact concerning the legality of the blockade, capture, etc., before the Executive could act, and that, as independently of this, there was no constitutional right vested in the Executive to deliver up the property of an American citizen, claimed by him as his own, and in his actual possession, and not condemned, nor legally adjudged to belong to another.

Grundy, At. Gen., 1838, 3 Op. 377.

The offense of breach of blockade "can not travel onwards with the vessel beyond the termination of the return voyage. If captured, or recaptured, at any stage of that voyage, she is taken *in delicto* and liable to be condemned; but if, as in the present case, she terminates it in safety, that liability is viewed as having ended."

Mr. Vail, Act. Sec. of State, to M. Pontois, French min., Oct. 19, 1838, MS. Notes to French Leg. VI. 32.

See Mr. Vail, Act. Sec. of State, to Mr. Cass, min. to France, No. 32, Nov. 6, 1838, MS. Inst. France, XIV. 251.

A cargo taken from a port in violation of a blockade, with the intent to transship it at an intermediate port for its port of ultimate destination, remains liable to capture and condemnation after the transshipment.

The Thompson, 3 Wall. 155.

The liability of a vessel to capture and condemnation for breach of blockade ceases at the end of her return voyage.

The Wren, 6 Wall. 582.

"The liability of a blockade runner to capture and condemnation begins and terminates with her voyage. If there is good evidence that she sailed with intent to evade the blockade, she is good prize

from the moment she appears upon the high seas. Similarly, if she has succeeded in escaping from a blockaded port she is liable to capture at any time before she reaches her home port. But with the termination of the voyage the offense ends."

Instructions to United States Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781.

V. *CESSATION OF BLOCKADE.*

1. Termination.

§ 1280.

The blockade of the *coast of Louisiana*, as established on the coast of the Southern States generally, by the President's proclamation of April 19, 1861, was not terminated by the capture of the forts below New Orleans by Commodore Farragut and the occupation of the city by General Butler, and the proclamation of the President of the 12th of May, 1862, declaring that after June 1 the blockade of the port of New Orleans should cease. It therefore remained in force at Calcasieu, on the western extremity of the coast of Louisiana.

The Baigorry, 2 Wall. 474; The Josephine, 3 Wall. 83.

The fact that the master and mate saw no blockading ships off the port where their vessel was loaded, and from which she sailed, is not enough to show that a blockade, once established and notified, had been discontinued.

The Baigorry, 2 Wall. 474.

A public blockade, that is to say, a blockade regularly notified to neutral governments, and as such distinguished from a simple blockade or such as may be established by a naval officer acting on his own discretion or under direction of his superiors, must, in the absence of clear proof to the contrary, be presumed to continue until notification is given by the blockading government of its discontinuance.

The Circassian, 2 Wall. 135; The Baigorry, id. 474.

The occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing, the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war. Still less does such occupation terminate such a blockade proclaimed and maintained not only against the city, but against the port and district commercially dependent upon it and blockaded by its blockade.

The Circassian, 2 Wall. 135.

Wharton, in his International Law Digest, III. 364, following Hall (3rd ed.), 656, says: "This ruling conflicts with Thirty Hogsheads *v.* Boyle, 9 Cranch, 191. Damages were afterwards given by the mixed commission to the owners of the Circassian."

He also quotes Lorimer, Law of Nations, 145, who says: "A British ship, the *Circassian*, was actually seized and confiscated by the American prize court for attempting to run the blockade at New Orleans *after* New Orleans had been retaken and was in possession of the North, and she was restored only under the mixed commission appointed by the treaty of Washington at the close of the war."

There is nothing in these comments to indicate that the decision had been carefully examined, and it is obvious that Lorimer, since he speaks of the ship having been "restored" by the mixed commission, was not acquainted either with the powers or the proceedings of that body.

It may be accepted as self-evident, as a general proposition, that the capture of a blockaded port by the blockading belligerent terminates his blockade of such port, since he could hardly blockade himself; nor does it necessarily appear that this proposition was denied in the case of the *Circassian*. The facts were that the Government of the United States, by a formal proclamation, assumed to continue the blockade of the *port* of New Orleans till July 1, 1862, though the occupation of the *city* of New Orleans was effected by the United States troops on the 2d of May. The *port* of New Orleans and the *city* of New Orleans were not the same; and the court drew a sharp distinction between the two things. "It may be well enough conceded," said the court, "that a continuous and complete possession of the city and the port, and of the approaches from the Gulf, would make a blockade unnecessary, and would supercede it. But, at the time of the capture of the *Circassian* there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade." Mr. Justice Nelson, however, in his dissenting opinion, contended that at the time when the vessel was seized both "the city and port of New Orleans were reduced, and full authority of the United States extended and held over them." (2 Wall. 150, 156.)

The same difference of opinion as to the facts apparently existed in the mixed commission, which, by a majority of votes, awarded compensation to the owners of the vessel. Although the award does not disclose the reasons on which it was founded, the dissenting opinion of Mr. Frazer, the American commissioner, indicates that they were the same as those maintained by Mr. Justice Nelson. Mr. Frazer's dissent was based solely upon the facts. At the close of an extended opinion, he said: "Comments and criticisms upon the judgment of the court had fallen under my eye; trusting to which, I confess, I had been somewhat impressed with serious doubts (to say the least) of the legality of the condemnation. But a very careful study of the case shows that, in making such criticisms, no account has been taken of the important fact that the possession of the United States forces at New Orleans did not extend to the whole port when the ship was seized; no such entire possession being anywhere directly asserted. That the error is one of inference, resulting from the fact, doubtless, that the wider area of the port, is contradistinguished from

the city of the same name, has usually escaped attention. It follows, therefore, that the principle supposed to be violated by the court was really not violated at all, and that the question was not that which has sometimes been supposed. It is not, I may hope, improper to say that the best care and judgment which I am able to bring to the consideration of the case has resulted in a clear conviction that the condemnation of the *Circassian* was correct." (Moore, Int. Arbitrations, IV, 3911, 3920, 3922.)

"It is advisable, where the exercise of a belligerent right is in doubt, to avoid, so far as practicable, a strained interpretation of the facts for the purpose of supporting the belligerent claim." (Mr. Day, Sec. of State, to Secretary of Navy, July 19, 1898, 230 MS. Dom. Let. 272.)

A vessel having been captured by a United States cruiser on June 29, 1898, for attempting to go to Guantanamo, Cuba, of which a blockade had been established by Admiral Sampson, it was contended that, at the time of the capture, the port of Guantanamo was in the possession and control of the United States and that the blockade was thereby terminated. The town of Guantanamo is eighteen miles from the mouth of Guantanamo Bay. The harbor was held by United States naval vessels and by a party of marines who occupied the crest of a hill on the west side of the harbor near its entrance, but the town at the head of the bay was still held by the Spanish forces, as were several other positions near by, and the campaign in the neighborhood was in active progress, and encounters between the American and Spanish troops were of frequent occurrence. Under these circumstances the court held that "the blockade was still operative as against vessels bound for the city of Guantanamo. The occupation of the city," continued the court, "terminates a blockade because, and only because, it supersèdes it, and if a vessel be bound to a port or place beyond, which is still occupied by the enemy, the occupation of the mouth of the harbor does not necessarily terminate the blockade as to such places."

The Adula, 176 U. S. 361; affirming 89 Fed. Rep. 351, and citing The Circassian, 2 Wall. 135.

2. Suspension.

§ 1281.

When a blockade has been abandoned and then renewed, there should be either a new proclamation by the blockading sovereign, or vessels making for the blockaded port (after notice of the withdrawal) ought to be "premonished of their danger and permitted to change their course as they might think proper."

Mr. Madison, Sec. of State, to Mr. C. Pinckney, min. to Spain, Oct. 25, 1801, Am. State Papers, For. Rel. II. 476.

An extract from this instruction is given in 3 Wheat., appendix, note 1. It is needless to say that a blockade is suspended where the blockading vessels are driven away by a force of the enemy.

The rule "which subjects to capture vessels, arriving at a port, in the interval between a removal and return of the blockading force," is a deviation from international law.

Mr. Madison, Sec. of State, report of Jan. 25, 1806, Am. State Papers, For. Rel. II. 728.

The blockade of Charleston, South Carolina, was carried into effect on May 11, 1861, when the U. S. S. *Niagara* took her position there. Subsequently, the *Niagara* was ordered to be replaced by the steamer *Harriet Lane*, but, owing to some accident, the latter failed to reach the station till a day or two after the *Niagara* had left. Without discussing the effect that this absence of the blockading force might have on any vessel that had entered or departed during that brief time, Mr. Seward maintained that it had not so far impaired the blockade as to render necessary a new notice of its existence.

Mr. Seward, Sec. of State, to Lord Lyons, British min., May 27, 1861, MS. Notes to Great Britain, VIII. 429.

In a circular of Feb. 5, 1863, to the members of the diplomatic corps, Mr. Seward, referring to "recent events" at Galveston, Texas, which might create an impression that the blockade of that port had been "interrupted," said that the blockade "was resumed immediately and will be continued until further notice," and that, "although due notice of such resumption will probably have been given by the commander of the blockading squadron to vessels which may attempt to enter Galveston, it is deemed advisable to communicate a similar notice to you." (MS. Notes to Netherlands Leg. VI. 228.)

Fauchille, while pushing his vindication of neutral rights to their extreme limit, holds that the United States accept the position of Sir W. Scott that a blockade is not broken by an accidental dispersion of the blockading squadron through stress of weather. "In 1800, the United States held that a blockade was maintained notwithstanding a temporary dispersion of the blockaders by storm (Mr. Marshall to Mr. King, September 20, 1800), and the same view was enforced by Mr. Mason in his instructions to the naval commanders of December 24, 1846." He admits, also, that the same position is taken by Phillimore, iii, § 294; 1 Kent, 365; and other high authorities. But he proceeds to cite the opinion of Ortolan (II. 311, and also Deane on Blockade, 51) to the effect that while a blockade is not vacated permanently by such a dispersion, it is suspended while the dispersion continues, so that vessels entering during such an interval are not liable to be seized for blockade running. He proceeds to argue that the preponderance of reason and of authority is with the

position that when a blockading force is dispersed by stress of weather or by other causes, the blockade is broken, and can not be renewed except by notice, as if it were a new blockade.

Fauchille, Blocus Maritime, 155.

"If the blockading vessels be driven away by stress of weather, but return without delay to their stations, the continuity of the blockade is not thereby broken; but if they leave their stations voluntarily, except for purposes of the blockade, such as chasing a blockade runner, or are driven away by the enemy's force, the blockade is abandoned or broken. As the suspension of the blockade is a serious matter, involving a new notification, commanding officers will exercise especial care not to give grounds for complaints on this score."

Instructions to U. S. Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780.

VI. *AMELIORATIONS.*

1. Special Concessions.

§ 1282.

It was observed by Lord Stowell that a license expressed in general terms, purporting to authorize a vessel to carry a cargo into or out of any of the enemy's ports, would not authorize her to enter or depart from a port under blockade; in other words, that the blockaded port would be considered as an exception to the general license, unless it was specially designated.

Twiss, Law of Nations, Rights and Duties in Time of War, § 119, p. 227, citing The Byfield, Edward's Adm. 188.

Twiss says that the foregoing dictum of Lord Stowell seems rather to conflict with the view taken by him in an earlier case, in which he held that, when a license had been granted to certain vessels, pursuant to a power given to His Majesty in council under an act in Parliament, to import Spanish wool from ports of Holland, it operated to protect the parties acting under it from the effects of a blockade which had been notified on the same day on which the license was granted. (The Hoffnung, 2 C. Rob. 162.)

It was subsequently held by Sir Alexander Croke, in the vice-admiralty court at Halifax, that the decision of Lord Stowell in the case of the Hoffnung remained untouched by the opinion expressed by him in the case of the Byfield, and that, although there was no express provision in a license or in a blockading order to that effect, yet, whenever it appeared to have been the *intention* of the government that the permission given by the license should not be suspended by an order of blockade, it was not affected by such order. (The Orion, Stewart's Reports, 506.)

A permit to enter or depart from a blockaded port, issued by an officer who has no authority to grant it, is invalid, and will not save a vessel from condemnation on the charge of blockade running.

The Sea Lion, 5 Wall. 630; s. p., The Ouachita Cotton, 6 id. 521; s. p., The Reform, 3 id. 617; s. p., Coppell *v.* Hall, 7 id. 542.

Where, in time of war, a foreign vessel, availing herself of a proclamation of the President of May 12, 1862, entered the port of New Orleans, the blockade of which was not removed, but only relaxed in the interests of commerce, she thereby assented to the conditions imposed by such proclamation that she should not take out goods contraband of war, nor depart until cleared by the collector of customs according to law.

United States *v.* Diekelman, 92 U. S. 520.

It is competent for a belligerent power to limit the operation of a blockade, provided that the limitation applies to all neutral nations in an equal manner. An example of such a limitation is the blockade established by the commanders of the French and British fleets, June 1, 1854, of the mouths of the Danube, "in order to prevent all transportation of supplies to the Russian armies." Again, when Great Britain declared a blockade of the ports of the continent of Europe from Brest to the river Elbe, the coast was divided into two parts, one of which was to be considered as rigorously blockaded, while the other was "open to the navigation of neutral vessels, laden with other goods than contraband of war or enemy's property," provided such vessels had not been laden in or were not proceeding to an enemy port and had not previously violated the blockade.

Twiss, Law of Nations, Rights and Duties in Time of War, § 118, p. 226.

By the law of nations "a belligerent may not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of states not engaged in the war. The foundation of this principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy."

Twiss, Law of Nations, Rights and Duties in Time of War, § 120 p. 229, quoting the language of Dr. Lushington, in the case of the Franciska, 2 Spinks, 135.

This case referred to the British order in council of March 29, 1854, under which Russian merchant vessels in the British dominions were allowed six weeks for loading their cargoes and departing and were then exempted from capture while on the voyage to their destination. It was held that during the interval provided by this order no valid

blockade of the Russian ports in the Baltic could be established by the British fleet. "It is obvious," says Twiss, "that so long as enemy vessels are allowed by a belligerent power freely to enter or to come out of enemy ports, the condition of things, which alone authorizes a belligerent to interfere at all with the trade of neutrals does not exist, namely, the necessity of interdicting all communication by way of trade with the ports in question, in order to compel the enemy to submission." The decision of Dr. Lushington was confirmed by the Lords of Appeal, but, in rendering their decision, their lordships suggested that enemy ships found at the outbreak of war in ports which they had entered in time of peace, with the expectation that it would continue, might be considered as forming an exceptional class, so that an express permission to enter their port of destination, though it was blockaded, might perhaps not affect the validity of the blockade. They might, said their lordships, be regarded as falling within the rule with regard to licenses granted in particular cases on special grounds. (10 Moore P. C. 56.)

With regard to applications made in behalf of the citizens of foreign countries for permission to export from the Southern States property acquired before the proclamation of blockade, the following facts appear: May 10, 1861, the Austrian minister asked permission for an agent of his Government to purchase and ship tobacco for the Austrian Government monopoly; this request was declined on May 13. On March 3 and March 16, 1863, similar applications were made by the French minister in behalf of French firms who were purchasing tobacco to fill contracts with the Government monopoly of France; these applications were refused. On November 10, 1863, President Lincoln issued an executive order sanctioning the exportation, subject to certain conditions, of tobacco in the United States belonging to the Government of France, of Austria, or of any other state with which the United States was then at peace, such tobacco having been purchased and paid for by such government prior to March 4, 1861; and an informal convention was signed by the Secretary of State and the French minister, November 23, 1863, for regulating the mode of carrying out the executive order. On November 19, 1863, the Austrian minister was furnished with a copy of the order. In April, 1864, the French legation applied for an extension of the time prescribed in the convention, which was five months from the date thereof, so that the five months might run from the date of a second executive order of March 7, 1864. Mr. Seward, on April 19, expressed regret that controlling circumstances prevented an extension of time, but stated that the further execution of the convention might be regarded as suspended, only to be resumed when the reason for the suspension should cease. General Grant, in December, 1864, suggested serious objections from a military point of view, and the matter was postponed from time to time, and, although French vessels received clearance papers from the collector of customs at New

York and proceeded to the James River, it does not appear from any records in the Department of State that they succeeded in getting out any of the tobacco before the blockade was raised.

Mr. Fish, Sec. of State, to Mr. Johnston, U. S. Senate, Feb. 27, 1872, 92 MS. Dom. Let. 587.

See, also, Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 799, Jan. 4, 1864, MS. Inst. Gr. Br. XIX. 122.

On several occasions during the war between the United States and Spain vessels were, for special reasons and for special purposes, allowed by the United States to enter places which the American forces had blockaded. After the blockade of certain ports on the north coast of Cuba, the French mail steamer *Lafayette* was permitted to enter the port of Havana for the purpose of landing mails and passengers. This concession was granted on the request of the French embassy, coupled with the representation that the vessel sailed from St. Nazaire, in France, for Havana before the proclamation was issued. A similar privilege was extended to the German steamer *Polaria* on the request of the German embassy, with the qualification that she should first obtain a formal permit from the United States naval commandant at Key West, that her entrance into Havana was for the sole purpose of landing her Hamburg passengers and mails, and that she should not land cargo of any kind, nor, with the exception of certain articles intended for the Emperor, take away any, though permission was granted to bring away "any American or neutral passengers that may desire to depart in her, but no others."

Mr. Day, Sec. of State, to M. Cambon, French ambass., May 7, 1898, MS. Notes to French Leg. X. 492; Mr. Day, Sec. of State, to Mr. von Holleben, German ambass., May 10 and May 13, 1898, MS. Notes to German Leg. XII. 132, 134; Mr. Moore, Assist. Sec. of State, to Sec. of Navy, May 13, 1898, 228 MS. Dom. Let. 460.

In harmony with the conditions imposed in these cases, permission was refused to neutrals to pass the blockade merely for the purpose of taking on board and bringing away neutral property. (Mr. Day, Sec. of State, to Sir J. Pauncefote, Brit. ambass., No. 1016, May 16, 1898, MS. Notes to Brit. Leg. XXIV. 191; Mr. Day, Sec. of State, to Mr. von Holleben, Aug. 8, 1898, MS. Notes to German Leg. XII. 177.)

Early in the war special permission was given to certain neutral vessels to enter specified blockaded ports in Cuba in order to bring away Americans and any neutrals who might desire to leave. The United States consul at Kingston, Jamaica, was instructed to give certificates for the purpose of passing the blockade to the designated vessels.

Mr. Moore, Act. Sec. of State, to Messrs. E. A. Atkins & Co., tels., May 3 and May 5, 1898, 228 MS. Dom. Let. 227, 269.

See, also, Mr. Moore, Assist. Sec. of State, to Mr. Manso, May 9, 1898, 228 MS. Dom. Let. 355.

Permission was also granted, on the request of the proper diplomatic representatives, for the British steamer *Myrtledene* and the Norwegian steamer *Folsjo* to reenter the port of Cardenas, both vessels appearing to have left that port on notification of the institution of the blockade. In each case it was stated that the steamer was not only notified of the blockade, but was also ordered to go away. The allegation that the vessels were ordered away was afterwards denied in the case of at least one of them; but, without regard to this question, there seemed to be an obvious implication that when notice of the blockade was given they were not informed of the provision in the President's proclamation allowing to neutrals vessels lying in any of the blockaded ports thirty days' grace, and that, if they were not expressly ordered away, they at any rate construed the notice as an order to depart. The *Folsjo* had actually taken on board a part of her cargo, and in each case the cargo which was abandoned appeared to be the property of citizens of the United States. Under these circumstances instructions were given to allow the vessels in question to reenter the port and take on board, with all possible expedition, the cargoes of sugar which they had abandoned, it being understood that the permission was granted subject to the exigencies of any active military operations; that both vessels were strictly to observe the duties of neutrality, and particularly that neither of them was to carry more men or provisions than were necessary for the voyage.

Subsequently, on the representation of the minister of Sweden and Norway that the *Folsjo*, after lying for some days at Key West, had proceeded to New York, and that in consequence of the delay she was required under a previous charter party to proceed to Europe, the Norwegian steamer *Uto* was allowed to take her place, with the additional condition that before proceeding to Cardenas she was to call at Key West and obtain from the commandant of the United States naval station a formal letter of permission.

Mr. Day, Sec. of State, to Mr. Grip, May 11, 1898, MS. Notes to Swedish Leg. VIII. 88; Mr. Moore, Assist. Sec. of State, to Sec. of Navy, May 11, 1898, 228 MS. Dom. Let. 404.

Mr. Day, Sec. of State, to Mr. Grip, May 13, 1898, MS. Notes to Swedish Leg. VIII. 89; Mr. Moore, Assist. Sec. of State, to Sec. of Navy, May 13, 1898, 228 MS. Dom. Let. 461.

It seems that the Spanish authorities at Cardenas refused to allow the *Myrtledene* to reenter the port. (See Mr. Day, Sec. of State, to Sir J. Pauncefote, May 20, 1898, MS. Notes to Br. Leg. XXIV. 200.)

In August, 1898, a request, made on behalf of a German subject, to permit a vessel to pass the blockade of the southern ports of Cuba for the purpose of "bringing away German property," was refused. (Mr. Day, Sec. of State, to Herr von Holleben, German ambass., No. 94, Aug. 8, 1898, MS. Notes to German Leg. XII. 177.)

2. Days of Grace.

§ 1283.

"That a belligerent may lawfully blockade the port of his enemy is admitted. But it is also admitted that this blockade does not, according to modern usage, extend to a neutral vessel, found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted. If, then, such a vessel be restrained from proceeding on her voyage by the blockading squadron, the restraint is unlawful. The *St. Francis de Assise* was so restrained, and her case is within the policy.

"It has been contended that it was the duty of the neutral master to show to the visiting officer of the belligerent squadron his right of egress, by showing not only the neutral character of his vessel and cargo, but that his cargo was taken on board before the institution of the blockade.

"This is admitted, and it is believed that the bill of exceptions shows satisfactorily that these facts were proved to the visiting officer. It is stated that the vessel and cargo were regularly documented; that the papers were shown, and that the cargo was put on board, and the vessel had actually sailed on her voyage, before the institution of the blockade."

Marshall, C. J., delivering the opinion of the court, Olivera *v.* Union Ins. Co. 1818, 3 Wheat. 183, 194.

"In some respects, I think the law of blockade is unreasonably rigorous towards neutrals, and they can fairly claim a relaxation of it. By the decisions of the English courts of admiralty—and ours have generally followed their footsteps—a neutral vessel which happens to be in a blockaded port is not permitted to depart with a cargo, unless that cargo was on board at the time when the blockade commenced, or was first made known. Having visited the port in the common freedom of trade, a neutral vessel ought to be permitted to depart with a cargo, without regard to the time when it was received on board."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Apr. 13, 1854, H. Ex. Doc. 103, 33 Cong. 1 sess. 12, 13.

When the blockade was proclaimed of the Confederate ports, Mr. Seward announced "that merchant vessels in port at the time when the blockade took effect will be allowed a reasonable time for their departure."

Mr. Seward, Sec. of State, to Baron Gerolt, Prussian min., May 2, 1861 MS. Notes to Prussian Leg. VII. 109.

Mr. Seward at the same time stated that the Government could not consent that emigrant vessels should enter the interdicted ports.

The Spanish minister at Washington sought permission for the bringing away of a quantity of tobacco which the Spanish Government had contracted with a commercial house in the Confederate States to purchase before the blockade was instituted. Mr. Seward expressed his regret that the circumstances were not so distinctly peculiar as to permit the request to be granted. Similar requests had, he said, been made by other governments and had been refused. (Mr. Seward, Sec. of State, to Mr. Tassara, Spanish min., Sept. 2, 1861, MS. Notes to Spanish Leg. VII. 232.)

See, also, Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 799, Jan. 4, 1864, MS. Inst. Great Britain, XIX. 122.

Referring to the case of two Russian vessels in the port of Savannah, Georgia, Mr. Seward stated that "fifteen days have been specified as a limit for neutrals to leave the ports after actual blockade has commenced, with or without cargo."

Mr. Seward, Sec. of State, to Mr. Stoeckl, Russian min., May 9, 1861, MS. Notes to Russian Leg. VI. 99.

See, as to the blockade at New Orleans, Mr. Seward, Sec. of State, to Lord Lyons, British min., May 27, 1861, MS. Notes to Great Britain, VIII. 431.

In a circular of October 16, 1861, Mr. Seward informed the members of the diplomatic corps that the judge of the United States court for the southern district of New York had lately decided, after elaborate argument of counsel, that the law of blockade did not permit a vessel in a blockaded port to take on board cargo after the commencement of the blockade. (MS. Notes to Netherlands Leg. VI. 180.)

The proclamation of blockade having allowed fifteen days for neutrals to leave, a vessel which overstays the time is liable to capture, even if her delay was partly due to difficulty in procuring a tug, this being one of the accidents which must have been foreseen and should have been provided for while the vessel was remaining in port and loading a cargo with the proclamation in view.

The Prize Cases, 2 Black, 635.

The first hostile act of the United States, on the outbreak of the war with Spain in 1898, was the blockade, under a proclamation of the President of April 22, 1898, of the ports of the north coast of Cuba from Cardenas to Bahia Honda, inclusive, and of the port of Cienfuegos on the south coast. On June 27, a governmental blockade was proclaimed of all ports on the south coast of the island from Cape Frances to Cape Cruz, inclusive, and of the port of San Juan, Porto Rico. Various blockades de facto were also maintained. The object of a blockade being to cut off all intercourse between the inhabitants of the blockaded place and the world outside, it is a

general rule that while a period is allowed—usually of fifteen days—during which vessels may depart either in ballast or with cargo bought and shipped before the commencement of the blockade, no cargo is permitted to be shipped after the blockade is instituted. In the first proclamation of blockade by the United States, which was issued April 22, a period of thirty days was allowed for the departure of neutral vessels from the blockaded ports, but nothing was said as to the cargo. The natural inference would therefore have been that no cargo could be taken on board after the blockade was instituted. But in applying the proclamation to the cases that arose under it, the United States construed it as permitting the taking of cargo during the thirty days, and when the next proclamation was issued, the point was expressly covered by a clause in which it was stated that neutral vessels lying in any of the ports to which the blockade was then extended would be allowed "thirty days to issue therefrom with cargo." The same rules were applied in the case of the de facto blockades established by Admiral Dewey in the Philippines. These and other features of the law of blockade were included in General Orders, No. 592, entitled "Instructions to blockading vessels and cruisers," which were issued by the Navy Department, with the cooperation of the Department of State, on June 20, 1898, for the information and guidance of the naval service.

Proclamations and Decrees during the War with Spain, 75, 79.

Naval Operations of the War with Spain, 99; Mr. Moore, Assist. Sec. of State, to Sec. of Navy, May 19, 1898, 228 MS. Dom. Let. 599; Mr. Day, Sec. of State, to Sir J. Pauncefote, Brit. ambass., No. 1029, May 21, 1898, MS. Notes to Great Britain, XXIV, 201.

In proclaiming on Dec. 20, 1902, a blockade of the ports of Puerto Cabello and Maracaibo, because of the rejection of certain demands by the Venezuelan Government, the German Government allowed days of grace, as follows: From ports in the West Indies or on the east coast of the American continent, 10 days for steamers and 20 days for sailing vessels; from all other points, 20 days for steamers and 40 days for sailing vessels, while ships lying in the blockaded ports were allowed 15 days. The British Government on the same day proclaimed a blockade of Laguayra, Carenero, Guanta, Cumana, Carupano, and the mouths of the Orinoco, with similar days of grace.

For. Rel. 1903, 425, 458.

The blockade was raised from midnight, Feb. 14–15, 1903. For. Rel. 1903, 476.

3. Ships of War.

§ 1284.

Commodore Biddle, in a letter of November 11, 1827, to the Brazilian admiral, states "that blockades never have been deemed to extend to public ships. Great Britain, almost perpetually at war, and numerically superior at sea to any other nation, never for a moment pretended that neutral ships-of-war could be affected by blockades. During several years of the war in Europe, the Government of the United States maintained its diplomatic intercourse with France, exclusively by means of its public ships entering the French blockaded ports. In 1811, in the United States steamer *Hornet*, I myself went into Cherbourg, then blockaded by a British squadron; was boarded as I went in by the blockading squadron, but merely for the purpose of ascertaining our national character." The Brazilian admiral in reply stated that by a recent decision of the British cabinet, "vessels-of-war could not enter blockaded ports, and such has continued to be the practice of the English."

15 Br. & For. State Papers, 1120.

The Secretary of the Navy was requested to order the commander of the U. S. S. *Boston*, which was to convey Commodore Porter to Algiers, to repair with him to such other port of the Mediterranean as he might designate, if, when the *Boston* reached the vicinity of Algiers, that place was "so strictly blockaded . . . as to render it dangerous or difficult for her to enter the harbor." (Sec. of State to Sec. of Navy, June 4, 1830, 23 MS. Dom. Let. 361.)

"Armed vessels of neutral states will have the right to enter and depart from the interdicted ports."

Mr. Seward, Sec. of State, to Baron Gerolt, Prussian min., May 2, 1861, MS. notes to Prussian Leg. VII. 110. This referred to the blockade of the Confederate ports.

Referring, on October 4, 1861, to reports that foreign vessels of war, which had entered blockaded Confederate ports, had "in some instances carried passengers, and in others private correspondence," Mr. Seward, in order to prevent future misunderstanding, notified the members of the diplomatic corps that no foreign vessel of war which might enter or depart from a blockaded port should "carry any person as a passenger, or any correspondence other than that between the government of the country to which the vessel may belong and the diplomatic and consular agents of such country at the ports adverted to."

Mr. Seward, Sec. of State, to Lord Lyons, British min. (circular), Oct. 4, 1861, Dip. Cor. 1861, 152.

July 15, 1898, the Department of State addressed to all the foreign representatives in Washington a circular in relation to the entrance of neutral men-of-war into blockaded ports. In this circular it was stated that while there was no disposition on the part of the Government "to restrict the courteous permission heretofore accorded to neutral men-of-war to enter blockaded ports, it is advisable that all risk of error or mischance should be avoided by due attention to the rules prescribed by prudence as well as by courtesy. To this end, a neutral man-of-war desiring to enter or to depart from a blockaded port should communicate with the senior officer of the blockading force." As to the port of Havana, it was said to be "advisable that neutral men-of-war . . . should, besides observing the above suggestions, approach the port from points between north by west and north by east, and follow the same general course in departing," for the reason that, as the commanding officer was stationed north of Morro, "such a course would enable vessels readily to communicate with him, and thus not only attend to a matter of proper naval ceremonial, but also to avoid the danger of a neutral man-of-war being mistaken for an enemy in the dusk or in thick weather."

The receipt of this circular was acknowledged by the different members of the diplomatic corps, and in no instance was objection then or subsequently made to its contents. On the contrary, the German Government presented certain counter suggestions, of a more stringent nature, which were accepted by the United States as embodying an arrangement for the future. The rules thus agreed on were as follows:

1. That the consent of the blockading Government, obtained through the usual diplomatic channels, should, unless in a case of exceptional urgency, be a prerequisite to the entrance of a neutral man-of-war into a blockaded port.

2. That approach to the blockaded port should be made in such manner that the senior officer of the blockading squadron would with certainty identify the neutral vessel, on her appearance in the blockaded belt, as the vessel of whose coming he had been notified.

3. That in exceptional cases, such as prevented the obtaining of previous permission through the usual diplomatic channels, the decision should rest with the senior officer present of the blockading squadron.

4. That in the departure from a blockaded port no special formalities were requisite other than might be necessary to identify the departing neutral, such formalities to be agreed on by her commander and the officer in command of the blockade.

For. Rel. 1898, 1159–1169.

Mr. Day, Sec. of State, to members of the diplomatic corps, circular, July 15, 1898, For. Rel. 1898, 1159; Mr. von Holleben, German

ambass., Aug. 26, 1898, id. 1167; Mr. Adee, Act. Sec. of State, to Mr. von Holleben, Sept. 28, 1898, id. 1168.

On the outbreak of the war the British Government expressed the desire to send a vessel of war to Havana and a gunboat to visit Santiago de Cuba, the proposed visit to be made solely for the purpose of giving any necessary advice or assistance to the British consular officers, and not to be prolonged beyond the time required to effect that object. The Secretary of the Navy, in compliance with this request, telegraphed the commander in chief of the United States naval forces on the Atlantic station to afford facilities as far as possible for the ships in question. Their names were subsequently furnished by the British ambassador. (For. Rel. 1898, 974–975.)

4. Diplomatic Agents.

§ 1285.

In 1868, Admiral Davis, commanding the South Atlantic Squadron, sent the U. S. S. *Wasp* up the Parana, with a view to bring away the American minister, Mr. Washburn, and his family from Paraguay. The commander of the allied forces of Brazil and the Argentine Republic refused to permit the *Wasp* to pass through his blockade up to Asuncion, in consequence of which the *Wasp* returned to Montevideo without having accomplished the object of her voyage. Mr. Seward took the ground that the United States had "a lawful right to send a ship of war up the Parana to Asuncion, for the purpose of receiving the United States minister and his family, and conveying them from the scene of siege and war to neutral territory or waters," and that the refusal of the commander of the allied forces to permit the *Wasp* to pass through "violates becoming comity on the part of Brazil and the allies towards the United States, and is in contravention of the law of nations." Before this instruction was received at Rio de Janeiro, the difference was settled by the action of the allies in agreeing that a United States man-of-war might proceed to Asuncion for Mr. Washburn and his family, subject to such trifling delay as might arise from the active execution of military operations.

Mr. Seward, Sec. of State, to Mr. Webb, min. to Brazil, No. 233, Aug. 17, 1868, Dip. Cor. 1868, II. 298.

As to the settlement of the difference, see Senhor Paranhos, Brazilian min. of for. aff., to Mr. Webb, Aug. 5, 1868, id. 295.

"I am aware of no instance in which the right of blockade has been invoked for the purpose of preventing the Government of a neutral and friendly state from communicating with its diplomatic agent accredited to the government of the blockaded territory. It is believed that safe conducts are rarely, if ever, refused under such circumstances, and when the refusal does take place the aggrieved party has a right to expect sufficient reasons therefor."

Mr. Fish, Sec. of State, to Mr. Kirk, June 17, 1869, MS. Inst. Arg. Rep. XV. 317.

When Mr. Nelson, American minister to Spain, arrived at Cadiz in 1823, he was unable to enter owing to the blockade of the port by a French squadron. (Moore, Int. Arbitrations, V. 4505–4506.)

VII. *OBSTRUCTION OF NAVIGABLE CHANNELS.*

§ 1286.

Febraury 14, 1862, Lord Stanhope, in the House of Lords, called attention to the report that a second squadron of ships laden with stone was about to be sunk by the United States in Maffitt's channel at Charleston, South Carolina. He observed that the sinking of large ships laden with stone on banks of mud at the entrance of a harbor could only end in its permanent destruction and was not justified by the laws of war, and declared that the British Government was well entitled to protest against the act. Earl Russell replied that he considered the destruction of commercial harbors a most barbarous act, that the French Government took the same view, and that they had decided to remonstrate with the Government of the United States. On February 28 Earl Russell stated that he had received a dispatch from Lord Lyons to the effect that Mr. Seward had stated that there had not been a complete filling up of Charleston Harbor and that no more stones would be sunk there.

The subject had been discussed between Mr. Seward and Lord Lyons, and Mr. Seward had made explanations to the effect that artificial obstructions in the channels of rivers leading to ports had been regarded as an ordinary military appliance of war; that it was not conceived that such obstructions could not be removed; and that, upon the termination of the war, there would be cast upon the Government the responsibility of improving the harbors of all the States. After these explanations were given, Mr. Seward ascertained and stated that between the channels at Charleston which had been obstructed there still remained two—the Swash channel and a part of Maffitt's channel—neither of which had been nor was intended to be artificially obstructed and which were to be guarded by the blockading naval forces. Mr. Seward observed that, in making these explanations he was not to be understood as conceding to foreign states a right to demand them. They were accepted by the French, as well as by the British Government.

Halleck, Int. Law (Baker's ed.), II. 23; Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 187, Feb. 17, 1862, Dip. Cor. 1862, 36; Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 111, Feb. 19, 1862, id. 315, 316.

See, also, Archiv. Dip. 1862, II. 80; Fauchille, Blocus Maritime, 111.

In a telegram to Mr. Young, minister at Peking, January 22, 1884, Mr. Frelinghuysen, referring to an interview which Mr. Lowell had had with Lord Granville, relative to the threatened obstruction by the Chinese of the Canton River, took the ground that "the treaty ports can not rightfully be closed by either France or China, except the latter should do so for necessary protection;" that, if France should "agree absolutely and not conditionally to make no attack on the treaty ports, a protest against their obstruction will be made to China by this Government;" but that no protest could be made to China against "taking such steps for its defence as it may deem necessary."

Prior to the sending of these instructions by Mr. Frelinghuysen, Mr. Young had had an interview with the ministers of the Tsung-li yamên, in which he had protested against the obstruction of the navigation of the Canton River, both on the ground that Article XXVI. of the treaty of 1858 provided that in case China should be at war with a foreign power the vessels of the United States should be permitted to continue their commerce with her ports in freedom and security, and that the Chinese authorities were performing in time of peace a belligerent act which, if permitted at Canton, would stand as a precedent for closing every port in China. The Chinese ministers warmly repelled the suggestion that a state of peace existed, declaring that the whole world knew that France was at war with China and that French troops were fighting Chinese troops in Tonquin. They also maintained the right of China to make the obstructions, as an act of self-defense. In an interview with Sir Harry Parkes, British minister, the ministers of the Tsung-li yamên intimated that if China could be authoritatively assured that France would not attack the open ports without notice the obstructions at Canton might be removed.

With reference to these discussions Mr. Frelinghuysen, on April 18, 1884, observed that the gravity of the question seemed in a great measure to have been removed by an assurance given by the yamên that a passage over 100 feet wide would be left in both channels for the convenience of steamers and sailing vessels, a width which seems afterwards to have been increased to 150 feet. "Even, however, under this favorable modification," said Mr. Frelinghuysen, "the obstruction to the channel at Canton and Whampoa can only be tolerated as a temporary measure, to be removed as soon as the special occasion therefor shall have passed, and under no circumstances to be admitted as a precedent for setting obstacles to open navigation at the treaty ports in time of peace, under pretext of being intended for ultimate strategic defense in the contingency of future war."

Mr. Frelinghuysen, Sec. of State, to Mr. Young, min. to China, tel., Jan. 22, 1884, For. Rel. 1884, 64; Mr. Young to Mr. Frelinghuysen,

Feb. 11, 1884, id. 66; Mr. Frelinghuysen to Mr. Young, No. 267, April 18, 1884, id. 96.

In August, 1884, the governor-general of the two Kwang provinces closed the southern channel of the Canton River by barriers and obstructions of piles, stones, and sunken junks, in order to prevent hostile ships from menacing Canton. The southern channel offered the easiest means of access for vessels to Canton; but, as reported by Mr. Denby, American minister at Peking, in May, 1886, the channel had up to that time remained closed to navigation. The yamên appeared to be opposed to the reopening of the channel, chiefly on the ground that the viceroy of Canton having memorialized the throne, requesting that it might be closed forever, the Emperor had given his approval, and thus disposed of the question.

Mr. Denby, min. to China, to Mr. Bayard, Sec. of State, No. 141, May 31, 1886, For. Rel. 1886, 90.

"Your No. 141 is before me, and brings to the Department, with much clearness, a question of great interest. It is unquestionable that a belligerent may, during war, place obstructions in the channel of a belligerent port, for the purpose of excluding vessels of the other belligerent which seek the port either as hostile cruisers or as blockade runners. This was done by the Dutch when attacked by Spain, in the time of Philip II; by England when attacked by the Dutch, in the time of Charles II; by the United States when attacked by Great Britain, in the Revolutionary war and in the war of 1812; by the United States during the late civil war; by Russia at the siege of Sebastopol; and by Germany during the Franco-German war of 1870. But while such is the law, it is equally settled by the law of nations that when war ceases such obstructions, when impeding navigation in channels in which great ships are accustomed to pass, must be removed by the territorial authorities. Such is the rule, apart from treaty; and it was implicitly admitted by Mr. Seward, when, in replying to the remonstrances by the British Government on the placing by the blockading authorities of obstructions in the harbor of Charleston, he stated that these obstructions were placed there merely temporarily. Were there any doubt about this question, which I maintain there is not, it would be settled by the provisions of our treaties with China, which virtually make Canton a free port, to which our merchant ships are entitled to have free access in time of peace. You are therefore instructed to make use of the best efforts in your power to induce the Chinese Government to remove the obstructions in the Canton River, which, as you state, operate to close the port of Canton to the merchant vessels of the United States. In sending to you this instruction, I affirm the

instruction of Mr. Frelinghuysen to Mr. Young, No. 267, dated April 18, 1884, printed in the Foreign Relations of that year."

Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, No. 90, July 28, 1886, For. Rel. 1886, 95.

March 19, 1888, Mr. Denby reported that the Tsung-li yamên had again refused to remove the obstruction, but that the diplomatic corps did not accept the obstruction as final. (For. Rel. 1888, I, 270. Also, id. 224, 250.)

During the war with Japan in 1894, the Tsung-li yamên announced the closure of Foochow for purposes of defense. One entrance was left open, and a place was designated as an anchorage for foreign and Chinese steamers outside the mouth of the river, where they were required to discharge and load cargo, which was conveyed to and from Foochow by lighters registered at the customs. These lighters followed an indicated route and plied only in the daytime. In reporting these measures, the American chargé at Peking observed that, burdensome as they doubtless would prove to be, no objection could be made to them in view of the demoralization of the Chinese naval forces, Foochow being an important naval depot which must be guarded at all hazards. The Government of the United States reaffirmed the position taken by Mr. Frelinghuysen in his telegram to Mr. Young of January 22, 1884, and by Mr. Bayard, in his instructions to Mr. Denby of July 28, 1886.

Mr. Gresham, Sec. of State, to Mr. Denby, jr., chargé at Peking, Sept. 28, 1894, MS. Inst. China, V. 95; Mr. Denby, jr., to Mr. Gresham, No. 60, Oct. 9, 1894, For. Rel. 1894, Appendix I. 71.

CHAPTER XXVIII.

NEUTRALITY.

1. *NATURE OF OBLIGATION.*

1. Its Significance.

§ 1287.

"By the usual principles of international law, the state of *neutrality* recognizes the cause of both parties to the contest as *just*—that is, it avoids all consideration of the merits of the contest."

Mr. J. Q. Adams, Sec. of State, to Mr. Gallatin, May 19, 1818, MS. Inst. U. States Ministers, VIII. 184, 187.

See Fiore, Droit Int. Public, III. 372; Rivier, Principes du Droit des Gens, II. 368–415; Kleen, I. 76.

The idea of a neutral nation "implies two nations at war, and a third in friendship with both."

Case of the Resolution, Federal Court of Appeals (1781), 2 Dallas, 19, 21.

"A neutral nation may, if so disposed, without a breach of her neutral character, grant permission to both belligerents to equip their vessels of war within her territory. But without such permission the subjects of such belligerent power have no right to equip vessels of war, or to increase or augment their force, either with arms or with men, within the territory of such neutral nation."

Brig Alerta *v.* Blas Moran (1815), 9 Cranch, 359, 365.

The view that a neutral may permit unneutral acts to be committed within its territory, provided it extends the permission to both belig-

erents, is now obsolete. It is obvious that, although such permission was impartially offered, it might be of immense use to one belligerent and of none to the other.

"As to the sale and the delivery of war vessels to belligerents, it is to be observed that that industry does not exist in the country. If any acts of such nature were to take place on Belgian territory, article 123 of the penal code would provide the Government with the necessary power to repress them, inasmuch as they would be contrary to the rules universally recognized by the law of nations."

M. de Favereau, Belgian min. of for. aff., to Mr. Storer, min. to Belgium, Sept. 6, 1898, enclosed by Mr. Storer with dispatch No. 140, Sept 14, 1898, MS. Desp. from Belgium.

About the middle of March, 1898, upwards of a month before the commencement of hostilities between the United States and Spain, the United States purchased two war ships then building in England—a torpedo boat and the Brazilian cruiser *Almirante Abreu*. When war was announced, the British Government promptly prohibited the departure of the nearly completed torpedo boat, which had been named the *Somers*, and stopped work on the cruiser. This action appeared to be in conformity with the obligations of neutrality, and was acquiesced in by the United States. By the protocol between the United States and Spain, signed at Washington, August 12, 1898, hostilities were suspended, and it was stipulated that commissioners should be sent to Paris to negotiate for peace. On November 19, 1898, the American embassy in London was instructed to make, if practicable, arrangements with the British Government "permitting the bringing to the United States of the torpedo boat *Somers*, now stored at Falmouth, England, giving assurance that in case of the resumption of hostilities with Spain this vessel will not be made use of." A formal request to this effect was presented to the British foreign office, December 1, 1898, the embassy observing, with reference to the condition above stated, that the resumption of hostilities "would now appear to be highly improbable." A treaty of peace between the United States and Spain was signed at Paris, December 10, 1898. Two days before, on December 8, Lord Salisbury, replying to the embassy's request, said: "You add that you are instructed by the United States Government to give an assurance that in the event of hostilities being resumed with Spain, which would now appear to be highly improbable, the *Somers* will not be made use of. In view of this assurance I have the honor to state that Her Majesty's Government are glad to comply with your request, and that the necessary instructions will at once be sent to the proper authorities in order to facilitate the departure of the vessel."

Mr. Sherman, Sec. of State, to Mr. White, chargé at London, tels., March 7 and 9, 1898, MS. Inst. Great Britain, XXXII. 423, 424; Mr. Day, Act. Sec. of State, to Mr. White, March 13, 1898, 6 Dip. Register, from Dept., 300; Mr. Hay, Sec. of State, to Mr. White, Nov. 19, 1898, For. Rel. 1898, 1006, MS. Inst. Great Britain, XXXIII. 33; Mr. White to Mr. Hay, No. 601, Dec. 10, 1898, For. Rel. 1898, 1006; Mr. Hay to Sec. of Navy, Dec. 10, 1898, 233 MS. Dom. Let. 175; Mr. Hay to Mr. White, Dec. 13, 1898, MS. Inst. Great Britain, XXXIII. 45; Mr. Hay to Mr. House, Feb. 15, 1900, 243 MS. Dom. Let. 70.

As to the purchase of the *Amazonas* and *Almirante Abreu*, see Mr. Hay to Mr. White, No. 1107, March 2, 1899, MS. Inst. Great Britain, XXXIII. 103.

For the neutrality proclamations of various governments during the war between the United States and Spain, see Proclamations and Decrees during the War with Spain, Washington, Government Printing Office, 1899.

"I have held a conference to-day with Don José Rovera, the commissioner appointed by the Provisional Government of Yucatan to proceed to this city for the purpose of re-establishing friendly and commercial relations between that state and the United States. I informed him, under instructions from the President:

"1. That whilst Yucatan continued to maintain her neutrality according to her own voluntary agreement, in the existing war between Mexico and the United States, the latter had respected this neutrality and placed her commerce on the same footing with that of all other neutral states.

"2. That the decree of the Extraordinary Congress of Yucatan, adopted on the 25th August last, had changed this neutrality into a state of hostility against the United States; and that therefore it became the duty of the latter to make a corresponding change in their conduct, and treat her as an enemy and not as a neutral.

"3. That the present revolutionary movement of the people of Yucatan for the purpose of restoring her to her former neutral position in the war between Mexico and the United States, has not yet to our knowledge proven completely successful. The City of Mexico, the capital of the state, at the date of our last authentic advices, was still in possession of the government which had sanctioned the decree of the 25th August last. The revolutionary struggle, so far as we have learned, has not yet terminated successfully for the partizans of neutrality. Under these circumstances, all that this Government can do with propriety is to instruct the officer commanding the U. S. naval forces in the Gulf of Mexico to treat Yucatan again as a neutral state whenever he shall have received authentic information that the revolution is accomplished and the government is restored to the hands of those determined to maintain a neutral position. The officer in command must first be satisfied, however, of the real, bona fide

neutrality of Yucatan; and, in case he should afterwards at any time discover that under the guise of neutrality the Yucatanese are carrying on a contraband trade and furnishing Mexico with arms and munitions of war, he will be instructed without further orders from his government to recommence hostile operations.

"It is the President's request that you should immediately issue instructions in conformity with the foregoing communication, which I have made verbally to Don José Rovera."

Mr. Buchanan, Sec. of State, to Mr. Mason, Sec. of the Navy, Feb. 22, 1847, 36 MS. Dom. Let. 315.

2. GOVERNMENTAL CONDUCT.

§ 1288.

The obligations of a neutral state may be embraced in "three classes, involving, respectively, ABSTENTION, PREVENTION, and ACQUIESCENCE." By the first of these the neutral state is "bound not to supply armed forces to a belligerent; not to grant passage to such forces, and not to sell to him ships or munitions of war, even when the sale takes place in the ordinary course of getting rid of superfluous or obsolete equipment."

Neutral Duties in a Maritime War, by Thomas Erskine Holland, Proceedings of the British Academy, II. 2.

In the course of the foregoing paper, Holland, referring to the fact that a neutral nation is bound not to sell men-of-war to a belligerent, says: "A new, though cognate, question has, however, been raised by the sale of certain German liners to Russia, which forthwith, after re-christening, commissioned them as armed cruisers. If these vessels were, as is alleged, subsidized by their own Government, with a view to their employment by that Government in case of need, it has been urged with much force that they practically form part of the reserve of the Imperial German Navy, and that, therefore, Germany being neutral, they could not be lawfully sold to a belligerent. It would seem that the opinion of the law officers to which Mr. Balfour alluded in August, 1904, was not given with reference to precisely the facts above stated." (Ibid.)

So long as the question of sovereignty and independence "remains at stake upon the issue of flagrant war, no third party can recognize the one contending for independence as independent, without assuming as decided the question the decision of which depends upon the issue of the war, and without thereby making itself a party to the question. No longer neutral to the question, the recognizing power can no longer claim the right of being neutral to the war. These positions are clear in principle, and they are confirmed by the experience of our own revolutionary history. The acknowledgment of our

independence by France was the immediate and instantaneous cause of war between France and Great Britain. It was not acknowledged by the Netherlands until after war between them and Great Britain had broken out. It was acknowledged by no other European power till it had been recognized by Great Britain herself at the peace. Had it been the interest and policy of the United States to make a common cause with Buenos Ayres, the acknowledgment of her independence would have followed of course."

Mr. Adams, Sec. of State, to Mr. Thompson, Sec. of Navy, May 20, 1819, 17 MS. Dom. Let. 304.

"The public measures designed to maintain unimpaired the domestic sovereignty and the international neutrality of the United States were independent of this policy [of avoidance of entangling alliances], though apparently incidental to it. The municipal laws enacted by Congress then and since have been but declarations of the law of nations. They are essential to the preservation of our national dignity and honor; they have for their object to repress and punish all enterprises of private war—one of the last relics of mediaeval barbarism; and they have descended to us from the fathers of the Republic, supported and enforced by every succeeding President of the United States."

Report of Mr. Fish, Sec. of State, to the President, July 14, 1870, S. Ex. Doc. 112, 41 Cong. 2 sess. 3.

Early in 1866 the Postmaster-General was informed by the postal department of France that the service of the French line of steam ocean packets, running between Vera Cruz and Matamoras, would be extended to New Orleans, and the employment of the line was tendered for the transmission of such correspondence as the United States might wish to transmit to Mexico by that route under an arrangement for the division of postage. The question whether there was any political objection to such an arrangement was submitted to Mr. Seward, who, after conferring with the President, said: "A French postal steam vessel running between the ports of Matamoras and Vera Cruz can be deemed by this Government to be exercising the rights of war as a belligerent against the Republic of Mexico, with which Republic the United States are maintaining with constancy the relations of friendship. I think, therefore, that Mexico will have ground of complaint against the United States, if the arrangement proposed shall be carried into effect."

Mr. Seward, Sec. of State, to the Postmaster-General, April 11, 1866, 73 MS. Dom. Let. 5.

With reference to a claim which was sought to be pressed against Guatemala, after she had refused to recognize it, for the payment of

certain drafts given by her representative, Mr. Segur, for the purchase of arms, the Department of State, in declining further to urge the claim, said that the transaction out of which it grew was unneutral, and that of this question the circumstance that Mr. Bushnell, to whom the drafts were given, may not have become criminally answerable to the laws of the United States was not a crucial test, when the employment by the government of its good offices was at stake. "There is a vast difference between the degree of repressive control which this government may be called upon to exert over its citizens in the pursuance of its neutral duties and the extent to which it may be permitted to go in actively aiding them to secure the fulfillment of contracts entered into in aid of a belligerent. For example, it is no offence either against the law of nations or against our neutrality statutes for a citizen of the United States to sell munitions of war to a belligerent; yet it could scarcely be contended that this government would be justified in employing its agents to promote such transactions. Such conduct, it is conceived, would be highly unneutral. It is the duty of this government to abstain from aiding a belligerent in hostilities against a friendly power. Such was the view of this Department in 1868, when it refused to yield its good offices in behalf of American citizens holding bonds of Chile and Peru issued in aid of a war with Spain in 1866. In that case the transaction was as innocent as any of the contracts with Mr. Segur could possibly have been. But the Department declared that 'the negotiation of a loan for the purpose of hostilities against a friendly power, with which the United States are at peace, is an unneutral act.' The government, it was further said, was asked to exert its friendly offices in a matter addressed 'to its discretion' and 'not founded upon a right to interposition,' and 'Spain might find ground to complain that this government patronizes a contribution by citizens of the United States to funds of her enemies for war purposes.'"

Mr. Rives, Act. Sec. of State, to Messrs. Morris & Fillette, Oct. 13, 1888, 170 MS. Dom. Let. 222.

In this case it was contended on the part of counsel for Bushnell that a state of war did not exist between Salvador on the one side and other Central American States on the other in 1863. The Department held that in fact it did, though it may not have been preceded by a formal declaration.

"Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hos-

tilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty.

"Whatever may be the traditional sympathy of our countrymen as individuals with a people who seem to be struggling for larger autonomy and greater freedom, deepened as such sympathy naturally must be in behalf of our neighbors, yet the plain duty of their government is to observe in good faith the recognized obligations of international relationship. The performance of this duty should not be made more difficult by a disregard on the part of our citizens of the obligations growing out of their allegiance to their country, which should restrain them from violating as individuals the neutrality which the nation of which they are members is bound to observe in its relations to friendly sovereign States. Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the government to honestly fulfill every international obligation, yet it is to be earnestly hoped, on every ground, that the devastation of armed conflict may speedily be stayed and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits."

President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, I. XXXII.

For correspondence as to the enforcement of the neutrality laws during the Cuban insurrection of 1895, see For Rel. 1895, II. 1187–1209.

Correspondence will be found in For. Rel. 1897, 529–540, as to the cases of The *Dauntless*, *Donna T. Briggs*, *Alexander Jones*, *Silver Heels*, and *Sommers N. Smith*.

See, also, Mr. Olney, Sec. of State, to Attorney-General, June 10, 1895, 202 MS. Dom. Let. 521; same to same, May 13, 1896, 210 MS. Dom. Let. 137; Mr. Adee, Act. Sec. of State, to same, Sept. 12, 1896, 212 MS. Dom. Let. 471; Mr. Olney, Sec. of State, to Treasury Dept., Oct. 8, 1896, 213 MS. Dom. Let. 169; Mr. Olney, Sec. of State, to Mr. Dupuy de Lôme, Spanish min., Nov. 11, 1896, MS. Notes to Spain, XI. 237.

See, as to the case of the *Dauntless*, Mr. Rockhill, Act. Sec. of State, to Mr. Dupuy de Lôme, Sept. 29, 1896, MS. Notes to Spain, XI. 224; Mr. Olney, Sec. of State, to Sec. of Navy, Oct. 10, 1896, 213 MS. Dom. Let. 200; Mr. Olney to Sec. of Treasury, Oct. 16, 1896, id. 268; Mr. Casanova, consul at Cienfuegos, to Dept. of State, Nos. 58 and 59, Oct. 17 and 22, 1896, MS. Consular Letters; Mr. Olney to Mr. Dupuy

de Lôme, Nov. 12, 1896, MS. Notes to Spain, XI. 239; Mr. Sherman, Sec. of State, to Mr. Dupuy de Lôme, May 29, 1897, id. 291.

As to the seizure of the *Lark*, see Mr. Olney, Sec. of State, to Attorney-General, Sept. 18, 1895, 204 MS. Dom. Let. 671.

As to the arrest of the schooner *R. S. Mallory*, see Mr. Olney, Sec. of State, to Sec. of Treasury, March 5, 1896, 208 MS. Dom. Let. 347.

As to the *Unique*, see Mr. Olney, Sec. of State, to Mr. Dupuy de Lôme, Oct. 20, 1896, MS. Notes to Spain, XI. 231.

In a protocol between the Netherlands and Venezuela, concluded at The Hague, August 20, 1894, for the restoration of diplomatic relations between the two countries, which had been suspended since 1875, on account of differences as to the action of the colonial authorities in the Dutch West Indies, the Government of the Netherlands declared that, wishing to give Venezuela a proof of its satisfaction with the special mission of General Francisco Tosta Garcia, it wished to manifest afresh "its intention to prevent, by every means within its power, all complots, insults, or other acts contrary to public order in Venezuela, derogatory to the principle of the most strict neutrality towards the constitutional government of the said country, in conformity with the rules established by international law;" and that it would renew in this sense the formal instructions which had previously been given to the Dutch colonial authorities.

See enclosure with dispatch of Mr. Quinby, min. to the Netherlands, to Mr. Olney, Sec. of State, No. 116, Sept. 26, 1894, MS. Desp. Netherlands.

Where a government permits political refugees to be received on board one of its men-of-war, it is its right, and also its duty, to refuse to land them at a place where they may proceed straightway to plot and contrive for the overthrow of the government of their country or for the continuance of hostilities.

The Case of the Salvadorean Refugees, 29 Am. Law. Rev. (Jan.–Feb., 1895), 1, 6.

During the war between the United States and Spain the cadets in the French school for the "Infanterie de Marine," a corps corresponding to United States marines, passed a resolution expressing their sympathy with Spain in the war and sent it to Madrid. The American ambassador at Paris, though deeming the act worthy of little attention, decided to bring it to the notice of the French Government, but the French minister of foreign affairs took the initiative and informed the American ambassador that he had taken official notice of the incident and would see that the cadets were properly reprimanded.

Mr. Porter, ambass. to France, to Mr. Day, Sec. of State, No. 267, June 7, 1898, MS. Desp. France.

Early in June, 1898, the American ambassador at Paris reported that Spain had applied to France for the use of her mint for coining silver pieces, and that the French minister of foreign affairs, before acceding to the request, desired to learn whether the United States would take exception to such a transaction. It appears that the French mint is a Government institution, but that it is used by various small states for their coinage, and it was surmised, in case the desired permission should be refused to Spain, the work would be done in Belgium, where the mint is a private institution. The Secretary of State communicated with the Secretary of the Treasury on the subject, and, in so doing, suggested that the inquiry of France might have been prompted by the circumstance that money may, under certain conditions, be treated as contraband; but before any conclusion was reached the American ambassador reported that other arrangements had been made by Spain, and that the coinage would not be done by the French mint.

Mr. Porter, ambass. to France, to Mr. Day, Sec. of State, tel., June 7, 1898, MS. Desp. France; Mr. Day, Sec. of State, to Sec. of Treas., June 7, 1898, 229 MS. Dom. Let. 202; Mr. Porter to Mr. Day, tel., June 11, 1898, MS. Desp. France.

It is a grave offense against the law of nations for a neutral government to sell a man-of-war to a belligerent.

Mr. Day, Sec. of State, to Mr. Hay, ambass. to England, tel., June 25, 1898, MS. Inst. Great Britain, XXXII. 680; Mr. Moore, Act. Sec. of State, to Mr. Hay, tel., June 26, 1898, id. 683.

3. Conduct of Public Officials.

§ 1289.

"All officials of the Government, civil, military, and naval, are hereby directed not only to observe the President's proclamation of neutrality in the pending war between Russia and Japan, but also to abstain from either action or speech which can legitimately cause irritation to either of the combatants. The Government of the United States represents the people of the United States, not only in the sincerity with which it is endeavoring to keep the scales of neutrality exact and even, but in the sincerity with which it deplores the breaking out of the present war, and hopes that it will end at the earliest possible moment and with the smallest possible loss to those engaged. Such a war inevitably increases and inflames the susceptibilities of the combatants to anything in the nature of an injury or slight by outsiders. Too often combatants make conflicting claims as to the duties and obligations of neutrals, so that even when discharging these duties and obligations with scrupulous care

it is difficult to avoid giving offense to one or the other party. To such unavoidable causes of offense, due to the performance of national duty, there must not be added any avoidable causes. It is always unfortunate to bring Old-World antipathies and jealousies into our life, or by speech or conduct to excite anger and resentment toward our nation in friendly foreign lands; but in a government employee, whose official position makes him in some sense the representative of the people, the mischief of such actions is greatly increased. A strong and self-confident nation should be peculiarly careful not only of the rights but of the susceptibilities of its neighbors; and nowadays all the nations of the world are neighbors one to the other. Courtesy, moderation, and self-restraint should mark international, no less than private, intercourse."

Executive order, March 10, 1904, For. Rel. 1904, 185.
See, also, Mr. Hay, Sec. of State, to Mr. Conger, min. to China, No. 862, Dec. 1, 1904, For. Rel. 1904, 185.

In April, 1904, the commandant of the Mare Island Navy-Yard transmitted to the Secretary of the Navy copies of circulars received in an envelope from the consulate-general of Japan at New York City, addressed "To the Japanese Serving in the United States Navy," soliciting subscriptions to Japanese bonds and contributions to the relief fund for Japanese soldiers and sailors and to the Red Cross Society of Japan. In view of the President's proclamation of neutrality, the Secretary of the Navy asked whether the circulars should be forwarded. It was held by the Department of State that, while Japanese in the United States doubtless had a right to make such subscriptions and contributions as were referred to, it was undesirable that they should be solicited through American official channels, and the commandant of the Mare Island Navy-Yard was instructed not to forward any of the circulars to Japanese in the United States. The legation of Japan was so notified.

For. Rel. 1904, 427.

In 1898, during the war between the United States and Spain, the Spanish consul at Singapore, acting upon reports published in the press, brought to the notice of the governor of the Straits Settlements the alleged action of Mr. Spencer Pratt, American consul-general at Singapore, in negotiating for the cooperation of Aguinaldo, the late head of the insurrection against Spain in the Philippines, with Admiral Dewey, when the latter was at Hongkong. The matter was laid before the British Government and was presented to the Government of the United States through the British embassy at Washington. The embassy stated that while the action of Mr. Pratt, as described in the press, may have fallen short of a breach of the

Foreign Enlistment Act, it was clearly in contravention of the spirit of Her Britannic Majesty's proclamation of neutrality and had given reasonable ground of complaint to the Spanish Government, and that Her Majesty's Government was therefore constrained to address a remonstrance to the United States on the subject of Mr. Pratt's proceedings and his public avowal of them, as reported in a speech published in the *Straits Times* of June 9, 1898, of which a copy was enclosed. The Department of State replied that the subject was one to which the Government of the United States had already given careful attention. As the result of its inquiries it had received the most ample assurances that Mr. Pratt formed with Aguinaldo no engagement whatever. It appeared that the Philippine insurgent leader was brought to Mr. Pratt by a British subject named Bray, after which two interviews between Mr. Pratt and Aguinaldo took place. Mr. Pratt then merely inquired of Admiral Dewey whether he wished the insurgent leader to accompany him to the Philippines. Admiral Dewey answered in the affirmative, and Aguinaldo then departed for Hongkong wholly on his own responsibility. The report of Mr. Pratt's speech, said the Department of State, appeared to be inaccurate, a circumstance which might in a measure be explained by the fact that Mr. Pratt was said to have spoken in French, while the published version was in English. In conclusion the Department of State observed that the Government of the United States regretted that Her Majesty's Government should have any cause to think that any representative of the United States had been wanting, within Her Majesty's dominions, in the observance of that course of conduct which it was incumbent upon him to maintain, and that the Government of the United States had previously given to all its consular officers the most stringent instructions to abstain from any act likely to compromise the neutrality of Her Majesty's Government, and that in the present instance it was believed that inaccurate publications had afforded the only ground for remonstrance against the conduct of the American consul-general at Singapore.

Mr. Moore, Act. Sec. of State, to Sir Julian Pauncefote, No. 1171, Sept. 2, 1898, MS. Notes to British Leg. XXIV. 311.

When the Congressionalist man-of-war *Blanco Encalada* was fired on by the forts at Valparaiso on January 16, 1891, and six persons on board were killed and six wounded, Captain St. Clair of the British man-of-war *Champion*, later in the day, at the request of the captain of the *Blanco Encalada*, and with the concurrence of the intendente of the town, removed the killed and wounded from the ship to the shore.

Parl. Paper, Chile, No. 1 (1892), 48.
See, also, id. 40–42.

For a denial of the report that the British cruiser *Talbot* had on two occasions during the blockade of Havana by the United States forces brought away Spanish officials, see For. Rel. 1898, 1000–1001.

In the spring of 1891, the Chilean Government requested, through the American minister at Santiago, that the United States would permit one of its men-of-war to convey from Valparaiso to Montevideo a quantity of bar silver which it desired to export for the purpose of paying the interest on the national debt abroad. The American minister, having received no reply, subsequently stated that the English Government had placed the British war ship *Espiègle* at the service of the Chilean Government to convey the bar silver to England.

Mr. Egan, min. to Chile, to Mr. Blaine, Sec. of State, No. 183, July 28, 1891. For. Rel. 1891, 148.

In October, 1899, the American minister at Caracas, Venezuela, inquired, confidentially, whether an American man-of-war might, if requested, be used for a conference between the President of Venezuela and the leader of the revolution then pending. The Department of State saw no objection to the suggested conference, as there had recently been several precedents for such action. The Secretary of the Navy, accordingly, authorized the commander of the U. S. S. *Detroit* to permit such a conference, if so requested.

Mr. Hill, Act. Sec. of State, to Act. Sec. of Navy, Oct. 9, 1899, 240 MS. Dom. Let. 435; Mr. Hill, Act. Sec. of State, to Mr. Loomis, min. to Venezuela, tel., Oct. 10, 1899, For. Rel. 1899, 799.

It was stated that the Ecuadorean Government had suspended the Ecuadorean consul-general at New York from the performance of his official functions till he should prove himself innocent of certain charges brought against him in connection with the transfer, during the war between China and Japan, of the Chilean man-of-war *Esmeralda* to Japan in an Ecuadorean port and under the Ecuadorean flag.

Mr. Uhl, Act. Sec. of State, to the governor of New York, Feb. 5, 1895, 200 MS. Dom. Let. 475.

4. Conduct of Private Persons.

§ 1290.

A claim was sought to be made, on behalf of the owners and crew of the bark *Georgiana*, against the Spanish Government on account of its alleged illegal proceedings at the Island of Contoy, in 1850. The *Georgiana* was condemned by the Spanish admiralty court of first instance at that place as lawful prize of war in consequence of

her having been engaged in transporting one of the Lopez expeditions and its munitions, designed for the invasion of Cuba. The Department of State declined to present the claim, saying that if the judgment of the court was erroneous a remedy should have been sought by the owners of the *Georgiana* through appeal to the court of last resort, where it was to be presumed that the error, if any, would have been corrected. "If it were admissible now to discuss the propriety of its judgment, this Government is not," said the Department of State, "in possession of such information as would enable it to show the condemnation of the vessel to have been unwarranted. It is not sufficient that the owners, and even the master, were ignorant of the destination and purpose of the criminal expedition in which the vessel was employed. 'The question,' it was said by Judge Betts, delivering the judgment of the district court for the southern district of New York, condemning the schooner *Napoleon*, 'is as to the innocency or guilt of *the vessel*, as if the transaction in which she was implicated was one of personal volition on her part.' He further remarks that 'the most distinguished and unblemished reputation on the part of a shipowner will not protect his vessel from confiscation when it is engaged, through untrustworthy agents and without his knowledge, and against his prohibition, in illicit employments, in infractions of revenue and fiscal laws and preeminently in violating the laws of war.' There is nothing to show that this doctrine, of which this Government has availed itself during the late rebellion, was not legitimately applied to the case of the *Georgiana*."

Mr. Fish, Sec. of State, to Mr. Buchanan, March 30, 1869, 80 MS. Dom. Let. 511.

See, to a similar effect, Mr. Porter, Act. Sec. of State, to Mr. King, Feb. 27, 1886, 159 MS. Dom. Let. 184; Mr. Bayard, Sec. of State, to Mr. Barksdale, Dec. 16, 1886, 162 MS. Dom. Let. 364.

See, as to the case of the *Susan Loud*, which was associated with that of the *Georgiana*, Mr. Bayard, Sec. of State, to Mr. Tirrell, May 26, 1885, 155 MS. Dom. Let. 499.

See, further, as to the cases of the Georgiana and Susan Loud and the Contoy prisoners, H. Ex. Doc. 83, 32 Cong. 1 sess.

A citizen of the United States in Bolivia having inquired whether he was at liberty to accept a mission to other countries on behalf of that republic, Mr. Fish said: "A citizen of the United States is at full liberty to accept any employment abroad under a government which is at peace with all others. . . . Bolivia is technically and nominally at war with Spain. Under these circumstances your acceptance of a commission from the government of that Republic, such as the one to which you refer, might be regarded as contrary to the spirit at least of the act of Congress of the 20th of April, 1818.

While, therefore, there may be no obligation for you to ask the permission referred to, it is conceived no express sanction to your acceptance of the trust can with propriety be given."

Mr. Fish, Sec. of State, to Mr. Caldwell, Sept. 4, 1869, MS. Inst. Bolivia, I. 112.

The person to whom this mission was offered was Mr. Caldwell, who had then lately been minister of the United States in Bolivia. His successor was commissioned April 16, 1869, and Mr. Caldwell took his leave July 25, 1869.

"I have to acknowledge the receipt of your favor of the 13th instant and to note the inquiries therein contained.

"Whether the bank or its officers could be criminally prosecuted under the neutrality laws of the United States because the bank had knowingly made itself a depository of funds contributed by sympathizers in the United States in support of the present Cuban insurrection, is a question as to which opinions may differ, and which can be satisfactorily settled only by the adjudication of the proper court. Should a bank engage in such a transaction, and, as you suggest, publish its acceptance of such a trust to the world, it would be my duty to call upon the Department of Justice to test the question whether or not the proceeding was a crime against the United States.

"It might also be my duty to suggest whether a bank holding a United States charter does not abuse its franchises and furnish ground for their forfeiture by acts in aid of hostilities against a nation with which the United States is at peace.

"I do not anticipate, however, that anything done by your bank or its officers is likely to promote the solution of the interesting legal questions your letter presents. You ask me not merely as to your technical legal liability but also as to your moral obligations, adding 'for we are all too loyal to our own country to seek to overthrow in any sense her laws.' I heartily commend the sentiment of the quotation, and am in a position to say that your moral duty in the premises does not admit of the least question. It has been expounded by no less an authority than the Supreme Court of the United States in the following language:

"'The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the Government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the Government is in amity and friendship.

"'This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of differ-

ent countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the Department of the Government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our Government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation.'

"Trusting you will find the foregoing a satisfactory answer to your inquiries, and that your bank, yourself, and its other officers will proceed accordingly, I am," etc.

Mr. Olney, Sec. of State, to Mr. Massey, June 18, 1895, 202 MS. Dom. Let. 654.

The extract quoted from the Supreme Court in the foregoing letter is from Kennett v. Chambers, 14 How. 38, 49.

"The Department is informed through its consular representatives in Cuba that the manager of the Soledad sugar plantation, belonging to you, near the city of Cienfuegos, has refused to receive a squad of soldiers ordered there by General Martinez Campos for the protection of the plantation, or to lend assistance in preparing certain defensive works near the sugar works which had been ordered to be made for the protection of the latter from assault, basing his refusal in each instance on the ground that, as the plantation is the property of an American citizen, he has to observe a perfect neutrality between the Spanish Government and the insurgents.

"In view of certain inquiries made in June last, by American owners of plantations in or near the theatre of insurrection in Cuba, as to the protection to be accorded to their property and their right to redress in case of injury thereto, the Department, on the 1st of July last, instructed the consulate-general at Havana as follows:

"'It is a generally accepted principle of international law that a sovereign government is not ordinarily responsible to alien residents for injuries they may receive within its territories from insurgents whose conduct it can not control. Within the limits of usual effective control, law-abiding residents have a right to be protected in the

ordinary affairs of life and intercourse, subject, of course, to military necessities should their property be situated within the zone of active operations. The Spanish authorities are represented to be using strenuous endeavors to prevent the class of spoliations which the writers apprehend and notification of any apprehended danger from the insurgents would probably be followed by the adoption of special safeguards by the authorities. In the event, however, of injury, a claim would necessarily have to be founded upon averment and reasonable proof that the responsible officers of the Spanish Government, being in a position to prevent such injury, have failed to use due diligence to do so.'

"As is implied by the passage above quoted, foreigners at the scene of insurrection necessarily look for protection, so far as may be required, to the titular sovereign, and they are also subject to its authority. Assuming the facts in regard to the action of the manager of the Soledad plantation to be as reported, he seems, so far at least as they relate to his refusal of protection, to have confounded his duty to abstain from participating in the conflict, and his exemption from being required to participate in it, with the doctrine of governmental neutrality as between recognized belligerents, and to have assumed that the insurgents in Cuba are to be treated by foreigners as possessing equal authority and responsibility with the Government.

"These observations are made merely for your information, and it is not doubted that the course of your manager, so far as it may be found to have involved unwarrantable assumptions, was taken upon his own responsibility and was unauthorized. The Department has instructed the consulate-general at Havana in this sense."

Mr. Adee, Act. Sec. of State, to Mr. Atkins, Aug. 31, 1905, 204 MS. Dom. Let. 385.

The agents in Venezuela of an American line of steamers, plying between New York and Venezuelan ports and carrying the mails, having on several occasions been applied to by one or the other of the factions contending for power in that country for the use of their vessels for special service out of their regular itinerary, requested the advice of Mr. Scruggs, then United States minister at Caracas. Mr. Scruggs replied: "The ships . . . being registered American vessels, . . . and being besides under contract with the United States Government for carrying the mails, can not be chartered or otherwise used by anyone of the factions now contending for power in Venezuela without manifest prejudice to their neutral character and to the interests of the United States. It is hoped, therefore, that you will courteously but firmly refuse to allow them to be so used." In acknowledging receipt of the correspondence, the Department of State said: "The Department regards your letter as,

under the circumstances, discreet. Avoidance of all interference in local conflicts is very desirable on the part of a mail line, although the suggested service to the titular or *de facto* authorities might not in fact infringe any statute of the United States."

Mr. Foster, Sec. of State, to Mr. Scruggs, Sept. 30, 1892, For. Rel. 1892, 627–628, enclosing a letter from the Secretary of the Treasury of Sept. 23, 1892, expressing the opinion, in a case lately before him, that the chartering of an American steamer in Honduras by the President of that Republic for use there against rebels, and the granting her for the time being permission to fly the Honduranean flag, did not subject the vessel, or her owners or master, to any penalty or disability under the statutes of the United States. See, also, as to the case in Honduras, For. Rel. 1893, 149–152, and supra, § 328, II. 1075.

On July 14, 1894, Commander Charles O'Neil, U. S. N., during a revolution in the Mosquito Reserve, issued a notice to the owners, agents, and captains of vessels flying the American flag in Nicaraguan waters, cautioning them not to take part in the affairs of either faction by permitting vessels under their charge "to engage in any military operations" by carrying bodies of armed men or military supplies, knowing them to be such, for either party, or by assisting in any hostile demonstration. Should either party attempt to coerce them to do so, or interfere with them in the peaceful pursuit of their legitimate business they were advised to protest, to exhibit the notice, and to communicate the facts to him.

For. Rel. 1894, Appendix, I. 321–322.

Feb. 3, 1899, on the outbreak of the insurrection under Gen. Reyes, Mr. Clancy, United States consular agent at Bluefields, issued a notice warning citizens of the United States not to take part in the political disturbances and requesting them to observe a strict neutrality. The uprising appears, however, to have been participated in by a number of aliens, including Americans, Englishmen, Cubans, Norwegians, and other nationalities. Subsequently, General Reuling, of the Nicaraguan army, on demanding the surrender of the town, with a view to avoid bloodshed and destruction of property, agreed with the commanders of an American and a British man-of-war, and with the foreign consuls, to allow the foreigners who were involved in the uprising to leave the country, and furnished them with passports with which they departed for New Orleans. This arrangement appears to have facilitated the prompt surrender of the town and the satisfactory termination of the revolution.

For. Rel. 1899, 551, 554–557, 582–584.

It is a misdemeanor at common law to plot and combine to disturb the peace and tranquillity of the United States and to draw them into a war with a foreign nation.

Lee, At. Gen., 1797, 1 Op. 75.
Rulings, contra, are noted in Wharton's Crim. Law, § 253.

Appeal from the admiralty of the State of Massachusetts acquitting the brig *Erstern* and her cargo. It appeared that upon the conquest of Dominica by the French a capitulation was entered into by which commercial intercourse between Great Britain and that island was prohibited. Under these circumstances, one Mason, a British subject, sought to establish at Ostend a plan by which the commerce of Great Britain with Dominica was to be kept up. Accordingly certain imperial subjects at Ostend purchased at London the brig *Erstern*, on which Mason put a cargo of British merchandise, the property of British subjects. The brig cleared out from London for Ostend, and, on her arrival there, the imperial subjects in question supplied her with false and colorable papers, by which they assumed the ownership of the cargo. The brig then sailed for Dominica with the cargo taken on board at London. It was held that this transaction was a fraudulent combination, and that the brig and cargo should be condemned, even though, by the ordinances of Congress, the cargo, if it were the property of the enemy, would not have been good prize if on board of a really neutral ship. The court seems to have proceeded on the idea of the "fraudulent combination" of imperial subjects with British subjects to evade the prohibition of the capitulation. The court said that, if the brig had been employed in "fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be prize," unless indeed it had been contraband, which it was not. The court said that the subjects of a neutral nation could not consistently with neutrality "combine" with British subjects to wrest out of the hands of the United States and France, as allies, the advantages they had acquired from Great Britain by the rights of war, since this would be "taking a decided part with the enemy."

Darby *v.* Brig Erstern, Federal Court of Appeals (1782), 2 Dall. 34.

"The forms of unneutral service which have been hitherto most common are: 1. Carriage of enemy dispatches or correspondence. 2. Carriage of enemy persons. 3. Enemy transport service. In recent wars, auxiliary coal, repair, supply, cable ships and the like have become of great value. . . . Pilotage by a neutral of an enemy vessel, the repetition of signals for the benefit of the enemy by any means, . . . and many other acts, the number of which will continually increase with the development of means of com-

munication and transmission, must be provided against by something beyond the laws of contraband and of blockade. Such acts are in the nature of unneutral service. . . . Their nature is hostile, because such service should primarily be performed by belligerent agents and agencies. The neutral agent in undertaking the act identifies himself with the belligerent to an extent which makes him liable to the treatment accorded to the belligerent. He is therefore liable to capture as an enemy, and his goods are liable to the treatment accorded to the enemy under similar conditions. The agent may be made a prisoner of war, and the agency may be seized, confiscated, or, in certain instances, so treated as to render it incapable of further rendering unneutral service."

George Grafton Wilson, Proceedings of the American Political Science Association, Chicago, Dec. 28–30, 1904.

II. *STANDARD OF OBLIGATION.*

§ 1291.

The measure of a neutral's obligations is to be found in the rules of international law, and it can not shelter itself by the allegation that its own legislation imposes a laxer standard on its subjects.

Papers relating to the Treaty of Washington, IV. 12; Moore, Int. Arbitrations, IV. 4101 et seq.

See, also, 103 North Am. Rev. (1866), 493.

"The duties of neutrality by the law of nations can not be either expanded or contracted by national legislation. The United States, for instance, may, in excessive caution, require from its citizens duties more stringent than those imposed by the law of nations; but this, while it may make them penally liable in their own land, does not by itself make them or their Government extraterritorially liable for this action in disobeying such local legislation. On the other hand, a government can not diminish its liability for breach of neutrality by fixing a low statutory standard."

Mr. Bayard, Sec. of State, to Mr. Smithers, chargé in China, June 1, 1885, For. Rel. 1885, 172.

"Breaches of neutrality may be viewed by this Government in two aspects: First, in relation to our particular statutes; and, secondly, in respect of the general principles of international law. Our own statutes bind only our own Government and citizens. If they impose on us a larger duty than is imposed on us by international law, they do not correspondingly enlarge our duties to foreign nations, nor do they abridge our duties if they establish for our municipal regulation a standard less stringent than that established by international law." (Mr. Bayard, Sec. of State, to Mr. Hall, Feb. 6, 1886, For. Rel. 1886, 51.)

The Hague Conference adopted the following resolution: The conference expresses the wish that the question of the rights and duties of neutrals should be considered at another conference. The American delegates voted for this resolution, but a few powers abstained from voting.

For. Rel. 1899, 513, 520.

III. *PROHIBITED ACTS.*

1. Acceptance of Commission.

§ 1292.

"Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars and imprisoned not more than three years."

Sec. 5281, Revised Statutes.

One Isaac Williams was convicted in a United States court in Connecticut, in 1797, and fined and imprisoned for a violation of the neutrality laws in accepting in the United States a French commission and under the authority thereof committing acts of hostility against Great Britain.

Murray *v.* Schooner Charming Betsy, 2 Cranch, 64, 82, note, summarizing the case as reported in the National Magazine, No. 3, p. 254.

2. Enlistments.

§ 1293.

"Every person who, within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, shall be deemed guilty of high misdemeanor, and shall be fined not more than one thousand dollars, and imprisoned not more than three years."

Sec. 5282, Revised Statutes.

"The provisions of this Title [R. S., §§ 5281–5291] shall not be construed to extend to any subject or citizen of any foreign prince,

state, colony, district, or people, who is transiently within the United States, and [*enlist*] [enlists] or enters himself on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people, who is transiently within the United States, to enlist or enter himself to serve such foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people. Nor shall they be construed to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States."

Sec. 5291, Revised Statutes.

It is a breach of the law of nations, punishable by indictment in the courts, to enlist in, or to aid in fitting out, foreign belligerent cruisers.

Henfield's Case, Wharton's State Trials, 49; Villato's Case, id. 185; Williams's Case, id. 652.

"Vessels of either of the parties not armed, or armed previous to their coming into the ports of the United States, which shall not have infringed any of the foregoing terms, may lawfully engage or enlist therein their own subjects or citizens, not being inhabitants of the United States."

Hamilton's Treasury circular of Aug. 4, 1793, 1 Am. State Papers, For. Rel. 140.

See Mr. Jefferson, Sec. of State, to Mr. Ternant, French min., May 15, 1793, forbidding belligerent recruiting in the United States. (Am. State Papers, For. Rel. I. 148.)

"Mr. Genet asserts his right of arming in our ports and of enlisting our citizens, and that we have no right to restrain him or punish them. Examining this question under the law of nations, founded on the general sense and usage of mankind, we have produced proofs, from the most enlightened and approved writers on the subject, that a neutral nation must, in all things relating to the war, observe an exact impartiality towards the parties, that favors to one to the prejudice of the other, would import a fraudulent neutrality, of which no nation would be the dupe; that no succor should be given to either, unless stipulated by treaty, in men, arms, or anything else directly serving for war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent; and he who does may be

rightfully and severely punished; that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments. To these principles of the law of nations Mr. Genet answers, by calling them 'diplomatic subtilties' and 'aphorisms of Vattel and others.' But something more than this is necessary to disprove them; and till they are disproved, we hold it certain that the law of nations and the rules of neutrality forbid our permitting either party to arm in our ports."

Mr. Jefferson, Sec. of State, to Mr. Morris, min. to France, Aug. 16, 1793, 4 Jefferson's Works, 34; Am. State Papers, For. Rel. I. 167, 168.

Mariners may be said to be citizens of the world; and it is usual for them of all countries to serve on board of any merchant ship that will take them into pay, and this practice, from the manner of their livelihood, seems, for obvious reasons, founded on convenience and, in many instances, on necessity. If foreign sovereigns purchase ships in the United States, and load them with provisions for the use of their fleets or armies, those ships are to be considered as commercially employed; and if they be not *attached* to the naval or military expeditions as part thereof in accompanying the fleet, or closely following the army from place to place for the purpose of furnishing them with supplies, there can be no pretext for restraining American sailors from hiring on board of them for the purpose of gaining a support in their customary way of occupation. A citizen of a neutral nation has a right to render his personal service as a sailor on board of any vessel whatever employed in mere commerce, though owned by either of the belligerent powers or the subjects or citizens of either, and nothing hostile can be imputed to such conduct.

Lee, At. Gen., 1796, 1 Op. 61.
To same general effect see 4 Op. 336; United States *v.* Skinner, 2 Wheel. Cr. Cas. 232; Stoughton *v.* Taylor, 2 Paine, 655.

An American citizen may enter either the land or naval service of a foreign government without compromising the neutrality of his own.

The Santissima Trinidad, 1 Brock. 478.

Colombian vessels are entitled, under articles 6 and 31 of the treaty with that Republic of 1824, to make repairs in our ports when forced into them by stress of weather, but not to enlist recruits there, either from our citizens or from foreigners, except such as may be transiently within the United States.

Wirt, At. Gen., 1825, 2 Op. 4.

The enlistment at New York of seamen or others for service on war vessels of Mexico (she being at war with Texas), such persons not being Mexicans transiently within the United States, is a breach of the act of 1818.

Nelson, At. Gen., 1844, 4 Op. 336.

The undertaking of a belligerent to enlist troops of land or sea in a neutral state without the previous consent of the latter is a hostile attack on its national sovereignty. The act of Congress prohibiting foreign enlistments is a matter of domestic or municipal right as to which foreign governments have no right to inquire, the international offense being independent of the question of the existence of a prohibitory act of Congress.

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

In this opinion it was advised that a foreign minister who engages in the enlistment of troops in the United States for his government is subject to be summarily expelled, or, after demand for his recall, dismissed by the President. See supra, § 640.

If agents of the British Government, being instructed to enlist military recruits, succeed in evading the municipal law and so escape punishment as malefactors, "such successful evasion serves to increase the intensity of the international wrong done the United States."

Cushing, At. Gen., 1855, 8 Op. 468; id. 476.

See, also, H. Ex. Doc. 107, 34 Cong. 1 sess.

For the indictment in United States *v.* Hertz, for illegal recruiting, see Wharton's Prec. 1123.

"While the laws of the Union are thus peremptory in their prohibition of the equipment or armament of belligerent cruisers in our ports, they provide not less absolutely that no person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered, in the service of any foreign state, either as a soldier or as a marine or seaman on board of any vessel of war, letter of marque, or privateer. And these enactments are also in strict conformity with the law of nations, which declares that no state has the right to raise troops for land or sea service in another state without its consent, and that, whether forbidden by the municipal law or not, the very attempt to do it without such consent is an attack on the national sovereignty.

"Such being the public rights and the municipal law of the United States, no solicitude on the subject was entertained by this Government when, a year since, the British Parliament passed an act to provide for the enlistment of foreigners in the military service of

Great Britain. Nothing on the face of the act or in its public history indicated that the British Government proposed to attempt recruitment in the United States, nor did it ever give intimation of such intention to this Government. It was matter of surprise, therefore, to find subsequently that the engagement of persons within the United States to proceed to Halifax, in the British province of Nova Scotia, and there enlist in the service of Great Britain, was going on extensively, with little or no disguise. Ordinary legal steps were immediately taken to arrest and punish parties concerned, and so put an end to acts infringing the municipal law and derogatory to our sovereignty. Meanwhile suitable representations on the subject were addressed to the British Government.

"Thereupon it became known, by the admission of the British Government itself, that the attempt to draw recruits from this country originated with it, or at least had its approval and sanction; but it also appeared that the public agents engaged in it had 'stringent instructions' not to violate the municipal law of the United States.

"It is difficult to understand how it should have been supposed that troops could be raised here by Great Britain without violation of the municipal law. The unmistakable object of the law was to prevent every such act which if performed must be either in violation of the law or in studied evasion of it; and in either alternative, the act done would be alike injurious to the sovereignty of the United States.

"In the meantime the matter acquired additional importance by the recruitments in the United States not being discontinued, and the disclosure of the fact that they were prosecuted upon a systematic plan devised by official authority; that recruiting rendezvous had been opened in our principal cities and depots for the reception of recruits established on our frontier, and the whole business conducted under the supervision and by the regular cooperation of British officers, civil and military, some in the North American provinces and some in the United States. The complicity of those officers in an undertaking which could only be accomplished by defying our laws, throwing suspicion over our attitude of neutrality, and disregarding our territorial rights is conclusively proved by the evidence elicited on the trial of such of their agents as have been apprehended and convicted. Some of the officers thus implicated are of high official position, and many of them beyond our jurisdiction, so that legal proceedings could not reach the source of the mischief.

"These considerations, and the fact that the cause of complaint was not a mere casual occurrence, but a deliberate design, entered upon with full knowledge of our laws and national policy and conducted by responsible public functionaries, impelled me to present the case to the British Government, in order to secure not only a

cessation of the wrong, but its reparation. The subject is still under discussion, the result of which will be communicated to you in due time."

President Pierce, annual message, Dec. 3, 1855, Richardson's Message I. 332.

As to the subsequent dismissal of Mr. Crampton, the British minister, and certain British consuls, see supra, § 640.

Joseph Wagner, who, at the October term, 1855, of the United States district court for the southern district of New York, was convicted of being concerned in the unlawful enlistment of men to serve a foreign prince, and sentenced to two years' imprisonment, and to pay a fine of $100, was pardoned in July, 1856. (Mr. Thomas, Assist. Sec. of State, to Mr. Hillyer, July 31, 1856, 45 MS. Dom. Let. 427.)

It is not a crime, under the neutrality law, to leave this country with intent to enlist in foreign military service; nor to transport persons out of the country with their own consent who have an intention of so enlisting. To constitute a crime under the statute, such person must be hired or retained to go abroad with the intent to be so enlisted.

United States *v.* Louis Kazinski, 2 Sprague, 7.

"I have to acknowledge the receipt of your No. 145 of the 7th instant, in which you report your action in relation to a public announcement in a newspaper of Ciudad Bolivar that the Spanish viceconsul in that city had, by the authority of the Spanish legation at Caracas, opened books 'for the enrollment of volunteers and the reception of subscriptions' in aid of Spain in her war with the United States. You state that both the President and the minister of foreign affairs of Venezuela agreed 'that the Spanish legation had gone too far, and that a stop should immediately be put to its efforts to raise men and money on Venezuelan soil with which to oppose the United States,' and it appears that as a result of your representations the ministry of foreign affairs issued on the 1st of June a decree in which attention is called to various provisions of the penal code of Venezuela by which it is forbidden to anyone, without authority of the national government, to make levies or to arm and equip 'Venezuelans or foreigners on Venezuelan soil destined for the service of another nation, or to arrogate to himself illegal functions, and, without authority, to open an office for making subscriptions or enlistments.'

"Upon your report of the matter by cable, with the inquiry whether you should demand the dismissal of the Spanish minister at Caracas, the Department, in its telegraphic reply, instructed you to lay such evidences as you possessed of the minister's offenses before the Venezuelan Government, with an expression of confidence that it would take appropriate measures for the vindication of its sovereignty. The

Department deemed it proper, after the proofs should be presented to the minister of foreign affairs, to afford the Venezuelan Government an opportunity to investigate the matter, and of its own motion to take such further action as the facts should require. It is assumed that the Venezuelan Government, especially in view of what you say of its friendly disposition toward the United States, will not be disinclined to signify in a substantial way its displeasure at what seems to have been a flagrant attempt to disregard its laws and its neutrality."

Mr. Day, Sec. of State, to Mr. Loomis, min. to Venezuela, June 20, 1898, For. Rel. 1898, 1136.

In a report of the chief of the Bureau of Navigation of the Navy Department, communicated by the Acting Secretary of the Navy to the Secretary of State, June 1, 1898, it is said to be "the opinion of the Bureau that not even a citizen of the United States residing abroad can enlist in time of war without coming to the United States, unless neutrality laws are violated."

For. Rel. 1898, 1175.

3. Fitting Out or Arming of Vessels.

(1) statutory provisions.

§ 1294.

"Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States."

Sec. 5283, Revised Statutes.

"Every citizen of the United States who, without the limits thereof, fits out and arms, or attempts to fit out and arm, or pro-

cures to be fitted out and armed, or knowingly aids or is concerned in furnishing, fitting out, or arming any private vessel of war, or privateer, with intent that such vessel shall be employed to cruise, or commit hostilities, upon the citizens of the United States, or their property, or who takes the command of, or enters on board of any such vessel, for such intent, or who purchases any interest in any such vessel, with a view to share in the profits thereof, shall be deemed guilty of a high misdemeanor, and fined not more than ten thousand dollars, and imprisoned not more than ten years. And the trial for such offense, if committed without the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought."

Sec. 5284, Revised Statutes.

The half of the proceeds of a vessel, forfeited and sold for violation of the neutrality laws, belonging, under section 5233, Revised Statutes, to the informer, does not by lapse of time become the property of the United States, even if no one appears to claim it.

United States *v.* The Resolute, 40 Fed. Rep. 543.

(2) ORIGIN OF INHIBITION.

§ 1295.

When M. Genet came to the United States as French minister in 1793, he brought with him a quantity of blank commissions, and after his arrival proceeded to fit out and commission privateers. Referring to this fact, and particularly to the capture and bringing into Philadelphia of a ship by one of these cruisers, Mr. Jefferson, on June 5, 1793, wrote to M. Genet that, as it was "the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring powers," so "the granting military commissions, within the United States, by any other authority than their own," was "an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country." The departure of the vessels, so illegally equipped, from the ports of the United States was therefore requested.

This request was not complied with, and captures continued, together with the sale of prizes in the ports of the United States. Accordingly, on August 7, 1793, Mr. Jefferson informed M. Genet that the President considered the United States "as bound, pursuant to positive assurances, given in conformity to the laws of neutrality, to effectuate the restoration of, or to make compensation for, prizes

which shall have been made, of any of the parties at war with France, subsequent to the 5th day of June last, by privateers fitted out of our ports;" that it was consequently expected that he would "cause restitution to be made" of all prizes so taken and brought in subsequent to that day, "in defect of which, the President considers it as incumbent upon the United States to indemnify the owners of those prizes, the indemnification to be reimbursed by the French nation;" and that, "besides taking efficacious measures to prevent the future fitting out privateers in the ports of the United States, they will not give asylum therein to any which shall have been at any time so fitted out, and will cause restitution of all such prizes as shall be hereafter brought within their ports, by any of the said privateers."

A similar note was addressed to the British minister, and this was followed up, on September 5, 1793, by another, in which Mr. Jefferson comprehensively defined the position of the United States. Referring to the treaties of the United States with France, the Netherlands, and Prussia, by which the contracting parties were bound to endeavor, "by all the means in their power," each to protect and defend in its ports or waters, or the seas near its coasts, vessels and effects belonging to citizens of the other, and to recover and cause to be restored to the right owners any such vessels or effects as should there be taken from them, Mr. Jefferson said:

"Though we have no similar treaty with Great Britain, it was the opinion of the President that we should use towards that nation the same rule, which, under this article, was to govern us with the other nations, and even to extend it to captures made *on the high seas*, and brought into our ports, if done by vessels which had been armed within them. Having, for particular reasons, forborne to use *all the means in our power* for the restitution of the three vessels mentioned in my letter of August 7th, the President thought it incumbent on the United States to make compensation for them; and though nothing was said in that letter of other vessels taken under like circumstances, and brought in after the 5th June, and *before the date of that letter*, yet, where the same forbearance had taken place, it was, and is his opinion, that compensation would be equally due. As to prizes made under the same circumstances, and brought in *after the date of that letter*, the President determined, that all the means in our power should be used for their restitution. If these fail, as we should not be bound by our treaties to make compensation to the other powers, in the analogous case, he did not mean to give an opinion, that it ought to be done to Great Britain. But still, if any cases shall arise subsequent to that date, the circumstances of which shall place them on similar ground with those before it, the President would think compensation equally incumbent on the United States. Instructions are given to the governors of the

different States, to use all the means in their power for restoring prizes of this last description, found within their ports. Though they will, of course, take measures to be informed of them, and the General Government has given them the aid of the custom-house officers for this purpose, yet you will be sensible of the importance of multiplying the channels of their information, as far as shall depends on yourself, or any persons under your direction, in order that the governors may use the means in their power for making restitution. Without knowledge of the capture, they can not restore it. It will always be best to give the notice to them directly; but any information, which you shall be pleased to send me also, at any time, shall be forwarded to them, as quickly as distance will permit. Hence you will perceive, sir, that the President contemplates *restitution* or *compensation*, in the cases before the 7th of August, and *after* that date, *restitution*, if it can be effected by any means in our power. And that it will be important, that you should substantiate the fact that such prizes are in our ports or waters.

"Your list of the privateers illicitly armed in our ports is, I believe, correct. With respect to losses by detention, waste, spoliation, sustained by vessels taken as before mentioned, between the dates of June 5th, and August 7th, it is proposed, as a provisional measure, that the collector of the customs of the district, and the British consul, or any other person you please, shall appoint persons to establish the value of the vessel and cargo, at the times of her capture, and of her arrival in the port into which she is brought, according to their value in that port. If this shall be agreeable, and you will be pleased to signify it to me, with the names of the prizes understood to be of this description, instructions will be given accordingly to the collectors of the customs where the respective vessels are."

Referring to this letter, Hall says: "The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main however it is identical with the standard of conduct which is now adopted by the community of nations."

Mr. Jefferson, Sec. of State, to M. Genet, June 5, 1793, Am. State Papers, For. Rel. I. 150; same to same, Aug. 7, 1793, id. 167; Mr. Jefferson, Sec. of State, to Mr. Hammond, Sept. 5, 1793, id. 174; Hall, Int. Law (5th ed.), 593; Moore, Int. Arbitrations, I. 312–316, 342–343; id. IV. 3970; 10 Washington's Writings, 546.

See, also, Mr. Jefferson to Mr. Madison, May 13, 1793, 2 Randall's Jefferson, 131; Mr. Jefferson, Sec. of State, to Mr. Rawle, May 15, 1793, 5 MS. Dom. Let. 109.

"Under the second point of view it appears to me wrong on the part of the United States (where not constrained by treaties) to permit one party in the present war to do what can not be permitted to the other. We can not permit the enemies of France to fit out privateers in our ports, by the 22d article of our treaty. We ought not, therefore, to permit France to do it: the treaty leaving us free to refuse, and the refusal being necessary to preserve a fair neutrality. Yet considering that the present is the first case which has arisen; that it has been in the first moment of the war, in one of the most distant ports of the United States, and before measures could be taken by the Government to meet all the cases which may flow from the infant state of our Government, and novelty of our position, it ought to be placed by Great Britain among the accidents of loss to which a nation is exposed in a state of war, and by no means as a premeditated wrong on the part of the Government. In the last light it can not be taken, because the act from which it results placed the United States with the offended, and not the offending party. Her minister has seen himself that there could have been on our part neither permission nor connivance. A very moderate apology then from the United States ought to satisfy Great Britain." (Opinion of Mr. Jefferson, Sec. of State, on the restitution by the United States of prizes taken by French privateers fitted out in Charleston, May 15, 1793, 2 Randalls' Life of Jefferson, 137.)

"The practice of commissioning, equipping and manning vessels in our ports, to cruise on any of the belligerent parties, is equally and entirely disapproved; and the Government will take effectual measures to prevent a repetition of it." (Mr. Jefferson, Sec. of State, to the minister of Great Britain, May 15, 1793, 3 Jeff. Works, 559.)

"As it was apprehended by the President of the United States that attempts might be made by persons within the United States to arm and equip vessels for the purpose of cruising against some of the powers at this time engaged in war, whereby the peace of the United States might be committed, the governors of the several States were desired to be on the watch against such enterprises, and to seize such vessels found within the jurisdiction of their States." (Mr. Jefferson, Sec. of Sate, to U. S. district attorney for New York, June 12, 1793, 5 MS. Dom. Let. 143.)

"I inclose you also several memorials and letters which have passed between the Executive and the ministers of France and England. These will develop to you the principles on which we are proceeding between the belligerent powers. The decisions, being founded on what is conceived to be rigorous justice, give dissatisfaction to both parties, and produce complaints from both. It is our duty, however, to persevere in them and to meet the consequences. You will observe that Mr. Hammond proposes to refer to his court the determination of the President that the prizes taken by the *Citôyen Genet* could not be given up; the reasons for this are explained in the papers. Mr. Genet had stated that she was manned by French citizens. Mr. Hammond had not stated to the contrary before the decision. Neither produced any proofs. It was therefore supposed that she was manned principally with French citizens. After the decision Mr. Hammond denies the fact, but without producing any proof. I am really unable to say how it was, but I believe it to be certain that there were very few Americans. He says the issuing the commission, etc., by Mr. Genet within our territory was an infringement of our

sovereignty; therefore, the proceeds of it should be given up to Great Britain. The infringement was a matter between France and us. Had we insisted on any penalty or forfeiture by way of satisfaction to our insulted rights, it would have belonged to us, not to a third party. As between Great Britain and us, considering all the circumstances explained in the papers, we deemed we did enough to satisfy her. We are moreover assured that it is the standing usage of France, perhaps, too, of other nations, in all wars, to lodge blank commissions with all their foreign consuls to be given to every vessel of their nation, merchant or armed, without which a merchant vessel would be punished as a pirate were she to take the smallest thing of the enemy that should fall in her way. Indeed, the place of the *delivery* of a commission is immaterial, as it may be sent by letter to anyone. So it may be delivered by hand to him anywhere; the place of *signature by the sovereign* is the material thing. Were that to be done in any other jurisdiction than his own, it might draw the validity of the act into question." (Mr. Jefferson, Sec. of State, to Mr. Pinckney, min. to England, June 14, 1793, MS. Inst. U. States Ministers, I. 307.)

See, also, Mr. Jefferson, Sec. of State, to Mr. Hammond, British min., June 19, 1793, 5 MS. Dom. Let. 164.

In Mr. Jefferson's letter of June 17, 1793, to M. Genet, he stated that, it being reported to the President that an armed French cruiser was fitting out, arming, and manning in the port of New York, for the express purpose of cruising against certain other nations with whom we were at peace, that she had taken her guns and ammunition aboard, and was on the point of departure, "orders were immediately sent to deliver over the vessel, and the persons concerned in the enterprise, to the tribunals of the country; that if the act was of those forbidden by the law, it might be punished, if it was not forbidden, it might be so declared." (1 Wait's State Papers, 90; 1 Am. State Papers, For. Rel. 154.)

Genet's notes of June 25, 1793, giving notice of arming of English vessels in United States harbors, are in 1 Am. State Papers, For. Rel. 159, and in succeeding pages of the same volume there is other correspondence as to the arming of vessels in such ports.

"The original arming and equipping of vessels in the ports of the United States, by any of the belligerent parties, for military service, offensive or defensive, is deemed unlawful.

"Equipments of merchant vessels, by either of the belligerent parties, in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.

"Equipments in the ports of the United States, of vessels of war in the immediate service of the Government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful. . . .

"Equipments of vessels in the ports of the United States, which are of a nature solely adapted to war, are deemed unlawful; except those stranded or wrecked," etc.

Hamilton's Treasury Circular of Aug. 4, 1793, 1 Am. State Papers, For. Rel. 140, 141.

"RULES ADOPTED BY THE CABINET AS TO THE EQUIPMENT OF VESSELS IN THE PORTS OF THE UNITED STATES BY BELLIGERENT POWERS, AND PROCEEDINGS ON THE CONDUCT OF THE FRENCH MINISTER.

"AUGUST 3D, 1793.

"1. The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service offensive or defensive is deemed unlawful.

"2. Equipments of merchant vessels by either of the belligerent parties, in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.

"3. Equipments, in the ports of the United States, of vessels of war in the immediate service of the government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful; except those which shall have made prize of the subjects, people, or property of France, coming with their prizes into the ports of the United States, pursuant to the seventeenth article of our treaty of amity and commerce with France.

"4. Equipments in the ports of the United States, by any of the parties at war with France, of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature, as being applicable either to commerce or war, are deemed lawful, except those which shall be made prize, &c.

"5. Equipments of any of the vessels of France in the ports of the United States, which are doubtful in their nature, as being applicable to commerce or war, are deemed lawful.

"6. Equipments of every kind in the ports of the United States, of privateers of the powers at war with France, are deemed lawful [unlawful].

"7. Equipments of vessels in the ports of the United States, which are of a nature solely adapted to war, are deemed unlawful; except those stranded or wrecked, as mentioned in the eighteenth article of our treaty with France, the sixteenth of our treaty with the United Netherlands, the ninth of our treaty with Prussia; and except those mentioned in the nineteenth article of our treaty with France, the seventeenth of our treaty with the United Netherlands, the eighteenth of our treaty with Prussia.

"8. Vessels of either of the parties not armed, or armed previous to their coming into the ports of the United States, which shall not have infringed any of the foregoing rules, may lawfully engage or enlist their own subjects or citizens, not being inhabitants of the United States; except privateers of the powers at war with France, and except those vessels which shall have made prize, &c.

"The foregoing rules having been considered by us at several meetings, and being now unanimously approved, they are submitted to the President of the United States.

"THOMAS JEFFERSON.
"ALEXANDER HAMILTON.
"HENRY KNOX.
"EDMUND RANDOLPH."

The above, which is given in 10 Washington's Writings (by Sparks), 546, as a cabinet resolution, appears in 1 Am. State Papers, For. Rel. 140, as an appendage to Hamilton's Treasury Circular of Aug. 4, 1793. In 10 Washington's Writings, 546, the serious mistake is made of putting "lawful" for "unlawful" at the end of clause "6."

For Hamilton's Treasury Circular, see, also, Moore, Int. Arbitrations, IV. 3971 et seq.

Etienne Guinet and John Baptist Le Maitre were indicted for a misdemeanor for fitting out and arming the vessel *Les Jumeaux*, at Philadelphia, to be employed in the service of the Republic of France against Great Britain, both powers being at peace with the United States. The indictment was brought upon section 3 of the neutrality act of 1795. Guinet only was apprehended. He pleaded not guilty. It appeared on the trial that the vessel when she entered Philadelphia, being laden with sugar and coffee, mounted four guns and two swivels. She had originally been a British cutter employed in the Guinea trade, and had ten portholes on each side; but only four were actually open at the time of her arrival, to accommodate the four guns thus mounted. After her arrival a contract was made with a ship carpenter to repair her, her condition being very rotten; and the carpenter agreed to open only the twenty ports which were pierced when she came into the port. While the repairs were proceeding, the Government instituted an inquiry into the subject. The twenty ports were then open, the upper deck was changed, and four guns on carriages, with two swivels, were lying on the wharf. The carpenter was ordered to desist, and a report was made to the Secretary of War, who directed that all the recent warlike equipments be dismantled, and the vessel restored to the state in which she arrived. The warden of the port caused the portholes to be shut up, and refused even to allow any ringbolts to be fixed in the vessel. When she sailed she carried, according to the custom-house entry, nothing in her hold but provisions, water casks, and wood. A witness stated that a few days previously he saw four guns in her hold, and the carpenter who repaired the boat said that she carried the four guns and two swivels which she brought with her. She sailed in the middle of the day, and some of the workmen went down in her as far as League Island. She came to at Wilmington, where she took on board three or four carriage guns, some small kegs, the contents of which were unknown,

and twenty to thirty muskets. The vessel then dropped down to New Castle, and a pilot boat was sent to Philadelphia to get some more guns and other articles. While the boat was waiting at Philadelphia for this purpose, she was seized, as well as the guns which were lying on the wharf, and the parties engaged in the transaction, one of whom was Guinet, were arrested.

The court held that the third section of the neutrality statute was meant to include all cases of vessels armed within United States ports, and that converting a merchant ship into a vessel of war must be deemed an original outfit, the offense consisting in the conversion from a peaceful use to warlike purposes. It was true, said the court, that the vessel left the wharf with only the number of guns which she had brought into port; but it was equally true that when she had dropped down the river, she took on board three or four more guns, muskets, water casks, etc., and it was manifest that other guns were ready to be sent to her by the pilot boat. These circumstances clearly proved a conversion from the original commercial design of the vessel to a design of cruising against the enemies of France. It was only necessary therefore to ascertain how far the defendant was knowingly concerned in the offense in question. It had been alleged in his defense that he was merely an interpreter. If he had appeared in that character alone, the court declared that it would not have thought it a sufficient ground for conviction. But the jury were to collect their views of the matter from all the circumstances. It appeared that the defendant carried orders from the owner of the ship to the ship carpenter; that he told the pilot boy at what time the guns should be taken on board the boat to be carried to the ship; that the accounts found in his possession contained charges for supplies of cannon ball, muskets, and commissions for services; and that the whole transaction was conducted in a secret and mysterious manner at night. The court said that if the defendant was concerned in the offense, it was effected as far as it was in his power to complete it. The illegal outfit of the vessel was accomplished; and the fact that an additional number of cannon was not sent to augment her force was not owing to his respect for the laws, but to the vigilance of the police.

The jury found a verdict of guilty.

United States *v.* Guinet (1795), 2 Dall. 321.

A belligerent can not send out privateers from neutral ports.

Talbot *v.* Janson, 3 Dall. 133.

"We never can allow one belligerent to buy and fit out vessels here, to be manned with his own people, and probably act against the other."

President Jefferson to the Secretry of State, Aug. 12, 1808, 5 Jefferson's Works, 339.

See, also, Mr. Buchanan, Sec. of State, to Mr. Saunders, min. to Spain, June 13, 1847, MS. Inst. Spain, XIV. 224.

"Our municipal law, in accordance with the law of nations, peremptorily forbids not only foreigners, but our own citizens, to fit out within the United States a vessel to commit hostilities against any state with which the United States are at peace, or to increase the force of any foreign armed vessel intended for such hostilities against a friendly state.

"Whatever concern may have been felt by either of the belligerent powers lest private armed cruisers or other vessels in the service of one might be fitted out in the ports of this country to depredate on the property of the other, all such fears have proved to be utterly groundless. Our citizens have been withheld from any such act or purpose by good faith and by respect for the law." (President Pierce, annual message, 1855, Richardson's Messages, V. 327, 332.)

On the general question, see Br. & For. State Papers, 1864–65, vol. 55.

(3) CONSTITUENTS OF THE OFFENSE.

§ 1296.

Under the neutrality laws of the United States it is an indictable offense either to fit out or to arm.

United States *v.* Guinet, 2 Dall. 321, Wharton's State Trials, 93; United States *v.* Quincy, 6 Pet. 445.

If a vessel be fitted out, furnished, or armed within the waters of the United States, and there be sufficient grounds for believing that it is done with intent to employ it in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects or property of another foreign prince or state with whom the United States are at peace, it is unlawful under the act of Congress. If an English vessel be seeking an armament with the latter purpose, it will be unlawful. But there is no law to prohibit her taking in arms or military stores, in the way of trade, or for necessary self-defense.

Rush, At. Gen., 1816, 1 Op. 190.

Sending armed vessels and munitions of war to the ports of a belligerent for sale as articles of commerce is not prohibited by the law of nations or by the laws of the United States. But, while the sale of a vessel armed or unarmed to a belligerent is not forbidden by international law, such a vessel, even on its way to the vendee, is liable to be seized as contraband on the high seas by the opposing belligerent.

Story, J., Santissima Trinidad, 7 Wheat. 283, 340.

"Judge Story, in delivering the opinion of the court, said—which was not necessary to the decision of the case, as there had been an illegal augmentation of force—that the sending of this vessel, fully armed and ready for use in war, under American colors, papers, and

command, to Buenos Ayres, for a *bonâ fide* purpose of offering her there for sale in the market, as a commercial enterprise, though it subjected her to capture as contraband, would not be a violation of our national neutrality." (Dana's Wheaton, § 439, note 215, p. 554.)

"Without wearying the patience of the tribunal in the further discussion of this question, it will be assumed that a vessel of war is not to be confounded with ordinary contraband of war. Indeed, the only respectable authority which has been cited even apparently to the contrary, is an observation which Mr. Justice Story thrust into the opinion of the Supreme Court of the United States, upon the case of the *Santisima Trinidad*. If that eminent jurist had said that a vessel of war was to be regarded in public law as an article which might be legitimately constructed, fitted out, armed, equipped, or dealt in by a person in the territory of a neutral, with the intent that it should enter the service of a belligerent, subject only to a liability to capture as contraband of war by the other belligerent, the United States would have been forced, with great regret, to ask this tribunal to disregard an opinion so at variance with common sense, and with the whole current of the actions of nations. Happily they are under no necessity of casting an imputation on the memory of one of their brightest judicial ornaments. . . . The court decreed a restitution of the property on the second ground [unlawful augmentation of force]. Any remarks, therefore, upon the first point [illegal fitting out] were outside of the requirements of the case. . . . Taking them in connection with the facts as shown in evidence, it is clear that the distinguished judge intended to confine his statement to the case of a vessel of war equipped and dispatched as a commercial venture, without previous arrangement or understanding with the belligerent, and at the sole risk of the owner. . . . It may, however, be said that the ordinary experiences of human life show that such deeds border upon the debatable ground between good faith and fraud. The court which decided that case evidently did so on the impressions which the judges received from the particular evidence before them; for, on the very next day, the most illustrious of American judges, John Marshall, then Chief Justice of the United States, in the parallel case of the *Irresistible*, a vessel built at Baltimore, sent to Buenos Ayres, and there commissioned as a privateer, pronouncing the opinion of the same court, declared that the facts as to the *Irresistible* showed a violation of the laws of the United States in the original construction, equipment, and arming of the vessel; and that, should the court decide otherwise, *the laws for the preservation of the neutrality of the country would be completely eluded*. The Gran Para, 7 Wheaton, 471." (Case of the United States at Geneva, Papers relating to the Treaty of Washington, I. 82–83.)

Where certain vessels being constructed in the United States for Mexico for the purpose of waging war against Texas (an independent state) were not delivered, nor the property changed, within our jurisdiction, but were sent out of port under control of our own citizens unarmed, and where every possible precaution had been taken to insure pacific conduct on the high seas, it was held that, although the

sale was made abroad, if the vessels were equipped by American citizens within the United States for belligerent purposes, and for a nation belligerent to another with which ours was at peace, knowing the purposes for which they were to be employed, such equipment was repugnant to the act of 1818.

Legaré, At. Gen., 1842, 3 Op. 741.
See 3 Op. 738.

The fitting out of a war vessel of the German Government in the port of New York, while a state of war exists between that Government and Denmark, such vessel being calculated to cruise and commit hostilities against Denmark, its property or subjects, is contrary to the act of 1818. The fact that the vessel was to repair to Bremerhaven, there to await orders, made no difference, as any intent, ultimate or proximate, to commit hostilities is a violation of the act.

Johnson, At. Gen., 1849, 5 Op. 92.
See, as to this case, Dana's Wheaton, note 215, p. 561, citing Annuaire des Deux Mondes (1852–53), 485; Ex. Doc. 5, 31 Cong.

Under the 3d section of the neutrality act of April 20, 1818, it is not necessary that the vessel should be armed or in a condition to commit hostilities, on leaving the United States, in order to convict a party concerned in the enterprise who is indicted for being concerned in fitting out a vessel with intent that she should be employed in the service of a foreign province or state at peace with the United States. It is sufficient if the defendant was knowingly concerned in fitting out or arming the vessel with intent as aforesaid, though the intent should appear to have been defeated after the vessel sailed. But if the defendant had no fixed intention when the vessel sailed to employ her as a privateer, but only a wish so to employ her if he could obtain funds on her arrival at a foreign port, for the purpose of arming her, he ought not to be convicted.

United States *v.* Quincy, 6 Pet. 445.

Replying to an inquiry whether an ironclad ship, intended for the Russian Government, which was then at war with Turkey, would be liable to detention if she "were duly purchased by a private party, who, in order to be enabled to transfer said vessel to the said belligerent, when beyond the jurisdiction of the United States, should obtain a clearance for some foreign port," Mr. Evarts said: "A circuitous transaction, including a violation of the law, is as much forbidden as a direct one."

Mr. Evarts, Sec. of State, to Mr. Park, Oct. 9, 1877, 120 MS. Dom. Let. 145.

A vessel constructed in a United States port for a hostile attack on a friendly sovereign will be arrested, under our neutrality laws, even

though she is not yet complete, and the intention is to send her to a foreign port for completion.

Mr. Evarts, Sec. of State, to Mr. Sullivan, Feb. 21, 1878, 121 MS. Dom. Let. 692.

See Mr. Evarts, Sec. of State, to Mr. Sherman, Sec. of Treas., June 5, 1878, 123 MS. Dom. Let. 192.

An expedition, organized in parts, and dispatched from the United States, to meet at a common rendezvous on the high seas, and thence proceed to acts of hostility against a friendly power, is within the prohibition of section 5283, Revised Statutes, and a vessel fitted out in the United States at such rendezvous is liable, under that section, to seizure and forfeiture for a breach of the neutrality laws.

The Mary N. Hogan, 18 Fed. Rep. 529.

The forfeiture under section 5283 is one-half to the use of the informer and the other half to the use of the United States. The Haytian minister stated that his Government did not desire to be considered as the informer in the sense of that section, and had not authorized any of its agents to claim or receive any part of the proceeds of the confiscation of the *Hogan* or of any other confiscation connected with the late insurrection. (Mr. Frelinghuysen, Sec. of State, to Mr. Preston, Haytian min., May 6 and May 24, 1884, MS. notes to Hayti, I. 327, 328.)

See, also, The Erwin, 20 Fed. Rep. 50. This vessel was the tender of the *Mary N. Hogan*, and the arms and munitions of war on board were condemned. (Mr. Preston, Haytian min., to Mr. Bayard, Sec. of State, Jan. 25, 1889, For. Rel. 1889, 515, 519. See, also, Mr. Adee, Act. Sec. of State, to Mr. Preston, Aug. 11, 1883, MS. notes to Hayti, I. 311; Mr. John Davis, Act. Sec. of State, to Mr. Preston, Aug. 15, 1883, id. 313.)

See, as to the *Azelda and Laura*, detained at New York on suspicion of having arms for the Haytian insurgents, Mr. Frelinghuysen, Sec. of State, to Mr. Preston, Nov. 22, 1883, MS. notes to Hayti, I. 317.

The schooner *I*, with a cargo for Richmond, received on board at New York certain cannon, muskets, and ammunition with orders, on being hailed by concerted signals, to put them off near the Virginia capes. But owing to seizure at New York of the steamer *Morgan* (which was to take them to Hayti to aid the insurrection there) the *I* was not signaled, but proceeded with them to Richmond. Held, that they were liable to libel for forfeiture, under § 5283.

United States *v.* Two Hundred and Fourteen Boxes of Arms, 20 Fed. Rep. 50.

To render a vessel subject to forfeiture for a violation of the neutrality laws, it is not necessary that she should have been armed or manned before leaving the United States, if the intention existed to arm and man her afterwards.

The City of Mexico, 28 Fed. Rep. 148

A possessory action in admiralty was brought against the collector of customs at Pensacola, Florida, for refusing during the insurrection of 1895 in Cuba to restore the papers of a steam tug because her nominal purchaser, who was described in the bill of sale as a trustee, refused to show by affidavit the name of the person for whom he was trustee. The papers were taken possession of by the collector by order of his official superiors. Subsequently, the steam tug having remained tied up at the wharf, he permitted her to engage in her usual business in Pensacola Harbor, a United States inspector of customs remaining on board. It was held that the action of the collector in withdrawing the papers, in which the nominal purchaser was described as trustee without indicating for whom, was lawful; that the possession of the owners had not been ousted, there having been no seizure by the collector; and that the court below, which had made a decree for damages in favor of the owner of the steam tug, had no jurisdiction in the case, and that the action must be dismissed.

The Monarch, 62 U. S. App. 622; same case, Brent *v.* Thornton, 91 Fed. Rep. 546.

The forfeiture of a vessel proceeded against under § 5283 of the Revised Statutes does not depend upon the conviction of the person or persons charged with doing the forbidden acts. A suit in rem, for forfeiture or condemnation of the vessel only, is a civil action, and not a criminal prosecution.

The Three Friends, 166 U. S. 1, 49 (1897).

A libel under § 5283, Revised Statutes, did not charge that the vessel was "fitted out and armed, or attempted to be fitted out and armed, with intent," etc., "within the limits of the United States," but charged in one count or article that she was "heavily laden with supplies, rifles, cartridges, machetes, dynamite, and other munitions of war, including one large twelve-pound Hotchkiss gun or cannon, and a great quantity of shot, shell, and powder therefor, . . . with intent," etc., and, in another count, that she was "fitted out and armed by being heavily laden with supplies, rifles, cartridges, . . . with intent," etc. "The libel," said the court, "is certainly not drawn with such legal precision and conciseness as to justify its use as a precedent, but taking it as a whole, and considering that the objections urged were not passed upon in the lower court, and, if passed upon adversely to the Government, the libel is plainly amendable, we are of the opinion that the exceptions urged should not be allowed in this court."

United States *v.* The Three Friends, 85 Fed. Rep. 424; 29 C. C. A. 244; 52 U. S. App. 571, 576–577.

See, also, The Three Friends, 32 C. C. A. 191; 89 Fed. Rep. 207.

(4) ACTS NOT WITHIN THE STATUTE.

§ 1297.

An American-built vessel, the *Hector*, having been fitted out and commissioned at Charleston by Genet as the French privateer *Vainqueur de la Bastille*, went to sea and then returned to the United States, and was detained and dismantled by the United States Government at Wilmington, N. C. She then sailed thence unarmed as a foreign vessel, but was equipped and commissioned at Hayti by the French authorities. She went again to sea, and brought a prize, the *Betsey*, into Charleston in 1795. It was held, that, under the circumstances, the fitting out by aid of which the capture was made, was not in contravention of law.

The Betsey, Bee, 67.

The fitting out and arming a vessel in anticipation of war is not a violation of neutrality.

Moodie *v.* The Alfred (1796), 3 Dall. 307.

It is not a violation of the neutrality laws of the United States to sell to a foreigner a vessel built in this country, though suited to be a privateer, and having some equipments calculated for war but frequently used by merchant ships.

Moodie *v.* The Alfred, 3 Dall. 307.

"Referring to your despatch, No. 875, upon the subject of building a certain number of launches in the Kingdom of Great Britain for the use of the United States, I have now to state that I am informed by the Secretary of the Navy, to whom I referred your despatch, for perusal, that from the reports made of the utility of the steam launches used in the British and French navies, in saving labor to the crew in towing, and for other purposes, it was thought advisable to order a few of them. The number so ordered was limited to twelve, in which no armament has been or will be placed."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 1305, March 17, 1865. MS. Inst. Great Britain. XX. 124.

A vessel called the *Meteor* was built in the United States in 1865, during the war between Chile and Spain, and sold to the Chilean Government, without armament, and then, it was alleged, commissioned, when in the United States, as a Chilean privateer. She was libeled in New York and seized January 23, 1866. On the hearing before Judge Betts it was maintained by the claimant to "be no offence [under the act of 1818] to issue a commission within the United States for a vessel fitted and equipped to cruise or commit

hostilities, and intended to cruise and commit hostilities, so long as such vessel was not armed at the time, and was not intended to be armed within the United States, although it could be shown that a clear intent existed, on the part of the person issuing or delivering the commission, that the vessel should receive her armament the moment she should be beyond the jurisdiction of the United States." It was said, however, by Judge Betts, that "the court can not give any such construction to the statute. Such a construction was repudiated by the Supreme Court. . . . The *Meteor*, although not completely fitted out for military operations, was a vessel of war, and not a vessel of commerce. She had in no manner been altered from a vessel of war so as to fit her to be only a merchantman and so as to unfit her to be a vessel of war. It needed only that she should reach a point beyond the jurisdiction of the United States, and there have her armament and ammunition put on board of her, to become an armed cruiser of the Chilean Government against the Government of Spain. . . . To say that the neutrality laws of the United States have never prohibited the sale of a vessel of war as an article of commerce is merely to say that they have not prohibited the fitting out and arming, or the attempting to fit out and arm, or the furnishing or fitting out or arming, of a vessel within the limits of the United States, provided the unlawful and prohibited intent did not exist." The court relied as authority on Dana's Wheaton, 562, 563, note 215, where it is said that "an American merchant may build and fully arm a vessel, and supply her with stores, and offer her for sale in our own market. If he does any acts, as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case, the extent and character of the equipments is as immaterial as in the other class of cases. The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent." Judge Betts then proceeded to say: "The evidence in the present case leaves no rational doubt that what was done here in respect to the *Meteor*, was done with

the intent that she should be employed in hostile operations in favor of Chile against Spain, and that what was done by her owners towards despatching her from the United States was done in pursuance of an arrangement with the authorized agents of Chile for her sale to that Government and for her employment in hostilities against Spain, and that the case is not one of a *bona fide* commercial dealing in contraband of war. With these views, there must be a decree condemning and forfeiting the property under seizure, in accordance with the prayer of the libel."

Report of the Case of the Steamship Meteor by F. V. Balch (Little, Brown & Co. 1869), I. 229. See, also, Halleck, Int. Law (Baker's ed.), II. 199.

"It has been by many supposed that the decision in this *Meteor* case will be of great weight and importance as a precedent in the question of the *Alabama* and other Confederate vessels, now pending between this country and Great Britain; and the suspicion has been intimated by some that the law was a little warped by the learned judge, with the charitable intent of aiding Mr. Seward in the controversy. To justify either of these ideas, it is of course primarily necessary that the cases should be at least substantially parallel. That they are very far from being so may be briefly shown. The *Meteor* was built as a purely commercial enterprise, to be sent to a foreign port, there to take her chance of finding a market, subject to the risk of capture on the way, to be followed by confiscation as contraband of war; and to the further risk, should she reach her destination in safety, of finding no market in case the war should be drawing to a close, or terms could not be agreed on; liable also to be sold to any other bidder who would pay a better price. She differed nowise from any other contraband merchandise except in the wholly insignificant fact that, instead of being of such a nature as to require to be carried, she was able to move herself. She was simply a mercantile speculation in contraband merchandise, which is of all men and nations confessedly and avowedly legitimate. The *Alabama* presents no one of these characteristics. . . . The question then being, as Mr. Dana says, of *intent*, the vital difference is readily distinguishable. The English builders had assured their trade before they entered upon the undertaking; the American merchants only had in view a quite probable purchaser. The former were not free to dispose of their ship to any person who might offer her price, for she was bespoken; the latter would have been very glad to have received and closed with a fair offer from any source. In short, the action of the former betrays clearly the *intent*, the element of illegality, but how the action of the latter can have been regarded in the same light, we must confess ourselves unable to see. Where, then, is the similarity? Or why should it have been conceived necessary to sacrifice the *Meteor*, to overrule old and good law, to create a new necessity requiring to be met by new statutes of untried efficiency, simply for the purpose of creating a precedent which is after all no precedent?" (103 North American Review (October, 1866), 488.)

Judge Betts's decree was reversed in the circuit court, where the following opinion was delivered by Mr. Justice Nelson:

"This is an appeal in admiralty from a decree of condemnation in a libel of information for the violation of the neutrality laws of the United States. We have examined the pleadings and proofs in the case, and have been unable to concur in the judgment of the court below, but from the pressure of other business have not found time to write out at large the grounds and reasons for the opinion arrived at. We must, therefore, for the present, be content in the statement of our conclusions in the matter:

"1. Although negotiations were commenced and carried on between the owners of the *Meteor* and agents of the Government of Chile for the sale of her to the latter, with the knowledge that she would be employed against the Government of Spain, with which Chile was at war, yet these negotiations failed, and came to an end, from the inability of the agents to raise the amount of the purchase money demanded; and if the sale of the vessel in its then condition and equipment, to the Chilean Government would have been a violation of our neutrality laws, of which it is unnecessary to express any opinion, the termination of the negotiation put an end to this ground of complaint.

"2. The furnishing of the vessel with coal and provisions for a voyage to Panama, or some other port of South America, and the purpose of the owners to send her thither, in our judgment, was not in pursuance of an agreement or understanding with the agents of the Chilean Government, but for the purpose and design of finding a market for her, and that the owners were free to sell her on her arrival there to the Government of Chile or of Spain, or of any other government or person with whom they might be able to negotiate a sale.

"3. The witnesses chiefly relied on to implicate the owners in the negotiations with the agents of the Chilean Government, with a view and intent of fitting out and equipping the vessel to be employed in the war with Spain, are persons who had volunteered to negotiate on behalf of the agents with the owners in expectation of large commissions in the event of a sale, or persons in the expectation of employment in some situation in the command of the vessel, and very clearly manifest their disappointment and chagrin at the failure of the negotiations; and whose testimony is to be examined with considerable distrust and suspicion. We are not satisfied that a case is made out, upon the proofs, of a violation of the neutrality laws of the United States, and must, therefore, reverse the decree below, and enter a decree dismissing the libel."

An appeal was taken by the Government from the decision of the circuit court to the Supreme Court of the United States, but was not prosecuted to a hearing, being dismissed by consent November 9, 1868.

Report of the Case of the Steamship Meteor, by F. V. Balch (Little, Brown & Co., 1869), II. 201, 202.

April 25, 1885, a libel was filed against the American steamer *City of Mexico*, at New York, for condemnation for violation of section 3 of the act of April 20, 1818, 3 Stat. 448, now section 5283, Revised Statutes, relating to neutrality. For some months an insurrection had existed in the State of Bolivar, Colombia, of which Barranquilla was the capital and Savanilla the seaport. March 12, 1885, the *City of Mexico* sailed from New York under charter to a local merchant for a voyage to Savanilla and return. She carried some arms and munitions of war consigned to merchants at Barranquilla and also some lumber and specie with which to procure a return cargo of fruit from Bocas del Toro. The steamer duly arrived at Savanilla and discharged her cargo, and the master went to Barranquilla and deposited the ship's papers with the United States consul. While there the master entered into a contract with the merchants, to whom the arms and ammunition had been consigned, to transport "about 250 passengers" from Savanilla to Rio Hacha, the latter port being then in the peaceable possession of the titular government, though the master was informed that it was in the possession of the insurgents. Under the contract he took on board about 150 troops, with arms and officers, and proceeded to Rio Hacha. When he arrived there the customs officials on coming aboard were seized and held by the troops against his protest. Subsequently the general in command of the troops demanded that the steamer should be used to capture a government vessel which was descried at a distance. The master and crew protested, and, as the chief engineer refused to work the engines, the project was abandoned. The master then proceeded to Savanilla, and afterwards entered a formal protest before the United States consul at Barranquilla. The de facto insurgent authorities disavowed the acts of the general and troops in making prisoners of the customs officials at Rio Hacha, and the *City of Mexico* was cleared for Bocas del Toro, where she obtained a partial cargo of fruit. She then returned to New York. The court held (1) that section 5283, Revised Statutes, prohibits only warlike or hostile voyages and not commercial ventures, and that the carrying of arms for the use of the insurgents to a port in their possession was not a violation of the statute; and (2) that, as the trip to Rio Hacha, no matter what may have been its intent, was not in contemplation when the steamer left New York, but was an independent diversion undertaken by the master on his own responsibility, it was not within the statute, because it was not planned "within the limits of the United States."

The City of Mexico (1885), 24 Fed. Rep. 33.

See For. Rel. 1885, 253, 254, 259, 260, 261. Also, Mr. Bayard, Sec. of State, to Mr. Garland, At. Gen., April 22, 1885, 155 MS. Dom. Let. 171; Mr. Bayard, Sec. of State, to Sec. of Treas., Feb. 19, 1886, 159 MS. Dom. Let. 124; Mr. Bayard, Sec. of State, to Mr. Garland, Feb. 25, 1886, id. 163; same to same, Feb. 27, 1886, id. 184.

As to the *Claribel*, see For. Rel. 1885, 263–264; Mr. Bayard, Sec. of State, to Attorney General, May 4, 1885, 155 MS. Dom. Let. 282.

As to the *Vertumnus*, see Mr. Bayard, Sec. of State, to Attorney General, June 19, 1885, 156 MS. Dom. Let. 47.

Where a vessel is chartered by a consul of a foreign government to carry a cargo of arms, deliverable as per bill of lading to his representatives, she can not be seized under section 5283 for being fitted out and armed to aid warring factions in another foreign government, though there is slight evidence that the arms may ultimately be employed for such purpose.

The Carondelet, 37 Fed. Rep. 799.

See Mr. Rives, Asst. Sec. of State, to Mr. Walker, Feb. 9, 1889, 171 MS. Dom. Let. 558.

See, also, For. Rel. 1889, 515, 520, 521, 522, 526, 527.

The evidence showed that a vessel was to be dispatched from New York to Samana in a condition unfit for the commission of hostilities, to be delivered there to the Government of the Dominican Republic. It was held that the use to which she might thereafter be put by that Government was a matter for which it and not the United States was responsible, and that a well-founded suspicion that the Dominican Government would use the vessel to commit hostilities in the service of a faction in Hayti under one Hyppolite and against an organization controlled by one Légitime, neither of which factions had been recognized as a belligerent power by the United States, would not justify a finding that the vessel was fitted out in New York with an intent to be used in hostilities in contravention of section 5283 of the Revised Statutes.

The Conserva, 38 Fed. Rep. 431.

As to the case of the *Conserva* or *Madrid*, see Mr. Preston, Haytian min., to Mr. Bayard, Sec. of State, Jan. 25, 1889, For. Rel. 1889, 515; Mr. Bayard to Mr. Preston, Jan. 28, 1889, id. 520; Mr. Preston, to Mr. Bayard, tel., Feb. 4, 1889, id. 521; Mr. Bayard to Mr. Preston, Feb. 5, 1889, id. 521; Mr. Preston to Mr. Bayard, Feb. 14, 1889, id. 522; same to same, Feb. 15, 1889, id. 526; Mr. Bayard to Mr. Preston, tel., Feb. 18, 1889, id. 527.

See, also, Mr. Bayard, Sec. of State, to Mr. Wilber, Jan. 28, 1889, 171 MS. Dom. Let. 427; Mr. Bayard, Sec. of State, to the Attorney-General, Feb. 5, 1889, id. 499; Mr. Bayard, Sec. of State, to collector of customs at New York, Feb. 15, 1889, id. 623; Mr. Blaine, Sec. of State, to Attorney-General, May 27, 1889, 173 id. 205.

As to the purchase of the steam yacht *Natalie* by the Haytian Government, see Mr. Uhl, Act. Sec. of State, to Attorney-General, Mar. 20, 1894, 196 MS. Dom. Let. 131.

No forfeiture can be claimed under section 5283, Revised Statutes, of a vessel which is only employed to transport arms and munitions of war to a vessel fitting out to pursue the forbidden warlike enterprise.

United States *v.* The Robert and Minnie, 47 Fed. Rep. 84.

"I am informed by the minister of Chile that he has authentic information that the American schooner *Robert and Minnie*, in tow of the tug *Vigilant*, which has put into a port in California (sailing from San Francisco), has aboard a large amount of arms and ammunition purchased by agents of the insurgents now engaged in insurrection against the established Government of Chile; that said schooner has been fitted out in the United States with hostile purpose against said Government, and that it is designed to transfer the said arms and ammunition to a vessel transport believed to be now hovering off the coast of California. In view of this information, it is desirable that prompt measures be taken to prevent the neutrality laws being violated to the injury of a friendly government." (Mr. Blaine, Sec. of State, to Attorney-General, May 4, 1891, 181 MS. Dom. Let. 592.)

The purchasing of arms and munitions of war and placing them on board an armed transport to be carried to a foreign country to be used in carrying on hostilities there is not a fitting out, or arming, or furnishing of a vessel under section 5283, Revised Statutes.

United States *v.* Trumbull, 48 Fed. Rep. 99. See, to the same effect, United States *v.* Itata, 49 Fed. Rep. 646; 56 Fed. Rep. 505; 5 C. C. A. 608.

For the citation of this decision in the case of the American schooner *Wahlberg*, which had secretly landed arms and munitions of war in Hawaii, see For. Rel. 1895, II. 867–876.

To bring a vessel within section 5283, Revised Statutes, it must be shown that her employment in the prohibited service was pursuant to an intention formed within the territorial limits of the United States; and the formation of such intention on the high seas, after she has left those limits, can not be construed, because she is an American vessel, as being within the statute.

United States *v.* The Laurada (1900), 98 Fed. Rep. 983; 39 C. C. A. 374; affirming United States *v.* The Laurada (1898), 85 Fed. Rep. 760.

But it is not necessary that the furnishing, fitting out, or arming should be completed within the limits of the United States. (United States *v.* The Laurada (1898), 85 Fed. Rep. 760.)

"It is believed that the presence of a United States cruiser off the coast of Florida, in the vicinity of Key West especially, might render valuable aid in preventing violations of the neutrality laws of the United States and in saving misguided citizens of the United States from the consequences of such violations.

"If the vessel be sent as suggested, it is thought her commander might properly be instructed not only to render all possible assistance

to marshals and other civil officers of the United States in the service of process at sea and otherwise, but to stop and examine, and if the result of the examination be not satisfactory, to take to the nearest port for further investigation, any vessel whose papers, cargo, armament, passengers or any other circumstances, tend to show that said vessel or those found on board are liable to prosecution for breach of the neutrality laws of the United States.

"The commander of the vessel will undoubtedly be familiar with the provisions of such neutrality laws. It might not be out of place, however, to call his attention to the fact that section 5283 of the Revised Statutes has been authoritatively construed and has been held not to cover the case of a vessel which receives arms and munitions of war in this country with intent to carry them to a party of insurgents in a foreign country, but not with intent that they shall constitute any part of the fittings or furnishings of the vessel herself.

"It has also been held that, under the same section of the Revised Statutes, a vessel cannot be condemned as piratical on the ground that she is in the employ of an insurgent party which has not been recognized by our Government as having belligerent rights."

Mr. Olney, Sec. of State, to Sec. of Navy, June 10, 1897, 202 MS. Dom. Let. 524.

"If the *Newark* can be employed to intercept the *Dauntless* and to take her into the nearest port of the United States, if upon examination she proves to have a filibustering expedition on board, it would seem to be plain that the interests of the United States require it to be done. See in this connection to-day's *New York Herald*, ninth page, telegraphic despatch from Jacksonville." (Mr. Olney, Sec. of State, to Sec. of Navy, Oct. 10, 1896, 213 MS. Dom. Let. 200.)

4. Augmentation of Force.

§ 1298.

"Every person who, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be deemed guilty of a high

misdemeanor, and shall be fined not more than one thousand dollars and be imprisoned not more than one year."

Sec. 5285, Revised Statutes.

The opening in a neutral port of the port-holes of a belligerent cruiser, which had been previously closed, is "as much *an augmentation of the force* of the said vessel as if the port-holes were now to be cut for the first time."

Decision of President Washington as given by Mr. Randolph, Sec. of State, to M. Fauchet, French min., June 13, 1795, 8 MS. Dom. Let. 262.

A libel was filed by the owners of the Dutch ship *Den Onzekeren* and her cargo, praying for the restitution of their property, which had been captured by the French privateer *Citizen of Marseilles* and brought within the jurisdiction of the United States, on the ground that the privateer was fitted out and armed in violation of the laws of the United States. It appeared that in the autumn of 1793 the privateer, being in San Domingo, was fitted out with 28 guns, but, her destination being changed, some of her warlike equipments were displaced to make room for passengers. Some of the portholes were closed, and some of the iron guns were removed and wooden ones put in their places, so that, though she presented the same appearance of force, she had 12 iron and 16 wooden guns mounted, the rest of the iron guns being placed in her hold. She then came to the United States, entering the port of Philadelphia. Here she was repaired; some improvised state rooms, used on the voyage for passengers, were knocked down; the vessel was caulked; her old gun carriages were repaired, and some new ones made by her own carpenters in place of an equal number of old ones which were broken up; the eye-bolts, for fixing the gun tackle, were taken out and replaced, and she was furnished with a new mast. She sailed from Philadelphia in the daytime, and it was not till she had left the Delaware capes that she opened the portholes that had been closed, and mounted the guns in her hold. Counsel for the privateer contended that the facts disclosed no evidence of augmentation of force, by cannon or mariners; that the substitution of new for old gun carriages was a mere replacement, not an augmentation of force; and that no augmentation of warlike force had taken place in the United States.

The court took this view, refusing restitution. Geyer *v.* Michel (1796), 3 Dall. 285. In a note to 3 Dall. 288, the reporter gives the judgment of Judge Bee, ordering the restitution of the ship *Betty Cathcart*, captured by the *Citizen of Marseilles*. Judge Bee found as a fact that the cruiser, while mounting only 12 guns on her arrival at Philadelphia, had 26 or 28 mounted when she left the Delaware River, having, in spite of the refusal of the authorities at Philadelphia to permit the opening of ports, opened them and mounted her guns

within the territories of the United States. The circuit court, however, took new testimony in the case, with the result of finding that there was not an augmentation of force in the United States.

Under the nineteenth article of the treaty with France of 1778, a privateer has a right, on any urgent necessity, to make repairs in any ports of the United States. The mere replacement of guns, masts, and sails, which have been taken out to enable the vessel to be repaired, is not an augmentation of force in the sense of the statute.

Moodie *v.* The Ship Phoebe Anne (1796), 3 Dall. 319.

It was held that the repairing the waist, and cutting two ports in it for guns at a port of the United States, of a vessel fitted out and commissioned as a vessel of war when she entered, does not by itself constitute an augmenting of her force within the meaning of the act of 5th June, 1794.

The Brothers, Bee, 76.

An augmentation of the force of a foreign belligerent vessel in a port of the United States, we being neutral, by a substantial increase of her crew, is a breach of our neutrality.

Santissima Trinidad, 7 Wheat. 283.

Under the neutrality laws of the United States, a belligerent will not be permitted to augment the force of his armed cruisers when in a port of the United States.

Mr. Clay, Sec. of State, to Mr. Rebello, Brazilian chargé, Jan. 29, 1828, MS. Notes to For. Legs. III. 418; same to same, April 8, 1828, IV. 5.

The repair of Mexican war steamers in the port of New York, together with the augmentation of their force by adding to the number of their guns, etc., is a violation of the act of 1818. But the repair of their bottoms, copper, etc., does not constitute an increase or augmentation of force within the meaning of the act.

Nelson, At. Gen., 1844, 4 Op. 336.

5. Hostile Expeditions.

(1) constituents of the offense.

§ 1299.

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on

from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

Sec. 5286, Revised Statutes.

A contract between citizens of the United States and an inhabitant of Texas, to enable him to raise men and procure arms to carry on the war with Mexico, the independence of Texas not having been acknowledged by the United States, was held contrary to our national obligations to Mexico, and violative of our public policy. It can not, therefore, be specifically enforced by a court of the United States.

Kennett *v.* Chambers, 14 How. 38.

There is no municipal law in the United States to prevent the organization of combinations to aid and abet rebellion in another country, unless forcible acts be attempted.

Cushing, At. Gen., 1856, 8 Op. 216.

A mere preparation or plan of violation of neutrality, without overt acts, does not make the party amenable under section 6 of the neutrality act of 1818. (Rev. Stat., § 5286.) If the means provided were procured to be used on the occurrence of a future contingent event, no liability is incurred under the statute. If, also, the intention is that the means provided shall only be used at a time and under circumstances when they could be used without a violation of law, no criminality attaches to the act.

United States *v.* Lumsden, 1 Bond, 5.

Proof that a vessel transported from Aspinwall to the coast of Cuba men, arms, and munitions of war, destined to aid the Cuban insurgents, is insufficient by itself to call for proceedings against such vessel for violation of the neutrality law of the United States.

Akerman, At. Gen., 1871, 13 Op. 541.

The papers presented by the Secretary of State in the case of the *Virginius* do not establish any violation of the neutrality laws, either by the owners of the steamer or by the persons engaged thereon.

Bristow, At. Gen., 1872, 14 Op. 49.

The captain and mate of a United States vessel, if they, knowing the character of their cargo and its intended purpose, transport arms

from a port within the United States to a foreign port, together with men and stores to be used in a military expedition against a people at peace with the United States, are guilty of a misdemeanor under Revised Statutes, section 5286.

United States *v.* Rand (1883), 17 Fed. Rep. 142.

In this case Rand, the master, and Pender, the mate, of the steamer *Tropic*, were both convicted. (Mr. John Davis, Act. Sec. of State, to Mr. Preston, May 28, and June 1, 1883, MS. Notes to Hayti, I. 293.)

The sending by a party of insurgents in Chile, organized and carrying on war against the government of that country, of an armed transport [the *Itata*] to the United States for the purpose of taking on board arms and ammunition purchased there and carrying them to Chile, is not the beginning, setting on foot, providing or preparing the means for a military expedition or enterprise to be carried on from the United States, within the meaning of sec. 5286, or of sec. 5285, Revised Statutes. "The cases of the Mary A. Hogan, 18 Fed. Rep. 529; United States *v.* Two Hundred and Fourteen Boxes of Arms, etc., 20 Fed. Rep. 50; and United States *v.* Rand, 17 Fed. Rep. 142, cited by counsel for the United States in support of their position in respect to this point, do not at all support it. In each of those cases there was a military expedition, and it was organized within, started from, and was to be carried on from the United States."

United States *v.* Trumbull (1891), 48 Fed. Rep. 99, 103.

See, to the same effect, United States *v.* Itata, 49 Fed. Rep. 646.

See, also, as to the case of the American schooner *Wahlberg*, charged with secretly landing arms and munitions of war in Hawaii, For. Rel. 1895, II. 867–876.

The military character of an expedition under section 5286, Revised Statutes, may be determined by the designation of officers or leaders, the organization of men in regiments or companies or otherwise, and the purchase of military stores; but no particular number of men is requisite, nor need the expedition actually set out, as the crime is completed by the mere organization, or other step in the inception thereof.

United States *v.* Ybanez, 53 Fed. Rep. 536.

"If . . . the persons supplying or carrying arms and munitions from a place in the United States are in any wise parties to a design that force shall be employed against the Spanish authorities, or that, either in the United States or elsewhere, before final delivery of such arms and munitions, men with hostile purposes toward the Spanish Government shall also be taken on board and transported in furtherance of such purposes, the enterprise is not commercial,

but military, and is in violation of international law and of our own statutes. (Rev. Stat. § 5286; United States *v.* Rand, 17 Fed. Rep. 142; United States *v.* The Mary N. Hogan, 18 Fed. Rep. 529; United States *v.* 214 Boxes of Arms, etc., 20 Fed. Rep. 50; The Conserva, 38 Fed. Rep. 431; United States *v.* Lumsden, 1 Bond. 105.)"

Harmon, At. Gen., Dec. 10, 1895, 21 Op. 267, 271.

The *Horsa*, a Danish steamer, sailing under the Danish flag and commanded by one Wiborg, a Danish subject, cleared from Philadelphia, November 9, 1895, for Port Antonio, Jamaica. She had on board but little cargo, among which were two lifeboats. Just before sailing Wiborg received a message instructing him, after passing out of the Delaware Bay, "to proceed north near Barnegat and await further orders." He did as directed and anchored off Barnegat light, on the high seas, between three and four miles from shore. Here he was met by a steam lighter, which had sailed from Brooklyn with some cases of goods and two lifeboats, and afterwards, in lower New York Bay, had taken on board during the night between thirty and forty men, apparently Cubans or Spaniards, who, with the cases of goods and the lifeboats, were transferred to the *Horsa*. After boarding the *Horsa* the men broke open the cases and took therefrom rifles, swords, and machetes, and a cannon, and practiced with them. The steamer took the usual course for Jamaica, which follows the Cuban coast for several hours. When about six miles off that coast, at night, the men disembarked under Wiborg's supervision, taking with them all the arms and ammunition they could carry. For the purpose of getting ashore they used the two lifeboats that were shipped at Philadelphia, the two that were brought by the lighter, and two belonging to the steamer. The *Horsa* then completed her voyage to Port Antonio. On her return to Philadelphia Wiborg was indicted with certain other persons in the United States district court for the eastern district of Pennsylvania, under section 5286 of the Revised Statutes, on the charge that they, "at the district aforesaid and within the jurisdiction of this court, did, within the territory and jurisdiction of the United States, to wit, at the port of Philadelphia, Pennsylvania, within the district aforesaid, begin, set on foot and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, against the island of Cuba," etc. The district judge instructed the jury that the evidence would not justify a conviction "of anything more than providing the means for or aiding such military expedition by furnishing transportation for their men, their arms, baggage," etc.; and that in order to convict they must be satisfied that the defendants understood that they were to carry the expedition, and had provided for it, and

understood what the expedition was, before leaving Philadelphia. The jury found Wiborg guilty. On a writ of error this verdict was sustained, the court saying: "It is true that the expedition started in the southern district of New York, and did not come into immediate contact with defendants at any point within the jurisdiction of the United States, as the *Horsa* was a foreign vessel; but the *Horsa's* preparation for sailing and the taking aboard of the two boats at Philadelphia constituted a preparation of means for the expedition or enterprise, and if defendants knew of the enterprise when they participated in such preparation, then they committed the statutory crime upon American soil, and in the eastern district of Pennsylvania, where they were indicted and tried."

Wiborg *v.* United States (1896), 163 U. S. 632, 655; 16 S. Ct. 1127, affirming United States *v.* Wiborg, 73 Fed. Rep. 159.

See, also, United States *v.* Hughes (1896), 75 Fed. Rep. 267; United States *v.* O'Brien, id. 900; United States *v.* Hart, 74 Fed. Rep. 724; 78 Fed. Rep. 868; Hart *v.* United States, 84 Fed. Rep. 799, 28 C. C. A. 612.

"The district judge . . . charged the jury in this case that it was not a crime or offence against the United States under the neutrality laws of this country for individuals to leave the country with intent to enlist in foreign military service, nor was it an offence against the United States to transport persons out of this country and to land them in foreign countries when such persons had an intent to enlist in foreign armies; that it was not an offence against the laws of the United States to transport arms, ammunition and munitions of war from this country to any foreign country, whether they were to be used in war or not; and that it was not an offence against the laws of the United States to transport persons intending to enlist in foreign armies and munitions of war on the same trip. But he said that if the persons referred to had combined and organized in this country to go to Cuba and there make war on the government, and intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, that would constitute a military expedition, and the transporting of such a body from this country for such a purpose would be an offence against the statute. The judge also charged the jury as follows:

"'In passing on the first question, it is necessary to understand what constitutes a military expedition within the meaning of the statute. For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for

efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so. I say "provided themselves with the means of doing so," because the evidence here shows that the men were so provided. Whether such provision, as by arming, and so forth, is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary.

"'Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army, they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important.'

"It appears to us that these views of the district judge were correct as applied to the evidence before him. This body of men went on board a tug loaded with arms; were taken by it thirty or forty miles and out to sea; met a steamer outside the three-mile limit by prior arrangement; boarded her with the arms, opened the boxes and distributed the arms among themselves; drilled to some extent; were apparently officered; and then, as preconcerted, disembarked to effect an armed landing on the coast of Cuba. The men and the arms and ammunition came together; the arms and ammunition were under the control of the men; the elements of the expedition were not only 'capable of proximate combination into an organized whole,' but were combined or in process of combination; there was concert of action; they had their own pilot to the common destination; they landed themselves and their munitions of war together by their own efforts. It may be that they intended to separate when they reached the insurgent headquarters, but the evidence tended to show that until that time they intended to stand together and defend themselves if necessary. From that evidence the jury had a right to find that this was a military expedition or enterprise under the statute, and we think the court properly instructed them on the subject."

Wiborg *v.* United States (1896), 163 U. S. 632, 653–654.

Harlan, J., in a dissenting opinion, expressed the view that "this was not . . . a military expedition or enterprise within the meaning of the statute. It had none of the features," he said, "of such an expedition or enterprise. There was no commanding officer, whose orders were recognized and enforced. It was, at most, a small company of persons, no one of whom recognized the authority of another, although all desired the independence of Cuba, and had the purpose to reach that island, and engage, not as a body, but as individuals, in

some form, in the civil war there pending—a loose, unorganized body, of very small dimensions, and without any surroundings that would justify its being regarded as a military expedition or enterprise to be carried on from this country." The number of persons in the company was from thirty to forty.

The court in the course of its opinion, which was delivered by Chief Justice Fuller, cited Calvo, Dict. de Droit Int. verbo. Expédition Militaire; Lawrence's Prin. Int. Law (1895), 508; Hall, Rights and Duties of Neutrals, § 22; Boyd's Wheaton, § 439*aa;* United States *v.* O'Sullivan, 2 Whart. Crim. Law, § 2802; United States *v.* Ybanez, 53 Fed. Rep. 536; Judge Brawley, in United States *v.* Hughes, not then reported; United States *v.* Pena, 69 Fed. Rep. 983; United States *v.* Hart (Judge Brown's opinion), not then reported. The court said that the judges, in the last two cases, "considered the statute as exacting a high degree of organization." In referring to the elements of the expedition as being "capable of proximate combination into an organized whole," the court quoted from Hall, as above cited.

See United States *v.* Wiborg, 73 Fed. Rep. 159; United States *v.* Hughes, 75, id. 267; United States *v.* O'Brien, id. 900; United States *v.* Hart, 74 Fed. Rep. 724, 78 Fed. Rep. 868; Hart *v.* United States (1898), 84 Fed. Rep. 799, 28 C. C. A. 612.

Mates of a foreign vessel sailing from a United States port, who at the time of sailing did not know that the vessel was to carry an expedition in violation of the neutrality law, and did not learn thereof until they met beyond the three-mile limit another vessel containing men and arms, are not guilty of an offense under section 5286.

Wiborg *v.* United States (1896), 163 U. S. 632, 16 S. Ct. 1127.

Section 5286, Revised Statutes, does not prohibit the shipping of arms, ammunition, or military equipments to a foreign country, nor forbid one or more individuals, singly or in unarmed association, from leaving the United States to join in any military operations being carried on between other countries or different parties in the same country.

United States *v.* Pena (1895), 69 Fed. Rep. 983, United States *v.* O'Brien (1896), 75 Fed. Rep. 900.

Evidence that the vessel of which defendant was captain stopped outside Sandy Hook and took on arms and men, and that the men were drilled during the voyage and were secretly landed at night on the coast of Cuba, is sufficient to justify holding him for trial under section 5286, Revised Statutes.

United States *v.* Hughes (1895), 70 Fed. Rep. 972.

If the owner of a vessel provides and furnishes her, knowing that she is to be used for the transportation to a foreign country of an

organized body of men, intending to act together in a concerted military way, and with arms, he is guilty of a violation of the statute.

United States *v.* O'Brien (1896), 75 Fed. Rep. 900.

One who provides the means for transporting a military expedition on any part of its journey, with knowledge of its ultimate destination and unlawful character, is punishable under section 5286, Revised Statutes.

Hart *v.* United States (1898), 84 Fed. Rep. 799, 28 C. C. A. 612; affirming 78 Fed. Rep. 868.

Providing the means for carrying a known military expedition to an island over which the United States has jurisdiction, as one stage of its journey, with knowledge of its final hostile destination, is an offense under the statute.

United States *v.* Hart (1897), 78 Fed. Rep. 868.

Section 5286, Revised Statutes, creates two offenses, (1) the setting on foot, within the United States, a military expedition, to be carried on against any power, etc., with whom the United States are at peace; (2) providing the means for such an expedition.

United States *v.* Hart (1897), 78 Fed. Rep. 868.

The transportation of goods for commercial purposes only and the carriage of persons separately, though their individual design may be to enlist in a foreign strife, are not prohibited by our law if the transportation is without any features of a military character. Indications of a military operation or of a military expedition are concert and unity of action, organization of men to act together, the presence of weapons, and some form of command or leadership.

United States *v.* Nuñez (1896), 82 Fed. Rep. 599.

A vessel may at the same time transport a military enterprise and a cargo of arms and munitions of war, and, while the transportation of the latter is lawful, that of the former is unlawful.

United States *v.* Murphy (1898), 84 Fed. Rep. 609.

A combination of a number of men in the United States, with a common intent to proceed in a body to a foreign country and engage in hostilities, either by themselves or in cooperation with others, against a power with which the United States is at peace, constitutes a military expedition, when they actually proceed from the United States, whether they are then provided with arms or intend to secure them in transit. It is not necessary that all the persons shall be

brought into personal contact with each other in the United States, or that they shall be drilled, uniformed, or prepared for efficient service.

United States *v.* Murphy (1898), 84 Fed. Rep. 609.

By section 11 of the British Foreign Enlistment Act of 1870 it is provided that "if any person within the limits of Her Majesty's dominions and without the license of Her Majesty, prepares or fits out any naval or military expedition against the dominions of any friendly state," the person so offending shall be punished by fine or imprisonment, or both, and that "all ships and their equipments, and all arms and munitions of war, used in forming part of such expedition, shall be forfeited." In the case of Regina *v.* Sandoval, prosecuted under this section, the jury, in answer to interrogatories, found that Sandoval "when he purchased the goods and ammunition in this country [Great Britain] knew and intended that they should be used for the purpose they subsequently were," that is to say, in aid of an insurrection against the Government of Venezuela. Sandoval was convicted and the judgment on appeal was affirmed. Wills, J., said: "The offense is not confined to the fitting out, but it includes the preparation." Any act which "contributes in any material degree towards setting on foot an expedition fitted for warlike purposes is, in my judgment, the preparation for that expedition."

Memorandum inclosed in Mr. Hay, Sec. of State, to Mr. Choate, ambass to England, No. 362, April 24, 1900. MS. Inst. Great Britain, XXXIII. 393, 394, citing Wheeler's British and American Enlistment Acts. 76–92, and Snow's International Law (2d ed., by Stockton), 118–134

By § 11 of the British Foreign Enlistment Act, 1870 (33 and 34 Vict. c. 90), it is provided that "if any person within the limits of her Majesty's dominions, and without the license of her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state," then "every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition," shall be guilty of an offence. Held, that, once the fact was established that there had been a preparation in the Queen's dominions, then "there may be an assistance in such preparation, or an employment of the kind mentioned in the section, outside the Queen's dominions, which will amount to an offence against the act, if the person rendering such assistance or accepting such employment be a subject of Her Majesty."

Reg. *v.* Jameson (1896), L. R. 2 Q. B. 425.

(2) DIPLOMATIC DISCUSSIONS.

§ 1300.

"The aiding either party, then, with vessels, arms, or men, being unlawful by the law of nations, and not rendered lawful by the treaty, it is made a question, whether our citizens, joining in these unlawful enterprises, may be punished. The United States, being in a state of peace with most of the belligerent powers by treaty, and with all of them by the laws of nature, murders and robberies committed by our citizens, within our territory, or on the high seas, on those with whom we are so at peace, are punishable, equally as if committed on our own inhabitants. . . . No citizen has a right to go to war of his own authority; and for what he does without right, he ought to be punished. Indeed, nothing can be more obviously absurd, than to say that all the citizens may be at war, and yet the nation at peace. It has been pretended, indeed, that the engagement of a citizen in an enterprise of this nature was a divestment of the character of citizen, and a transfer of jurisdiction over him to another sovereign. Our citizens are certainly free to divest themselves of that character by emigration, and other acts manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do. But the laws do not admit that the bare commission of a crime amounts of itself to a divestment of the character of citizen, and withdraws the criminal from their coercion."

Mr. Jefferson, Sec. of State, to Mr. Morris, min. to France, Aug. 16, 1793, Am. State Papers, For. Rel. I. 167, 168.

The Government of the United Sates will not at the request of a foreign government intervene to prevent the transit to the country of the latter of persons objectionable to it unless they form part of a hostile military expedition.

Mr. Jefferson, Sec. of State, to the minister of France, Nov. 30, 1793, 4 Jefferson's Works, 86.

See Field's Int. Code, § 971; 4 Hamilton's Writings, by Lodge, 48.

In 1806 a military expedition was organized at New York by Francesco de Miranda, commonly known as General Miranda, a native of Caracas, who came to the United States in the latter part of 1805 for the purpose of getting up an expedition against the Spanish dominions in South America. He sailed from New York in February, 1806, on the ship *Leander*, and after procuring two schooners at Jacmel proceeded to the northern part of South America. On arriving off that coast the schooners were captured by the Spaniards. The *Leander* with Miranda escaped. On the schooners were thirty-six American citizens who had sailed on the *Leander* from New York,

but who were transferred to the schooners at Jacmel. They were tried at Puerto Cabello on a charge of piracy, and on conviction were imprisoned at Carthagena. They alleged that they were entrapped into accompanying Miranda from New York by false statements, and that when they became cognizant of his designs they were forcibly prevented from leaving his service; and they sought and obtained the interposition of the United States for the purpose of securing their release. In July, 1806, Col. William S. Smith, surveyor of the port of New York, and Samuel G. Ogden were tried at New York under the act of 1794, for being concerned in setting on foot the expedition. The defense sought to prove that the expedition had been begun with the concurrence, if not at the suggestion, of the Administration, and summoned as witnesses the Secretary of State and other principal officials. These officers, in a communication to the court, set forth their inability to attend on account of public duties, but proposed that their testimony should be taken by commission. To this the defendants declined to assent and asked for compulsory process. The court decided, however, that their testimony would be immaterial, inasmuch as the previous knowledge or approbation by the President of illegal acts of a citizen could afford the latter no legal justification, as the President possessed no dispensing power. The charge of the judge was strongly against the defendants, but the jury returned a verdict of not guilty.

Lloyd's Trials of William S. Smith and Samuel G. Ogden, in July, 1806: New York, 1807.

See, also, Adams's History of the United States, III. 189, 209, 238; Am. State Papers, For. Rel. III. 256; Dana's Wheaton, 558, note; note by W. B. Lawrence, 2 Wharton's Crim. Law, § 1908; 8 Hamilton's Writings, by Lodge, 506.

By Art. IX. of the treaty of Feb. 22, 1819, Spain renounced all claims against the United States growing out of "injuries caused by the expedition of Miranda, that was fitted out and equipped at New York."

"Miranda had the address to make certain persons at New York, among others Col. W. Smith, the surveyor, believe that, on his visit to Washington, he had enlisted the Executive into a secret sanction of his project. They fell into the snare; and in their testimony, when examined, rehearsed the representations of Miranda as to what passed between him and the Executive. Hence the outcry against the latter as violating the law of nations against a friendly power. The truth is, that the Government proceeded with the most delicate attention to its duty; on one hand keeping in view all its legal obligations to Spain, and on the other, not making themselves, by going beyond them, a party against the people of South America. I do not believe

that in any instance a more unexceptionable course was ever pursued by any Government."

Mr. Madison, Sec. of State (unofficial), to Mr. Monroe, Mar. 10, 1806, 2 Madison's Writings, 220.

The war between Mexico and Texas gave rise to voluminous discussions as to the preservation of the neutrality of the United States, against the fitting out of hostile expeditions.

As to the limits of neutrality in the war between Mexico and Texas, see Mr. Forsyth, Sec. of State, to Mr. Ellis, min. to Mexico, Dec. 9, 1836, MS. Inst. Mex. XV. 88; report of Mr. Forsyth, Sec. of State, Jan. 8, 1838, H. Ex. Doc. 74, 25 Cong. 2 sess.; Mr. Calhoun, Sec. of State, to Mr. Hoffman, Sept. 21, 1844, 34 MS. Dom. Let. 401.

In 1837 an insurrection occurred in Canada, under the leadership of Wm. Lyon McKenzie, a printer, and certain other persons. The movement was attended with commotions at various places in the United States along the Canadian frontier. December 7, 1838, Mr. Forsyth, who was then Secretary of State, addressed a letter to the district attorneys of the United States for Vermont, Michigan, and the northern district of New York, stating that it was "the fixed determination of the President faithfully to discharge, so far as his power extends, all the obligations of this Government, and that obligation especially which requires that we shall abstain, under every temptation, from intermeddling with the domestic disputes of other nations." On the same day Mr. Forsyth wrote to the governors of New York, Michigan, and Vermont, requesting their "prompt interference to arrest the parties concerned, if any preparations are made of a hostile nature against any foreign power in amity with the United States." Meanwhile the Canadian insurgents were defeated, and some of them sought refuge in the United States. Among the refugees were two of the leaders, McKenzie and Dr. Rolfe, who held public meetings in Buffalo and solicited recruits, of whom they succeeded in obtaining a considerable number, as well as a quantity of arms and ammunition.

The collectors of customs on the Canadian frontier were instructed to lend their aid in enforcing the neutrality laws, and the marshal of the United States for the northern district of New York was directed to proceed to Buffalo for the purpose of suppressing the violations of neutrality in that quarter. On the 28th of December, 1837, he reported that on his arrival at Buffalo he found 200 or 300 men, mostly from the American side of the Niagara River, encamped on Navy Island, in Upper Canada, armed and under the command of Rensselaer Van Rensselaer, of Albany, who had assumed the title of "general." The encampment had received accessions till it num-

bered about 1,000 men, well armed. This expedition had been organized at Buffalo after McKenzie's arrival. Warrants had been issued for the arrest of the men, but could not be served.

On the 29th of December occurred the destruction of the steamer *Caroline*, at Schlosser, in the State of New York, by a British force from Canada. December 30 the collector of customs at Buffalo wrote: "Our city is in great alarm. The whole frontier is in motion, and God knows where it will end. An express has been sent to Governor Marcy to call out the militia." The collector feared that the laws could not be enforced without great loss of life. The revenue cutter *Erie* was placed at his disposal to aid in enforcing the laws; and he was ordered to seize any vessels or boats which might be engaged in carrying arms, ammunition, or military supplies to forces arrayed against the Government on the Canadian side of the line.

January 5, 1838, President Van Buren sent a message to Congress, saying that the existing laws, as experience on the southern border and the events daily occurring on the northern frontier had shown, were insufficient to guard against the hostile invasion from the United States of the territory of neighboring and friendly nations, and recommending that the Executive be clothed with "full power to prevent injuries being inflicted upon neighboring nations, by the unauthorized and unlawful acts of citizens of the United States, or of other persons who may be within our jurisdiction, and subject to our control." General Scott was sent to the frontier, with letters to the governors of New York and Vermont, requesting them to call out the militia. Congress passed the act of March 10, 1838.

See, for a fuller account of the situation on the Canadian frontier, Moore, Int. Arbitrations, III. 2419 et seq.; H. Ex. Doc. 64, 25 Cong., 2 sess.; H. Ex. Doc. 73, 25 Cong., 2 sess.; H. Ex. Doc. 74, 25 Cong., 2 sess.; H. Ex. Doc. 302, 25 Cong., 2 sess.; 38 Br. and For. State Papers, 1074.

See act of March 10, 1838, 5 Stat. 212.

On the receipt, in Washington, Jan. 4, 1838, of news of the burning of the *Caroline*, General Scott was ordered to the frontier. He went by way of Albany, and was accompanied to Buffalo by Governor Marcy and Adjutant-General McDonald, of the State of New York. Troops, both regulars and volunteers, were ranged along the border in Vermont as well as in New York, and the disorders gradually ceased. (General Scott's Autobiography, I. 305–317.)

See President Van Buren, annual message, Dec. 3, 1838.

As to the execution of the sentence imposed on McKenzie, on his conviction of violation of the neutrality laws of the United States, see Mr. Forsyth, Sec. of State, to Mr. Garrow, U. S. marshal, district of New York, Apr. 14, 1840, 31 MS. Dom. Let. 30.

See, as to alleged conspiracies to produce a revolution in Canada, paper recorded in 32 MS. Dom. Let. 479.

See, also, Mr. Webster, Sec. of State, to Mr. Seward, governor of New York, Sept. 23, 1841, 32 MS. Dom. Let. 52.

"We have received information from various sources, both official and unofficial, that among the creoles of Cuba there has long existed a deep-rooted hostility to Spanish dominion. The revolutions which are rapidly succeeding each other throughout the world, have inspired the Cubans with an ardent and irrepressible desire to achieve their independence. Indeed, we are informed by the consul of the United States at the Havana, that 'there appears every probability that the island will soon be in a state of civil war.' He also states that 'efforts are now being made to raise money for that purpose in the United States, and there will be attempts to induce a few of the volunteer regiments now in Mexico to obtain their discharge and join in the revolution.'

"I need scarcely inform you that the Government of the United States has had no agency whatever in exciting the spirit of dissaffection among the Cubans. Very far from it. A short time after we received this information from our consul, I addressed a despatch to him, of which I transmit you a copy, dated on the 9th instant, from which you will perceive that I have warned him to keep a watchful guard both upon his words and actions, so as to avoid even the least suspicion that he had encouraged the Cubans to rise in insurrection against the Spanish Government. I stated also that the relations between Spain and the United States had long been of the most friendly character: and both honor and duty required that we should take no part in the struggle which he seemed to think was impending.

"I informed him that it would certainly become the duty of this Government to use all proper means to prevent any of our volunteer regiments now in Mexico from violating the neutrality of the country by joining in the proposed civil war of the Cubans against Spain.

"Since the date of my despatch to him, this duty has been performed. The Secretary of War, by command of the President, on the day following, (June 10th,) addressed an order to our commanding general in Mexico, and also to the officer having charge of the embarcation of our troops at Vera Cruz, (of which I transmit you a copy,) directing each of them to use all proper measures to counteract any such plan, if one should be on foot, and instructing them 'to give orders that the transports on which the troops may embark proceed directly to the United States, and in no event to touch at any place in Cuba.'

"The consul, in his despatch to me, also stated that, if the revolution is attempted and succeeds, immediate application would be made to the United States for annexation; but he did not seem to think that it would be successful, and probably would not be undertaken without the aid of American troops. To this portion of the despatch I replied—knowing the ardent desire of the Cubans to be annexed to

our Union—that I thought it would not be 'difficult to predict that an unsuccessful rising would delay, if it should not defeat, the annexation of the island to the United States,' and I assured him that the aid of our volunteer troops could not be obtained.

"Thus you will perceive with what scrupulous fidelity we have performed the duties of neutrality and friendship towards Spain. It is our anxious hope that a rising may not be attempted in Cuba; but if this should unfortunately occur, the Government of the United States will have performed their whole duty towards a friendly power."

Mr. Buchanan, Sec. of State, to Mr. Saunders, min. to Spain, June 17, 1848, MS. Inst. Spain, XIV. 256; H. Ex. Doc. 121, 32 Cong. 1 sess. 42–49.

"Although these offenders against the laws have forfeited the protection of their country, yet the Government may, so far as is consistent with its obligations to other countries and its fixed purpose to maintain and enforce the laws, entertain sympathy for their unoffending families and friends, as well as a feeling of compassion for themselves. Accordingly, no proper effort has been spared and none will be spared to procure the release of such citizens of the United States engaged in this unlawful enterprise as are now in confinement in Spain; but it is to be hoped that such interposition with the Government of that country may not be considered as affording any ground of expectation that the Government of the United States will hereafter feel itself under any obligation of duty to intercede for the liberation or pardon of such persons as are flagrant offenders against the laws of nations and the laws of the United States. These laws must be executed. If we desire to maintain our respectability among the nations of the earth, it behooves us to enforce steadily and sternly the neutrality acts passed by Congress and to follow as far as may be the violation of those acts with condign punishment.

"But what gives a peculiar criminality to this invasion of Cuba is that, under the lead of Spanish subjects and with the aid of citizens of the United States, it had its origin with many in motives of cupidity. Money was advanced by individuals, probably in considerable amounts, to purchase Cuban bonds, as they have been called, issued by Lopez, sold, doubtless, at a very large discount, and for the payment of which the public lands and public property of Cuba, of whatever kind, and the fiscal resources of the people and government of that island, from whatever source to be derived, were pledged, as well as the good faith of the government expected to be established. All these means of payment, it is evident, were only to be obtained by a process of bloodshed, war, and revolution. None will deny that those who set on foot military expeditions against foreign states by

means like these are far more culpable than the ignorant and the necessitous whom they induce to go forth as the ostensible parties in the proceeding. These originators of the invasion of Cuba seem to have determined with coolness and system upon an undertaking which should disgrace their country, violate its laws, and put to hazard the lives of ill-informed and deluded men. You will consider whether further legislation be necessary to prevent the perpetration of such offenses in future.

"No individuals have a right to hazard the peace of the country or to violate its laws upon vague notions of altering or reforming governments in other states. This principle is not only reasonable in itself and in accordance with public law, but is ingrafted into the codes of other nations as well as our own. But while such are the sentiments of this Government, it may be added that every independent nation must be presumed to be able to defend its possessions against unauthorized individuals banded together to attack them. The Government of the United States at all times since its establishment has abstained and has sought to restrain the citizens of the country from entering into controversies between other powers, and to observe all the duties of neutrality. At an early period of the Government—in the Administration of Washington—several laws were passed for this purpose. The main provisions of these laws were reenacted by the act of April, 1818, by which, amongst other things, it was declared that 'if any person shall, within the territory or jurisdiction of the United States, begin, or set on foot, or provide or prepare the means for, any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding $3,000 and imprisoned not more than three years. And this law has been executed and enforced to the full extent of the power of the Government from that day to this.

"In proclaiming and adhering to the doctrine of neutrality and nonintervention, the United States have not followed the lead of other civilized nations; they have taken the lead themselves and have been followed by others. This was admitted by one of the most eminent of modern British statesmen, who said in Parliament, while a minister of the Crown, 'that if he wished for a guide in a system of neutrality he should take that laid down by America in the days of Washington and the Secretaryship of Jefferson;' and we see, in fact, that the act of Congress of 1818 was followed the succeeding year by an act of the Parliament of England substantially the same in its general provisions. Up to that time there had been no similar law in

England, except certain highly penal statutes passed in the reign of George II., prohibiting English subjects from enlisting in foreign service, the avowed object of which statutes was that foreign armies, raised for the purpose of restoring the house of Stuart to the throne, should not be strengthened by recruits from England herself.

"All must see that difficulties may arise in carrying the laws referred to into execution in a country now having 3,000 or 4,000 miles of seacoast, with an infinite number of ports and harbors and small inlets, from some of which unlawful expeditions may suddenly set forth, without the knowledge of Government, against the possessions of foreign states."

President Fillmore, annual message, Dec. 2, 1851, Richardson's Messages, V. 113, 115–116; Mr. Webster, Sec. of State. For the special message of President Taylor, June 1, 1850, on attempts to get up armed expeditions in the United States for the purpose of invading Cuba, see S. Ex. Doc. 57, 31 Cong. 1 sess.

See circular of Mr. Webster, Sec. of State, to marshals, district attorneys, and collectors of customs, Sept. 3, 1850, MS. Circulars, I. 108.

As to the cases of Messrs. Henderson and Quitman, see Mr. Webster, Sec. of State, to Mr. Hunton, U. S. district attorney at New Orleans, Feb. 28, 1851, 38 MS. Dom. Let. 481.

For the President's proclamation of Aug. 11, 1849, as to threatened invasions of Cuba and Mexico, see 39 Br. & For. State Papers (1849, 1850), 77.

June 26, 1855, J. W. Fabens, in a letter to Mr. Marcy, Secretary of State, solicited the interference of the Government of the United States to further what was called the Kinney expedition to Nicaragua, and to protect the lives and property of those concerned in it after they should have arrived in that country. The professed object of the expedition was that of peaceful colonization, but the Government of Nicaragua had issued a proclamation denouncing it as a filibustering or "piratical" enterprise for the subversion of the national independence, and a grand jury at New York had, after investigation of the case, presented both Kinney and Fabens for trial on a charge of fitting out a hostile expedition. When Fabens applied to the Department of State for assistance, this charge had not been tried, owing to the fact that Kinney had evaded trial by leaving the United States. Under the circumstances Mr. Marcy declined to act upon Fabens's assurance that the expedition was a lawful one. "I am aware," said he, "that civil discord now prevails in the Republic of Nicaragua, and it is natural to conclude that what one party oppose another may favor. While this Government believes it prudent to abstain from interfering as far as practicable with these internal divisions, yet it can not decline, in certain emergencies, to decide who possess the political power of the state. Our minister in Nicaragua has regarded the authorities which issued the proclamation against

your expedition to be in possession of the executive power of Nicaragua; he has been received by and [has] treated with them as the Government of that country, and has lately negotiated a treaty with them. This fact has an important bearing on the subjects presented in your letter of the 26th instant, and sustains the positions I have taken in this reply to it."

Mr. Marcy, Sec. of State, to Mr. Fabens, June 29, 1855, 44 MS. Dom. Let. 173.

The *National Intelligencer* of Washington, issue of Feb. 25, 1857, gives an extract from a decision rendered on the preceding Saturday by Commissioner Morell, denying the motion to dismiss the complaint against Fabens and Boulton, who were under arrest for violating the neutrality laws in recruiting men for hostile service in Nicaragua.

The *Washington Union*, July 22, 1854, discusses the charge which Mr. Justice Campbell had then lately delivered to the grand jury at New Orleans on the question of what constitutes an unlawful expedition.

"The undersigned, Secretary of State of the United States, has the honor to acknowledge the receipt of the note of Mr. Molina, chargé d'affaires of the Republic of Costa Rica, of the 6th instant, inviting the attention of the undersigned to current events in Nicaragua.

"The motives which Mr. Molina assigns for this proceeding are natural and are appreciated by the undersigned. It is apprehended, however, that he is mistaken in ascribing, as he apparently does, the recent revolution in Nicaragua solely to the armed intervention of citizens of the United States. The undersigned is informed that such of those citizens as took part in the contest which led to that result, were invited by citizens of that Republic as auxiliaries. If, in accepting this invitation, they should have violated their duties as prescribed by the laws of the United States, they will be called to account on returning within the jurisdiction of those laws.

"The Government of the undersigned regrets that persons who may owe it either temporary or permanent allegiance should proceed from the United States to any foreign country for hostile purposes and acknowledges its obligation to prevent this misdemeanor by all proper means. The laws of the United States by which this policy and obligation are declared and acknowledged, are believed to be ample for their purpose. Circumstances, however, imputable neither to the inadequacy of those laws nor to the want of good faith in the persons charged with their administration may occasionally enable offenders to escape detection. In the case under consideration Mr. Molina will acknowledge the force of such circumstances. The United States citizens who have taken part in the recent commotions in Nicaragua were most if not all of them passengers in the steamers between San Francisco and San Juan del Sur. On embarking, they

were to all appearances peaceful citizens returning to their original homes in the Atlantic States. There was nothing connected with their embarkation which would justify their arrest, for this, as Mr. Molina is aware, under the Constitution of the United States could only be done with the existence of probable cause supported by the oath or affirmation of a credible witness. It is understood, however, that many persons against whom reasonable suspicion existed were in point of fact prevented from proceeding from San Francisco to San Juan del Sur.

"In regard to the recognition of the new government of Nicaragua by the United States minister in that Republic, the undersigned has the honor to acquaint Mr. Molina that that proceeding was not authorized by but was contrary to the instructions of this Department.

"The undersigned is aware that the independence of states which may be comparatively weak in physical power is as dear to them as that of the strongest. It is the desire, the determination, and, the undersigned will add the interest of the United States to respect that independence. If they were to disregard it by any culpable act or omission they would forfeit the respect of other civilized states and would also lose that moral strength which, with the amplest physical resources, is indispensable for national respectability and even independence."

Mr. Marcy, Sec. of State, to Mr. Molina, Costa Rican min., Dec. 10, 1855, MS. Notes to Cent. Am. I. 99.

"The United States gave an early example to other nations in regard to its neutral duties by enacting stringent neutrality laws; they certainly preceded Great Britain in legislation upon the subject. These laws have laid upon the citizens or residents of the United States such restraints as neutral obligations towards other states require, or are compatible with the spirit of free institutions. They prohibit enlistments for foreign service within the limits of the United States, or any agreement to go beyond those limits, for the purpose of such enlistments; they denounce, under heavy penalties, the fitting out of privateers or the organizing any expeditions against foreign states or their territories. Mr. Molina will find it difficult to show an instance in which any other country, including his own, has done more by legislation than the United States to preserve with fidelity neutral relations with other powers. The execution of these laws is all that can be required of this Government in maintaining its foreign relations." (Mr. Marcy, Sec. of State, to Mr. Molina, Apr. 25, 1856, MS. Notes to Cent. Am. I. 105.)

In Mr. Cass's instructions of July 25, 1858, to Mr. Lamar (MS. Inst. Am. States, XV. 321) the vigilance and good faith of the United States in putting down filibustering preparations in Nicaragua is shown in detail. An extract from these instructions on another point is given in Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 281.

See circular of Mr. Cass, Sec. of State, to United States attorneys, marshals, and collectors, Sept. 18, 1857, 47 MS. Dom. Let. 362.

As to the execution of Col. Crabb and his associates, see H. Ex. Doc. 64, 35 Cong. 1 sess.

As to the alleged violation of the neutrality laws of the United States in 1863 by Mr. Segur, Salvadorean minister, see Mr. Bayard, Sec. of State, to Mr. Walker, U. S. dist. attorney at New York, July 21, 1888, 169 MS. Dom. Let. 207, acknowledging the receipt of the latter's letter of July 21, 1888.

"What have been called expeditions organized within our limits for foreign service have been only the departure of unassociated individuals. Such a departure, though several may go at the same time, constitutes no infringement of our neutrality laws, no violation of neutral obligations, and furnishes no ground for the arraignment of this Government by any foreign power."

Mr. Marcy, Sec. of State, to Mr. Escalante, May 8, 1856, MS. Notes to Spain, VII. 79.

September 18, 1857, Mr. Cass, as Secretary of State, issued a circular to United States attorneys, marshals, and collectors, calling upon them to enforce the neutrality laws of the United States against lawless persons who were believed to be engaged within the limits of the United States in setting on foot and preparing the means for military expeditions to be carried on against the territories of Mexico, Nicaragua, and Costa Rica, a copy of which circular was, on October 2, 1857, sent by the Secretary of the Navy to various officers of the Navy. Among these was Commander Frederick Chatard, commanding the U. S. S. *Saratoga*, at Colon. Commander Chatard was present with his ship at Punta Arenas, Nicaragua, when on November 25, 1857, the steamer *Fashion* arrived there from Mobile, having on board a large number of "passengers." These passengers proved to be William Walker and 150 followers, all of whom were permitted to land without interference. Commander Chatard was afterwards suspended from command on account of his nonaction on this occasion. On the 6th of December, Commodore Paulding arrived at Punta Arenas, and on the 8th of the month demanded of Walker the surrender of his arms and the embarcation of his entire band. The men were placed on board the *Saratoga* and sent to New York, but, before the departure of that ship Walker was taken by Commodore Paulding on board his flagship, the *Wabash*, which landed Walker at Colon, where he took a steamer to New York, under engagement to present himself on his arrival to the United States marshal. On March 19, 1858, Commodore Paulding landed the arms at the New York navy-yard, the Navy Department having ordered that they should be delivered to the owner or owners who should show a sufficient title, the United States having no claim upon

them. President Buchanan took the view that Commodore Paulding in capturing Walker and his command, "after they had landed on the soil of Nicaragua," although it was done with the assent of the authorities of the country, had committed a grave error. This error, said President Buchanan, consisted in "landing his sailors and marines in Nicaragua, whether with or without her consent, for the purpose of making war upon any military force whatever which he might find in the country, no matter from whence they came." Under these circumstances, when Marshal Rynders, on December 29, 1857, presented himself at the Department of State with Walker in custody, Mr. Cass informed him that the executive department of the Government did not recognize Walker as a prisoner and had no directions to give concerning him, and that it was only through the action of the judiciary that he could be lawfully held in custody to answer any charges that might be brought against him.

Special message of President Buchanan to the Senate, Jan. 7, 1858, S. Ex. Doc. 13, 35 Cong. 1 sess.

"A Government is responsible only for the faithful discharge of its international duties, but not for the consequences of illegal enterprises of which it had no knowledge, or which the want of proof or other circumstances rendered it unable to prevent." (Mr. Cass, Sec. of State, to Mr. Molina, Nov. 26, 1860, MS. Notes to Central America, I. 177.)

"Let the memories of past annoyances endured by Costa Rica as well as by her neighboring states from lawless bands of invaders from our shores be buried, and let her rely upon the sympathy and support of the United States if at any time she shall need them." (Mr. Seward, Sec. of State, to Mr. Riotte, min. to Costa Rica, No. 2, June 21, 1861, MS. Inst. Am. States, XVI. 165.)

Writing to the American minister in Nicaragua, September 24, 1861, Mr. Seward said that whenever citizens of the United States were found in Nicaragua giving aid and comfort to the insurgents in the United States, he was to exert himself in any way that should not compromise the sovereignty of Nicaragua to the end that they might be arrested by the forces of the United States on land or sea. Writing again, however, on November 9, 1861, Mr. Seward said: "We have no treaty with Nicaragua which would warrant us in attempting to interfere with the personal liberty of known leaders of the secession party who might escape to that country. You would, however, endeavor to notify our naval officers on the different coasts of their movements, so that their capture on the high seas might be facilitated." (Mr. Seward, Sec. of State, to Mr. Dickinson, min. to Nicaragua, No. 6, Sept. 24, 1861, MS. Inst. Am. States, XVI. 174; same to same, No. 10, Nov. 9, 1861, id. 179.)

October 19, 1864, a party of twenty or more persons, acting in the interest of the Confederate States, who had been commorant in Canada, raided the town of St. Albans, Vt., fired shots at various persons, of whom one was killed; set fire to several buildings, and appropriated

the funds of the banks, together with horses and other property. They then returned to Canada, where some of them were arrested. The incident formed the subject of an extended diplomatic correspondence. Claims against Great Britain in behalf of the citizens of the United States who were injured or suffered losses were presented to the mixed commission under Art. XIII. of the treaty of May 8, 1871. These claims were unanimously disallowed, on the ground that the enterprise was conducted with such secrecy that no care or diligence which one nation might reasonably require of another in such cases would have been sufficient to discover it. It appeared that the raiders came over to St. Albans, not in organized form, but apparently as peaceable travelers by railroad and not in company, and stopped at the village hotels.

Moore, Int. Arbitrations, IV. 4042–4054.

For the diplomatic correspondence, see Dip. Cor. 1864, II. 341, 355, 750 et seq.; 1865, I. 37, 49, 69, 74, 91, 303; II. 11, 12, 16, and various other pages.

As to the recovery and return of money to the St. Albans bank by the Canadian authorities, see Dip. Cor. 1865, II. 192.

For the extradition proceedings in the case, see 1 Moore on Extradition, 322.

The activity of the Fenian Brotherhood in raising movements and stirring up insurrection against the British Government in Ireland and in Canada formed the subject of correspondence between the governments of the United States and Great Britain in 1865 and subsequent years, some of the persons implicated in these affairs having proceeded from the United States. During the sessions of the joint high commission at Washington, in 1871, the British commissioners brought forward claims of the people of Canada for injuries suffered from Fenian expeditions carried out from the United States. The American commissioners declined to entertain the claims, as they did not come within the class of subjects indicated by Sir Edward Thornton in his note of January 26, 1871, as being referred to the consideration of the commission. The British commissioners did not urge the settlement of the claims by the commission, and stated that they had less difficulty in taking this course, as a portion of the claims "were of a constructive and inferential character." In the diplomatic correspondence, the United States maintained that it had fully performed its full duties as a neutral in repressing any ascertainable attempts to violate the neutrality laws, and that neither the character of the agitation nor the condition of international relations rendered it wise for the United States to denounce the proceedings of the agitators, as long as they confined themselves "within those limits of

moral agitation which are recognized as legitimate equally by the laws of the United States and by those of Great Britain."

Mr. Seward, Sec. of State, to Mr. Burnley, British chargé, March 20, 1865, Dip. Cor. 1865, II. 103; Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 1709 (confid.), March 10, 1866, Dip. Cor. 1866, I. 77.

As to the proceedings of the joint high commission, see Moore, Int. Arbitrations, I. 687.

As to the effect of President Johnson's proclamation in putting down cooperation in the United States with the Fenian invasion of Canada, see Bemis's American Neutrality, 92.

In March, 1866, Mr. Seward was confidentially informed of the arrival at Buffalo, New York, consigned to an Irish resident of that city, of sundry boxes filled with arms, cartridges, and other munitions of war. He was also furnished with a public advertisement extracted from a newspaper published in the same city in which a committee solicited aid "in establishing a republican form of government in Ireland." "Our field of operations," said the advertisement, "is guessed at by the public, and subscribers can rest assured that work of the most active character is meant." These incidents, said Mr. Seward, occurring simultaneously with popular meetings held in various parts of the country at which contributions of men, money, and arms were solicited for the purpose avowed, in some instances of levying war against Great Britain and Ireland, and in others of levying war against the same power in British America, had engaged the attention of the President and had made it his duty to ask the Attorney-General to instruct the attorneys and marshals of the United States to be vigilant in preventing any violation of the neutrality laws and of bringing before the courts of justice all persons who might be found to have engaged in such unlawful attempts.

Mr. Seward, Sec. of State, to Mr. Speed, At. Gen., April 2, 1866, 72 MS. Dom. Let. 407.

"The Prince Maximilian is either a principal or a subordinate belligerent in Mexico. The treaty which has been made between Austria and that belligerent by which the former authorizes the organization within the Austrian dominions of two thousand or more volunteers, manifestly to be engaged in war against the Republic of Mexico, is deemed by this Government inconsistent with the principle of neutrality, and an engagement with Maximilian in his invasion of that Republic."

Mr. Seward, Sec. of State, to Mr. Motley, min. to Austria, April 30, 1866, MS. Inst. Austria, I. 302.

See supra, § 958.

In the summer of 1883 a schooner called the *Ounalaska*, which was said to have been "equipped" with "warlike supplies for the insurgents in Salvador," was seized in the port of Acajutla and was, together with her cargo, condemned by the supreme court of Salvador as lawful prize for the benefit of the state. Immediately after this sentence the Salvadorean Government placed the vessel "at the disposal of the American Government, under whose flag she was sailing, as a proof of special deference and consideration towards the United States of America;" and she was sent in charge of the U. S. S. *Ranger* to San Francisco. The Department of State and the Department of Justice concurred in the opinion that the schooner thus became the property of the United States, subject only to the consent of Congress to the acceptance of the gift from the Government of Salvador. Meanwhile the Secretary of the Navy was requested to direct the proper naval officers at San Francisco to take charge of the schooner, which was then in the custody of the United States civil authorities, till such time as the President should have been informed of the determination of Congress, and the Attorney-General was desired to consider the possibility of prosecuting the persons who had been concerned in sending her out from San Francisco, especially in connection with section 5286 of the Revised Statutes.

Mr. John Davis, Act. Sec. of State, to the At. Gen., Aug. 29, 1883, 148 MS. Dom. Let. 80; Mr. John Davis, Act. Sec. of State, to the Act. At Gen., Sept. 25, 1883, id. 233; Mr. Frelinghuysen, Sec. of State, to Sec. of Navy, Oct. 9, 1883, id. 336; Mr. Frelinghuysen, Sec. of State, to the Act. At. Gen., Oct. 10, 1883, id. 343.

On March 23, 1884, the British minister confidentially communicated to Mr. Frelinghuysen, Secretary of State, a dispatch from the governor-general of Canada, touching rumors persistently circulated in the press of the United States that a Fenian movement was in progress in the States adjoining the northwest provinces of the Dominion. The governor-general referred to the importance of being supplied with any information possessed or obtainable by the United States authorities on the subject. Mr. Frelinghuysen replied that, when in the preceding February the rumors in question came to his knowledge, inquiries were set on foot through the War Department, and confidential instructions were sent to General Terry, commanding the Department of Dakota, who reported that, after inquiries made through his subordinates, no indications could be discovered of such a project as was alleged, and that the story was the invention of an unscrupulous writer for the press.

Mr. Frelinghuysen, Sec. of State, to the Hon. Sackville West, British min., March 27, 1884, MS. Notes to Great Britain, XIX. 438.

In the case of the Riel rebellion in Manitoba, in 1885, in which it was reported that Indians and whites from the United States with cannon and munitions were taking part with the Winnipeg insurgents, prompt measures were taken by the United States to prevent the departure of any hostile expedition or the shipment of arms or ammunition across the border.

Mr. Bayard, Sec. of State, to Mr. Garland, At. Gen., March 25, 1885, 154 MS. Dom. Let. 609; Mr. Bayard, Sec. of State, to Mr. Endicott, Sec. of War, March 28, 1885, id. 618; Mr. Bayard, Sec. of State, to Mr. Manning, Sec. of Treas., March 28, 1885, id. 615; Mr. Bayard, Sec. of State, to the governor of Minnesota, tel., March 28, 1885, id. 611; Mr. Bayard, Sec. of State, to Mr. Endicott, Sec. of War, April 17, 1885, 155 MS. Dom. Let. 132; same to same, April 10, 1885, id. 61.

In December, 1892, complaints were made by the Mexican legation at Washington of the reappearance on the Texas border of the Garza bandits and of raids by them into Mexico. It was alleged that two Mexican officers and four privates were burned by them in a raid on the Mexican side of the river opposite San Ignacio, in which fire was set to the Mexican barracks. Complaints were also made by the Mexican Government of raids at other places. The Mexican Government alleged that the raids would not have occurred but for the lack of United States troops in Texas to prevent violations of the neutrality laws and for the want of care shown in the matter by the local authorities of that State. The United States, on the other hand, maintained that the conditions rendered it difficult to police the frontier, which was a long line, thinly populated, where the nature of the country furnished great facilities for concealment and escape, with a river so easily crossed at any point; that the persons making the raids were organized secretly in Texas and did not appear as organized bodies till they had crossed the river, too late for attack by United States troops; that likewise, on returning from Mexico, they dispersed and scattered over the country, either individually or in small parties, making pursuit difficult, if not impossible, as they never presented an object of attack by troops on American soil; that renewed orders had, however, been given to the American forces for the exercise of the greatest vigilance to prevent any violation of the neutrality laws. Correspondence was also held with the authorities of Texas, with a view to suppress the raiders.[a] It appears that at the close of December, 1892, the total number of troops in active service on the Mexican side of the line was 2,727. The United States forces in the vicinity of the Rio Grande numbered at the same time about 1,800 men.[b]

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[a] For. Rel. 1893, 424–435.

[b] For. Rel. 1893, 435.

From time to time report was made of the capture in the United States of the following bandits: Francisco Benavides, Prudencio Gonzales, Cecilio Echeverria, Isidoc Ereda, Quiocino, Julian Flores, Librado Gutierrez, Dionicio Salaza, Gregorio Jueborro, Clemente Gutierrez, José Maria Moralez, Aniceto Treviño, Fernandez Salinas, Rafael Ramirrez, Tomas Cuellar, Procopio Gutierrez, Amando Garcia, Jesus Sandoval, Chico Procopio Sandoval, Secundino Ramirez, Juan Maldonado, Eslas Ybañez, Juan Guerra, Maximo Martinez, A. Arambula, E. Martivero, Juan Manuel Zarrate, Roman Garcia, Jesus Flores, Pedro Garcia, Delfino Garcia, Eusebio Garcia, Catarino Garcia, Anicilo Vela, Justo Vela, Anciano Sanchez, Felipe Trevino, and Sesstores Lemon.[a]

The Mexican Government suggested that it would be well for the war department of each country to inform the other of what forces it proposed to assign to preserve peace on its frontiers and what system it proposed to adopt for the attainment of this end, so that, by both acting in concert, the purpose of both governments might be more easily accomplished.[b] This suggestion was concurred in by the United States, the fullest cooperation that was possible under the circumstances being desirable.[c]

In a note of March 18, 1893, Mr. Romero, Mexican minister at Washington, said:

"The circumstance that a considerable number of the bandits who took part in the late incursions into Mexico, after organization in Texas, should have surrendered shows the efficacy of the pursuit of them by the agents of the United States Government, and is in contrast with the leniency manifested during the first two raids, one led by Ruiz Sandoval and the other by Catarino Garza. It is very satisfactory to observe that the active and efficacious pursuit of these bandits is bearing fruit, and I believe that in future there will be no further invasions of a friendly country like those which have occurred in the last three years."[d]

The Mexican minister having asked for the prosecution under the neutrality laws of one Victor Ochoa, who was charged with having organized a gang of bandits in the United States to commit depredations in Mexico, the Attorney-General of the United States advised that, as the neutrality law "clearly is directed against the invasion of foreign territory by *organized military bodies* for the purpose of conducting military operations against the foreign government in its political capacity," it was not applicable to common criminals like Ochoa and his associates.[e]

[a] For. Rel. 1893, 440, 444, 445, 446, 447, 448, 456.
[b] For. Rel. 1893, 442.
[c] For. Rel. 1893, 446–447.
[d] For. Rel. 1893, 445–446.
[e] For. Rel. 1894, 428, 429.

The Mexican minister in reply called attention to the cases of Benavides, Martinez, and others, who were tried and sentenced in the Federal courts for conducting expeditions very similar, as the minister contended, to that carried into effect by Ochoa.[a]

The Attorney-General subsequently instructed the proper district attorney to prosecute any violation of the neutrality laws on being furnished with any tangible evidence of it, and it was stated that the War Department would also render any cooperation which might be practicable.[b]

The grand jury at El Paso, at the April term, 1894, returned a true bill against Ochoa for alleged violation of the neutrality laws. Ochoa was reported then to be at a hotel in the city of New York.[c]

It appears that after the failure of his attempts in Mexico, Catarino Garza fled to Costa Rica. Subsequently he went to San Juan del Norte, in Nicaragua, where he gathered about him some thirty men, chiefly Colombian exiles, and securing money and a quantity of small arms returned to Costa Rica with a view to make an incursion into Colombia. On the approach of Costa Rican troops he embarked, with his followers, for Bocas del Toro, where they were defeated and Garza and eleven of his followers killed, while the rest were taken prisoners.

Mr. Baker, min. to Costa Rica, to Mr. Gresham, Sec. of State, No. 490, March 10, 1895, For. Rel. 1895, II. 1035.

See, as to the Garza raids, Mr. Blaine, Sec. of State, to Attorney-General, June 26, 1890, 178 MS. Dom. Let. 123; Mr. Wharton, Act. Sec. of State, to Attorney-General, Sept. 18, 1891, 183 MS. Dom. Let. 320; Mr. Blaine, Sec. of State, to Attorney-General, Dec. 29, 1891, 184 MS. Dom. Let. 516; Mr. Blaine to governor of Texas, Jan. 5, 1892, 184 MS. Dom. Let. 582.

6. Use of Neutral Territory as Base of Operations.

(1) station for hostilities.

§ 1301.

"As it is contrary to the law of nations that any of the belligerent powers should commit hostility on the waters which are subject to the exclusive jurisdiction of the United States, so ought not the ships of war, belonging to any belligerent power, to take a *station in those waters in order to carry on hostile expeditions from thence.* I do myself the honor, therefore, of requesting of your excellency, in the name of the President of the United States, that, as often as a fleet, squadron, or ship, of any belligerent nation, shall clearly and unequivocally use the rivers, or other waters of ——— *as a station, in*

[a] For. Rel. 1894, 429. [b] For. Rel. 1894, 430–431. [c] For. Rel. 1894, 432.

order to carry on hostile expeditions from thence, you will cause to be notified to the commander thereof that the President deems such conduct to be contrary to the rights of our neutrality; and that a demand of retribution will be urged upon their government for prizes which may be made in consequence thereof. A standing order to this effect may probably be advantageously placed in the hands of some confidential officer of the militia, and I must entreat you to instruct him to write by the mail to this Department, immediately upon the happening of any case of the kind."

Mr. Randolph, Sec. of State, to the governors of the several States, circular, April 16, 1795, 1 Am. State Papers, For. Rel. 608; 8 MS. Dom. Let. 138.

See, also, Mr. Randolph, Sec. of State, to Mr. Hammond, Brit. min., April 13 and April 22, 1795, 8 MS. Dom. Let. 124, 145.

The circular of April 16, 1795, did "not request that vessels, using our waters as a hostile *station* should be ordered to depart," but "only that notice should be given to them of our intended demand upon their Government. An order to depart would be inconsistent with the letter of the 9th of Sept. 1793, which concedes to them our ports as a refuge in case of necessity and a resort for comfort or convenience, without limiting the time of their stay."

Mr. Randolph, Sec. of State, to governor of Virginia, May 8, 1795, 8 MS. Dom. Let. 174.

Referring to the use alleged to have been made of the port of St. Thomas, D. W. I., for the purpose of capturing neutral vessels, Mr. Seward stated that Commander Craven, U. S. N., had been instructed by the Secretary of the Navy "that it was not proper to make a convenience, in any manner, of neutral territory for the purpose of exercising the belligerent right of search or capture. A capture of a neutral vessel made after standing off and on a neutral harbor, or mouth of a river, or lying in wait within it for the purpose, although actually made beyond the neutral jurisdiction, would not be recognized as valid, and the right of search can not properly be exercised when it is known previously that, whatever the event of the search, the capture would not be lawful."

Mr. Seward, Sec. of State, to Lord Lyons, British min., July 29, 1863, MS. Notes to Great Britain, X. 175.

(2) SALE OF PRIZES.

§ 1302.

"The doctrine as to the admission of prizes, maintained by the Government from the commencement of the war between England, France, etc., to this day has been this: The treaties give a right to

armed vessels, *with their prizes*, to go where they please (consequently into our ports), and that these prizes shall not be detained, seized, nor adjudicated, but that the armed vessel may depart as *speedily as may be*, *with her prize*, to the place of her commission; and we are not to suffer their enemies to sell in our ports the prizes taken by their privateers. Before the British treaty, no stipulation stood in the way of permitting France to sell her prizes here; and we did permit it, but expressly as a favor, not as a right. . . . These stipulations admit the prizes to put into our ports in cases of necessity, or perhaps of convenience, but no right to remain if disagreeable to us; and absolutely not to be sold."

Mr. Jefferson, President, to Mr. Gallatin, Aug. 28, 1801, 1 Gallatin's Writings, 41, 42.

"The sale of prizes brought into the ports of the United States by armed vessels of the French Republic . . . has been regarded by us not as a right to which the captors were entitled either by the law of nations or our treaty of amity and commerce with France."

Mr. Pickering, Sec. of State, to Mr. Adet, May 24, 1796, 1 Am. State Papers, For. Rel. 651. In Mr. Pickering's letter to Mr. Adet, of Nov. 15, 1796, this is confined, for the present, to sales of prizes taken by *privateers*. (9 MS. Dom. Let. 363.)

See, also, Mr. Pickering, Sec. of State, to the President, July 19, 1796, 9 MS. Dom. Let. 221.

"Prizes made upon the high seas, which may come to the ports of my dominions, shall not be permitted to sell their cargoes, if they consist of prohibited goods; but if they are not of that kind, and are exposed to damage, they shall be permitted to be sold."

Royal Cedula of the King of Spain, No. 2, June 14, 1797, 10 MS. Dom. Let. 284.

There is high authority for the position that a prize may be carried into a neutral port and there sold, but considerations of expediency should lead the neutral sovereign to exercise his undoubted right of prohibiting such sale. It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent or a depot for his spoils and prisoners. It is not a breach of neutrality to permit a vessel captured as prize to be repaired in our ports and put in a condition to be taken to a port of the captor for adjudication.

Wirt, At. Gen., 1828, 2 Op. 86.

When a foreign belligerent cruiser brings a prize into a neutral port, the cruiser will be required to depart as soon as practicable, and will not be permitted to dispose in such port of the prize or of its goods.

Mr. Clay, Sec. of State, to Mr. Tacon, Apr. 11, 1828, MS. Notes to For. Legs. IV. 8.

"The laws of the United States do not admit of the sale within their jurisdiction, for any purpose, of prize goods taken by one belligerent from another and brought into their ports. This Government does not take jurisdiction at all upon the question of prize or no prize, but leaves that question exclusively to the cognizance of the tribunals of the respective belligerents."

Mr. Clay, Sec. of State, to Mr. Obregon, May 1, 1828, MS. Notes to For. Legs. IV. 22.

See, also, Mr. Buchanan, Sec. of State, to Mr. Saunders, min. to Spain, June 13, 1847, MS. Inst. Spain, XIV. 224.

"Neither belligerent is allowed by the laws of the United States to sell his prizes within their ports. The rights of hospitality are equally offered to both. They could not be denied, in many cases, without a violation of the duties of humanity."

Mr. Clay, Sec. of State, to Mr. Rebello, May 1, 1828, MS. Notes to For. Legs. IV. 16.

A neutral nation, while admitting belligerent men-of-war to its ports, may, as it sees fit, wholly admit or wholly exclude their prizes.

Cushing, At. Gen., 1855, 7 Op. 122.

In the case of the American steamer *Chesapeake*, which was taken possession of, while on a voyage from New York to Portland, Me., by persons acting in the name of the Confederate States, and which was afterwards recaptured in Nova Scotian waters, where the captors had sought asylum, by a United States ship of war, who took the vessel to Halifax and delivered her to the colonial authorities, the Hon. Alex. Stewart, C. B., of the vice-admiralty court, held that the sovereign whose territorial rights are violated by the subjects or citizens of a friendly state can, if he finds them within his jurisdiction, inflict on them his own penalty in his own mode; that the *Chesapeake*, if a prize at all, was an uncondemned prize; that for a belligerent to bring an uncondemned prize into a neutral port to avoid recapture is such a grave offense against the neutral state that it ipso facto subjects the prize to forfeiture, and that the vessel should be restored to the owners on the payment of costs. Mr. Seward had contended for the restitution of the vessel unconditionally, by executive authority, without waiting for an adjudication; but, on the rendition of the court's decision, he advised the owners to pay the costs under protest, and accepted the restitution as decreed.

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 852, Feb. 24, 1864, Dip. Cor. 1864, I. 196.

For the judgment of the court, see id. 197.

For a further account of the case of the *Chesapeake*, see supra, § 210.

Replying to an inquiry of the Peruvian legation as to the course the United States would pursue during the war between Spain and Peru, Mr. Seward said: "This Government will observe the neutrality which is enjoined by its own municipal law and by the law of nations. No armed vessels of either party will be allowed to bring their prizes into the ports of the United States."

Mr. Seward, Sec. of State, to Señor Garcia, Feb. 26, 1866, MS. Notes to Peruvian Leg. I. 312.

(3) HOSTILE PASSAGE.

§ 1303.

Early in April, 1898, the Canadian Government, acting upon a request presented by the Department of State to the British ambassador at Washington, granted permission for four United States revenue cutters to pass through the canals under Canadian control from the Great Lakes to the Atlantic coast, two of the vessels being armed revenue cutters, while the other two were under construction and were not to be delivered by the builders to the United States till they reached the sea. April 27, 1898, war between the United States and Spain having meanwhile begun, a memorandum was left at the Department of State by the British ambassador, in which, referring to the fact that the four vessels were in Lake Ontario awaiting the opening of navigation, he stated that Her Majesty's Government were of opinion that the permission given before the outbreak of war should not be withdrawn, "provided that the United States Government are willing to give an assurance that the vessels in question will proceed straight to a United States port without engaging in any hostile operation." The opinion was further expressed "that the vessels should not be furnished with more coal and stores than are necessary to take them to New York or some other United States port within easy reach." The hope was expressed that assurances to that effect would at once be given, "in order that the facilities granted before the outbreak of war . . . may still be extended without any breach of neutrality." The Department of State replied that instructions would be sent to the commanders of the vessels to observe the conditions above expressed, but added: "It is, of course, understood that the prohibition of engaging in any hostile operation would not preclude resistance to a hostile attack." On the 4th of May the British ambassador was advised that the proper orders had been issued to the commanding officers of two vessels which were then on their way to the Atlantic coast, and that similar orders would be given to the others whenever they should follow.

For. Rel. 1898, 968–970.

This incident is mentioned in President McKinley's annual message, Dec. 5, 1898. See, also, H. Doc. 471, 56 Cong. 1 sess. 65–72.

"In order that it may be able to refute the charges . . . that the Portuguese authorities are allowing the free passage through this port of European volunteers for the Republican armies, the local government, some time ago and while I was in Pretoria, decided that all passengers passing through this port and bound for the Transvaal should, before receiving their Portuguese passports to cross the frontier, make oath, before their respective consuls, that they desired to proceed to the Transvaal to engage in some particular business, and not with the intention to take part in the war. As a good many Americans are now passing through this port I had some of these oaths printed, and enclose a copy for your inspection.

"The American wishing to proceed to the Transvaal subscribes to this oath in duplicate. One copy I retain here on file, and the other is filed in the archives of the Government of Lourenço Marquez."

Mr. Hollis, consul at Lourenço Marquez, to Mr. Hill, Assist. Sec. of State, April 4, 1900, MSS. Dept. of State.

Form of neutrality oath:

CONSULATE OF THE UNITED STATES OF AMERICA.
LOURENÇO MARQUEZ.

——, ——.	——, 19—.
Eu, ——, portador do——, faco un juramento com muita solemnidade que eu quero ir para o Transvaal para —— e nao con intencao de tomar parte na guerra ——.	I, ——, bearer of ——, solemnly swear that I wish to go to the Transvaal for the purpose of —— and not with the intention to take part in the war ——
Juramento feito em minha presenca,	Sworn to before me,

United States Consul.

The Department of State took the view that the Portuguese authorities had the right, in execution of their neutrality laws and regulations, to require the oath to be made.

Mr. Cridler, Third Assist. Sec. of State, to Mr. Hollis, No. 58, May 12, 1900, 173 MS. Inst. Consuls, 341; same to same, No. 66, Aug. 8, 1900, id. 592.

The consul was instructed that it was not proper for him to charge a fee for the issuance of the neutrality certificates required by the Portuguese Government.

When the war between Great Britain and the Transvaal began, free passage was given by Portugal to British troops through Beira to Rhodesia. This permission was based on the Anglo-Portuguese treaty of June 11, 1891.[a] By Art. XII. of this treaty Portugal

[a] London *Standard*, April 27, 1900.

"engages to permit and to facilitate transit for all persons and goods of every description over the waterways of the Zambesi, the Shiré, the Pungive, the Busi, the Limpopo, the Sabi, and their tributaries, and also over the landways which supply means of communication where these rivers are not navigable." By Art. XIV. Portugal agrees "to grant absolute freedom of passage between the British sphere of influence and Pungive Bay for all merchandise of every description, and to give the necessary facilities for the improvement of the means of communication," and also "to construct a railway between Pungive and the British sphere."

83 Br. & For. State Papers, 1890, 1891, 27, 35, 36, 38; Hertslet's Commercial Treaties, XIX. 777.

The question "whether a neutral state may permit a belligerent force to pass through its territory" is discussed by Hall, who concludes that "a hard and fast line could scarcely be drawn" and that the behavior of the neutral state would "require to be judged by the circumstances of the case." (Int. Law (4th ed.), 623–626.)

See letter by "J. S. T.," Washington, April 20, 1900, in N. Y. *Sun*, April 22, 1900.

(4) TELEGRAPHIC SERVICE.

§ 1304.

After the destruction of the Spanish fleet at Manila in May, 1898, Admiral Dewey obtained possession of the Philippines end of the cable of the Hongkong and Manila Telegraph Company, which held its concession from Spain on condition that it should not send telegrams when forbidden by the Spanish Government to do so. Acting under this clause, the Spanish Government ordered the company to cease working the cable at Hongkong, and the company was obliged to suspend operations. Under these circumstances, the United States sought from the British Government permission for the landing at Hongkong of a new cable from the Philippines, to be constructed by an American company. Lord Salisbury replied, after consultation with the law officers of the Crown, that it had been decided that the British Government was not at liberty to comply with the request of the United States. The Marquis of Tweeddale, president of the Hongkong and Manila Telegraph Company, sought permission from the Spanish Government to take telegrams from both sides, but this was at first refused, and he therefore declined to yield to solicitations for the use of the cable by the United States, unless secured by the latter by a formal guarantee against all losses which might result, including those arising from the forfeiture of the company's concession. On July 11, 1898, however, the London representative of the Spanish telegraph department informed Lord Tweeddale that he was authorized by the Spanish Government to take the necessary

steps "to obtain complete neutralization of the cable, giving you entire independence and freedom from interference on the part of the one or the other of the belligerents, on condition that your office at Manila is considered neutral territory to give free course to all telegrams—official, private, in plain or secret language, whether in code or in figures, without distinction, by senders of all nationalities or addressed to the same." On the 12th of July the American ambassador at London was instructed by his Government to "postpone consideration" of this proposal for the time being.

For. Rel. 1898, 976–980.

On August 17, 1898, after the conclusion of the armistice between the United States and Spain, the American ambassador in London was instructed that the United States did not object to the restoration of the cable, and that the French ambassador had been requested to express the hope that Spain would not object. On August 22 notice was received by the United States that the cable was repaired and open for business. (For. Rel. 1898, 980.)

On May 2, 1898, the consul of the United States at Barbados, British West Indies, telegraphed that the governor of the colony, under instructions from the home Government, controlled the cable office and would not permit messages to be sent out relative to the movements of war ships, whether Spanish or American.

Mr. Adee, Second Assist. Sec. of State, to Sec. of Navy, May 3, 1898, 228 MS. Dom. Let. 231.

"A neutral state is, no doubt, on principle, similarly bound to prevent the use of its territory for the reception and transmission of messages by wireless telegraphy, in furtherance of belligerent interests; and China seems to have accordingly destroyed, though tardily, the electrical installment placed by the Russians in the neighborhood of Chefoo, for the maintenance of communications between the beleaguered fortress of Port Arthur and the outer world."

Neutral Duties in a Maritime War, by Thomas Erskine Holland, Proceedings of the British Academy, II. 3.

Perhaps the learned author of the above passage did not intend to convey the idea that it would be the duty of a neutral state to prevent a private company engaged in transmitting wireless messages from receiving and transmitting any such message in furtherance of belligerent interests. The point in the particular case to which he refers was the establishment of a station in neutral territory by one of the belligerents, an act which the neutral undoubtedly may be required to use due diligence to prevent. With regard to the transmission of telegraphic messages by private companies regularly engaged in such business, there would appear to be no difference between the use of wireless telegraphy and the use of land lines or submarine cables.

(5) COAL SUPPLIES.

§ 1305.

Mr. Seward complained that the governor of Maranham, Brazil, allowed the "pirate" *Sumter* to enter that port to receive shelter for an indefinite period and to procure supplies by purchase of coal and provisions in unlimited quantities, and that she used the supplies and provisions so obtained in making a voyage across the Atlantic, in which she renewed her depredations on American merchant vessels. The Brazilian Government justified the conduct of the governor of Maranham. The discussion drifted into an affirmation by Brazil and a denial by the United States that the *Sumter* was entitled to belligerent rights, the question of the quantity of coal and supplies taken being neglected in the controversion of this point.

Mr. Seward, Sec. of State, to Mr. Webb, min. to Brazil, No. 20, March 18, 1862, MS. Inst. Brazil, XV. 319; same to same, No. 21, April 3, 1862, id. 325.

It was maintained by the United States at Geneva and denied by Great Britain that an undue indulgence was shown to Confederate cruisers in the extent to which they were permitted to obtain supplies of coal in British ports.

Count Sclopis took the view that the question of coal supply could be treated only as connected with the second rule of Article VI. of the treaty of Washington, which declares that a neutral government is bound not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other or for the purpose of the renewal or augmentation of military supplies. He would not say that the mere fact of having allowed a greater amount of coal than was necessary to enable the vessel to reach the nearest port of its own country constituted in itself a ground for an indemnity. But when he saw the *Florida* choose for her field of action the stretch of sea between the Bahama Archipelago and Bermuda to cruise there at ease, and the *Shenandoah* choose Melbourne and Hobsons Bay for the purpose, which was immediately carried out, of going to the Arctic seas to attack whaling vessels, he could not but regard supplies of coal in quantities sufficient for such purposes as infringements of the rule above mentioned.

Mr. Adams expressed the opinion that the safest course in any critical emergency would be to deny altogether a supply of coal to a belligerent vessel, except perhaps in the case of positive distress. Such a policy would, however, he said, be regarded as selfish and illiberal and would entail upon powers enormous and continual expense for the maintenance of coaling stations. He thought that a supply of coal would involve no responsibility to the neutral when it was made in

response to a demand presented in good faith with the single object of satisfying a legitimate purpose openly assigned; but that the contrary would be the case if it was made either tacitly or explicitly with the view to promote or complete the execution of a hostile act. He therefore thought that the only way to determine the responsibility of a neutral in such a case was "by an examination of the evidence to show the *intent* of the grant in any specific case."

Sir Alexander Cockburn contended that the term "base of naval operations" had no relation to the case of a vessel which, while cruising against an enemy's ship, put into a port, and, after obtaining necessary supplies, again pursued her course, but that it referred to the use of a port or of waters as a place from which a fleet or ship might watch an enemy and sally forth to attack him, with the possibility of falling back upon the port or waters in question for fresh supplies or shelter or a renewal of operations.

Mr. Staempfli, in his opinion in the case of the *Sumter*, held that the permission given to that vessel did not in itself constitute a sufficient basis for charging the British authorities with a failure in the observance of neutral duties, especially as the vessel was, both before and afterwards, permitted to obtain coal in the ports of many other states, and that her last supply before she crossed the Atlantic was not secured in a British port.

The tribunal of arbitration in its award held: "In order to impart to supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character."

In signing the award Viscount d'Itajubá remarked that he was of opinion that every government was "free to furnish to the belligerents more or less" of coal.

It does not appear that in any case Great Britain was held responsible for the acts of a vessel in consequence of supplies of coal.

Moore, Int. Arbitrations, IV. 4097–4101; Papers relating to the Treaty of Washington, IV. 433, 458, 513, 74, 148, 422, 136, 50, 47.

It is not a breach of neutrality for a neutral state to permit the coaling of belligerent steamers in its ports to the same extent as it permits the coaling of other foreign steamers resorting to its ports casually and without settled stations established for them. Nor is it a breach of neutrality for a neutral state to permit the sale of coal to any extent to a belligerent. It would, however, be a breach of neutrality for a neutral to permit a permanent depot or magazine to be opened on its shores, on which a particular belligerent could depend for constant supplies. To require a neutral to shut up its ports

so as to exclude from coaling all belligerents, would expose a nation with ports as numerous as those of the United States to an expense as great as would be imposed by actual belligerency. It is on the belligerent, who goes to war, not on the neutral, who desires to keep out of it, that should be thrown expenses so enormous and constitutional strains so severe as those thus required. On the other hand, the breaking up of central depots or magazines for the constant supply of particular belligerents would be within easy range of ordinary national police. Nor can there be any charge of partiality made in allowing coaling with the limitation above stated, when the same privilege is granted to both belligerents.

2 Wharton, Crim. Law (9th ed.), § 1908.

In the Franco-German war, 1870, Prince Bismarck earnestly remonstrated with Great Britain for permitting the export of coal to France. This remonstrance, however, was ineffectual. "When Prussia was in the same position as that in which Great Britain found herself in 1870, her line of conduct was similar, and she found herself equally unable to enforce upon her subjects stringent obligations against the exportation even of unquestionable munitions of war. During the Crimean war arms and ammunition were freely exported from Prussia to Russia, and arms of Belgian manufacture found their way to the same quarter through Prussian territory, in spite of a decree issued by the Prussian Government, prohibiting the transport of arms coming from foreign states."

2 Halleck's Int. Law (3d ed., by Baker), 228, note. "It appears from the *Journal Officiel* of July 26, 1870, that the French Government did not consider coal to be contraband of war." (Ibid.)

"It is certainly no breach of neutrality to sell coal for use on a belligerent steamer visiting the port of sale casually under distress of weather. But it would plainly be a breach of neutrality to establish a coaling depot to supply all steamers of belligerent." (Whart. Com. Am. Law, § 226.)

See views of W. B. Lawrence, in Wharton's Crim. Law (9th ed.), § 1908.

During the Franco-German war the Peruvian Government issued, October 31, 1870, a decree limiting the amount of coal that might be obtained by belligerent ships to a quantity sufficient to take them to their nearest home or territorial port, for the obtaining of which supply they were to be allowed to remain in port only so long as was necessary; and they were not allowed to renew their supply till four months had elapsed from the date of their last departure from Peruvian waters.

Mr. Elmore, Peruvian min. of for. aff., to Mr. Dudley, Am. min., July 23, 1898, enclosed with Mr. Dudley to Mr. Day, Sec. of State, July 21, 1898, MSS. Dept. of State.

A number of the neutrality proclamations issued by foreign powers during the war between the United States and Spain contained a clause limiting the supply of coal which a belligerent vessel might obtain to a quantity sufficient to take such vessel to the nearest port of its own country, or, in other words, to its nearest national port. In the decree of the Netherlands, the provision read that "the store of coal shall only be supplemented sufficiently to allow the ship or vessel to reach the nearest port of the country to which it belongs, or that of one of its allies in the war." When the Spanish fleet, which was afterwards destroyed at Santiago, arrived off Curaçao on the 14th of May, 1898, the commander sought from the Dutch colonial authorities permission to await there 5,000 tons of coal which had been sent thither. This request was denied, as well as a request for permission to ship the coal whenever it should arrive. A request that each vessel be allowed to take 700 tons was likewise refused. Finally, permission was asked and granted for two of the vessels, the *Maria Teresa* and the *Vizcaya*, to enter the harbor and each to take 200 tons, the rest of the ships meanwhile to remain at anchor in the roads. The 400 tons thus obtained were said to be of "very poor quality."

Mr. Newel, minister at The Hague, to the Sec. of State, May 20, 1898, MSS. Dept. of State; Mr. Moore, Assist. Sec. of State, to the Sec. of the Navy, June 2, 1898, 229 MS. Dom. Let. 93; Mr. Smith, consul at Curaçao, May 16 and May 18, 1898, MSS. Dept. of State. There was at one time a rumor, which proved to be erroneous, that the *Maria Teresa* and the *Vizcaya* each obtained at Curaçao 600 tons of coal, which was far more than enough to take them to Porto Rico, the nearest Spanish possession, or to Cuba. By such a transaction Curaçao would have been "converted into a base of hostile operations for Spanish vessels in violation of neutrality." (Mr. Day, Sec. of State, to Mr. Newel, tel., May 17, 1898, MS. Inst. to the Netherlands, XVI. 357.)

When, in the latter part of May, 1898, it was rumored that the Spanish armored squadron had sailed or was about to sail to the United States and might stop at the Azores for coal, the minister of the United States at Lisbon was instructed to protest against its coaling at those islands, on the ground that, as they lay entirely outside the route from Spain to the Spanish West Indies, such an act would convert the Portuguese territory into a base of hostile operations against the United States.

Mr. Day, Sec. of State, to Mr. Townsend, min. to Portugal, tel., May 20, 1898, MS. Inst. Portugal, XVI. 146.

The squadron did not in fact sail westward, but afterwards proceeded eastward as far as the Suez Canal, and then returned to Spain.

Before the outbreak of hostilities, the Pacific Mail Steamship Company was permitted, under its agreement with the Mexican Government, to furnish supplies of coal to United States men-of-war at Acapulco. During the war, the Mexican Government placed limitations on the supply of coal to belligerent vessels in its ports, and made no exception as to United States vessels at Acapulco. The Department of State abstained from addressing any representation to Mexico on the subject, on the ground that as it had "on numerous recent occasions asked of Mexico the strict execution of its neutral duties," it was "not disposed, upon the strength of an agreement between the Pacific Mail Steamship Company and the Mexican Government, made before the war, to insist that public ships of the United States may now be allowed to take coal without limit in a Mexican port."

Mr. Day, Sec. of State, to Sec. of Navy, Aug. 5, 1898, 230 MS. Dom. Let. 541.

June 29, 1898, when it was supposed that the Spanish armored fleet would proceed to the Philippines by way of the Suez Canal, Mr. Hay, the United States ambassador in London, was instructed to inform the British Government of a report that the Spanish fleet intended to coal from British colliers at the British island of Perim.

Mr. Hay replied that the British Government had cabled to the resident at Aden and the assistant resident at Perim, concerning the British vessel *Imaum*, whose presence had given rise to the report, and that it was ascertained that she was then discharging 5,000 tons of coal consigned to the Perim Coal Company, and that when this work was finished she would proceed to Karachi. He stated that every precaution had been taken to prevent a violation of neutrality.

For. Rel. 1898, 983–984.

"British Government concludes Camara can not remain at Port Said more than twenty-four hours, except in case of necessity, and can not coal there if he has enough coal to take him back to Cadiz, which appears to be the case."

Mr. Hay, ambass. to England, to Mr. Day, Sec. of State, tel., June 29, 1898, For. Rel. 1898, 983.

"We learn that the acting consul-general of the United States has addressed another note to the Egyptian Government calling its attention to the fact that the Spanish admiral at Port Said has long exceeded the time, allowed by international law, for remaining in a port belonging to a neutral power.

"The governor-general of the Suez Canal has received instructions to request Rear-Admiral Camara to arrange for the departure from Port Said of the squadron under his command, as soon as possible.

"Two Spanish colliers have arrived at Port Said, but transshipment of the coal in the port has been forbidden." (The *Egyptian Gazette*, Alexandria, Egypt, Friday, July 1, 1898.)

By the rules for the observance of neutrality, published in the London Gazette, Feb. 11, 1904, the amount of coal which might be supplied to a belligerent war ship was defined as so much "as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer named neutral destination."

This rule was qualified by rules issued by the British Admiralty, Aug. 5, 1904, by which it was explained that the reason for the practice of admitting belligerent vessels of war to neutral ports arose out of "the exigencies of life at sea" and "hospitality," but that this did "not extend to enabling such vessels to utilize a neutral port directly for the purpose of hostile operations." It was therefore declared that the rule above quoted was "not to be understood as having any application to the case of a belligerent fleet proceeding either to the seat of war, or to a position or positions on the line of route, with the object of intercepting neutral vessels on suspicion of carrying contraband of war;" that "such fleet can not be permitted to make use in any way of a British port for the purpose of coaling, either directly from the shore, or from colliers accompanying the fleet, whether the vessels of the fleet present themselves at the port at the same time or successively;" and that the same course was to be pursued with reference "to single belligerent war vessels, if it be clear that they are proceeding for the purpose of belligerent operations as above defined," though it was "not to be applied to the case of a vessel putting in on account of actual distress at sea."

Parl. Papers, Russia, No. 1 (1905), 10, 11, 15.

The issuance of these rules was directly connected with the controversy with Russia touching contraband. Indeed, Lord Lansdowne, in advising the Russian ambassador at London of their issuance, declared that the decision of the Russian Government to regard coal as "unconditionally contraband of war" had made it incumbent upon the British Government "to use special vigilance when dealing with the question of coal supply." Under the formula used in the rule published on Feb. 11, 1904, a Russian ship, said Lord Lansdowne, might take on board, say at Aden, enough coal "to carry her to Vladivostock." The rule, however, would continue to apply to all vessels not coming within the scope of the rules of August 8. These rules would apply equally to both belligerents. The Russian ambassador inquired whether they would be extended to supplies of provisions and stores as well as of coal. Lord Lansdowne replied that his communication referred only to coal, though personally he saw no difference between the privilege of coaling and that of obtaining other supplies. (Id. 14–15.)

"May she [a belligerent cruiser] also replenish her stock of coal? To ask this question may obviously, under modern conditions and under certain circumstances, be equivalent to asking whether belligerent ships may receive in neutral harbours what will enable them

to seek out their enemy, and to manœuvre while attacking him. It was first raised during the American civil war, in the first year of which the Duke of Newcastle instructed colonial governors that 'With respect to the supplying in British jurisdiction of articles *ancipitis usus* (such, for instance, as coal), there is no ground for any interference whatever on the part of colonial authorities.' But by the following year the question had been more maturely considered, and Lord John Russell directed on January 31, 1862, that the ships of war of either belligerent should be supplied with 'so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination.' Identical language was employed by Great Britain in 1870, 1885, and 1898, but in the British instructions of February 10, 1904, the last phrase was strengthened so as to run: 'or to some nearer *named neutral* destination.' The Egyptian proclamation of February 12, 1904, superadds the requirement of a written declaration by the belligerent commander as to the destination of his ship and the quantity of coal remaining on board of her; and Mr. Balfour, on July 11, informed the House of Commons that 'Directions had been given for requiring an engagement that any belligerent man-of-war, supplied with coal to carry her to the nearest port of her own nation, would in fact proceed to that port direct.'

"Finally, a still stronger step was taken by the Government of this country, necessitated by the hostile advance towards Eastern waters of the Russian Pacific squadron. Instructions were issued to all British ports on August 8, which, reciting that 'Belligerent ships of war are admitted into neutral ports in view of the exigencies of life at sea, and the hospitality which is customary to extend to vessels of friendly powers, but this principle does not extend to enable belligerent ships of war to utilize neutral ports directly for the purpose of hostile operations,' goes on to direct that the rule previously promulgated, 'inasmuch as it refers to the extent of coal which may be supplied to belligerent ships of war in British ports during the present war, shall not be understood as having any application to the case of a belligerent fleet proceeding either to the seat of war or to any position, or positions, on the line of route, with the object of intercepting neutral ships on suspicion of carrying contraband of war, and that such fleets shall not be permitted to make use, in any way, of any port, roadstead or waters, subject to the jurisdiction of His Majesty, for the purpose of coaling, either directly from the shore or from colliers accompanying such fleet, whether vessels of such fleet present themselves to such port or roadstead, or within the said waters, at the same time or successively; and that the same practice shall be pursued with reference to single belligerent ships of war proceeding for the purpose of belligerent operations, as above defined; provided that

this is not to be applied to the case of vessels putting in on account of actual distress at sea.'"

Neutral Duties in a Maritime War, by Thomas Erskine Holland, Proceedings of the British Academy, II. 6–7; citing Parl. Papers, Russia No. 1 (1905), 15, and Malta Government Gazette of August 12, 1904.

To an inquiry of the Government of the Netherlands as to whether the United States understood that the Japanese declaration that coal was contraband of war entailed any restrictions of the rule that coal might be supplied to a belligerent man-of-war in neutral waters sufficient to enable it to reach the nearest home port, the Department of State replied in the negative, saying that the effect of the Japanese proclamation was understood to be merely to serve notice that where Japan found coal being carried to her enemy she would seize it, just as in the case of other articles treated as contraband.

For. Rel. 1904, 523.

See Lapradelle, La Nouvelle Thèse du Refus de Charbon aux Belligérants dans les Eaux Neutres, Revue Générale de Droit Int. XI. 531.

7. Question as to Rescue of Seamen.

§ 1306.

"I freely admit that it is no part of a neutral's duty to assist in making captures for a belligerent, but I maintain it to be equally clear that, so far from being neutrality, it is direct hostility for a stranger to intervene and rescue men who had been cast into the ocean in battle, and then carry them away from under the conqueror's guns."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 1035, July 15, 1864, Dip. Cor. 1864, II. 218, 219, referring to the action of the British steam yacht *Deerhound*, in picking up Captain Semmes and other survivors of the *Alabama* and taking them to England, where they were set at liberty.

"One can hardly admit into this class of neutral obligation [i. e., of abstention] a duty not to rescue drowning crews of a belligerent warship. The question was raised with reference to the action of the British yacht *Deerhound*, when the *Alabama* was sunk by the *Kearsarge* off Cherbourg; and was again discussed with reference to the help rendered to the crew of the *Variag*, when that vessel was destroyed last year in the harbour of Chemulpo. It must doubtless be the duty of the government to which the rescuers belong to see that their charitable interference does not set free the persons benefited by it for continued service in the war."

Neutral Duties in a Maritime War, by Thomas Erskine Holland, Proceedings of the British Academy, II. 3.

IV. *ACTS NOT PROHIBITED.*

1. Sale of Merchant Ships.

§ 1307.

It is not a violation of the neutrality laws of the United States for a merchant or ship owner to sell his vessel and cargo (should the latter even consist of warlike stores) to a citizen or inhabitant of Buenos Ayres (then an insurgent belligerent). Nor will it make any difference whether such sale be made directly in a port of the United States, with immediate transfer and possession thereupon, or under a contract entered into here, with delivery to take place in a port of South America.

Rush, At. Gen., 1816, 1 Op. 190.

"If vessels have been built in the United States and afterwards sold to one of the belligerents and converted into vessels of war, our citizens engaged in that species of manufacture have been equally ready to build and sell vessels to the other belligerent. In point of fact both belligerents have occasionally supplied themselves with vessels of war from citizens of the United States. And the very singular case has occurred of the same shipbuilder having sold two vessels, one to the King of Spain and the other to one of the southern republics, which vessels afterwards met and encountered each other at sea.

"During the state of war between two nations the commercial industry and pursuits of a neutral nation are often materially injured. If the neutral finds some compensation in a new species of industry, which the necessities of the belligerents stimulate or bring into activity, it can not be deemed very unreasonable that he should avail himself of that compensation, provided he confines himself within the line of entire impartiality, and violates no rule of public law."

Mr. Clay, Sec. of State, to Mr. Rivas y Salmon, Spanish chargé, June 9, 1827, MS. Notes to For. Legs. III. 365.

Mr. Clay's opinion is cited and followed in Mr. Bayard, Sec. of State, to Mr. McGarr, consul at Guayaquil, No. 20, July 14, 1886, 118 MS. Inst. Consuls, 399.

"Shipbuilding is a great branch of American manufactures, in which the citizens of the United States may lawfully employ their capital and industry. When built they may seek a market for the article in foreign ports as well as their own. The Government adopts the necessary precaution to prevent any private American vessel from leaving our ports equipped and prepared for hostile action, or, if it allow, in any instance, a partial or imperfect armament, it subjects the owner of the vessel to the performance of the duty of giving

bond, with adequate security, that she shall not be employed to cruise or commit hostilities against a friend of the United States.

"It may possibly be deemed a violation of strict neutrality to sell to a belligerent vessels of war completely equipped and armed for battle, and yet the late Emperor of Russia could not have entertained that opinion, or he would not have sold to Spain during the present war, to which he was a neutral, the whole fleet of ships of war, including some of the line.

"But if it be forbidden by the law of neutrality to sell to a belligerent an armed vessel completely equipped and ready for action, it is believed not to be contrary to that law to sell to a belligerent a vessel in any other state, although it may be convertible into a ship of war.

"To require the citizens of a neutral power to abstain from the exercise of their incontestable right to dispose of the property, which they may have in an unarmed ship, to a belligerent, would in effect be to demand that they should cease to have any commerce, or to employ any navigation in their intercourse with the belligerent. It would require more—it would be necessary to lay a general embargo, and to put an entire stop to the total commerce of the neutral with all nations; for, if a ship or any other article of manufacture or commerce, applicable to the purpose of war, went to sea at all, it might directly or indirectly find its way into the ports, and subsequently become the property of a belligerent.

"The neutral is always seriously affected in the pursuit of his lawful commerce by a state of war between other powers. It can hardly be expected that he should submit to a universal cessation of his trade, because by possibility some of the subjects of it may be acquired in a regular course of business by a belligerent, and may aid him in his efforts against an enemy. If the neutral show no partiality; if he is as ready to sell to one belligerent as the other; and if he take, himself, no part in the war, he cannot be justly accused of any violation of his neutral obligations."

Mr. Clay, Sec. of State, to Mr. Tacon, Spanish min., Oct. 31, 1827, MS. Notes to For. Legs. III. 396.

See, also, Mr. Clay, Sec. of State, to Mr. Rebello, Brazilian chargé, May 1, 1828, MS. Notes to For. Legs. IV. 16; Mr. Bayard, Sec. of State, to Mr. McGarr, consul at Guayaquil, No. 20, July 14, 1886, 118 MS. Inst. Consuls, 399.

"On the 19th ultimo you telegraphed to the Department inquiring 'Can Americans sell steamers to Chinese?' You were answered to the effect that the inquiry was too vague to admit of intelligent examination.

"On March 20 you repeated the inquiry in a modified form, 'Can American steamers here be sold to Chinese?'

"The question is still too obscurely presented to admit of a reply by telegraph covering the different cases which it presents. There are alternative aspects to each fundamental point covered by your inquiry, thus:

"(1) Are the steamers in question registered vessels of the United States plying between our ports and those of China, or are they foreign-built vessels in Chinese waters which have become the property of citizens of the United States through *bona fide* purchase?

"(2) Are the owners of the steamers residing within or without the jurisdiction of China?

"(3) Is it proposed to sell them to the Chinese Government, or to individual subjects of China?

"(4) Are they to be employed as regularly enrolled vessels-of-war or as privateers under Chinese commission issued to individuals, or as Government transports, or as merchant vessels in legitimate trade with unblockaded ports, or as blockade-runners?

"Any given combination of these points would involve a distinct application of international law thereto.

"Assuming that the owners of the steamers are within Chinese jurisdiction, as the steamers appear to be, judging from your second telegram, the intervention of the consular officers of the United States would be required, in case of sale to aliens, to cancel the papers under which the steamers now bear our flag. If they are regularly registered vessels, the registry is to be destroyed and one-half of it sent to this Department. If they are foreign built and owned by American citizens, the certified bill of sale allowed under paragraph 340 of the Consular Regulations of 1881 should be canceled by the consul; and if the new transfer should take place at another consulate than that at which the original purchase of the vessel was recorded, official correspondence between the two consulates would be needed to effect such cancellation.

"It would, however, be manifestly improper for any official of the United States to take part in the transfer of a steamer, or of any property whatever, for a warlike purpose, to a belligerent towards whom the United States maintained a position of neutrality.

"If, however, the proposed transaction should be clearly and positively determined to be wholly pacific, and not intended in any way directly or indirectly to favor the employment of the vessel for or in aid of any hostile purpose, the intervention of the consul to cancel the existing documents of the vessel would not violate any international obligation on the part of this Government. The utmost discretion and the most evident and positive proof of the legitimacy of the transfer would, however, be necessary, and in case of doubt, however remote, it would be the consul's duty to decline to intervene in the transaction.

"Your inquiry is susceptible of still another aspect, for you may have desired to know whether you were under any obligation to *prevent* the transfer of American-owned steamers to the flag of China, whether with pacific or with hostile intent. In any case where the ultimate object of the transfer is or may appear to be hostile, and where consular intervention is necessary to effect a valid transfer, the withholdment of such intervention would be the limit to which a consul could go to prevent such unlawful change of ownership. But if the legalization of the sale should be unnecessary, there would be no international obligation on the consul to prevent the seller from alienating his property, nor would any preventive means appear to be within the consul's reach, in such a manner as to impute responsibility to him for failure to employ them. The consul would have no more control, and consequently no more responsibility, in in the case of transfer of the American vendor's property by private contract and simple delivery within Chinese jurisdiction, than in the case of a private contract on the part of the same vendor to lend his personal aid to either belligerent. In either case, the party alienating his property or his services does so at his own risk and peril.

"This instruction, although covering only a part of the hypothetical field embraced in your inquiries, may serve to guide you in whatever specific case may be presented; but if you should be in doubt on any point involved, precise instructions will be given to you thereon."

Mr. Bayard, Sec. of State, to Mr. Stahel, consul at Shanghai, Apr. 14, 1885, For. Rel. 1885, 170, enclosed with Mr. Bayard to Mr. Smithers, acting minister to China, No. 428, April 20, 1885, id.

These vessels had been previously sold to citizens of the United States by Chinese. (President Arthur's annual message of 1884, and §§ 323, 324, supra.)

"The distinction between fitting out and arming ships of war for the service of a belligerent, which is not permissible, and selling to such belligerent ships to be converted into men-of-war and munitions of war, which is permissible, may be thus explained: It is not indictable for a gunsmith to sell a pistol to a party who may use it unlawfully, even though the vendor may have reasons to suspect the object of the purchase. It would, however, be unlawful for the gunsmith to join in arranging a machine by which a specific unlawful purpose is to be achieved. It is not unlawful, in other words, to be concerned in preparations which will not, unless diverted by an independent force, produce a violation of law. It is, however, unlawful to be concerned in putting in actual operation dangerous machines. He who is concerned in fitting out and arming a man-of-war for the purpose of preying on the commerce of a friendly state, or of attacking its armed ships or ports, is as much concerned in the attack as he who

takes part in manufacturing and planting a torpedo in a frequented channel is responsible for the mischief done by the torpedo. This distinction has been already asserted in the cases which rule that it is an indictable offense to be concerned in counseling and aiding a specific attack, but not an indictable offense to be concerned in selling arms by which such attack is to be made."

Wharton, Int. Law Digest, III. 525.

During the civil war in Chile in 1891 the Peruvian Government detained at Callao the steamer *Mapocho*, of the South American Steamship Company, which the company intended to place at the disposal of President Balmaceda by virtue of the company's contract with the Chilean Government. The steamer was capable of transporting 3,000 soldiers. The agents of President Balmaceda made every effort to secure the departure of the vessel from Callao, but the Peruvian Government detained it there till the close of the war. The case is fully detailed in the report of the Peruvian foreign office for 1891, page 20.

Mr. Elmore, Peruvian min. of for. aff., to Mr. Dudley, Am. min., July 23, 1898, enclosed with Mr. Dudley to Mr. Day, Sec. of State, July 21, 1898, MS. Desp. from Peru.

" In January of the present year the Chilean Congress is reported to have refused to accept a very high price offered by an American firm for six war ships, doubtless believing that the ships were destined for either Russia or Japan. A new, though cognate, question has, however, been raised by the sale of certain German liners to Russia, which forthwith, after rechristening, commissioned them as armed cruisers. If these vessels were, as is alleged, subsidized by their own Government, with a view to their employment by that Government in case of need, it has been urged with much force that they practically form part of the reserve of the imperial German navy, and that, therefore, Germany being neutral, they could not be lawfully sold to a belligerent. It would seem that the opinion of the law officers to which Mr. Balfour alluded in August, 1904, was not given with reference to precisely the facts above stated."

Holland, Neutral Duties in a Maritime War, April 12, 1905, Proceedings of the British Academy, II. 2.

2. Sale of Contraband.

(1) by private persons.

§ 1308.

"Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal disarrangement in their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of any of the belligerent powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned, and, that even private contraventions may work no inequality between the parties at war, the benefit of them will be left equally free and open to all."

Mr. Jefferson, Sec. of State, to the British min., May 15, 1793, 5 MS. Dom. Let. 105; Am. State Papers, I. 69, 147; 3 Jefferson's Works, 558, 560.

See a pamphlet entitled "The Supplies for the Confederate Army. How they were obtained in Europe and how paid for." By Caleb Huse, Major and Purchasing Agent, C. S. A., Boston. Press of T. R. Marvin & Son, 1904.

"The purchasing within, and exporting from the United States, *by way of merchandise*, articles commonly called contraband, being generally warlike instruments and military stores, is free to all the parties at war, and is not to be interfered with."

Hamilton's Treasury circular of Aug. 4, 1793, 1 Am. State Papers, For. Rel. 140.

Belligerents may come into the territory of a neutral nation and there purchase and remove any article whatsoever, even instruments of war, unless the right be denied by express statute. If, however, the object of such an act be to impede the operations of either belligerent power, and to favor the other, it is a violation of neutrality.

Lee, At. Gen., 1796, 1 Op. 61.

In the correspondence between Mr. Pickering, Secretary of State, and Mr. Adet, minister of France, in 1796, while it was agreed on both sides that horses are contraband of war, it was maintained correctly by Mr. Pickering, in opposition to Mr. Adet, that the only means of redress in such cases by the offended belligerent was the

seizure of such contraband on the high seas, or in his own country, and that the government of the country of exportation was not required by international law to prohibit such exportation.

Mr. Pickering, Sec. of State, to Mr. Adet, Jan. 20, and May 25, 1796, 1 Am. State Papers, For. Rel. 645, 649.

"It was contended on the part of the French nation, in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry, themselves, to the belligerent powers, contraband articles subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. (Richardson *v.* Maine Ins. Co., 6 Mass. 113; The Santissima Trinidad, 7 Wheat. 283.) The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act." In a note it is added: "This passage is cited and approved by Lord Westbury in Ex parte Chavasse *re* Grazebrook, 11 Jur. N. S. 400, 34 L. J. N. S. 17; by Historicus, Int. Law, 119, 129 (on neutral trade in contraband of war); Hobbs *v.* Henning, 17 C. B. N. S. 791; 11 Op. At. Gen. 408, 410; id. 451; The Helen, L. R. 1 Ad. & Ec. 1." (1 Kent's Comm. 142.)

"In both the sections cited [110 and 113, Vattel] the right of neutrals to trade in articles contraband of war is clearly established; in the first, by selling to the warring powers who come to the neutral country to buy them; in the second, by the neutral subjects or citizens carrying them to the countries of the powers at war, and there selling them."

Mr. Pickering, Sec. of State, to the minister of France, May 25, 1796, Am. State Papers, For. Rel. I. 649.

The Government of the United States can not undertake to punish its own citizens for disposing in another country of contraband articles in violation of the laws of such country. "Neither . . . our own laws, nor, as is believed, those of any foreign country, make provision for the enforcement of the penal laws of another country, the general rule being that the laws of every nation are competent to vindicate their own authority."

Mr. Clay, Sec. of State, to Mr. Obregon, Mexican min., Apr. 6, 1827, MS. Notes to For. Legs. III. 345. See, on this topic, Whart. Crim. Law, §§ 271 et seq.

"In pursuance of this policy, the laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the

hazards of war, his acts do not involve any breach of national neutrality nor of themselves implicate the Government. Thus, during the progress of the present war in Europe, our citizens have, without national responsibility therefor, sold gunpowder and arms to all buyers, regardless of the destination of those articles. Our merchantmen have been, and still continue to be, largely employed by Great Britain and by France in transporting troops, provisions, and munitions of war to the principal seat of military operations and in bringing home their sick and wounded soldiers; but such use of our mercantile marine is not interdicted either by the international or by our municipal law, and therefore does not compromit our neutral relations with Russia."

President Pierce, annual message, Dec. 3, 1854, Richardson's Messages, V. 327, 331; adopted by Sir W. Harcourt, in Historicus, 132.

"The mere exportation of arms and munitions of war from the United States to a belligerent country has never, however, been considered as an offense against the act of Congress of the 20th of April, 1818. All belligerents enjoy this right equally, and a privilege which is open to all can not justly be complained of by any one party to a war. Guatemala, however, has a right under the law of nations and under her treaty with the United States to seize contraband of war on its way to her enemy, and this Government will not complain if she should exercise this right in the manner which the treaty prescribes." (Mr. Marcy, Sec. of State, to Mr. Molina, Mar. 16, 1854, MS. Notes to Cent. Am. I. 55.)

"It is certainly a novel doctrine of international law that traffic by citizens or subjects of a neutral power with belligerents, though it should be in arms, ammunition, and warlike stores compromits the neutrality of that power. That the enterprise of individuals, citizens of the United States, may have led them in some instances, and to a limited extent, to trade with Russia in some of the specified articles is not denied, nor is it necessary that it should be, for the purpose of vindicating this Government from the charge of having disregarded the duties of neutrality in the present war. . . . Private manufacturing establishments in the United States have been resorted to for powder, arms, and warlike stores, for the use of the allies; and immense quantities of provisions have been furnished to supply their armies in the Crimea. In the face of these facts, open and known to all the world, it certainly was not expected that the British Government would have alluded to the very limited traffic which some of our citizens may have had with Russia, as sustaining a solemn charge against this Government for violating neutral obligation towards the allies. Russia may have shared scantily, but the allies have undoubtedly partaken largely in the benefits derived from the capital, the industry, and the inventive genius of American citizens in the progress of the war; but as this Government has had no connection with

these proceedings, neither belligerent has any just ground of complaint against it."

Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, Oct. 13, 1855, 47 Br. & For. State Papers, 421, 424.

Late in 1862 the Mexican minister at Washington complained that the exportation of mules and wagons on French account was permitted at New York, and in this relation he adverted to the orders issued by the Government of the United States forbidding the exportation of arms and munitions of war and various other articles most embraced in contraband lists. Mr. Seward, on December 15, 1862, replied that the action of the United States in prohibiting certain exports was a municipal measure due to the exigencies of the war; that it had no reference to the war in Mexico, and gave no preference to either of the belligerents there. "If Mexico," said Mr. Seward, "shall prescribe to us what merchandise we shall not sell to French subjects, because it may be employed in military operations against Mexico, France must equally be allowed to dictate to us what merchandise we shall allow to be shipped to Mexico, because it might be belligerently used against France. Every other nation which is at war would have a similar right, and every other commercial nation would be bound to respect it as much as the United States. Commerce in that case, instead of being free or independent, would exist only at the caprice of war."

Mr. Seward, Sec. of State, to Mr. Romero, Mexican min., Dec. 15, 1862, MS. Notes to Mexico, VII. 215.

"The undersigned, after the most careful reading of Mr. Romero's note, is unable to concede that the Government of the United States has obliged itself to prohibit the exportation of mules and wagons, for which it has no military need, from its ports on French account, because, being in a state of war, and needing for the use of the Government all the firearms made and found in the country, it has, temporarily, forbidden the export of such weapons to all nations." (Mr. Seward, Sec. of State, to Mr. Romero, Mex. min., Jan. 7, 1863, Dip. Cor. 1863, II. 1138.)

See, also, Mr. Seward to Mr. Romero, Aug. 7, 1865, Dip. Cor. 1865, III. 640–641. Mr. Seward, however, referring to the course of British subjects in furnishing supplies of arms and munitions of war to the Confederacy "in vessels owned or chartered by the pretended insurgent authorities or running the blockade under contract with them," declared, "British subjects who intervene in our civil war in the manner . . . mentioned are by the law of nations liable to be treated by this Government as enemies of the United States, having no lawful claim to be protected by Her Majesty's Government." (Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 1026, July 9, 1864, MS. Inst. Gr. Br. XIX. 362.)

There is no law or regulation which forbids any person or government, whether the political designation be real or assumed, from pur-

chasing arms from citizens of the United States and shipping them at the risk of the purchaser.

Speed, At. Gen., 1865, 11 Op. 408; id. 451.

As to supply of arms to South American colonies when in insurrection against Spain, see 5 J. Q. Adams's Memoirs, 46.

For a criticism of the position of the United States in reference to the rights of neutrals to furnish contraband of war to belligerents, see 3 Phill. Int. Law (3d ed.), 250, 408; and as criticising Sir R. Phillimore and pointing out his mistakes in this relation, see Historicus [Sir W. Vernon Harcourt], Letters on some Questions of Int. Law, 130.

Citizens of the United States have, by the law of nations and by treaty, the right to carry to the enemies of Spain, whether insurgents or foreign foes, all merchandise not contraband of war, subject only to the requirements of legal blockade. "Articles contraband of war, when destined for the enemies of Spain, are liable to seizure on the high seas, but the right of seizure is limited to such articles only, and no claim for its extension to other merchandise, or to persons not in the civil, military, or naval service of the enemies of Spain, will be acquiesced in by the United States. This Government certainly can not assent to the punishment by Spanish authorities of any citizen of the United States for the exercise of a privilege to which he may be entitled under public laws and treaties."

Mr. Fish, Sec. of State, to Mr. Lopez Roberts, Span. min., April 3, 1869, S. Ex. Doc. 7, 41 Cong. 2 sess. 12.

This note is cited in Mr. Fish, Sec. of State, to Mr. Cushing, min. to Spain, No. 31, June 9, 1874, For. Rel. 1876, 493.

See, also, Mr. Fish, Sec. of State, to Mr. Shippen, Ecuadorean consul at Philadelphia, Nov. 4, 1876, 115 MS. Dom. Let. 615; Mr. Evarts, Sec. of State, to Mr. Sherman, Sec. of Treas., June 19, 1877, 118 MS. Dom. Let. 621.

"The exportation of arms and munitions of war of their own manufacture to foreign countries, is an important part of the commerce of the United States. In time of war their Government will expect those engaged in the business to beware of all the risks legally incident to it. No such expectation, however, can be indulged in a time of profound peace; an indemnification will be asked of any nation which may unnecessarily or illegally obstruct such trade."

Mr. Fish, Sec. of State, to Mr. Cramer, July 28, 1874, MS. Inst. Denmark, XV. 107. See, also, Mr. Fish, Sec. of State, to Mr. Russell, June 4, 1875, MS. Inst. Venezuela, II. 291.

During the war between Chile, Bolivia, and Peru the Chilean Government desired the Argentine Republic to prohibit the traffic in arms and munitions of war with the belligerents. Bolivia strongly

protested against such an inhibition, maintaining that it would in its operation be unfair to that Government. On the question at issue the Argentine minister of foreign affairs, Dr. Bernardo de Irigoyen, took substantially the following position: That while it is generally conceded that the traffic in arms and munitions of war by private persons, without intent to aid either belligerent, is admissible as a commercial transaction, subject to the risk of capture, yet that, when the shipment is made by agents of the belligerents on a scale so large as to convert them into important aids to the war, neutral governments should use due diligence to prevent such traffic with one of the belligerents, so that it may not be required to sanction similar operations on the part of the other belligerent and thus tolerate the conversion of its territory into a center of expeditions in conflict with its neutral character. The reports of the Argentine ministry of foreign affairs show several cases during the war in which Chile protested against alleged shipments of arms from the Argentine Republic to Bolivia; but as the alleged shipments in question were unimportant, the matter does not appear to have resulted in anything more than an exchange of notes.

Mr. Buchanan, min. to the Argentine Republic, to Mr. Hay, Sec. of State, No. 584, Dec. 1, 1898, enclosing a report of Mr. François S. Jones, sec. of legation, 37 MS. Desp. from Arg. Rep.

In the summer of 1879 the captain of a steamer bound from Panama to Callao declined to take on board five large packages which were bound from New York to Callao, and which, on examination, were found to contain "a torpedo launch, in five sections, ready to be set up." It was stated that other consignments of like character were to follow. At the instance of a United States customs inspector at Panama the Treasury Department solicited the views of the Department of State as to whether the transaction, assuming that the articles were to be delivered to the Government of Chile or of Peru, involved an infraction of the neutrality laws of the United States. Mr. Evarts, after conference with the Secretary of the Treasury and incidentally with the Chilean minister, and after having caused the question to be examined by the law officer of the Department of State, stated that the only legal provision, if any, applicable to the case was section 5283 of the Revised Statutes, and that he was "clearly of opinion that the simple manufacture and shipment of such materials [as those in question] as merchandise would not be in violation of the provisions of that section. Uniform and repeated rulings of the executive and judicial branches of the Government," said Mr. Evarts, "in regard to the true interpretation of the neutrality laws of the United States in the case of even completed seagoing vessels, make it clear that the facts respecting this material stated by In-

spector Carter, if the same was found within the jurisdiction of the United States, would not present a case of the violation of the provisions of section 5283 of the Revised Statutes. The articles in question are, as before stated, doubtless contraband of war, and are sold, shipped, and purchased at the peril and risk of capture. Subject to such risk, they continue to be a legitimate element of commerce to the citizens of the United States, a neutral power, with either of the belligerents in time of war, in the same manner and to the same extent as they would be in time of peace, and afford no ground for the interference of the executive officers of the United States, either within their own jurisdiction or elsewhere, with such a mercantile transaction."

Mr. Evarts, Sec. of State, to Mr. Sherman, Sec. of Treas., Nov. 14, 1879, 130 MS. Dom. Let. 472.

March 2, 1885, Mr. Becerra, Colombian minister at Washington, advised the Department of State that certain Colombian citizens, acting in the interest of the rebels who then controlled the Atlantic coast of that country, were about to purchase arms and munitions of war in New York, and also possibly to fit out vessels there for the purpose of carrying the war into the interior of Colombia. These allegations were brought by Mr. Bayard, who was then Secretary of State, to the attention of the proper authorities.

On March 10, 1885, Mr. Garland, Attorney-General, sent to Mr. Root, United States district attorney at New York, the following telegram: "Minister of United States of Colombia at this capital states that parties are engaged in purchase of arms to carry on war against his Government. Steamer leaves your port to-morrow or next day. You are directed to immediately adopt stringent measures to prevent any departure of warlike elements intended to assist expeditions against Colombia."

Mr. Root, on receiving this telegram, ascertained through the local Treasury officials that the steamer *Albano*, belonging to a regular line, had just cleared for a port in Colombia having arms on her manifest. He requested that the clearance be stopped and the vessel not allowed to leave till further examination; and at the same time he asked Mr. Garland for more particular information, saying: "The mere fact that a steamer cleared for a port in the United States of Colombia having arms among her cargo is no ground for interference. It is highly improbable that the vessel in question, whether it be the *Albano* or any other steamer, will correspond with the description of section 5290. The *Albano* I understand to be a vessel of a regular line. The detention for the purpose of examination justified by section 5290 will accordingly be brief. In order to take

any further steps to prevent the arms from going forth, I must have some facts which will establish a violation of some provisions of the neutrality act. The case of the steamship *Florida*, decided by Judge Blatchford in the district court in this district in 1871, and reported in the 4th of Benedict District Court Reports, 452, illustrates the difficulty of establishing violations of law of this description."

This correspondence was communicated by Mr. Bayard to Mr. Becerra on March 11, 1885. Next day Mr. Becerra, undertaking to furnish the further information which Mr. Root had requested, represented that the *Albano* had special contracts with the Colombian Government—a more than ordinary observance of neutrality in the domestic contentions of that country was required; that, in spite of this, the vessel had taken on arms for the rebels, for the purpose of delivering them at a port which the competent authorities of Colombia had by decree declared to be closed to foreign commerce; and that the United States, as the guarantor of the neutrality of the Isthmus under the treaty of 1846, was specially interested in preserving order there and in repressing the insurrection. On the 17th of March Mr. Becerra complained that the *Albano*, in spite of his efforts, had not been detained; and he also stated that a sailing vessel laden with arms had left New York for a port in Colombia held by the insurgents and likewise declared closed to commerce.

On March 25, 1885, Mr. Bayard, replying to Mr. Becerra's representations, said: "The existence of a rebellion in Colombia does not authorize the public officials of the United States to obstruct ordinary commerce in arms between citizens of this country and the rebellious or other parts of the territory of the Republic of Colombia. It is a well-established rule of international law that the allowance of such commerce is no breach of duty towards the friendly government whose enemies may thus be supplied with arms. As no charge is made that the vessels in question are armed vessels intended for the use of the rebels mentioned, or that military expeditions are being set on foot in this country against the Republic of Colombia, the duties of this Government are limited to the enforcement of the statutory provisions which apply to such cases."

In a subsequent note to Mr. Becerra, of March 27, 1885, Mr. Bayard, again referring to the shipment of arms by the *Albano*, said: "It has not as yet been possible to ascertain whether these articles are intended to be used in expeditions hostile to the Colombian Government, but even should this prove to be the case, this Government, however much it may regret the encouragement in any manner from this country of the revolt against the constitutional authorities of its sister Republic, must maintain the right of its citizens to carry on without a violation of the neutrality laws the ordinary traffic in arms

with the rebellious or other parts of that Republic, as more particularly set forth in my note to you of the 25th instant."

Mr. Becerra, Colombian min., to Mr. Frelinghuysen, Sec. of State, March 2, 1885, For. Rel. 1885, 231; Mr. Bayard, Sec. of State, to Mr. Becerra, March 11, 1885, id. 232–234; Mr. Becerra to Mr. Bayard, March 12, 1885, id. 234–236; Mr. Bayard to Mr. Becerra, March 25, 1885, and March 27, 1885, id. 238–239.

See, also, Mr. Bayard, Sec. of State, to Mr. Garland, At. Gen., March 17, 1885, 154 MS. Dom. Let. 503; same to same, March 9, 1885, id. 415; same to same, March 12, 1885, id. 451; Mr. Bayard, Sec. of State, to Sec. of Treas., March 17, 1885, id. 509.

"It is also to be observed that the fact that certain articles of commerce are contraband does not make it a breach of neutrality to export them. There has not been, since the organization of our Government, a European war in which, in full accordance with the rules of international law, as accepted by the United States, munitions of war have not been sent by American citizens to one or both of the belligerents; yet it has never been doubted that these munitions of war, if seized by the belligerent, against whom they were to be used, could have been condemned as contraband.

"The question, then, is whether furnishing to belligerents coal and life shells is a breach of neutrality which the law of nations forbids. The question must be answered in the negative as to coal, and the same conclusion may be adopted with regard to life shells, which are said to be projectiles used in the bringing to shore or rescue of wrecks.

"Under these circumstances it is not perceived why, in the present case, the United States authorities should intervene to prevent such supply from being forwarded to the open ports of either belligerent. Even supposing such articles to be contraband of war and consequently liable to be seized and confiscated by the offended belligerent, it is no breach of neutrality for a neutral to forward them to such belligerent ports subject, of course, to such risks. When, however, such articles are forwarded directly to vessels of war in belligerent service another question arises. Provisions and munitions of war sent to belligerent cruisers are unquestionably contraband of war. Whether, however, it is a breach of neutrality, by the law of nations, to forward them directly to belligerent cruisers depends so much upon extraneous circumstances that the question can only be properly decided when these circumstances are presented in detail."

Mr. Bayard, Sec. of State, to Mr. Smithers, chargé at Peking, June 1, 1885, For. Rel. 1885, 172.

See, also, For. Rel. 1885, 156, 168, 170. That neutrals may sell arms to belligerents, see Mr. Frelinghuysen, Sec. of State, to Mr. Dayton, Feb. 19, 1883, MS. Inst. Netherlands, XV. 418.

Art. 20 of the treaty between the United States and Hayti, of November 3, 1864, provides that "liberty of navigation and commerce shall extend to all kinds of merchandise, excepting those only which are distinguished by the name of contraband of war." The article then specifies the things which shall be comprehended under that designation. Art. 21 stipulates that "all other merchandises and things" not comprehended in the list shall be considered as subjects of free and lawful commerce, which may be transported in the freest manner by the citizens of both contracting parties, even to places belonging to an enemy, excepting only such as may be besieged or blockaded. The Haytian minister at Washington asked that the United States, on the strength of these stipulations, take steps to prevent the exportation of articles contraband of war to Hayti. The United States dissented from this construction of the treaty. It was not unusual, said the Department of State, to find in the treaties of the United States specifications of what things should be regarded as contraband of war between the contracting parties. Such provisions, however, had never been held to bind either government to prevent its citizens from exporting such things to the territory of any other country under any circumstances whatever. The United States had uniformly maintained the position taken by Mr. Jefferson, as Secretary of State, that "our citizens have always been free to make, vend, and export arms."

Mr. Bayard, Sec. of State, to Mr. Preston, Haytian min., Nov. 28, 1888, For. Rel. 1888, I. 1000. See, also, same to same, Oct. 29, 1888, id. 990.

The landing of a cargo contraband of war, on the shore of the country of one belligerent, at a point not blockaded, is not an act of hostility against the other belligerent.

The Florida, 4 Benedict, 452.

"I have the honor to acknowledge the receipt of your note of the 10th instant, in which you inform me that your Government has prohibited, until further orders, the importation into the Republic of arms and munitions of war of all kinds.

"In conveying this information you request me, if possible, to communicate this decree to the custom-houses of the United States in order that the shipment of such articles to Chile may be prevented; and in this relation you state that an agent of the insurgents in Chile has arrived in the city of New York for the purpose of purchasing arms and munitions of war.

"The laws of the United States on the subject of neutrality, which may be found under title LXVII of the Revised Statutes, while forbidding many acts to be done in this country which may affect the relations of hostile forces in foreign countries, do not forbid the man-

ufacture and sale of arms or munitions of war. I am therefore at a loss to find any authority for attempting to forbid the sale and shipment of arms and munitions of war in this country, since such sale and shipment are permitted by our law. In this relation it is proper to say that our statutes on this subject are understood to be in conformity with the law of nations, by which the traffic in arms and munitions of war is permitted, subject to the belligerent right of capture and condemnation.

"Since your note has directed attention to the subject of neutrality, it should be stated that our laws on that subject are put in force upon application to the courts, which are invested with the power to enforce them and to inflict the penalties prescribed for their violation. Our statutes not only forbid the infringement in this country of the rules of neutrality, but also impose grave penalties for their infraction.

"I will inclose a copy of your note to the Secretary of the Treasury and the Attorney-General."

Mr. Blaine, Sec. of State, to Mr. Lazcano, Chilean min., March 13, 1891, For. Rel. 1891, 314.

"The sale of arms and munitions of war, even to a recognized belligerent, during the course of active hostilities, is not in itself an unlawful act, although the seller runs the risk of capture and condemnation of his wares and contraband of war."

Mr. Foster, Sec. of State, to Mr. Bolet Peraza, Venezuelan min., Sept. 22, 1892, For. Rel. 1892, 645.

The mere sale or shipment of arms and munitions of war by persons in the United States to persons in Cuba is not a violation of international law, however strong a suspicion there may be that they are to be used in an insurrection against the Spanish Government. Nor does the sale or the shipment of such articles become a violation of international law merely because they are not destined to a port recognized by Spain as being open to commerce or because they are to be landed by stealth.

Harmon, At. Gen., Dec. 10, 1895, 21 Op. 267, 270–271, citing The Santissima Trinidad, 7 Wheat. 283, 340; The Bermuda, 3 Wall. 514; United States *v.* Trumbull, 48 Fed. Rep. 99; The Itata, 66 Fed. Rep. 505; Hendricks *v.* Gonzales, 67 Fed. Rep. 351; 2 Pradier-Fodéré, Droit Int. Pub., sec. 469; Cobbett's Leading Cases on Int. Law, 167–171; Phillimore's Int. Law, III, 274; Snow's Cases on Int. Law, 408–420; 11 Op. At. Gen. 451; The steamship Florida, 4 Ben. 452; Abdy's Kent, Int. Law, 491; Snow's Cases on Int. Law, 497.

It was added, however, that if force was intended to be employed in landing the arms, the question of a hostile expedition might be raised.

"If, in characterizing this country as a base of operations against Spain, it be meant that the Cuban insurgents procure the larger part

of their military supplies here, the fact may be so, though the means of comparing other countries, the British West Indies in particular, with the United States are not at hand. But the comparison is of no importance, and it would be of no consequence if the insurgents derived their whole stock of warlike equipment from the United States. The citizens of the United States have a right to sell arms and munitions of war to all comers—neither the sale nor the transportation of such merchandise, except in connection with and in furtherance of a military expedition prosecuted from our shores, are a breach of international duty or give Spain any ground of complaint—and the denunciation of such acts as evidencing 'criminal conspiracy,' or as showing United States territory to have become a base of operations against Spain, is greatly to be deprecated as without sufficient warrant in law or in fact, and as therefore ill calculated to promote the harmonious relations of the two countries."

Mr. Olney, Sec. of State, to Mr. Dupuy de Lome, July 15, 1896, MS. Notes to Spain, XI. 178.

The neutrality laws are not designed to interfere with commerce, even in contraband of war, but merely to prevent distinctly hostile acts, as against a friendly power, which tend to involve this country in war.

United States *v.* The Laurada, 85 Fed. Rep. 760.

Three persons, one a citizen of the South African Republic, another a citizen of the State of New York, and the third the consul-general of the Orange Free State, whose citizenship was not disclosed, filed a bill in equity in the United States circuit court for the eastern district of Louisiana, April 13, 1901, in which they set forth that they were owners of property in the South African Republic and the Orange Free State; that Great Britain was by force of arms destroying their property; that a certain steamer, employed by her owners and charterers in the military service of Great Britain, was loading horses and mules which were the property of the British Government and were to be employed in its military service; that the port of New Orleans was thus being made a base of military operations in aid of Great Britain for the renewal and augmentation of her military supplies; that the aid thus furnished enabled the British army to carry on war and destroy property, thus causing the complainants irreparable injury; that one of the complainants has already suffered loss of property amounting to $90,000, and was threatened with further loss by the continuance of the war which Great Britain was enabled to carry on only by the renewal and augmentation of military supplies from ports of the United States, and especially from the port of New Orleans. It was therefore prayed that an injunction issue restrain-

ing the master and certain other persons, the defendants in the bill, from loading the ship with the animals in question.

It was conceded on the argument that the court had no jurisdiction of the cause ratione personarum, but it was maintained that there was jurisdiction ratione materiæ, by virtue of the treaty between the United States and Great Britain of May 8, 1871, relating to the Alabama claims, in which it is declared: "A neutral government is bound . . . not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men."

Held (1) that this clause was not intended "to subvert the well-established principle of international law that the private citizens of a neutral nation can lawfully sell supplies to belligerents;" (2) that according to affidavits in the case the vessel was not equipped for war nor in the military service of Great Britain, nor controlled by the naval authorities of that nation, and that if a belligerent might come to the country and buy munitions of war it seemed clear that he might "export them as freight in private merchant vessels of his own or any other nationality, as cargo could be exported by the general public;" (3) that the injury apprehended by the complainants from the shipping of the animals seemed to be remote, indistinct, and entirely speculative, while the averment that the war would cease if the shipments were stopped was only an expression of opinion and hope which could not be made the basis of judicial action; (4) that there was nothing in the case "upon which could be founded a charge that the neutrality statutes of the United States are being violated," and that there existed a presumption that the United States had provided in those statutes for the punishment of every breach of neutrality which it recognized; and (5) that above all other considerations the case was a political one, of which a court of equity could take no cognizance, and which in the nature of governmental things must belong to the executive branch.

Pearson *v.* Parson (1901), 108 Fed. Rep. 461.

The court, in the course of its opinion, said: "The main case relied on by the counsel for the complainants is the case of Emperor of Austria *v.* Day, 3 De Gex, F. & J. 217 (English Chancery Reports), in which the Emperor of Austria sought and obtained an injunction to restrain the manufacture in England of a large quantity of notes purporting to be receivable as money in, and to be guaranteed by, Hungary. That action was brought by the Emperor of Austria as the sovereign and representative of his nation, and the case turned and was decided on considerations entirely different from, and in no manner resembling, those presented in this cause. It may be worth noticing that the counsel for the Emperor of Austria freely conceded in the argu

ment of the case that the exportation of munitions of war could not be enjoined." (Id. 465.)

February 1, 1902, Mr. Samuel Pearson, in behalf of the South African Republic, then at war with Great Britain, addressed to the President a letter, in which he said:

"I affirm that at the port of Chalmette, a few miles below the city of New Orleans, a British post has been established; and men and soldiers are there assembled and are there daily engaged in warlike operations, and are there for the purpose of the renewal and augmentation of military supplies and for the recruitment of men.

"The attention of the courts has been called and an appeal made to them, and the United States circuit court for the eastern district of Louisiana, in the case of Pearson *v.* Parson (108 Fed. Rep., p. 461), declared that this matter was not in the cognizance of the court, expressly declaring that the matter was one that 'can be dealt with only by the executive branch of the government.'

"No concealment has been made of the facts I have stated. The war is carried on by officers in the army of Edward VII openly at Port Chalmette in all respects. They do not appear in uniform. Will I be permitted to strike these with the force I might assemble here? I pray your excellency to either put an end to this state of affairs or permit me to strike here one blow.

"With every respect for the authority of the United States Government, may I not consider your silence or inaction the equivalent of consent for me to stop the further violation of the neutrality laws at this port, or to carry on war here for the burghers."

A copy of this letter was sent by Mr. Hay, Secretary of State, to the Louisiana authorities, by whom it was referred to the sheriff of St. Bernard Parish, in which the port in question lies. The sheriff, in reply, in a letter to the governor of Louisiana, said:

"I beg to state that the extract from the letter of Mr. Samuel Pearson, reproduced in your letter, does not contain a correct statement of the facts existing in the parish of St. Bernard, except as to the following points:

"Mules and horses have been and are now being loaded at Port Chalmette, in the parish of St. Bernard, and, as I am informed, for the British Government, either directly or indirectly, but the loading of said animals, as well as the preparing of the ships for the reception of same, is done by local men, all of whom, I believe, are citizens of the United States. In fact, I have been informed that at present the loading of said animals is being done by the longshoremen of the city of New Orleans. The work, I understand, is supervised by Englishmen, who may or may not be officers of the British army. Certainly there is no one there in uniform.

"There is no such thing as a British post with men and soldiers established at Port Chalmette. So far as the recruiting of men is concerned, I am sure and can certify that it is not being done in the parish of St. Bernard. As I understand, the only men taken on the ships are the muleteers, who are employed in the city of New Orleans. I understand they are employed by the contractors; they having an office for that purpose in said city, and said men never stop on St. Bernard soil, being taken aboard the steamships when in midstream by a tug which starts from the wharves of the city of New Orleans.

"In so far as the danger of there being any trouble between the English officers and the Boer sympathizers at Chalmette, I do not believe that it will occur, but even if it does, I can vouch that it will soon be suppressed by the officials of the parish of St. Bernard.

"I have always endeavored to enforce obedience to the laws of this State, as well as to the laws of the United States, and therefore should you inform me that said shipments are contrary to the law I will certainly prevent any further violations of the said law." (H. Doc. 568, 57 Cong. 1 sess.)

"I have the honor to acknowledge the receipt of your letter of the 11th instant, in which you quote a letter received from Doctor Hendrik Muller, envoy extraordinary of the Orange Free State, dated The Hague, November 28 last, in which he calls your attention to the alleged shipment of material, contraband of war, by the English Government on a large scale from the United States, maintains that such shipment is contrary to the law of nations, and suggests your remonstrating with this Government against the continuance of such irregularities.

"In reply I have the honor to quote from 1 Kent's Commentaries, page 142, concerning the well-established doctrine as to the law of nations on the subject. Chancellor Kent said:

"'It was contended on the part of the French nation in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war, to the belligerent powers. It was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry, themselves, to the belligerent powers, contraband articles, subject to the right of seizure, *in transitu*. The right has since been explicitly declared by the judicial authorities of this country.'

"Mr. Justice Story, in the case of The Santissima Trinidad (7 Wheaton, 340), used the following language:

"'There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation.'

"In the case of The Bermuda, 3 Wallace, 514, Chief Justice Chase said:

"'Neutrals in their own country may sell to belligerents whatever belligerents choose to buy. The principle exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other,' etc.

"An examination of Wharton's Digest of International Laws, section 391, will make it clear that the Executive Departments of this Government from the earliest period have maintained the correct-

ness of the doctrine stated by Chancellor Kent, and that, in this position, they have been supported by the decisions of the courts of the United States and by the opinions of eminent authorities on international law.

"Under the circumstances, therefore, and in view of the fact that the law on the subject in the United States is well settled, the Department does not consider it necessary to cause an investigation as to the correctness of the facts alleged by Doctor Muller."

Mr. Hay, Sec. of State, to Mr. Pierce, Dec. 15, 1899, MS. Notes to Foreign Consuls, IV. 464.

"If the sale of munitions of war is to be held a breach of neutrality, 'instantly upon the declaration of war between two belligerents, not only the traffic by sea of all the rest of the neutral powers of the world would be exposed to the inconveniences of which they are already impatient, but the whole inland trade of every nation of the earth, which has hitherto been free, would be cast into the fetters. . . . It would give to the belligerent the right of interference in every act of neutral domestic commerce, till at last the burden would be so enormous that neutrality itself would become more intolerable than war, and the result of this assumed reform, professing to be founded on "the principles of eternal justice," would be nothing less than universal and interminable hostilities.' (Sir W. Harcourt, Historicus, 134.) For, not only the vendor of the iron would have to be prevented from selling to the vendor of the gun, but the miner and machinist would have to be prevented from working for the vendor of the iron. A neutral sovereign, therefore, would have either to stop all machinery by which munitions of war could be produced for belligerent use, or expose himself to a call for whatever damages his failure so to do might have caused either belligerent. Under such circumstances it would be far more economical and politic to plunge into a war as a belligerent than to keep out of it as a neutral.

"The mere act of furnishing by the subject of a neutral state a belligerent with munitions of war, does not involve such neutral state in a breach of neutrality. (1) Between selling arms to a man and indictable participation in an illegal act intended to be effected by the vendee through the instrumentality of such arms there is no casual connection. The miner or manufacturer, to appeal to an analogous case, may regard it not only as possible, but as probable, that his staples, when consisting of weapons or of the materials of weapons, may be used for guilty purposes, but neither miner nor manufacturer becomes thereby penally responsible. (2) To make the vendor of munitions of war punishable would make it necessary to impose like responsibility on the manufacturer; and if on the

manufacturer, then on the producer of the raw material which the manufacturer works up. In each case the thing made or sold is one of the necessities of war. In each case the producer or vendor knows that the thing produced or sold will probably be used for warlike purposes. Hence, in times of war, not only would neutral sales of munitions of war become penal, but penal responsibility might be attached to the production of any of the materials from which such weapons are manufactured. (3) Nor would this paralysis be limited to periods of war. A prudent Government, long foreseeing a rupture, or preparing in secret to surprise an unprepared foe, might take an unfair advantage of its adversary, were this permitted, by purchasing in advance of the attack all munitions which neutral states might have in the market; but, on the theory before us, a neutral state could not permit this without breach of neutrality, since to permit such a sale would be to give a peculiarly unfair advantage to the purchasing belligerent. Hence, if such sales are indictable in times of war, they are *à fortiori* indictable in times of peace. Why would a foreign nation, it might well be argued, want in times of peace to buy Armstrong guns, or ironclads, unless to pounce suddenly down on an unprepared foe? No munitions of war, therefore, could be sold in any country unless to its own subjects and for its own use; and countries which can not produce the iron or coal necessary for the manufacture of artillery or ironclads, would, if no nation can furnish munitions of war to another, will have to do without artillery or ironclads. (4) To establish a national police which could prevent the sale of such staples would impose on neutral states a burden, not only intolerable, but incompatible with constitutional traditions. It might be possible in a land-locked province like Switzerland; it might even be possible in islands of the size of Great Britain; but in a country so vast as the United States, and with an ocean frontier so extended, it would be impossible to establish a police that could preclude such exportation without vesting in the National Government powers and patronage inconsistent with republican institutions, and so enormously expensive as to make it more economical to interpose in a war as a belligerent than to watch such war as a neutral. For these and other reasons the United States Government has insisted on the right of a neutral to send munitions of war to a belligerent; and this position was taken by President Grant in his proclamation of August 22, 1870. The right was stoutly contested, however, by Germany, while it was maintained by both England and the United States."

Note of Dr. Francis Wharton, in Wharton's Int. Law Digest, III. 516, § 391, citing Wharton's Crim. Law (9th ed.), § 1903; 1 Kent's Com. 142; 6 Webster's Works, 452.

"As an illustration of the difficulties that would arise in this country from an extension of neutral liability, may be mentioned the fact that in 1882–83, munitions of war, approximating in value to $5,000,000, were forwarded from San Francisco to China. 'The ammunition cases had the brand U. S. Government, 45 caliber, and all the cases were from Springfield, Mass.' 'During that period 240,000 Springfield rifles, and 25,000,000 cartridges in all have been forwarded, besides from 500 to 800 bales of cotton duck suitable for tents, by express by each steamer for China.' (Philadelphia *Inquirer*, Aug. 8, 1883.) The United States Government could not, except by measures which would involve not only enormous expense, but a vast and perilous increase of police force, prevent parties from buying up ammunition at public or private sale, and sending it to China. Yet, if the non-prevention of such exportations imposed liability for the damage thereby produced, the United States would be obliged to pay for all the injury done to English or French property by such ammunition in case of a war between China and France or England." (Wharton, Com. Am. Law, § 246.)

As to the question of dealing in contraband, confusion has resulted from the failure to distinguish the different lights in which contraband traffic is to be viewed. In works on international law we often find the statement that the sale of contraband is unlawful, while we also find the statement that it is lawful. Both statements are true in the sense in which they are intended to be understood, but they refer to two different things.

The fundamental principles are simply these: From the point of view of *neutrality* the question of *unlawfulness* is presented in two aspects, (1) that of international law, and (2) that of municipal law. Offenses under (1), i. e., acts unlawful by international law, are divided into two classes, (a) acts which the state is bound to prevent, and (b) acts which the state is not bound to prevent, and which therefore are not usually offenses against municipal law. The dealing in contraband belongs under (1) (b), for it is (1) unlawful by international law, as is shown by the fact that the noxious articles may be seized on the high seas and *confiscated;* but (b) it is not an act which it is the duty of the neutral state to prevent, and therefore is not usually prohibited by municipal law.

Why is the neutral state not bound to prevent it? Simply because, from obvious considerations of convenience, it has been deemed just to confine within reasonable bounds the duty of the neutral state to interfere with the commerce of its citizens, even for the purpose of repressing unneutral acts. The principal interest to be subserved being that of the belligerents, it is left to them, in respect of many acts in their nature unneutral, to adopt measures of self-protection; and neutral states are deemed to have discharged their full duty when they submit to the belligerent enforcement of such measures against their citizens and their commerce.

But, there is also a broad distinction between what a neutral government may permit its citizens to do and what it may do itself. This distinction was altogether lost sight of by Senator Matt. Carpenter, when, in discussing the sale of arms during the Franco-German war, he expressed the opinion that the Government of the United States might have freely sold arms to France without violating the duties of neutrality. Nothing should be clearer than that a neutral government is bound to abstain from doing any act whatsoever that is in its nature unneutral. It should seem obvious that a neutral government can not itself sell arms to a belligerent without a flagrant violation of neutrality any more than it can itself supply money to a belligerent without a breach of neutral duty. When France supplied arms and money to the United States in the early days of the American Revolution she showed her sense of the real nature of the transactions by conducting them indirectly through a fictitious commercial firm; and when, in February, 1778, she formally became the ally of the United States she merely avowed her real position. And yet no one now contends that Great Britain, France, and Germany failed in their duty when they omitted to prevent their citizens from selling arms to the United States and purchasing the bonds of the United States in 1861–1865 and 1898, or that the United States failed in its duty when omitting to prevent its citizens from selling arms to Britons or Boers or from purchasing British consols during the Boer war, or that it has failed to perform its duty in similar respects during the Russo-Japanese war.

President Grant, in his neutrality proclamation of August 22, 1870, during the Franco-German war, expressly declared that "all persons" might "lawfully and without restriction, by reason of the aforesaid state of war, manufacture and sell within the United States arms and munitions of war and other articles ordinarily known as 'contraband of war,'" subject to the risk of hostile capture on the high seas.

(2) BY GOVERNMENTS, INADMISSIBLE.

§ 1309.

In 1872 a question was raised in the United States Senate as to certain "sales of ordnance stores" which had been made by the Government of the United States during the fiscal year ending June 30, 1870, to persons who were said to be agents of the French Government. A committee was appointed to investigate the subject. The report of the committee was made by its chairman, Mr. Carpenter, on May 11, 1872. The report referred to the act of Congress of 1868 (15 Stat. 259), which authorized the sale by the Government of such

arms and military stores as were "unsuitable" for use. Under this provision, so the report stated, large sales were made without preference to purchasers as to opportunities or conditions of purchase, except that persons were excluded from the opportunity to purchase who were suspected of being agents of France, which was then at war with Germany. The report took the ground, however, that as Congress had, by the act of 1868, directed the Secretary of War to dispose of the arms and stores in question, and as the Government was engaged in such sales prior to the war between France and Germany, it "had a right to continue the same during the war." The report stated that *after* certain sales to Remington & Sons had been agreed on, but before delivery, the Secretary of War received a telegram which led him to suspect that Remington & Sons might be purchasing as agents of the French Government, and that he then gave orders that no further sales should be made to them, although the sale already made was not repudiated and the articles were afterwards delivered. The committee, in conclusion, held: "(1) The Remingtons were not, in fact, agents of France during the time when sales were made to them; (2) if they were such agents, such fact was neither known nor suspected by our Government at the time the sales were made; and, (3) if they had been such agents, and if that fact had been known to our Government, or if, instead of sending agents, Louis Napoleon or Frederick William had personally appeared at the War Department, to purchase arms, it would have been lawful for us to sell to either of them, in pursuance of a national policy adopted by us prior to the commencement of hostilities."

Report of Mr. Carpenter, from Senate Committee on the Sale of Arms by the Ordnance Department, May 11, 1872, S. Rept. 183, 42 Cong. 2 sess.

See, also, H. Rept. 46, 42 Cong. 2 sess.

For reports of Sir Edward Thornton on this transaction, see 61 Br. & For. State Papers, 925.

See Calvo, Droit International, V. sec. 2774.

Hall, referring to the above transaction, says: "The vendor of munitions of war in large quantities during the existence of hostilities knows perfectly well that the purchaser must intend them for the use of one of the belligerents, and a neutral government is too strictly bound to hold aloof from the quarrel to be allowed to seek safety in the quibble that the precise destination of the articles bought has not been disclosed."

Perels, after stating the facts, remarks that they do not require comment.

Snow expressed the hope that Mr. Carpenter's report "does not express the settled law of the United States upon this subject. It

confounds the rights and duties of a neutral state with those of the private citizens of a neutral state, which is a very different matter."

Hall, Int. Law (5th ed.), 598; Perels, Int. Seerecht, 251; Snow, Cases on Int. Law, 461.

See, also, Fiore, Droit International (2d ed. by Antoine, 1886), 1561.

3. Blockade Running.

§ 1310.

"During the civil war in the United States large interests in England were concerned in movements for breaking the blockade in the Southern ports. The profits were enormous, and vast sums of money were spent and great skill and energy employed in taking advantage of the opportunity. Nassau, a port ordinarily without business, became the center of a large and active trade, and teemed with adventurers, speculators, and sailors engaged in fitting out and manning vessels to run into the blockaded ports. Many of these vessels were built in England and Scotland for this very end: large, deep, swift, painted in such a way as not to catch the eye, capable of carrying large freight, and manned with bold and skillful navigators. The Government of the United States addressed to the British Government protests against this system, organized and carried on in and through British ports and with British capital. But Earl Russell, in a letter of May 10, 1862, declared that fitting out vessels of this class was not in contravention either of British municipal law or of the law of nations. He likened the case in this respect to that of exportations of munitions of war, the exportation of which no state is required by international law to prohibit. A blockade runner, it is true, if proved to be such, can be seized with its cargo and confiscated, but the remedy is to be limited to this seizure. (Arch. Dipl., 1863, iv. 100.) This position was elaborately sustained by Mountague Bernard in his treatise on British neutrality, ch. xii. By Rolin-Jacquemyns (Revue de Droit International for 1871, 127–129) the position is accepted with some modifications, and only in subordination to the general rule that to impose on a neutral the duty of stopping the building and sailing of blockade runners would impose a new and onerous burden on neutrals, and give an undue advantage to belligerency over neutrality. (See Fauchille, Blocus Maritime, Paris, 1882, 391. See also Wharton on Contracts, § 479.)"

Wharton, Int. Law Digest, § 365, III. 469.

"A neutral state is not bound by the law of nations to impede or diminish its own trade by municipal restrictions. A neutral merchant may ship goods prohibited *jure belli*, and they may be rightfully seized and condemned. It is one of the cases where two

'conflicting rights' exist which either party may exercise without charging the other with doing wrong. As the transport is not prohibited by the laws of the neutral sovereign, his subjects may lawfully be concerned in it, and as the right of war lawfully authorizes a belligerent power to seize and condemn the goods, he may lawfully do it. Whatever is not prohibited by the positive law of a country is lawful. Although the law of nations is part of the municipal law of England, and it may be said that by that law contraband trade is prohibited to neutrals, and consequently unlawful, yet the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers. (The Helen, 35 Law J. (N. S.) Adm. 2; compare with it the Santissima Trinidad, 7 Wheat. 283; Richardson *v.* Marine Insurance Co., 6 Mass. 113; Seton and Others *v.* Low, 1 Johns. R.; ex parte Chavasse, 34 Law J. (N. S.) Chanc. 17.)"

Halleck, Int. Law (3d ed., by Baker), II. 144, note.

4. Loans or Contributions of Money.

(1) by private persons.

§ 1311.

June 17, 1823, the law officers of the Crown advised the British Government that "subscriptions" by individuals of a neutral nation for the use of a belligerent state were inconsistent with neutrality and contrary to the law of nations, although they might not constitute a just ground of hostilities; but that "loans, if entered into merely with commercial views," would not be an infringement of neutrality, although if the "loan" was only a cover for a "gratuitous contribution," the transaction would constitute such an infringement. The law officers were then asked to give an opinion on the question whether individuals and corporations making "subscriptions" could be legally proceeded against in England. On the 21st of June the law officers reported that, reasoning upon general principles, the persons making such "subscriptions" would be subject to prosecution for a misdemeanor. The law officers added, however, that subscriptions of a similar nature had formerly been made, particularly in favor of the people of Poland in 1792 and 1793, without any notice having been taken of them by the public authorities of the country and apparently without complaint by any of the powers, and that they could find no instance of a prosecution in such a case, or even of a hint of such a proceeding in any period of English history. They concluded, therefore, that it was not likely that a prosecution against the individuals concerned in such a transaction would be suc-

cessful, and that, until the money was actually sent out, the only mode of proceeding would be for counseling or conspiring to assist with money one of the belligerents—a prosecution which would be attended with still greater difficulty.

Halleck, Int. Law (3rd ed., by Baker), II. 164–165.

On March 21, 1885, Mr. Valera, Spanish minister at Washington, requested Mr. Bayard, who was then Secretary of State, "to cause the issuance of suitable orders to prevent expeditions from going to Cuba, and likewise to prevent any steps from being taken for their organization." Among the means employed to secure the fitting out of such expeditions, he cited the sale of lottery tickets at Key West as though they were for the drawings of a branch of the Havana lottery, while in reality they were intended to obtain money for filibustering purposes. Mr. Bayard, in reply, said: "There is no Federal statute prohibiting sales either of lottery tickets or any other article of traffic, on the ground that the proceeds are to be applied to aid insurgents in a foreign land, nor is it a principle of international law that a sovereign is bound in any sense to prohibit sales of any kind on the ground that the proceeds might go to unlawful objects. There are, however, in most of the States in the Union statutes providing for the punishment of those concerned in lottery tickets, without reference to the object to which their proceeds may be applied. To secure the prosecution and conviction of the offenders in such cases the proper course is to apply to the authorities of the State where the lottery tickets complained of are sold, bringing the matter to their attention by an oath made by a proper presentation to a State magistrate."

Mr. Bayard, Sec. of State, to Mr. Valera, Spanish min., March 21, 1885, For. Rel. 1885, 771.

The furnishing of funds by subjects of a neutral state to relieve suffering in a belligerent state is not a breach of neutrality. During the Franco-German war large sums of money were sent from Germans in the United States to their relations and friends in Germany for the relief of sufferers in the hospitals, and large sums were also sent by sympathizers with France for the relief of persons in French hospitals; but in no case was it maintained that such action constituted a violation of the neutrality laws or that the tolerance of the Government constituted a breach of neutral duty. In subsequent wars, including that between Russia and Japan, large contributions have been sent from neutral countries for the relief of sufferers in the belligerent states.

See Wharton's Commentaries on American Law, § 215.

Wharton, after expressing the view that the lending of money by persons in neutral countries to a belligerent government is not a violation of neutrality, says: "It is remarkable that a contrary view should be taken by Bluntschli (§ 768), Calvo (§ 1060), and Phillimore (III. 247). Mr. Hall mentions that during the Franco-German war the French Morgan loan and part of the North German Confederation loan were issued in England. On the other hand, it has been held that a suit can not be maintained on a loan made expressly to effect a belligerent object (Kennett *v.* Chambers, 14 Howard, 38), or to aid in an insurrection in a foreign state against a government at peace with the state of the lender. De Wütz *v.* Hendricks, 9 Moore C. P. 586, 2 Bing. 314."

Wharton, Int. Law Digest, III. 508.

With reference to this statement, it may be observed that the loan in Kennett *v.* Chambers was made to effect not merely a "belligerent object," but an actual violation of the neutrality laws of the United States.

In the war between Great Britain and the South African Republics loans were openly negotiated for the British Government in the United States and elsewhere, and the same thing has taken place in the war between Russia and Japan. We cannot too constantly bear in mind the fact that in dealing with the question of "unlawfulness" in matters of neutrality, a distinction must be drawn between what is unneutral in a general sense and what is unneutral in the sense of being criminally punishable under the neutrality laws, and that, while a neutral government is not bound to prevent all unneutral acts, it must itself refrain from engaging in them, and that, as a consequence of this duty of abstention, it may well be that its courts should not lend their processes for the purpose of enforcing transactions which, although they may not be penally preventable, may be in their essence unneutral.

(2) BY GOVERNMENTS, INADMISSIBLE.

§ 1312.

With reference to the loan of money which was solicited from the United States by the French Government, in 1798, through the American envoys in Paris, the United States took the ground that such a loan would be a violation of neutrality. This is cited with approval by Chancellor Kent.

See Mr. Pickering, Sec. of State, to Messrs. Pinckney, Marshall, and Gerry, March 23, 1798, Am. State Papers, For. Rel. II. 200.

In 1816 Colonel Devereux, commercial agent of the United States at Buenos Ayres, presented a memorial to the Government at that place offering his services to procure for its use a loan in the United States under the guarantee of the United States Government. His

proposition was sent to the Congress at Tucuman, and, after receiving its sanction, was agreed to by the supreme director and assisting members of the Congress at Buenos Ayres. The action of Colonel Devereux, though his intentions were not questioned, was disavowed, and Mr. Worthington, the agent of the United States in South America, was instructed to inform the Government of Buenos Ayres that the refusal of the United States to carry out the arrangement which was sought to be made "must be the result of its existing laws and duties in relation to the civil war between Spain and the Spanish American colonies."

Robert Brent, Acting Sec. of State, to Mr. Worthington, April 21, 1817, 2 MS. Desp. to Consuls, 24.

5. Expressions of Opinion.

§ 1313.

See supra, § 193.

On July 4, 1816, at "a public feast at Baltimore," Mr. Skinner, the postmaster at that city, gave a "festive" toast supposed to reflect on the character of the then French Government. The French minister at Washington called upon Mr. Monroe, then Secretary of State, to cause the postmaster to be dismissed and to apologize for the alleged insult. This was refused by Mr. Monroe, who stated in reply that on matters of this character the Government of the United States exercised no control.

Mr. Monroe, Sec. of State, to Mr. Gallatin, Sept. 10, 1816, MS. Inst. U. States Ministers, VIII. 100.

Subsequently, in retaliation for the "toast," the functions of the French consul at Baltimore were suspended by the French minister, who had taken additional offense on account of a toast given at a New York dinner to "Marshal Grouchy," who, the French minister said, was not a "marshal."

Mr. Monroe, Sec. of State, to Mr. Gallatin, Nov. 2, 1816, Id. 111.

The French Government having asked for the dismissal of Mr. Skinner in consequence of his "disrespectful" conduct, the Duke of Richelieu, minister of foreign affairs, in an interview with Mr. Gallatin, minister of the United States at Paris, said that "in asking for the dismission of Mr. Skinner there was no intention of giving offense; it was only stating the kind of reparation which appeared most natural, and which would be satisfactory. . . . I am sorry to say that no explanation I could give appeared to make any impression on him. . . . He immediately added that they would not

preserve any public agent in the town where His Majesty had been publicly insulted."

Mr. Gallatin to Mr. Monroe, Nov. 21, 1816, 2 Gallatin's Writings, 19.

The Duke of Richelieu subsequently told Mr. Gallatin that "the refusal to dismiss the postmaster at Baltimore" would indispose the Government of Louis XVIII. to take steps towards paying for Napoleon's spoliations.

Same to same, Jan. 20, 1817, id. 22.

The Government of the United States, when called upon by the minister of Russia to explain certain newspaper "calumnies" on his Government, to which the Government of the United States was intimated to have "directly or indirectly given . . . its support," answered, through the Secretary of State, that no further explanations could be given "until an imputation so injurious to the reputation of this Government, and so inconsistent with its sincere professions of amity for Russia and respect for its sovereign, shall be withdrawn."

Mr. Livingston, Sec. of State, to Mr. de Sacken, Dec. 4, 1832, MS. Notes to For. Leg. V. 73.

The United States Government has no power, under our Constitution and laws, to interfere with publications in the States criticising foreign governments or encouraging revolt against such governments.

Mr. Cass, Sec. of State, to Mr. Molina, Costa Rican min., Nov. 26, 1860, MS. Notes to Cent. Am. I. 177.

As to expressions of sympathy with Ireland, see report of Mr. Banks, July 25, 1866, H. Report 100, 39 Cong. 1 sess.

See Mr. Seward, Sec. of State, to Mr. Speed, At. Gen., April 2, 1866, 72 MS. Dom. Let. 407.

On July 21, 1885, Mr. Valera, Spanish minister at Washington, in a note to the Department of State, declared that "conspiracies" were carried on in various parts of the United States, especially at New York, New Orleans, and Key West, against the public peace of Spain and the integrity of her territory, by efforts "to collect funds for piratical enterprises, by forming associations for this purpose, and by holding public meetings at which Spain is outraged by all sorts of insults and calumnies, and at which those present are incited to rebellion and civil war." Mr. Valera adverted to the fact that he had, on a previous occasion been advised, in reply to his complaints, that the courts of the country were open to the representatives of Spain, but he observed that this method of obtaining satisfaction was almost always very costly and inefficient, and that another serious argument

against appealing to the courts was furnished by the system of trial by jury. In this relation he adverted to the case of Carlos Agüero, a Cuban revolutionist, who, after his discharge at Key West, on an application by Spain for his extradition, was drawn in triumph through the streets of the city, several local officers joining in the procession, and was also encouraged and assisted to go to Cuba, where, after pillaging and burning, he was at length shot.

Replying to these complaints, Mr. Bayard, Secretary of State, in a note of July 31, 1885, observed that "the Executive of the United States has no authority to take cognizance of individual opinions and the manifestation thereof, even when taking the shape of revolutionary and seditious expressions directed against our own Government;" and that it was "no less incompetent to pass upon the subversive character of utterances alleged to contravene the laws of another land." Mr. Bayard adverted to the alien and sedition laws of 1798, and to their great unpopularity and brief duration. He added, however, that in passing from the mere announcement of the purpose to do an unlawful act to the overt commission thereof the domain of prohibitive law was entered. But, in such case, proceedings must be "set in motion by due information made under oath by some person cognizant of the facts alleged or possessing belief sufficient to that end," and must be so set in motion in the name, by the power, and through the officers of the United States. While the Government could not undertake to control the workings of opinion and sympathy, yet any affidavit founded even upon mere information or belief, charging a breach of any law, would lead to an examination and a prosecution by the officials of the United States wholly at the public cost, should the facts alleged be found to bring the matter within the purview of the law.

Mr. Bayard, Sec. of State, to Mr. Valera, Spanish min., July 31, 1885. For. Rel. 1885, 776–778.

September 28, 1885, Mr. Valera addressed a note to Mr. Bayard stating that he was informed by the Spanish consul-general at New York that the Cuban revolutionists were preparing to celebrate in that city the anniversary of the outbreak of the insurrection of 1868, and for that purpose had appointed a committee of arrangements. Mr. Valera said that he brought the matter to the notice of Mr. Bayard "solely in order that the Administration may be prepared to repress any expedition against the peace and tranquillity of the Island of Cuba that the insurrectionists may, perchance, desire to set on foot as a concomitant to their aforesaid celebration." On the 6th of October Mr. Bayard wrote to Mr. Valera that the Attorney-General had been requested to take such steps in the matter, through the United States district attorney at New York, as might be necessary "to preserve the neutrality of this Government, and secure the enforcement of its laws in that regard." (For. Rel. 1885, 779.)

See supra, §§ 193, 224.

See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, No. 1086, Feb. 27, 1885, MS. Inst. Gr. Br. XXVII. 424, citing Queen *v.* Most, L. R. 7 Q. B. D. 244.

"The second aspect of his excellency's inquiry, touching the treatment of persons who in the United States may publish their sympathy with those who oppose the rule of Turkey in Asia Minor, has been on several occasions discussed with your esteemed predecessor. Mavroyeni Bey has been repeatedly informed that while the laws of this country provide a judicial remedy for any act of armed hostility against a power with which the United States are at peace by organizing expeditions or fitting out vessels to make war against the same, the expression of opinion by speech, writing, or otherwise is free under our Constitution and laws, so that neither the act nor the actor can be held accountable by any exercise of administrative power, nor can they come within the cognizance of the courts save in case of libel or defamation, upon suit brought by the party alleging to have suffered injury. In a number of his later notes Mavroyeni Bey has expressly referred to and recognized this position, so that I may assume that it is well known to your Government, and that the inclusion of this suggestion in his excellency's telegram may have been due to his employment of a circular formula intended to be addressed principally to the governments of countries whose laws provide for administrative treatment of press offenses and where, contrary to the constitutional rule which here obtains, the discretionary power of expulsion may be used by the executive branch."

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

V. *ASYLUM.*

1. Concession Presumed.

§ 1314.

In a dispatch from Mr. Wheaton to Mr. Upshur, Secretary of State, November 10, 1843, in the case of the Bergen prizes, Mr. Wheaton said: "If, then, there was no express prohibition in this case, and if there was no treaty existing between Denmark and Great Britain by which the former was bound to refuse to the enemies of the latter these privileges (and I suppose there was no such prohibition or treaty), then the American cruisers had an unquestionable right to send their prizes into Danish ports. Still more had they such right, grounded on necessity arising from stress of weather, as appears to have been the case here. When once arrived there, the neutral government of Denmark was bound to respect the military right of

possession, lawfully acquired in war by the captors on the high seas and continued in the neutral port into which the prize was brought."

Mr. Wheaton, min. to Prussia, to Mr. Upshur, Sec. of State, No. 233, Aug. 23, 1843, H. Ex. Doc. 264, 28 Cong. 1 sess. 4, 6.

See, as to the case of the Bergen prizes, Moore, Int. Arbitrations, V. 4572, citing Wharton's Dip. Cor Am. Rev. III. 385, 433, 435, 528, 534, 540, 597, 678, 744; V. 462; VI. 261, 717; act of March 28, 1806, 6 Stat. 61; H. Report 389, 25 Cong. 2 sess.; H. Ex. Doc. 264, 28 Cong. 1 sess; act of March 21, 1848, 9 Stat. 214; Lawrence's Wheaton (1863), note 16, p. 41; Mr. McLane, Sec. of State, to Mr Kennedy, Jan. 4, 1834, 26 MS. Dom. Let. 135

"France, England, and all other nations, have a right to cruise on our coasts—a right, not derived from our permission, but from the law of nature. To render this more advantageous, France has secured to herself by a treaty with us (as she has done, also, by a treaty with Great Britain, in the event of a war with us, or any other nation), two special rights: (1) Admission for her prizes and privateers into our ports. This, by the seventeenth and twenty-second articles, is secured to her exclusively of her enemies, as is done for her in the like case by Great Britain, were her present war with us, instead of Great Britain. (2) Admission for her public vessels of war into our ports, in cases of stress of weather, pirates, enemies, or other urgent necessity, to refresh, victual, repair, etc. This is not exclusive. As we are bound by treaty to receive the public armed vessels of France, and are not bound to exclude those of her enemies, the Executive had never denied the same right of asylum, in our ports, to the public armed vessels of your nation. They, as well as the French, are free to come into them in all cases of weather, pirates, enemies, or other urgent necessity, and to refresh, victual, repair, etc. And so many are these urgent necessities to vessels far from their own ports, that we have thought inquiries into the nature, as well as the degree, of their necessities which drive them hither, as endless as they would be fruitless; and, therefore, have not made them. And the rather, because there is a third right, secured to neither by treaty, but due to both, on the principles of hospitality between friendly nations—that of coming into our ports, not *under the pressure of urgent necessity*, but whenever their comfort or convenience induced them. On this ground, also, the two nations are on a footing."

Mr. Jefferson, Sec. of State, to Mr. Hammond, Brit. min., Sept. 9, 1793, Am. State Pap. For. Rel. I. 176; 4 Jefferson's Works, 65.

"Through every stage of the conflict [between Spain and her colonies in America] the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war. They have regarded the contest not in the light

of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having, as to neutral powers, equal rights. Our ports have been open to both, and every article, the fruit of our soil or of the industry of our citizens, which either was permitted to take, has been equally free to the other."

President Monroe, annual message, Dec. 2, 1817, Richardson's Messages, II. 13.

See, to the same effect, President Monroe's annual message, Dec. 7, 1819, id. 58.

Similar declarations were made in President Monroe's second inaugural address, 1821, in which he also declared that "the neutrality heretofore observed should still be adhered to." (Id. 88–89.)

"This contest [between Spain and her colonies] was considered at an early stage by my predecessor a civil war in which the parties were entitled to equal rights in our ports. This decision, the first made by any power, being formed on great consideration of the comparative strength and resources of the parties, the length of time, and successful opposition made by the colonies, and of all other circumstances on which it ought to depend, was in strict accord with the law of nations. Congress has invariably acted on this principle, having made no change in our relations with either party. Our attitude has therefore been that of neutrality between them, which has been maintained by the government with the strictest impartiality. No aid has been afforded to either, nor has any privilege been enjoyed by the one which has not been equally open to the other party, and every exertion has been made in its power to enforce the execution of the laws prohibiting illegal equipments with equal rigor against both.

"By this equality between the parties their public vessels have been received in our ports on the same footing; they have enjoyed an equal right to purchase and export arms, munitions of war, and every other supply, the exportation of all articles whatever being permitted under laws which were passed long before the commencement of the contest; our citizens have treated equally with both, and their commerce with each has been alike protected by the Government."

President Monroe, second inaugural address, March 5, 1821; Richardson's Messages, II. 88.

"The Government of the United States has been sincerely disposed to perform towards both belligerents all the offices of hospitality enjoined by humanity and the public law and consistent with their friendship to both; but it can permit neither, under allegations of distress, whether feigned or real, to perform acts incompatible with a strict and impartial neutrality." (Mr. Clay, Sec. of State, to Mr. Obregon, May 1, 1828, MS. Notes to For. Legs. IV. 22.

The Government of the United States having recognized the existence of a civil war between Spain and Buenos Ayres and avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse, each party is to be deemed a belligerent nation, having sovereign rights of war, though the independence of the colony has not been acknowledged by us. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports, under the law of nations, must be considered by the courts as equally the right of each.

The Santissima Trinidad, 7 Wheat. 283.

The admission of armed ships of a belligerent, whether men-of-war or private armed cruisers, with their prizes, into the territorial waters of a neutral for refuge, whether from chase or from the perils of the sea, is a question of mere temporary asylum, accorded in obedience to the dictates of humanity, and to be regulated by specific exigency. The right of asylum is, nevertheless, presumed where it has not been previously denied.

Cushing, At. Gen., 1855, 7 Op. 122.

Privateers are not held as equally entitled with ships of war to the right of asylum; and neutral nations not infrequently exclude them from their ports.

Cushing, At. Gen., 1855, 7 Op. 122.

2. Limitation of Stay and Supplies.

§ 1315.

Under Article XVII. of the treaty with France of 1778, the men-of-war of the enemies of France were forbidden to bring their prizes into the ports of the United States, and a direction for the enforcement of this obligation was embraced in the instructions to collectors of customs of Aug. 4, 1793. But, with this exception, belligerent men-of-war were permitted to enter the ports of the United States by the letter of Sept. 9, 1793, "which concedes to them our ports as a refuge in case of necessity and a resort for comfort or convenience, without limiting the time of their stay."

Mr. Randolph, Sec. of State, to governor of Virginia, May 8, 1795, 8 MS. Dom. Let. 174.

See, also, Mr. Randolph, Sec. of State, to Mr. Hammond, British min., May 8, 1795, Id. 177.

That the misconduct, however, of belligerent cruisers in neutral waters will justify the ordering them to depart from such waters was

affirmed by Mr. Jefferson in his proclamation of Nov. 19, 1807, ordering the departure of the British squadron from the waters of the United States. (Am. State Papers, For. Rel. III. 23.)

August 15, 1861, Mr. Seward instructed Mr. Pike, at The Hague, to represent to the Government of the Netherlands that the Dutch authorities at Curaçao had permitted the Confederate cruiser *Sumter*, which Mr. Seward described as a "privateer," to enter that port and take in 120 tons of coal and a quantity of provisions, besides showing her other hospitalities. Mr. Seward intimated that a claim might later be presented for damages "for so great a violation of the rights of the United States," and directed Mr. Pike, besides asking for explanations, to say that if the facts were as stated the United States would expect the Dutch Government to disown the action of the authorities at Curaçao, cause the governor of the island to feel its severe displeasure, and adopt efficient means to prevent the recurrence of such proceedings.

An elaborate reply was made by Baron Van Zuylen, Dutch minister of foreign affairs, September 17, 1861. He pointed out that the neutrality proclamation of the Netherlands prohibited the entrance of privateers into Dutch ports, except in case of distress, but affirmed that the *Sumter* was not a privateer, but a ship of war duly commissioned by the government of the Confederate States. He then argued at great length in favor of the right to grant asylum in such cases, referring, among other things, to the asylum accorded by the Netherlands to the ships of John Paul Jones, whose surrender the British Government demanded as pirates.

Mr. Seward, writing to Mr. Pike on the 17th of October, declared that the *Sumter* "was, by the laws and express declaration of the United States, a pirate," and protested against her receiving the treatment of a man-of-war.

Baron Van Zuylen stated, on Oct. 29, 1861, that in consequence of Mr. Seward's representations, new instructions had been given to the governors of Curaçao and Surinam; that these instructions applied impartially to both parties to the conflict in the United States; that these instructions permitted men-of-war of the belligerents to sojourn in the ports of the Dutch West Indies not more than 48 hours; and that privateers, with or without prizes, remained excluded altogether, except as before.

Mr. Seward, Sec. of State, to Mr. Pike, Aug. 15, 1861, Dip. Cor. 1861, 341; Baron Van Zuylen to Mr. Pike, Sept. 17, 1861, id. 352; Baron Van Zuylen to Mr. Pike, Oct. 15, 1861, ibid.; Mr. Seward to Mr. Pike, No. 26, Oct. 17, 1861, id. 364; Baron Van Zuylen to Mr. Pike, Oct. 29, 1861, id. 369.

Mr. Seward wrote to Mr. Pike, Nov. 23, 1861: "Felicitate the Government of the Netherlands as we felicitate ourselves on the renewed

auguries of good and cordial relations between friends too old to be alienated thoughtlessly or from mere impatience." (Dip. Cor. 1861, 371.)

Special attention may be directed to the note of Baron Van Zuylen of Sept. 17, 1861, as a singularly forcible and able discussion of the question of asylum.

"Whereas on the 22d day of August, 1870, my proclamation was issued [see infra, § 1319, p. 1007], enjoining neutrality in the present war between France and the North German Confederation and its allies, and declaring, so far as then seemed to be necessary, the respective rights and obligations of the belligerent parties and of the citizens of the United States; and whereas subsequent information gives reason to apprehend that armed cruisers of the belligerents may be tempted to abuse the hospitality accorded to them in the ports, harbors, roadsteads, and other waters of the United States, by making such waters subservient to the purposes of war:

"Now, therefore, I, Ulysses S. Grant, President of the United States of America, do hereby proclaim and declare that any frequenting and use of the waters within the territorial jurisdiction of the United States by the armed vessels of either belligerent, whether public ships or privateers, for the purpose of preparing for hostile operations, or as posts of observation upon the ships of war or privateers or merchant vessels of the other belligerent lying within or being about to enter the jurisdiction of the United States, must be regarded as unfriendly and offensive, and in violation of that neutrality which it is the determination of this Government to observe; and to the end that the hazard and inconvenience of such apprehended practices may be avoided, I further proclaim and declare that, from and after the 12th day of October instant, and during the continuance of the present hostilities between France and the North German Confederation and its allies, no ship of war or privateer of either belligerent shall be permitted to make use of any port, harbor, roadstead, or other waters within the jurisdiction of the United States as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities of warlike equipment; and no ship of war or privateer of either belligerent shall be permitted to sail out of or leave any port, harbor, or roadstead, or waters subject to the jurisdiction of the United States from which a vessel of the other belligerent (whether the same shall be a ship of war, a privateer, or a merchant ship) shall have previously departed, until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the jurisdiction of the United States. If any ship of war or privateer of either belligerent shall, after the time this notification takes effect, enter any port, harbor, roadstead, or waters of the United States, such vessel shall be required to depart and to

put to sea within twenty-four hours after her entrance into such port, harbor, roadstead, or waters, except in case of stress of weather or of her requiring provisions or things necessary for the subsistence of her crew, or for repairs; in either of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been permitted to remain within the waters of the United States for the purpose of repair shall continue within such port, harbor, roadstead, or waters for a longer period than twenty-four hours after her necessary repairs shall have been completed, unless within such twenty-four hours a vessel, whether ship of war, privateer, or merchant ship of the other belligerent, shall have departed therefrom, in which case the time limited for the departure of such ship of war or privateer shall be extended so far as may be necessary to secure an interval of not less than twenty-four hours between such departure and that of any ship of war, privateer, or merchant ship of the other belligerent which may have previously quit the same port, harbor, roadstead, or waters. No ship of war or privateer of either belligerent shall be detained in any port, harbor, roadstead, or waters of the United States more than twenty-four hours, by reason of the successive departures from such port, harbor, roadstead, or waters of more than one vessel of the other belligerent. But if there be several vessels of each or either of the two belligerents in the same port, harbor, roadstead, or waters, the order of their departure therefrom shall be so arranged as to afford the opportunity of leaving alternately to the vessels of the respective belligerents, and to cause the least detention consistent with the objects of this proclamation. No ship of war or privateer of either belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without sail power, to the nearest European port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal which she would be entitled to receive if dependent upon steam alone; and no coal shall be again supplied to any such ship of war or privateer in the same or any other port, harbor, roadstead, or waters of the United States, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war or privateer shall, since last thus supplied,

have entered a European port of the Government to which she belongs."

President Grant's proclamation of Oct. 8, 1870, For. Rel. 1870, 48.

October 10, 1870, Sir Edward Thornton wrote to Earl Granville, enclosing a copy of the proclamation of the President of the United States of the 8th of October, as to the treatment of armed vessels of the belligerents in ports of the United States. Sir Edward Thornton said that the issuance of this document had been instigated by the recent acts of French vessels of war in the neighborhood of the port of New York; that French gun-boats had lately moored at the entrance of that port, and had sometimes anchored outside, within three miles of the coast, for the purpose of intercepting any North German vessels which might leave New York, and particularly the German steamers which, in consequence of the termination of the blockade of the German ports, had renewed their voyages. On one occasion the French gun-boat *Latouche Tréville* steamed up the New York bay, around the German steamer *Hermann*, went out again and anchored outside. Recently a French frigate and two smaller vessels of war had arrived at New London, Conn., on the pretext of requiring repairs. They remained there for some days, though they only had to repair some spars, which could have been done nearly as well at sea as on shore. But from that point notice could be given of the sailing of the German vessels from New York, and men-of-war stationed at New London could easily intercept them. Mr. Fish, so Sir Edward Thornton said, had told him that he had represented to the French minister that, although he could not positively allege a violation of international law, he considered that the proceedings of belligerent vessels of war in hovering about the entrance of a neutral port, and as it were blockading it and making the neighborhood a station for their observations, were contrary to custom, and were unfriendly and uncourteous to the United States. Mr. Fish added that Mr. Berthémy had written on the subject to the French admiral, who, in reply, had denied the fact of hovering about the port, or of using the neighborhood as a station of observation, but confessed that the proceeding of the *Latouche Tréville*, in entering the port of New York for the purpose of observing the German steamer, was improper, and that her commander had consequently been severely reproved. Sir Edward Thornton said that his Prussian colleague, in expressing his satisfaction at the issuance of the proclamation, had made observations indicating that he maintained that by its provisions merchant vessels were prohibited from exporting arms and ammunition from the ports of the United States for the use of the belligerents, and he feared that Baron Gerolt might have telegraphed in that sense to his Government. He did not feel called upon to question Baron Gerolt's view of the case, but could find no expression in the application which justified such an interpretation. Indeed, Mr. Fish denied that it was intended to convey any such meaning. (61 Br. & For. State Papers, 878.)

The foregoing proclamation is incorporated, mutatis mutandis, in the neutrality proclamation issued by President Roosevelt, Feb. 11, 1904, on the outbreak of the war between Russia and Japan.

For. Rel. 1904, 32.

"The Pacific fleet, under Commodore George Dewey, had lain for some weeks at Hongkong. Upon the colonial proclamation of neutrality being issued and the customary twenty-four hours' notice being given, it repaired to Mirs Bay, near Hongkong, whence it proceeded to the Philippine Islands under telegraphed orders to capture or destroy the formidable Spanish fleet then assembled at Manila."

President McKinley, annual message, Dec. 5, 1898, For. Rel. 1898, LVIII.

An incident of the early stages of the war between the United States and Spain suggests the need of an amplification of the rule by which a belligerent man-of-war is required, except in case of stress of weather or of need of provisions or repairs, to leave a neutral port within twenty-four hours after her arrival. On May 11, 1898, Captain Cotton, of the auxiliary cruiser *Harvard*, cabled from St. Pierre, Martinique, to the Secretary of the Navy that the Spanish torpedo-boat destroyer *Furor* had touched during the afternoon at Fort de France, Martinique, and had afterwards left, destination unknown, and that the governor had ordered him not to sail within twenty-four hours from the time of the *Furor's* departure. At noon on the 12th of May Captain Cotton was informed by the captain of the port at St. Pierre that the *Furor* had about 8 a. m. again called at Fort de France and would leave about noon and that he might go to sea at 8 p. m.; but that if he did not do so he would be required to give the governor twenty-four hours' notice of his intention to leave the port. On the same day Captain Cotton received information which led him to telegraph to the Secretary of the Navy that he was closely observed and blockaded at St. Pierre by the Spanish fleet, and that the Spanish torpedo-boat destroyer *Terror* was at Fort de France. Later Captain Cotton cabled that the Spanish consul protested against his stay at St. Pierre, and that he had requested permission to remain a week to make necessary repairs to machinery. Replying to these reports, the Secretary of the Navy telegraphed to Captain Cotton as follows: "Vigorously protest against being forced out of the port in the face of superior blockading force, especially as you were detained previously in the port by the French authorities because Spanish men-of-war had sailed from another port. Also state that United States Government will bring the matter to the attention of the French Government. Urge the United States consul to protest vigorously." It proved to be unnecessary to take further action. Captain Cotton's request for time was granted. The governor showed no disposition to force him out of port, only requiring twenty-four hours' notice of an intention to sail; and the dangers to which the *Harvard* seemed to be exposed soon disappeared. It may be observed, however, that as the enforcement, under circumstances such as were described, of the twenty-four hours' limit would con-

stitute a negation of the admitted privilege of asylum it is not likely that it would be held to be applicable in such a situation.

Naval Operations of the War with Spain, 383–389, 407–410.

During the war between the United States and Spain an interesting question arose as to the U. S. S. *Monocacy* in China. By communications of the Tsung-li yamên to Mr. Denby, United States minister at Peking, of May 2 and May 9, 1898, official announcement was made that the yamên had telegraphed the viceroys, governors, and taotais-general of the Yangtze and maritime provinces to instruct their subordinates to observe the laws of neutrality. In the communication of the 9th of May it was stated that, in due observance of international law, vessels of war of the belligerents would not be allowed to "anchor in Chinese ports." In the proclamation of the taotai of Shanghai, issued May 22, 1898, it was more precisely declared that such vessels must not use Chinese-controlled waters and ports for anchorage or fighting purposes, or anchor there for lading war supplies; and that, should any such vessel enter a Chinese port, except under stress of weather or for necessary food or repairs, it must not remain over twenty-four hours. A question having arisen as to the applicability of these provisions to the *Monocacy*, an antiquated ship of war of light draft, which had, because of her adaptation to river service, for years been kept in Chinese waters for the protection of American citizens, the Government of the United States maintained (1) that, as the circumstances of her long-continued employment and her unfitness for service at sea rendered it apparent that her presence was not connected with the war, she did not come within the operation of rules designed to prevent the use of neutral waters as a base of hostilities, and (2) that the existence of war between the United States and a third power could not deprive the former of the right to take the customary measures for the protection of its citizens in China.

Mr. Day, Sec. of State, to Mr. Denby, min. to China, No. 1593, June 7, 1898, MS. Inst. China, V. 566. The *Monocacy* remained in China.

For the proclamation of the taotai of Shanghai, see Proclamations and Decrees during the War with Spain, 18–20.

3. Repairs.

(1) of war damage inadmissible.

§ 1316.

The Buenos Ayrean privateer *Juncal* put in at Baltimore for the purpose of making repairs after an action at sea with a Brazilian cruiser. Under these circumstances, the collector of customs at Baltimore was instructed: "Whilst you will not fail to allow her the

usual hospitality, and to procure the necessary refreshments, the President directs that you will be careful in preventing any augmentation of her force and her making any repairs not warranted by law. With respect to the latter article, the reparation of damages which she may have experienced from the sea is allowable, but the reparation of those which may have been inflicted in the action is inadmissible."

Mr. Clay, Sec. of State, to Mr. McCulloch, April 7, 1828, 22 MS. Dom. Let. 177.

See, to the same effect, Mr. Clay, Sec. of State, to Mr. Thompson, collector at New York, April 9, 1828, 22 MS. Dom. Let. 178.

See, also, Sec. of State to At. Gen., April 22, 1828, 22 MS. Dom. Let. 187; Wirt, At. Gen., May 3, 1828, 2 Op. 86.

June 3, 1905, three Russian men-of-war, the *Aurora*, the *Oleg*, and the *Zemtchug*, after an engagement with the Japanese, sought asylum at Manila. The commander of the squadron, Admiral Enquist, stated that the *Aurora* and the *Oleg* were seriously damaged, and that the *Zemtchug* was in bad condition; and he requested permission to make repairs and to fill up with provisions and coal. On board the ships there were a hundred and thirty wounded men. Permission was at once granted by the local authorities for the landing of a number of these; and an examination was made by a United States naval board of the condition of the ships. It was found that the *Aurora* and the *Oleg*, which were seriously injured near the water line, would require, respectively, thirty and fifty days to repair, while the *Zemtchug* would require seven; and that none of them had coal enough to steam. Admiral Enquist desired three thousand tons of coal. The facts were immediately reported by the authorities in the Philippines to the War Department and the Navy Department, by which they were in turn communicated to the Department of State.

In a memorandum of June 5, 1905, Mr. W. L. Penfield, then solicitor of the Department of State, after referring (1) to Art. VI. of the treaty of Washington of May 8, 1871, by which it is declared that a neutral government is bound not to permit either belligerent to make use of its ports or waters as the base of naval operations against the other or for the purpose of renewal or augmentation of supplies of arms and munitions of war or the recruitment of men; (2) to the clause in the President's neutrality proclamation of Feb. 11, 1904, limiting the stay of belligerent men-of-war to twenty-four hours, except in certain cases; (3) to the similar clause in the British neutrality proclamation issued during the Spanish-American war; and (4) to the clause in the neutrality rules promulgated by the Italian Government in 1864, and again in 1898, forbidding the increase, under pretext of repairs, of warlike force by belligerent ships, or the

execution, under such pretext, of any work that could in any way add to their fighting strength, expressed the opinion that the President's proclamation of February 11, 1904, in what it said concerning repairs of belligerent ships, referred only to damage caused by the sea and not to damage caused by war, and that, if the Russian ships were permitted to renew their fighting strength, either by the restoration of their guns or of their armor plate, or to repair any other damage caused by the guns of the Japanese fleet, the neutral port in which such things were allowed would become a naval arsenal for the belligerent and a base of his hostile operations. He adverted to the internment of the Russian cruiser *Lena* at San Francisco, in the summer of 1904, on the ground that the repairs which she required were so extensive as to amount to a renovation of the ship, although in that case there was no war damage to be repaired.

In conformity with the view taken in this memorandum, the Secretary of the Navy on the same day telegraphed to Admiral Train, commanding the United States Asiatic Fleet, then at Cavite, that the Russian vessels could not be allowed to repair war damages unless interned, it being the policy of the United States to restrict all belligerent operations in its ports. Admiral Train was instructed to confer with Mr. Wright, governor-general of the Philippines, and if he approved to take charge of the vessels.

On the next day, June 6, the War Department instructed Governor Wright to advise Admiral Enquist that as his ships were suffering from damage due to battle and as it was the policy of the United States to restrict all operations of belligerents in neutral ports, the President could not consent to any repairs unless the ships were interned at Manila till the close of hostilities. Governor Wright was further directed, after notifying Admiral Enquist of this conclusion, to turn over the execution of the order to Admiral Train.

In reporting on June 6 the execution of these orders, Governor Wright stated that Admiral Enquist, on being advised of the ruling as to repairs, had expressed a wish to cable his government on the subject, and had asked whether he would be required to put to sea within twenty-four hours or would be allowed to obtain coal and provisions sufficient to take him to his nearest port. The ships, said Governor Wright, had been allowed to take only 150 tons of coal for use in the harbor, and enough food supplies to last from day to day. Governor Wright also stated that he had just received a communication from the Japanese consul at Manila calling attention to the fact that three Russian war ships had been in the harbor since the night of June 3, and asking whether the 24-hour limit would be enforced. He had replied that, in view of the condition of the ships and of their request for coal and repairs, he was awaiting instructions.

With reference to this report the War Department, on the same day, instructed Governor Wright that the President directed that the 24-hour limit must be strictly enforced, and that the necessary supplies and coal must be taken within that time.

On June 9 Admiral Train reported that, as the Russian ships had not left the harbor within the required 24 hours, he had notified Admiral Enquist that the force under his command must be considered as interned after June 8 at noon. Admiral Train stated that disarmament was going on by removing the breech plugs, and that the engines were sufficiently disabled for the purpose of internment by limiting the coal supply. He added that Admiral Enquist, in accordance with instructions of his government, had expressed his willingness to give his parole and the paroles of his officers and men not to take any further part in the war.

June 19, 1905, the Russian ambassador at Washington inquired whether the hospital ship *Kostroma*, which had been ordered from Shanghai to Manila, would be allowed to take wounded or sick officers and sailors from Admiral Enquist's vessels back to Russia on their giving their paroles to take no further part in the war. A similar inquiry was received from Admiral Train. The matter was on June 20 brought to the attention of the Japanese legation, but on the next day, before its answer was received, the *Kostroma* arrived at Manila, and the President deemed it proper and humane to direct a compliance with the Russian request, upon the officers and men giving their parole, in accordance with the assurance given in the Russian ambassador's note. Meanwhile, the Japanese Government instructed its legation to state that it would not object to any disposition which the United States might see fit to make of the subject.

June 20 Admiral Enquist, through the French consul, asked permission to bring from Shanghai material other than munitions of war for repairing his vessel, such as cordage, sail cloth, waste, and oil for machinery, and other articles. Permission was granted by the War Department, with the understanding that the vessels were still to remain in internment.

June 24 Admiral Train inquired whether the hauling down of the flag of the Russian ships was regarded as a necessary condition of internment. The Department of State, on being consulted, advised, June 28, that the internment of the ships did not take from them their nationality, and that, although the hospitality which the Russian ships enjoyed at Manila was limited by the exigencies of war and the duties of the United States as a neutral, yet their internment would not seem to deprive them of the mere privilege of flying their national colors. Admiral Train was accordingly instructed that the hauling down of the flag was "not considered a necessary condition of internment."

July 26, 1905, the Russian ambassador at Washington asked that Sublieutenant Bertenson, of the *Aurora*, be allowed to return to Russia, on his parole not to take further part in the war. The request, which appeared to be made as for a favor, was, with the concurrence of the Japanese Government, granted. It soon appeared, however, by a cable from Manila, that Sublieutenant Bertenson was ill, and that Admiral Enquist had asked permission not only for him, but for certain other officers, who also were ill, to return to Russia, their physical condition requiring that they leave the climate of Manila. Permission was, with the concurrence of the Japanese Government, granted for their return to Russia on parole, it appearing by the examination and report of the United States naval authorities at Manila that they were ill. The permission embraced two lieutenants and two sublieutenants.

Toward the end of July, 1905, the Russian Government announced that it would detail Commander Bartsch to take command of the *Aurora*, in place of Captain Iegorieff, deceased. The naval authorities at Manila were instructed to permit him, on his arrival, to take command of the ship, and to obtain his parole under the same conditions as were required of the officers of the other interned vessels.

October 7, 1905, the commander of the United States naval forces in the Philippines cabled that Admiral Enquist had asked permission for Shipbuilder Lohvitzky to return to Russia on parole for urgent and satisfactory personal reasons. Under the conditions then existing, it being assumed that a "shipbuilder" was not an active combatant, permission was granted without obtaining the consent of the Japanese Government.

October 18, 1905, Mr. Root, Secretary of State, referring to his letter of the 14th of the month to the Secretary of the Navy advising the latter that the Government of the United States had been officially notified of the ratification of the treaty of peace between Russia and Japan by both Governments and that the *Lena* and her complement at San Francisco might be released, wrote to the Secretary of the Navy that the same treatment might be accorded to the Russian war vessels and their complements at Manila or in Philippine waters. Instructions were accordingly given to the United States naval authorities in the Philippines, and within a few days the vessels departed.

Mr. Morton, Sec. of Navy, to Sec. of State, June 5, 1905; Memorandum of Mr. Penfield, Solicitor of Department of State, June 5, 1905; Mr. Morton, Sec. of Navy, to Sec. of State, June 5, 1905; Mr. Taft, Sec. of War, to Sec. of State, June 5, 1905; Mr. Oliver, Act. Sec. of War, to Sec. of State, June 6, 1905; same to same, June 6, 1905; same to same, confid., June 6, 1905; Mr. Darling, Act. Sec. of Navy, June 9, 1905; Mr. Taft, Sec. of War, to Sec. of State, June 9, 1905; Count Cassini, Russian ambass., to Mr. Loomis, Act. Sec. of State, June 19,

1905; Mr. Darling, Act. Sec. of Navy, to Sec. of State, June 19, 1905; Mr. Loomis, Act. Sec. of State, to Mr. Takahira, Japanese min., No. 203, June 20, 1905; Mr. Loomis, Act. Sec. of State, to Mr. Hioki, Jap. chargé, June 21, 1905; Mr. Hioki, Jap. chargé, to Mr. Loomis, June 22, 1905; Mr. Hay, Sec. of State, to Count Cassini, Russ. amb., No. 267, June 23, 1905; Mr. Peirce, Act. Sec. of State, to Sec. of Navy, June 24, 1905; same to same, June 24, 1905; Mr. Darling, Act. Sec. of Navy, to Sec. of State, confid., June 24, 1905; Mr. Taft, Sec. of War, to Sec. of State, June 20, 1905; same to same, June 24, 1905; Mr. Darling, Sec. of Navy, to Sec. of State, confid., June 24, 1905; Mr. Pierce, Act. Sec. of State, to Sec. of Navy, June 28, 1905; Mr. Bonaparte, Sec. of Navy, to Sec. of State, July 1, 1905; Baron Rosen, Russ. amb., to Mr. Adee, Act. Sec. of State, July 26, 1905; Mr. Adee, Act. Sec. of State, to Mr. Hioki, Jap. chargé, July 27, 1905; Mr. Hioki to Mr. Adee, July 28, 1905; Mr. Adee, Act. Sec. of State, to Sec. of Navy, July 29, 1905; Mr. Adee, Act. Sec. of State, to Baron Rosen, Russ. amb., No. 5, July 29, 1905; Mr. Bonaparte, Sec. of Navy, to Sec. of State, Aug. 2, 1905; same to same, Aug. 4, 1905; same to same, July 28, 1905; Mr. Adee, Act. Sec. of State, to Sec. of Navy, July 29, 1905; Mr. Adee, Act. Sec. of State, to Mr. Hioki, Jap. chargé, July 29, 1905; Mr. Hioki to Mr. Adee, July 31, 1905; Mr. Adee, Act. Sec. of State, to Sec. of Navy, Aug. 2, 1905; Mr. Adee, Act. Sec. of State, to Baron Rosen, Russ. amb., Aug. 2, 1905; Mr. Bonaparte, Sec. of Navy, to Sec. of State, Aug. 3, 1905; Mr. Adee to Jap. chargé, Aug. 8, 1905; Mr. Darling, Act. Sec. of Navy, to Sec. of State, Sept. 19, 1905; Mr. Adee, Act. Sec. of State, to Baron Rosen, Sept. 21, 1905; Mr. Adee, Act. Sec. of State, to Mr. Takahira, Jap. min., Sept. 21, 1905; Mr. Adee, Act. Sec. of State, to Sec. of Navy, Sept. 21, 1905; Baron Rosen, Russ. amb., to Dept. of State, July 27, 1905; Mr. Adee, Act. Sec. of State, to Sec. of Navy, July 31, 1905; Mr. Adee, Act. Sec. of State, to Mr. Hioki, Jap. chargé, No. 211, July 31, 1905; Mr. Bonaparte, Sec. of Navy, to Sec. of State, Aug. 2, 1905; Mr. Adee, Act. Sec. of State, to Sec. of Navy, Aug. 7, 1905; Mr. Darling, Act. Sec. of Navy, to Sec. of State, Aug. 9, 1905; Mr. Bonaparte, Sec. of Navy, to Sec. of State, Oct. 7, 1905; Mr. Bacon, Act. Sec. of State, to Sec. of Navy, Oct. 11, 1905; Mr. Bonaparte, Sec. of Navy, to Sec. of State, Oct. 13, 1905; Mr. Root, Sec. of State, to Sec. of Navy, Oct. 18, 1905; Mr. Bonaparte, Sec. of Navy, to Sec. of State, Oct. 20, 1905; Mr. Darling, Act. Sec. of Navy, to Sec. of State, Oct. 28, 1905; Mr. Root, Sec. of State, to Sec. of Navy, Nov. 2, 1905; Mr. Root, Sec. of State, to Baron Rosen, Russ. amb., Nov. 2, 1905; MS. Dept. of State.

As to the case of the *Lena*, see infra, § 1317.

(2) ORDINARY DAMAGE: LIMITATIONS; INTERNMENT.

§ 1317.

The Spanish torpedo-boat destroyer *Temerario*, which was reported to have been sent down the coast of South America to intercept the U. S. S. *Oregon* on her way around Cape Horn to Cuba, was permitted by the Paraguayan Government to lie up during the war at Asuncion, in a condition of disability unfitting her for service.

On August 12, 1904, the Russian cruiser *Askold* and the Russian torpedo-boat destroyer *Grozoroi*, which had escaped from Port Arthur, arrived at Shanghai, where they sought to obtain repairs. On the 17th of August they were visited by Chinese officials, who reported that the repairs of the *Grozoroi* would consume eighteen days and those of the *Askold* twenty-eight. On the 19th of August the taotai notified the Russian consul-general that the vessels had been in Shanghai seven days, and that he would require the *Grozoroi* to leave within twenty-four hours and the *Askold* to complete her repairs within forty-eight hours, and to go out within twenty-four thereafter. This demand the Russian consul-general refused. Meanwhile, the Standard Oil Company had asked protection for their plant, near which the *Askold* lay, in case the latter should be attacked by the Japanese. On the 20th of August the taotai wrote to the senior consul and disclaimed further responsibility for anything that might happen. The consul-general of the United States called a meeting of the consular body to consult what action the neutral powers should take. Meanwhile, he was instructed by his Government that, although he was to protest against any act endangering neutral interests, he was not competent, in union with the consular body, to give effect to China's neutrality; that he was to safeguard only, as far as possible, American neutral interests if threatened, but was not to commit himself to any theory that the United States could be called upon by China or by the foreign consuls to guarantee Chinese neutrality. At the same time, the American minister at Peking was directed to use his influence to support the Government of China in its demand for the neutrality of its waters. The taotai at Shanghai subsequently notified the Russian consul-general that both boats must complete their repairs by noon of the 23d of August and leave immediately thereafter. The Russian consul-general again refused to comply with the taotai's demand, and, as the repairs were being executed by a British company, over which the taotai had no control, the latter applied to the British consul-general, in order that the work might be stopped. The British consul-general, after consultation with the Russian consul-general, gave notice that work would stop on the 24th of August. On that day the taotai received a dispatch from the Russian consul-general to the effect that both vessels were to be disarmed. On the 27th of August Prince Ch'ing informed the American minister at Peking that the commanders of the Russian vessels had agreed to lower their flags on the evening of the 25th of August; that this was to be considered as equivalent to disarmament, and that the soldiers would be withdrawn and the sailors sent home, in accordance with the precedent established in the case of the *Mandjur*. Prince Ch'ing further stated that a telegram had at once been sent to the taotai to

see that this was carried out, with the result that there would be no damage to the property of the Standard Oil Company or other foreign interests at Shanghai.

For. Rel. 1904, 137–146.

It appears that in the case of the Russian cruiser *Askold* and the destroyer *Grozovoi* the Japanese Government on the 19th of August notified Peking that the Russian ships should be required to leave Shanghai, either immediately or, if necessary, after two days' repairs to make them seaworthy; and that, if they were unwilling to leave Shanghai, they should be disarmed without making any repairs and detained in port till the conclusion of the war. In the event of China's failure to enforce either of these three alternatives, the Japanese Government reserved the right to take such self-protective measures as it might deem necessary, reponsibility for the consequences to rest with China. Subsequently, in view of the difficult position of the Chinese Government, Japan consented to a delay till the 21st of August; and when the Chinese Government granted on the 23d of August an extension for repairs and for the departure of the ships till noon of the 28th, the Japanese Government again protested.

For. Rel. 1904, 426.

In connection with the arrival at Shanghai of the Russian cruiser *Askold*, the American consul-general was instructed that he was not to commit himself to any theory that the United States could be called on by China or by the foreign consuls to guarantee Chinese neutrality; that he was to safeguard only, as far as possible, American neutral interests if threatened, and to avoid all indications of general policy, and that the utmost circumspection was required.

Mr. Adee, Act. Sec. of State, to Mr. Conger, min. to China, tel., Aug. 23, 1904, For. Rel. 1904, 137.

The American minister at Peking was at the same time directed to use his influence to support the Chinese Government in its demand for the neutrality in Chinese waters, since an abuse of her neutrality by one of the belligerents would naturally provoke reprisals by the other. (Mr. Hay, Sec. of State, to Mr. Conger, tel., Aug. 26, 1904, For. Rel. 1904, 137.)

In August, 1904, Dr. von Mühlberg, imperial acting secretary of state for foreign affairs, stated that the Russian ships which had taken refuge at Tsingtau, including the battle ship *Cesarevitch* and three torpedo boats, had been disarmed by the German authorities and would not be allowed to repair. Dr. von Mühlberg remarked that the principles of international law with regard to the repair of belligerent ships in neutral ports were very difficult of application,

but that, while it could not be laid down that Germany would under no circumstances allow belligerent ships to repair in her ports, it had been decided in the present instance not to allow it to be done, and that he had reason to believe that the British Government would act in a similar case as the German Government had done. As to the officers and men belonging to the Russian ships, and numbering about 1,000, the Japanese Government had been asked whether it objected to their being sent to Russia under proper safeguards.

Mr. Dodge, chargé at Berlin, to Mr. Hay, Sec. of State, No. 440, Aug. 17, 1904, For. Rel. 1904, 323.

September 13, 1904, the Russian ambassador and the Japanese minister at Washington both advised the Department of State of the arrival at San Francisco of the Russian transport or auxiliary cruiser *Lena*, with a crew of 500 men and an armament of 27 quick-firing guns. The Russian ambassador stated that the vessel was in an unseaworthy condition, and asked that she might receive all aid compatible with neutrality. The Japanese minister asked that "appropriate measures" be taken. On September 14 the Russian ambassador was advised that if the vessel was repaired, only such bare repairs could be allowed as might be necessary to render the vessel seaworthy and enable her to reach the nearest home port, and that even such repairs could be permitted only on condition that they should not prove to be too extensive; that an inspection made by United States officers at San Francisco showed that the repairs asked for included a complete outfit of new boilers and the reconstruction of engines, which would consume at least four or five months, or, according to the captain's estimate, eight months, and amount to a renovation of the vessel. It was declared that this could not be allowed with a due regard to neutrality, and an immediate answer was desired as to whether the Russian Government preferred to have the limited repairs made or to have the vessel laid up at the Mare Island Navy-Yard. On the 15th of September the Russian ambassador asked for a delay of forty-eight hours, in order that he might receive the instructions of his Government, but he was advised in reply that the captain of the *Lena* had informed the American naval authorities at San Francisco that the ship, being unseaworthy, must disarm, and had asked that she be allowed to make needed repairs. In view of this formal application of the captain of the vessel, the President, on the afternoon of the 15th of September, issued an order directing that the *Lena* be taken into custody by the naval authorities of the United States and disarmed under the following conditions: (1) That the vessel be taken to the Mare Island Navy-Yard and there disarmed by removal of small guns, breechblocks, small arms, ammunition, and ordnance stores, and such other dismantlement as might

be prescribed by the commandant of the navy-yard; (2) that the captain of the *Lena* should give a written guarantee that she should not leave San Francisco till peace had been concluded, and that the officers and crew should be paroled not to leave San Francisco till some other understanding as to their disposal might be reached between the United States and both belligerents; (3) that, after disarmament, the vessel might be removed to a private dock for such reasonable repairs as would make her seaworthy and preserve her in good condition during detention, or be so repaired at the navy-yard, should the Russian commander so elect, and that while at the private dock the commandant of the navy-yard should have the custody of the ship, and that the repairs should be overseen by an engineer officer to be detailed by him; (4) that the cost of repairs, of private docking, and of maintenance of the ship, officers, and crew while in custody should be borne by the Russian Government, but the berthing at Mare Island and the custody and surveillance of the vessel by the United States; (5) that the vessel, when repaired, if peace had not then been concluded, should be taken back to Mare Island and there held in custody till the end of the war. The Russian ambassador expressed the adherence of his Government to these conditions, but asked that the officers and crew of the vessel, except 5 officers and 100 seamen, who were necessary for her care, might be permitted to leave the United States. The Japanese Government, on the other hand, asked that all the officers and crew be detained in the United States till the termination of hostilities. The President decided that it would not be consistent with neutrality to grant the request for the repatriation of any of the officers or crew of the *Lena*, unless both the belligerents agreed to it. Without such an agreement he regarded the position of the men as being identical in principle with that of a military force entering neutral territory and there necessarily held by the neutral.

December 10, 1904, the Russian ambassador asked that the captain and crew of the *Lena* might be permitted to celebrate the name day of the Emperor on the 19th of the month, by hoisting the national flag over the vessel, dressing the ship, and firing the imperial salute. The United States assented to the display of the national standard and the dressing of the ship, but found it impracticable to agree to the firing of the salute, in view of the fact that, as the *Lena* was not in commission, but was lying in a friendly port completely disarmed and in the custody of the United States till the end of the war, her character as a warship, including the function of saluting and the right to receive salutes, was in abeyance.

For. Rel. 1904, 428–430, 785–790.

See, particularly, Mr. Adee, Act. Sec. of State, to Count Cassini, Russian amb., tels., Sept. 14 and 15, 1904; Mr. Loomis, Act. Sec. of State, to

Count Cassini, Sept. 24, 1904; Mr. Hay, Sec. of State, to Count Cassini, No. 252, Dec. 14, 1904; For. Rel. 1904, 785–786, 787, 788, 789.

"It shall be lawful for the President, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign vessel to depart the United States in all cases in which, by the laws of nations or the treaties of the United States, she ought not to remain within the United States."

Sec. 5288, Revised Statutes.

(3) INTERNMENT OF FUGITIVE TROOPS.

§ 1318.

Although a neutral must not lend his territory for purposes of war, he may receive a beaten army or individual fugitives, provided he disarms them and does not allow them again to engage in the war. But as he can not be expected to provide for them himself, and as to require either belligerent to pay for their support would be indirectly aiding the other, "perhaps the equity of the case and the necessity of precaution might both be satisfied by the release of such fugitives under a convention between the neutral and belligerent states, by which the latter should undertake not to employ them during the continuance of the war."

Hall, Int. Law, 650; 5th ed. 626.

When belligerent troops, in order to escape the other belligerent, take refuge in neutral territory, if they do not lay down their arms they should be compelled to do so by the neutral sovereign. In such case they are protected by the law of nations from the opposing belligerent. This, it is true, is contested by Bynkershoek. "But Bynkershoek is not supported by the practice of nations. Some writers on public law maintain the sounder doctrine, that when the flying enemy has entered neutral territory, he is placed immediately under the protection of the neutral power, and that there is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. The Government of the United States has invariably claimed the absolute inviolation of neutral territory."

2 Halleck's Int. Law (3d ed., by Baker), 148.

"ARTICLE LVII. A neutral State which receives in its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.

" It can keep them in camps, and even confine them in fortresses or locations assigned for this purpose.

" It shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without authorization.

"ARTICLE LVIII. Failing a special Convention, the neutral State shall supply the interned with the food, clothing, and relief required by humanity.

"At the conclusion of peace, the expenses caused by the internment shall be made good.

"ARTICLE LIX. A neutral State may authorize the passage through its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither combatants nor war material. In such a case, the neutral State is bound to adopt such measures of safety and control as may be necessary for the purpose.

" Wounded and sick brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral State, so as to insure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

"ARTICLE LX. The Geneva Convention applies to sick and wounded interned in neutral territory."

Convention respecting the Laws and Customs of War on Land, signed at The Hague, July 29, 1899, Annex, Regulations, Section IV., on the Internment of Belligerents and the Care of the Wounded in Neutral Countries, 32 Stat. II. 1824.

VI. *ENFORCEMENT OF NEUTRAL DUTIES.*

1. PROCLAMATIONS.

§ 1319.

" Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands of the one part, and France on the other, and the duty and interests of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

" I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid toward these powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.

"And I do hereby also make known, that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles which are deemed contraband by the *modern* usage of nations, will not receive the protection of the United States, against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war, or any of them."

President Washington's Neutrality Proclamation, April 22, 1793, Am. State Papers, For. Rel. I. 140.

See Moore, Int. Arbitrations, I. 310; V. 4406.

"I particularly recommend to your consideration the means of preventing those aggressions by our citizens on the territory of other nations, and other infractions of the law of nations, which, furnishing just subject of complaint, might endanger our peace with them." (President Washington, annual address to Congress, Nov. 6, 1792, Richardson's Messages, I. 128.)

"You may on every occasion give assurances, which cannot go beyond the real desires of this country, to preserve a fair neutrality in the present war, on condition that the rights of neutral nations are respected in us as they have been settled in *modern* times either by the express declarations of the powers of Europe, or their adoption of them on particular occasions. From our treaties with France and Holland, and that of England and France, a very clear and simple line of conduct can be marked out for us, and I think we are not unreasonable in expecting that England will recognize towards us the same principles which she has stipulated to recognize towards France in a state of neutrality." (Mr. Jefferson, Sec. of State, to Mr. Pinckney, min. to England, April 20, 1793, MS. Inst. U. States Ministers, I. 272.)

"The public papers giving us reason to believe that the war is becoming nearly general in Europe, and that it has already involved nations with which we are in daily habits of commerce and friendship, the President has thought it proper to issue the proclamation of which I inclose you a copy, in order to mark out to our citizens the line of conduct they are to pursue. That this intimation, however, might not work to their prejudice, by being produced against them as conclusive evidence of their knowledge of the existence of war and of the nations engaged in it, in any case where they might be drawn into courts of justice for acts done without that knowledge, it has been thought necessary to write to the representatives of the belligerent powers here the letter, of which a copy is also inclosed, reserving to our citizens those immunities to which they are entitled till authentic information shall be given to our Government by the parties at war, and be thus communicated with due certainty to our citizens." (Mr. Jefferson, Sec. of State, to Messrs. Morris, Pinckney, and Short, Apr. 26, 1793, MS. Inst. U. States Ministers, I. 275.)

See, to the same effect, Mr. Jefferson, Sec. of State, to the "Ministers of France and Great Britain and the President of the United Netherlands," April 23, 1793, 5 MS. Dom. Let. 92.

"You have most perfectly seized the *original* idea of the proclamation. When first proposed as a declaration of neutrality, it was opposed, first, because the Executive had no power to declare neutrality. Second, as such, a declaration would be premature, and would lose us the benefit for which it might be bartered. It was urged that there was a strong impression in the minds of many, that they were free to join in the hostilities on the side of France. Others were unapprised of the danger they would be exposed to in carrying contraband goods, etc. It was, therefore, agreed that a proclamation should issue, declaring that we were in a state of peace, admonishing the people to do nothing contravening it, and putting them on their guard as to contraband. On this ground, it was accepted or acquiesced in by all, and E. R., who drew it, brought it to me, the draft, to let me see there was no such word as *neutrality* in it. Circumstances forbid other verbal criticisms. The public, however, soon took it up as a declaration of neutrality, and it came to be considered at length as such. . . . With respect to our citizens who had joined in hostilities against a nation with whom we are at peace the subject was thus viewed. Treaties are law. By the treaty with England, we are in a state of peace with her. He who breaks that peace, if within our jurisdiction, breaks the laws, and is punishable by them. And if he is punishable, he ought to be punished, because no citizen should be free to commit his country to war." (Mr. Jefferson to Mr. Monroe, July 14, 1793, 2 Randall's Life of Jefferson, 167.)

See, also, Mr. Jefferson, Sec. of State, to Mr. Morris, min. to France, Aug. 16, 1793, Am. State Papers, For. Rel. I. 167; Jefferson to Madison, June 23, 1793, 3 Rives's Madison, 325.

The issuance of the proclamation gave rise to animated discussions both as to the nature of the act and as to the President's constitutional powers. Hamilton, under the name of Pacificus, argued that all treaty-making and war powers belong to the Executive, except so far as limited by the Constitution, while Madison, under the name of Helvidius, contended that such powers should be exercised by means of laws, which should be enacted by the legislature and enforced by the Executive. (1 Madison's Writings, 614 et seq.) As to this discussion, see 3 Rives's Madison, 354, 355; 4 Hildreth's Hist. of the United States, 429.

"Of the great trading nations, America is almost the only one that has shown consistency of principle. The firmness and thorough understanding of the laws of nations, which during this war [growing out of the French Revolution] she has displayed, must for ever rank her high in the scale of enlightened communities." (Ward's Rights and Duties of Neutrals, cited in Bemis's American Neutrality, 28.)

A collection of the laws, decrees, and circulars of various governments in relation to neutrality may be found in the papers submitted by the United States to the Geneva tribunal. By a circular of the Department of State of June 21, 1898, the diplomatic representatives of the United States were directed to obtain and report

any later laws or regulations of the governments to which they were accredited on the subject of neutrality, as well as any cases that had arisen under such laws and regulations, and particularly any action taken in regard to the sale or delivery of arms and munitions of war and other contraband, and the sale or delivery of ships, to belligerents. The proclamations and decrees issued by neutral governments as well as by the belligerents during the war between the United States and Spain were collected and published by the Bureau of Foreign Commerce of the Department of State in a pamphlet entitled "Proclamations and Decrees during the War with Spain: Washington, Government Printing Office, 1899." A portion of this pamphlet is printed in the Foreign Relations of the United States for 1898, pages 841–904.

For responses to the circular of June 21, 1898, see the following manuscript dispatches:

Mr. Buchanan, min. to the Argentine Republic, No. 584, Dec. 1, 1898, enclosing a report prepared by Mr. François S. Jones, sec. of legation. This report stated that there were no Argentine neutrality laws; that the question of enacting such laws had been agitated in the congress, but that none had been adopted. An investigation of the diplomatic relations of the country since 1870 showed few cases involving questions of neutrality, and such as were discovered were embraced in the report.

Mr. Storer, min. to Belgium, No. 140, Sept. 14, 1898. The Belgian foreign office stated that no law had been enacted by that country since 1870. It is the practice of the Belgian Government, when foreign powers are at war, to publish in the official journal a notice of the fact, calling attention to article 123 of the penal code.

Mr. Wilson, min. to Chile, to Mr. Day, Sec. of State, Sept. 8, 1898, enclosing copy of a note from the Chilean minister of foreign relations of Aug. 20, 1898, saying that that Government "has never taken any steps regarding neutrality, nor has any question arisen regarding this subject" since 1870.

Mr. Allen, min. to Corea, to Mr. Day, No. 129, July 29, 1898, reporting that Corea had enacted no laws or regulations affecting neutrality, except perhaps the instructions that were given to the port authorities during the war between the United States and Spain.

Mr. Sampson, min. to Ecuador, No. 53, Aug. 6, 1898, reporting that nothing could be found in Ecuador on the subject of neutrality since 1870.

Mr. Rockhill, min. to Greece, No. 5, Aug. 24, 1898, conveying a similar report with regard to that country.

Mr. Hunter, min. to Guatemala, No. 81, Aug. 4, 1898, enclosing a translation of a note of the Guatemalan minister of foreign affairs of July 27, 1898, stating that Guatemala had no special law on the subject of neutrality, but was governed in such matters by the principles of international law.

Mr. Buck, min. to Japan, July 26, 1898, saying that he had found no laws or regulations in that country since 1870, and that no questions appeared to have arisen as to the sale or delivery of contraband or of ships.

Mr. Clayton, min. to Mexico, No. 517, July 13, 1898, reporting that articles 1090 and 1091 of the Mexican penal code embraced all the legislation of Mexico on the subject of neutrality, and that no cases had arisen growing out of the violations of those articles. By article 1090, "any Mexican who, by acts not authorized nor approved by the Government, provokes a foreign war, or gives cause for declaring such war, or exposes Mexicans thereby to suffer oppressions or reprisals, shall be punished by four years' imprisonment." By article 1091, "any official who, in discharge of public functions, compromises the faith or dignity of the Republic shall suffer four years' imprisonment; but if the crime be committed in the exercise of diplomatic or consular functions the punishment shall be doubled."

Mr. Newel, min. to the Netherlands, Oct. 11, 1898, enclosing circulars issued by the Dutch Government in 1877, 1894, and 1897, together with an extract from the penal code. By this extract it appears that any person "who, during a war in which the Netherlands are not concerned," intentionally commits any act by which the neutrality of the State is endangered, or intentionally infringes any special order issued by the Government with a view to the maintenance of its neutrality, is punishable with imprisonment not exceeding six years.

Mr. Finch, minister to Paraguay, Sept. 22, 1898, reporting that the only special measure ever adopted by that Government with regard to neutrality was the decree of Dec. 21, 1865, prohibiting the sale in Paraguayan ports of prizes that might be taken by the Chilean or Spanish forces, which were then at war.

Mr. Dudley, min. to Peru, July 21, 1898, enclosing copies of decrees issued by the Peruvian Government on October 24 and 31, 1870, during the Franco-German war.

Mr. Townsend, min. to Portugal, Sept. 20, 1898, reporting that no laws or declarations of neutrality had been issued by Portugal since 1870, except the declaration issued in 1898 with reference to the war between the United States and Spain, and that the only case which had arisen under the Portuguese regulations governing neutrality was that of the Prussian man-of-war *Arcona*, which made a long stay in the waters of the Azores in 1870 on the ground of asylum. Mr. Townsend's dispatch encloses a copy of the entire correspondence made from the archives of the Portuguese foreign office, together with a translation. The case involved disputed questions of fact as well as of law.

Mr. Rockhill, min. to Servia, No. 15, Aug. 11, 1898, reporting that since 1877, when Roumania formally declared its independence, no special laws or regulations on the subject of neutrality had been made.

Mr. King, min. to Siam, Aug. 19, 1898, reporting that there were no special laws or regulations on the subject of neutrality in that country.

Mr. Thomas, min. to Sweden and Norway, June 13, 1899, enclosing copies of Swedish ordinances of April 8, 1854, September 13, 1855, June 21, 1856, and July 29, 1870; and a Norwegian ordinance of March 7, 1864.

Mr. Leishman, min. to Switzerland, July 7, 1898, transmitted a note of the Swiss Government of July 6, 1898, stating that there were no new laws or regulations in that country concerning neutrality since 1870.

As to the neutrality proclamations issued by various powers on the outbreak of the Russo-Japanese war, see For. Rel. 14.

"Whereas a state of war unhappily exists between France, on the one side, and the North German Confederation and its allies, on the other side; and whereas the United States are on terms of friendship and amity with all the contending powers, and with the persons inhabiting their several dominions; and whereas great numbers of the citizens of the United States reside within the territories or dominions of each of the said belligerents, and carry on commerce, trade, or other business or pursuits therein, protected by the faith of treaties; and whereas great numbers of the subjects or citizens of each of the said belligerents reside within the territory or jurisdiction of the United States, and carry on commerce, trade, or other business or pursuits therein; and whereas the laws of the United States, without interfering with the free expression of opinion and sympathy, or with the open manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest:

"Now, therefore, I, Ulysses S. Grant, President of the United States, in order to preserve the neutrality of the United States and of their citizens and of persons within their territory and jurisdiction, and to enforce their laws, and in order that all persons, being warned of the general tenor of the laws and treaties of the United States in this behalf, and of the law of nations, may thus be prevented from an unintentional violation of the same, do hereby declare and proclaim that by the act passed on the 20th day of April, A. D. 1818, commonly known as the 'neutrality law,' the following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to wit:

"1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

"2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

"3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

"4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

"5. Hiring another person to go beyond the limits of the United States with the intent to be entered into service as aforesaid.

"6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

"7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the

said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

"8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

"9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

"10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting the force of any ship of war, cruiser, or other armored vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects or citizens of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war.

"11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents.

"And I do further declare and proclaim that by the nineteenth article of the treaty of amity and commerce which was concluded between His Majesty the King of Prussia and the United States of America, on the 11th day of July, A. D. 1799, which article was revived by the treaty of May 1, A. D. 1828, between the same parties, and is still in force, it was agreed that 'the vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under any legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show.'

"And I do further declare and proclaim that it has been officially communicated to the Government of the United States by the envoy extraordinary and minister plenipotentiary of the North German Confederation, at Washington, that private property on the high seas will be exempted from seizure by the ships of His Majesty the King of Prussia, without regard to reciprocity.

"And I do further declare and proclaim that it has been officially communicated to the Government of the United States by the envoy extraordinary and minister plenipotentiary of His Majesty the Emperor of the French, at Washington, that orders have been given that, in the conduct of the war, the commanders of the French forces on land and on the seas shall scrupulously observe toward neutral powers the rules of international law, and that they shall strictly adhere to the principles set forth in the declaration of the congress of Paris of the 16th of April, 1856, that is to say: 1st. That privateering is and remains abolished. 2d. That the neutral flag covers enemy's goods, with the exception of contraband of war. 3d. That neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag. 4th. That blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy: and that, although the United States have not adhered to the declaration of 1856, the vessels of His Majesty will not seize enemy's property found on board of a vessel of the United States, provided that property is not contraband of war.

"And I do further declare and proclaim that the statutes of the United States and the law of nations alike require that no person within the territory and jurisdiction of the United States shall take part, directly or indirectly, in the said war, but shall remain at peace with each of the said belligerents, and shall maintain a strict and impartial neutrality, and that whatever privileges shall be accorded to one belligerent within the ports of the United States shall be in like manner accorded to the other.

"And I do hereby enjoin all the good citizens of the United States, and all persons residing or being within the territory or jurisdiction of the United States, to observe the laws thereof, and to commit no act contrary to the provisions of the said statutes, or in violation of the law of nations in that behalf.

"And I do hereby warn all citizens of the United States, and all persons residing or being within their territory or jurisdiction, that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of either belligerent cannot lawfully be originated or organized within their jurisdiction; and that while all persons may law-

fully, and without restriction, by reason of the aforesaid state of war, manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as 'contraband of war,' yet they cannot carry such articles upon the high seas for the use or service of either belligerent, nor can they transport soldiers and officers of either, or attempt to break any blockade which may be lawfully established and maintained during the war, without incurring the risk of hostile capture, and the penalties denounced by the law of nations in that behalf.

"And I do hereby give notice that all citizens of the United States, and others who may claim the protection of this Government, who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the Government of the United States against the consequences of their misconduct."

President Grant's neutrality proclamation, Aug. 22, 1870, For. Rel. 1870, 45.

See Mr. Evarts, Sec. of State, to Aristarchi Bey, Turkish min., May 3, 1877, For. Rel. 1877, 613.

The foregoing proclamation is substantially reproduced mutatis mutandis, in the proclamation issued by President Roosevelt, Feb. 11, 1904, on the outbreak of the war between Russia and Japan, but is combined in President Roosevelt's proclamation with the substance, mutatis mutandis, of the proclamation issued by President Grant Oct. 8, 1870 (supra, § 1315, p. 987), defining the hospitalities to be accorded to belligerent cruisers. For President Roosevelt's proclamation, see For. Rel. 1904, 32.

2. Legislation.

§ 1320.

In his fifth annual address to Congress, in 1793, Washington, after narrating what had been done to preserve the neutrality of the United States, stated that it rested with Congress to correct, improve, or enforce this plan of procedure. By the act of June 5, 1794, provision was made by statute for the performance of the obligations of neutrality.

1 Am. State Papers, For. Rel. I. 21; 1 Stat. 381.

The act of 1794 was to remain in force for a limited time only. It was extended by the act of March 2, 1797, and by the act of April 24, 1800, was continued in force indefinitely. (1 Stat. 497; 2 id. 54.)

"In the course of this conflict [following the breach of the peace of Amiens] let it be our endeavor, as it is our interest and desire, to cultivate the friendship of the belligerent nations by every act of justice and of innocent kindness; to receive their armed vessels with hospitality from the distresses of the sea, but to administer the means of annoyance to none; to establish in our harbors such a

police as may maintain law and order; to restrain our citizens from embarking individually in a war in which their country takes no part; to punish severely those persons, citizen or alien, who shall usurp the cover of our flag for vessels not entitled to it, infecting thereby with suspicion those of real Americans and committing us into controversies for the redress of wrongs not our own; to exact from every nation the observance toward our vessels and citizens of those principles and practices which all civilized people acknowledge; to merit the character of a just nation, and maintain that of an independent one, preferring every consequence to insult and habitual wrong. Congress will consider whether the existing laws enable us efficaciously to maintain this course with our citizens in all places and with others while within the limits of our jurisdiction, and will give them the new modifications necessary for these objects. . . . Separated by a wide ocean from the nations of Europe and from the political interests which entangle them together, with productions and wants which render our commerce and friendship useful to them and theirs to us, it can not be the interest of any to assail us, nor ours to disturb them. We should be most unwise, indeed, were we to cast away the singular blessings of the position in which nature has placed us, the opportunity she has endowed us with of pursuing, at a distance from foreign contentions, the paths of industry, peace, and happiness, of cultivating general friendship, and of bringing collisions of interest to the umpirage of reason rather than of force."

President Jefferson, annual message, Oct. 17, 1803, Richardson's Messages, I. 361.

"It is found that the existing laws have not the efficacy necessary to prevent violations of the obligations of the United States as a nation at peace toward belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States.

"With a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States, I recommend to the consideration of Congress the expediency of such further legislative provisions as may be requisite for detaining vessels actually equipped, or in a course of equipment, with a warlike force within the jurisdiction of the United States, or, as the case may be, for obtaining from the owners or commanders of such vessels adequate securities against the abuse of their armaments, with the exceptions in such provisions proper for the cases of merchant vessels furnished with the defensive armaments usual on distant and dangerous expeditions, and of a private commerce in mili-

tary stores permitted by our laws, and which the law of nations does not require the United States to prohibit."

President Madison, message of Dec. 26, 1816, Richardson's Messages, I. 582.

"Having communicated to you, verbally, the information asked for by your letter of the 1st instant, except so far as relates to the last inquiry it contains, I have now the honor to state, that the provisions necessary to make the laws effectual against fitting out armed vessels in our ports, for the purpose of hostile cruising, seem to be—

"First. That they should be laid under bond not to violate the treaties of the United States, or the obligations of the United States under the law of nations, in all cases where there is reason to suspect such a purpose on foot, including the cases of vessels taking on board arms and munitions of war, applicable to the equipment and armament of such vessels, subsequent to their departure.

"Second. To invest the collectors, or other revenue officers where there are no collectors, with power to seize and detain vessels under circumstances indicating strong presumption of an intended breach of the law: the detention to take place until the order of the Executive, on a full representation of the facts had thereupon, can be obtained. The statute book contains analogous powers to this above suggested. (See particularly the eleventh section of the act of Congress of April 25, 1808.)

"The existing laws do not go to this extent. They do not authorize the demand of security in any shape or any interposition on the part of the magistracy as a preventive, where there is reason to suspect an intention to commit the offence. They rest upon the general footing of punishing the offence merely where, if there be full evidence of the actual perpetration of the crime, the party is handed over, after the trial, to the penalty denounced."

Mr. Monroe, Sec. of State, to Mr. Forsyth, Jan. 6, 1817, 4 Am. State Papers, For. Rel. 103.

"In addition to the letter which I wrote to you on the 6th, in reply to the one which you wrote to me on the 1st instant, I have the honor to state, that information has been received at this Department, from various sources, that vessels have been armed and equipped in our ports for the purpose of cruising against the commerce of nations in amity with the United States, and no doubt is entertained that this information was in some instances correct. The owners of these vessels have, however, generally taken care so to conceal these armaments and equipments, and the object of them, as to render it extremely difficult, under existing circumstances, to prevent or punish this infraction of the law. It has been represented—

"First. That vessels belonging to citizens of the United States, or

foreigners, have been armed, and equipped in our ports, and have cleared out from our custom-houses, as merchant vessels; and, after touching at other ports, have hoisted the flag of some of the belligerents, and cruised under it against the commerce of nations in amity with the United States.

"Secondly. That in other instances, other vessels, armed and equipped in our ports, have hoisted such flags after clearing out and getting to sea, and have, in like manner, cruised against the commerce of nations in amity with the United States, extending their depredations, in a few cases, to the property of citizens of the United States.

"Thirdly. That in other instances, foreign vessels have entered the ports of the United States, and, availing themselves of the privileges allowed by our laws, have, in various modes, augmented their armaments, with pretended commercial views; have taken on board citizens of the United States, as passengers, who, on their arrival at neutral ports, have assumed the character of officers and soldiers in the service of some of the parties in the contest now prevailing in our southern hemisphere.

"Information, founded upon these representations, has from time to time been given to the attorneys and collectors of the respective districts in which the armaments are stated to have been made; but, from the difficulty of obtaining the necessary evidence to establish facts on which the law would operate, few prosecutions have been instituted.

"In reply to your second inquiry, I beg leave to refer to the communication from the Secretary of the Treasury to the Committee of Ways and Means, during the last session of Congress, in the case of the *American Eagle*, and to the papers enclosed herewith."

Mr. Monroe, Sec. of State, to Mr. Forsyth, Jan. 10, 1817, 4 Am. State Papers, For. Rel. 104.

The foregoing recommendations of President Madison and Mr. Monroe for the adoption of further legislation for the enforcement of the neutrality of the United States were immediately due to representations of the Portuguese minister at Washington, that privateers were fitted out in American ports and sailed thence under colors of the revolted Portuguese colonies; that these vessels were often officered and manned by Americans, and that after cruising they returned to American ports and were refitted. He acquitted the Government of any want of disposition to punish the offenders, but suggested that the difficulty lay in the want of preventive remedies in the act of 1794. As the result of the efforts of the administration there was passed the act of March 3, 1817, 3 Stat. 370. But this act, together with all prior legislation on the subject, was repealed and superseded by the comprehensive statute of April 20, 1818, 3 Stat. 447, the provi-

sions of which are now embodied in the Revised Statutes, secs. 5281–5291. An act similar in its prohibitions, though less effective in its administrative powers, was passed by the British Parliament in the following year.

Dana's Wheaton, sec. 440, note, 541; A Hundred Years of American Diplomacy, by J. B. Moore, proceedings of the American Bar Association, 1900.

"In the existing unfortunate civil war between Spain and the South American provinces, the United States have constantly avowed and faithfully maintained an impartial neutrality. No violation of that neutrality, by any citizen of the United States, has ever received sanction or countenance from this Government. Whenever the laws, previously enacted for the preservation of neutrality, have been found, by experience, in any manner defective, they have been strengthened by new provisions and severe penalties. Spanish property, illegally captured, has been constantly restored by the decisions of the tribunals of the United States; nor has the *life itself* been spared of individuals guilty of piracy, committed upon Spanish property on the high seas."

Mr. Adams, Sec. of State, to Mr. Vives, May 3, 1820, MS. Notes to For. Legs. II. 386; Am. State Papers, For. Rel. IV. 683.

"The Government of the United States may almost be said to have originated the modern doctrine of the obligations of neutrals to maintain their neutrality. They were the first to make that international obligation the subject of a municipal law. They have been loyal to that doctrine throughout their history. They have suffered because other powers have been less loyal to it than themselves, and they have continued to maintain it throughout the present disturbances in the islands of the West Indies. If there was any neglect to properly scrutinize the character of these vessels in the United States, which I do not admit, it was due in the one case to the neglect of the minister of Hayti and in the other case to the neglect of the Haytian consul."

Mr. Fish, Sec. of State, to Mr. Bassett, min. to Hayti, No. 16, Oct. 13, 1869, MS. Inst. Hayti, I. 158.

This instruction related to the departure from the United States of the vessels *Quaker City* and *Florida*. The *Quaker City* was originally seized on the representations of the Spanish minister, but was afterwards discharged for want of evidence to justify her detention. Subsequently the British minister represented that she had been sold to British subjects for a voyage to Jamaica, for which place she was cleared. About the same time legal proceedings were begun in New York, at the instance of representatives of the Haytian Government, to detain her as a cruiser intended to operate against that Government, but after consideration of the matter she was permitted to

depart upon giving the usual bond required by the statute. She left the United States unarmed and in fact went to Jamaica, and any hostile character which she assumed was taken on after her arrival there. The *Florida* was for some time under scrutiny in Philadelphia, but as no evidence against her was discovered she was permitted to sail for Boston, and there took in a cargo for Jamaica, apparently with the knowledge of the Haytian consul at that port, as well as of the Haytian minister. After her clearance the latter asked that she be detained, but she was then on the high seas. She sailed without armament. Both vessels seem to have been converted into vessels of war in Haytian waters. (Ibid.)

"The public measures designed to maintain unimpaired the domestic sovereignty and the international neutrality of the United States were independent of this policy [of avoiding entangling alliances], though apparently incidental to it. The municipal laws enacted by Congress then [in Washington's Administration] and since have been but declarations of the law of nations. They are essential to the preservation of our national dignity and honor; they have for their object to repress and punish all enterprises of private war, one of the last relics of mediæval barbarism; and they have descended to us from the fathers of the Republic, supported and enforced by every succeeding President of the United States."

Report of Mr. Fish, Sec. of State, to the President, July 14, 1870, S. Ex. Doc. 112, 41 Cong. 2 sess.; Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 305.

As to attempts made in 1866 to repeal the inhibitions of the neutrality laws of the United States against the fitting out of ships for belligerents, see Moore, Int. Arbitrations, 1, 497. Bemis's American Neutrality (Boston, 1866) ably exhibited the objections to this course, and advocated the consolidation and improvement of the laws.

Referring to "alleged defects in the municipal law" of Great Britain for the enforcement of neutrality during the civil war in the United States, and to the failure then to remedy those defects by appropriate legislation, Mr. Fish said:

"We hold that the international duty of the Queen's Government in this respect was above and independent of the municipal laws of England. It was a sovereign duty, attaching to Great Britain as a sovereign power. The municipal law was but a means of repressing or punishing individual wrongdoers; the law of nations was the true and proper rule of duty for the Government. If the municipal laws were defective, that was a domestic inconvenience, of concern only to the local government, and for it to remedy or not by suitable legislation as it pleased. But no sovereign power can rightfully plead the defects of its own domestic penal statutes as justification or extenuation of an international wrong to another sovereign power."

Mr. Fish, Sec. of State, to Mr. Motley, min. to England, No. 70, Sept. 25, 1869, For. Rel. 1873, III. 329, 332; MS. Inst. Great Britain, XXII. 50, 63.

See Moore, Int. Arbitrations, I. 520.

"But though it is an entire mistake to say that the American act of 1818 was in any respect superior to the British act of the ensuing year, it is true that, since the time the American act was passed, the working of the legal administration in the United States has become, for the purpose of proceeding against a suspected vessel, in one respect better than that of Great Britain. It appears that in each district of the United States there is a resident legal officer of the Federal Government, called the district attorney, to whom, if the action of the Government is invoked, a question of this kind is referred, and whose duty it is to ascertain the facts, collect the evidence, and report to the Government. Such an officer is, no doubt, better adapted to such a purpose than a collector of customs. But can it be said to have been the duty of the British Government, not having similar district officers, to appoint such, at the different shipbuilding ports, with a view the better to protect belligerents against ships being equipped or armed against them?

"Another advantage of the American system is, that the duty of adjudicating in such a case devolves on a judge in the court of admiralty instead of on a jury, who are sometimes apt to be swayed in favor of their own countrymen when sued at the instance of foreigners. But this relates to the condemnation of vessels, not to their seizure. And with the exception of the *Florida* and *Alabama*, every vessel the seizure of which could be asked for as instanced in the cases of the *Alexandra*, the *Pampero*, and the iron-clad rams at Birkenhead, was seized and prevented from doing any harm to the commerce of the United States. The *Alexandra*, it is true, was released after trial in England, but she was seized again at Nassau, and not liberated till after the close of the war. Practically speaking, therefore, in the later cases, everything was accomplished which could have resulted from the most perfect machinery that could have been devised for such a purpose."

Sir A. Cockburn, opinion in Geneva Tribunal of 1872, Papers relating to the Treaty of Washington, IV. 274.

In the same opinion (id. 301), the various "filibustering" expeditions which were started in the United States are reviewed with great zest.

"Mr. Baron Channell, in the case of the *Alexandra*, said: 'The foreign enlistment act, particularly the seventh section, is very imperfectly worded. There is no doubt that it was in a great measure, but with what appeared to me very important variations, penned from an act of the United States, passed in Congress, in 1792, and re-

enacted in 1818.' This vessel was built at Liverpool, nominally for Frazer, Trenholm & Co. She was, after being launched, immediately taken to a public dock for completion. According to the evidence at the trial, she was apparently built for war but not for commerce, but might have been used as a yacht. At the trial, which took place before the chief baron of the court of exchequer, on an information by the attorney-general, the jury found for the defendants. The question was left to the jury by the chief baron as follows: 'Was there any intention that in the port of Liverpool, or in any other port, she should be either equipped, furnished, fitted out, or armed with the intention of taking part in any contest? If you think the object was to equip, furnish, fit out, or arm that vessel at Liverpool, then that is a sufficient matter. But if you think the object really was to build a ship in obedience to an order and in compliance with a contract, leaving to those who bought it to make what use they thought fit of it, then it appears to me that the foreign enlistment act has not in any degree been broken.' (The Neutrality of Great Britain during the American Civil War, Mountague Bernard, ch. xiii. 355.) The arguments on the motion to discharge the rule are in Attorney-General *v.* Sillem, 2 Hurl & C. 431.

"Contrary to the course of the United States, in confiding the execution of her neutrality acts, including that of 1818, to the admiralty courts, the English act of 1819 gave jurisdiction to the common-law courts; and the case of the *Alexandra*, which was formally decided in favor of the defendant, though the opinions of the judges of the court of exchequer were divided on a technical question of construction, produced an irritation in the minds of the American people which neither the decision, in a contrary sense, of a Scotch court, nor even the interference of the Government with the purchase of the Anglo-Chinese squadron, supposed to be intended for the South, had any effect in allaying.

"So far back as January, 1867, a commission was appointed, consisting of some of the most eminent English jurists, including Phillimore, Twiss, and Vernon Harcourt, all high authorities on international law, and to which Mr. Abbott (now Lord Tenterden) was attached in the capacity that he held to the high commission at Washington. The result of their labors was embodied in the act of 9th of August, 1870, the passage of which was hastened by the Franco-Prussian war. This act prohibits the building, or causing to be built, by any person within Her Majesty's dominions any ship, with intent or knowledge of its being employed in the military or naval service of any foreign state at war with any friendly state; issuing or delivering any commission for any such ship; equipping any such ship, or dispatching or causing any such ship to be dispatched for such purpose. It is deserving of notice that Mr. Vernon Harcourt dissented to that

portion of the report of the commissioners that applied to the prohibition of ship building. Jurisdiction in cases under the act is given to the court of admiralty, which is not the least important amendment of the law."

Note by Mr. W. B. Lawrence to Wharton, Crim. Law (9th ed.), § 1908, p. 660.

"I recommend that the scope of the neutrality laws of the United States be so enlarged as to cover all patent acts of hostility committed in our territory and aimed against the peace of a friendly nation. Existing statutes prohibit the fitting out of armed expeditions and restrict the shipment of explosives, though the enactments in the latter respect were not framed with regard to international obligations, but simply for the protection of passenger travel. All the statutes were intended to meet special emergencies that had already arisen. Other emergencies have arisen since, and modern ingenuity supplies means for the organization of hostilities without open resort to armed vessels or to filibustering parties.

"I see no reason why overt preparations in this country for the commission of criminal acts, such as are here under consideration, should not be alike punishable, whether such acts are intended to be committed in our own country or in a foreign country with which we are at peace.

"The prompt and thorough treatment of this question is one which intimately concerns the national honor."

President Arthur, annual message, Dec. 1, 1884, For. Rel. 1884, IX.

3. Executive Action.

§ 1321.

The execution of the neutrality laws was at first left to the State executives, on the appeal of the President. "The militia of Richmond, in Virginia, actually marched, at a moment's warning, between seventy and eighty miles, to seize a vessel supposed to be under preparation as a French privateer. Resistance was at first apprehended, but it was overawed, and the business completely effected."

Mr. Randolph, Sec. of State, to Mr. Pinckney, Aug. 11, 1794, MS. Inst. U. States Ministers, II. 129.

"The extent of the United States imposes the necessity of substituting the agency of the governors in the place of an instantaneous action in the Federal Executive, and therefore general rules alone can be provided."

Mr. Randolph, Sec. of State, to Mr. Fauchet, Oct. 22, 1794, 1 Am. State Papers, For. Rel. 589.

Down to 1818 the general practice was for the President to call on the governors of States to aid in enforcing neutrality laws. After the statute of April 20, 1818, the President (and sometimes the Secretary of State acting for him) addressed circular letters, or special letters, to the attorneys-general, or to district attorneys and marshals, as the case might require, calling for their assistance in preserving neutrality.

See, Mr. Calhoun, Sec. of State, to Mr. Hoffman, Sept. 21, 1844, 34 MS. Dom. Let. 401; Mr. Buchanan, Sec. of State, circular, Aug. 30, 1848; Mr. Clayton, Sec. of State, circulars, Aug. 8 and 10, 1849, Jan. 22, and May 17, 1850; Mr. Marcy, Sec. of State, circular, June 5, 1854; Mr. Seward, Sec. of State, circular, April 8, 1861; Mr. Fish, Sec. of State, to Mr. Hoar, July 24, 1869, Mar. 4, 1870; Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Akerman, Aug. 1, 1870; Mr. Fish, Sec. of State, to Mr. Pierrepont, Feb. 19, 1876; to Mr. Bliss, Aug. 19, and Nov. 1, 1876; to Mr. Taft, Nov. 13, 1876, and Jan. 13, 1877; Mr. F. W. Seward, Act. Sec. of State, to Mr. Devens, Apr. 25, 1877; Mr. Evarts, Sec. of State, to Mr. Devens, June 5, 1877; to Messrs. Sullivan et al., Dec. 17, 1877; to Mr. Kobbe, Jan. 9, 1878; MS. Dom. Lets.

When there is probable cause to believe that expeditions are on foot to violate the neutrality laws of the United States, the President will direct the district attorneys of the jurisdictions in which such movements are suspected to exist to order due inquiries, and, if there be sufficient evidence, to commence legal proceedings against the parties implicated. (Mr. Forsyth, Sec. of State, circular, Dec. 21, 1837, 29 MS. Dom. Let. 261. Other circulars to the same effect will be found in the records of the Department of State for 1837–'38–'39. See, also, letter of Mr. Forsyth to the Governor of Vermont, Dec. 27, 1837, 29 MS. Dom. Let. 268.)

In 1855 the British minister at Washington called the attention of Mr. Marcy, Secretary of State, to the case of the ship *Maury*, at New York, which was suspected by the British consul of fitting out to be a Russian privateer. On the strength of affidavits of the consul, his lawyer, and two police officers, who expressed their belief that such was the destination of the vessel, the United States district attorney was directed to institute a prosecution, if cause appeared. The district attorney libeled the vessel and placed her in the custody of the marshal; but investigation showed that she was intended for the China trade, and the British consul withdrew his complaint.

Case of the United States at Geneva, Papers relating to the Treaty of Washington, I. 58; IV. 53–62; Dana's Wheaton, 561.

The Spanish consul at New York having stated that Mr. Fish had informed the Spanish minister at Washington that all complaints or information in respect to violations of the neutrality laws of the United States should be presented to the United States district attorney, Mr. Fish explained that, while he had requested the Spanish minister, for convenience in the judicial proceedings which might be

begun, as well as to secure prompt judicial action, to inform the Spanish consuls that they would be authorized to lay before the prosecuting officers of the United States, without previous transmission to the Department of State through the Spanish legation, any legal proofs of a violation of law which might be in their possession, it was not his purpose "to surrender to these subordinates the respective right and duty of making and receiving all complaints in respect to any alleged violation of the neutrality laws of this country, to the prejudice of the lawful authority of Spain. Such a proceeding would not have accorded with the dignity of this Government, or with the respect which it entertains for its ancient ally and friend."

Mr. Fish, Sec. of State, to Mr. Lopez Roberts, Spanish min., Dec. 28, 1870, For. Rel. 1871, 785, 787.

With reference to the case of the steamer *Hornet*, which had been seized at New York for violation of the neutrality laws, but which was afterwards discharged for want of evidence, Mr. Fish said: "A district attorney of the United States is an officer whose duties are regulated by law, and who, in the absence of executive warrant, has no right to detain the vessels of American citizens without legal process, founded not upon surmises, or upon the antecedent character of a vessel, or upon the belief or conviction of a consul, but upon proof submitted according to the forms required by law."

Mr. Fish, Sec. of State, to Mr. Lopez Roberts, Spanish min., Dec. 28, 1870, For. Rel. 1871, 785, 786.

After the announcement by Spain, in 1878, of the close of the insurrection, known as the Ten Years' War, in Cuba, the Department of State was in receipt of frequent representations from the Spanish legation as to alleged hostile expeditions, of more or less consequence, which were reported to be in preparation in the United States against the peace of Cuba. In all these cases the Department of State promptly took such measures as the circumstances admitted of, in concert with other departments of the Government, in order to prevent any violation of the neutrality laws.

The Spanish legation having informally represented that certain persons in New York, supposed to be natives of Cuba, were holding meetings, making inflammatory speeches, and collecting money for resuming the insurrection in Cuba, the Attorney-General was requested to call the matter to the attention of the United States district attorney in New York in order that "any breach of the law against hostile expeditions to a friendly foreign country" might be prevented, and the offenders prosecuted, if the requisite proof should be obtainable. (Mr. Hunter, Act. Sec. of State, to Mr. Devens, At. Gen., Sept. 2, 1879, 129 MS. Dom. Let. 593.)

Investigations through agents of the Treasury and the Department of Justice failed to discover sufficient ground for judicial proceedings in

the case of an alleged expeditionary enterprise, in which Col. Miguel Barnet and Gen. Cecilio Gonzalez were supposed to be concerned in Florida. (Mr. Evarts, Sec. of State, to Mr. Mendez de Vigo, Spanish min., April 7, 1880, MS. Notes to Spain, X. 96.)

Investigations of reports from Cuba that an expedition was fitting out near Key West, in ships named the *Cespedes* and *Estrella Solitaria Cubana*, elicited information that no such ships had been heard of at or near Key West. (Mr. Evarts, Sec. of State, to Mr. Mendez de Vigo, Span. min., May 3 and May 14, 1880, MS. Notes to Spain, X. 101, 105.)

A press report that the fruit steamer *Tropic* had taken a torpedo boat from Philadelphia to the Cuban coast was, after investigation, pronounced groundless. (Mr. Evarts, Sec. of State, to Mr. Mendez de Vigo, May 3, 1880, MS. Notes to Spain, X. 101.)

As to the exertions of the United States to prevent filibustering expeditions from Key West to Cuba, in 1884, especially in connection with the movements of Carlos Aguero, see Mr. Frelinghuysen, Sec. of State, to Mr. Reed, min. to Spain, No. 167, April 30, 1884, For. Rel. 1884, 493.

In the case of a filibustering expedition against Cuba said to be in preparation at Key West in January, 1885, the Department of State invoked the aid of the Attorney-General and of the Treasury and Navy Departments, and telegraphed to the governor of Florida urging the "exercise of all vigilance by State authorities in case of need to second efforts of Departments of Treasury, Navy, and Justice to prevent violation of neutrality statutes." (Mr. Frelinghuysen, Sec. of State, to Mr. Brewster, At. Gen., Jan. 16, 1885 (and same to Sec. of Navy and Sec. of Treasury), 153 MS. Dom. Let. 674; to Mr. Perry, governor of Florida, Jan. 16, 1885, id. 672; to governor of Florida, tel., Jan. 16, 1885, id. 673.)

A petition was presented by several citizens of the United States in February, 1885, for the pardon of Emilio Diaz, convicted at Key West July 1, 1884, and sentenced to imprisonment till March 5, 1885, for violating the neutrality laws. (Mr. Frelinghuysen, Sec. of State, to Mr. Brewster, At. Gen., Feb. 13, 1885, 154 MS. Dom. Let. 234.)

In May, 1885, the Attorney-General was requested to telegraph the agents of his Department at New Orleans to lend all due aid to further the ends of justice, in respect of a filibustering expedition said to be fitting out there against Cuba, "so soon as the judicial mechanism necessary for the enforcement of the laws applicable to the case shall have been set in motion by due information made under oath by some person having knowledge or belief of the facts alleged." The Treasury Department also telegraphed to the collector of customs. It was alleged that a bark named the *Adelina* was to be employed. (Mr. Bayard, Sec. of State, to Mr. Valera, Span. min., May 28 and June 13, 1885, For. Rel. 1885, 773; Mr. Bayard, Sec. of State, to At. Gen., May 28, 1885, 155 MS. Dom. Let. 521.)

See, also, Mr. Bayard, Sec. of State, to Mr. Valera, Span. min., March 31, 1885, For. Rel. 1885, 771; Mr. Bayard, Sec. of State, to Mr. Garland, At. Gen., Aug. 3, 1885, 156 MS. Dom. Let. 446.

As to drilling of men at Tampa and Key West, in 1886, with supposed intent to invade Cuba, see Mr. Bayard, Sec. of State, to At. Gen., June 14, 1886, 160 MS. Dom. Let. 173; Mr. Bayard, Sec. of State, to

Act. Sec. of Treas., July 3, 1886, id. 639; Mr. Bayard to At. Gen., July 3, 1886, id. 636.

See, further, as to action taken upon allegations as to attempts to send out filibustering expeditions, Mr. Adee, Acting Sec. of State, to Mr. Garland, At. Gen., Sept. 16, 1887, 165 MS. Dom. Let. 388; Mr. Bayard, Sec. of State, to Sec. of Treasury, Nov. 3, 1887, 166 MS. Dom. Let. 56; same to same, April 25, 1888, 168 MS. Dom. Let. 203 (referring to a proclamation of martial law by the governor-general of Cuba in the provinces of Havana, Pinar del Rio, and Santa Clara); same to same, personal, April 25, 1888, ibid.

Where reports of intended violations of neutrality are brought by foreign ministers to the notice of the Department of State, it is the practice of the Department to transmit a copy of the minister's note to the Secretary of the Treasury and the Attorney-General, with the request that the agents of their respective departments in the localities named shall take, in cooperation so far as practicable, all proper precautions to frustrate any violations of law. At the same time the minister is reminded that the officials of his government on the spot should be instructed to make, or cause to be made, before the proper judicial authorities, formal declaration of any facts within their knowledge which may inculpate the authors of any such violations of law, and thus to set in motion the machinery necessary to the administration of justice.

For. Rel. 1887, 1026–1029.

See, also, For. Rel. 1885, 773.

In February, 1886, Mr. Valentine, consul-general of Guatemala at New York, communicated to Mr. Bayard, who was then Secretary of State, a letter from the minister of foreign relations of Guatemala, advising him of reports that persons residing at New York were endeavoring to send out filibustering expeditions against Honduras and Salvador, and instructing him to do all in his power to impede such expeditions, just as if they were directed against his own Government. Mr. Valentine asked Mr. Bayard to authorize him to cable his Government that the assistance of the United States was at its command "to prevent expeditions against Central America." Mr. Bayard replied that, while the Government of the United States was disposed to use all possible means to prevent the setting on foot of hostile expeditions, he was unable to give an assurance that the power of the United States would be "allied" with that of Guatemala to prevent alleged violations of neutrality against the peace of other Central American States. He added, however, that if evidence of any such violation was presented in a proper way in respect of any of those states, no efforts would be spared to prevent and punish any persons concerned in a violation of the neutrality laws.

Mr. Bayard, Sec. of State, to Mr. Hall, min. to Central America, No. 329, Feb. 20, 1886, For. Rel. 1886, 56–58.

The Department of State will take prompt measures whenever information is laid before it to advise the proper authorities to inquire into an alleged movement to violate the neutrality laws, but prompter action would be assured if the agents of the foreign government at any place within the United States where such an expedition is supposed to be preparing were to apply directly to the United States district attorney and present to him full information.

Mr. Bayard, Sec. of State, to Mr. Preston, Haytian min., Oct. 29, 1888, For. Rel. 1888, I. 990.

"As you were informed by my telegram of the 10th instant, the collector of customs at New York, under instructions communicated to him by the Secretary of the Treasury, had taken steps to prevent the departure of the said steamer pending an investigation.

"In that telegram I had the honor to advise you to lay such proofs as you might possess before the collector, and in my telegram of to-day, of which I inclose a copy herewith, I further requested you to confer with the United States attorney for the southern district of New York with a view to instituting by competent complaint, under oath and with submission of proofs, the judicial proceedings necessary in such cases.

"Your note of the 10th instant appears to suggest your impression that it is the province of the Government of the United States to continue the proceedings and determine whether or not the vessel in question has violated the neutrality laws of the United States. Such a determination, however, can only be reached by due process of law, and, following the rule established in such cases, the direct intervention of the Executive Department of this Government is limited to taking such steps as may afford a reasonable opportunity for substantial complaint before the competent judicial authorities, and for the adoption by them of such measures as may bring the case within the jurisdiction of the court.

"Under all the circumstances, I need not impress upon you the necessity for immediate action in order that the machinery of justice may be duly set in motion; and I am sure, Mr. Minister, that you will appreciate the urgency of promptly doing so in order that the temporary and purely precautionary intervention of the Executive in this relation may be replaced by regular judicial process of libel and trial."

Mr. Adee, Act. Sec. of State, to Mr. Bolet Peraza, Venezuelan min., Sept. 12, 1892, For. Rel. 1892, 640-641.

The steamer referred to was the *South Portland*. She was not libeled, and a proceeding against the master having failed to establish any

violation of the neutrality laws, was discharged and permitted to sail. "The essential charge having failed, no room remained for the libeling of the vessel. The [United States] attorney having so reported, the executive discretion of this department to request the further detention of the *South Portland* by the customs authorities came to an end, and it became my duty so to advise the Secretary of the Treasury." (Mr Foster, Sec. of State, to Mr. Bolet Peraza, Venezuelan min., Sept. 22, 1892, For. Rel. 1892, 645.)

See Mr. Foster, Sec. of State, to U. S. dist. attorney, New York, tel., Sept. 14, 1892, 188 MS. Dom. Let. 165; same to same, tel., Sept. 17, 1892, id. 214; Mr. Foster to Sec. of Treasury, Sept. 17, 1892, id. 220.

"I note your concluding request that, in obedience to the cordial sentiments of the United States for Venezuela, orders be sent by telegraph to the commanders of the naval vessels of the United States now in Venezuelan waters not to permit the *South Portland*, which has been cleared for Trinidad, to land contraband of war at Puerto Cabello, which port you state to be now occupied by a revolutionary faction. Even were a state of belligerency duly recognized and the obligations of international neutrality flowing therefrom actually incumbent upon this Government, I need hardly point out to you that no duty to assist one of the combatants to blockade a hostile port, or to assume to exercise belligerent rights and powers in respect of such contraband of war, could exist. The function of blockade and the rights to be exercised in respect to contraband of war pertain exclusively to combatants, and may not be assumed by a neutral power, however friendly."

Mr. Foster, Sec. of State, to Señor Bolet Peraza, Venezuelan min., Sept. 28, 1892. For. Rel. 1892, 647.

The *South Portland* had been detained by Executive order at New York, pending the arrest and examination of her master on a charge of violation of the neutrality laws, but the charge not being substantiated had been permitted to sail. (For. Rel. 1892, 624, 625, 627, 639–646.)

On June 11, 1895, the Treasury Department issued circular instructions to all collectors and deputy collectors at the sixty-four ports and subports on the Atlantic coast, from New York City to Brownsville, Texas, enjoining vigilance in the enforcement of the neutrality laws in order to prevent any illegal aid to the insurrection in Cuba. These instructions were, on the next day, followed by a proclamation of the President warning all persons against any violation of the neutrality laws. The length of coast covered by the Treasury instructions of June 11, 1895, was 5,470 miles. Nevertheless, during the two and a half years of the insurrection, it was alleged in an elaborate report made by the legal adviser of the Spanish legation that only six American vessels, of an aggregate of 1,331 registered tons, had successfully landed expeditions from the United States in

Cuba. Three foreign vessels, of an aggregate of 1,772 registered tons, were alleged to have been successful in landing such expeditions in Cuba.

Mr. Gage, Sec. of Treasury, to Sec. of State, Nov. 30, 1897, Treasury Dept. Doc. No. 1989.

This document contains an elaborate review of the neutrality cases that had been the subject of controversy between the two governments.

March 1, 1899, the Secretary of the Navy, pursuant to representations of the Secretary of State, telegraphed to the commanding officer of the U. S. S. *Machias*, then at Puerto Cortez, Honduras, a report that the steamer *Managua* had left New Orleans, ostensibly for Puerto Barrios, in Guatemala, with a numerous, well-organized, armed expedition intended to foment insurrection in Honduras, and instructed him to take such action as might be necessary under the neutrality laws of the United States "to prevent the commission of hostile acts by this expedition, fitted out in the United States against a friendly government." Measures were also taken by the President of Guatemala to prevent the landing of the alleged filibusters in that country, and the legation of the United States in Guatemala was instructed if there were reasonable grounds of suspicion not to oppose the action of the Government of Guatemala in refusing to permit them to land. At the same time the customs authorities at New Orleans were directed by the Treasury Department to prevent any violation of the laws of the United States. On the 2d of March the collector at New Orleans telegraphed the Treasury that 116 alleged filibusters had arrived there from Kansas City on the preceding day. Inspectors were placed at the various steamship landings and other points of exit from the city, with instructions to prevent the departure of any suspicious passengers. The leaders of the expedition, finding it impossible to take the men out without a clash with the authorities, abandoned the project and paid the fare of 67 of the men back to Kansas City. The rest remained and sought to get away in small groups, but they were placed under close watch and prevented from departing. Clearance was withheld from two steamers until certain passengers could be examined, some of whom, being found to belong to the expedition, were not allowed to sail. The collector further reported: "This office is of opinion that no contraband goods nor men who propose to engage in the filibustering enterprises have left this port recently. Acting in conjunction with the United States attorney, this office has been careful, in all instances where a question arose as to the propriety of a shipment of goods or departure of men, to act without exercising its authority, the agents or owners of vessels in each instance taking upon themselves, by advice of this office, the

responsibility of refusing the shipments or passengers." The President of Honduras subsequently telegraphed to the chargé d'affaires of Honduras in Guatemala that by the action of the President of that Republic and of the United States the menace of filibusters had disappeared.

For. Rel. 1899, 364–370.

As to alleged expeditions against Honduras, especially in connection with the steamer *San Domingo*, see Mr. Bayard, Sec. of State, to Sec. of Treasury, Feb. 9, 1886, 159 MS. Dom. Let. 33; Mr. Bayard to Attorney-General, Feb. 11, 1886, id. 50; same to same, March 10, 1886, id. 274; Mr. Bayard to Mr. Helder, March 16, 1886, id. 332. See, also, Mr. Bayard to Gov. Gordon, of Georgia, June 7, 1887, 164 MS. Dom. Let. 337, as to an expedition supposed to be fitting out at Savannah, Ga.

4. Judicial Action.

§ 1322.

"[The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.] In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this Title [R. S., 5281–5291]; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to the execution of the prohibitions and penalties of this Title, and to the restoring of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace."

Sec. 5287, Revised Statutes.

"It seems obvious that the *Executive* branch of Government would not be justified in *ordering judicial process* where the *judicial* officer did not find *legal* ground for a prosecution."

Mr. Pickering, Sec. of State, to Mr. Bond, Brit. chargé d'affaires, Sept. 30, 1795, 8 MS. Dom. Let. 413.

To an action of trespass for the seizure of a ship under the neutrality act of 1794, defendant pleaded that the vessel was attempted to be fitted out and armed to carry on hostilities against a foreign state with which the United States were at peace. It was objected that the plea did not specify the state against which the ship was intended to be employed. The court, Story, J., delivering the opinion, said: "As the allegation follows the words of the statute, it has sufficient certainty for a libel or information *in rem* for the asserted forfeiture under the statute, and, consequently, it has sufficient certainty for a plea. Indeed, there is as much certainty as there would have been, if it had been averred that it was in the service of, or against, some foreign state unknown to the libellant, which has been adjudged in this court, to be sufficient in an information of forfeiture. (Locke *v.* The United States, 7 Cranch, 339.)"

Gelston *v.* Hoyt (1818), 3 Wheat. 246, 330.

The Secretary of State can not with propriety draw the line or define the boundary between neutral and unneutral acts. The interpretation and exposition of the laws belong peculiarly to the judiciary, and a stranger who desires information concerning them should consult private counsel.

Mr. Adams, Sec. of State, to Mr. Aguirre, Aug. 27, 1818, MS. Notes to For. Legs. 11, 337.

The test of the violation of the laws of the United States against interference with foreign governments is the commission of an overt act.

Cushing, At. Gen., 1855, 8 Op. 472.

While objecting to a continuance granted by the presiding judge in the trial of the case of Rumble, tried and acquitted in England in 1865 for breach of neutrality laws, "this Government acknowledges that it does not otherwise find any sufficient ground for questioning the learning or the impartiality of the presiding judge in the conduct of the trial."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, March 21, 1865, Dip. Cor. 1865, I. 254.

Rumble was indicted and tried for violation of the British neutrality laws in the equipment and the enlistment of men for the *Kappahannock*. For the report of the trial, in which Rumble was acquitted by the jury, see Dip. Cor. 1865, I. 112.

"You appear to impugn the sufficiency of the existing modes of procedure in the United States with reference to infractions of law, as, for instance, when you advert to the apprehended results of trial by a jury of the vicinage where the offense may have been committed, and assume that the prevalence of popular sympathy with the accused would 'almost certainly' result in acquittal. . . .

"You say that you deplore 'as almost incomprehensible this laxity in defending a friendly nation from the attacks of any conspirators, and this singular idea of calling "neutrality" this lack of discrimination between a legitimate and civilized government, which is regarded as friendly and an outlaw who seeks to make war upon that Government by means of robbery, plunder, and incendiarism. *One would think that there was no room for neutrality in such a case*, and that none was possible between two parties whose characters are so entirely distinct.' . . .

"This Government administers its own law in the case; it does not assume to visit with penalty conduct which, if committed within a foreign jurisdiction, might be punishable therein. To do otherwise would be, in effect, to attempt to recognize and administer within the sovereignty of the United States a domestic law of another sovereign. As I intimated in my note to you of May 28 last, proceedings under the 'neutrality laws' of the United States are 'set in motion by due information made under oath by some person cognizant of the facts alleged or possessing belief sufficient to that end,' but they are so set in motion in the name, and by the power, and through the officers, of the Government of the United States. Prosecutions against any who are alleged to have contravened those laws are not by suit *inter partes*, but in the name and behalf of the Government of the United States against the accused. The foreign government against whose peace the alleged hostile act may be directed is not a plaintiff in the action, as you seem to suggest. The Government of the United States is the plaintiff.

"The injury complained of is not to the foreign government, but to the peace and good order and laws of the Government of the United States. And the Executive can no more punish or repress offenses of this nature without the judicial ascertainment of the fact that an unlawful act has been committed than it could by administrative mandate award death on a charge of murder. Neither in the one case nor in the other could the representations of parties claiming to be aggrieved override the indispensable requisite of a judicial proceeding. The fact that the imputed act of wrong doing may, in its result, affect the peace of another state, does not supersede the law applicable to the case, and recourse to that law can not 'imply the uselessness of a diplomatic representative.'"

Mr. Bayard, Sec. of State, to Mr. Valera, Span. min., July 31, 1885, For. Rel. 1885, 776.

See, in a similar sense, Mr. Bayard, Sec. of State, to Mr. Garland, At. Gen., Aug. 3, 1885, 156 MS. Dom. Let. 446.

"It is certain, however, that the Executive has no right to interfere with or control the action of the judiciary in proceedings against persons charged with being concerned in hostile expeditions against friendly nations. The President may employ the military and naval forces to disperse or prevent the departure from our territory of any such expedition, or of any men, arms, or munitions which are manifestly parts thereof; and, being a coordinate authority, he would not be precluded from so doing, in a proper case, by the action of the judiciary. But it is plain that such means are practicable only when there is open defiance of the authority of the Government by an organized body of men.

"Occasions may be imagined when the summary process of martial law might perhaps be resorted to against the persons composing such a body. But in all such cases as those which have come to the notice of the Government these conditions do not exist, and the judicial authority is the only one which can be properly or efficiently invoked. (See Mr. Bayard to the Spanish minister, 3 Whart. Dig. Int. Law, p. 625.) Our Government possesses all the attributes of sovereignty with respect to the present subject, and has for their exercise the appropriate agencies which are recognized among civilized nations: but our Constitution forbids the arbitrary exercise of power when the liberty or property of individual citizens is involved. It cannot therefore resort to some measures which are still possible in some countries. But I do not think that it can be held chargeable with lack of diligence for not taking steps which would be inconsistent with the principles on which all republics are founded."

Harmon, At. Gen., Dec. 10, 1895, 21 Op. 267, 273.

A consul of a foreign government, who is the only representative present of his government, has the right to intervene and claim a vessel belonging to such government against which a libel has been filed to secure her forfeiture for violation of the neutrality laws.

The Conserva, 38 Fed. Rep. 431.

A proceeding under section 5283, Revised Statutes, is a simple suit in admiralty, where the decree will be simply that the libel will be dismissed or the vessel condemned; and no decree of restitution is necessary.

The Conserva, 38 Fed. Rep. 431.

5. Arrest and Detention.

§ 1323.

A vessel under arrest, to prevent her from cruising against belligerent powers, may be discharged on the order of the President communicated to the marshal having her in custody.

Bradford, At. Gen., 1794, 1 Op. 48.

In an action of trespass for damages for the wrongful seizure of a vessel under the neutrality laws, the defendant, a collector of customs, who had employed only civil means, sought to justify the seizure on the strength of section 7 of the act of 1794, by alleging an order of the President of the United States, and arguing that as the President had authority by section 7 to employ the military and naval forces for the purpose of executing the neutrality laws, he might a fortiori employ a civil officer or force for that purpose, and that his order to that effect was a sufficient justification of the seizure. Story, J., delivering the opinion of the court, said:

"But upon the most deliberate consideration, we are of a different opinion. The power thus entrusted to the President is of a very high and delicate nature, and manifestly intended to be exercised only when, by the ordinary process or exercise of civil authority, the purposes of the law cannot be effectuated. It is to be exerted on extraordinary occasions, and subject to that high responsibility which all executive acts necessarily involve. Whenever it is exerted, all persons who act in obedience to the executive instructions, in cases within the act, are completely justified in taking possession of, and detaining, the offending vessel, and are not responsible in damages, for any injury which the party may suffer by reason of such proceeding. Surely it never could have been the intention of Congress, that such a power should be allowed as a shield to the seizing officer, in cases where that seizure might be made by the ordinary civil means? One of these cases put in the section is, where any process of the courts of the United States is disobeyed and resisted; and this case abundantly shows, that the authority of the President was not intended to be called into exercise, unless where military or naval force were necessary to ensure the execution of the laws. In terms the section is confined to the employment of military and naval forces; and there is neither public policy nor principle to justify an extension of the prerogative, beyond the terms in which it is given. Congress might be perfectly willing to entrust the President with the power to take and detain, whenever, in his opinion, the case was so flagrant that military or naval force were necessary to enforce the laws, and yet with great propriety deny it, where, from the circumstances

of the case, the civil officers of the Government might, upon their private responsibility, without any danger to the public peace, completely execute them. It is certainly against the general theory of our institutions to create great discretionary powers by implication, and in the present instance we see nothing to justify it."

Gelston *v.* Hoyt (1818), 3 Wheat. 246, 331.

Every neutral nation has a right to exact by force, if need be, that belligerent powers shall not make use of its territory for the purposes of their war.

Cushing, At. Gen., 1855, 7 Op. 122.

When an officer belonging to a military force ordered out by the President, under the neutrality act of March 10, 1838, section 8 (5 Stat. 214), "to prevent the violation, and to enforce the due execution" of the act, and instructed by his commanding general to execute that purpose, seized property, as a precautionary means to prevent an intended violation of the act, with a view of detaining it until an officer having the power to seize and hold it for the purpose of proceeding with it in the manner directed by the statute could be procured and act in the matter, it was held that the seizure was lawful.

Stoughton *v.* Dimick, 3 Blatch. 356; 29 Vt. 535.

In November, 1864, the steamer *Colon* was seized at San Francisco on suspicion of an intended violation of the neutrality laws. The papers showed that the vessel was purchased for $32,000 by General P. Herran, of Colombia, to be equipped for war purposes and sent to Callao to be transferred to the Peruvian Government. General Herran acted ostensibly as a commissioner of Peru, although the Peruvian minister at Washington was not advised of his employment. Mr. Seward asked that the vessel be detained till the President should otherwise direct. "The relations existing between Spain and Peru at this time," said Mr. Seward, "not being of the most amicable nature, it is incumbent upon the United States to guard against any causes of dissatisfaction on the part of either of those governments which might arise from a departure from our just neutrality towards them." As the survey of the vessel made at San Francisco indicated that she was well adapted to the revenue service but was not strong enough for a man-of-war, Mr. Seward at the same time suggested that the Treasury Department purchase her for the former purpose.

Ten days later Mr. Seward stated that as the vessel was purchased, armed, and equipped "evidently with a view to the prosecution of hostilities, and in contravention of the Executive order of November

21, 1862, prohibiting the exportation of warlike materials from the ports of the United States," she would be detained till ordered by the President to be released.

On March 23, 1865, Mr. Seward stated that orders had been issued by the Department of State "to the Secretaries of War and Treasury, for the release of the steamer *Colon*, purchased by General P. A. Herran for the Peruvian Government," and that orders to that effect had been telegraphed by the War Department to the general commanding the Department of the Pacific.

Mr. Seward, Sec. of State, to Mr. Fessenden, Sec. of Treasury, Dec. 9, 1864, 67 MS. Dom. Let. 272; Mr. Seward, Sec. of State, to Señor Don Carlos Tracy, Dec. 19, 1864, MS. Notes to Peruvian Leg. I. 288; Mr. Seward, Sec. of State, to Señor Don Emilio Bonifaz, March 15, 1865, id. 291; same to same, March 23, 1865, id. 292.

Persons and vessels arrested under order of the President for breach of neutrality may be detained by the naval forces of the United States, under his directions, until lawfully discharged.

Mr. Fish, Sec. of State, to Mr. Edwards Pierrepont, U. S. dist. atty. at New York, June 29, 1869, 81 MS. Dom. Let. 325.

In July, 1869, the President issued to the district attorney and marshal for the southern district of New York a commission empowering them, or either of them, "to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purposes indicated in the eighth section of the act of April 20, 1818, commonly known as the 'neutrality act.'"

Mr. Fish, Sec. of State, to Mr. Pierrepont, July 13, 1869, 81 MS. Dom. Let. 385.

Orders were at the same time given for the capture of all concerned in expeditions violating such law. (Ibid.)

See also Mr. Fish's letter to Mr. Pierrepont, of July 15, 1869; Mr. Fish to Mr. Barlow, July 17, 1869; Mr. Fish to Mr. Robeson, Aug. 10, 1869; Mr. Fish to Mr. Barlow, Aug. 10, 1869, as to custody of gunboats seized under above order: 81 MS. Dom. Let. 399, 411, 516, 517.

As to the subsequent destiny of these gunboats, see Mr. Fish to Mr. Pierrepont, Nov. 26, 1869, 82 MS. Dom. Let. 385.

The proper authorities in New York will be instructed to detain gunboats preparing to issue from that port, in violation of neutrality in the contest between Peru and Spain.

Mr. Fish, Sec. of State, to Mr. Freyre, Aug. 10, 1869, MS. Notes to Peru, I. 373.

As to withdrawal of this order on peace between Peru and Spain, see same to same, Dec. 8, 1869, id. 385.

In the case of certain Spanish gunboats which were detained under legal process at New York at the instance of the Peruvian minister,

on the ground that a state of war existed between Peru and Spain and that they were intended to operate against Peru, the Spanish minister at Washington desired the Department of State to inform the Peruvian minister that the vessels were not intended to operate against Peru or to relieve other vessels of the Spanish navy in Cuban waters for use against Peru, and that it was the desire of the Spanish Government to cultivate the most friendly relations with all the Spanish-American republics and to discard any unfriendly policy towards them. Mr. Fish communicated these assurances to the Peruvian minister, at the same time referring to a declaration made by the latter to Mr. Seward on May 8, 1868, that a formal state of war no longer existed between the allied republics and Spain, "but on the contrary a condition of imperfect peace." The Peruvian minister, accepting these assurances, withdrew any objection to the departure of the vessels; and the Government of the United States announced that it could no longer hesitate to adopt "the conclusion that a state of war does no longer exist between the governments of Spain and Peru," a conclusion which involved the withdrawal of the proceedings against the gunboats.

Mr. Fish, Sec. of State, to Mr. Freyre, Peruvian min., Dec. 3, 1869, MS. Notes to Peruvian Leg. I. 379; same to same, Dec. 8, 1869, id. 385.

As to a similar declaration made by the representative of Peru to Spain in 1868, in the case of the monitors *Oneota* and *Catawber*, see Mr. Fish, Sec. of State, to Mr. Freyre, Dec. 8, 1869, MS. Notes to Peruvian Leg. I. 385; Mr. Seward, Sec. of State, to Sec. of Treas., May 23, 1868, 78 MS. Dom. Let. 493.

See, also, Mr. Evarts, Sec. of State, to Mr. Shishkin, Feb. 21, 1879, MS Notes to Russia, VII. 259.

The President, under the eighth section of the act of April 20, 1818, is not required to arrest in a United States port an unarmed vessel unless it be shown that a military enterprise is begun or set on foot through her contrary to the provisions of the statute.

Mr. Fish, Sec. of State, to Mr. Bernabé, Mar. 23, 1874, MS. Notes to Spain, IX. 220.

"The several collectors of the customs shall detain any vessel manifestly built for warlike purposes, and about to depart the United States, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances, render it probable that such vessel is intended to be employed by the owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, until the decision of the President is had thereon, or until the owner

gives such bond and security as is required of the owners of armed vessels by the preceding section."

Section 5290, Revised Statutes.

"I notice your reference to the inadequacy of the powers with which a collector of customs is invested under Title 67, R. S., to meet the emergency of an attempt by an armed organization to leave our shores in violation of the neutrality laws. The conjoint operation of the revenue and judicial powers has, however, in recent instances been sufficient to thwart and punish criminal attempts in the United States against the peace of friendly neighbors, such as Hayti and Honduras."

Mr. Bayard, Sec. of State, to Act. Sec. of Treasury, July 3, 1886, 160 MS. Dom. Let. 639.

Under sec. 970, Revised Statutes, the collector of a port made application for a certificate of reasonable cause for having seized a steamer for a violation of the neutrality laws. The steamer had been chartered for the use of insurgents against the Colombian Government to carry arms for their use. The manifest did not state that she had arms aboard, and a false destination was given. After discharging her arms she took soldiers aboard, who captured custom-house officers and tried to use the steamer to capture a Colombian vessel. Held, that the certificate should issue.

The City of Mexico, 25 Fed. Rep. 924.

A collector of customs is not justified in refusing clearance to a vessel and her cargo, under sec. 5290, Revised Statutes, because she is intended to transport arms and munitions of war for the use of an insurrectionary party in a country with which the United States is at peace.

Henricks *v.* Gonzalez, 67 Fed. Rep. 351, 14 C. C. A. 659.

6. Exaction of Bond.

§ 1324.

"The owners or consignees of every armed vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall, before clearing out the same, give bond to the United States, with sufficient sureties, in double the amount of the value of the vessel and cargo on board, including her armament, conditioned that the vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any

foreign prince or state, or of any colony, district, or people, with whom the United States are at peace."

Section 5289, Revised Statutes.

"The Government of the United States has taken no new resolution to prevent vessels under their flag sailing from their ports in a warlike condition. The law on this subject has remained the same during the last ten years. According to the provisions of the act of Congress, every person is prohibited from fitting out and arming or augmenting the force of any vessel within the limits of the United States to cruise against the subjects, citizens, or property of any prince or state, colony, district, or people with whom the United States are at peace. In instances in which the sailing of armed vessels belonging wholly or in part to citizens of the United States, which is allowed in certain cases for self-protection against pirates or other unlawful aggressions, the owners are required to give bond with sufficient sureties in double the amount of the value of the vessel and cargo, prior to clearing, that it shall not be employed by such owners to cruise against powers with which the United States are at peace. And in other instances the proper officers are authorized to detain any vessel manifestly built for warlike purposes, and about to depart from the United States, the cargo of which vessel shall principally consist of arms and ammunition of war when the number of men shipped on board or other circumstances shall indicate that such vessel is intended to be employed by the owners to cruise or commit hostilities against friendly powers until the decision of the President thereon, or until the owners shall give bond and security as previously required."

Mr. Clay, Sec. of State, to Mr. Rebello, Brazilian chargé, May 1, 1828, MS. Notes to For. Legs. IV. 16.

As to the bond given by the German Empire (which ceased to exist Dec. 20, 1849), that the war steamer *United States* should not be used in hostilities against Denmark during the Schleswig-Holstein war, see Mr. Clayton, Sec. of State, to Mr. Hilliard, M. C., Feb. 23, 1850, 37 MS. Dom. Let. 450.

That a United States district judge has power to require a person, who has given just ground to suspect him of an intent to violate the neutrality laws, to give bond that he will observe them, see United States *v.* Quitman, 2 Am. L. Reg., 645.

When a court of the United States, in the exercise of its discretion, has advisedly determined to permit a vessel libeled for violation of the neutrality laws to be released on bond, the executive department has no power to interfere with the proceedings.

Stanbery, At. Gen., 1866, 12 Op. 2.

"It has been held that persons justly suspected of an intention to engage in such enterprises may be required by the courts to give bond not to do so. (United States *v.* John A. Quitman, 2 Am. Law Reg., 645.) Persons in charge of any armed vessel may be required to give like security as a condition of clearance. (Rev. Stats., secs. 5289, 5290.)"

Harmon, At. Gen., Dec. 10, 1895, 21 Op. 267, 272–273.

Where a vessel, libeled for forfeiture under section 5283 of the Revised Statutes, was released on bond and stipulation, it was held that she was improvidently released and should be recalled; and it was intimated, but not decided, that, in the case of a libel for forfeiture under section 5283, the release of a vessel on bond and stipulation, as in the pending case, before answer or hearing, against the objection of the United States, was unauthorized.

The Three Friends (1897), 166 U. S. 1. 68, citing, particularly, The Mary N. Hogan, 17 Fed. Rep. 813.

7. Restitution of Captured Property.

§ 1325.

"The Sieur Cunningham, captain of an American armed vessel, after having wasted the British commerce, entered the port of Dunkirk. He there disarmed his vessel, and declared that he was about to load with merchandise for one of the ports of Norway. As this declaration appeared suspicious, security was demanded of Cunningham; he presented two, the Sieurs Hodge and Allen, both British. Cunningham sailed in reality from the port of Dunkirk without being armed; but clandestinely, and in the night, he caused seamen, guns, and warlike stores to be put on board his vessel, which was in the road. He set sail and in a short time made prize of a British packet-boat, the Prince of Orange. As soon as the French government was made acquainted with the fraud of Cunningham, they caused the Sieur Hodge, one of his securities, to be arrested and conducted to the Bastile; and the packet-boat was restored to the Court of London without further trial, because the offense of Cunningham was evident and public."

Observations on the Justificative Memorial of the Court of London, by Pierre Augustin Caron de Beaumarchais, English translation, Philadelphia, 1781.

A copy of the rare pamphlet from which the foregoing is quoted was presented by the Hon. A. B. Hagner, of Washington, to the Department of State in 1879. Of this pamphlet, Caleb Cushing, in a letter to Mr. Hagner, of January 7, 1874, speaks as follows: "The memoirs which it contains are of the highest possible historical and juridical value.

The English memoir was written by Edward Gibbon. The several memoirs constitute the first example and precedent of regular discussion of the great question, Under what circumstances may a neutral Government recognize the independence of the rebels or seceders of another and a friendly government?

"My knowledge of these memoirs is derived from the 'Causes Celèbrès' of Martens; but I find, to my surprise, on comparing Martens with your English copy, that the original has been greatly mutilated by Martens."

The expeditions of Cunningham (or Conyngham) are narrated in detail in Hale's Franklin in France, 136, 174, 309, 346, 348, 375.

See, also, the same work for notices of the French evasion of their own neutrality laws in rendering aid to American privateers prior to the declaration of war by France against England.

The seizure by one belligerent, in neutral territory, of a ship belonging to another belligerent, is unlawful, and the ship must be restored.

Randolph, At. Gen. 1793, 1 Op. 32; 1 Am. State Papers, For. Rel. 148.

"Restitution of prizes has been made by the Executive of the United States only in the two cases, 1st, the capture within their jurisdiction, by armed vessels, originally constituted such without the limits of the United States; or 2d, of capture, either within or without their jurisdiction, by armed vessels, originally constituted such within the limits of the United States, which last have been called proscribed vessels.

"All *military equipments* within the ports of the United States are forbidden to the vessels of the belligerent powers, even where they have been constituted vessels of war before their arrival in our ports; and where such equipments have been made before detection, they are ordered to be suppressed when detected, and the vessel reduced to her original condition. But if they escape detection altogether, depart and make prizes, the Executive has not undertaken to restore the prizes.

"With due care, it can scarcely happen that military equipments of any magnitude shall escape discovery. Those which are small may sometimes, perhaps, escape, but to pursue these so far as to decide that the smallest circumstance of military equipment to a vessel in our ports shall invalidate her prizes through all time, would be a measure of incalculable consequences. And since our interference must be governed by some general rule, and between great and small equipments no practicable line of distinction can be drawn, it will be attended with less evil on the whole to rely on the efficacy of the means of prevention, that they will reach with certainty equipments of any magnitude, and the great mass of those of smaller importance also; and if some should in the event, escape all our vigilance, to consider these as of the number of cases which will at times baffle the

restraints of the wisest and best-guarded rules which human foresight can devise. And I think we may safely rely that since the regulations which got into a course of execution about the middle of August last, it is scarcely possible that equipments of any importance should escape discovery."

Mr. Jefferson, Sec. of State, to minister of Great Britain, Nov. 14, 1793, 4 Jefferson's Works, 78; 5 MS. Dom. Let. 346.

A French privateer having come to Charleston unarmed, leave to arm her was asked and refused. She returned, after a cruise, with guns mounted and a prize. The court restored the prize, the ground being that she did take on board the guns at Charleston to be used as her armament, and that the act was an illegal augmentation of force.

The Nancy, Bee, 73.
See, also, The Betty Cathcart, Bee, 292, and Dana's Wheaton, § 439, note, 215; The Alerta *v.* Moran (1815), 9 Cranch, 359.
See Geyer *v.* Michel (1796), 3 Dall. 285.

The capture of a vessel of a country at peace with the United States, made by a vessel fitted out in one of our ports, and commanded by one of our citizens, is illegal, and if the captured vessel is brought within our jurisdiction, the district courts, upon a libel for a tortious seizure, may inquire into the facts, and decree restitution. And if a privateer, duly commissioned by a belligerent, collude with a vessel so fitted out and commanded, to cover her prizes and share with her their proceeds, such collusion is a fraud on the law of nations, and the claim of the belligerent will be rejected.

Talbot *v.* Janson (1795), 3 Dall. 133.

"The power and duty of the United States to restore captures made in violation of our neutral rights and brought into American ports, have never been matters of question; but, in the constitutional arrangement of the different authorities of the American Federal Union, doubts were at first entertained, whether it belonged to the executive government or to the judiciary to perform the duty of inquiry into captures made in violation of American sovereignty, and of making restitution to the injured party. But it has long since been settled that this duty appropriately belongs to the Federal tribunals, acting as courts of admiralty and maritime jurisdiction. It, however, has been judicially determined that this peculiar jurisdiction of the courts of the neutral government to inquire into the validity of captures made in violation of the neutral immunity, will be exercised only for the purpose of restoring the specific property when voluntarily brought within the territory, and does not extend

to the infliction of vindictive damages, as in ordinary cases of maritime injuries, and as is done by the courts of the captor's own country. The punishment to be imposed upon the party violating the municipal statutes of the neutral state, is a matter to be determined in a separate and distinct proceeding. The court will exercise jurisdiction, and decree restitution to the original owner, in case of capture from a belligerent power, by a citizen of the United States, under a commission from another belligerent power, such capture being a violation of neutral duty; but they have no jurisdiction on a libel for damages for the capture of a vessel as prize by the commissioned cruiser of a belligerent power, although the vessel may belong to citizens of the United States, and the capturing vessel and her commander be found and proceeded against within the jurisdiction of the court."

2 Halleck's Int. Law (3d ed., by Baker), 173.

"Our courts, however, held [during the war between France and England], and they continue to hold, that if the capture be made within the territorial limits of a neutral country into which the prize is brought, or by a privateer which has been illegally equipped in such neutral country, the prize courts of that country not only possess the power, but it is their duty to restore the property to the owner."

W. B. Lawrence, 127 North Am. Rev. (July, 1878), 26.

If a capture be made by a privateer, which had been illegally equipped in a neutral country, the prize courts of such neutral country have power and it is their duty to restore the captured property, if brought within their jurisdiction, to its owner.

Brig. Alerta *v.* Moran, 9 Cranch, 359.

There is no distinction between captures, in violation of our neutrality, by public ships and by privateers.

L'Invincible, 1 Wheat. 238; The Santissima Trinidad, 7 Id. 283.

If restitution be claimed on the ground that the capturing vessel has augmented her force in the United States by enlisting men, it rests upon the claimant to prove the enlistment; and, this being done, upon the captors to prove that the persons enlisted were subjects or citizens of the prince or state under whose flag the cruiser sails, transiently within the United States, and therefore subject to enlistment.

The Estrella, 4 Wheat. 298; S. P., La Amistad de Rues, 5 Id. 385.

If a prize, taken in violation of our neutrality, is voluntarily brought within our territory, the courts must decree restitution to

the original owner. Where, however, the original owner seeks restitution on the ground of a violation of our neutrality by the captors, the onus probandi rests on him to make out his case.

La Amistad de Rues, 5 Wheat. 385.

"The doctrine heretofore asserted in this court is, that whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done upon the footing of the general law of nations; and the doctrine is fully recognised by the act of Congress of 1794. But this court have never yet been understood to carry their jurisdiction, in cases of violation of neutrality, beyond the authority to decree restitution of the specific property, with the costs and expenses during the pending of the judicial proceedings. We are now called upon to give general damages for plunderage, and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages to the same extent as in ordinary cases of marine torts. We entirely disclaim any right to inflict such damages; and consider it no part of the duty of a neutral nation to interpose, upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents. Strictly speaking, there can be no such thing as a marine tort between the belligerents. Each has an undoubted right to exercise all the rights of war against the other; and it cannot be a matter of *judicial* complaint, that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify. At least, they have never been held within the cognizance of the prize tribunals of neutral nations. The captors are amenable to their own government exclusively for any excess or irregularity in their proceedings; and a neutral nation ought not otherwise to interfere, than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction. A neutral nation may, indeed, inflict pecuniary, or other penalties, on the parties for any such violation; but it then does it professedly in vindication of its own rights, and not by way of compensation to the captured. When called upon by either of the belligerents to act in such cases, all that justice seems to require is, that the neutral nation should fairly execute its own laws, and give no asylum to the property unjustly captured. It is bound, therefore, to restore the property if found within its own ports; but beyond this it is not obliged to interpose between the belligerents."

Story, J., La Amistad de Rues, 5 Wheat. 385, 389.

A capture of Spanish property, in violation of our neutrality, by a vessel built, armed, equipped, and owned in the United States, is

illegal, and the property, if brought within our territorial limits, will be restored to the original owner.

La Conception, 6 Wheat. 235.

If a public armed vessel of a belligerent violate our neutrality by unlawfully enlisting men in our ports, the property captured by her on the ensuing cruise will, if brought within the territorial limits of the United States, be restored to the original owners.

The Santissima Trinidad, 7 Wheat. 283.

It is settled that if captures are made by vessels which have violated our neutrality acts, the property may be restored if brought within our territory. Hence a vessel armed and manned in one of our ports, and sailing thence to a belligerent port, with the intent thence to depart on a cruise with the crew and armament obtained here, and so departing and capturing belligerent property, violates our neutrality laws, and her prizes coming within our jurisdiction will be restored.

The Gran Para, 7 Wheat. 471.

If property captured in violation of our neutrality laws be found within our jurisdiction, in the hands of the master of the capturing vessel, it will be restored, whether a condemnation or other change of title has intervened or not.

The Arrogante Barcelones, 7 Wheat. 496.

Where a capture is made by captors acting under the commission of a foreign country, such capture gives them a right which no other nation neutral to them has a right to impugn, unless for the purpose of vindicating its own violated neutrality.

La Nereyda, 8 Wheat. 108.

8. Effect of a Commission.

§ 1326.

Neutrality—Illegal Fitting Out of Vessels.

An information was exhibited against the *Cassius* as a vessel illegally fitted out in the United States. The case came on to be argued on a suggestion, filed by the United States district attorney under the direction of the President, that the vessel was the public property of the French Republic, and therefore not liable to seizure or forfeiture. After the argument was begun a doubt was intimated by the court as to whether the circuit court had jurisdiction in the case, or whether the jurisdiction did not belong exclusively to the district court.

After argument Judge Peters expressed the opinion that the jurisdiction of the district court was exclusive under the act of Congress. He said that in the case of the United States *v.* Guinet (2 Dall. 321) he had, upon full consideration, directed the information in rem to enforce the forfeiture of the cannon to be instituted in the district court, but had bound the defendant over to the circuit court to answer personally for his offense. Wilson, Justice, took the same view, holding that the jurisdiction of the district court was exclusive, under the ninth section of the judiciary act, in all suits for penalties and forfeitures incurred under the laws of the United States. The information was therefore dismissed.

Ketland *v.* The Cassius (1796), 2 Dall. 365.

A vessel was fitted out at Savannah with armament, munitions, and sea stores, and being afterwards found, under another name, with a commission from the Republic of Venezuela to cruise against the subjects of the King of Spain, was seized by the United States authorities for violating the neutrality laws. The captain admitted that the vessel had already made a cruise in the capacity above stated, but applied to the President for her discharge from further prosecution on the ground that she was a legitimate armed vessel, lawfully sailing under the flag of Venezuela. It was advised that the case was one for adjudication in court, and did not call for the extraordinary interference of the Government.

Wirt, At. Gen., 1818, 1 Op. 231.

"As it is probable that by virtue of this act [of March 3, 1819, to protect the commerce of the United States and to punish the crime of piracy] vessels may be taken bearing the flag and pretending to have commissions from Venezuela, Captain Perry will give the most explicit assurances that it is not the intention of the United States to capture or molest any of the cruisers of Venezuela duly commissioned and authorized to wear its flag, but that vessels fitted out, armed and manned within the United States, cruising against nations with which they are at peace, can not be recognized as having a lawful authority. He will explicitly state that the United States consider as illegal all commissions issued in blank and delivered within the United States for vessels fitted out in their ports."

Mr. Adams, Sec. of State, to Mr. Thompson, Sec. of Navy, May 20, 1819, 17 MS. Dom. Let. 304.

A vessel called the *Irresistible* was fitted out at Baltimore in violation of the neutrality laws, and sent to Buenos Ayres, where she was commissioned as a privateer to cruise against Spain. She afterwards

captured a prize, called the *Gran Para*, which she brought into the United States, and which was there libeled for restitution. Against this claim it was contended that, as the *Irresistible* made no prize on her passage from Baltimore to Buenos Ayres, her offense against the neutrality laws was deposited there, so that her subsequent cruise could not in any way be connected with it. As to this contention, Chief Justice Marshall said: "If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military operations, need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew, to become perfectly legitimate cruizers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would, indeed, be a fraudulent neutrality, disgraceful to our own Government, and of which no nation would be the dupe. It is impossible for a moment to disguise the facts, that the arms and ammunition taken on board the *Irrestible* at Baltimore, were taken for the purpose of being used on a cruize, and that the men there enlisted, though engaged, in form, as for a commercial voyage, were not so engaged in fact. There was no commercial voyage, and no individual of the crew could believe that there was one."

Gran Para (1822), 7 Wheat. 471, 487.

As to the effect of a commission and the deposit of the offense against the neutrality laws, see, further, Moore, Int. Arbitrations, I. 576, 612; IV. 4082–4097.

A citizen of the United States who has violated its neutrality can not shelter himself under a commission from a foreign belligerent.

The Bello Corrunes, 6 Wheat. 152.

"It was maintained in the American case that, by the true construction of the second clause of the first rule of the treaty, when a vessel like the *Florida*, *Alabama*, *Georgia*, or *Shenandoah*, which has been especially adapted within a neutral port for the use of a belligerent in war, comes again within the neutral's jurisdiction, it is the duty of the neutral to seize and detain it. This construction was denied by Great Britain. It was maintained in the British papers submitted to the tribunal, that the obligation created by this clause refers only to the duty of preventing the original departure of the vessel, and that the fact that the vessel was, after the original departure from the neutral port, commissioned as a ship of war protects it against detention.

"To this point we rejoined that a commission is no protection against seizure in such case, and does not operate to release the neutral from the obligation to detain the offender.

"The Viscount d'Itajubá seemed to favor the American construction. He said:

"'According to the latter part of the first rule of Article VI. of the treaty of Washington, the neutral is bound also to use due diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, [viz., against a belligerent,] such vessel having been specially adapted, in whole or in part, within its jurisdiction to warlike use. . . . If, then, a vessel built on neutral territory for the use of a belligerent, fraudulently and without the knowledge of the neutral, comes again within the jurisdiction of the sovereign whose neutrality it has violated, it ought to be seized and detained.'

"Count Sclopis says, on this point:

"'It is on the nature of these special circumstances that the first rule laid down in Article VI. of the treaty of Washington specifically rests. The operation of that rule would be illusory, if it could not be applied to vessels subsequently commissioned. The object in view is to prevent the construction, arming, and equipping of the vessel, and to prevent her departure when there is sufficient reason to believe that she is intended to carry on war on behalf of one of the belligerents; and when probability has become certainty, shall not the rule be applicable to the direct and palpable consequences which it originally was intended to prevent?'

"In the award the tribunal says that—

"'The effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the Government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step by which the offense is completed can not be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence. The privilege of exterritoriality, accorded to vessels of war, has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principles of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality.'

"It will be observed that the tribunal, instead of adopting the recognition by the Viscount d'Itajubá of *a positive obligation* on the part of the neutral to detain the vessel, in the case supposed, limited itself to expressing the opinion that, in such case, the neutral would have the *right* to make such detention."

Report of Mr. J. C. B. Davis, agent of the United States at Geneva, Sept. 21, 1872, Papers relating to the Treaty of Washington, IV. 10–11.

"The fact that a vessel, built in contravention of the laws of neutrality, escapes and gets out to sea, does not free that vessel from the responsibility she has incurred by her violation of neutrality; she may, therefore, be proceeded against if she returns within the jurisdiction of the injured state. The fact of her having been transferred or commissioned in the meanwhile, does not annul the violation committed, unless the transfer or commissioning, as the case may be, was a bona fide transaction."

Opinions of Mr. Stämpfli, Papers relating to the Treaty of Washington, IV. 105.

9. Question of Extraterritorial Pursuit.

§ 1327.

Whether a neutral sovereign is bound to pursue beyond his territorial waters a belligerent vessel fitted out in such waters in violation of his neutrality, has been much discussed. In La Amistad de Rues, 5 Wheat. 390, it was said by Story, J., that when a neutral nation is "called upon by either of the belligerents to act in such cases, all that justice seems to require is, that the neutral nation shall fairly execute its own laws, and give no asylum to the property unjustly captured." On the other hand, it is said by Story, J., in The Marianna Flora, 11 Wheat. 42, that "it is true, that it has been held in the courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean, and rightfully brought into our courts for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages." Sir W. Harcourt, in criticising these rulings in Historicus (p. 158), says: "The principle to be deduced from this decision [*La Amistad*] is, that the neutral power can not be called upon by the injured belligerent to grant him any remedy beyond that which may be exercised over property or persons who are at the time within the neutral jurisdiction. It is true that, in the celebrated case of the Portuguese expedition to Terceira, it was contended by the Duke of Wellington's government that an expedition having fraudulently evaded the English jurisdiction, and started from these shores in violation of the enlistment act, the English Government was entitled to pursue and seize the ships beyond the jurisdiction. And though this opinion receives some countenance from the *dicta* of the

court in the American case of The Marianna Flora, 11 Wheat. 42, nevertheless this doctrine was vehemently, and it is generally thought successfully, controverted by the minority, of whom Sir J. Mackintosh and the late Dr. Joseph Phillimore and Mr. Huskisson were the principal spokesmen (vide Hansard, vol. xxiv, new series). At all events, I think it is quite clear that, whether such a *right* exists or not, on the part of a neutral, it is not a *duty* on his part which the belligerent can call upon him to enforce."

During the war between Spain and the republics on the west coast of South America, the Peruvian Government, being unable to secure the clearance from the United States of ships of war for which it had contracted with citizens of the United States, entered into a secret convention with the Mosquera government in Colombia, which convention was ratified by President Mosquera November 20, 1866, under which Colombia undertook to purchase the vessels, and, after they arrived within Colombian jurisdiction, to sell and deliver them to Peru on terms which clearly indicated that the sale within the United States by Peru to Colombia was colorable only and in fraud of the neutrality laws of the United States. In pursuance of this convention, the Colombian Government, through its minister at Washington, obtained the release of the steamer *R. R. Cuyler*, which had been detained at New York for being fitted out in violation of the neutrality laws to make war in behalf of Peru and her allies against Spain, on the assurance that the vessel had been purchased by Colombia and was the property of that Government. When these proceedings became known to the Colombian Congress they were repudiated by that body, and the Colombian Government, President Mosquera having been displaced, disavowed and denounced them. Meanwhile, the Colombian Government was embarrassed by the presence of the vessel in its waters, involving the prospect of complications with Spain, and asked that it might be returned to New York under the naval protection of the United States. The Government of the United States declined to take this course, on the ground (1) that the vessel was permitted to depart from the jurisdiction of the United States in reliance upon the representations of the Colombian minister; (2) that, so far as the United States was concerned, the vessel must be considered as a foreign ship belonging to Colombia, and in nowise to the commercial marine of the United States; (3) that there was no law by which the United States could, under these circumstances, extend its control over the vessel in any place whatsoever, so long as she was neither doing nor threatening any wrong to the United States; (4) that the United States could not receive her and cause her to be transferred in American waters to any belligerent.

Mr. Seward, Sec. of State, to Mr. Sullivan, min. to Colombia, No. 17, Sept. 27, 1867. MS. Inst. Colombia, XVI. 238.

See, also, same to same, No. 39, April 14, 1868, id. 272.

With reference to the vessels *Quaker City* and *Florida*, which after their departure from the United States, appeared to have been converted into men-of-war in Haytian waters, the Haytian Government intimated a desire that the United States should interfere by force to prevent the insurgents from using them. "It is the settled policy of this Government," said Mr. Fish, in reply, "to remain neutral in all controversies where its own honor or the welfare of its own citizens is not concerned. We would gladly see Hayti at peace with itself and with the world, and enjoying the wonderful advantages which a beneficent Providence has placed within the reach of its people. But we can not shut our eyes to the fact that the unhappy strife going on there partakes of the nature of a civil war, although not recognized as such by us. Both parties have armed forces in the field, each possesses a portion of the territory of the Republic, each controls ports and maintains armed vessels upon the high seas, and conflicts take place between both with varying success. If the United States under such circumstances give to the existing government the moral force of their recognition of it as the rightful ruler of the whole territory of the Republic, and withholds from the insurgents even the recognition of a state of war, all of which we are doing, that is the extent to which a neutral can be asked to go. The United States, reserving always their right to conform their policy to the existing facts as they occur, have, up to this time, steadily pursued the course which I have described towards the government to which you are accredited."

Mr. Fish, Sec. of State, to Mr. Bassett, min. to Hayti, No. 16, Oct. 13, 1869, MS. Inst. Hayti, I. 158.

As to judicial proceedings subsequently taken in the case of the *Quaker City* at New York, see Mr. Fish, Sec. of State, to Mr. Bassett, min. to Hayti, No. 34, March 2, 1870, MS. Inst. Hayti, I. 184.

Referring to the report of the United States consul at Guayaquil that the American steamer *Charona*, then in Peruvian waters, was about to be sold to Ecuadorian revolutionists, to be used in hostilities against the established government, Mr. Bayard said: "I do not see how this Government can in any way intervene in this case. The steamer in question is now within Peruvian jurisdiction. To purchase and fit her out there for hostile purposes is an offence, if at all, against the neutrality laws, not of the United States, but of Peru. It is to the Government of Peru that the Ecuadorian Government should address its remonstrances; and against Peru it must

present any claims for damages that it may suffer from the action of the said vessel."

Mr. Bayard, Sec. of State, to Mr. McGarr, consul at Guayaquil, No. 20, July 14, 1886, 118 MS. Inst. Consuls, 399.

Mr. Bayard added that, if the steamer was within the jurisdiction of the United States, her mere sale while unarmed would not be a violation of the neutrality laws. (Ibid.)

In 1885 Mr. Jacob Baiz, consul-general of Honduras at New York, complained that the American steamer *City of Mexico*, a passenger and freight vessel, had taken on board at Belize, when on her ordinary coasting route, some political refugees who, it was supposed, were meditating hostile action against the Government of Honduras. Mr. Baiz also alleged that the *City of Mexico* was about to carry a quantity of contraband of war from Jamaica to Honduras for the use of the revolutionists; and he asked that American men-of-war in Central American waters be instructed to watch the steamer. Mr. Bayard, who was then Secretary of State, replied that acts such as those complained of, even supposing that they might be considered as breaches of neutrality if committed within the jurisdiction of the United States, could not be imputed to the United States when committed in a foreign port; nor could it, he said, be justly urged that, because the vessel carried the American flag, it was the duty of the United States to send cruisers to watch her in order to prevent her from committing breaches of neutrality while passing from one foreign port to another. "For this Government," said Mr. Bayard, "to send armed vessels to such ports to control the actions of the *City of Mexico* would be to invade the territorial waters of a foreign sovereign. For this Government to watch its merchant and passenger vessels on the high seas, to stop them if they carry contraband articles or passengers meditating a breach of neutrality, would impose on the United States a burden which would be in itself intolerable, which no other nation has undertaken to carry, and which the law of nations does not impose. . . . Whether the *City of Mexico*, when she returns to her home port, or those concerned in her or in this particular voyage, may be subject to adverse procedure under our neutrality statutes, I have not deemed it necessary here to discuss or decide."

Mr. Bayard, Sec. of State, to Mr. Hall, min. to Central America, No. 325, Feb. 6, 1886, For. Rel. 1886, 51.

In August, 1885, Mr. Bayard brought to the notice of the Secretary of the Treasury and the Attorney-General, with a request for appropriate action, a telegram from Mr. Baiz to the effect that he was informed that the *City of Mexico* was about to sail from New York with a filibustering expedition to Honduras. The Secretary of the Treasury, on October 1, 1885, reported that, upon careful inspection of the ves-

sel's cargo and equipment, nothing indicating an intent to violate the neutrality laws could be found, and that no information of anything tending in that direction had been obtained. He therefore inquired whether there was any objection to granting the vessel a clearance. Mr. Bayard answered that none was perceived; and the steamer duly sailed. (For. Rel. 1885, 138–144.)

[1] In connection with the subject of seizure of vessels, in relation to the right of search, see a series of able articles by James C. Welling, in the *National Intelligencer*, June 1, 1858, and other issues.

In 1898, Mr. Merry, American minister to some of the Central American States, on hearing that an American vessel which had sailed from Salvador was suspected of carrying a revolutionary expedition against the Government of Nicaragua, issued a circular letter to consular officers within his jurisdiction instructing them to make inquiries, and, if the result should justify the step, authorizing them to call upon the commander of any American man-of-war within reach "to examine her papers and seize her if found to be engaged in an illegal voyage in violation of the statutes of the United States." With reference to this circular, the Department of State said: "There is not, so far as the Department is aware, any statutory provision authorizing the seizure of a vessel under such conditions. Section 5287 of the Revised Statutes, which provides for the seizure of vessels under certain stated circumstances, is not applicable to the case of vessels fitted out beyond the jurisdiction of the United States. . . . It is entirely proper for you to call upon the consular officers to make inquiry as to the truth of the charges against the vessel, and to furnish to this Government any evidence tending to show that the *Celia* has violated the neutrality laws of the United States by preparing for such expedition within the waters of the United States. Further than this, there is no authority for a minister or consul to act."

Mr. Sherman, Sec. of State, to Mr. Merry, No. 66, March 25, 1898, MS. Inst. Central America, XXI. 293.

10. Duty Under Extraterritorial Jurisdiction.

§ 1328.

In 1867 the Japanese Government, as represented by the Tycoon, sent two commissioners to the United States to purchase ships of war. They bought from the Government of the United States the ironclad ram *Stonewall*, the price being $400,000, of which the sum of $300,000 was paid, the rest to be transmitted to the United States through the American legation in Japan. The ram was sent out to Japan under Captain George Brown, U. S. N., who was granted leave of absence, to act as the agent of the Japanese

commissioners in taking the vessel to Yokohama. Before her arrival there war broke out between the Tycoon and the Mikado; and on February 28, 1868, the diplomatic corps in Japan agreed upon and signed a memorandum in which they declared that the only way to preserve a perfect neutrality between the contending parties was to regard them both as belligerents, and that, as vessels of war had been ordered by princes belonging to both parties, in Europe as well as in America, they had decided to use their utmost endeavors to prevent the delivery of the vessels in question on their arrival. In acknowledging receipt of the American legation's report of this proceeding, Mr. Seward, who was then Secretary of State, remarked that the course which had been marked out seemed in regard to the *Stonewall* to be impracticable, since the vessel was delivered to the Japanese Government in American waters and was placed under the Japanese flag, her officers and crew being employees of the Japanese Government and not in the service of the United States. Under these circumstances, it was thought that no agent of the Government of the United States had a lawful right to reduce the vessel into possession, or to interfere with her movements. The subject was, however, left to the legation's discretion. Before these instructions were written the *Stonewall* arrived in Japan and was kept by the legation under the American flag. The legation reported that if she could have been delivered all the money due on her would have been promptly paid by the Tycoon's government; but that, as that government to all appearances had subsequently ceased to exist, and the Mikado's government had not taken possession of Yedo, the *Stonewall* had been kept at Yokohama, the legation having provided for her expenditures while there. The legation, in a communication to Captain Brown, written immediately on the arrival of the *Stonewall*, directed that the vessel should be kept under the American flag and not delivered into the hands or control of any Japanese until instructions, which had been applied for, should have been recieved from the Department of State. Representatives of the Tycoon claimed the vessel, but the legation declined to permit her to be delivered up; and the legation at the same time refused to deliver her to the government of the Mikado. November 12, 1868, Mr. Seward, instructed the legation as follows: "Your proceeding in retaining possession and control of that vessel [the *Stonewall*] is approved. We, nevertheless, anxiously await such a solution of the political complication in Japan as will enable this Government to relieve you of that embarrassment."

For the correspondence in relation to the case of the *Stonewall*, see Dip. Cor. 1867, II. 24, 30, 45; Dip. Cor. 1868, I. 677, 730, 733, 763, 829, 838.

The position of the United States is that the principles of neutrality are applicable to China. In the case of the Tonquin war, in 1885, the Department of State, referring to the course which the United States had pursued in their international conflicts, and in the recent wars between Russia and Turkey and between Chile and Peru, directed the American minister at Peking that he was, so far as he had opportunity, to "enjoin upon all American citizens in China the necessity and importance of their due observance of the laws and obligations of neutrality, watching at the same time with care and diligence the interests and rights of such American citizens regarding their persons, property, ships, and commercial privileges."

Mr. Frelinghuysen, Sec. of State, to Mr. Young, min. to China, No. 382, Feb. 2, 1885, MS. Inst. China, III. 686.

In March, 1885, Mr. Young, American minister at Peking, referring to the war then going on between France and China, cabled to his Government as follows: "Chinese object American pilots French men-of-war. Shall I forbid such service?" To this inquiry Mr. Bayard replied: "Although well disposed, we can not forbid our citizens serving under private contract at their own risk. Not prohibited by statutes or cognizable by consuls." In confirming this reply by a formal instruction, Mr. Bayard adverted to the fact that, while the obligation of a neutral government to prevent the commission of hostile acts was usually limited to things done within its own jurisdiction, foreign powers possess extraterritorial jurisdiction in China by virtue of treaties. But this jurisdiction was, he said, in no wise arbitrary, but was limited by laws, and was not preventive, but punitory. In this relation Mr. Bayard cited section 4102, R. S., which provides that "insurrection or rebellion against the government of either of those countries [i. e., the countries named in sec. 4083, whereof China is one] with intent to subvert the same, and murder, shall be capital offenses, punishable with death," and added: "But the simple act of entering into a private contract to serve either combatant in open warfare would not appear to be triable under this section; and even if it were, this Government would have no rightful power to forbid such service. It is, of course, understood that this reasoning does not apply to persons in the employ of the Government of the United States. For such persons, while so employed, to perform hostile service for either party would be a breach alike of discipline and neutral good faith, which the rules of the service would be competent to prevent."

Mr. Bayard, Sec. of State, to Mr. Young, min. to China, No. 407, March 11, 1885, For. Rel. 1885, 160.

Mr. Bayard further said: "In the interest of good will between nations, it is desirable that citizens of the United States should not take part

with either belligerent, or, if they do so, that it should be distinctly known that they thereby act beyond all effective responsibility of their own Government. Your discretion will doubtless show you how far it may be opportune to go in the direction of dissuading any citizen of the United States from taking sides in the present contest, but whatever you may do should be marked with the most obvious impartiality." (Id. 161.)

The question raised by Mr. Young obviously is a very important one, and it may be proper to consider whether sec. 4102 covers, or was intended to cover, the whole ground of jurisdiction in the consular courts in extraterritorial countries to prevent and punish unneutral acts. Those courts possess general jurisdiction to enforce the criminal statutes of the United States as to acts done by American citizens within the consul's jurisdiction. It may be doubted whether the distinction drawn between the power to "punish" and the power to "forbid" is material, where the act is in reality forbidden and made punishable by law. In considering the question whether a consul in an extraterritorial country has jurisdiction to enforce there the neutrality statutes, the fact should be borne in mind that a negative answer necessarily would signify either that the American citizen is in such matters subject to the local jurisdiction, which in the case before us is that of China, or that he is, when in such a country, under no legal responsibility to refrain from making war upon it, unless his act takes the form of insurrection or rebellion. In view of these very grave considerations, it may be observed that the language of the formal instruction to Mr. Young was much less definite and positive than that of the telegraphic response.

"Your memorandum does not suggest that the coming of armed revolutionary expeditions to Constantinople is apprehended; but even in the extreme supposition that citizens of the United States might attempt to enlist abroad for the purpose of making war upon any foreign power with which the United States are at peace, the United States minister is authorized in countries where the United States possess extraterritorial jurisdiction to issue writs and otherwise to prevent such enlistments, carrying out this power by resort to such force belonging to the United States as may at the time be within his reach (Rev. Stat., sec. 4090). Under this provision, the admiral commanding the United States fleet on the European station was instructed nearly a year ago to cooperate heartily with our minister in Turkey in enforcing all writs issued by the latter to prevent the entry into Turkey of any American citizens as armed revolutionists. As your communication has particular reference to the situation at Constantinople, it is proper to remark that the admiral's instructions can only hold good in fact at ports or places visited by the vessels under his orders, so that in the absence of a dispatch boat at Constantinople subject to his directions the hands of the United States minister are tied."

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

VII. *MEASURE OF EXERTION.*

1. Requisite Diligence.

§ 1329.

During the wars immediately preceding the Peace of Amiens, many claims arose on the part of citizens of the United States against Spain on account of captures made either by French privateers fitted out in Spain or by French privateers in Spanish waters, as well as on account of condemnations by French consuls or other French agents in Spanish jurisdiction. The Spanish Government denied its liability, first, on the ground that it was unable to prevent the acts complained of, and, secondly, on the ground that the primary liability rested on France, and that as France was (so the Spanish Government contended) released from any liability for the claims by the convention with the United States of Sept. 30, 1800, the secondary liability of Spain was released. The United States, on the other hand, maintained (1) that Spain was primarily liable; (2) that the renunciation of the convention of 1800 extended only to claims for which France was primarily liable, and (3) that the inability of Spain to prevent the acts complained of was not established. Mr. Madison, in an instruction of Oct. 25, 1802, took the ground, as to the last point, that, in order to excuse a sovereign for permitting a violation of his neutrality, it must "be shown that the force or danger which destroyed the free agency really existed, and that all reasonable means were employed to prevent or remedy the evil resulting." By the treaty of February 22, 1819, the United States renounced its claims against Spain and undertook to compensate its own citizens to the amount of $5,000,000. Among the claims embraced in this settlement were those "on account of prizes made by French privateers, and condemned by French consuls, within the territory and jurisdiction of Spain."

Mr. Marshall, Sec. of State, to Mr. Humphreys, min. to Spain, Sept. 8, 1800, MS. Inst. U. States Ministers, V. 358; Mr. Madison, Sec. of State, to Mr. Pinckney, min. to Spain, Oct. 25, 1802, id. VI. 57; same to same, Feb. 6, 1804, id. 196; Mr. Madison to Mr. Monroe, Oct. 26, 1804, id. 256.

For an opinion of Messrs. Ingersoll, Rawle, McKean, and Duponceau in support of Spain's alleged release by the French convention of 1800, see Am. State Papers, For. Rel. II. 605.

For comments on this opinion, see Moore, Int. Arbitrations, V. 4491–4492; and see, generally, id. 4487–4498, 4513.

See Rosanquet, S. R. C., and Tangye, R. T. G., The Burden of Neutrality. Notes for Onlookers in Time of War; London, 1904.

"The Government of the United States, having used all the means in its power to prevent the fitting out and arming of vessels [in

this case privateers under South American flags, but alleged to have been manned with American citizens to cruise against Portugal] in their ports to cruise against any nation with whom they are at peace, and having faithfully carried into execution the laws enacted to preserve inviolate the neutral and pacific obligations of the Union, cannot consider itself bound to indemnify individual foreigners for losses by captures over which the United States have neither control nor jurisdiction."

Mr. Adams, Sec. of State, to Mr. Correa de Serra, Mar. 14, 1818, MS. Notes to For. Legs. II. 315.

Nov. 7, 1850, the Portuguese minister at Washington, renewing a claim for damages in the foregoing case, proposed the appointment of a board of commissioners to determine the amount to be paid. The United States, while observing that this proposition omitted the essential question whether there had been any neglect of neutral duty, referred to the answers which were "returned to similar applications from the time of President Madison in 1816 to that of President Monroe in 1822." "The acts complained of were of a nature which no government has ever been able to prevent. There is no reason to believe that the Government of the United States neglected their duty on this occasion. In a country ruled by law, it is impossible to act finally on suspicion, however well founded, and it is extremely difficult to prove intent. . . . Portugal, with forces wholly inadequate to the effort, was endeavoring to retain possession of her vast trans-Atlantic Empire; and the ineffectual struggle afforded scope for all sorts of illegal adventure." The attempts of Portugal and Brazil to suppress the slave trade had shown "how easy it is for bold and reckless adventurers, stimulated by the prospect of great gains, to evade the restraints of laws and treaties." (Mr. Everett, Sec. of State, to Commander de Figaniere é Morao, Feb. 28, 1853, MS. Notes to Portugal, VI. 131.)

The Spanish minister at Washington alleged that the vessels known as the *Perit*, the *Catherine Whiting*, the *H. M. Cool*, the *Jonathan Chase*, the *George B. Upton*, and the *Hornet* had been engaged in aiding the insurrection in Cuba in such a way as to violate the neutrality laws of the United States, and expressed the opinion that the owners of the vessels should be made to feel the legal consequences of breaking the laws established for the maintenance of the duties of "international neutrality." He also complained that the district attorney at New York had refused to proceed against some of the vessels or persons for technical reasons, and also that against some of the individuals named no proceedings could be maintained because, under the operation of the proclamation of the President of October 12, 1870, all offenses against the international or municipal laws referred to therein were pardoned or condoned. Mr. Fish, in reply, denied that the officials of the United States had manifested any want of readiness to prevent attempted violations of the law. He referred

to the contest in Cuba and to the decrees which had been issued by the Spanish authorities interfering or threatening to interfere with the rights of citizens of the United States. In order that such questions might be settled, special authority was conferred on the Spanish minister at Washington, but this authority was later withdrawn by the Spanish Government, "in view," as the United States was afterwards officially informed, "of the favorable situation in which the island of Cuba then was." This "favorable situation," said Mr. Fish, was assumed to refer to the supposed extinction of organized armed resistance to Spanish authority in Cuba. Under these circumstances, it seemed to the President that the restraints upon the commerce of the United States and upon the free movements of their citizens should no longer be imposed, and that preventive or punitive proceedings against individuals or vessels should not be continued, when the cause which prompted the alleged illegal acts was supposed to have disappeared. It was, said Mr. Fish, believed to be in harmony with the humane policy which had characterized the United States that a suspension of the rigid prosecution of offenses (partaking of a political character) growing out of sympathy with a political struggle in a neighboring island might well take place, and it was hoped that this benevolent example might be reflected in the policy of Spain towards Cuba, and that the United States "would be relieved from the disagreeable duties which it had performed for about two years." In the course of his representations, the Spanish minister had referred to the declaration of Mr. Fish, in an instruction to Mr. Motley, of September 25, 1869, that the international duty of the British Government in respect of the enforcement of its neutrality during the civil war in the United States was above and independent of the municipal law of England and was governed by the law of nations. Commenting upon this citation, Mr. Fish said that "these doctrines were applied to a condition when a state of war was recognized by the neutral," and that the grievances of which the United States complained were caused by the acts of a government "which had formally recognized a state of war between the United States and their armed opponents." In conclusion, Mr. Fish inquired whether Spain regarded her position towards the insurgents of Cuba as being the same as that which the United States occupied toward their insurgent citizens at the time of the occurrences complained of.

Mr. Fish, Sec. of State, to Mr. Lopez Roberts, Spanish min., Dec. 28, 1870, For. Rel. 1871, 785.

For the instruction of Mr. Fish to Mr. Motley of Sept. 25, 1869, see For. Rel. 1873, III, 329; MS. Inst. Gr. Brit. XXII. 50.

July 9, 1872, the Secretary of the Treasury informed the Department of State that on the preceding day the United States revenue cutter *Moccasin* had spoken and boarded off Newport a vessel, which called herself the Cuban war schooner *Pioneer*, and, on finding that she was

armed and had on board a quantity of ammunition and a crew of sixteen persons and had no papers except a document said to be a commission of her officers, took her in tow and carried her into Newport. The Department of State, replying to a request for its views, said that, as the Cuban insurgents had not been acknowledged as belligerents, any vessel claiming to act under their authority was liable to be proceeded against for piracy, and that, although it was not alleged that the *Pioneer* had committed any piratical act, it was deemed advisable that she should be detained till the full report of the captain of the revenue cutter should have been received, since there might have been a violation of the act of 1818 by the acceptance of a commission. The case was subsequently submitted to the Attorney-General, the detention of the vessel meanwhile continuing. (Mr. Boutwell, Sec. of Treas., to Mr. Hale, Act. Sec. of State, July 9, 1872, MS. Misc. Letters; Mr. Hale, Assist. Sec. of State, to Mr. Boutwell, July 9, 1872, 94 MS. Dom. Let. 514; Mr. Hale, Acting Sec. of State, to Mr. Boutwell, July 13, 1872, 94 MS. Dom. Let. 547.)

"I have the honor to acknowledge the receipt of your letter of the 18th instant, accompanied by a copy of one from Noah Davis, esq., United States attorney for the southern district of New York, in relation to the case of Ryan and Jordan, who have been indicted in that district for violation of the neutrality laws. You request suggestions from me in reference to the matter.

"In reply, I venture no expression as to the sufficiency of the cause assigned for the nonprosecution of the indictment against Ryan further than to say that it would have been very convenient to the Government to have had some more explicit reasons to assign to the friendly government against which it was alleged that Ryan was enlisting men, or getting up a hostile expedition, for the nonprosecution of the complaint against that individual whose subsequent actions and open declarations are understood to have been in the direction of the line of conduct charged against him.

"The inference seems almost inevitable from Mr. Davis's letter that it is assumed that a prosecution for violation of the neutrality laws of the United States is to be conducted only on evidence furnished by the Government against which the alleged offence is designed.

"This Government suffered very grievously during its recent civil war from the application of a similar theory of the duty of neutrals and has strenuously contended for a more active obligation as incumbent upon the neutral powers.

"It would relieve this Department of many complaints, and would strengthen the position of the Government in the maintenance of the claims which it is prosecuting against Great Britain, if the prosecuting officers in New York and some other parts of the country appreciated, as fully as this Department is bound to do, the impor-

tance of a vigorous and faithful enforcement of the neutrality laws; and if they would further act upon the theory for which this Government has contended, and which it is now exerting itself to maintain, that a neutral or a friendly government is bound to use due diligence to prevent hostile expeditions from being fitted out within its territory, against a power with which it is at peace, and that such obligation of a neutral, or of a friendly, power is not satisfied by throwing upon the power whose peace or whose territories are threatened the burden of the prosecution, or the whole duty of furnishing testimony.

"The position which the United States assumed and has maintained in cases of a somewhat kindred nature, with another power, has been that when reasonable grounds were presented to a Government by a friendly power for suspicion that its peace is threatened by parties within the jurisdiction of that Government, it is the duty of the latter to become the active prosecutor of those threatening the peace of the former.

"It appears to me that Mr. Davis's letter implies that the obligations of this Government extend no further than to present to a jury such evidence of violation of the neutral duties of the United States as Spain may furnish. This is not the extent of a neutral power's duty, as has been insisted by this Government in its diplomatic correspondence with other States. I have ventured, in answer to your inquiry, to submit these suggestions as called for by the statements in Mr. Davis's letter, and in the belief that not only the duty of the United States, but that important questions now pending, require that the Government become the active prosecutor of violations of its neutral duties whenever reasonable cause for such prosecution has been presented to it.

"Whether the presentation by a grand jury be not such reasonable cause is a question which I need not raise.

"P. S. As certain diplomatic questions are at this time pending with the Spanish Government, it may be well that the suggestions made and opinions expressed in this letter be not allowed to be published during the pendency of these questions."

Mr. Fish, Sec. of State, to Mr. Akerman, At. Gen., Nov. 20, 1871, 91 MS. Dom. Let. 356.

Wharton, Int. Law Digest, III, 618, referring to this letter, says: "This supposes that the Government in which such disturbing action takes place has the legal and constitutional power to suppress it. Whether, supposing it has such power, it is internationally liable for failure to prosecute, depends upon the amount of proof accessible to it, and the nature of the alleged breaches of neutrality. But want of constitutional power to prosecute is not in itself a bar to a claim for a failure to enforce neutrality."

"The United States do not employ any police force. Consequently, it is usually advisable for the agents of a foreign state which may suppose that illegal enterprises against it are about to be set on foot in this country to employ detectives of their own to watch suspected parties. If a discovery should thereby be made of an offense against the law, the testimony of the detective would be available for the prosecution of the offenders. Under the law of this country and of England, as contradistinguished, I believe, from that of the continent of Europe and elsewhere, no person can be arrested or prosecuted for a crime or misdemeanor except upon the affidavit of a credible witness."

Mr. Fish, Sec. of State, to Mr. Garcia, Nov. 17, 1874, MS. Notes Arg. Rep. VI. 134.

"This Government has hitherto expected and will continue to expect that other Governments will fulfill their duties as *neutrals* towards the United States. It has been its endeavor and always will be its purpose to fulfill the same duties towards other nations, and in like manner towards Spain. It is not conscious of any dereliction in this respect, and it believes that its power is ample for the purpose. Any Government which requires the exercise of that power must, however, proceed in the only way by which that authority can be available." (Mr. Fish, Sec. of State, to Mr. Mantilla, Sept. 27, 1875, MS. Notes to Spain, IX. 386.)

For a discussion of the Alabama case, see Mr. Fish, Sec. of State, to Sir E. Thornton, Sept. 18, 1876, MS. Notes to Gr. Brit. XVII. 228.

"The duty of the United States, when a state of war is declared or recognized by another country, is of its own motion to use diligence to discover and prevent, within its borders, the formation or departure of any military expedition intended to carry on or take part in such war. (3 Whart. Dig. Int. Law, pp. 630, 637.) It is by no means certain that knowledge of the existence of a mere insurrection, even when its location or alleged motives may be thought likely to lead to violations of our laws in its behalf, imposes any general duty of watchfulness, the neglect of which would be just ground of complaint by the nation involved which does not itself acknowledge a state of war. Actual notice, however, of hostile expeditions against a friendly nation, undertaken or threatened, creates the duty of vigilance to prevent them; and the fact that the different elements intended to constitute a hostile expedition are separately prepared or transported does not change such duty, but merely renders it more difficult to perform. But the obligation is one of diligence and not a guaranty against such expeditions; and what constitutes diligence must always depend on the circumstances in each case. (3 Whart. Dig. Int. Law, p. 639; Creasy Int. Law, pp. 160–164.)"

Harmon, At. Gen., Dec. 10, 1895, 21 Op. 267, 271–272.

2. Rules of 1871; Geneva Award.

§ 1330.

"In deciding the matters submitted to the arbitrators, they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the arbitrators shall determine to have been applicable to the case:

"RULES.

"A neutral government is bound—

"First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

"Her Britannic Majesty has commanded her high commissioners and plenipotentiaries to declare that Her Majesty's Government can not assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

"And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them."

Art. VI., Treaty of Washington, May 8, 1871, relating to the arbitration of the Alabama claims.

As to the origin of these rules, see Moore, Int. Arbitrations, I. 495 et seq. As to the term "due diligence," see id. I. 572, 610, 612, 654; IV. 4057–4082.

"Whereas, having regard to the VIth and VIIth articles of the said treaty, the arbitrators are bound under the terms of the said VIth article, 'in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case;'

"And whereas the 'due diligence' referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part;

"And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's government of all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861;

"And whereas the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, can not be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence;

"And whereas the privilege of exterritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality;

"And whereas the absence of a previous notice can not be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

"And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character;

"And whereas, with respect to the vessel called the *Alabama*, it clearly results from all the facts relative to the construction of the ship at first designated by the number '290' in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the *Agrippina* and the *Bahama*, dis-

patched from Great Britain to that end, that the British government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number '290,' to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

"And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore can not be considered sufficient to release Great Britain from the responsibility already incurred;

"And whereas, in despite of the violations of the neutrality of Great Britain committed by the '290,' this same vessel, later known as the confederate cruiser *Alabama*, was on several occasions freely admitted into the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

"And whereas the government of Her Britannic Majesty can not justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed:

"Four of the arbitrators, for the reasons above assigned, and the fifth for reasons separately assigned by him, are of opinion that Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first and the third of the rules established by the VIth article of the treaty of Washington.

"And whereas, with respect to the vessel called the *Florida*, it results from all the facts relative to the construction of the *Oreto* in the port of Liverpool, and to its issue therefrom, which facts failed to induce the authorities in Great Britain to resort to measures adequate to prevent the violation of the neutrality of that nation, notwithstanding the warnings and repeated representations of the agents of the United States, that Her Majesty's Government has failed to use due diligence to fulfil the duties of neutrality;

"And whereas it likewise results from all the facts relative to the stay of the *Oreto* at Nassau, to her issue from that port, to her enlistment of men, to her supplies, and to her armament, with the co-operation of the British vessel *Prince Alfred*, at Green Cay, that there was negligence on the part of the British colonial authorities;

"And whereas, notwithstanding the violation of the neutrality of Great Britain committed by the *Oreto*, this same vessel, later known as the confederate cruiser *Florida*, was nevertheless on several occasions freely admitted into the ports of British colonies;

"And whereas the judicial acquittal of the *Oreto* at Nassau can not relieve Great Britain from the responsibility incurred by her under

the principles of international law; nor can the fact of the entry of the *Florida* into the confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain:

" For these reasons the tribunal, by a majority of four voices to one, is of opinion that Great Britain has in this case failed, by omission, to fulfil the duties prescribed in the first, in the second, and in the third of the rules established by Article VI of the treaty of Washington.

"And whereas, with respect to the vessel called the *Shenandoah*, it results from all the facts relative to the departure from London of the merchant-vessel the *Sea King*, and to the transformation of that ship into a confederate cruiser under the name of the *Shenandoah*, near the island of Maderia, that the government of Her Britannic Majesty is not chargeable with any failure, down to that date, in the use of due diligence to fulfil the duties of neutrality;

" But whereas it results from all the facts connected with the stay of the Shenandoah at Melbourne, and especially with the augmentation with the British government itself admits to have been clandestinely effected of her force, by the enlistment of men within that port, that there was negligence on the part of the authorities at that place:

" For these reasons the tribunal is unanimously of opinion that Great Britain has not failed, by any act or omission, ' to fulfil any of the duties prescribed by the three rules of Article VI. in the Treaty of Washington, or by the principles of international law not inconsistent therewith,' in respect to the vessel called the *Shenandoah*, during the period of time anterior to her entry into the port of Melbourne;

"And, by a majority of three to two voices, the tribunal decides that Great Britain has failed, by omission, to fulfil the duties prescribed by the second and third of the rules aforesaid, in the case of this same vessel, from and after her entry into Hobson's Bay, and is therefore responsible for all acts committed by that vessel after her departure from Melbourne, on the 18th day of February, 1865.

"And so far as relates to the vessels called the *Tuscaloosa* (tender to the *Alabama*), the *Clarence*, the *Tacony*, and the *Archer* (tenders to the *Florida*), the tribunal is unanimously of opinion that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively.

"And so far as relates to the vessel called *Retribution*, the tribunal, by a majority of three to two voices, is of opinion that Great Britain has not failed by any act or omission to fulfil any of the duties prescribed by the three rules of Article VI. in the treaty of Washington, or by the principles of international law not inconsistent therewith.

"And so far as relates to the vessels called the *Georgia*, the *Sumter*, the *Nashville*, the *Tallahasee*, and the *Chickamauga*, respectively, the tribunal is unanimously of opinion that Great Britain has not failed, by any act or omission to fulfil any of the duties prescribed by the three rules of Article VI. in the treaty of Washington, or by the principles of international law not inconsistent therewith.

"And so far as relates to the vessels called the *Sallie*, the *Jefferson Davis*, the *Music*, the *Boston*, and the *V. H. Joy*, respectively, the tribunal is unanimously of opinion that they ought to be excluded from consideration for want of evidence.

"And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States:

"The tribunal is, therefore, of opinion, by a majority of three to two voices, that there is no ground for awarding to the United States any sum by way of indemnity under this head.

"And whereas prospective earnings can not properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies:

"The tribunal is unanimously of opinion that there is no ground for awarding to the United States any sum by way of indemnity under this head.

"And whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses, and all claims for 'gross freights,' so far as they exceed 'net freights:'

"And whereas it is just and reasonable to allow interest at a reasonable rate:

"And whereas, in accordance with the spirit and letter of the treaty of Washington, it is preferable to adopt the form of adjudication of a sum in gross, rather than to refer the subject of compensation for further discussion and deliberation to a board of assessors, as provided by Article X. of the said treaty:

"The tribunal, making use of the authority conferred upon it by Article VII. of the said treaty, by a majority of four voices to one, awards to the United States a sum of $15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in Article VII. of the aforesaid treaty.

"And, in accordance with the terms of Article XI. of the said treaty, the tribunal declares that 'all the claims referred to in the

treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled.'

"Furthermore it declares that 'each and every one of the said claims, whether the same may or may not have been presented to the notice of, or made, preferred, or laid before the tribunal, shall henceforth be considered and treated as finally settled, barred, and inadmissible.'"

Award of the Geneva Tribunal, signed at the Hôtel de Ville, of Geneva, Switzerland, Sept. 14, 1872, by Charles Francis Adams, Count Frederick Sclopis, Jacques Stämpfli, and Vicomte D'Itajubá, Papers relating to Treaty of Washington, IV. 49, 50.

As appears by the award, Sir Alexander Cockburn, though he concurred in allowing damages for the depredations of the *Alabama*, did not concur in all the reasoning of the other arbitrators. He therefore did not sign the award, but filed a paper containing an exposition of his reasons for dissenting from the award. (Moore, Int. Arbitrations, I. 652, 659.)

"In the arbitration, which took place at Geneva, the main contentions on each side, and the decisions, so far as any were given, were as follows:

"I. The United States contended that the three rules were in force before the treaty was made. Great Britain denied this, both in the treaty and in the papers submitted at Geneva. In the British counter case it was said: 'These rules go beyond any definition of neutral duty which, up to that time, had been established by the law or general practice of nations.' The tribunal did not notice this point; but Mr. Gladstone, in the House of Commons, on the 26th day of May, 1873, said with respect to it: 'Were they, as regards us, an *ex post facto* law? I say they were not. We deemed that they formed part of the international law at the time the claims arose.'

"II. The United States contended that the Government of Great Britain, by its indiscreet haste in counseling the Queen's proclamation recognizing the insurgents as belligerents, by its preconcerted joint action with France respecting the declarations of the Congress of Paris, by its refusal to take steps for the amendment of its neutrality laws, by its refraining for so long a time from seizing the rams at Liverpool, by its conduct in the affair of the *Trent*, and by its approval of the course of its colonial officers at various times—and that the individual members of the Government, by their open and frequent expressions of sympathy with the insurgents, and of desires for their success—had exhibited an unfriendly feeling, which might affect their own course, and could not but affect the action of their subordinates; and that all this was a want of the 'due diligence' in the observance of neutral duties which is required at once by the treaty and by international law. They also contended that such facts, when

proved, imbued with the character of culpable negligence many acts of subordinates in the British service for which, otherwise, the Government might not be held responsible; as, for instance, acts of the collector of customs at Liverpool respecting the *Florida* and the *Alabama;* acts of the authorities at Nassau respecting the arming of the *Florida* at Green Cay, and subsequently respecting her supplies of coal; acts of the authorities at Bermuda respecting the *Florida*, and acts of the authorities at Melbourne respecting the *Shenandoah*. They further contended that there were many such acts of subordinates which, taken individually and by themselves, would not form a just basis for holding culpable a government which was honestly and with vigilance striving to perform its duty as a neutral: but which, taken in connection with each other, and with the proofs of animus which were offered, established culpability in the government itself.

"The mode of stating the contentions on each side in these proceedings was peculiar. The two parties were, by the treaty, required to deposit their cases simultaneously; also in like manner their counter-cases (each of which was to be a reply to the case of the other), and their arguments on the cases, counter cases, and evidence. When, therefore, the theory of the attack in the case of the United States was developed, the theory of the defence in the case of Great Britain was developed simultaneously. In respect of the necessity of bringing home to the government itself the acts of the subordinates, it was identical in theory with the case of the United States. It said:

"'A charge of injurious negligence on the part of a sovereign government, in the exercise of any of the powers of sovereignty, needs to be sustained on strong and solid grounds. Every sovereign government claims the right to be independent of external scrutiny or interference in its exercise of these powers; and the general assumption that they are exercised with good faith and reasonable care, and that laws are fairly and properly administered—an assumption without which peace and friendly intercourse could not exist among nations—ought to subsist until it has been displaced by proof to the contrary. It is not enough to suggest or prove that a government, in the exercise of a reasonable judgment on some question of fact or law, and using the means of information at its command, has formed and acted on an opinion from which another government dissents or can induce an arbitrator to dissent. Still less is it sufficient to show that a judgment pronounced by a court of competent jurisdiction, and acted upon by the Executive, was tainted with error. An administrative act founded on error, or an erroneous judgment of a court, may, indeed, under some circumstances, found a claim to compensation on behalf of a person or government injured by the act or judgment. But a charge of negligence brought against a government can not be

supported on such grounds. Nor is it enough to suggest or prove some defect of judgment or penetration, or somewhat less than the utmost possible promptitude and celerity of action, on the part of an officer of the government in the execution of his official duties. To found on this alone a claim to compensation, as for a breach of international duty, would be to exact, in international affairs, a perfection of administration which few governments or none attain in fact, or could reasonably hope to attain, in their domestic concerns; it would set up an impracticable, and therefore an unjust and fallacious standard, would give occasion to incessant and unreasonable complaints, and render the situation of neutrals intolerable. Nor, again, is a nation to be held responsible for a delay or omission occasioned by mere accident, and not by the want of reasonable foresight or care. Lastly, it is not sufficient to show that an act has been done which it was the duty of the government to endeavor to prevent. It is necessary to allege and to prove that there has been a failure to use, for the prevention of an act which the government was bound to endeavor to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation. These considerations apply with especial force to nations which are in the enjoyment of free institutions, and in which the government is bound to obey, and can not dispense with, the laws.'

"III. It was maintained in the American case that the diligence of the neutral should 'be proportioned to the magnitude of the subject, and to the dignity and strength of the power which is to exercise it' [p. 158], and that it should be 'gauged by the character and magnitude of the matter which it may affect, by the relative condition of the parties, by the ability of the party incurring the liability to exercise the diligence required by the exigencies of the case, and by the extent of the injury which may follow negligence' [p. 152].

"On the other side it was said, 'Her Majesty's Government knows of no distinction between more dignified and less dignified powers; it regards all sovereign states as enjoying equal rights, and equally subject to all ordinary international obligations; and it is firmly persuaded that there is no state in Europe or America which would be willing to claim or accept any immunity in this respect, on the ground of its inferiority to others in extent, military force, or population.' 'Due diligence on the part of a sovereign government signifies that measure of care which the government is under an international obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, is to be deduced from the nature of the obligation itself, and from those considerations of justice, equity, and general expediency on which the law of nations is founded. The measure of care which a government is bound to

use in order to prevent within its jurisdiction certain classes of acts, from which harm might accrue to foreign states or their citizens, must always (unless specifically determined by usage or agreement) be dependent, more or less, on the surrounding circumstances, and can not be defined with precision in the form of a general rule. It would commonly, however, be unreasonable and impracticable to require that it should exceed that which the governments of civilized states are accustomed to employ in matters concerning their own security or that of their own citizens.'

"The tribunal in its award said:

"'The due diligence referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part; and the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's Government of all possible solicitude for the observance of the rights and duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861.'"

Davis, Notes, Treaty Volume (1776–1887), 1363–1365.
For further discussions of the phrase "due diligence," see Moore, Int. Arbitrations, I. 572, 610, 612, 654; IV. 4057–4082.

The three rules of the treaty of Washington were at the very outset discredited in England by the declaration inserted in the treaty that Her Majesty's Government, while agreeing to them as rules of decision, could not assent to them as a statement of principles of international law which were in force at the time when the *Alabama* claims arose. As the result of this declaration the view was generally accepted, in spite of the opinions which Sir Roundell Palmer and others had expressed to the contrary, that the rules as a matter of course imposed upon Great Britain as a neutral new and intolerable burdens; and when the adverse award was rendered it was generally ascribed to this cause, though it was also supposed that the arbitrators had in their award so interpreted the rules as to make them even worse than they were in their naked form. Nor was indiscriminate criticism of this kind confined to England. In the United States adherents of the theory that a loose and nominal neutrality, gauged by convenience and inclination, is the kind most conducive to international peace, as well as those who, while taking a more rigid view of the duties of neutrality, thought the rules too sweeping, began to take alarm and to utter warnings against making the duties of neutrals so onerous as to render the state of belligerency preferable to that of neutrality. And yet it is difficult to find among these utter

ances a serious attempt to establish specific objections either to the rules or to the award.

Prof. E. Robertson, referring in the Encyclopædia Britannica [a] to the three rules and the award, says:

"These rules, which we believe to be substantially just, have been unduly discredited in England, partly by the result of the arbitration, which was in favour of the United States, partly by the fact that they were from the point of view of English opinion *ex post facto* rules, and that the words defining liability ('due diligence') were vague and open to unforeseen constructions; for example, the construction actually adopted by the Geneva tribunal that due diligence ought to be exercised in proportion to the belligerent's risk of suffering from any failure of the neutral to fulfil his obligations." [b]

These observations are very fully sustained by the opinions of publicists. At the session of the Institute of International Law at Geneva in 1874 a report was made by a commission, of which Bluntschli was reporter, which had been appointed to examine the three rules. The principal paper was presented by Calvo, who, after examining international transactions and the legislation of particular states, and citing the opinions of Klüber, G. F. de Martens, Fiore, Pando, Bello, De Cussy, Hautefeuille, Heffter, Bluntschli, Gessner, Hall, Ortolan, Massé, Halleck, and other publicists, concluded that "incontestably the three rules . . . do not constitute a new obligation in the law of nations . . . ; but on the contrary they merely affirm preexisting principles consecrated for many years by numerous acts and by the legislation and practice of nations." [c]

Professor Lorimer, of Edinburgh, assailed the rules on the significant ground that neutrality itself was by no means a constant duty, but altogether circumstantial. He also suggested that by cutting off

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[a] XIII. 196, Article International Law.

[b] These observations are in striking contrast with those of Sir Henry Maine (International Law, 216), who declares that Great Britain "was penally dealt with for a number of acts and omissions, each in itself innocent." The grounds of this singular statement are not disclosed. It could hardly have been made as the result of an examination of the cases of the *Alabama*, the *Florida*, and the *Shenandoah*, which were the only vessels in respect of which Great Britain was held liable. On September 19, 1872, *The Nation* (XV. 180), referring to the Geneva award, very pertinently said: "No hardship or inconvenience can ever result to any government from being held bound to prevent what England permitted to occur with regard to the fitting out of that ship [the *Alabama*]. . . . The case of the *Oreto*, afterward the *Florida*, was nearly as bad. . . . The *Shenandoah* . . . was received at Melbourne with welcome and rejoicings which it is no exaggeration to call wild. . . . The tribunal imposes no new or heavy burden on neutrals in deciding that what occurred at Melbourne made the English Government liable for all the damage done by the *Shenandoah* afterwards."

[c] Rev. de Droit Int. VI. 453.

military supplies wars might be brought to an end before the belligerents were sufficiently exhausted. Moreover, he thought the first rule capable of being so applied as to prohibit commerce in ships between belligerents and neutrals altogether, and objected to making the intention with respect to a ship's use, rather than her actual character, the test of neutrality.[a]

President Woolsey was of opinion that the rules represented the duties prescribed by international law and that they were correctly interpreted by the Geneva tribunal. He thought that the commissioners who framed the treaty understood that a vessel which had been fitted out and armed and had then escaped should be seized if she reentered the jurisdiction. In this relation he pointed out that Lord Granville in his instructions to the British high commissioners of February 9, 1871, had said that Her Majesty's Government was prepared to accept the rule that no vessel in the military or naval service of any belligerent which should have been "equipped, fitted out, armed, or dispatched contrary to the neutrality of a neutral state should be admitted into any port of that state," as well as the rule that no vessel should be received as a vessel of war in a neutral port which had not been commissioned in some port in the actual occupation of the government by which her commission was issued.[b]

M. Rolin-Jacquemyns, after an able analysis of the subject, came to the conclusion that the rules did not constitute an innovation. He commented on Lorimer's idea that a peace must be regarded as delusive if concluded before the total ruin of the combatants.[c]

William Beach Lawrence thought that the interpretation given by the Geneva tribunal to the words "due diligence" rendered the rules unacceptable. He thought that the declaration that the diligence of the neutral government must be in exact proportion to the risk to which the belligerents were exposed would make neutrals guarantors of every injury which might be inflicted on one of the belligerents by the use of the property of the other belligerent which should be found in the neutral jurisdiction.[d]

Prof. Mountague Bernard adhered to the view of his government, as expressed in the treaty, of which he was one of the signers, that the rules constituted an innovation.[e]

Bluntschli, as reporter of the commission, summed up its conclusions. He pronounced the paper of Calvo "very learned and very judicious," and declared that it "demonstrated" that the rules did not constitute an innovation, but on the contrary embodied long-recognized principles by which neutral states had regulated their

[a] Rev. de Droit Int. VI. 542. [b] Id. 559. [c] Id. 561. [d] Id. 574. [e] Id. 575.

conduct. He dissented from Lorimer's suggestion that it was good policy to prolong wars. He concurred with President Woolsey in the view that the rules might be more definitely expressed and that "due diligence" should be defined. He expressed general concurrence in the views of Rolin-Jaequemyns, and dissented from the argument of William Beach Lawrence.[a]

The institute voted that the rules were only declaratory of the law of nations; but, with a view to prevent controversies as to their interpretation, referred them for revision to the commission which had previously had them under examination, at the same time adding to the commission four new members, one of whom was Professor Westlake.[b]

At the session of the institute at The Hague in 1875 Bluntschli submitted a project of rules, with certain observations and proposed amendments presented by various members of the commission.[c] The report was discussed on the 30th of August, there being present M. Asser, counselor to the ministry of foreign affairs, Amsterdam; Prof. Mountague Bernard; M. Besobrasoff, of St. Petersburg; Dr. Bluntschli, of Heidelberg; M. Brocher, of the University of Geneva; Dr. Bulmerincq, counselor of state, of Wiesbaden; David Dudley Field; Professor Lorimer; Dr. Marquardsen, member of the Reichstag; Professor de Martens, of St. Petersburg; M. Moynier, of Geneva; Dr. Neumann, member of the Austrian House of Peers; M. de Parieu, member of the French Senate and of the Institute of France; M. Pierantoni, member of the Italian Parliament; M. Rolin-Jaequemyns, of Ghent; Sir Travers Twiss; Professor Westlake; and MM. Den Beer Portugael, Hall, Holland, Rivier, and Albéric Rolin. The institute, Messrs. Bernard, Lorimer, and Twiss opposing, adopted the following rules:[d]

"I. L'État neutre désireux de demeurer en paix et amitié avec les belligérants et de jouir des droits de la neutralité, a le devoir de s'abstenir de prendre à la guerre une part quelconque, par la prestation de secours militaires à l'un des belligérants ou à tous les deux, et de veiller à ce que son territoire ne serve de centre d'organisation

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[a] Rev. de Droit Int. VII. 127.

[b] Id. VI. 606. The commission as thus constituted was composed of Bluntschli, reporter, and MM. Asser, Carlos Calvo, Lorimer, Mancini, Neumann, Rolin-Jaequemyns, Westlake, and Woolsey.

[c] Rev. de Droit Int. VII. 427.

[d] Annuaire, I. 139. Rivier, in his work on the law of nations, intimates that these rules are not less liable to misinterpretation than the three rules themselves. He observes that the communication of the three rules to maritime powers with an invitation to accede to them would now be superfluous, since no state would dream of contesting the principle they contain, even though the manner in which it is expressed might be criticised. (Principes du Droit des Gens, par Alphonse Rivier, II. 408; Paris, 1896.)

ou de point de départ à des expéditions hostiles contre l'un d'eux ou contre tous les deux.

" II. En conséquence l'État neutre ne peut mettre, d'une manière quelconque, à la disposition d'aucun des États belligérants, ni leur vendre ses vaisseaux de guerre ou vaisseaux de transport militaire, non plus que le matériel de ses arsenaux ou de ses magasins militaires, en vue de l'aider à poursuivre la guerre. En outre l'État neutre est tenu de veiller à ce que d'autres personnes ne mettent des vaisseaux de guerre à la dispositon d'aucun des États belligérants dans ses ports ou dans les parties de mer qui dépendent de sa juridiction.

" III. Lorsque l'État neutre a connaissance d'entreprises ou d'actes de ce genre, incompatibles avec la neutralité, il est tenu de pendre les mesures nécessaires pour les empêcher et de poursuivre comme responsables les individus qui violent les devoirs de la neutralité.

" IV. De même l'État neutre ne doit ni permettre ni souffrir que l'un des belligérants fasse de ses ports ou de ses eaux, la base d'opérations navales contre l'autre, ou que les vaisseaux de transport militaire se servent de ses ports ou de ses eaux, pour renouveler ou augmenter leurs approvisionnements militaires ou leurs armes, ou pour recruter des hommes.

" V. Le seul fait matériel d'un acte hostile commis sur le territoire neutre, ne suffit pas pour rendre responsable l'État neutre. Pour qu'on puisse admettre qu'il a violé son devoir, il faut la preuve soit d'une intention hostile (Dolus), soit d'une négligence manifeste (Culpa).

" VI. La puissance lésée par une violation des devoirs de neutralité n'a le droit de considérer la neutralité comme éteinte, et de recourir aux armes pour se défendre contre l'État qui l'a violée, que dans les cas graves et urgents, et seulement pendant la durée de la guerre.

" Dans les cas peu graves ou non urgents, ou lorsque la guerre est terminée, des contestations de ce genre appartiennent exclusivement à la procédure arbitrale.

" VII. Le tribunal arbitral prononce *ex bono et æquo* sur les dommages-intérêts que l'État neutre doit, par suite de sa responsabilité, payer à l'État lésé, soit pour lui-même, soit pour ses ressortissants." [a]

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[a] I. The neutral state, desirous of maintaining peace and friendship with the belligerents and of enjoying the rights of neutrality, ought to abstain from taking any part whatever in the war by furnishing military aids to either or both of the belligerents, and to see to it that its territory does not serve as a center of organization or point of departure for hostile expeditions against one or both of the belligerents.

II. Consequently the neutral state can not in any manner put at the disposition of any belligerent or sell to it ships of war or military transports or material from its arsenals or military stores with a view to aid it in the prosecution of the war. Moreover, the neutral state is bound to see to it that other

Wharton, who had once gone so far as to declare that the "three rules" "placed limitations on the rights of neutrals greater even than those England had endeavored to impose during the Napoleonic wars,"[a] afterwards stated[b] that "while the weight of authority" was that "the 'rules' themselves contain propositions which are generally unobjectionable," such was "not the case with the decisions of the majority of the arbitrators, who interpret the 'rules' so as to impose on neutrals duties not only on their face unreasonable, but so oppressive as to make neutrality a burden which no prudent nation, in cases of great maritime wars abroad, would accept." As to what was meant by "the decisions of the majority of the arbitrators" we are left to conjecture; but it would be unfair to assume that the phrase was intended to apply to the result at which the tribunal arrived with respect to the *Alabama*, the *Florida*, and the *Shenandoah* after she left Melbourne.[c] It seems rather to have been intended to apply to the "*rationes decidendi*" of the arbitrators; and in this assumption we are warranted by the fact that the passage in which the phrase in question is found is preceded by various extracts in

persons do not within its ports or waters put vessels of war at the disposition of any of the belligerents.

III. When the neutral state has knowledge of the enterprises or acts of this character, which are incompatible with neutrality, it is bound to take the necessary measures to prevent them, and to hold responsible the individuals who violate the duties of neutrality.

IV. The neutral state ought not to permit or suffer the belligerents to make its ports or waters the base of naval operations against each other, or their military transports to use its ports or waters for renewing or augmenting their military supplies or their arms, or for recruiting men.

V. The mere fact that a hostile act has been committed on the neutral territory does not suffice to make the neutral state responsible. In order to show that such state has violated its duty it is necessary to show either a hostile intention (*dolus*) or a manifest neglect (*culpa*).

VI. The power injured by the violation of the duties of neutrality has a right to consider neutrality as broken, and to resort to arms to defend itself against the state which has violated neutrality only in grave and urgent cases and only while the war is going on. In cases not grave or urgent, or when the war has come to an end, disputes of this kind appertain exclusively to arbitral procedure.

VII. The arbitral tribunal pronounces *ex bono et æquo* on the amount of damages which the neutral state ought, in view of its responsibility, to pay to the injured state either for itself or its citizens.

[a] Commentaries on American Law, sec. 244. In the same section it was also asserted that the rules had been "repudiated" by Great Britain and the United States and "rejected by all other powers."

[b] Int. Law Digest, III. 649.

[c] A recent English writer, whose pages bear evidence of a personal examination of the records, expresses a clear opinion, for which he sets forth his reasons, that Great Britain was responsible for these vessels on any reasonable theory of due diligence. (Walker, Science of International Law, 485, 490, 496.)

which those reasons, especially on the question of diligence, are criticised. For example, a passage from Creasy[a] is quoted, in which four of the arbitrators are represented as having "virtually" announced the "dogma" that in determining whether a state is chargeable with negligence, "no regard whatever is to be paid to the system of criminal process which, and which alone, is recognized and permitted by the fundamental institutions of that state." Certain passages on the subject of due diligence are also quoted from Sir Alexander Cockburn's dissent, with comments from which it might be implied that a majority of the arbitrators held that the neutral must employ "perfect diligence."

Doubtless it is true that if we take particular expressions in the individual opinions of the arbitrators and in the award, and construe them without reference either to the context or to the results at which the tribunal arrived, it may not be difficult to find matter for criticism. For example, the representation that four of the arbitrators "virtually" announced a "dogma" subversive of the legislative independence of states evidently is based on their declaration in the case of the *Alabama* that "the Government of Her Britannic Majesty cannot justify itself for a failure of due diligence on the plea of insufficiency of the legal means of action which it possessed." It is not asserted that this declaration actually contains the dogma in question, but it is alleged that it "virtually" does so. On the other hand, it may be said that the declaration was merely intended to express the sound general principle, peculiarly applicable to the case of the *Alabama*, which Earl Russell had admitted to be a "scandal and reproach" to British laws, that a government can not be allowed to say, when called upon to perform its international duties: "The laws do not permit me to do so." It is a self-evident proposition that if a government may by legislation fix the measure of what it owes to other states, there is no such thing as international law or international obligation. To say that a government can not "justify" a failure in duty by pleading the "insufficiency" of its laws by no means warrants the inference that, in determining whether it has been negligent, "no regard whatever" is to be paid to its system of criminal process.

We have referred to certain passages from Sir Alexander Cockburn on the subject of due diligence. The rule laid down in these passages and approvingly commented upon by Wharton is that which the "*diligens paterfamilias suis rebus adhibere solet;*" or in the form in which Wharton expresses it, "such diligence as under the circumstances of the particular case good business men of the particular class

[a] International Law, 335.

are accustomed to show." To what extent does this differ from the rule laid down by the four arbitrators? The award declares that the due diligence referred to in the rules "ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfill the obligations of neutrality on their part." What is the degree of diligence which the "*diligens paterfamilias*," or the "good business man" is accustomed to show? Wharton, in his work on Negligence, says that it is "proportionate to the duty imposed;"[a] that "the same act may or may not be negligent as the probability of injury ensuing from it may be greater or less;[b] and that in order "to avert the charge of *culpa levis*," which he defines as the negligence of a good business man in his specialty, the "amount of care bestowed must be equal to the emergency."[c] Pollock[d] says that in determining the question of negligence, which is merely the contrary of diligence, the "caution that is required is in proportion to the magnitude and the apparent imminence of the risk." Cooley[e] states that the "care and vigilance" required "may vary according to the danger involved in the want of diligence." These expressions may be considered as axiomatic. The exercise of vigilance in proportion to the risk of injury is involved in the very idea of diligence.

As appears above, the contracting parties agreed not only to observe the three rules as between themselves in future, but also "to bring them to the knowledge of other maritime powers and to invite them to accede to them." Before the exchange of the ratifications of the treaty a question arose as to the proper construction of that clause of the second rule by which the neutral is bound "not to permit or suffer either belligerent to make use of its ports or waters for the purpose of the renewal or augmentation of military supplies or arms." In order to remove an objection which had been raised in England, Mr. Fish declared that the President understood and insisted that the rule did not "prevent the open sale of arms or other military supplies in the ordinary course of commerce," and that the United States would, in bringing the rules to the knowledge of other powers and asking their assent to them, insist that such was their proper interpretation and meaning. On June 17, 1871, the day the ratifications of the treaty were exchanged at London, Earl Granville sent to Sir Edward Thornton, then British minister at Washington, a draft of a note to be used in presenting the three rules to the several maritime powers. In this note it was stated that the second rule was to be understood as prohibiting the use of neutral waters for the renewal or augmentation of military supplies only for the service of a vessel cruising or

[a] Sec. 48. [b] Sec. 47. [c] Sec. 53. [d] Law of Torts, 353, 372. [e] Torts, 2d ed. 752.

carrying on war, or intended to cruise or carry on war against another belligerent, and not when the military supplies or arms were exported in the ordinary course of commerce. Mr. Fish proposed to substitute for this explanation the phrase he had previously used. Earl Granville objected to the word "open," because it would seem to make the Government responsible for clandestine sales. Mr. Fish intimated that he would be willing to omit this word, but strongly objected to the word "exportation" in Lord Granville's draft. Lord Granville was willing to omit it. When the discussion had reached this stage and seemed about to result in an agreement, it was interrupted by the controversy as to the "indirect claims" embraced in the American case at Geneva, and was not resumed till several months after the Geneva tribunal had rendered its award. Meanwhile the situation had materially changed. Prince Bismarck was reported to have expressed himself in a manner unfavorable to the rules, not because they went too far, but because they did not go far enough, intimating that, in order to render them acceptable, they should be extended so as to forbid the supplying of arms and other munitions of war. On October 7, 1872, General Schenck reported from London that Count Beust, the Austrian ambassador, had, in his correspondence with his Government, taken strong ground against the rules, and that Count Bernstoff, the German ambassador, had told Lord Granville that his Government probably would oppose the rules when they were proposed for its acceptance. But it was the award at Geneva that served, more than anything else, to prevent the joint submission of the rules by the United States and Great Britain to the other maritime powers. On March 21, 1873, a debate took place in the House of Commons on a motion of Mr. Harvey, for an address to the Crown praying that Her Majesty, in communicating the rules to foreign powers, would declare her dissent from the principles set forth by the Geneva tribunal. Several speakers, among whom were Sir W. Vernon Harcourt, spoke in condemnation of the rules. Mr. Gladstone, then prime minister, declared that "the *dicta* of the arbitrators," their "recitals," and their "*rationes decidendi*," should not be allowed to enter into the question; but he intimated that the attempt to place a "substantive interpretation" on the rules in recommending them to other powers would be open to objection. There was much criticism of the rules in the House of Commons again in the following May; and on November 3, 1873, after the question of submitting the rules had been revived by Mr. Fish, Lord Granville instructed Sir Edward Thornton that, while Her Majesty's Government would not propose to fix, without the full concurrence of that of the United States, any particular interpretation of the rules, they would think it necessary to guard themselves against any unintended consequences which, as the result of the Geneva award, the rules might be thought to involve.

The subject then remained substantially in abeyance till the spring of 1875. It was subsequently revived on several occasions in connection with the preparations for the Halifax Commission, but with no practical result. On July 26, 1876, Sir Edward Thornton concluded a note to Mr. Fish, containing a recapitulation of the negotiations, with the statement that the delay in dealing with the matter could not be laid to the account of Her Majesty's Government. In a similar recapitulation, embodied in a note of September 18, 1876, Mr. Fish endeavored to show that the responsibility lay with the British Government, and, in this relation, he adverted to the fact that the same clause in the treaty which bound the contracting parties to observe the rules in future, also obliged them to present the rules to other powers. "The stipulation," said Mr. Fish, "is regarded by the United States as indivisible, so that a failure to comply with one part thereof may, and probably will, be held to carry with it the avoidance and nullity of the other." In closing, he expressed the wish of the United States to cooperate in the solution of the question of submission.

For a fuller account, see Moore, Int. Arbitrations, I. 666–670, citing S. Ex. Doc. 26, 45 Cong. 3 sess.; 65 Br. & For. State Papers, 399.

For an adverse criticism of the rules, see Wharton, Commentaries on American Law, sec. 244, citing Lorimer's Institutes of the Law of Nations, 52.

See, also, Twiss, Law of Nations in Time of War (2d ed.), Introduction, xlii.; 7 Am. Law Review, 193, 237.

VIII. *STATE OF BELLIGERENCY.*

1. Essential, as against Titular Government

§ 1331.

"I have to acknowledge the receipt of your letter of the 9th instant, relative to the legitimacy of the Salnave Government of Hayti, and the sailing of the Haytian man-of-war *Galatea* from the port of New York. The Salnave Government must, until some other has established itself *de facto*, and has been recognized as such by the proper Department of our Government, be regarded as the legitimate Government of Hayti and such respect must be paid to its acts and rights as are due to its character. The *Galatea* is understood to be a regular Haytian man-of-war, which being disabled put into the port of New York for repairs. This Government had no authority to detain her; but on the contrary was bound in comity to allow her to refit and if need be to facilitate the same. You will perceive that the principles above stated apply equally to the case of the brig *Esey*, alleged by you in your telegram of the 12th instant to be about to sail with ammunition for Salnave. There is here no violation of neutrality as there are no governments interested between which this Government

should be neutral. The supplies in question are destined for the aid of the legitimate Government in the maintenance of its integrity against insurgents."

Mr. Seward, Sec. of State, to Mr. Wheelwright, Sept. 15, 1868, 79 MS. Dom. Let. 319.

"Valuable assistance was rendered by the Japanese authorities to the United States transport ship *Morgan City* while stranded at Kobe. Permission has been granted to land and pasture army horses at Japanese ports of call on the way to the Philippine Islands. These kindly evidences of good will are highly appreciated."

President McKinley, annual message, Dec. 5, 1899, For. Rel. 1899, xxv.

2. NOT ESSENTIAL, AS AGAINST DISTURBERS OF PEACE.

§ 1332.

July 10, 1810, Peter A. Schenck, surveyor of the port of New York, acting on the written direction of David Gelston, collector of the port, seized the ship *American Eagle* and certain ballast, provisions, and stores, forming part of her equipment, all the property of Goold Hoyt, for a violation of section 3 of the act of 1794. On the trial, before the United States district court, the ship and other property were acquitted, and the court refused to give a certificate of reasonable cause of seizure. In January, 1813, Hoyt brought an action of trespass against Gelston and Schenck in the supreme court of the State of New York for damages for the seizure. The defendants pleaded, in substance, (1) that the seizure of the ship was justified because she was attempted to be fitted out and armed, with intent to be employed in the service of a foreign state (viz. that part of the island of St. Domingo then under the dominion of Petion) to commit hostilities upon the subjects of another foreign state with whom the United States was at peace (viz. that part of St. Domingo then under the government of Christophe); and (2) that the seizure was made by authority of the President of the United States under section 7 of the act of 1794. On demurrer these pleas were overruled, and on the trial a judgment for damages was entered for the plaintiff. This judgment was affirmed by the New York court of errors and appeals, and the case was then brought before the Supreme Court of the United States.

Mr. Justice Story, delivering the opinion of the court, held (1) that the defendants, as officers of the customs, had a right to make the seizure, if there were sufficient grounds for it; (2) that the sentence of acquittal of the United States district court, with a denial of a certificate of reasonable cause, was conclusive evidence that the seizure was tortious, and precluded the litigation of the question in

any other forum, e. g., in the courts of the State of New York; (3) that, as no evidence was offered in the State court to prove that Petion or Christophe was recognized by the United States or France as a government, it did not belong to that court to take judicial notice of the matter and decide affirmatively that Petion and Christophe were foreign princes within the purview of section 3 of the act of 1794; (4) that section 7 of the act of 1794 did not confer on the President the power to order a seizure, but only to call out the military and naval forces when necessary to enforce a seizure; (5) that the judgment of the New York court of errors and appeals was affirmed, with damages at 6 per cent from the date of its rendition, with costs. On point "(3)" Mr. Justice Story said:

"No doctrine is better established than that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own Government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this court in the case of Rose *v.* Himely (4 Cranch, 241), and to that decision on this point we adhere. And the same doctrine is clearly sustained by the judgment of foreign tribunals. (The Manilla, 1 Edwards, R. 1; The City of Berne *v.* The Bank of England, 9 Ves. 347; Dolden *v.* Bank of England, 10 Ves. 353, 11 Ves. 283.) If, therefore, this were a fact proper for the consideration of a jury, and to be proved *in pais*, the court below were not bound to admit the other evidence, unless this fact was proved in aid of that evidence, for without it no forfeiture could be incurred. If, on the other hand, this was matter of fact, of which the court were bound judicially to take cognizance, then the court were right in rejecting the evidence, for as far as we have knowledge, neither the government of Petion or Christophe have ever been recognized as a foreign state, by the Government of the United States, or of France."

In view of the decision that the United States district court's judgment of acquittal without a certificate of reasonable cause established the tortious character of the seizure, the foregoing expression of opinion upon the question of recognition was more or less *obiter*. Mr. Justice Johnson, while concurring in the judgment of the court, stated in a brief opinion that he considered that the court had decided only (1) that the State court was incompetent to try the question of forfeiture, and (2) that section 7 of the act of 1794 gave the President power merely to call out the Army and Navy when necessary to enforce a seizure.

Gelston *v.* Hoyt (Feb. 27, 1818), 3 Wheat. 246.

In section 3 of the act of 1794, under which this case was tried, the words used were "foreign prince or state." The defect disclosed in these

words by the foregoing case was immediately cured by the act of April 20, 1818 (sec. 5283, Revised Statutes), by which there were added to the phrase "of any foreign prince or state" the words "or of any colony, district, or people."

The president of a shipbuilding firm in Wilmington, Delaware, inquired whether he could, without infringing the neutrality laws of the United States, fit out and deliver to officers of the Colombian Government at Wilmington, with a custom-house clearance for a Colombian port, an armed gunboat with which the Colombian Government expected to take Cartagena and other Colombian ports then in the hands of the insurgents. The Department of State replied: "The existence of a state of war has not, in a formal sense, been recognized by this Government in respect of the hostilities in Colombia, nor have the insurgents there in arms against the recognized Government been regarded as belligerents. There does not appear to be any possible ground, therefore, for considering a contractual operation such as you describe, with the legitimate authorities of Colombia, as a contravention of the neutrality statutes of the United States. The same question came up during the late Haytian insurrection, when the insurgents, who held Jacmel, Gonaives, and other ports of Hayti, sent agents to the United States to oppose and to contest by legal means the right of the legitimate Government of Hayti to procure warlike supplies in the United States, and the result was wholly adverse to their pretensions. I see no reason to regard your proposed delivery of such gunboat to the Colombian minister or his authorized agent as other than an ordinary commercial venture on your part."

Mr. Bayard, Sec. of State, to Mr. Gibbons, July 3, 1885, 156 MS. Dom. Let. 174.

The neutrality act of 1818 is not restricted in its operation to cases of war between two nations or where both parties to a contest have been recognized as belligerents, that is, as having a sufficiently organized political existence to enable them to carry on war. It would extend to the fitting out and arming of vessels for a revolted colony, whose belligerency had not been recognized, but it should not be applied to the fitting out, etc., of vessels for the parent state for use against a revolted colony whose independence has not in any manner been recognized by our Government.

Hoar, At. Gen., 1869, 13 Op. 177.

"The phrase 'neutrality act' is a distinctive name, applied for convenience sake merely, as is the term 'foreign enlistment act' to the analogous British statute. The scope and purpose of the act are not thereby declared or restricted. The act itself is so compre-

hensive that the same provisions which prevent our soil from being made a base of operations by one foreign belligerent against another likewise prevent the perpetration within our territory of hostile acts against a friendly people by those who may not be legitimate belligerents, but outlaws in the light of the jurisprudence of nations. There is and can be no 'neutrality' in the latter case. If the hostile party carries his hostility beyond the pale of law, he commits a crime against the United States and is amenable to the prescribed process and punishment."

Mr. Bayard, Sec. of State, to Mr. Valera, Spanish min., July 3, 1885, For. Rel. 1885, 776–777.

"I announce with sincere regret that Hayti has again become the theater of insurrection, disorder, and bloodshed. The titular government of President Salomon has been forcibly overthrown, and he driven out of the country to France, where he has since died.

"The tenure of power has been so unstable amid the war of factions that has ensued since the expulsion of President Salomon, that no Government constituted by the will of the Haytian people has been recognized as administering responsibly the affairs of that country. Our representative has been instructed to abstain from interference between the warring factions, and a vessel of our Navy has been sent to Haytian waters to sustain our minister and for the protection of the persons and property of American citizens.

"Due precautions have been taken to enforce our neutrality laws and prevent our territory from becoming the base of military supplies for either of the warring factions."

President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, xiv.

With reference to the question whether the fitting out of a vessel by or in the interest of the Congressional party in Chile, who had not been recognized by the United States as belligerents, could be considered as a violation of section 5283, Revised Statutes, the court said that the section was found in the chapter entitled "Neutrality" and was "originally enacted in furtherance of the obligations of the nation as a neutral," and added: "The very idea of neutrality imports that the neutral will treat each contending party alike; that it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other."

United States *v.* Trumbull (1901), 48 Fed. Rep. 99.

The foregoing may be regarded as *obiter*, as the court held that the facts alleged did not in any event constitute a violation of section 5283. The term "neutrality" forms no part of the statute itself, the obvious purpose of the law being to prevent the commission of certain acts designed to disturb the peace of friendly nations, and not merely to prevent the commission of unneutral acts after a state of public war

had actually been established. It could hardly have been the intention of the legislature to make the United States a safe place for the getting up of expeditions to start and help along insurrections in friendly countries till the point of public war and recognized belligerency should be reached, and then to make it a penal offense to render aid thereafter. Such a result would be most incongruous, to say the least.

During the insurrection in Cuba, which began in 1895, the Government of the United States declined to recognize the insurgents as belligerents. On June 12, 1895, however, President Cleveland issued what is commonly called a "neutrality" proclamation. This proclamation recited that the island of Cuba was "the seat of serious civil disturbances, accompanied by armed resistance to the authority of the established Government of Spain," a power with which the United States were at peace, and that "the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established Government, by accepting or exercising commissions for warlike service against it, by enlistment or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such Government." Therefore, "in recognition of the laws aforesaid, and in discharge of the obligations of the United States towards a friendly power, and as a measure of precaution, and to the end that citizens of the United States and all others within their jurisdiction may be deterred from subjecting themselves to legal forfeitures and penalties," the President admonished all such citizens and other persons to abstain from every violation of the laws referred to, and warned them that all violations of such laws would be rigorously prosecuted; and he enjoined upon all officers of the United States charged with the execution of the laws in question "the utmost diligence in preventing violations thereof and in bringing to trial and punishment any offenders against the same."

For. Rel. 1895, II. 1195.

The laws of the United States, commonly known as the neutrality laws, are so called because their main purpose is to enable the United States to fulfill its duties as a neutral toward belligerents, but they were also intended to prevent offenses against friendly powers, whether such powers are or are not engaged in war or in an attempt to suppress a mere revolt.

Harmon, At. Gen., Dec. 10, 1895, 21 Op. 267, 270.

"The [neutrality] statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency. (13 Ops. Attys. Gen. 177, 178.) Section 5286 defines certain offences against the United States and denounces the punishment therefor, but, although a penal statute, it must be reasonably construed, and not so as to defeat the obvious intention of the legislature."

Wiborg *v.* United States (1896), 163 U. S. 632, 647.

A vessel was libeled as forfeited to the United States, under § 5283 of the Revised Statutes, for being furnished, fitted out, and armed with intent that she should be employed in the service of what was variously described as "a certain people, to wit, certain people then engaged in armed resistance to the Government of the King of Spain, in the island of Cuba," and "a certain people, to wit, the insurgents in the island of Cuba, otherwise called the Cuban revolutionists," to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain, in the island of Cuba. In one of the paragraphs of the libel it was set forth that the vessel was "furnished, fitted out and armed, being loaded with supplies and arms and munitions of war," and also that she was "furnished, fitted out and armed with one certain gun or guns, . . . and with munitions of war thereof." The district judge held that the libel was insufficient, because it did not allege "that said vessel had been fitted out with intent that she be employed in the service of a foreign prince or state, or of any colony, district, or people recognized as such by the political power of the United States." Held—

1. That the operation of the neutrality act was not necessarily dependent upon the existence of a state of war between contending parties recognized as belligerents. Wiborg *v.* United States, 153 U. S. 632.

2. That while the word "people" might mean the entire body of the inhabitants of a state, or the state or nation collectively in its political capacity, or the ruling power of the country, its meaning in that part of the section under consideration, taken in connection with the words "colony" and "district," covered any insurgent or insurrectionary "body of people acting together, undertaking and conducting hostilities," although its belligerency had not been recognized. Gelston *v.* Hoyt, 3 Wheat. 246; The Estrella, 4 Wheat. 298; The Nueva Anna and Liebra, 6 Wheat. 193; The Gran Para, 7 Wheat. 471; United States *v.* Quincy, 6 Pet. 445; Nesbitt *v.* Lushington, 4 T. R. 783; Mauran *v.* Insurance Co., 6 Wall. 1; The Salvador, L. R., 3 P. C. 218.

3. That "any other conclusion rests on the unreasonable assumption that the act is to remain ineffectual unless the Government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals or even war, may be the consequence of failure in the performance of obligations towards a friendly power, while on the other, the recognition of belligerency involves the right of blockade, visitation, search and seizure of contraband articles on the high seas and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare. No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed."

4. That the distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in the legal sense, was sharply illustrated in the pending case, since the political department of the Government, while it had not recognized the existence of a *de facto* political power engaged in hostility with Spain, had "recognized the existence of insurrectionary warfare" prevailing before, at, and since the forfeiture alleged, so that the courts were "judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government" with which the United States was at peace, although "acknowledgment of the insurgents as belligerents by the political department" had not taken place. Proclamations of the President, June 12, 1895, and July 27, 1896; annual messages, Dec. 2, 1895, and Dec. 7, 1896.

The decree of the district court was reversed.

The Three Friends (1897), 166 U. S. 1.

See, as to the *Three Friends*, Mr. Olney, Sec. of State, to Mr. Dupuy de Lome, Oct. 6, 1896, MS. Notes to Spain, XI. 228; Mr. Olney to At. Gen., Dec. 28, 1896, 214 MS. Dom. Let. 640.

"It belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."

Fuller, C. J., delivering the opinion of the court, The Three Friends (1897), 166 U. S. 1, 63.

"In Wilborg *v.* United States, 163 U. S. 632, which was an indictment under section 5286, we referred to the eleven sections from 5281 to 5291, inclusive, which constitute Title LXVII of the Revised Statutes, and said: 'The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belli[g]

erency,' and the consideration of the present case arising under section 5283 confirms us in the view thus expressed."

The Three Friends (1897), 166 U. S. 1, 51.

"Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward both parties, but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention.

"Hence, as Mr. Attorney-General Hoar pointed out, 13 Opinions, 177, 178, though the principal object of the act was 'to secure the performance of the duty of the United States, under the law of nations, as a neutral nation in respect of foreign powers,' the act is nevertheless an act 'to punish certain offences against the United States by fines, imprisonment and forfeitures, and the act itself defines the precise nature of those offences.'"

The Three Friends (1897), 166 U. S. 1, 52, Fuller, C. J., delivering the opinion of the court.

IX. *EFFECT OF ARMISTICE.*

§ 1333.

"Shortly after I had entered upon the discharge of the executive duties I was apprized that a war steamer belonging to the German Empire was being fitted out in the harbor of New York with the aid of some of our naval officers rendered under the permission of the late Secretary of the Navy. This permission was granted during an armistice between that Empire and the Kingdom of Denmark, which had been engaged in the Schleswig-Holstein war. Apprehensive that this act of intervention on our part might be viewed as a violation of our neutral obligations incurred by the treaty with Denmark and of the provisions of the act of Congress of the 20th of April, 1818, I directed that no further aid should be rendered by any agent or officer of the Navy; and I instructed the Secretary of State to apprize the minister of the German Empire accredited to this Government of my determination to execute the law of the United States and to maintain the faith of treaties with all nations. The correspondence which ensued between the Department of State and the minister of the German Empire is herewith laid before you. The execution of the law and the observance of the treaty were

deemed by me to be due to the honor of the country, as well as to the sacred obligations of the Constitution. I shall not fail to pursue the same course should a similar case arise with any other nation. Having avowed the opinion on taking the oath of office that in disputes between conflicting foreign governments it is our interest not less than our duty to remain strictly neutral, I shall not abandon it. You will perceive from the correspondence submitted to you in connection with this subject that the course adopted in this case has been properly regarded by the belligerent powers interested in the matter."

President Taylor, annual message, Dec. 4, 1849, Richardson's Messages, V. 10.

See, as to this case, which was that of the war steamer *United States*, see Mr. Clayton, Sec. of State, to Baron Roënne, April 10, April 29, and May 5, 1849, MS. Notes to German States, VI. 201, 208, 214.

As to the bond required of the German Empire in this case, see Mr. Clayton, Sec. of State, to Mr. Hilliard, M. C., Feb. 23, 1850, 37 MS. Dom. Let. 450.

On August 22, 1898, ten days after the conclusion of the general armistice between the United States and Spain, Mr. Hay, American ambassador in London, was instructed to "ascertain whether Admiral Dewey may dock, clean, and paint bottoms of vessels under his command at Hongkong. These operations," it was added, "could not under present circumstances be considered as connected with actual hostilities, but are in the nature of repairs affecting the preservation of vessels."

August 23 Mr. Hay replied that the British Government had telegraphed to the governor of Hongkong to accede to Admiral Dewey's application.

For. Rel. 1898, 1002.

"I have the honor to inform you that on the 22nd ultimo I received the following telegram of that date from Mr. Harris, United States consul at Nagasaki: 'Ascertain if Japanese Government will allow dock-yard company here to dock ships of our fleet during armistice. Answer soon as possible.'

"From an interview had with the vice-minister for foreign affairs it is clear that the Japanese Government are strongly convinced that, the present being an armistice and not definite peace, the relation of neutral and belligerent remains unchanged: and that therefore they could not without a breach of neutrality allow the docking of United States war vessels in a Japanese port.

"Mr. Harris was accordingly on the 24th ultimo answered by wire in the negative. He has since informed me that his telegram to me was sent in view of a telegram to him from Admiral Dewey request

ing him to ascertain whether ships of the fleet could be docked at Nagasaki during the armistice, and desiring a speedy reply."

Mr. Buck, min. to Japan, to Mr. Day, Sec. of State, No. 190, Sept. 6, 1898, MS. Desp. Japan.

September 21, 1898, after the conclusion of the general armistice between the United States and Spain, the Department of State instructed the embassy of the United States in London that it was desired to send the small light-draft gunboat *Helena* to China for river service, for which purpose she was expressly built, and that she would sail about October 1st, touching at Bermuda, Madeira, and Gibraltar. The embassy was instructed to ask permission for the vessel to visit Bermuda and Gibraltar and coal there, with the understanding that she "does not reinforce Asiatic Squadron for operations against Spain should hostilities be resumed."

The desired permission was granted by the British Government on the understanding expressed in the application.

For. Rel. 1898, 1005.

By the protocol between the United States and Spain, concluded at Washington, August 12, 1898, hostilities were immediately suspended, and it was provided that commissioners should meet at Paris to treat of peace. Subsequently the U. S. S. *Marietta*, on visiting the Dutch port of Curaçao, in the West Indies, was, after a stay of forty-four hours, requested to depart. The American minister at The Hague was instructed to bring the matter to the attention of the Dutch Government and to inquire whether it regarded its neutrality proclamation as being strictly applicable during the existing truce and when the treaty of peace seemed to be on the eve of consummation. It was stated that other neutral powers had treated the armistice between the United States and Spain as a practical end of the war, and had admitted public ships of the United States freely to enter their ports for docking, taking on supplies, and for other purposes.

Mr. Hay, Sec. of State, to Mr. Newel, min. to the Netherlands, No. 195, Feb. 8, 1899, MS. Inst. Netherlands, XVI. 401.

See, also, Mr. Hay, Sec. of State, to Mr. White, chargé at London, Oct. 24, 1898, No. 917, MS. Inst. Great Britain, XXXIII. 14.

X. *RESPECT DUE TO NEUTRAL TERRITORY.*

1. INVIOLABILITY.

§ 1334.

On May 2, 1793, the United States received from Mr. Hammond, the British minister, a request for the restoration of the British ship *Grange*, which had been captured by the French frigate *L'Embus-*

cade, in the Delaware Bay, and brought to Philadelphia. Next day Mr. Jefferson assured Mr. Hammond that the United States would "certainly not see with indifference its territory or jurisdiction violated" by either belligerent, and that an inquiry would at once be made into the facts. On the same day Mr. Jefferson wrote in a similar sense to the French minister and asked that the ship be detained till the President's decision could be made. Subsequently Mr. Jefferson asked that the ship and her cargo be restored, and this was done.

Am. State Papers, For. Rel. I. 148, 150; Moore, Int. Arbitrations, IV. 3968; Mr. Jefferson, Sec. of State, to the British minister, May 3, 1793, 5 MS. Dom. Let. 101; Mr. Jefferson, Sec. of State, to the French minister, May 3, 1793, id. 100.

"As in cases where vessels are reclaimed by the subjects or citizens of the belligerent powers, as having been taken within the jurisdiction of the United States, it becomes necessary to ascertain that fact, by testimony taken according to the laws of the United States, the governors of the several States, to whom the application, will be made in the first instance, are desired immediately to notify thereof the attorneys of their respective districts. The attorney is thereupon instructed to give notice to the principal agent of both parties, who may have come in with the prize, and also to the consuls of the nations interested, and to recommend to them to appoint, by mutual consent, arbiters, to decide whether the capture was made within the jurisdiction of the United States, as stated to you in my letter of the 8th instant, according to whose award the governor may proceed to deliver the vessel to the one or the other party. But in case the parties, or consul shall not agree to name arbiters, then the attorney, or some person substituted by him, is to notify them of the time and place, when and where he will be, in order to take the depositions of such witnesses as they may cause to come before him, which depositions he is to transmit for the information and decision of the President."

Mr. Jefferson, Sec. of State, to Mr. Hammond, Brit. min., Nov. 10, 1793, Am. State Papers, For. Rel. I. 183; 1 Wait's State Papers, 196; 4 Jefferson's Works, 76.

No foreign power can of right institute or erect any court of judicature in the United States, except such as may be warranted by treaties, and the admiralty jurisdiction which has been exercised in the United States by the consuls of France, not being so warranted, is not of right and cannot be recognized

Glass *v.* Sloop Betsey (1794), 3 Dall. 6.

By a royal cedula of June 14, 1797, the King of Spain declared that the immunity of the coasts of all his dominions should not be limited as theretofore "by the doubtful and uncertain reach of a cannon shot, but by the distance of two miles of nine hundred toises each," and that no prize made within that distance should be valid unless it belonged to a power with which he was at war. All prizes made within that limit were to be adjudged by the Spanish tribunals; those made outside, by the tribunals of the captor. But this rule was subject to the qualification that, if a neutral vessel captured outside the territorial distance and brought into a Spanish port should contain Spanish property amounting to a half of the value of the cargo, the whole prize should be judged by the Spanish tribunals, while, if the Spanish property on board amounted to less than half the value of the cargo, the tribunals of the captor should take cognizance of it.

10 MS. Dom. Let. 284.

The invasion of neutral rights by an attack on one belligerent cruiser by another on neutral waters is not condoned by the fact that the chase was begun outside of the neutral line.

Mr. Madison, Sec. of State, to Mr. Monroe, Nov. 25, 1806, MS. Inst. U. States Ministers, VI. 367.

"I take the true principle to be, that 'for violations of jurisdiction, with the consent of the sovereign, or his voluntary sufferance, indemnification is due; but that for others he is bound only to use all *reasonable* means to obtain indemnification from the aggressor, which must be calculated on his circumstances, and these endeavors *bonâ fide* made; and failing, he is no further responsible.' It would be extraordinary indeed if we were to be answerable for the conduct of belligerents through our whole coast, whether inhabited or not."

Mr. Jefferson, President, to the Secretary of State, Apr. 21, 1807, 5 Jefferson's Works, 69.

In the case of the American privateer brig *General Armstrong*, which was destroyed by an English squadron in the harbor of Fayal in 1814, the United States claimed indemnity from Portugal on account of the failure of protection. Louis Napoleon, to whom the case was referred as arbitrator, disallowed the claim on the ground that, before the fight took place, the commander of the privateer omitted to invoke the protection of the colonial authorities.

Moore, Int. Arbitrations, II. 1071, 1096.

See, also, Hall, Int. Law (4th ed.), 648; Abdy's Kent (2d ed.), 157; Lawrence's Wheaton (1863), 720; Dana's Wheaton, 208; 1 Kent's Comm. 118, Holmes's note; Wharton's Comm. on Am. Law, § 249.

As to the distribution of the appropriation made by Congress in this case, see 21 Op. At. Gen., 154, 523.

A capture made in neutral waters is, as between enemies, deemed to all intents and purposes rightful. It is only by the neutral sovereign that its legal validity can be called in question; and if he omits or declines to interpose a claim, the property is condemnable, jure belli, to the captors. If the captured vessel commence hostilities upon the captor in neutral waters, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought from the neutral sovereign.

The Anne, 3 Wheat. 435.

The minister of Colombia having complained of the capture within the territorial waters of the United States by the *Mars* and another Spanish brig of the Colombian privateer *Zulmi*, which was taken to Havana and detained there, together with the crew, the minister of the United States in Madrid was directed to present the case to the Spanish Government "and demand an immediate restoration of the *Zulmi* and her crew," as well as damages for her unlawful capture and detention. "A compliance with this demand," said the Department of State, "is due to the violated authority of the United States, and to the fidelity with which this Government has observed a neutrality during the existing war."

Mr. Clay, Sec. of State, to Mr. A. H. Everett, min. to Spain, Jan. 15, 1827, MS. Inst. U. States Ministers, XI. 237.

As to the capture of an American vessel called the *Kelton* by a British cruiser apparently within Portuguese jurisdiction, see Mr. Clay, Sec. of State, to Mr. Holmes, M. C., March 16, 1826, 21 MS. Dom. Let. 289.

It is a principle of the law of nations that no belligerent can rightfully make use of the territory of a neutral state for belligerent purposes, without the consent of the neutral government.

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

The pursuit by a belligerent cruiser of an enemy's ship within neutral waters, and driving the latter ashore, is a violation of the law of nations.

Mr. Seward, Sec. of State, to Mr. Tassara, May 21, 1863, MS. Notes to Spain, VI. 378.

"I am directed by the President to ask you to give the following instructions, explicitly, to the naval officers of the United States, namely: Firstly, that under no circumstances will they seize any foreign vessel within the waters of a friendly nation." Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, Aug. 8, 1862, Blue Book, North America, No. 5 (1863), 3, 4.

In a note of Dec. 12, 1864, which seems, by an understanding between Mr. Seward and the Brazilian legation, not to have been formally submitted by the latter till the 21st of December, certain demands were presented in connection with the capture of the Confederate cruiser *Florida* by the U. S. S. *Wachusett* at Bahia, Brazil, on the 7th of the preceding October. The *Wachusett* had been some days in port, when, on the 4th of October, the *Florida* arrived, sixty-one days out from Teneriffe, and applied for permission to obtain provisions and coal and to repair her boilers, which were in bad condition. The United States consul opposed her receiving any hospitality, but the authorities allowed her 48 hours for provisions and a further time for repairs, subject to an examination by a machinist, and the consul was said to have given a pledge for the observance of neutrality by the commander of the *Wachusett*. At dawn of the 7th of October, however, the *Wachusett* was seen to leave her anchorage and approach the *Florida*, and soon afterwards to fire on the latter. The commander of the Brazilian naval division then present intervened, and the firing ceased. But it was soon afterwards perceived that the *Florida* was in motion, and that the *Wachusett* was towing her out to sea. The Brazilian commander pursued, but could not overtake her, and the *Florida* was brought to Hampton Roads. The consul, who had been actively implicated in the affair, left on the *Wachusett*. The Brazilian Government demanded (1) a "solemn and public declaration by the Government of the Union that it was surprised by the unusual action of the commander of the *Wachusett*, which it highly rebukes and condemns, regretting that it should have occurred;" (2) the "immediate dismissal of said commander, followed by the commencement of proper process;" and (3) "a salute of 21 guns to be given in the port of the capital of Bahia by some vessel of war of the United States, having hoisted at her masthead during such salute the Brazilian flag." The Brazilian Government also claimed, "as reparation, full liberty to the crew and all individuals who were on board the *Florida* when she was captured; and the delivery of the vessel to the Government of the Emperor" in one of its ports.

Mr. Seward, Dec. 26, 1864, replied that the President disavowed and regretted the proceedings at Bahia; that he would suspend the commander of the *Wachusett* and direct him to appear before a court-martial; that the consul, as he admitted that he advised and incited the commander, would be dismissed, and that the flag of Brazil would receive from the United States Navy the honor customary in the intercourse of friendly maritime powers. This answer, said Mr. Seward, rested exclusively upon the ground that the capture of the *Florida* was "an unauthorized, unlawful, and indefensible exercise

of the naval force of the United States, within a foreign country, in defiance of its established and duly recognized Government." As to the captured crew of the *Florida*, it was stated that they would be set at liberty to seek refuge wherever they could find it, with the hazard of recapture when beyond the jurisdiction of the United States. With reference to the demand for the return of the *Florida* to Bahia, Mr. Seward stated that the vessel, while anchored in Hampton Roads, sank on the 28th of November, owing to a leak which could not be seasonably stopped.

Mr. Barboza da Silva, Brazilian chargé, to Mr. Seward, Dec. 12, 1864, MS. Notes from Brazil; Mr. Seward, Sec. of State, to Mr. Barboza da Silva, Dec. 26, 1864, MS. Notes to Brazilian Leg. VI. 173.

See, also, Mr. Seward to Mr. Barboza da Silva, Dec. 15, 1864, id. 319; Mr. Seward, Sec. of State, to Mr. Webb, min. to Brazil, No. 146, June 15, 1865, MS. Inst. Brazil, XVI. 115.

As to the special salute to the flag of Brazil, see Dip. Cor. 1866, II. 302, 305, 307.

With reference to a report that the troops of General Diaz, after defeating and routing their adversaries on Mexican soil, pursued them into Texas, where they again attacked and dispersed them, Mr. Evarts instructed the American minister in Mexico: "While it is deemed hardly probable that this unjustifiable invasion of American soil was made in obedience to any specific orders from the Mexican capital, it is, nevertheless, a grave violation of international law, which can not, for a moment, be overlooked. You are instructed to call the attention of the officers of the *de facto* Government with whom you are holding unofficial intercourse to this case, and to say that the Government of the United States will confidently expect a prompt disavowal of the act, with reparation for its consequences, and the punishment of its perpetrators."

Mr. Evarts, Sec. of State, to Mr. Foster, No. 395, June 21, 1877, For. Rel. 1877, 413.

According to the Japanese official statement of the *Ryeshetelni* incident, Chinese neutrality was held to be imperfect, being applicable only to places not occupied by the armed forces of either belligerent, so that, when the vessel escaped from Port Arthur and sought asylum at Chefoo, Japan was justified in regarding the harbor of Chefoo as belligerent, so far as the incident in question was concerned. With the termination of the incident the neutrality of the port was revived. The Japanese Government also contended that Russia had disregarded her engagement to respect the neutrality of China, by establishing a system of wireless telegraphy between Port Arthur and the Russian consul at Chefoo. The Japanese Government also alleged that the statement of the commander of the *Ryeshetelni* that his ship

was disarmed on arrival at Chefoo was untrue, and that the *Ryeshetelni* was in fact the first to begin hostilities, which resulted in her capture.

For. Rel. 1904, 139.

"There are, of course, states which are unable so to demean themselves as to be entitled to have their neutrality thus respected, as was the case when the *Variag* and *Korietz* were attacked in Korean waters at Chemulpo; and as seems to have been, at any rate partially, the case when the *Ryeshetelni* was forcibly abducted from the Chinese harbor of Chefoo."

Neutral Duties in a Maritime War, by Thomas Erskine Holland, Proceedings of the British Academy, II. 3.

2. Duty to Prevent Violations.

§ 1335.

In all the authorities so far cited the question of the legal status of the men of war and other public property of a foreign sovereign is discussed from the point of view of privilege and exemption. Nothing is said as to the question of protection, nor is it intimated that the circumstance that the property is exempt from the local jurisdiction imposes upon the local sovereign a special obligation to protect. Marshall, in his opinion in the case of the *Exchange*, speaks of the public ship in the port of a friendly nation as being "under the protection of the government of the place," but the same thing is true of the merchant vessel; and it does not appear that he intended, by the phrase in question, to make any distinction between the two things. There is, however, a class of cases in which the duty of protection of men of war, as well as of merchant vessels, in the ports of a friendly country has been expressly considered. It has sometimes happened that a man of war or a merchant vessel of one belligerent has been attacked by the other belligerent in neutral waters. In such case, what is the measure of the neutral's duty?

This question has twice concerned the United States as an injured belligerent. In March, 1814, the United States frigate *Essex* was attacked and destroyed by the British men of war *Phoebe* and *Cherub*, just outside the limits of the port of Valparaiso, but in territorial waters. No claim for reparation appears to have been made in this case; nor does it appear to have been alleged that there was negligence on the part of the territorial sovereign in not preventing the attack.

In September 1814 the American privateer *General Armstrong*, Captain Reid commander, was destroyed by a British squadron in the port of Fayal, within the jurisdiction of Portugal. The fight

was begun by the privateer firing into a British longboat which was, as Captain Reid maintained, engaged in a design to board him. Three hours afterwards a set attack was made on the privateer by boats, but it was repulsed. Later, the privateer was scuttled and destroyed. It was admitted at the time, though it was questioned afterwards, that the authorities of the port were physically unable to protect the privateer against the British attack, and no application was made to them for protection till after the firing into the longboat.

November 13, 1815, Mr. Monroe, Secretary of State, instructed Mr. Sumter, United States minister at Rio de Janeiro, then the seat of the Portuguese court, that it was hoped that a sense of what was "due to their own dignity, as well as a sense of justice to the citizens of the United States" who had "suffered by the lawless capture and destruction of their vessels and property by British cruisers within the territorial jurisdiction of Portugal," would "induce the Portuguese Government to adopt effectual measures to cause reparation to be made," and that "this point should be pressed as far as it may be useful or proper to do so."[a]

In a later instruction of January 3, 1815, Mr. Monroe informed Mr. Sumter that the "growing frequency" of outrages similar to that in the case of the *General Armstrong* made it "more than ever necessary" for the United States "to exact from nations in amity with them a rigid fulfillment of all the obligations which a neutral character imposes," and that the President did not doubt that the Prince Regent of Portugal would assert "the rights of his own dominion, and those of a belligerent power in friendship with him;" and he requested Mr. Sumter "to bring all the circumstances of the transaction distinctly to the view of the Portuguese Government, and to state the claim which the injured party has to immediate indemnification."[b]

Before these instructions were received by Mr. Sumter, the Portuguese Government had directed its minister at London "to require satisfaction and indemnification" not only for certain Portuguese subjects whose persons or property on shore were injured by the British fire, but also "for the American privateer, whose safety was guaranteed by the protection of a neutral port."

In 1818 Mr. John Quincy Adams, then Secretary of State, addressed a note to the Portuguese minister concerning the claim, concluding as follows: "It is hoped your Government will, without further delay, grant to the sufferers by that transaction the full indemnity to which they are by the laws of nations entitled."[c]

[a] MS. Inst. to U. S. Ministers, VIII. 2.

[b] MS. Inst. U. States Ministers, VIII. 29.

[c] Mr. Adams, Sec. of State, to Portuguese min., March 14, 1818, MS. Notes to For. Legs. II. 315.

With this communication the diplomatic correspondence was closed for a period of nearly twenty years. It was reopened in 1835, when Mr. Asbury Dickens, Acting Secretary of State, writing to Mr. Kavanagh, United States chargé d'affaires at Lisbon, in relation to claims, observed that "another claim which appeared to the Department, upon the statement submitted in behalf of the parties interested, to be well founded," and which he was "accordingly instructed to present to the Government of Portugal," was that of the brig *General Armstrong*. "The Portuguese authorities having . . . failed," said Mr. Dickens, "to afford to this vessel the protection to which she was entitled in a friendly port, which she had entered as an asylum, the Government is unquestionably bound by the law of nations to make good to the sufferers all the damages sustained in consequence of the neglect of so obvious and acknowledged a duty."[a]

Under these instructions the claim was, after further consideration, somewhat tentatively and doubtfully presented. A correspondence ensued, and the Portuguese Government at length declared the claim to be inadmissible; and on January 10, 1844, Mr. Upshur, as Secretary of State, informed the claimants that the Department of State was unwilling to press it further. "Argument and importunity" had, he declared, been exhausted, and the Government could "see nothing in the circumstances to justify or warrant it in having recourse to any other weapons."[b] This position was reaffirmed by the Department of State in August, 1844, and it remained undisturbed, though the claimants had appealed to Congress, till 1849, when Mr. Clayton became Secretary of State. Mr. Clayton took ground in advance of any of his predecessors. He made a positive demand for redress, on the ground that Portugal was under an absolute obligation either to enforce her neutrality or to afford compensation for any injury resulting from her failure to do so, as well as on the ground that the governor of Fayal had not used all the means in his power for requiring the neutrality of the port to be respected. The Portuguese Government refused to yield to this demand, but offered arbitration. Mr. Clayton declined arbitration, and the two countries seemed to be on the brink of rupture, when Mr. Webster became Secretary of State and accepted the Portuguese offer. Louis Napoleon was chosen as arbitrator. He rendered, November 30, 1852, an award in which he held that as Captain Reid did not "in the beginning" apply for the intervention of the neutral sovereign, but "had recourse to arms for the purpose of repelling an unjust aggression of which he claimed to be the object," and thus "released that sovereign from

[a] Mr. Dickens, Act. Sec. of State, to Mr. Kavanagh, May 20, 1835, MS. Inst. Portugal, XIV. 24.

[b] Mr. Upshur, Sec. of State, to Mr. S. C. Reid, Jan. 10, 1844, 33 MS. Dom. Let. 450.

the obligation to afford him protection by any other means than that of a pacific intervention." Portugal could not be held responsible "for the result of a collision, which took place in contempt of her rights of sovereignty, in violation of her territory, and without the local officers or lieutenants being requested in proper time or warned to grant aid and protection to those to whom it was due."

It is obvious that the arbitrator did not decide that the Portuguese Government was under an absolute duty to protect the privateer in all contingencies.

Not long after the decision of the arbitrator was rendered Mr. Sam C. Reid, jr., as agent of the owners, officers, and crew of the privateer, made a claim against the United States, based partly on the allegation that the case was not properly presented to the arbitrator. This claim was referred to the Court of Claims, which, in 1858, by a vote of two to one, reported against allowing it. The Court of Claims, while citing Bynkershoek as maintaining a doctrine which would make Portugal in any event liable for the loss of the privateer, if the privateer was not the aggressor, quoted, as maintaining the opposite view, Kent, Wheaton, and Klüber.

By a bill which became a law May 1, 1882, without the approval of the President, the sum of $70,739 was appropriated for the payment of the claim, but not upon any particular ground. Mr. Pen[illegible]ton, who supported the bill in the Senate, said: "I do not care to place this claim upon any particular or special legal ground, although I think it is defensible upon several. I wish gentlemen to vote for it either because it appeals to patriotism, to good feeling, to an admiration of the heroism of our countrymen which was displayed on that occasion." Mr. Platt, of Connecticut, the only other Senator who spoke, said that the only other ground on which the claim could be put was "that stated by the Senator from Ohio, that it appeals strongly to the imagination."

The only international question actually decided in the case of the *General Armstrong* is that a vessel which, in anticipation of a hostile attack, prepares to resist it by force, and does so resist it, without applying to the neutral sovereign for protection, can not afterwards hold such a sovereign responsible for his injuries.

The question of governmental liability has been discussed in various cases in which a vessel of one belligerent has attacked a vessel of another belligerent in the waters of a third and neutral nation. As against such acts, it is admitted that the territory of a neutral is inviolable, and it has therefore been held that a belligerent is legally bound to restore, on the application of the neutral, enemies' property which he may have captured within the latter's jurisdiction or by means of hostilites there committed.[a] "The sanctity of a claim

[a] Wheaton, Law of Maritime Captures and Prizes, 57.

of territory," said Lord Stowell in a well-known case, "is undoubtedly very high. . . . When the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy; and if the captor should appear to have erred willfully, and not merely through ignorance, he would be subject to further punishment."[a] Acting upon this doctrine, Lord Stowell ordered the Spanish ship *Anna*, which was captured by a British privateer within a mile or two of some of the small mud islands at the mouth of the Mississippi, to be restored.[b]

March 4, 1801, the Danish minister at London demanded the restitution of certain Swedish ships which had been captured by the English frigate *Squirrel* in Danish waters. On the 18th he demanded restitution of a French ship captured by the British mantution of certain Swedish ships which had been captured by the English frigate *Squirrel* in Danish waters. On the 18th he demanded restitution of a French ship captured by the British man-of-war *Achilles* under similar circumstances. March 24 Lord Hawkesbury replied that the complaints, so far as they related to the Swedish ships, having been ascertained to be well founded, His Majesty's Government would signify in the strongest manner its disapprobation of the conduct of the offending officer, and would cause the ships in question to be released.[c]

Such being the duty of the belligerent, what is the duty of the neutral? Vattel[d] cites the case of the Dutch East India fleet, which having put into Bergen, in Norway, in 1666, in order to avoid a British squadron, was attacked by the English admiral. "But," says Vattel, "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." The action of the governor of Bergen was within his admitted right; and it is not only the right but the duty of the neutral to cause its territory to be respected. But, if its territory is violated by the seizure or destruction of enemies' property within its jurisdiction, is it under an absolute obligation to the injured belligerent to compel the offending belligerent to restore or pay for the property, or else to restore or pay for it itself?

By various early treaties it was stipulated that if the property of either party should be captured within the jurisdiction of the other, the latter, being at the time neutral, should do its utmost to

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[a] The Vrow Anna Catharina, 5 C. Rob. 15, 16.

[b] The Anna, 5 C. Rob. 373.

[c] Ortolan, Dip. de la Mer, II. 432.

[d] Lib. III, c. VII., 132.

restore it, but at the owner's expense.[a] Bynkershoek considered this rule unjust. If, for example, the captor should seize the property and go away, was the private person to make war to regain it? By later treaties, however, the stipulation as to the expense was omitted, and it was provided that the contracting parties should use "all the means in their power" to effect restitution. And "if," says Bynkershoek, "it is the duty of the prince to do this, even by all the means in his power, he will do it at his own expense, even by war, if no other argument (ratio) suffices."[b] Molloy refers to a case in which the Dutch "assaulted, took, burnt, and spoiled" some English merchantmen in the neutral waters of Hamburg; "for which action," he says, "and not preserving the peace of their port, they (the Hamburghers) were by the law of nations adjudged to answer the damage, and I think they have paid the most or all of it since."[c] He makes no statement of the case beyond this unsatisfactory version of it.

May 12, 1675, Sir Leoline Jenkins gave the King an opinion on a memorial of the Dutch ambassador concerning the Dutch ship *Postillon*. (The *Postillon* had on board 164 pipes of Spanish wines.) It appeared that this ship, while at anchor in the English port of Torbay, on March 29, 1675, discovered four French ships making at her. She cut her cable and ran aground for better security, but the French ships then sent out four boats, manned and armed, which, under the conduct of the frigate, seized the *Postillon* so near to the shore that the bullets fell on land. The deputy vice-admiral went on board the French admiral's vessel, and, in the name of the King of England, demanded restitution of the ship and cargo as being unduly seized and carried away in a British port. The French admiral refused to give her up and took her away, saying that he would leave it to his King to settle the matter.

Sir Leoline Jenkins said:

"That the matter of the fact was thus, I have all reason to believe, because it agrees with the information I have from Sir John

[a] "Article XXII. That if any Ship or Ships belonging to the People or Inhabitants of either Republick, or any neutral Power, be taken in the Harbours of either by any third Power, not belonging to the People or Inhabitants of either Republick, they in whose Port, or Offings, or Jurisdiction the Ships aforesaid shall be taken, shall be oblig'd in like manner with the other Party to do their utmost for pursuing and bringing back the said Ship or Ships, and restoring them to their Owners. But all this shall be done at the Expence of the Owners, or those whom it concerns." (Treaty of Peace and Union between Oliver Cromwell, as Protector of England, and the United Provinces of the Netherlands. At Westminster, April 5, 1654. A General Collection of Treatys (London 1732), III. 74.)

[b] Questionum Juris Publici, Lib. I. c. VIII., "An hostem aggredi vel persequi in Amici territorio vel portu?"

[c] De Jure Maritimo (ed. 1701), 12.

Fowell, your Majesty's vice-admiral in those parts; and I humbly conceive it to be a violation of that security, which all parties in war ought, by the law of nations, to suffer each other to enjoy in your Majesty's ports. And as your Majesty's vice-admiral used his endeavours to prevent the said violation, so the French commander is more deeply in the wrong, in that the action here is not of a desperate caper, but of a commander of note; who being admonish'd by the proper signal and spoken to by the proper officer to forbear hostility, has more violated the reverence due to your Majesty's ports, than I have known hitherto in any case that has fallen within the compass of my observation.

"That there is a reparation most justly due to your Majesty, and to your Majesty alone in this case, is my humble opinion; yet I know not how that reparation can be reputed a full and satisfactory one, unless the ship and goods that were taken out of your Majesty's protection be restored, or else the full equivalent thereof with the damages; 'tis true the Dutch are now in a capacity to make a direct demand of such a restitution from the French, yet if the wrong doer do carry away and enjoy the fruits of his violences, and the innocent ally be forced to sit down by his loss, the the rights of ports, where every man promises to himself safety from his enemy, (as it were upon the public faith) will be thought not asserted to the full, since they consist not only in the reverence due to the Government, but in the indemnity of all parties for the punishment of an unjust violence, such as this is; and which undoubtedly belongs to your Majesty, and to your Majesty alone to punish: the affront to authority must in the first place be expiated, but then the loss to the party violated ought, as I humbly conceive, to be fully made up. However, the time and manner of demanding this reparation, is not (cannot be) prescribed by any rule of law that I know of; therefore I shall not presume to speak any thing in it; your Majesty's reasons of state, and your royal resentment, being the proper measures for this demand."[a]

In this opinion the measure of reparation due from the belligerent to the neutral for his violation of the neutral territory is clearly defined, but it is stated that the "time and manner" of demanding this reparation are not prescribed by any law, but must depend upon His Majesty's "reasons of state" and "royal resentment."

On the morning of the 18th of August, 1759, the Toulon fleet of seven vessels, while on its way to Havre under the command of M. de la Clue, was chased by a British fleet of sixteen ships of the line and two frigates under the command of Admiral Boscawen. A running fight ensued, and on the following morning M. de la Clue

[a] Life of Sir Leoline Jenkins, II. 777.

had only four vessels left—the *Océan*, the *Redoubtable*, the *Temeraire*, and the *Modeste*. His position was then such that escape seemed impossible, and, being near the Portuguese fortress of Lagos, in Algarve, he determined to run his ships aground and burn them, trusting to the protection of the neutral territory for saving their crews. The *Océan* was the first vessel to go ashore. She was beached near the fort of Almadana, and an officer was sent to the commandant to express the hope that, if the English should attack her, he would defend her. The *Redoubtable* grounded near the fort of Ezaria. The *Temeraire* did not go ashore, but anchored near the fort of Figueras and asked for protection. Nevertheless, the *Temeraire* and the *Modeste* were attacked by the English and carried away, while the *Océan* and the *Redoubtable*, though aground, were fired on and burnt.

When Pitt first heard of this incident he hastened to instruct the British minister at Lisbon to express regret for any violation of territory which might have been committed. He was not to attempt to justify what the law of nations condemned; but if there had been an actual violation of the coasts of Portugal, it might be urged in "extenuation" that the action was begun a great way from them. Moreover, "all reasonable satisfaction" consistent with "honor" would, said Pitt, be given; but, he added, "any personal mark on a great Admiral who has done so essential a service to his country, or on anyone under his command, is totally inadmissible, as well as the idea of restoring the ships of war taken." The King would not be averse even to sending an extraordinary mission to Portugal if the circumstances should turn out to be of sufficient magnitude.[a]

At this time the prime minister of Portugal was the famous Conde d'Oeyras, better known as the Marquis of Pomba. He represented in strong terms the injury done to Portugal, and, while refusing to accept as satisfactory the expressions of the British minister, demanded the restoration of the vessels that were carried away.[b] This demand seems to have given Pitt much annoyance. The Earl of Kinoul was appointed special ambassador extraordinary to Lisbon, and in a "most secret" instruction to him Pitt referred to the demand for restitution as "unexpected," and said that notwithstanding the "friendly and confidential" declaration of the Conde d'Oeyras "that a compliance therewith was not expected," it was attended with difficulty and inconvenience. A refusal would be made use of both by enemies and by neutrals. A total declination of discussion would look like peremptoriness, and the going far into one "would open an

[a] Mahon's History of England from the Peace of Utrecht to the Peace of Paris (Reed's ed.), II. 581.

[b] Ortolan, Dip. de la Mer, II. 317.

ample and litigious field for every hireling and ill-intentioned pen all over Europe to inveigh against the naval pretensions of England, already too much the common object of envy and calumny." Under these circumstances Lord Kinoul "was not to enter into much controversial reasoning," but to "touch lightly" on the continuous character of the fight and add that English officers would be admonished to be more careful in the future.[a] It seems that Lord Kinoul afterward, in the presence of the diplomatic corps at Lisbon, made a speech in this sense, and that the Portuguese Government investigated the conduct of the commandants of the forts at Lagos, who were charged with having made "a very feeble resistance" to the English. It does not appear, however, that anyone was punished. The French Government demanded that Portugal procure restitution of the captured ships, and her failure to do so was mentioned when in 1762 France and Spain declared war against her. But it was not the cause of the hostilities on the part of France.[b] The war was preceded by a demand on the part of France and Spain that the King of Portugal join their alliance against England. They gave him eight days in which to answer. The Spanish declaration of war recited that neither representations "founded in justice and utility" nor "fraternal persuasions" had been able to "alter the King of Portugal's blind affection for the English." The French declaration recited the alliance between France and Spain "to curb the excessive ambition" of the English Crown; their "invitation" to the King of Portugal to join their alliance; his "suspicious and dangerous neutrality;" Spain's "motives of the most tender friendship and affinity;" the Portuguese King's "blind devotion to the will of England," and the fact that "moderation" had been "thrown away" on him. Independently of these common motives each government had, said the French declaration, separate grievances, and it then referred to the demand for the restitution of the ships and to an attempt on the part of the Portuguese court to regulate the precedence of ambassadors by the date of their commissions.[c]

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[a] Mahon's History of England, II. 581–582.

[b] Flassan's Diplomatie Française, VI. 179, 467.

[c] Annual Register, 1762 [218], [219]. "Everyone knows the utmost and violent attack made by the English, in 1759, on some of the (French) King's ships under the cannon of the Portuguese forts at Lagos. His Majesty demanded of the most faithful king to procure him restitution of those ships; but that prince's ministers, in contempt of what was due to the rules of justice, the laws of the sea, the sovereignty and territory of their master (all which were indecently violated by the most scandalous infraction of the rights of sovereigns and of nations), in answer to the repeated requisitions of the king's ambassador on this head, made only vague speeches, with an air of indifference that bordered on derision." (The French King's declaration of war against Portugal, Versailles, June 20, 1762. Annual Register, 1762, p. [220].) See

In 1781, during the reign of Louis XIV., an English squadron commanded by Commodore Johnstone was, while at anchor at Porto Praya, in the Cape Verde Islands, in the dominions of Portugal, attacked by a French fleet under the command of M. De Suffern. Neither side took any prize from the other, and after the attack was over M. De Suffern, who had been resisted by the Portuguese forts as well as by the English ships, continued on his course. He subsequently received the approbation of his Government; perhaps, says Ortolan, in retaliation for the action of the English at Lagos. It seems that he was a lieutenant on the *Océan* on that occasion, and was carried a prisoner to England.[a]

Results of precedents.

By the foregoing precedents it appears (1) that the commission of hostilities by one belligerent against another in neutral territory is a violation of the law of nations; (2) that such violation involves an offense to the neutral nation, and that reparation from the offending belligerent is due to that nation alone; (3) that, if property was captured, it is the duty of the offending belligerent to restore it on the demand of the neutral; (4) that nations have by numerous treaties pledged themselves as neutrals to use "all the means in their power" to protect or effect the restitution of property in such cases; but (5) that the manner in which this obligation must be discharged was not ascertained either by any express rule or by any general understanding.

American precedents.

Turning to the diplomatic history of the United States, we find that the character of the obligation in such cases has on certain occasions, when that Government held the position of a neutral, been specifically discussed and defined. By early treaties with France, the Netherlands, and Prussia,[b] the United States bound itself by a reciprocal engagement to endeavor "by all the means in its power" to protect and defend in its ports or waters, or in the seas near its coasts, "the vessels and effects" belonging to the citizens of the other parties, and to "recover and restore" to the right owners any such vessels or effects as should there be taken from them. In the first war of the French Revolution the Government of the United States, being neutral, received complaints of the seizure of British vessels by French cruisers within its jurisdiction, as well as of the sale within its jurisdiction of British vessels which were captured on the high seas by French cruisers

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Flassan, Diplomatie Française, VI. 182. Lord Mahon, referring to the French and Spanish declarations, remarks: "Never was any aggression more destitute—I will not say of good reason—but even of plausible pretext." (History of England, II. 457.)

[a] Dip. de la Mer. II. 320.

[b] France, February 6, 1778, Art. VII.; Netherlands, October 8, 1782, Art. V.; Prussia, September 10, 1785, Art. VII.

fitted out in violation of its neutrality. At that time the United States had no treaty with Great Britain similar to those with France, the Netherlands, and Prussia, but in a note to the British minister of September 5, 1793, Mr. Jefferson said that it was the opinion of the President that the United States should observe toward his nation the same rule, and even "extend it to the captures made *on the high seas* and brought into our ports, if done by vessels which had been armed within them." Continuing, Mr. Jefferson, referring to three vessels which, after having been captured near the coast, were brought into the port of Philadelphia, where they then lay, said:

"Having, for particular reasons, forborne to use *all the means in our power* for the restitution of the three vessels mentioned in my letter of August 7th, the President thought it incumbent on the United States to make compensation for them; and though nothing was said in that letter of other vessels taken under like circumstances, and brought in after the 5th of June, and *before the date of that letter*, yet, where the same forbearance had taken place, it was, and is his opinion, that compensation would be equally due. As to prizes made under the same circumstances, and brought in *after the date of that letter*, the President determined, that all the means in our power should be used for their restitution. If these fail, as we should not be bound by our treaties to make compensation to the other powers, in the analogous case, he did not mean to give an opinion, that it ought to be done to Great Britain. But still, if any cases shall arise subsequent to that date, the circumstances of which shall place them on similar ground with those before it, the President would think compensation equally incumbent on the United States."[a]

By this note the obligation of the United States to use "all the means in its power" was confined to the exercise of those means within its own jurisdiction, and such was the construction given to the note by the board of commissioners under Article VII. of the Jay treaty.[b] By the neutrality act of 1794 the courts of the United States were expressly invested with power to restore property brought within the jurisdiction under the circumstances which Mr. Jefferson described.[c]

During the first administration of President Monroe a correspondence took place between the United States and Portugal in regard to

[a] Mr. Jefferson, Sec. of State, to British min., Sept. 5, 1793, 5 MS. Dom. Let. 248.

[b] Moore, Int. Arbitrations, I. 299 et seq.

[c] "The doctrine heretofore asserted in this court is that whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done upon the footing of the general law of nations; and the doctrine is fully recognized by the act of Congress of 1794." (La Amistad de Rues, 5 Wheat. 385, 389, s. p., Arrogante Barcelones, 7 Wheat. 496.)

depredations on Portuguese commerce by privateers said to have been fitted out in the United States, and to have been commanded by American captains and manned by American crews.[a]

In this relation Mr. John Quincy Adams, who was then Secretary of State, declared:

"The Government of the United States having used all the means in its power to prevent the fitting out and arming of vessels in their ports to cruize against any nation with whom they are at peace, and having faithfully carried into execution the laws enacted to preserve inviolate the neutral and pacific obligations of this Union, can not consider itself bound to indemnify individual foreigners for losses by captures, over which the United States have neither control nor jurisdiction. For such events no nation can in principle nor does in practice hold itself responsible. A decisive reason for this, if there were not other, is the inability to provide a tribunal before which the facts can be proved.

"The documents to which you refer must of course be *ex parte* statements, which in Portugal or in Brazil as well as in this country, could only serve as a foundation for actions in damages, or for the prosecution and trial of the persons supposed to have committed the depredations and outrages alleged in them. Should the parties come within the jurisdiction of the United States, there are courts of admiralty competent to ascertain the facts upon litigation between them, to punish the outrages which may be duly proved, and to restore the property to its rightful owners should it also be brought within our jurisdiction, and found upon judicial inquiry to have been taken in the manner represented by your letter. By the universal laws of nations the obligations of the American Government extend no further."[b]

By the treaty of Washington of 1871 the neutral is required to use "due diligence" to prevent violations of neutrality within its jurisdiction by one belligerent to the detriment of the other. The tribunal of arbitration held that "due diligence" must be exercised "in exact proportion to the risks" to which either belligerent might be exposed by the neutral's failure to fulfill its obligations—in a word, that "due diligence" was a question of circumstances. And it was

[a] In a note to Mr. Clay of March 9, 1850, the Conde de Tojal, discussing the case of the *General Armstrong*, said that during the war between the United States and Great Britain of 1812 the American privateer *Grampus* on July 17, 1814, captured the British ship *Doris* near the Island of Flores, in Portuguese jurisdiction; and that another American privateer, the *Warrior*, on March 12, 1815, captured the British vessels *Nicholson* and *Dundee* near Fort San Antonio, also within Portuguese jurisdiction; and that in none of the cases did the British Government exact any indemnity.

[b] Mr. Adams to the Chevalier Correa de Serra, March 11, 1818, H. Ex. Doc. 53, 32 Cong. 1 sess. 166.

only in cases in which the tribunal found that there had been an absence of such diligence—an absence of due diligence within the neutral jurisdiction—that Great Britain was held liable to make compensation for the consequent injuries.

It may further be observed that in the discussions of neutral obligations no distinction appears to have been drawn between the protection due to merchant vessels and that due to men-of-war in neutral waters against belligerent attack. In either case the subject has been approached from the simple point of view of the duty of the neutral to enforce the law within its territory.

XI. *RIGHTS OF NEUTRAL TRADE.*

§ 1336.

"The policy of the United States is to maintain neutral immunities for the following reasons:—(1) The probabilities of war are far less with us than with the great European states. From the nature of things, points of friction between the United States and foreign nations are comparatively few. We have an ocean between us and the great armed camps of the Old World; and, while there are innumerable questions as to which one European state may come into collision with another, the only points as to which we would be likely to come into collision with a European state are those concerned in the maintenance of neutral rights. It was to maintain such rights that we went to war in 1812; and, except during the abnormal and exceptional spasm of the late civil war, our national life has heretofore been the life of a neutral and a vindicator of neutral rights. And neutrality, when our system took shape, was arduous. . . . (2) Although the richest country in the world, our traditions and temper are averse to large naval and military establishments. (3) The idea of pacific settlement of disputed international questions is one of growing power among us; the horror of war has not been diminished by the experience of the civil war; there is no country in the world where love of order is so great, and in which public peace is kept by an army and navy so small; it would be hard to convince the people of the United States that the immense and exhausting armaments of the great European states are not in part caused by the assigning of undue power to belligerents, and that one of the best ways of inducing a gradual lessening of these armaments would be the reduction of these powers. . . . (4) It is impossible to overcome the feeling that the sea, like the air, should be free, and that no power, no matter how great its resources, should be permitted to dominate it, so as to enable it, in case of war, to ransack all ships which may be met for the discovery of an enemy's goods. . . . (5) It is not

right to offer such a premium to preponderance of naval strength as is offered by the theory of belligerent rights as maintained in Great Britain."

Wharton, Com. Am. Law, § 242.

The last reason above stated refers to the rule, abandoned by Great Britain at the time of the Crimean war, of seizing enemies' property in neutral ships.

"With respect to the general principle which disallows to neutral nations, in time of war, a trade not allowed to them in time of peace, it may be observed:

"First. That the principle is of modern date; that it is maintained, as is believed, by no other nation but Great Britain, and that it was assumed by her under the auspices of a maritime ascendency, which rendered such a principle subservient to her particular interest. The history of her regulations on this subject shows that they have been constantly modified under the influence of that consideration. The course of these modifications will be seen in an appendix to the fourth volume of Robinson's Admiralty Reports.

"Secondly. That the prinicple is manifestly contrary to the general interest of commercial nations, as well as to the law of nations, settled by the most approved authorities, which recognizes no restraints on the trade of nations not at war, with nations at war, other than that it shall be impartial between the latter; that it shall not extend to certain military articles, nor to the transportation of persons in military service, nor to places actually blockaded or besieged.

"Thirdly. That the principle is the more contrary to reason and to right, inasmuch as the admission of neutrals into a colonial trade shut against them in times of peace, may, and often does, result from considerations which open to neutrals direct channels of trade with the parent state, shut to them in times of peace, the legality of which latter relaxation is not known to have been contested; and inasmuch as commerce may be, and frequently is, opened in time of war, between a colony and other countries, from considerations which are not incident to the war, and which would produce the same effect in a time of peace; such, for example, as a failure or diminution of the ordinary sources of necessary supplies, or new turns in the course of profitable interchanges.

"Fourthly. That it is not only contrary to the principles and practice of other nations, but to the practice of Great Britain herself. It is well known to be her invariable practice in time of war, by relaxations in her navigation laws, to admit neutrals to trade in channels forbidden to them in times of peace, and particularly to open her colonial trade, both to neutral vessels and supplies, to which it is shut in times of peace; and that one at least of their objects in these relaxa-

tions is to give to her trade an immunity from capture, to which, in her own hands, it would be subjected by the war.

"Fifthly. The practice, which has prevailed in the British dominions, sanctioned by orders of council and an act of Parliament (39 Geo. III. c. 98) authorizing for British subjects a direct trade with the enemy still further diminishes the force of her pretensions for depriving us of the colonial trade. Thus we see in Robinson's Admiralty Reports, passim, that during the last war a licensed commercial intercourse prevailed between Great Britain and her enemies, France, Spain, and Holland, because it comprehended articles necessary for her manufactures and agriculture, notwithstanding the effect it had in opening a vent to the surplus productions of the others. In this manner she assumes to suspend the war itself, as to particular objects of trade beneficial to herself, while she denies the right of the other belligerents to suspend their accustomed commercial restrictions in favor of neutrals. But the injustice and inconsistency of her attempt to press a strict rule on neutrals, is more forcibly displayed by the nature of the trade which is openly carried on between the colonies of Great Britain and Spain, in the West Indies. The mode of it is detailed in the inclosed copy of a letter from ———, wherein it will be seen that American vessels and cargoes, after being condemned in British courts, under pretense of illicit commerce, are sent on British account to the enemies of Great Britain, if not to the very port of the destination interrupted when they were American property. What respect can be claimed from others to a doctrine, not only of so recent an origin, and enforced with so little uniformity, but which is so conspicuously disregarded in practice by the nation itself, which stands alone in contending for it?

"Sixthly. It is particularly worthy of attention, that the Board of Commissioners, jointly constituted by the British and American Governments, under the seventh article of the treaty of 1794, by reversing condemnations of the British courts, founded on the British instructions of November, 1793, condemned the principle, that a trade forbidden to neutrals in time of peace could not be opened to them in time of war; on which precise principle these instructions were founded. And, as the reversal could be justified by no other authority than the law of nations, by which they were to be guided, the law of nations, according to that joint tribunal, condemns the principle here combatted. Whether the British commissioners concurred in these reversals, does not appear; but whether they did or not, the decision was equally binding, and affords a precedent which could not be disrespected by a like succeeding tribunal, and ought not to be without great weight with both nations, in like questions recurring between them.

"On these grounds the United States may justly regard the British captures and condemnations of neutral trade, with colonies of the enemies of Great Britain, as violations of right; and if reason, consistency, or that sound policy which cannot be at variance with either, be allowed the weight which they ought to have, the British Government will feel sufficient motives to repair the wrongs done in such cases by its cruisers and courts."

Mr. Madison, Sec. of State, to Mr. Monroe, min. to England, Apr. 12, 1805, 3 Am. St. Papers, For. Rel. 101.

The principle that "a trade opened to neutrals by a nation at war, on account of the war, is unlawful," has no foundation in the law of nations. (Mr. Madison, Sec. of State, report of Jan. 25, 1806, MS. Dom. Let.)

Mr. Monroe, in a dispatch to Mr. Madison, August 20, 1805, states that the British position is declared by Lord Mulgrave to be "that a neutral power had no right to a commerce with the colonies of an enemy in time of war which it had not in time of peace, and that every extension of it in the former state, beyond the limit of the latter, was due to the concession of Great Britain, not to the right of the neutral power." (3 Am. St. Papers, 105. For a conference with Mr. Fox on this subject, see Mr. Monroe to Mr. Madison, April 28, 1806, 3 Am. St. Papers, For. Rel. 118.)

For the proceedings of the board of commissioners under Art. VII. of the treaty of 1794, referred to by Mr. Madison, supra, see Moore, Int. Arbitrations.

"New principles . . . have been interpolated into the law of nations, founded neither in justice nor the usage or acknowledgment of nations. According to these a belligerent takes to himself a commerce with his own enemy which he denies to a neutral on the ground of its aiding that enemy in the war; but reason revolts at such an inconsistency, and the neutral having equal right with the belligerent to decide the question, the interests of our constituents and the duty of maintaining the authority of reason, the only umpire between just nations, impose on us the obligation of providing an effectual and determined opposition to a doctrine so injurious to the rights of peaceable nations." (President Jefferson, annual message, Dec. 3, 1805, Richardson's Messages, I. 384.)

"The rights of a neutral to carry on a commercial intercourse with every part of the dominions of a belligerent permitted by the laws of the country (with the exception of blockaded ports and contraband of war) was believed to have been decided between Great Britain and the United States by the sentence of their commissioners mutually appointed to decide on that and other questions of difference between the two nations, and by the actual payment of the damages awarded by them against Great Britain for the infractions of that right. When, therefore, it was perceived that the same principle was revived with others more novel and extending the injury, instructions were given to the minister plenipotentiary of the United States at the court of London, and remonstrances duly made by him on this subject, as will appear by documents transmitted herewith. These were followed by a partial and temporary suspension only, without any disavowal of the principle. He has, therefore, been instructed to

urge this subject anew, to bring it more fully to the bar of reason, and to insist on rights too evident and too important to be surrendered. In the meantime the evil is proceeding under adjudications founded on the principle which is denied. Under these circumstances the subject presents itself for the consideration of Congress." (President Jefferson, special message, Jan. 17, 1806, Richardson's Messages, I. 395.)

The correspondence of Mr. Pinkney, United States minister at London, in 1806–'08, with Mr. Canning, British foreign secretary, in reference to the British orders in council affecting the trade of the United States is found in 3 Am. St. Papers, For. Rel. 203, 221.

"To former violations [by Great Britain] of maritime rights another is now added of very extensive effect. The Government of that nation has issued an order interdicting all trade by neutrals between ports not in amity with them; and being now at war with nearly every nation on the Atlantic and Mediterranean seas, our vessels are required to sacrifice their cargoes at the first ports they touch, or to return home without the benefit of returning to any other market. Under this new law of the ocean our trade on the Mediterranean has been swept away by seizures and condemnations, and that in other seas is threatened with the same fate." (President Jefferson, annual message, Oct. 27, 1807, Richardson's Messages, I. 427.)

"The declaration which Her Britannic Majesty's Government proposes to issue is distinct in interdicting to neutrals the coasting and colonial trade with the belligerent, if not enjoyed by them previous to the war. In regard to this trade, you are aware that Great Britain asserted principles, in the wars resulting from the French revolution, before she issued her obnoxious orders in council, which this country held to be in violation of the law of nations. Should she still adhere to those principles in the coming conflict in Europe, and have occasion to apply them to our commerce, they will be seriously controverted by the United States, and may disturb our friendly relations with her and her allied belligerents. The liberal spirit she has indicated in respect to the cargoes under a neutral flag, and neutral property which may be found on board of enemies' ships, gives an implied assurance that she will not attempt again to assert belligerent rights, which are not well sustained by the well-settled principles of international law."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Apr. 13, 1854, H. Ex. Doc. 103, 33 Cong. 1 sess. 12, 13.

Neutrals, in their own country, may sell to belligerents whatever belligerents choose to buy. The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors to either; nor prepare, nor suffer to be prepared within their territory, armed ships or military or naval expeditions against either. Neutrals also may convey to belligerent ports not under blockade whatever bellig-

erents may desire to take, except contraband of war, which is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners, or of the master with their sanction.

The Bermuda, 3 Wall. 514, 551.

"There is no law of the United States which authorizes the refusal of a clearance to a vessel bound to a port in a state of insurrection, or the imposition of any penalty for the entrance of a United States vessel into such a port for commercial purposes only. The just belligerent rights, however, of all powers, engaged in civil or foreign war, so far as those rights may be invaded by citizens of the United States, are, it is conceived, amply protected by the act of Congress of the 20th of April, 1818."

Mr. Marcy, Sec. of State, to Mr. Almonte, Mexican min., May 14, 1855, MS. Notes to Mex. VII. 23.